THE EVOLUTION OF INTERNET TORTS – TAKING ON CYBERBULLIES

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If we desire respect for the law, we must first make the law respectable.
Louis D. Brandeis

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I. Introduction

The internet is ubiquitous and has improved our lives in so many respects it is hard to imagine a world without it.[1] One author has gone so far as to describe the internet's impact as follows: "Life, it seems, begins not at birth but with online conception."[2] While crucial to our 21st century way of life, the internet has also become a breeding ground for vicious and pervasive harassment, defamation, and unwelcome intrusions into the lives of private individuals. Internet malfeasance takes different forms including posting

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1. BBVA Openmind. "The Impact of the Internet on Society: A Global Perspective" (2014) <https://www.bbvaopenmind.com/en/articles/the-impact-of-the-internet-on-society-a-global-perspective/>.
2. Allen Salkin, "What's in a baby name? Ask Google" The Seattle Times (November 28, 2011) <https://www.seattletimes.com/life/lifestyle/whats-in-a-baby-name-ask-google/>.

intimate images of an individual online without their consent; defaming the reputation of an individual or their family or friends; or intentionally inflicting emotional suffering as retribution for a perceived wrong or grievance. The perpetrators harass their victims from anywhere in the world, in a largely unpoliced forum, while hiding behind their internet provider for cover and often ignoring judicial orders.[3] The victims are captive and cannot escape the intrusion into their private lives which often creates damage to their self esteem, fear for their lives,[4] and a high risk of depression, anxiety, and self-harm.[5]

There is a staggering amount of internet harassment to the point where some commentators have characterized it as epidemic.[6] "The threat today of one's life being turned upside down because of something someone else says on the internet that is heard or read by strangers half a world away is real and cannot just be dismissed or ignored like a person with a megaphone on the street."[7] Traditional tort law remedies were not designed to address this serious challenge to civil society. As one Canadian jurist commented, the internet has upset the delicate balance which the law achieved between freedom of speech and defamation.[8]

Following the American model[9] and based upon the principles for the recognition of new torts espoused by the Supreme Court of

3. *Yenovkian v. Gulian*, 2019 ONSC 7279, 62 C.C.L.T. (4th) 45, 315 A.C.W.S. (3d) 523 (Ont. S.C.J.) at para. 200.
4. Dylan E. Penza, "The Unstoppable Intrusion: The Unique Effect of Online Harassment and What the United States Can Ascertain from Other Countries Attempts to Prevent It" *Vol 51 Cornell International Law Journal* found at <https://www.lawschool.cornell.edu/research/ILJ/upload/Penza-note-final.pdf>; *Caplan v. Atas*, 2021 ONSC 670, 71 C.C.L.T. (4th) 36, 328 A.C.W.S. (3d) 377 (Ont. S.C.J.) at para. 163.
5. "Cyberbullying linked with suicidal thoughts and attempts in young adolescents", National Institutes of Health (July 12, 2022): https://www.nih.gov/news-events/nih-research-matters/cyberbullying-linked-suicidal-thoughts-attempts-young-adolescents; Michelle, Quirk, "Cyberbullying can Influence Child and Adolescent Self-Harm" (November 7, 2023) *Psychology Today* <https://www.psychologytoday.com/ca/blog/emotional-nourishment/202311/cyberbullying-can-influence-child-and-adolescent-self-harm>; Dylan E. Penza, "The Unstoppable Intrusion: The Unique Effect of Online Harassment and What the United States Can Ascertain from Other Countries' Attempts to Prevent It" (2018) 51 Cornell International Law Journal 297 <https://www.lawschool.cornell.edu/research/ILJ/upload/Penza-note-final.pdf>.
6. *Caplan v. Atas*, *supra* note 4 at para. 163.
7. *385277 Ontario Ltd. v. Gold*, 2021 ONSC 4717, 336 A.C.W.S. (3d) 347, 2021 CarswellOnt 9570 (Ont. S.C.J.) at paras. 54, 59.
8. *Caplan v. Atas*, *supra* note 4 at paras. 4-6.

Canada,[10] some Canadian provincial courts have recognized new torts to address internet malfeasance: intrusion upon seclusion, public disclosure of private facts, intentional infliction of mental suffering, and a tort of harassment. Other provinces have passed legislation creating statutory remedies to address these issues and rejected recognition of common law torts. The Federal Government has recently tabled Bill C-63[11] to address online harms and specifically child pornography on the internet.

This paper will consider the current state of tort law and legislative initiatives which address internet intrusions on privacy, defamation, and harassment, as well as the judicial tools available to identify and stop the perpetrators including injunctions and Norwich Orders. This paper will also consider the use of the internet as a "medium of virtually limitless international defamation", including its borderless reach and the continued re-publication of the harm. The paper concludes with a discussion of why legislative initiatives rather than *ad hoc* judicial recognition of new torts would be a more effective response to internet malfeasance.

II. The Panoply of New Torts to Address Internet Malfeasance

In an article written in 1960 entitled "Privacy", Professor William L. Prosser identified four privacy torts which were ultimately adopted by the American Law Society in the *Restatement (Second) of Torts* (2010):[12]

a. Intrusion upon seclusion;
b. Public disclosure of embarrassing private facts;
c. Publicity which places a person in a false light;
d. Appropriation, for advantage, of a person's name or likeness.

Prior to the recognition of these four torts in Canada, invasion of privacy was addressed by the tort of nuisance.[13] These four torts have now each been recognized in Canada by some provincial courts

9. Restatement of Torts, Second, Torts, para. 652.
10. *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, [2020] 1 S.C.R. 166, 443 D.L.R. (4th) 183 (S.C.C.) at paras. 235-237. For a proposed nominate tort to be recognized by the courts, at a minimum it must reflect a wrong, be necessary to address that wrong, and be an appropriate subject of judicial consideration.
11. Bill C-63, An Act to enact the Online Harms Act, to amend the Criminal Code, the Canadian Human Rights Act and An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service and to make consequential and related amendments to other Acts. Bill C-63's first reading occurred on February 26, 2024.
12. William L. Prosser, "Privacy" (1960), 48 Cal L R 383.

while other provinces have legislated equivalent statutory torts. The torts and legislation are intended to address the increasing use of the internet to invade privacy or harass individuals. However, where they have fallen short, some Canadian courts have recognized a new common law tort of harassment or internet harassment and some provincial legislatures have enacted broader legislation to address cyber bullying.[14]

Before considering each of these torts, it is important to consider the circumstances in which courts recognize new torts. In *Nevsun Resources Ltd. v. Araya*,[15] Justice Abella, writing for the majority of the Supreme Court of Canada, explained that the common law develops "where such developments are necessary to clarify a legal principle, to resolve an inconsistency, or to keep the law aligned with the evolution of society."[16] She quoted from Lord Scarman in *Sidaway v. Bethlem Royal Hospital Governors*:[17]

> Unless statute has intervened to restrict the range of judge-made law, the common law enables the judges, when faced with a situation where a right recognised by law is not adequately protected, either to extend existing principles to cover the situation or to apply an existing remedy to redress the injustice. There is here no novelty: but merely the application of the principle *ubi jus ibi remedium* [for every wrong, the law provides a remedy].[18]

Justice Abella made clear in her judgment that a new tort will not be recognized where the harm may be adequately addressed with existing torts.[19]

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13. *Motherwell v. Motherwell* (1976), 73 D.L.R. (3d) 62, [1976] 6 W.W.R. 550, 1 A.R. 47 (Alta. C.A.).
14. *Privacy Act*, R.S.B.C. 1996, c. 373, ss. 1–3; *Privacy Act*, C.C.S.M. c. P.125, s. 2; *Privacy Act*, R.S.S. 1978, C. P-24, ss. 2–3; *Privacy Act*, R.S.N.L. 1990, C. P-22, ss. 3–4. *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c. P-26.9, s. 3; *The Intimate Image Protection Act*, C.C.S.M. I87, s. 11; *Privacy Act*, R.S.S. 1978, C. P-24, s. 7.3; *Intimate Images Protection Act*, R.S.P.E.I. 1988, c. I-9.1, s. 3; *Intimate Images Protection Act*, R.S.N.L. 2018, c. I-22, s. 4; *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c. 7, s. 5; *Charter of Human Rights and Freedoms*, C.Q.L.R. c. C. 12, art. 5; *Civil Code of Quebec*, C.Q.L.R. c. C.C.Q. 1991. art. 35.
15. *Nevsun Resources Ltd. v. Araya*, *supra* note 10.
16. *Ibid* at para. 118.
17. (1985), 61 N.R. 51, [1985] A.C. 871, [1985] 1 All E.R. 643 (U.K. H.L.) at p. 884 [A.C.].
18. *Nevsun Resources Ltd v. Araya*, *supra* note 10 at para. 118.
19. *Ibid* at para. 123.

a. Intrusion Upon Seclusion

In 2012, the Ontario Court of Appeal recognized the tort of intrusion upon seclusion in *Jones v. Tsige*.[20] In *Jones*, the plaintiff and defendant did not know one another but worked for different branches of the same bank. The defendant was in a common law relationship with the plaintiff's ex-husband. The defendant used her workplace computer to access the plaintiff's bank accounts 174 times over four years but never disseminated the information to others. The plaintiff sued the defendant for invasion of privacy. The motion judge dismissed the motion on the basis that there was no common law tort of invasion of privacy in Ontario. On appeal the Ontario Court of Appeal held that that the tort of intrusion upon seclusion should be recognized in Ontario and found that the defendant had satisfied the elements of the tort.

The elements of intrusion upon seclusion were adopted by the Court of Appeal from the American Restatement (Second) of Torts (2010): one who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy if the invasion would be highly offensive to a reasonable person. The Court of Appeal reasoned that "privacy has long been an animating value of various traditional causes of action to protect personal and territorial privacy."[21] Further, the Court stated that "Charter jurisprudence recognizes privacy as a fundamental value in our law and specifically identifies, as worthy of protection, a right to informational privacy that is distinct from personal and territorial privacy. The right to informational privacy closely tracks the same interest that would be protected by a cause of action for intrusion upon seclusion."[22]

The Court of Appeal held that the defendant committed the tort of intrusion upon seclusion when she repeatedly reviewed the private bank records of the plaintiff: "the intrusion was intentional, it amounted to an unlawful invasion of Jones' private affairs, it would

20. *Jones v. Tsige*, 2012 ONCA 32, 346 D.L.R. (4th) 34, 96 B.L.R. (4th) 1 (Ont. C.A.) [*Jones*].
21. *Ibid* at para. 66.
22. *Ibid.* In addition to recognizing that personal privacy is the underlying purpose of some *Charter* Rights, the Supreme Court has declared privacy laws to be quasi-constitutional. Laws with quasi-constitutional status "save...constitutional laws [are] more important than all others." *Lavigne v. Canada (Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, 214 D.L.R. (4th) 1 (S.C.C.) at para. 24; John Helis, *Quasi Constitutional Laws of Canada,* (Toronto: Irwin Law, 2018) pp 1-2.

be viewed as highly offensive to the reasonable person and caused distress, humiliation or anguish."[23]

The Court of Appeal was concerned about keeping the floodgates of privacy litigation closed while still recognizing that privacy rights are worthy of common law protection. They restricted the tort to "deliberate and significant invasions of personal privacy"[24] and excluded claims by individuals who are sensitive or unusually concerned about their privacy. Private information which the Court indicated would be protected includes financial or health records, sexual practises and orientation, employment, diary, or private correspondence.[25]

Proof of actual loss is not an element of the cause of action of intrusion upon seclusion which arguably opens up the floodgates of litigation based upon the tort.[26] However, in cases where the plaintiff suffered no pecuniary losst, the Court found that damages would ordinarily be a "modest conventional sum". The Court held that damages in these cases were in the nature of "symbolic" or "moral" damages which are awarded to "to vindicate rights or symbolize recognition of their infringement"[27] and fixed the range of damages as up to $20,000. The Court awarded the plaintiff $10,000 based upon the following factors:

> [90] In determining damages, there are a number of factors to consider. Favouring a higher award is the fact that Tsige's actions were deliberate and repeated and arose from a complex web of domestic arrangements likely to provoke strong feelings and animosity. Jones was understandably very upset by the intrusion into her private financial affairs. On the other hand, Jones suffered no public embarrassment or harm to her health, welfare, social, business or financial position and Tsige has apologized for her conduct and made genuine attempts to make amends. On balance, I would place this case at the mid- point of the range I have identified and award damages in the amount of $10,000. Tsige's intrusion upon Jones' seclusion, this case does not, in my view, exhibit

23. *Ibid* at para. 89.
24. *Jones v. Tsige*, 2012 ONCA 32, 346 D.L.R. (4th) 34, 96 B.L.R. (4th) 1 (Ont. C.A.) at para. 72.
25. *Ibid* para. 72.
26. Schafler, Lucarini, Qari, *"Twelve years since the recognition of the tort of intrusion upon seclusion: How Jones v. Tsige continues to impact privacy class actions in Canada"*, Dentons Commercial Litigation Blog (May 21, 2024) https://www.commerciallitigationblog.com/twelve-years-since-the-recognition-of-the-tort-of-intrusion-upon-seclusion-how-jones-v-tsige-continues-to-impact-privacy-class-actions-in-canada/.
27. *Jones v Tsige*, *supra* note 20 at para. 75. M. Waddams, *The Law of Damages*, looseleaf (Toronto: Thomson Reuters, 2011), at para. 10.4.

> any exceptional quality calling for an award of aggravated or punitive damages.[28]

The common law tort of intrusion upon seclusion has been recognized in some, but not all, Canadian jurisdictions. It has been recognized as a cause of action in Ontario,[29] New Brunswick, Nova Scotia,[30] Manitoba, and Newfoundland and Labrador.[31] It has not yet been considered in Saskatchewan, Prince Edward Island, Yukon, Nunavut and the Northwest Territories, and it has been rejected in Alberta.[32] The British Columbia Court of Appeal has expressly stated that the common law on intrusion upon seclusion remains unsettled in BC.[33] It is unclear whether the tort has been recognized by the Federal Court of Appeal.[34]

A number of Canadian provinces have developed a statutory tort of invasion of privacy including British Columbia, Manitoba, Saskatchewan, and Newfoundland.[35] All four privacy statutes are

28. *Ibid* at para. 90.
29. For a recent example see *Chen v. Huang*, 2024 ONSC 1173, 2024 CarswellOnt 3245 (Ont. S.C.J.).
30. *Murray v. Capital District Health Authority*, 2015 NSSC 61, 71 C.P.C. (7th) 114, 334 C.R.R. (2d) 190 (N.S. S.C.) at para. 97, reversed in part 2017 NSCA 28, 99 C.P.C. (7th) 205, 278 A.C.W.S. (3d) 242 (N.S. C.A.).
31. *Welshman v. Central Regional Health Authority*, 2024 NLSC 35, 2024 A.C.W.S. 897, 2024 CarswellNfld 60 (N.L. S.C.) at para. 37.
32. *Lam v. Flo Health Inc.*, 2024 BCSC 391, 2024 A.C.W.S. 2381, 2024 CarswellBC 647 (B.C. S.C.) at para. 60; *D(SJ) v. P(RD)*, 2023 ABKB 84, 87 R.F.L. (8th) 210, 2023 A.C.W.S. 628 (Alta. K.B.) at para. 15.
33. *Tucci v. Peoples Trust Company*, 2023 BCSC 2004, 2023 A.C.W.S. 5703, 2023 CarswellBC 3400 (B.C. S.C.) at para. 81; *Insurance Corporation of British Columbia v. Ari*, 2023 BCCA 331, 485 D.L.R. (4th) 505, 35 C.C.L.I. (6th) 28 (B.C. C.A.) at para. 69; *Situmorang v. Google, LLC*, 2024 BCCA 9, 97 C.C.L.T. (4th) 171, [2024] 7 W.W.R. 404 (B.C. C.A.) at para. 89.
34. *Condon v. R.*, 2014 FC 250, (*sub nom.* Condon v. Canada) 450 F.T.R. 216, 239 A.C.W.S. (3d) 28 (F.C.) at paras. 52-64, reversed 2015 FCA 159, (*sub nom.* Condon v. Canada) 474 N.R. 300, 255 A.C.W.S. (3d) 836 (F.C.A.). While the Federal Court's jurisdiction is limited to administering the law of Canada, the Federal Court may also apply provincial law incidentally necessary to resolve the issues presented by the parties where the case is in pith and substance within the court's statutory jurisdiction: *Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.*, (*sub nom.* ITO - International Terminal Operators Ltd. v. Miida Electronics Inc.) [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641, 34 B.L.R. 251 (S.C.C.) at p. 78 [S.C.R.]. But see *Pinder v. Canada (Minister of Environment)*, 2015 FC 1376, 262 A.C.W.S. (3d) 214, 2015 CarswellNat 6944 (F.C.) at para. 107, affirmed 2016 FCA 317, 274 A.C.W.S. (3d) 321, 2016 CarswellNat 6743 (F.C.A.).
35. British Columbia, *Privacy Act*, R.S.B.C. 1996, c. 373, s. 1; Manitoba, *Privacy Act*, R.S.M. 1987, c. P125, s. 2(1); Saskatchewan, *Privacy Act,* R.S.S. 1978, c. P-24, s. 2; Newfoundland, *Privacy Act*, R.S.N.L., 1990, c. P-22, s. 3 ; Under

similar. They establish a limited right of action, whereby liability will be found if the defendant acts wilfully (not a requirement in Manitoba) and without a claim of right. Moreover, the nature and degree of the plaintiff's privacy entitlement is circumscribed by what is "reasonable in the circumstances."[36]

The intrusion upon seclusion tort has also been advanced by plaintiffs against defendants whose alleged recklessness in the design and operation of computer systems facilitated a hacker's intrusion into the system. For example, in *Agnew-Americano v. Equifax Canada*,[37] Equifax gathered personal information about consumers for the purposes of providing credit reports to Equifax customers seeking that information and sold services to individual customers who want to protect themselves from credit fraud, identity theft and other unauthorized disclosure of personal information.[38] In 2017 Equifax announced an unauthorized intrusion due to a cyber attack by criminals who "exploited a U.S. website application vulnerability" in their computer systems.[39] The information accessed by hackers included social security numbers, birth dates, addresses, drivers licences and credit card numbers. The cyber attack affected 143 million US consumers and 20,000 Canadian residents. A Canadian class action was commenced, and, amongst other things, the plaintiffs claimed intrusion upon seclusion on the basis that the defendants failed to take appropriate steps to guard against unauthorized access to sensitive financial information involving the class members' private affairs or concerns which caused distress and anguish to the class members.

The lower Court found that the claim for intrusion upon seclusion was not "fanciful or frivolous and did not raise any glaring deficiencies"[40] and was "consistent with the broad and liberal approach courts have adopted with respect to privacy rights."[41]

Quebec law, the right to privacy is explicitly protected by the *Civil Code of Québec,* CQLR c CCQ-1991, s 3 and 35-37; *Charter of Human Rights and Freedoms,* CQLR c C-12, s. 5.

36. *Jones v Tsige*, *supra* note 20 at paras. 52-53.
37. *Agnew-Americano v. Equifax Canada*, 2018 ONSC 275, 288 A.C.W.S. (3d) 27, 2018 CarswellOnt 837 (Ont. S.C.J.).
38. *Ibid* at paras. 26-27.
39. *Ibid* at para. 28.
40. *Ibid* at para. 12.
41. *Ibid.* The court cites and relies upon similar class proceedings in *Tucci v. Peoples Trust Company*, 2017 BCSC 1525, 283 A.C.W.S. (3d) 88, 2017 CarswellBC 2373 (B.C. S.C.), reversed in part 2020 BCCA 246, 451 D.L.R. (4th) 302, 69 C.C.L.T. (4th) 198 (B.C. C.A.); and *Bennett v. Lenovo (Canada) Inc.*, 2017 ONSC 1082, 276 A.C.W.S. (3d) 808, 2017 CarswellOnt 2314 (Ont. S.C.J.). See also *Kaplan v. Casino Rama*, 2019 ONSC 2025, (*sub*

However, in a trilogy of decisions (of which the *Equifax* decision was one), known as the Database Defendant Trilogy, the Ontario Court of Appeal concluded that class members did not have a viable cause of action based upon the tort of intrusion upon seclusion against "defendants who, for commercial purposes, collected and stored the personal information of others ('Database Defendants'), and whose failure to take adequate steps to protect that information allowed third-party 'hackers' to access and/or use the personal information."[42]

The Court of Appeal accepted the argument of the Database Defendants that they should not be held responsible for the theft of third party hackers:

> The Database Defendants submitted that, just as the negligent operator of a storage facility does not become a thief when a third party takes advantage of the operator's negligence, enters a storage unit and steals property kept in that unit, the Database Defendants do not invade the privacy of the persons whose information is stored in the databases if a third party takes advantage of the Database Defendants' failure to adequately protect the information and accesses that information.[43]

The Court of Appeal dismissed the appeals and found that the Database Defendants "did not do anything that could constitute an act of intrusion or invasion into the privacy of the plaintiffs. The intrusions alleged were committed by unknown third party hackers, acting independently from, and to the detriment of, the interests of the Database Defendants."[44] The Court of Appeal did note that, while the tort of intrusion did not apply, the Database Defendants could be liable in negligence, contract or under various statutes.[45]

In view of the Database Defendant Trilogy, some lawyers assert that in the 12 years since the Ontario Court of Appeal recognized the tort of intrusion upon seclusion in *Jones v. Tsige*, Ontario courts have narrowed the scope of the tort in class action proceedings and "are increasingly taking on a 'gatekeeping role' in such cases."[46]

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nom. Kaplan v. Casino Rama Services Inc.) 145 O.R. (3d) 736, 305 A.C.W.S. (3d) 249 (Ont. S.C.J.) at para. 29, additional reasons 2019 ONSC 3310, 306 A.C.W.S. (3d) 711, 2019 CarswellOnt 9260 (Ont. S.C.J.).

42. *Owsianik v. Equifax Canada Co.*, 2022 ONCA 813, 35 B.L.R. (6th) 187, 89 C.C.L.T. (4th) 83 (Ont. C.A.) at para. 2, leave to appeal refused 2023 CarswellOnt 10675, 2023 CarswellOnt 10676 (S.C.C.).
43. *Ibid* at para. 3.
44. *Ibid* at para. 7.
45. *Ibid* at para. 8.
46. Zena Olijnyk, "Scope of 'intrusion on seclusion' tort in Canada has narrowed since recognized in 2021:lawyers", *Canadian Lawyer* (June 25, 2024) <https://www.canadianlawyermag.com/practice-areas/privacy-and-

However, *Jones v. Tsige* should be characterized as a watershed moment in the evolution of the torts to address internet malfeasance because it set the stage for the internet torts which followed.

b. Public disclosure of embarrassing private facts

In 2014, the Canadian Parliament criminalized the nonconsensual distribution of intimate images under section 162.1 of the *Criminal Code*.[47] It is a crime to "knowingly publish, distribute, transmit, sell, make available or advertise an intimate image of a person that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct."[48] Since then the Ontario, Alberta, Saskatchewan, and Nova Scotia courts have all recognized the tort of public disclosure of private facts as a new tool to address internet distribution of intimate images. In a recent article, "*Intimate Images: Diverging Approaches to Remedies in the Prairie Provinces*" Eric Turcotte explores the "technology-enabled rise of non-consensual distribution of intimate images" also known as "revenge porn". He explains that disclosure of these images "can result in catastrophic consequences to a survivor's mental health, privacy and overall quality of life in a way that is nearly impossible for a court to remedy:"[49]

> The harm caused by [nonconsensual disclosure of intimate images]is well documented. Survivors can face public shame, and humiliation, professional and romantic difficulties, and serious mental health effects. Indeed, the initial sharing often arises in a relationship of trust by known perpetrators, who may also use the images for coercion or intimidation. The images can reach close contacts, appear in internet searches, or result in harassment when posted with contact information. Moreover,

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data/scope-of-intrusion-on-seclusion-tort-in-canada-has-narrowed-since-recognized-in-2012-lawyers/386985>; Schafler, Lucarini, Qari, "Twelve years since the recognition of the tort of intrusion upon seclusion: How Jones v. Tsige continues to impact privacy class actions in Canada", Dentons Commercial Litigation Blog (May 21, 2024) <https://www.commerciallitigationblog.com/twelve-years-since-the-recognition-of-the-tort-of-intrusion-upon-seclusion-how-jones-v-tsige-continues-to-impact-privacy-class-actions-in-canada/>.

47. *Criminal Code*, RSC 1985, c C-46, s 162.1.
48. *Criminal Code*, RSC 1985, c C-46, s 162.1.
49. Eric Turcotte, "Non-consensual Distribution of Intimate Images: Diverging Approaches in the Prairie Provinces", 2024 87-1 Saskatchewan Law Review 51, 2024 CanLIIDocs 893 https://www.canlii.org/en/commentary/doc/2024CanLIIDocs893#page_1.

> the difficulty in removing the images and the possibility of resharing can repeat and compound the potential harm to a survivor.[50]

The elements of the cause of action of public disclosure of private facts are:

a. the defendant publicized an aspect of the plaintiff's private life;
b. the plaintiff did not consent to the publication;
c. the matter publicized or its publication would be highly offensive to a reasonable person; and
d. the publication was not of legitimate concern to the public.[51]

In a number of cases Canadian courts have now recognized and awarded damages for public disclosure of private facts. For example, in *Jane Doe 72511 v. Morgan*[52] the plaintiff's boyfriend posted a sexually explicit video of the plaintiff on a pornographic website, without her knowledge or consent. The video was "revenge porn" for the defendant's arrest and conviction for physical violence against the plaintiff, much of which took place at the home of the defendant's parents. The plaintiff brought an action for public disclosure of private facts and claimed general, aggravated, and punitive damages for assault and battery. She also made a claim against the defendant's parents in negligence because they failed to protect her from their son's behaviour in their home. Justice Gomery considered the *Protecting Canadians from Online Crime Act*, making it a criminal offence to publish an intimate image without consent,[53]

50. Eric Turcotte, "Non-consensual Distribution of Intimate Images: Diverging Approaches in the Prairie Provinces", 2024 87-1 Saskatchewan Law Review 51, 2024 CanLIIDocs 893 https://www.canlii.org/en/commentary/doc/2024CanLIIDocs893#page_1, p. 56.
51. *Jane Doe 72511 v. Morgan*, 2018 ONSC 6607, 53 C.C.L.T. (4th) 289, [2018] O.J. No. 5741 (Ont. S.C.J.) at para. 99.
52. *Jane Doe 72511 v. Morgan*, 2018 ONSC 6607, 53 C.C.L.T. (4th) 289, [2018] O.J. No. 5741 (Ont. S.C.J.) [*Jane Doe*]. See also *Jane Doe 464533 v. D. (N.)*, 2016 ONSC 541, 394 D.L.R. (4th) 169, 25 C.C.L.T. (4th) 19 (Ont. S.C.J.) where the plaintiff was harassed by the publication of pornographic videos on the internet and the Ontario Superior Court granted default judgment but the judgment was set aside.
53. At para. 92, Justice Gomery also acknowledged that Manitoba was the only Canadian jurisdiction that had enacted legislation to address this issue: *Intimate Image Protection Act*, C.C.S.M. c. 187. This law came into force on January 15, 2015; *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c 7; *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c P-26.9; *Intimate Images Protection Act*, R.S.N.L. 2018, c I-22; *Privacy Act*, RSS 1979, c P-24, Part 2, s. 7.1-7.8.

and decided that where misconduct attracts criminal sanction, the same misconduct should provide a civil remedy:

> 85 Parliament's criminalization of the publication of an intimate image without consent recognizes that this behaviour is highly offensive and should give rise to a civil remedy for a person who suffers damages as a result of it. The only question is how this is best accomplished...
>
> 88 It is difficult to conceive of a privacy interest more fundamental than the interest that every person has in choosing whether to share intimate or sexually explicit images and recordings of themselves. Every person should have the ability to control who sees images of their body. This is an important part of each individual's personal freedom to decide how they share the most intimate aspects of themselves, their sexuality and their bodies. A cause of action which protects this privacy interest is rooted in our deepest values as a society. Failing to develop the legal tools to guard against the intentional, unauthorized distribution of intimate images and recordings on the internet would have a profound negative significance for public order as well as the personal wellbeing and freedom of individuals.[54]

Justice Gomery found the ex-boyfriend liable and awarded general damages of $50,000 and $50,000 in aggravated and punitive damages. Gomery J. did not follow the $20,000 limit on damages set in *Jones v. Tsige* because she found that "the breach of the plaintiff's privacy rights in a case like this are much more serious than in an action for intrusion on seclusion."[55] She explained the devastating effects of this tortious behaviour:

> Revenge porn can have devastating consequences. In the most extreme cases, where sexually explicit images of very young people have been shared without their consent, the victims have been driven to suicide because of their feelings of intense shame and social isolation. In every case, the victim is betrayed by someone they trusted. Something that may have been a celebration of their affection or sexual attraction for another person is used against them. They have forever lost their right to control who sees their body. Even if the posting is removed, copies remain as the result of downloads and sharing. They live with the fear that this single event will define how they are perceived and treated by family, friends and strangers for the rest of their lives.

In *Racki v. Racki*[56] the Nova Scotia Supreme Court recognized the tort of public disclosure in circumstances where a husband

54. *Jane Doe 72511 v. N.M., supra,* paras. 85, 88.
55. *Jane Doe 72511 v. N.M., supra,* paras. 130-132.
56. *Racki v. Racki*, 2021 NSSC 46, 72 C.C.L.T. (4th) 310, 52 R.F.L. (8th) 1 (N.S. S.C.) [*Racki*].

published a book disclosing his wife's addiction to drugs and her attempted suicide.[57] The Court awarded the wife $18,000 in general damages and $10,000 in aggravated damages.[58] Notably in 2018 Nova Scotia passed the *Intimate Images and Cyber-Protection Act*[59] which defines "intimate image"[60] and provides that that a person depicted in an intimate image does not lose their expectation of privacy if they consented to another person recording the image or if the person provided the image to another person, where the other person knew or ought reasonably to have known the image was not to be distributed to any other person. The Act also provides the Court with the power to make an order requiring a person to take down or disable access to an intimate image and to pay general, special, aggravated, or punitive damages to the person depicted in the image.[61]

In *ES v. Shillington*,[62] the Alberta Court of Queen's Bench cited and relied upon *Racki* and *Jane Doe* to recognize the tort of public disclosure. [63] In *Shillington* the plaintiff and defendant were involved in a romantic relationship and had two children together. The defendant committed multiple acts of physical and sexual assault against the plaintiff. The plaintiff ultimately left the defendant and went to live in a shelter for women at risk.[64] During the course of their relationship the plaintiff gave sexually explicit photographs of

57. *Ibid* at paras. 54-55; the Court in *Racki* awarded the plaintiff $10,000 in aggravated damages but did not award punitive damages (see paras. 54-55).
58. *Ibid* at paras. 52-55. The Court did not award punitive damages because the defendant's misconduct was not so malicious, oppressive and high-handed that it offended the Court's sense of decency.
59. *Intimate Images and Cyber-protection Act*, SNS 2017, c 7, https://canlii.ca/t/53dcv.
60. "intimate image" means a visual recording of a person made by any means, including a photograph, film or video recording, (i) in which a person depicted in the image is nude, is exposing the person's genital organs, anal region or her breasts, or is engaged in explicit sexual activity, (ii) that was recorded in circumstances that gave rise to a reasonable expectation of privacy in respect of the image, and (iii) where the image has been distributed, in which the person depicted in the image retained a reasonable expectation of privacy at the time it was distributed.
61. *Intimate Images and Cyber-protection Act*, SNS 2017, c 7, https://canlii.ca/t/53dcv, s4. Section 6 of the Act provides the Court with the power to make orders declaring an image an intimate image, prohibiting a person from distributing the intimate image, or requiring a person to take down or disable access to an intimate image or communication.
62. 2021 ABQB 739, 78 C.C.L.T. (4th) 253, [2021] 12 W.W.R. 540 (Alta. Q.B.). [*Shillington*].
63. *Ibid* at para. 31.
64. *Ibid* at para. 9.

herself to the defendant on the understanding that he would not share the photographs. Unbeknownst to the plaintiff, the defendant posted these images online. When the plaintiff became aware of the postings she suffered "significant mental distress and embarrassment... nervous shock, psychological and emotional suffering, depression, anxiety, sleep disturbances, embarrassment, humiliation, and other impacts to her wellbeing."[65]

The Court considered that in Alberta there is a civil statute, *Protecting Victims of Non-Consensual Distribution of Intimate Images Act*,[66] which has been in force since August 4, 2017 (the *Alberta Act*). However, the *Alberta Act* was not in force at the time the malicious postings in *Shillington* were made and therefore it did not apply.[67] In any event, the *Alberta Act* provides that "a person who distributes an intimate image of another person knowing that the person depicted in the image did not consent to the distribution, or is reckless as to whether or not that person consented to the distribution, commits a tort against that other person."[68] The Court found that the *Alberta Act* would not apply to distribution of images which fell outside of the statutory definition of distribution of information.[69] The Court also determined that the *Alberta Act* did not cover the facts of the case before it and that the internet malfeasance in this case was a wrong for which there was no established tort. The Alberta Court therefore recognized the tort of public disclosure of private facts:

> The existence of a right of action for Public Disclosure of Private Facts is thus confirmed in Alberta. To do so recognizes these particular facts where a wrong exists for which there are no other adequate remedies. The tort reflects wrongdoing that the court should address. Finally, declaring the existence of this tort in Alberta is a determinate incremental change that identifies action that is appropriate for judicial adjudication.[70]

65. *Ibid* at para. 12.
66. SA 2017, c P-26.9; Manitoba was the first province to enact legislation to create a statutory tor to address publication of intimate images on the internet *The Intimate Image Protection Act*, CCSM c 187; *Ibid* at para. 31.
67. *Ibid* at para. 41. The Court notes at para. 42 that the *Protecting Victims of Non-Consensual Distribution of Intimate Images Act,* SA 2017, c P-26.9, only applies to the distribution of intimate images and the term "intimate images is narrowly defined".
68. *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c P-26.9, s 3.
69. *ES v. Shillington*, *supra* note 62 at paras. 31, 42.
70. *Ibid* at para. 63.

The court identified the following elements for the Alberta tort of public disclosure of private facts:

a. the defendant publicized an aspect of the plaintiff's private life;
b. the plaintiff did not consent to the publication;
c. the matter publicized or its publication would be highly offensive to a reasonable person in the position of the plaintiff; and
d. the publication was not of legitimate concern to the public.[71]

The Court held that the plaintiff had proved all the elements of the tort in this case because in posting the sexually explicit material, the defendant had publicly disclosed an aspect of the plaintiff's private life which the plaintiff did not consent to; a reasonable person would consider the posting of the material to be highly offensive because the plaintiff's body and sexual acts were exposed; and there was nothing about the video that gave the public a legitimate interest in its publication.[72] The Court granted a permanent injunction barring the defendant from sharing any private images of the plaintiff publicly in the future and awarded the plaintiff $80,000 in general damages and $50,000 in punitive damages.[73] The Court noted that punitive damages would not be awarded in every case even though the test for the tort in Alberta requires the court to find that the defendant's conduct was "highly offensive". However, the Court determined that in this case the defendant's conduct "was motivated by actual malice"; his conduct increased the plaintiff's humiliation and anxiety, and the publication of the images was another form of the domestic abuse that the plaintiff had experienced.[74]

The Saskatchewan Court of King's Bench relied upon *Shillington* to recognize the tort of public disclosure in *S.B. v. D.H.*[75] However, as one commentator pointed out, there is disagreement in the Prairie

71. *Ibid* at para. 68.
72. *Ibid* at para. 31.
73. *Ibid* at paras. 81-82. The Court also found that the defendant's actions constituted a breach of confidence as the defendant had promised the plaintiff allowed the defendant to have the images in confidence and under the express understanding that the defendant would not disclose them (see paras. 82-83).
74. *Ibid* at para. 102. See also *Grummett v. Warholik*, 2023 ABKB 208, 92 C.C.L.T. (4th) 115, [2023] 10 W.W.R. 145 (Alta. K.B.) at para. 243.
75. *S.B. v. D.H.*, 2022 SKKB 216, 88 C.C.L.T. (4th) 286, 2022 A.C.W.S. 3899 (Sask. K.B.).

Provinces as to whether these cases should be dealt with as statutory torts or as common law torts:

> In 2021, Justice Inglis of the Court of Queen's Bence of Alberta in Shillington applied the Common Law Public Disclosure Tort and other non-statutory torts but not Alberta's NCDII Statutory Tort. The following year, Justice Zinchuk of the Court of Queen's Bench of Manitoba in *Roque v. Peters* applied the province's NCDII Statutory Tort and Statutory Breach of Privacy Tort but no other non-statutory torts. Yet, just a few months later Justice Zerr of the Court of King's Bench for Saskatchewan in *SV v. DH* applied Saskatchewan's NCDII Statutory Tort, the Common Law Public Disclosure tort and other non statutory torts, but Zerr J. did not consider the province's Statutory Breach of Privacy Tort.
>
> In analyzing the reasoning in SB v. DH this article concludes that Saskatchewan courts, where possible, should focus on the NCDII Statutory Tort rather than the common law to craft effective remedies to respond to NCDII. This is because the necessity for the Common Law Public Disclosure Tort is uncertain in the Saskatchewan statutory context. Additionally, an NCDII Statutory Tort, preferably supported by a Statutory Breach of Privacy Tort, lays out a more practical method of relief that does not risk distorting the common law privacy torts in a manner departing from their theoretical beginnings.

c. Placing Person in a False Light

The tort of publicity placing person in a false light was recognized in Ontario in *Yenovkian v. Gulian*.[76] In *Yenovkian*, the parents of two children, a 12-year-old daughter and 9 year old son, were married and then separated. The husband was abusive and violent during the marriage which ended in 2016 when the husband asked for a divorce. The wife left Ontario with the children and moved to London. The parties were engaged in a long custody dispute which culminated in the children moving back to London with their mother. The husband began a campaign of internet harassment against his wife and her parents. He created two websites which contained embedded links to many videos involving the children. One website was focused on the wife, her parents, and their family business and accused them of various illegal acts including kidnapping, child abuse, theft, *etc*. The other was a website for a campaign to "unseat" a justice of the Ontario Superior Court of Justice because of her rulings in the custody dispute case. In addition to the websites, the husband

76. *Yenovkian v Gulian*, *supra* note 3 [*Yenovkian*].

created ten videos posted on his YouTube channel, a Facebook page, a Go Fund Me page to "save an abducted autistic girl from captivity", and two online petitions to remove the Justice from the bench.[77] The Court held that the tort of placing a person in a false light should be recognized in Ontario in this case. Justice Kristjanson adopted the elements of the tort from the American *Restatement* of Torts:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[78]

Justice Kristjanson also noted the clarification in the Restatement's commentary:

> [171] I adopt this statement of the elements of the tort. I also note the clarification in the *Restatement*'s commentary on this passage to the effect that, while the publicity giving rise to this cause of action will often be defamatory, defamation is not required. It is enough for the plaintiff to show that a reasonable person would find it highly offensive to be publicly misrepresented as they have been. The wrong is in publicly representing someone, not as worse than they are, but as other than they are. The value at stake is respect for a person's privacy right to control the way they present themselves to the world.[79]

The Court in *Yenovkian* found that the tort of placing a person in a false light has much in common with the tort of public disclosure of private facts:

> They share the common elements of 1) publicity, which is 2) highly offensive to a reasonable person. The principal difference between the two is that public disclosure of private facts involves true statements, while "false light" publicity involves false or misleading claims. (Two further elements also distinguish the two causes of action: "false light" invasion of privacy requires that the defendant know or be reckless to the falsity of the information, while public disclosure of private facts

77. *Ibid* at para. 19.
78. *Ibid* at para. 170.
79. *Ibid* at para. 171.

> involves a requirement that there be no legitimate public concern justifying the disclosure.).[80]

Further, while creating publicity that places a person in a false light, the wrongdoer is likely to include true, but private facts, about the person they are highlighting. In *Yenovkian* the husband publicized falsehoods about the wife but also publicized private facts about where she and the children and her parents were living which were true but private.[81] The court described the defendant's conduct as "intentional, flagrant and outrageous; calculated to produce the harm that it has; highly offensive, causing distress and humiliation and the tort of intentional infliction of mental suffering has been established."[82]

The Court held that the cap on damages outlined in *Jones v. Tsige* did not apply to placing a person in a false light because the intrusion upon seclusion tort does not involve publicity to the outside world.[83] The Court adopted the factors for determining non-pecuniary damages set out by Cory J. in *Hill v. Church of Scientology*:[84]

> a) the nature of the false publicity and the circumstances in which it was made,
>
> b) the nature and position of the victim of the false publicity,
>
> c) the possible effects of the false publicity statement upon the life of the plaintiff, and
>
> d) the actions and motivations of the defendant.[85]

The Court found that the false publicity in this case was egregious and widely disseminated on the internet and the plaintiff suffered damage as a mother, employee and in her community and church. On this basis the Court awarded the plaintiff $50,000 in compensatory damages for intentional infliction of mental suffering[86] and $100,000 in damages for the torts of false light and public disclosure of private facts. The Court relied upon "the increased potential for harm given that the publicity is by way of the internet, which is 'instantaneous, seamless, interactive, blunt,

80. *Ibid* at para. 172.
81. *Ibid* at para. 174.
82. *Ibid* at para. 184.
83. *Ibid* at para. 187.
84. *Ibid* at para. 190.
85. *Ibid.*
86. *Ibid* at para. 192. The Court relied on *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419, 374 D.L.R. (4th) 293, 16 C.C.E.L. (4th) 239 (Ont. C.A.).

borderless and far-reaching'."[87] Finally the Court awarded punitive damages of $150,000 "to express the court's denunciation, deterrence and punishment."[88]

In awarding punitive damages, the Court in *Yenovkian* considered the fact that the defendant was not deterred in his conduct by court orders. This is a pervasive theme in cases of internet malfeasance, that the defendants are not deterred by court orders, and will be considered further below. The tort of placing a person in a false light has also been recognized in British Columbia.[89]

As one commentator recently pointed out, "Canadian courts will soon have to grapple with the mischief of AI-generated fake videos once images also know as deep fakes".[90] The authors argue that the tort of false light is a means of compensating victims without stifling innovation.

d. Appropriation, for advantage, of a person's name or likeness

The elements of the tort of appropriation of a person's name or likeness, and its emergence in Canadian tort law, were recently addressed by Justice Schabas in *Wiseau Studio, LLC et al. v. Harper et al.*[91]

In *Wiseau Studio*, the plaintiff brought a claim for misappropriation of personality based upon the use of his image on the defendants' social media and on posters, trailers, tickets, and on Kickstarter (a crowdfunding website) in the defendants' documentary about the plaintiff's work. Justice Schabas reviewed some of the existing Canadian case law and noted that the tort would be established "where one's personality has been appropriated, amounting to an invasion of his right to exploit his personality by the use of his image, voice or otherwise with damage to the plaintiff."[92]

87. *Yenovkian v. Gulian*, *supra* note 3 at para. 193.
88. *Yenovkian v. Gulian*, *supra* note 3, para. 202.
89. *Durkin v. Marlan*, 2022 BCSC 193, 343 A.C.W.S. (3d) 398, 2022 CarswellBC 296 (B.C. S.C.).
90. A. Goldenberg, L. Strand and A. Ladhani, "Deep Fakes: Bringing the tort of false light out of the shadows" (2023) 42 Adv. J. No. 3, 40-44.
91. *Wiseau Studio, LLC et al. v. Harper et al.*, 2020 ONSC 2504, 174 C.P.R. (4th) 262, 320 A.C.W.S. (3d) 473 (Ont. S.C.J.), affirmed 2021 ONCA 532, 68 C.P.C. (8th) 99, 333 A.C.W.S. (3d) 723 (Ont. C.A.). These principles were accepted by the Court of Appeal for Ontario in *Hategan v Frederiksen*, 2022 ONCA 217 at para. 48 *Hategan v. Frederiksen*, 2022 ONCA 217, 2022 A.C.W.S. 3051, 2022 CarswellOnt 3148 (Ont. C.A.) at para. 48, affirmed 2023 ONCA 57, 2023 A.C.W.S. 6, 2023 CarswellOnt 909 (Ont. C.A.).
92. *Wiseau Studio, LLC et al v. Harper et al*, *supra* note 91 at paras. 210-212.

Justice Schabas also noted the balance to be struck between the exploitation of one's personality for commercial benefit, and freedom of expression and the importance of contribution to public debate on political or social issues.[93] In particular, the portrayal of one's personality would be immune from the ambit of liability under the tort where the portrayal was not improper and for commercial gain (*i.e.*, a biography about an individual's life, versus the use of an individual's likeness to endorse and promote a product for commercial gain).[94]

The use of the plaintiff's image in *Wiseau Studio* fell into the former category (*i.e.* in connection with a documentary that speaks about the plaintiff and his work). As such, it was not an unlawful appropriation of personality.[95] Put another way by Justice Thomas of the British Columbia Supreme Court, "the use of a person's name primarily to promote sales constitutes a tort, whereas portraying someone primarily to contribute information to public debate does not."[96]

At least one case has gone so far as to state that the tort of misappropriation of personality is restricted to situations where a defendant wrongfully uses a plaintiff's "celebrity status" in the advertising or promotion of the defendant's business, service, or product.[97] If this case stands for the principle that a plaintiff must have "celebrity status" to bring a claim based on the tort of misappropriation, the authors respectfully disagree. It is the fact that individuals have the right to control and market their own personality for commercial gain, not the nature of the personality, which triggers liability under the tort. It may be easier to apply the tort to endorsement-type situations[98] (where the commercial gain is more easily identifiable), but that does not mean it is, or should be, restricted to those types of situations. The tort has, in fact, been extended to non-celebrity plaintiffs.[99]

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93. *Ibid* at paras. 212-215.
94. *Ibid* at paras. 212-216.
95. *Ibid* at paras. 215-216.
96. *Bleuler v. RateMDs Inc.*, 2024 BCSC 755, 2024 A.C.W.S. 2175, 2024 CarswellBC 1275 (B.C. S.C.) at para. 73.
97. *Konstan v. Berkovits*, 2023 ONSC 497, 2023 CarswellOnt 932 (Ont. S.C.J.) at paras. 342-343, additional reasons 2023 ONSC 3052, 2023 CarswellOnt 7623 (Ont. S.C.J.).
98. *Ibid* at para. 342.
99. *Hay v. Platinum Equities Inc.*, 2012 ABQB 204, 93 C.C.L.T. (3d) 210, 538 A.R. 68 (Alta. Q.B.) at paras. 66-73; *Bao v. Welltrend United Consulting Inc.*, 2023 BCSC 1566, 2023 A.C.W.S. 4430, 2023 CarswellBC 2619 (B.C. S.C.) at paras. 64-66.

Further, Justice Schabas found that the plaintiff failed to lead any evidence of damage to his personality or to its value. This was fatal based upon the case law which requires that damages be shown to make out the tort.[100] To the extent that misappropriation of personality occurs on the internet, it would appear that it must be accompanied by commercial gain (or at least, the intention behind the use of another's personality must be for commercial gain).

III. The Internet as a Medium for Defamation and Harassment

a. Internet Defamation

The internet provides a perfect forum for anonymous, borderless defamation. As noted in the introduction to this paper, the courts have historically tried to strike a balance between freedom of speech and defamation. In *York University v. Bell Canada Enterprises*, Justice Strathy noted that "there has been considerable litigation in the United States concerning Internet libel and the interaction with the First Amendment right to freedom of speech which has been traditionally treated as including a right to speak anonymously."[101] One American Jurist described how the courts balance these two rights:

> In that the Internet provides a virtually unlimited, inexpensive, and almost immediate means of communication with tens, if not hundreds, of millions of people, the dangers of its misuse cannot be ignored. The protection of the right to communicate anonymously must be balanced against the need to assure that those persons who choose to abuse the opportunities presented by this medium can be made to answer for such transgressions. . . . Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights.[102]

100. *Wiseau Studio, LLC et al v. Harper et al*, *supra* note 91 at para. 217. See also *Krouse v. Chrysler Canada Ltd.* (1973), 40 D.L.R. (3d) 15, 13 C.P.R. (2d) 28, 1 O.R. (2d) 225 (Ont. C.A.).

101. *York University v. Bell Canada Enterprises* (2009), 311 D.L.R. (4th) 755, 82 C.P.C. (6th) 352, 99 O.R. (3d) 695 (Ont. S.C.J.) at para. 22 quoting Thomas A. Lipinski, "To Speak or Not to Speak: Developing Legal Standards for Anonymous Speech on the Internet" (2002), 5 Justice, Law and Public Policy 3, at p. 95 and *Dendrite International Inc. v. Doe*, 775 A.2d 756, 29 Media L. Rep. 2265, 342 N.J. Super. 134 (U.S. N.J. Super. A.D., 2001); *Cohen v. Google Inc.*, Index No. 100012/09 (N.Y.S.C., August 17, 2009).

102. *In re Subpoena Duces Tecum to America Online, Inc.*, 2000 WL 1210372, 52 Va. Cir. 26 (U.S. Va. S.C., 2000) at p. 34 [Va. Cir.], reserved on other

The Law Commission of Ontario (LCO) recently engaged in a multi-year law reform project, *Defamation Law in the Internet Age,* "reconsidering the purpose and function of defamation law in light of transformative technological change."[103] In their final report released 2020, the LCO adopted seven principles guiding defamation law reform.[104] The first of the seven principles is that defamation law must re-balance protection of reputation and freedom of expression in the internet age:

> However, whereas the Charter created "ripples" in the law of defamation, the internet has arguably created a "tsunami".
>
> Law reform to date has not yet fully accounted for the transformation of communications brought about by the internet. Technological innovation in communications necessarily influences both protection of reputation and freedom of expression, and this has never been more apparent than in the emergence of the internet era. Online defamation claims increasingly involve individual publishers posting comments that do not engage the public interest, but which may spread across the social media universe to cause severe and persistent reputational harm. The LCO has concluded that a new balancing of protection of reputation and freedom of expression is necessary to accommodate the broader diversity of publications and reputational harm to which defamation law must now respond. Several of our recommendations below attempt to achieve this balance while preserving a central role for freedom of expression.[105]

The tort of defamation "involves the publication of a statement that tends to injure the reputation of the person to whom it refers ...to

grounds *America Online, Inc. v. Anonymous Publicly Traded Co*., 261 Va. 350, 542 S.E.2d 377 (Sup. Ct., 2001).

103. Law Reform Commission of Ontario, "*Defamation Law in the Internet Age*", Final Report, March 2020, https://www.lco-cdo.org/wp-content/uploads/2020/03/Defamation-Final-Report-Eng-FINAL-1.pdf. See also Special Issue of the Osgoode Hall Law Journal devoted to the Law Reform project and Gratton, Sue. "*Introduction to OHLJ Special Issue: Reforming Defamation Law in the Age of the Internet*." Osgoode Hall Law Journal 56.1 (2019) : iv-vii where the author outlines the tension between the free expression and internet defamation.

104. The 7 principles are: 1. Defamation law must re-balance protection of reputation and freedom of expression in the internet age; 2. Defamation Law needs to be updated, some statutory reforms are necessary; 3. Defamation law is evolving, new reforms must complement these developments; 4. Access to justice and dispute resolution must be improved; 5. Defamation Law must specifically address online personal attacks; 6. There must be new obligations for intermediary platforms; 7. Defamation law and privacy law have distinct objectives and should remain separate.

105. Law Reform Commission of Ontario, "*Defamation Law in the Internet Age*", supra note 103, p. 9.

cause him or her to be regarded with feelings of hatred, ridicule, contempt, fear or dislike."[106] In *Haaretz v. Goldhar*, the Supreme Court of Canada held that a plaintiff in a defamation action must prove three things:

> (1) that the impugned words were defamatory in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;
>
> (2) that the words in fact referred to the plaintiff; and
>
> (3) the words were published, meaning that they were communicated to at least one person other than the plaintiff.[107]

Publication of defamatory statements on the internet occurs when the statements are read or downloaded by the recipient. The situs of internet-based defamation is the place where the defamatory statement is read, accessed, or downloaded by the third party.[108] In a separate opinion, Justice Karakatsanis noted in *Haaretz.com v. Goldhar* that when defamation occurs on the Internet, where all it takes is one download, the tort is theoretically committed all over the world.[109]

b. Hyperlinking and Publication

Courts have also considered the impact that the presence of the internet itself has on damages for defamation. As Blair J.A. noted in *Barrick Gold Corp. v. Lopehandia* in 2004:[110]

> Is there something about defamation on the Internet - "cyber libel", as it is sometimes called - that distinguishes it, for purposes of damages, from defamation in another medium? My response to that question is "Yes".

106. *Color Your World Corp. v. Canadian Broadcasting Corp.* (1998), 156 D.L.R. (4th) 27, 38 O.R. (3d) 97, [1998] O.J. No. 510 (Ont. C.A.), leave to appeal refused [1998] 2 S.C.R. ix, 119 O.A.C. 397 (note), [1998] S.C.C.A. No. 170 (S.C.C.).
107. *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, 314 D.L.R. (4th) 1 (S.C.C.) at para. 28.
108. *Haaretz.com v. Goldhar*, 2018 SCC 28, [2018] 2 S.C.R. 3, 423 D.L.R. (4th) 419 (S.C.C.) at para. 36.
109. *Ibid* at paras. 48, 126.
110. *Barrick Gold Corp. v. Lopehandia* (2004), 239 D.L.R. (4th) 577, 31 C.P.R. (4th) 401, 71 O.R. (3d) 416 (Ont. C.A.) at paras. 28-30. See also Robert Danay, "*The Medium is not the Message: Reconciling Reputation and Free Expression in Cases of Internet Defamation*", 2011 56-1 *McGill Law Journal* 1, 2011 CanLIIDocs 220, https://canlii.ca/t/29wz.

> The standard factors to consider in determining damages for defamation are summarized by Cory J. in [Hill v. Church of Scientology of Toronto] at p. 1203. They include the plaintiff's position and standing, the nature and seriousness of the defamatory statements, the mode and extent of publication, the absence or refusal of any retraction or apology, the whole conduct and motive of the defendant from publication through judgment, and any evidence of aggravating or mitigating circumstances.
>
> In the Internet context, these factors must be examined in the light of what one judge has characterized as the "ubiquity, universality and utility" of that medium...

For example, the ability to connect individuals to information via hyperlinking on the internet exacerbates the speed and frequency with which a defamatory publication can be reviewed. Hyperlinks are an "indispensable part" of the internet's operation.[111] In *Crookes v. Wikimedia Foundation Inc.*, the Supreme Court of Canada considered whether hyperlinks which connected to allegedly defamatory material constituted "publication" of that defamatory material.[112] Justice Abella, writing for the Court, defined a "hyperlink" as a device routinely used in articles on the Internet whereby a word or phrase is identified, often with underlining, as being a portal to additional, related information.[113]

In *Crookes,* the plaintiff sued the defendant on the basis that the defendant posted an article which contained hyperlinks to other websites and other articles, which in turn contained information about the plaintiff. The plaintiff's argument was that by using the hyperlinks, the defendant was publishing the defamatory material.[114] Justice Abella concluded that hyperlinks acted as references to other content, which was fundamentally different from other acts involved in publication:[115]

> 26 A reference to other content is fundamentally different from other acts involved in publication. Referencing on its own does not involve exerting control over the content. Communicating something is very different from merely communicating that something exists or where it exists. The former involves dissemination of the content, and suggests control over both the content and whether the content will reach an audience at all, while the latter does not. Even where the goal of the person referring to a defamatory publication is to expand that

111. *Crookes v. Wikimedia Foundation Inc.*, 2011 SCC 47, (*sub nom.* Crookes v. Newton) [2011] 3 S.C.R. 269, 337 D.L.R. (4th) 1 (S.C.C.) at paras. 34-35.
112. *Ibid* at paras. 1-3.
113. *Ibid* at para. 2.
114. *Ibid* at paras. 4-6.
115. *Ibid* at paras. 26-30.

> publication's audience, his or her participation is merely ancillary to that of the initial publisher: with or without the reference, the allegedly defamatory information has already been made available to the public by the initial publisher or publishers' acts. These features of references distinguish them from acts in the publication process like creating or posting the defamatory publication, and from repetition.
>
> 27 Hyperlinks are, in essence, references. By clicking on the link, readers are directed to other sources. Hyperlinks may be inserted with or without the knowledge of the operator of the site containing the secondary article. Because the content of the secondary article is often produced by someone other than the person who inserted the hyperlink in the primary article, the content on the other end of the link can be changed at any time by whoever controls the secondary page. Although the primary author controls whether there is a hyperlink and what article that word or phrase is linked to, inserting a hyperlink gives the primary author no control over the content in the secondary article to which he or she has linked....
>
> 28 These features – that a person who refers to other content generally does not participate in its creation or development – serve to insulate from liability those involved in Internet communications in the United States...
>
> 29 Although the person selecting the content to which he or she wants to link might facilitate the transfer of information (a traditional hallmark of publication), it is equally clear that when a person follows a link they are leaving one source and moving to another. In my view, then, it is the actual creator or poster of the defamatory words in the secondary material who is publishing the libel when a person follows a hyperlink to that content. The ease with which the referenced content can be accessed does not change the fact that, by hyperlinking, an individual is referring the reader to other content...
>
> 30 Hyperlinks thus share the same relationship with the content to which they refer as do references. Both communicate that something exists, but do not, by themselves, communicate its content. And they both require some act on the part of a third party before he or she gains access to the content. The fact that access to that content is far easier with hyperlinks than with footnotes does not change the reality that a hyperlink, by itself, is content neutral – it expresses no opinion, nor does it have any control over, the content to which it refers. [citations omitted]

For these reasons, Justice Abella concluded that the use of hyperlinks as references to the existence or location of other content would not be publication of the content–something more is required

to present content from the hyperlinked material in a way that repeats the defamatory content to constitute publication.[116] *Crookes* has been followed in other jurisdictions for the proposition that a presumption of publication does not arise simply because a document is available on the Internet.[117] That said, there is also case law which acknowledges that "publication to persons who are not specifically identified and are therefore never called to testify can be inferred" because of the "modern realities of information dissemination via the internet".[118]

Other problems exist with defamation published on the internet. For example, in *Shtaif v. Toronto Life Publishing Co.*,[119] the Ontario Court of Appeal questioned whether an internet publication is subject to the provisions of the Ontario *Libel and Slander Act*.[120] The problem was summarized by the Ontario Court of Appeal:[121]

> 19 The motion judge ruled that the internet version of the article was not subject to the notice and limitation provisions of the Act. He held that a website posting is not a "newspaper". He also held that he had no evidence Toronto Life's website was a "broadcast" as defined in the Act; moreover, as Toronto Life's server is located in Texas, its website was not broadcast from a station in Ontario.
>
> 20 Both sides have questioned the correctness of the motion judge's ruling. The question whether or in what circumstances an internet publication is subject to ss. 5(1) and 6 of the Act is a difficult one. The Act was drafted to address alleged defamation in traditional print media and in radio and television broadcasting. It did not contemplate this era of emerging technology, especially the widespread use of the internet. The application of the Act to internet publications will have to come about by legislative amendment or through judicial interpretation of statutory language drafted in a far earlier era.

Some Judges have applied principles of statutory interpretation to account for evolving technology. For example, in *John v. Ballingall*,

116. *Ibid* at para. 42.
117. *Wilson v. Switlo*, 2011 BCSC 1287, 207 A.C.W.S. (3d) 366, 2011 CarswellBC 2532 (B.C. S.C.) at para. 207, affirmed 2013 BCCA 471, 368 D.L.R. (4th) 253, 7 C.C.L.T. (4th) 145 (B.C. C.A.), additional reasons 2016 BCSC 130, 263 A.C.W.S. (3d) 318, 2016 CarswellBC 227 (B.C. S.C.).
118. *Malak v. Hanna*, 2023 BCSC 1337, 94 C.C.L.T. (4th) 87, 2023 A.C.W.S. 3931 (B.C. S.C.) at para. 208, additional reasons 2023 BCSC 2036, 96 C.C.L.T. (4th) 29, 2023 A.C.W.S. 5793 (B.C. S.C.), affirmed 2024 BCCA 370, 2024 CarswellBC 3290 (B.C. C.A.).
119. *Shtaif v. Toronto Life Publishing Co.*, 2013 ONCA 405, 366 D.L.R. (4th) 82, 306 O.A.C. 155 (Ont. C.A.).
120. *Libel and Slander Act*, R.S.O. 1990, c. L.1.
121. *Shtaif v. Toronto Life Publishing Co Ltd*, *supra* note 119 at paras. 19-20.

the Ontario Court of Appeal agreed that an online newspaper would be considered a "newspaper" for the purpose of the *Libel and Slander Act* notwithstanding that it was not a physical paper or traditional print:[122]

> 21 The appellant submits the online version of the article is not published "in a newspaper" because there is no paper. He argues that because it is not printed on physical paper, it is excluded from the LSA. Further, he submits the legislature clearly intended not to include online versions of a newspaper because there has been no amendment to the LSA to cover this point.
>
> 22 I do not agree. In Weiss v. Sawyer (2002), 61 O.R. (3d) 526 (Ont. C.A.), this court considered the issue and concluded that a newspaper does not cease to be a newspaper when it is published online. ... In my view, the purpose and scheme of the notice provision in the Libel and Slander Act are to extend its benefits to those who are sued in respect of a libel in a newspaper irrespective of the method or technique of publication. To use the words of Justice Lax, "a newspaper is no less a newspaper because it appears in an online version." [Citations omitted.]
>
> . . .
>
> 25 The regime in the LSA provides timely opportunity for the publisher to address alleged libellous statements with an appropriate response that could be a correction, retraction, or apology. Now that newspapers are published and read online, it would be absurd to provide different regimes for print and online versions.

In truth, legislation in Ontario and in other parts of Canada is outdated and ill suited to address the scope and nature of online harms. In the Final Report of the LCO on Defamation Law in the Internet Age, referenced above, the LCO concludes that the status quo is untenable:

> The future of written communications is online and there was considerable consensus among stakeholders that defamation law must evolve accordingly. Legal rules should no longer differ depending on whether defamation is contained within a speech, book, newspaper, broadcast, blog, Facebook post, emoji or some other format yet to be invented. Looking into the future, defamation law should offer a flexible set of legal principles applicable to all publications without regard to the medium through which they are transmitted.[123]

122. *John v. Ballingall*, 2017 ONCA 579, 415 D.L.R. (4th) 520, 136 O.R. (3d) 305 (Ont. C.A.) at paras. 21-25, leave to appeal refused 2018 CarswellOnt 7921, 2018 CarswellOnt 7922, [2017] S.C.C.A. No. 377 (S.C.C.).

123. In connection with this conclusion the LCO recommends in its Final report

c. Internet Harassment

While the tort of defamation is available to victims of internet malfeasance, it has proven to be inadequate to address the unique way in which the internet is used to harass individuals.[124] "Existing torts do not capture the mischief or harm intended by online harassment" which is not always defamatory but is persistent and meant to intimidate.[125] One of the most significant problems with existing tort law's approach to internet harassment is that generally speaking, torts require proof of physical or provable mental injury, where the goal of harassment is to bother, upset, and intimidate.[126] In *385277 Ontario Ltd. v. Gold*, Justice Myers explained the mischief that makes internet harassment different from other torts:[127]

> 54 The point of harassment is to cause mental suffering or to change another's behaviour by subjecting them to unwelcomed torment. It may but need not lead to "visible and provable illness". It may not create a threat of imminent physical harm. Ms. Gold mouthed many threats of physical harm. None was really "imminent".
>
> 55 Existing torts do not necessarily capture the mischief or harm intended by online harassment meant to intimidate.
>
> 56 The use of the internet is integral to this new phenomenon. If the Golds had stood across the street from Mr. Baghai's home and yelled or used a megaphone to blare the same things they say on the internet, the effect would be very different. Few would have heard her apart from Mr. Baghai and his family. While that may still be unsettling, it is of a whole different order of harm than using the internet to do the same thing.

In *Barrick Gold Corp.*, Blair J.A. wrote:

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that the Ontario *Libel and Slander Act* be replaced with a new Defamation Act establishing the legal framework for resolving defamation complaints in Ontario but that defamation law should not be codified but should continue to develop in the common law. Law Reform Commission of Ontario, "*Defamation Law in the Internet Age*", Final Report, March 2020, https://www.lco-cdo.org/wp-content/uploads/2020/03/Defamation-Final-Report-Eng-FINAL-1.pdf, pp. 9-10.

124. *Caplan v. Atas*, *supra* note 4 at para. 6. See also Jamie Cameron, "*Reforming Defamation Law in the Age of the Internet*", 56 Osgoode Hall Law Journal 1, 2019 CanLIIDocs 3959 where the author recommends reworking the tort of defamation accord with the realities of internet defamation and creating an online defamation tribunal.
125. *385277 Ontario Ltd v. Gold*, *supra* note 7 at para. 54.
126. *Ibid* at para. 50.
127. *Ibid* at paras. 50-59.

> ...Internet defamation is distinguished from its less pervasive cousins, in terms of its potential to damage the reputation of individuals and corporations, by the features described above, especially its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility. The mode and extent of publication is therefore a particularly significant consideration in assessing damages in Internet defamation cases.[128]

Some Canadian provinces have recognized a general tort of harassment and others have restricted the tort to internet harassment. The Ontario Court of Appeal rejected the need for a general tort of harassment in *Merrifield v. Canada (Attorney General)*.[129] In that case a junior constable in the RCMP brought a claim of harassment and bullying against members of RCMP management. Although the trial judge found that the common law tort of harassment exists in Ontario and the elements were satisfied in this case, the Ontario Court of Appeal overturned that decision.[130] The Court reviewed the basis upon which new torts are recognized in Canada and found that development of the common law should be incremental.[131] The Court found that taken as a whole the cases considered by the trial judge "confirm neither the existence of the tort [of harassment] nor its elements."[132] The Court concluded that "we were not provided with any foreign judicial authority that would support the recognition of a new tort. Nor were we provided with any academic authority or compelling policy rationale for recognizing a new tort and its requisite elements."[133] The Court wrote that unlike *Jones v. Tsige* this case was "not a case whose facts cry out for the creation of a novel legal remedy."[134]

However, after the Court of Appeal's decision in *Merrifield* the Superior Court of Ontario recognized the tort of *internet harassment* in *Caplan v. Atas*.[135] In that case the defendant engaged in extraordinary and malicious internet harassment against myriad individuals for many years. She "carried on systematic campaigns of

128. *Barrick Gold Corp v. Lopehandia*, *supra* note 110 at para. 34.
129. *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, 432 D.L.R. (4th) 433, 53 C.C.E.L. (4th) 193 (Ont. C.A.), additional reasons 2019 ONCA 336, 304 A.C.W.S. (3d) 40, 2019 CarswellOnt 6065 (Ont. C.A.), leave to appeal refused 2019 CarswellOnt 14956, 2019 CarswellOnt 14957, [2019] S.C.C.A. No. 174 (S.C.C.).
130. *Ibid* at para. 4.
131. *Ibid* at para. 24.
132. *Ibid* at paras. 28, 36.
133. *Ibid* at para. 40.
134. *Ibid.*
135. *Caplan v. Atas*, *supra* note 4.

malicious falsehood to cause emotional and psychological harm to persons against whom she had grievances"[136] including adverse parties in litigation, her own lawyers, opposing lawyers and agents and their relatives (including siblings, spouses, and children), a former employer and its successor, owners, managers, and an ever-widening circle of over 150 victims. The victims were "chosen to cause misery to her prime victims, those against whom she harbours festering grievances."[137] Justice Corbett described the defendant's penchant for cyber-stalking:

> [2] Cyber-stalking is the perfect pastime for Atas. She can shield her identity. She can 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. Unrestrained by basic tenets of decency, when she is enjoined from attacking named plaintiffs, she moves her focus to their siblings, their children, their other family members and associates, in a widening web of vexatious and harassing behaviour.[138]

The victims of the defendant's internet harassment brought four actions against the defendant for defamation, harassment, and related claims. Justice Corbett heard three motions for summary judgment and one motion for default judgment in respect of the four actions. Justice Corbett granted the motions for summary judgment and refused to set aside the default judgment. In this context he recognized the tort of internet harassment. He wrote that "this case illustrates some of the inadequacies in current legal responses to internet defamation and harassment".[139] He also concluded that the internet upset the balance between the right to freedom of speech and the law of defamation and that this case illustrated the need for the law to develop better tools to address internet harassment to protect societal order and the marketplace of ideas:

> [6] This case illustrates some of the inadequacies in current legal responses to internet defamation and harassment. This court's response is a solution tailored for these cases and addresses only the immediate

136. *Ibid* at para. 7.
137. *Ibid.*
138. *Ibid* at para. 2. One of the many examples of the defendant's internet harassment was her vicious campaign targeting the brother of the lawyer who was acting on an application to declare the defendant a vexatious litigant. The brother was a cardiologist practising in New Mexico who had nothing to do with the proceedings. The defendant altered and posted newspaper articles which wrongly described the brother as a pedophile and pornographer in an effort to destroy his reputation as a respected doctor.
139. *Ibid* at para. 6.

> problem of a lone publisher, driven by hatred and profound mental illness, immune from financial constraints and (dis)incentives, apparently ungovernable except through the sledgehammer response of incarceration. It remains to be seen whether there is any way to control Atas' unacceptable conduct other than by locking her up and/or compelling her to obtain treatment. Whatever the solution may be that brings an end to her malicious unlawful attacks on other people, it is clear that the law needs better tools, greater inter-jurisdictional cooperation, and greater regulation of the electronic "marketplace" of "ideas" in a world with near universal access to the means of mass communication. Regulation of speech carries with it the risk of over-regulation, even tyranny. Absence of regulation carries with it the risk of anarchy and the disintegration of order. As should be clear from the discussion that follows, a situation that allows someone like Atas to carry on as she has, effectively unchecked for years, shows a lack of effective regulation that imperils order and the marketplace of ideas because of the anarchy that can arise from ineffective regulation.[140]

Importantly, Justice Corbett found that the law's response to the defendant's behaviour failed to deter her. Despite spending 74 days in jail and numerous injunctions and court orders, the defendant was undeterred in her malicious internet campaign and was judgment proof.[141] The defendant, once a qualified real estate professional who owned two income producing properties, became destitute and was living in a shelter as an undischarged bankrupt. Justice Corbett wrote that the courts "have been challenged to recognize new torts or expand old ones to face the challenges of the internet age of communication. The academic commentators are almost universal in their noting that, while online harassment and hateful speech is a significant problem, there are few practical remedies available for the victims."[142] He also noted that despite publication of a LCO's Final Report, *Defamation Law in the Internet Age*, released in 2020 and referenced above, there has been no legislation in Ontario to address this issue.[143]

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140. *Ibid* at paras. 4-6.

141. *Ibid* at para. 93.

142. *Caplan v. Atas*, *supra* note 4. After some movement toward the recognition of a common law tort of harassment, the English Parliament passed the *Protection from Harassment Act 1997*, which created statutory protections and civil remedies for harassment. In 2014, the Australian Law Reform Commission recommended the passage of legislation for a statutory civil remedy for harassment. In 2015, New Zealand passed the *Harmful Digital Communications Act*, which created an agency to administer a complaints process and applicable remedies: *Harmful Digital Communications Act 2015* (NZ). See also *Online Safety Act 2021* (Austl).

143. Law Commission of Ontario, Defamation Law in the Internet Age: Final

Justice Corbett concluded that "while the law of defamation provides some recourse for the targets of this kind of conduct...that recourse is not sufficient to bring the conduct to an end or to control the behaviour of the wrongdoer"[144] and therefore the common law tort of harassment should be recognized in Ontario. "Harassment" best described what the defendant in this case was doing and ordering the defendant "to stop harassment provides remedial breadth not available in the law of defamation."[145] He noted the Ontario Court of Appeal decision in *Merrifield* and found it was based on two critical conclusions: (i) the tort of intentional infliction of mental suffering was a sufficient remedy in the circumstances of that case and (ii) the Court was not provided with any foreign judicial authority to support the recognition of the tort or any compelling policy rationale.[146] However, he found that the Court of Appeal did not foreclose the development of a properly conceived tort of harassment that might apply in appropriate contexts.[147]

Justice Corbett described the need for a tort of internet harassment because the intent of cyberbullies is to harass rather than to defame and the tort of intentional infliction of mental suffering is inadequate in these circumstances:

> [168] In my view, the tort of internet harassment should be recognized in these cases because Atas' online conduct and publications seek not so much to defame the victims but to harass them. Put another way, the intent is to go beyond character assassination: it is intended to harass, harry and molest by repeated and serial publications of defamatory material, not only of primary victims, but to cause those victims further distress by targeting persons they care about, so as to cause fear, anxiety and misery. The social science literature referenced above makes it clear that real harm is caused by serial stalkers such as Atas.
>
> [169] The tort of intentional infliction of mental suffering is simply inadequate in these circumstances: it is designed to address different situations. The test is set out in *Prinzo v. Baycrest Centre for Geriatric Care*. The plaintiff must prove conduct by the defendant that is (1) flagrant and outrageous, (2) calculated to produce harm, and which (3) results in visible and provable illness. The third branch of the test must be understood in the context of the broad range of behaviour that may be

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Report (Toronto: March 2020). https://www.lco-cdo.org/wp-*Ibid* at para. 164content/uploads/2020/03/Defamation-Final-Report-Eng-FINAL-1.pdf.

144. *Ibid* at para. 104.

145. *Ibid.*

146. *Ibid* at para. 164.

147. *Ibid* at para. 165.

> caught by the first two branches of the test. It is not part of the test that the conduct be persistent and repetitive.[148]

Justice Corbett recognized the tort of internet harassment developed by American courts[149] and held that the tort is made out "where the defendant maliciously or recklessly engages in communication or conduct so outrageous in character, duration, and extreme in degree, so as to go beyond all possible bounds of decency and tolerance, with the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff, and the plaintiff suffers such harm."[150]

Since *Caplan*, other Ontario cases have recognized the tort of internet harassment and some cases suggest that the tort may be available to a corporation where the harassment is intended to negatively impact the corporation's business.[151] As of writing, the Ontario Court of Appeal has not considered the tort of Internet harassment.

By contrast, the British Columbia Courts[152] and the Nova Scotia Courts[153] have specifically rejected a tort of harassment. The Alberta

148. *Ibid* at paras. 168-169.

149. Some states like Montana have Anti Intimidation legislation. See for example *Gersh v. Anglin*, 353 F.Supp.3d 958 (D. Mont., 2018) and see *Elonis v. United States*, 575 U.S. 723 (2015) where an individual was prosecuted for publishing threatening lyrics about his wife under US federal law 18 U.S.C. 875(c). which prohibits making threats over the internet.

150. *Caplan v. Atas*, *supra* note 4 at para. 171.

151. *40 Days for Life v. Dietrich et. al.*, 2022 ONSC 5588, 87 C.C.L.T. (4th) 73, 2022 A.C.W.S. 3964 (Ont. S.C.J.), additional reasons 2022 ONSC 7273, 2022 CarswellOnt 18616 (Ont. S.C.J.), affirmed 2024 ONCA 599, 99 C.C.L.T. (4th) 173, 2024 CarswellOnt 11559 (Ont. C.A.) where the Court held that internet harassment may be available to a corporation; *385277 Ontario Ltd. v. Gold*, 2021 ONSC 4717, 336 A.C.W.S. (3d) 347, 2021 CarswellOnt 9570 (Ont. S.C.J.) where the defendants set out on a campaign to harass and intimidate their landlord. Some of the posts were defamatory, and others were just profane, threatening and intimidating (para. 47). In *2110120 Ontario Inc. o/a Cargo County v. Buttar*, 2022 ONSC 1766, 82 C.C.L.T. (4th) 276, 2022 A.C.W.S. 561 (Ont. S.C.J.), affirmed 2023 ONCA 539, 485 D.L.R. (4th) 551, 94 C.C.L.T. (4th) 1 (Ont. C.A.), leave to appeal refused *Gurmukhjeet Buttar, et al. v. 2110120 Ontario Inc. o/a Cargo County Group, et al.*, 2024 CarswellOnt 5460, 2024 CarswellOnt 5461 (S.C.C.) the Court appears to have accepted the possibility of a tort claim proceeding as a result of the defendants' "manipulation of social media to deliberately negatively impact" the corporate plaintiff's business, but did not expressly rule on it. See also *Fowlie v. Spinney*, 2024 ONSC 5080, 2024 CarswellOnt 14004 (Ont. S.C.J.).

152. *Anderson v. Double M Construction Ltd.*, 2021 BCSC 1473, 2021 A.C.W.S. 791, 2021 CarswellBC 4284 (B.C. S.C.) at para. 60; *Skutnik v. British Columbia (Attorney General)*, 2021 BCSC 2408, 2021 A.C.W.S. 499, 2021

Court of King's Bench took a different approach and recognized a new general common law tort of harassment in *Alberta Health Services v. Johnston*.[154] In that case a candidate for mayor of Calgary used his campaign to spew misinformation, conspiracy theories and hate directed at a number of targets including Alberta Health Services ("AHS") and a public health inspector with AHS. The health inspector and AHS brought an action for defamation, tortious harassment, invasion of privacy and assault. The Court determined that AHS was a government actor and therefore could not sue in defamation. However, the Court held that the health inspector could bring a claim in defamation and for tortious harassment. The Court found that they were not bound by the Ontario Court of Appeal's decision in *Merrifield* and recognized a general tort of harassment, rather than a narrower tort of internet harassment.[155] Like the Court in *Caplan,* the Alberta Court found that existing torts do not address the harm caused by harassment: "Defamation and assault get at some kinds of harassing behaviour but are inadequate because they are limited to false statements causing reputational harm in the case of defamation and imminent threats of physical harm in the case of assault. The new privacy torts address harassment only if there is a reasonable expectation of privacy – which is absent in the present case." [156] Unlike the Court in *Caplan,* the Alberta Court did not limit the tort to internet harassment. The Court found that a defendant has committed the tort of harassment where the defendant has:

(1) engaged in repeated communications, threats, insults, stalking, or other harassing behaviour in person or through or other means;
(2) that the defendant knew or ought to have known was unwelcome;
(3) which impugn the dignity of the plaintiff, would cause a reasonable person to fear for her safety or the safety of her

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CarswellBC 3862 (B.C. S.C.); *Ilic v. British Columbia (Justice)*, 2023 BCSC 167, 2023 A.C.W.S. 4915, 2023 CarswellBC 315 (B.C. S.C.) at para. 196; *Rai v. Meta Platforms Inc.* [2024] B.C.J. No. 1449.

153. *Goree v. Daye*, 2022 NSSM 61, 2022 CarswellNS 954 (N.S. Small Cl. Ct.) at para. 20; *Finck v. Hartlieb*, 2006 NSSC 3, 763 A.P.R. 246, 240 N.S.R. (2d) 246 (N.S. S.C. [In Chambers]) at para. 32.

154. *Alberta Health Services v. Johnston*, 2023 ABKB 209, 482 D.L.R. (4th) 725, 93 C.C.L.T. (4th) 124 (Alta. K.B.).

155. *Ibid* at para. 82.

156. *Ibid* at para. 99.

loved ones, or could foreseeably cause emotional distress; and

(4) caused harm.[157]

Based on this definition of harassment, the Court held that the defendant had harassed the public health inspector by calling her a terrorist or fascist, mocking her and her family while showing pictures of them from her social media account, and making statements which incited violence against the inspector and her family. The Court found that the defendant knew or ought to have known that this conduct was unwelcome and that his behaviour would cause a reasonable person to fear for her safety and the safety of her family.[158] The Court awarded the plaintiff $300,000 in general damages for defamation and $100,000 in general damages for harassment, and $250,000 in aggravated damages.[159] The Court also granted a permanent injunction to restrain the defendant's activities in relation to AHS and the health inspector.[160] In Manitoba, though not recognized yet, the courts have expressed a willingness to consider a tort of internet harassment to provide relief to harm perpetrated online.[161]

There is definitely an issue about whether civil courts are the appropriate forum to promptly and effectively address online harassment. It is no secret that as of the date of writing, the civil courts in Ontario and other provinces are experiencing significant delays in hearing cases.[162] The old adage, justice delayed is justice denied, is all the more relevant in the case of online harms. Information can travel around the world on the internet in a matter of seconds. Consequently, victims need swift recourse and enforcement mechanisms to respond quickly to internet harms. Some commentators have suggested that online defamation and

157. *Ibid* at para. 107; *Skwark v. Vallittu*, 2022 MBKB 211, [2023] 5 W.W.R. 488, 2022 A.C.W.S. 5008 (Man. K.B.) at paras. 45-47.

158. *Alberta Health Services v. Johnston*, *supra* note 154 at para. 109.

159. *Ibid* at paras. 110-116, 118-120.

160. *Ibid* at paras. 110-116, 118-120, 146-147. See also *Ford v. Jivraj*, 2023 ABKB 92, 2023 A.C.W.S. 5186, 2023 CarswellAlta 458 (Alta. K.B.), additional reasons 2023 ABKB 465, 2023 A.C.W.S. 4022, 2023 CarswellAlta 2170 (Alta. K.B.).

161. *Skwark v. Vallittu*, 2022 MBKB 211, [2023] 5 W.W.R. 488, 2022 A.C.W.S. 5008 (Man. K.B.) at para. 47.

162. The Advocate's Society, "*Delay No Longer, The Time to Act is Now*, *A Call for Action on Delay in the Civil Justice System.",* June 29, 2023 https://www.advocates.ca/Common/Uploaded%20files/Advocacy/CivilJustice/2023/The_Advocates_Society_Delay_No_Longer_Final_Published_June_29_2023.pdf.

harassment complaints be addressed by an administrative tribunal rather than by the courts.[163]

England,[164] Nova Scotia,[165] and Manitoba[166] have enacted legislation to address online harassment.[167] In 2018 Nova Scotia passed the *Intimate Images and Cyber-Protection Act*[168] which defines cyber-bullying as "an electronic communication, direct or indirect, that causes or is likely to cause harm to another individual's health or well-being where the person responsible for the communication maliciously intended to cause harm to another individual's health or well-being or was reckless with regard to the risk of harm to another individual's health or well-being."[169] The Nova Scotia Act gives the Court the power to make a broad range of orders respecting cyber-bullying including an order declaring a communication to be cyber-bullying, prohibiting a person from making cyber-bullying communications, and ordering a person to pay general, aggravated or punitive damages to a victim of cyberbullying.[170] As mentioned above, in 2014 the Canadian Parliament criminalized the nonconsensual distribution of intimate images under section 162.1 of the *Criminal Code*.[171] It is a crime to "knowingly publish, distribute, transmit, sell, make available or advertise an intimate image of a person that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct."[172]

163. See Jamie Cameron, "*Reforming Defamation Law in the Age of the Internet*", 56 Osgoode Hall Law Journal 1, 2019 CanLIIDocs 3959 where the author recommends reworking the tort of defamation to accord with the realities of internet defamation and creating an online defamation tribunal.
164. The UK enacted the *Protection from Harassment Act 1997*, (c 40) which pre-empted the development of a common law tort of harassment. See *Khorasandjian v. Bush*, [1993] 3 W.L.R. 476 (Eng. & Wales C.A. (Civil)) and Jane Stapleton, "In Restraint of Tort" in Peter Birks, ed, *The Frontiers of Liability* (Oxford: Oxford University Press, 1994) 83 at 10.
165. *Intimate Images and Cyber-Protection Act*, SNS 2017, c 7.
166. There may also be a common law tort of online harassment in Manitoba see *Skwark v. Vallittu*, 2022 MBKB 211, [2023] 5 W.W.R. 488, 2022 A.C.W.S. 5008 (Man. K.B.) at paras. 45-47.
167. *Protection from Harassment Act 1997* (UK).
168. *Intimate Images and Cyber-Protection Act*, SNS 2017, c 7.
169. *Intimate Images and Cyber-Protection Act*, SNS 2017, c 7.
170. *Intimate Images and Cyber-Protection Act*, SNS 2017, c 7.
171. *Criminal Code*, RSC 1985, c C-46, s 162.1.
172. *Criminal Code*, RSC 1985, c C-46, s 162.1.

d. Liability of Internet Intermediaries

Once privacy torts began to take shape in Ontario, it was not long before plaintiffs began to raise the question of whether an internet intermediary could be held liable for an invasion of privacy.[173] Internet intermediaries often have deeper pockets and are easier to identify than the perpetrators of the invasion of privacy. However, as discussed above, the Ontario Court of Appeal disposed of the question, at least in respect of intrusion upon seclusion claims against "Database Defendants", entities with electronic databases of information that are the victims of a cyberattack by an intruder.

In three cases before the Ontario Court of Appeal referred to as the Database Defendants Trilogy, referenced more fully in the section on intrusion upon seclusion above, Doherty J.A., wrote in *Owsianik v. Equifax Canada Co*. (His Honour's comments applied *mutatis mutandis* to all three appeals):

> On the facts as pleaded, the defendants did not do anything that could constitute an act of intrusion or invasion into the privacy of the plaintiffs. The intrusions alleged were committed by unknown third-party hackers, acting independently from, and to the detriment of, the interests of the Database Defendants. [...] The identity of the hackers is unknown. On the claims as pleaded, the Database Defendants' fault lies in their failure to take adequate steps to protect the plaintiffs from the intrusion upon their privacy by hackers acting independently of the Database Defendants. [...]

173. See *Winder v. Marriott International, Inc*., 2022 ONSC 390, 343 A.C.W.S. (3d) 124, 2022 CarswellOnt 641 (Ont. S.C.J.), affirmed 2022 ONCA 815, 164 O.R. (3d) 528, 2022 A.C.W.S. 4616 (Ont. C.A.), leave to appeal refused 2023 CarswellOnt 10673, 2023 CarswellOnt 10674 (S.C.C.); *Agnew-Americano v. Equifax Canada Co*., 2019 ONSC 7110, 313 A.C.W.S. (3d) 694, 2019 CarswellOnt 20409 (Ont. S.C.J.) at para. 45, reversed *Owsianik v. Equifax Canada Co*., 2021 ONSC 4112, 18 B.L.R. (6th) 78, 75 C.C.L.T. (4th) 243 (Ont. Div. Ct.), affirmed *Owsianik v. Equifax Canada Co*., 2022 ONCA 813, 2022 A.C.W.S. 2838, 2022 CarswellOnt 16846 (Ont. C.A.), leave to appeal refused *Alina Owsianik v. Equifax Canada Co., et al*., 2023 CarswellOnt 10675, 2023 CarswellOnt 10676 (S.C.C.); *Tucci v. Peoples Trust Company*, 2017 BCSC 1525, 283 A.C.W.S. (3d) 88, 2017 CarswellBC 2373 (B.C. S.C.) at para. 152, reversed in part 2020 BCCA 246, 451 D.L.R. (4th) 302, 69 C.C.L.T. (4th) 198 (B.C. C.A.); *Kaplan v. Casino Rama*, 2019 ONSC 2025, (*sub nom*. Kaplan v. Casino Rama Services Inc.) 145 O.R. (3d) 736, 305 A.C.W.S. (3d) 249 (Ont. S.C.J.) at paras. . 28-29, additional reasons 2019 ONSC 3310, 306 A.C.W.S. (3d) 711, 2019 CarswellOnt 9260 (Ont. S.C.J.); *Obodo v. Trans Union of Canada, Inc*., 2021 ONSC 7297, 2021 CarswellOnt 15509 (Ont. S.C.J.) at para. 22, leave to appeal refused 2022 ONSC 1184, 2022 A.C.W.S. 256, 2022 CarswellOnt 2622 (Ont. Div. Ct.), affirmed 2022 ONCA 814, 164 O.R. (3d) 520, 2022 CarswellOnt 16847 (Ont. C.A.), leave to appeal refused 2023 CarswellOnt 10594, 2023 CarswellOnt 10595 (S.C.C.).

> The Database Defendants' failure to meet their common law duty of care, or their contractual and statutory responsibilities to the plaintiffs to properly store the data, cannot, however, be transformed by the actions of independent third-party hackers into an invasion by the Database Defendants of the plaintiffs' privacy.
>
> ...
>
> To impose liability on Equifax for the tortious conduct of the unknown hackers, as opposed to imposing liability on Equifax for its failure to prevent the hackers from accessing the information, would, in my view, create a new and potentially very broad basis for a finding of liability for intentional torts. A defendant could be liable for any intentional tort committed by anyone, if the defendant owed a duty, under contract, tort, or perhaps under statute, to the plaintiff to protect the plaintiff from the conduct amounting to the intentional tort. [...] Not only would the scope of intentional torts expand, that expansion would radically reconfigure the border between the defendant's liability for the tortious conduct of third parties, and the defendant's direct liability for its own failure to properly secure the information of the plaintiffs.

Internet defamation and internet harassment, like intrusion upon seclusion, are intentional torts. Given the Ontario Court of Appeal's reasoning in *Owsianik*, above, it seems unlikely that internet intermediaries who host platforms upon which defamation or harassment occurs online will be held liable under these torts. Where legislation exists, or has been proposed, to address online harms, it does not appear to be the legislature's intent to hold intermediaries on the internet liable for what occurs online.[174] As indicated in *Owsianik*, this would not exclude claims against those providers in negligence or on some other basis.

174. For example, see Bill C-63. It proposes to amend the *Canadian Human Rights Act*, to exclude liability for internet or other intermediaries (i.e., telecommunications service providers, social media service providers), for hate speech: "...a person communicates or causes to be communicated hate speech so long as the hate speech remains public and the person can remove or block access to it" (proposed s. 13(2)), and "... a person does not communicate or cause to be communicated hate speech by reason only that they (a) indicate the existence or location of the hate speech; or (b)host or cache the hate speech or information about the location of the hate speech." (proposed s. 13(3)).

V. Remedies

a. Norwich Orders

One of the problems faced by victims of internet malfeasance is identifying the perpetrator. As the Newfoundland and Labrador Trial Division pointed out in *King v. Power*:[175]

> 4 If one is trying to identify an anonymous person behind any particular internet activity, the first step is to obtain the IP address. An IP address is a multi-digit identifier that is automatically and randomly assigned by an Internet Service Provider (ISP) to a subscriber's computer when that device connects to the Internet. The IP address assigned by the ISP can change whenever a subscriber reconnects to the internet. If one obtains the IP address for a specific time and date then that can be matched to identify the subscriber of a specific internet account. The matching exercise requires supplemental disclosure from the ISP (e.g. Bell or Rogers). Facebook and Twitter have the IP addresses for the specific times and dates associated with the internet activity and the ISPs have the corresponding subscriber name.

Norwich orders, which originated from the House of Lords decision in *Norwich Pharmacal Co. v. Customs & Excise Commissioners*,[176] have been used by Canadian courts to require internet service providers to disclose the information necessary to determine the identity of anonymous authors of defamatory or harassing internet posts.[177] In *GEA Group AG v. Ventra Group Co.*[178] the Ontario Court of Appeal reviewed the Canadian cases on Norwich orders and identified the circumstances in which this relief is available in Ontario. The Court of Appeal held that in determining

175. *King v. Power*, 2015 NLTD(G) 32, 65 C.P.C. (7th) 423, 332 C.R.R. (2d) 39 (N.L. T.D.) at para. 4.

176. [1973] UKHL 6, [1974] A.C. 133, [1973] 2 All E.R. 943 (U.K. H.L.).

177. *York University v Bell Canada Enterprises*, *supra* note 101 at paras. 17-19. As noted in *York University* orders have also been made under Rules 30.10 (production from non-parties with leave) and 31.10 (discovery of non-parties with leave) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 requiring an internet service provider to disclose the identity of the sender of an allegedly defamatory email for example in *Irwin Toy Ltd. v. Joe Doe* (2000), 12 C.P.C. (5th) 103, 99 A.C.W.S. (3d) 399, [2000] O.J. No. 3318 (Ont. S.C.J.). In *Hogan v. Great Central Publishing Ltd.* (1994), 111 D.L.R. (4th) 526, 16 O.R. (3d) 808, [1994] O.J. No. 135 (Ont. Gen. Div.), the publisher of a magazine was ordered to disclose the name of the author of articles that were allegedly defamatory.

178. *GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619, 312 D.L.R. (4th) 160, 76 C.P.C. (6th) 3 (Ont. C.A.), additional reasons 2009 ONCA 878, 315 D.L.R. (4th) 558, 79 C.P.C. (6th) 201 (Ont. C.A.).

whether to grant a Norwich order the court should consider the following factors:

> (i) Whether the applicant has provided evidence sufficient to raise a valid, *bona fide* or reasonable claim;
> (ii) Whether the applicant has established a relationship with the third party from whom the information is sought, such that it establishes that the third party is somehow involved in the acts complained of;
> (iii) Whether the third party is the only practicable source of the information available;
> (iv) Whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure . . .; and
> (v) Whether the interests of justice favour obtaining the disclosure following factors govern the determination of whether to grant a Norwich Order.[179]

The Court of Appeal held that demonstrating that pre-action discovery is "necessary" was not a requirement on its own for obtaining a Norwich order. The "important point is that a Norwich order is an equitable, discretionary and flexible remedy. It is also an intrusive and extraordinary remedy that must be exercised with caution."[180] An applicant for a Norwich order must "demonstrate that the discovery sought is required to permit a prospective action to proceed, although the firm commitment to commence proceedings is not itself a condition precedent to this form of equitable relief."[181] A similar approach to Norwich orders was adopted in Alberta.[182] Norwich orders have also been granted in the United Kingdom against service providers and website publishers.[183]

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179. *Ibid* at para. 51.
180. *Ibid* at paras. 51, 84-85.
181. *Ibid* at paras. 51, 85.
182. *Alberta Treasury Branches v. Leahy*, 2000 ABQB 575, 78 C.R.R. (2d) 221, [2000] A.J. No. 993 (Alta. Q.B.) at para. 106, affirmed 2002 ABCA 101, 303 A.R. 63, [2002] A.J. No. 524 (Alta. C.A.), leave to appeal refused (2002), 296 W.A.C. 120 (note), 327 A.R. 120 (note), [2002] S.C.C.A. No. 235 (S.C.C.).
183. *York University v. Bell Canada Enterprises*, *supra* note 101 at para. 20; David Price and Korieh Duodu, *Defamation: Law, Procedure and Practice*, 3rd ed. (London: Sweet & Maxwell, 2003) at paras. 35-114, referring to an unreported decision in *Scoot v. Interactive Investor International; and Totalise v. Motley Fool Ltd.*, [2001] E.M.L.R. 29, [2001] Masons C.L.R. 87, 151 N.L.J. 644 (Eng. Q.B.), var. with respect to costs (2001), [2001] EWCA Civ 1897, [2003] 2 All E.R. 872, [2002] 1 W.L.R. 1233 (Eng. C.A.). Similar orders have been granted by American Courts in *Cohen v. Google Inc.*, Index No. 100012/09 (N.Y.S.C., August 17, 2009); *In re Subpoena Duces Tecum to America Online, Inc.*, 2000 WL 1210372, 52 Va. Cir. 26 (U.S. Va. S.C., 2000) at p. 34 [Va. Cir.], reserved on other grounds *America Online,*

In *York University v. Bell Canada Enterprises*,[184] York University sought a Norwich order from Bell Canada Enterprise and Rogers Communications Inc. to disclose information necessary to identify the anonymous authors of allegedly defamatory emails and a website posting respecting York University's President and his appointment of the Dean of Liberal Arts and Professional Studies. York had already obtained a Norwich order compelling Google Inc. to disclose information to aid in identifying the authors of the communications. Pursuant to an earlier order of the Court, Google disclosed the Internet protocol addresses associated with the e-mail addresses to York. This information led to identifying Rogers and Bell as the relevant sources to determine the identity of the emails and web posting.

Justice Strathy granted the Norwich order on the basis that (i) the applicant had established a *prima facie* case of defamation and that the claim appeared to be reasonable and made in good faith, (ii) Bell and Rogers were innocent of wrongdoing but implicated in the defamation because their services were used for publication, (iii) reasonable efforts had been made to obtain the information from the only known potential sources without success, (iv) costs of compliance were nominal and were met, (v) without the information sought the plaintiff would be without a remedy, (vi) the internet service customer who sent the emails could not have a reasonable expectation of privacy in relation to using the internet to publish defamatory statements, and (vii) disclosure of the information was for the limited purpose of enabling the plaintiff to commence litigation.

Although courts seem to be willing to grant Norwich orders if the test is met, there has been resistance by internet providers to comply with Norwich orders. In particular, internet providers will commonly seek their fees for compliance with the Norwich orders. In *Rogers Communications Inc. v. Voltage Pictures, LLC*, the Supreme Court of Canada stated that a "precondition of a *Norwich* order is that an [internet service provider] is entitled to its reasonable legal costs."[185]

In *Rogers Communications Inc. v. Voltage Pictures, LLC*, the Supreme Court of Canada returned the issue of Rogers' costs of compliance with the Norwich order to the Federal Court, to allow

Inc. v. Anonymous Publicly Traded Co., 261 Va. 350, 542 S.E.2d 377 (Sup. Ct., 2001).

184. *York University v. Bell Canada Enterprises*, *supra* note 101.

185. *Rogers Communications Inc. v. Voltage Pictures, LLC*, 2018 SCC 38, [2018] 2 S.C.R. 643, 425 D.L.R. (4th) 22 (S.C.C.) at para. 59.

Rogers an opportunity to prove its reasonable costs of compliance.[186] The Court stated that it was important to consider not only the reasonableness of the costs of compliance, but also the reasonableness of Rogers' process for responding to *Norwich* orders, including in this case.[187] In the result, the Court considered how long it took Rogers to look up customer information and IP addresses, and directed the applicant to pay Rogers' costs, in the amount of $67.23, plus HST.[188]

Ultimately, an internet provider is in the best position to disclose this information to victims of online harm. Considering how quickly and cost-effectively the information can be located, it is not appropriate for internet providers to object to providing disclosure.

b. Injunctions

The test for an interlocutory injunction is well known. An applicant seeking an interlocutory injunction must show: (1) there is a serious question to be tried; (2) he or she will suffer irreparable harm if the injunction is not granted; and (3) the balance of convenience favours granting an injunction.[189] Where the interlocutory relief requested is a mandatory injunction, the applicant must show a strong and clear case with a high degree of assurance that an injunction would be rightly granted.[190] The Courts apply a different test for an interlocutory injuction in defamation cases; the words must be clearly defamatory and obviously impossible to justify.[191]

In *385277 Ontario Ltd. v. Gold*, Justice Myers recognized that the intended pain inflicted by harassment and the risks associated with the internet (set out in *Barrick Gold*, by Justice Blair) are not readily capable of remedy in monetary damages (*i.e.*, irreparable harm).[192]

In *Caplan*, discussed above, there had been three interlocutory injunctions made against Atas for her behaviour in three actions.

186. *Voltage Pictures, LLC v. Salna*, 2019 FC 1047, 309 A.C.W.S. (3d) 268, 2019 CarswellNat 4911 (F.C.) at para. 2.
187. *Voltage Pictures, LLC v. Salna*, 2019 FC 1047, 309 A.C.W.S. (3d) 268, 2019 CarswellNat 4911 (F.C.) at para. 22.
188. *Voltage Pictures, LLC v. Salna*, 2019 FC 1047, 309 A.C.W.S. (3d) 268, 2019 CarswellNat 4911 (F.C.) at para. 89.
189. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114 (S.C.C.).
190. *Manson v Doe*, 2011 ONSC 4663 *Manson v. John Doe*, 2011 ONSC 4663, 206 A.C.W.S. (3d) 26, 2011 CarswellOnt 8031 (Ont. S.C.J.) at para. 10.
191. *Canada (Human Rights Commission) v. Canadian Liberty Net* (1998), 157 D.L.R. (4th) 385, [1998] 1 S.C.R. 626, 6 Admin. L.R. (3d) 1 (S.C.C.).
192. *385277 Ontario Ltd v. Gold*, *supra* note 7 at para. 79.

The plaintiffs then sought a permanent injunction against Atas. As Justice Corbett noted, permanent injunctions have consistently been ordered in defamation cases where either (1) there is a likelihood that the defendant will continue to publish defamatory statements despite the finding that he is liable to the plaintiff for defamation; or (2) there is a real possibility that the plaintiff will not receive any compensation, given that enforcement against the defendant of any damage award may not be possible.[193]

Justice Corbett was prepared to order a permanent injunction, given the serious and wrongful misconduct by Atas (described above). His Honour specifically noted that for someone who has acted the way Atas had, a complete prohibition on the use of the Internet (though not what the plaintiffs requested) would not be foreclosed (though it would be "akin to ordering someone to never use the telephone again").[194] Instead, Justice Corbett granted a permanent injunction barring Atas in her own name, or any nickname, pseudonym, or alias from disseminating, publishing, distributing, communicating or posting on the internet by any means, including hyperlinks or otherwise, any comment, chat, blog, statement, photograph, depiction, description, review on any webpage, or any other online platform or medium, with respect to all plaintiffs and other victims (as specified) of her defamation and harassment, together with their families and related persons, and business associates.[195]

The internet also raises an issue of location when it comes to injunctive relief. In *Barrick Gold Corp*., the Ontario motions judge did not grant injunctive relief because the acts complained of were not acts by an Ontario party, and since the claim for injunctive relief was a claim *in personam* and not *in rem*, it should have been pursued against the defendant in British Columbia on appeal.[196] Blair J.A. dismissed both concerns and directed courts to do more where harm is perpetrated by the use of the internet:[197]

> 73 Courts have traditionally been reluctant to grant injunctive relief against defendants who are outside the jurisdiction.

193. *Astley v. Verdun*, 2011 ONSC 3651, 38 C.P.C. (7th) 39, 106 O.R. (3d) 792 (Ont. S.C.J.), noted in Caplan v. Atlas, supra note 4, para. 216. See also *St. Lewis v. Rancourt* (2015), 337 O.A.C. 15, 2015 ONCA 513, 2015 CarswellOnt 10241, 256 A.C.W.S. (3d) 233 (Ont. C.A.), leave to appeal refused 2016 CarswellOnt 2480, 2016 CarswellOnt 2481, [2015] S.C.C.A. No. 407 (S.C.C.).
194. *Caplan v. Atlas, supra* note 4, at paras. 218-220.
195. *Ibid* at paras. 214, 220.
196. *Barrick Gold Corp v. Lopehandia*, *supra* note 110 at paras. 68, 70.
197. *Ibid* at paras. 71-78.

74..... is also a case where there is a sufficient connection, actual and potential, between the parties and Ontario to justify the granting of a permanent injunction as sought. Not only is there a real and substantial connection between Barrick and Ontario, but there is a connection between the publication of the libel by Mr. Lopehandia and Ontario as well.

75 Mr. Lopehandia is ordinarily resident in British Columbia, but there is no way to determine from where his postings originate. They could as easily be initiated in an Internet caf in downtown Toronto or anywhere else in the world, as in his offices in Vancouver. Given the manner in which the Internet works, it is not possible to know whether the posting of one of Mr. Lopehandia's messages on one of the bulletin boards in question, or the receipt of that message by someone accessing the bulletin board, traveled by way of a server in Ontario to or from the message board. It may have, however. The highly transmissible nature of the tortious misconduct at issue here is a factor to be addressed in considering whether a permanent injunction should be granted. The courts are faced with a dilemma. On the one hand, they can throw up their collective hands in despair, taking the view that enforcement against such ephemeral transmissions around the world is ineffective, and concluding therefore that only the jurisdiction where the originator of the communication may happen to be found can enjoin the offending conduct. On the other hand, they can at least protect against the impugned conduct re- occurring in their own jurisdiction...

76 Here, at least one of the bulletin boards utilized by Mr. Lopehandia for the dissemination of his campaign against Barrick is operated by Yahoo Canada Inc. in Toronto. The posting of messages on that board constitutes at least an act done by the defendant that affects Barrick's reputation, goodwill, and personal property in Ontario, and arguably constitutes an act done by him in Ontario. The courts in Ontario must have jurisdiction to restrain such conduct. Even if an injunction may only be enforced in this Province against Mr. Lopehandia if he enters the Province personally, there are two reasons why the injunction may nonetheless be effective. The first is that it will operate to prevent Yahoo from continuing to post the defamatory messages...Secondly, it may be enforceable in British Columbia, where Mr. Lopehandia resides...

...

78 I would set aside the decision of the motions judge in this regard and grant a permanent injunction as requested, restraining the defendants from disseminating, posting on the Internet or publishing further defamatory statements concerning Barrick or its officers, directors or employees.

This reasoning has been applied consistently in other cases. For example, in *Black v. Breeden*, the Ontario Court of Appeal reiterated that some activities, such as internet defamation, "by their very nature involve a sufficient risk of harm to parties outside the forum in which they originate that any unfairness in assuming jurisdiction is mitigated or eliminated."[198] In *Elfarnawani v. International Olympic Committee & Ethics Commission*, the Court held that with internet publications, "the necessary "publication" takes place whenever and wherever a third party downloads or views the impugned material from the website. This is where the plaintiff's reputation is damaged, and this is where the tort of defamation is committed."[199] The British Columbia Court has also noted that where defamation has been published on the internet under pseudonyms, the wording of the injunction must be very broad.[200]

c. Damages

Several decisions have canvassed and summarized the types of damages available to plaintiffs in cases of internet defamation and internet harassment cases. General damages in defamation cases serve three functions: (1) consolation for the distress suffered from the defamatory publication (2) repair for the harm to reputation; and (3) vindication of reputation.[201]

In *Barrick Gold Corp.*, Blair J.A. acknowledged the importance of considering the internet context when assessing damages. His Honour found that the motions judge failed to consider the true extent of the target audience on the internet and the potential impact of the libelous statements in the context of the internet. In particular, Blair J.A. held:[202]

> 44 She failed to take into account the distinctive capacity of the Internet to cause instantaneous, and irreparable, damage to the business reputation of an individual or corporation by reason of its interactive

198. *Black v. Breeden*, 2010 ONCA 547, 321 D.L.R. (4th) 659, 76 C.C.L.T. (3d) 52 (Ont. C.A.) at para. 65, affirmed 2012 SCC 19, [2012] 1 S.C.R. 666, 343 D.L.R. (4th) 629 (S.C.C.).
199. *Elfarnawani v. International Olympic Committee & Ethics Commission*, 2011 ONSC 6784, 20 C.P.C. (7th) 412, 209 A.C.W.S. (3d) 539 (Ont. S.C.J.) at para. 31.
200. *Hunter Dickinson Inc. v. Butler*, 2010 BCSC 939, 191 A.C.W.S. (3d) 1009, 2010 CarswellBC 1752 (B.C. S.C.) at para. 80.
201. *Mina Mar Group Inc. v. Divine*, 2011 ONSC 1172, 198 A.C.W.S. (3d) 356, 2011 CarswellOnt 1122 (Ont. S.C.J.) at para. 13.
202. *Barrick Gold Corp v. Lopehandia*, *supra* note 110 at paras. 44-45.

> and globally all-pervasive nature and the characteristics of Internet communications outlined in paragraphs 28-33 above.
>
> 45 Had the motions judge taken these characteristics of the Internet more fully into account, she might well have recognized Barrick's exposure to substantial damages to its reputation by reason of the medium through which the Lopehandia message was conveyed.

In *Sommer v. Goldi*, Justice Corbett noted that awards related to internet defamation have often exceeded awards related to defamation, ranging between $100,000 to $400,000,[203] because internet publications have continued presence and impact for years, and are notoriously difficult to remove from the internet.[204]

Some cases have considered the specific impact of "bots" on damages for internet defamation. In *Clancy v. Farid*, the defendant argued that his posts were multiplied by bots, and he should not be held responsible for the republication by these bots. Justice Corbett disagreed:

> 47 During his submissions, the defendant acknowledged that it would be difficult, if not impossible, to remove the content from the internet and submits that the posts are multiplied by bots. He pointed to a post for the plaintiff, Ms. Clancy, which he submits has been replicated "word for word for word" for six to seven years. He argued he could not accept responsibility for replication caused by bots. Generally, "a person is responsible only for his or her own defamatory publications, and not for their repetition by others"...There is an exception, whereby the person who originally published the statement may be liable for the re-publication where it was authorized by the author or where the "republication is the natural and probable result of the original publication"...In my view, bots are a feature of the internet, being the mode of publication chosen by the defendant to disseminate the egregious and vile defamatory postings about the plaintiffs. It was therefore reasonably foreseeable that those postings would be replicated and multiplied on the Internet, such is the nature of the Internet.
>
> 48 In this case, the defendant chose a medium which was borderless, had an audience that was global, with the click of a mouse, and an impact that is continually amplified, if his submissions are true, by the existence of bots. That is to say, the defamatory statements will perhaps always reside on the Internet.

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203. See also *Malak v. Hanna*, *supra* note 118 at paras. 228-238.
204. *Sommer v. Goldi*, 2022 ONSC 3830, 2022 A.C.W.S. 5952, 2022 W.C.B. 2246 (Ont. S.C.J.) at paras. 35-36.

> 49 In my view, the publication of the defamatory postings on the Internet is a significant factor justifying a larger award.

In *Barrick Gold Corp.*, Blair J.A. also set aside the decision of the motions judge not to award punitive damages. A defamer or harasser's decision to use the internet as the medium for misconduct — to inflict maximum, wide-reaching harm–should be met with the appropriate punishment:[205]

> While it is always important to balance freedom of expression and the interests of individuals and corporations in preserving their reputations, and while it is important not to inhibit the free exchange of information and ideas on the internet by damage awards that are overly stifling, defendants such as Mr. Lopehandia must know that courts will not countenance the use of the internet (or any other medium) for purposes of a defamatory campaign of the type engaged in here.

The same can be said of aggravated damages. Where a defamer or harasser does not remove their defamatory content, cease their activities, or continues their campaign, such conduct may warrant aggravated damages:[206]

> While the internet can exacerbate damages, it has in some cases mitigated damages (to a limited extent). In *Griffin v. Sullivan*, the British Columbia Supreme Court awarded $100,000 in general damages for defamation.[207] The Court found that the fact that the defamatory statements were published online was not enough because it was impossible to say (1) how many people actually read the statements; (2) how many people believed the statements (of those who read them); and (3) of those who read and/or believed the statements, whether any of those people personally knew the plaintiff (such that his reputation was lowered).[208] In the case before the Court, these factors had a limited, but somewhat, mitigating effect, though the Court noted that in an appropriate case, the factors could more substantially impact the award of damages.[209] This is partially in line with the requirement that someone must have read the defamatory information for it to be defamation;[210] it is the publication which makes it wrongful.

205. *Barrick Gold Corp v. Lopehandia*, *supra* note 110 at para. 64.
206. *Sommer v. Goldi*, *supra* note 204 at para. 38.
207. *Griffin v. Sullivan*, 2008 BCSC 827, 168 A.C.W.S. (3d) 538, 2008 CarswellBC 1469 (B.C. S.C.) at para. 106.
208. *Ibid* at paras. 105-106. See also *Hudson v. Myong*, 2020 BCSC 517, 324 A.C.W.S. (3d) 443, 2020 CarswellBC 848 (B.C. S.C.) at para. 166.
209. *Griffin v. Sullivan*, *supra* note 207 at paras. 105-106.
210. *Hudson v. Myong*, *supra* note 208 at paras. 111-112.

Another issue which is relevant in these cases is the possible impecuniosity of the defendant tortfeasor. Damages may compensate a plaintiff for their loss but only if the damages are collectible. In *Caplan v. Atas*, for example, the defendant had been insolvent for years and could not pay the damages awarded against her. That led the plaintiffs to abandon their claims for general, punitive, and aggravated damages.[211] Where a defendant is judgment-proof and calls into question the likelihood that a plaintiff will be able to enforce the judgment, a permanent injunction will likely be more appropriate.[212]

d. Apologies

Courts have ordered retractions and apologies as remedies, in some cases. However, as Justice Corbett made clear in *Caplan v. Atas*, an apology is not always practical or appropriate. For example, in *Atas*, Justice Corbett decided that an apology was not useful or appropriate because (1) Atas was not a public person whose word carried credibility or weight; (2) Atas did not publish the impugned words under her own name; (3) flooding the internet with apologies from Atas' various pseudonyms would draw further attention to the impugned words; (4) vindication came from judgment; and (5) the plaintiffs did not ask for any apology to be published in reputable media sources.

If an apology is given, it may fall under the ambit of the Ontario *Apology Act*.[213] The *Apology Act* defines an "apology" as an expression of sympathy or regret, a statement that a person is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit fault or liability or imply an admission of fault or liability in connection with the matter to which the words or actions relate. Once made by or on behalf of a person in connection with any matter, it does not constitute an express or implied admission of fault or liability.[214] Of course, where an apology is ordered, a court would have already determined fault or liability.

Apologies are also important where the defendant has refused to apologize for the defamatory statements. In those cases, the failure or refusal to apologize is an aggravating factor in support of a larger damage award.[215]

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211. *Caplan v. Atas*, *supra* note 4 at paras. 95-96.
212. *Hudson v. Myong*, *supra* note 208 at paras. 211-213.
213. S.O. 2009, c. 3.
214. *Apology Act*, S.O. 2009, c. 3, ss. 1–2.

e. The Right to Be Forgotten

Although the "right to be forgotten" seems impossible in the internet age, Ontario courts have canvassed the remedy of removing the defamatory or harassing posts. An order directing the wrongdoer to remove the impugned post is easy enough to grasp, in theory, but it leaves the victim at the mercy of the wrongdoer. What if the wrongdoer does not comply?

In some Ontario cases, parties have asked the Court to grant a vesting order vesting the postings and accounts of the defamers or harassers with the plaintiffs. Such a request was made to Justice Centa in *Mirzadegan v. Mahdizadeh* – and rejected in favour of an order simply directing the wrongdoers to remove the posts:[216]

> 18 I also order Ehsan Mahdizadeh and Ms. Amirian to have the posts removed.
>
> 19 I am not prepared to make an order vesting the postings and accounts of Ehsan Mahdizadeh and Ms. Amirian with the plaintiffs. The evidentiary record regarding the ownership of the accounts does not satisfy me that such an order should be made. There is no evidence, for example, regarding the possible consequences of vesting ownership of an account on the legitimate activities of Ehsan Mahdizadeh and Ms. Amirian that are unrelated to the defamatory posting. The plaintiffs may, however, request that any entity hosting these defamatory posts remove them to give effect to this decision.

Leaving aside whether the wrongdoer will ever comply with a court order to remove a post, the question for the victim becomes whether the entities hosting the posts will remove them without the consent of the person who made the post. In Europe, the concept of the "right to be forgotten" helps assist parties in removing information about them (private or defamatory) from the internet. Defined by the European Court of Justice in *Google Spain SL and Google Inc v Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez*,[217] the right to be forgotten provides individuals with the right to control the extent to which their personal information can be accessed and assembled through search engines by de-indexing search results returned from a search

215. *Clancy v. Farid*, 2023 ONSC 2750, 92 C.C.L.T. (4th) 234, 2023 A.C.W.S. 3046 (Ont. S.C.J.) at para. 52, additional reasons 2023 ONSC 4536, 96 C.C.L.T. (4th) 220, 2023 A.C.W.S. 6141 (Ont. S.C.J.).

216. *Mirzadegan v. Mahdizadeh*, 2022 ONSC 6082, 2022 CarswellOnt 17572, [2022] O.J. No. 5418 (Ont. S.C.J.) at paras. 18-19.

217. C-131/12, [2014] [GC], online: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0131&from=EN.

conducted with their name. Following the decision in *Google Spain*, the right to be forgotten was enshrined in Article 17 of the General Data Protection Regulation 2016/679.[218]

In Canada, the "right to be forgotten" has not been addressed or enshrined in legislation. *PIPEDA,*[219] of course, is federal legislation which provides for a de-indexing mechanism, but it is unclear whether *PIPEDA* captures search engines (i.e. so that individuals may control and manage the references to defamatory or private information online about them, and not just the hosts of the information itself). Like hyperlinks, search engines help organize and navigate the smorgasbord of information on the internet.

Principles 4.6, 4.9.5 and 4.10, of Schedule 1 of *PIPEDA*, suggest a right of de-indexing where information is rightly challenged on the basis of accuracy, completeness, and up-to-dateness. It is unclear whether a search engine "collects, uses, or discloses personal information in the course of commercial activities." Considering that in *Crookes*, the Supreme Court of Canada found that hyperlinks (which are in essence, what search engines provide) are not publication of information as the requisite control is missing,[220] search engines may not control information to the extent required under *PIPEDA*.

Simply put, as defined by the Federal Court of Appeal, the "right to be forgotten" is "about whether individuals have a right to have publicly available private information about them removed from the internet. Its proponents often emphasize the privacy and autonomy interests that they say underlie and justify the right."[221] Given the limits and difficulty for victims to remove defamatory and private information from the internet, it may again be time for the legislature to address the rights of parties to control and manage their reputations online.

To that end, Bill C-63 appears to be a small step in the right direction, in respect of specific harmful information. The aim of Bill C-63, An Act to enact the *Online Harms Act*, is to promote the online

218. EC, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection. Of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (entered into force 25 May 2018) [GDPR].

219. *Personal Information Protection and Electronic Documents Act,* S.C. 2000, c. 5.

220. *Crookes v. Wikimedia Foundation Inc*., 2011 SCC 47, (*sub nom*. Crookes v. Newton) [2011] 3 S.C.R. 269, 337 D.L.R. (4th) 1 (S.C.C.), at paras. 26-27.

221. *Google LLC v. Canada (Privacy Commissioner)*, 2023 FCA 200, 486 D.L.R. (4th) 737, 539 C.R.R. (2d) 288 (F.C.A.) at para. 24.

safety of persons and reduce harms caused to persons in Canada as a result of harmful content online, with specific emphasis on children.[222] Its focus is harmful content, defined more specifically as (1) content that foments hatred; (2) content that incites violence; (3) content that incites violent extremism or terrorism; (4) content that induces a child to harm themselves; (5) content that sexually victimizes a child or revictimizes a survivor; (6) content used to bully a child; and (7) intimate content communicated without consent.[223]

Among other things, the *Online Harms Act* creates a duty on operators of regulated services to make inaccessible any content that sexually victimizes a child or revictimizes a survivor" or "intimate content communicated without consent.[224] It also establishes a Digital Safety Commission of Canada, which would have the authority, at least in respect of complaints regarding content that sexually victimizes a child or revictimizes a survivor or intimate content communicated without consent, to make orders requiring operators of social media services[225] to make the content inaccessible to persons in Canada,[226] which appears as a quasi-right to be forgotten in these limited circumstances. It remains to be seen whether the legislature will reconsider an expansion of the "right to be forgotten" for other harmful information (including defamatory and harassing information) posted online, under existing or novel legislation.

V. Conclusion

Judicial recognition of new torts to protect the privacy and reputation of people on the internet illustrates the flexibility of the

222. https://www.parl.ca/DocumentViewer/en/44-1/bill/C-63/first-reading.

223. Bill C-63, Part 1, *Online Harms Act*, proposed s. 2.

224. Bill C-63, Part 1, *Online Harms Act*, proposed ss. 67-71.

225. Bill C-63, Part 1, *Online Harms Act*, proposed ss. 81-83. "Social media service" is defined in the proposed *Online Harms Act* as "a website or application that is accessible in Canada, the primary purpose of which is to facilitate interprovincial or international online communication among users of the website or application by enabling them to access and share content", and includes (1) an adult content service, namely a social media service that is focused on enabling its users to access and share pornographic content; and (2) a live streaming service, namely a social media service that is focused on enabling its users to access and share content by live stream. The Act specifically excludes from its definition of "social media service" any service that does not enable a user to communicate content to the public, but in particular, communicate to a potentially unlimited number of users not determined by the user.

226. Bill C-63, Summary. It also proposes to impose on operators of social media services a duty to make that same content inaccessible.

common law. However, the current patchwork of common law torts is a slow and cumbersome response to this significant threat to civil society. Considering how quickly information is transmitted online, victims of online harms need more robust mechanisms to respond to misconduct and enforce their rights. As Justice Myers noted in *385277 Ontario Ltd.*, "whether people harass others online to gain clicks (and thereby make money), to hurt, or to intimidate, the law must be able to respond with some boundary to protect and preserve countervailing values like peoples' privacy, their right to go about their days unmolested, their right to health and to protect the health of their loved ones, and the rule of law."[227]

The internet is the source of immeasurable and incalculable privacy infringements, and instances of defamation, harassment, and harmful content. In a matter of seconds, information is disseminated worldwide through search engines, hyperlinks and bots. Misinformation or private information is available seemingly forever, never to be removed or disconnected from online personality. Online personality, and all the information available about a person at the press of a button, shapes their reputation, and has an immeasurable impact on well-being and self-worth. The law should provide individuals with tools to properly preserve their online personality and to protect against the harms visited upon them online.

Unfortunately, the common law evolves too slowly for the internet. Given the enormity of the problem, legislation is a better response to the constantly changing evils created by the internet. Legislators should develop comprehensive legislative frameworks to address internet malfeasance and safeguard the privacy and reputations of Canadian citizens. Some Canadian provinces and other common law jurisdictions including England, Australia and New Zealand have legislated to address these issues. It is incumbent upon our legislatures to strictly regulate those who provide online services and host the stadiums in which online harms play out. Legislation should protect against online harms beyond those addressed in Bill C-63, including privacy violations, defamation, and harassment, and provide a robust and swift path to justice.

Thomas Jefferson once said, "*I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of*

227. *385277 Ontario Ltd v. Gold*, *supra* note 7 at para. 62.

circumstances, institutions must advance also to keep pace with the times."[228] Nothing could apply more aptly to the present clash of the common law and the digital age. It is time for our laws to catch up.

228. https://www.nps.gov/articles/000/jefferson-memorial-education-each-new-generation.htm.