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INSURANCE LAW BULLETIN

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Internet Harassment – An Introduction to a New Tort *Caplan v Atas*

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Introduction

The Ontario Superior Court of Justice recognized the new tort of internet harassment in the case of *Caplan v Atas*. This tort was imported from the United States to better address the social malady of internet harassment, a means by which 1.1 million Canadians been victimized. In finding that the defendant, Nadire Atas, was liable for the tort of internet harassment, Justice D. L. Corbett was able to grant unique relief specially tailored to the plaintiffs' needs, which would not have been available under the other torts alleged.

Facts

Atas was a real estate professional until her employment was terminated in 1993, when her employer had reason to believe that she committed professional misconduct and fraud. In the 27 years following her termination, Nadire Atas delighted in distributing false literature in both physical and online formats to attack the physical and psychological well-being of persons against whom she had grievances. Atas' false statements ranged from allegations of professional misconduct to allegations of pedophilia and sexual predation. In one instance, Atas mailed an anonymous letter to her former employer in which she wrote, "*the image of [your wife's] bloated ugly corpse engulfed in flames tickles the soul. However, an incinerator would have been more appropriate, for that bloated piece of Garbage.*" Atas' other victims included friends and family of those she wished to harm. Sometimes she even targeted children.

Atas was eventually sued in a series of actions, by a total of 42 plaintiffs, for the torts of defamation, invasion of privacy and harassment. The legal actions ranged over the course of more than 16 years and resulted in an aggregate motion record containing

more than 30,000 pages of evidence. Atas continued to distribute the harmful literature despite numerous court orders prohibiting her from doing so. As a result of her failure to follow the court orders, she spent a total of 74 days in jail and was found to be a vexatious litigant. Atas became an undischarged bankrupt and had to resort to living in shelters during the course of the litigation, yet she continued to victimize the plaintiffs from public computers and apparently enjoyed the ongoing legal conflict.

Justice Corbett attempted to rationalize Atas' conduct with the following words, “[s]erious mental illness must underlie this conduct: what person of sound mental health would throw away a decade of her life, her material prosperity, and risk her liberty, for such paltry visceral satisfaction... her lack of empathy is sociopathic.”

The Summary Judgment Motion

This particular judgment was made on a summary judgment motion relating to all of the actions, which were being heard together.

Justice Corbett determined that Atas committed the tort of defamation then considered whether the alleged novel tort of internet harassment should be available to the plaintiffs. In doing so, Justice Corbett an academic journal article which noted that harassment can make victims more likely to fear for their lives and more likely to commit suicide. Online harassment is especially harmful because the victim is not even safe in his or her own home. Justice Corbett found that this cries out for a remedy and the traditional remedies available in defamation were not sufficient to properly address Atas' conduct. As such, it was necessary to import the tort of internet harassment from the United States. This tort is made out where the defendant:

- 1) *maliciously or recklessly engages in communications conduct so outrageous in character, duration, and extreme in degree, so as to go beyond all possible bounds of decency and tolerance;*
- 2) *with the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff; and,*
- 3) *the plaintiff suffers such harm.*

Justice Corbett ordered the novel relief that title to the posts was to vest in the plaintiffs and supporting orders would be made to allow the plaintiffs to remove the content. Justice Corbett also issued a permanent injunction barring Atas from posting media on the internet with respect to any of the plaintiffs, their families, related persons, or business associates.

Take Aways

It is possible that the tort of internet harassment will be considered by an appellate court. In the 2019 judgment of *Merrifield v Canada (Attorney General)*, the Court of Appeal for Ontario refused to recognize the tort of harassment because there was “*no compelling reason to recognize the new tort.*” However, internet harassment might well withstand the scrutiny of appellate courts and become a full-fledged tort because, unlike in

Merrifield, the court in this case had compelling reasons as to why the tort should finally be accepted.

One does not need to look to academic literature to understand the devastating effects that internet harassment has on Canadians. Fifteen-year-old Amanda Todd committed suicide after an internet stalker shared intimate photos with classmates on Facebook. This is just one example of how online harassment caused severe harm to a victim. Canadians will be exposed more than ever to internet harassment since online interaction is becoming more common due to social distancing. The need for a tort that offers unique relief tailored to victims of internet harassment is important and therefore may become a permanent tort.

A similar version of this tort has already been implemented in California, where the *California Code for Civil Procedure* provides that an employer whose employee has suffered cyber stalking in the workplace can seek an injunction on behalf of the employee. The CCP also provides that an officer or employee of a post-secondary school who has reason to believe that a student has suffered a credible threat may with the consent of the student seek a temporary injunction. The recognition of the tort of internet harassment is a double-edged sword in California. There it is promising that employers and post-secondary faculty can intervene in the harassment of a victim by obtaining an injunction from the courts. However, employers and post-secondary faculty have also potentially become more susceptible to being sued by those they ought to have acted on behalf of. For example, in the 2015 *Burke v Brentwood Union School District* case, a California school board was sued because school administrators did not report all instances of online sexual harassment. The case settled for \$2 million USD.

If the tort of internet harassment is accepted in Ontario, it could result in municipal employers, post-secondary schools and other similar institutions, such as health care providers and children's aid societies, bearing greater liability in tort where representatives and employees of the institution did not take appropriate legal action to address the internet harassment on behalf of a victim.

Further, the municipality or a similar institution that is a defendant in an Internet Harassment proceeding would likely be the most appealing source of monetary relief for victims. Given how difficult it often is to identify the perpetrators of internet harassment and the potential that the harassers may live in jurisdictions that are beyond the reach of Ontario's courts, many plaintiffs may seek to add other targets. It remains to be determined what amount, if any, of monetary relief is available in Ontario for this tort.

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