FTR Now

New Common Law Tort of Internet Harassment Recognized by Ontario Superior Court

Date: February 1, 2021

The problem of hateful communication on the internet has garnered much recent attention. In Caplan v. Atas, Justice Corbett of the Ontario Superior Court of Justice recognized a new common law "tort of internet harassment" to address this issue. The decision comes nearly two years after the Ontario Court of Appeal declined to recognize a common law tort of harassment in *Merrifield v. Canada (Attorney General)*.

Background Facts

The case arose from "extraordinary campaigns of malicious harassment and defamation carried out unchecked, for many years, as unlawful acts of reprisal." The defendant, Ms. Atas, used the internet to anonymously or pseudonymously disseminate malicious falsehoods – including allegations ranging from professional misconduct to pedophilia – which were directed to as many as 150 people against whom she held perceived grievances. Victims included her former employer, adverse parties in litigation, former lawyers, and relatives of these individuals, including their siblings, spouses and children.

The defendant persisted in her conduct for more than fifteen years, despite court orders enjoining her to stop, an assignment into bankruptcy, a declaration as a vexatious litigant, and 74 days' incarceration for contempt of court. Describing the defendant's "lack of empathy" as "sociopathic", the Court found she was "apparently content to revel in ancient grievances, delighting in legal process and unending conflict because of the misery and expense it causes for her opponents."

Court's Findings

The Superior Court heard a consolidation of four proceedings against the defendant for, among other things, harassment and defamation. The Court had no trouble in finding that the defendant's conduct was defamatory. The impugned publications were published on the internet, were defamatory, were intended to harass the people against whom they were targeted and were part of long-term campaigns to harass and defame the people against whom they were targeted. The Court also concluded, on the basis of "overwhelming evidence", that the offending online statements were made or directed by the defendant and that no defence was available to her.

More difficult for the Court to resolve was how best to provide a remedy for the defendant's conduct. It stated that "The law's response, thus far, has failed to respond adequately to Atas' conduct" and that it was evident that the self-represented litigant enjoyed the ongoing conflict. The defendant, who had once been a real estate professional and had owned several income properties, was now destitute and living in shelters. "Compensation," the Court wrote, "though usually a primary goal of the civil justice system, is not available from a person such as Atas." While awards of punitive or exemplary damages would typically be used to express the law's approbation of misconduct, the defendant's poverty meant she was judgment-proof. The Court also found that the existing torts of intentional infliction of mental suffering and invasion of privacy were either inadequate or inapplicable to the case at hand.

New Tort of Online Harassment

In light of these issues, the Court stated that 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 as to harass them."

The Ontario Court of Appeal previously declined to recognize a new common law tort of harassment in the employment law context in its decision in *Merrifield*, which we wrote about in a previous *Case in Point*. While the Court of Appeal did not foreclose the development of a properly conceived tort of harassment in appropriate contexts, it concluded there was no compelling reason to recognize a new tort in the case before it. Leave to appeal to the Supreme Court of Canada was later denied.

The Court distinguished the case before it from *Merrifield*, emphasizing that the facts in this case "cried out for a remedy" and that this is a developing area of law.

The Court adopted the American test for the tort of harassment in internet communications, which is made out where "the defendant maliciously or recklessly engages in communications conduct so outrageous in character, duration and extreme in degree, so as to go beyond all possible bounds of decency and tolerance, with the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff, and the plaintiff suffers such harm."

Remedies for Online Harassment

To remedy the defendant's harassment, the Court imposed a permanent injunction as the defendant had previously continued to publish defamatory and harassing content online despite court orders not to do so. It also crafted an order enabling the removal of the offending content from the internet by vesting title in the postings with the plaintiffs which would enable them to take steps to remove it. It stated that it would be futile to order the defendant to remove the offending content from the internet herself as she had shown herself unwilling to follow court orders. The Court also found that there was no utility in an apology because, among other reasons, the defendant was not a public person whose word carried credibility or weight.

The scope of the orders were framed broadly to prohibit the defendant in engaging in harassment and defamation of non-parties. If its orders did not apply to non-parties, the Court expressed concern that the defendant would simply shift her focus to a new set of victims, creating an endless cycle. The Court also recognized that the expense of defamation litigation might deter new victims from seeking a remedy for online harassment.

The Law of Online Harassment Continues to Develop

The problem of hateful internet communication has recently received much attention. This decision illustrates an effort by an Ontario court to address the problems of online harassment. While communications technology has evolved rapidly in the past decades, the common law has not always kept pace. Many employers have enacted policies governing the appropriate use of email and social media by their employees. Nonetheless, online harassment, bullying, hate speech and cyber stalking are increasingly cause for concern, both inside and outside the workplace. The creation of a new tort of online harassment is one effort to address these issues, though it remains to be seen to what extent the court will apply this to less drastic fact scenarios and whether the Superior Court's decision will withstand potential appeal.

Should you have any questions or require more information about this decision, please contact your regular Hicks Morley lawyer.