

**CITATION:** Caplan v. Atas, 2021 ONSC 670  
**COURT FILE NOS.:** CV-10-400035, CV-16-544153, CV-18-594948, CV-18-608448  
**DATE:** 20210128

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**COURT FILE NO.: CV-10-400035**

**B E T W E E N:** )  
)  
STANCER GOSSIN ROSE LLP ) *Gary Michael Caplan and Rebecca Longpré*  
) for the Plaintiffs  
Plaintiffs )  
)  
**- and -** )  
)  
NADIRE ATAS and JANE DOE ) *Nadire Atas* self-represented  
)  
Defendant )

**COURT FILE NO.: CV-16-544153**

**B E T W E E N:** )  
)  
DALE & LESSMAN LLP, ROBERT E. ) *Gary Michael Caplan and Rebecca Longpré*  
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RAHUL SHASTRI, DAVID WINER, )  
STANCER GOSSIN ROSE LLP, )  
RAYMOND STANCER, ERIC GOSSIN, )  
MITCHELL ROSE, GARTH DINGWALL, )  
and RALPH STEINBERG, J. DAVID )  
SLOAN, PEOPLES TRUST COMPANY, )  
DEREK PEDDLESDEN, FRANK RENOU, )  
MARTIN MALLACH and SHARON )  
SMALL )  
Plaintiffs )  
)  
**- and -** )  
)  
NADIRE ATAS ) *Nadire Atas* self-represented  
)  
Defendant )

COURT FILE NO.: CV-18-594948

**B E T W E E N:**

DR JOSEPH CAPLAN, DEREK LUTH,  
YAHIEL NOV, JONATHAN MICHAEL  
STANCER, CHARLES ADAM STANCER,  
RAYMOND STANCER, TOM PIRES and  
NELLA PIRES

Plaintiffs

)  
)  
) *Gary Michael Caplan and Rebecca Longpré*  
) for the Plaintiffs  
)  
)

**- and -**

NADIRE ATAS

Defendant

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) *Nadire Atas* self-represented  
)  
)

COURT FILE NO.: CV-18-608448

**B E T W E E N:**

GUY BABCOCK, LUC GROLEAU, JULIA  
GROLEAU, MARC GROLEAU, SHU  
GUANG SHEN, REBECCA HAUFÉ,  
ANDREW HAUFÉ, KATHERINE BRNJAC,  
TOM BABCOCK, RAMONA HELM, JOHN  
BABCOCK, MILA BAIER, SHAWN  
MURRAY AND AGNIESZKA MURRAY,  
PRESTON SCHMIDT, BRANDON  
SCHMIDT, RALPH SCHMIDT, SARA  
BASARA, JOHN BAIER, TONY LOCANE,  
ALEXANDRA BORONDY, ALFONSO  
COSENTINO and STEVE PROC<sup>1</sup>

Plaintiffs

)  
)  
) *Gary Michael Caplan and Rebecca Longpré*  
) for the Plaintiffs  
)  
)

**- and -**

NADIRE ATAS

Defendant

)  
)  
) *Nadire Atas* self-represented  
)  
)

) **ALL HEARD:** at Toronto November 15 and  
) December 6 and 19, 2019

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<sup>1</sup> Mr Proc discontinued his claim by Notice of Discontinuance dated December 6, 2019.

## **JUDGMENT**

**D.L. Corbett J.:**

### **Part 1: Overview, Disposition and Facts**

#### **I – Introduction**

##### **(a) Nature of the problem in these Cases**

[1] These cases concern extraordinary campaigns of malicious harassment and defamation carried out unchecked, for many years, as unlawful acts of reprisal. Nadire Atas, has used the internet to disseminate vicious falsehoods against those towards to whom she bears grudges, and towards family members and associates of those against whom she bears grudges. Atas is destitute and 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.

[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.

[3] Serious mental illness must underlie this conduct: what person of sound mental health would throw away more than a decade of her life, her material prosperity, and risk her liberty, for such paltry visceral satisfaction: the obsession seems clear. When this conduct is placed alongside the apparent grievances that have spurred Atas on, the disproportionality – even as apparently apprehended by Atas herself – is so unbalanced as to impugn her grasp on reality: what mentally sound person would devote so much time and energy to such negative unproductive activities? And then one must consider some of the persons Atas has been willing to attack to cause harm to her primary victims: persons unknown to her, used by her as ammunition to hurt others. Her lack of empathy is sociopathic.

[4] Freedom of speech and the law of defamation have developed over centuries to balance the importance of preserving open public discourse, advancing the search for truth (which must allow for unpopular and even incorrect speech), protecting personal reputations, promoting free democratic debate, and enforcing personal responsibility for statements made about others. The value of freedom of speech, and the need for some limits on that freedom, have long been recognised as central to a vibrant and healthy democracy and, frankly, any decent society.

[5] The internet has cast that balance into disarray.

[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 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.

### **(b) Grievances Underlying Atas' Campaigns of Harassment and Defamation**

[7] Atas has carried on systematic campaigns of malicious falsehood to cause emotional and psychological harm to persons against whom she has grievances. These include adverse parties in litigation, Atas' own lawyers, and the lawyers and agents, relatives (including siblings, spouses and children) of these people, a former employer, its successor, owners, managers and employees of this former employer, and generally an ever-widening circle of victims, generally chosen to cause misery to Atas' prime victims, those against whom she harbours festering grievances. As of the time that these motions were argued, there have been as many as 150 victims of Atas' attacks.

[8] And what are the grievances that have moved Atas to do this? There appear to be four sets of them. The first includes a broad range of persons connected with mortgage enforcement proceedings taken against Atas in the early years of the twenty-first century. The sums actually in dispute, at the time of those disputes, were relatively modest, but ballooned as legal costs, interest and penalties accrued over the years. The underlying dispute was resolved on a final basis by a judge of this court in 2004, a decision upheld a year later by the Ontario Court of Appeal. Atas' attacks against persons connected with these cases have been premised on her view that the mortgage enforcement proceedings were wrongly decided: she has been unable to accept that the case ended fifteen years ago, and to move on from that decision.

[9] The second set of grievances concern mortgage enforcement proceedings arising after she refinanced her two properties in the shadow of the first dispute. The properties were sold long ago – one by Atas herself and the other by her lender under power of sale proceedings – and all that has really remained, for years, were disputes over the propriety of certain mortgage enforcement charges claimed by the mortgagee against Atas. At the outset, the real value of these disputes was some tens of thousands of dollars – not inconsequential sums, in the context of the loans, but hardly claims that would be a reasonable basis to distort the fabric of the rest of one's life.

[10] The third set of grievances concerns an application brought by some parties adverse to Atas to have her declared a vexatious litigant pursuant to s.140 of the *Courts of Justice Act* – an

application that proceeded in a linear fashion, over four years, from start to finish, a model of alacrity in comparison to the other litigation involving Atas.

[11] The first three sets of grievances are connected in that they all concern underlying litigation over mortgage enforcement proceedings brought against Atas respecting her two highly leveraged residential real estate income properties, properties she lost a decade ago. They have all festered since the events that gave rise to Atas' grievances.

[12] The fourth set of grievances are unrelated to the first three. They originate in the termination of Atas' employment in the 1990's, a termination that was for cause for alleged dishonesty and unethical conduct as a real estate agent. This set of grievances led Atas to engage in harassment and defamation of the principal of her former employer at the time of her termination, in the 1990's, and then again two years later, when that employer refused to provide her with a reference for new employment. Then the conduct stopped. It was roughly twenty years later, in 2018, that the former employer discovered that a wave of defamation and harassment had been mounted against him – and against his family members and other associated persons – starting in 2016. It was only when this former employer found out about Atas' conduct towards the victims of her first three campaigns of harassment and defamation that this fourth group realized that it was Atas who was behind the recent campaign against them.

**(c) The Cases at Bar**

[13] This decision concerns four cases brought against Atas. The plaintiffs in these four actions sue Atas for defamation, harassment and related claims (collectively, the “**Defamation Proceedings**”). In chronological order, the four cases are:

- (d) CV-10-400035 (the “Stancer Action”);
- (e) CV-16-544153 (the “Dale & Lessman Action”);
- (f) CV-18-594948 (the “Caplan Action”); and
- (g) CV-18-0060848-0000 (the “Babcock Action”).

[14] The Stancer Action involves a campaign of internet harassment and defamation arising from Atas' first set of grievances. The plaintiff is a law firm that acted on behalf of the mortgagees against Atas in the mortgage enforcement proceedings authoritatively decided in 2004.

[15] The Dale & Lessman Action arises from Atas' second set of grievances. The first-named plaintiff is a law firm that acted on behalf of the mortgagee, Peoples Trust Company, enforcing mortgages it held against Atas' two properties.

[16] The Caplan Action arises from the third set of grievances. The first-named plaintiff is the brother of Gary Caplan, counsel for the plaintiffs in the four cases at bar and a lead counsel for applicants in the s.140 application against Ms Atas. This action is not confined to persons associated with the third set of grievances, however: when Ms Atas embarked on this campaign, she cast her net to include a range of persons against whom she bore grievances.

[17] The Babcock Action arises from the fourth set of grievances. The first-named plaintiff was the principal of Atas' employer and terminated her from her employment back in the 1990's. Babcock subsequently refused to provide Atas with a reference after he sold his real estate brokerage firm in the mid-1990's, and, in the result, the new owners of that firm declined to employ Atas. Plaintiffs in this action include Babcock's sons, the new owners of the brokerage firm, and various real estate agents and others associated with residential real estate services in and around the City of Hamilton from the time Atas had worked there.

[18] The impugned statements in the Stancer Action and the Dale & Lessman Action are summarized in the Judgment and that summary is incorporated into this decision by reference (Judgment, paras. 174-183). It is on this basis that I focus more in this judgment on describing the impugned statements in the Caplan Action and the Babcock Action than those in the Stancer Action and the Dale & Lessman Action.

[19] In Section IV of this section of this decision, I set out the factual basis for these decisions. I incorporate by reference portions of prior decisions involving Ms Atas, as summarized below. Defined terms in this decision bear the same meaning as is given to those terms in the Judgment in the s.140 application made January 3, 2018 (as explained below).<sup>2</sup>

#### **(d) Procedural History of these Motions**

[20] In this section, I explain how these motions come before this court as three motions for summary judgment and one motion for default judgment and why there is no evidence before the court from Atas on any of these motions.

[21] The starting point for this summary is the Judgment. All litigation involving Atas was stayed pending final determination of the s.140 application. That stay was replaced by the directions set out in the Judgment for the processes to be followed for all litigation by Atas. Atas repeatedly sought stays of the Judgment pending appeal, which were refused by me and by the Court of Appeal.<sup>3</sup> Thus, the directions set out in the Judgment applied to Atas' litigation (including the Defamation Actions) from January 3, 2018. Central to the processes prescribed in the Judgment was case management of all proceedings by this court.

[22] Since January 3, 2018, this court has issued 45 endorsements published on CanLII and additional handwritten endorsements. Of these, the following explain the history of the Defamation Actions and these motions since the Judgment:

- (a) April 6, 2018: direction for a case conference to address the new allegations that are the subject matter of the Caplan Action: 2018 ONSC 2249
- (b) June 27, 2018: case management endorsement (2018 ONSC 4059), salient portions of which are found at paras. 6-11:

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<sup>2</sup> *Peoples Trust Company v. Atas*, 2018 ONSC 58 (the **Judgment**”).

<sup>3</sup> See for example *Peoples Trust Company v. Atas*, 2018 ONSC 2173.

[6] In respect to the three defamation actions, the plaintiffs are now all represented by Mr Caplan. They seek consolidation or an order that they be tried together before the same judge. They seek a trial date and appointment of a trial judge. They believe the trial can be conducted in two weeks. Ms Atas does not consent to consolidation, but does agree to trial together before the same trial judge. In my view the cases ought to be ordered tried together or serially in front of the same trial judge – the issue of application of facts in one proceeding to the other proceedings can be addressed by the trial judge as matters of similar fact evidence.

[7] In my view the trial date ought to be obtained from Justice Firestone, in his capacity as head of the Toronto Civil Team. I agree with the preliminary assessment that two weeks ought to be sufficient time for the trial. The key relief sought is a permanent injunction (damages are sought but it seems unlikely there is a prospect of recovery of material damages). There is an interlocutory injunction in place and the plaintiffs are obliged to move forward to trial expeditiously now that the s.140 application has been decided and case management is moving forward.

[8] Ms Atas was canvassed over deadlines for delivery of pleadings in the defamation proceedings. She is under the burden of three injunctions, now in place until trial in the actions, and she has been clear in her materials that she considers these injunctions burdensome. The plaintiffs say they are ready for trial now in these actions, and the only impediment to moving forward is scheduling steps required by Ms Atas to ready her for trial. I have made this clear to her – that the delay extends the period during which these injunctions will be in force before trial, and that if she does not like having the injunctions in place, she can move more quickly to ready herself for trial. To be clear – I indicated that the court will take reasonable steps to expedite these trials in view of Ms Atas' position that she is prejudiced by continuation of the pre-trial injunctions.

[9] Ms Atas has not completed pleadings in the defamation actions. She has agreed to complete these documents and serve them by July 13, 2018, and to file them by July 20, 2018. I would have been prepared to give her more time than this, however, I understand her desire to see these actions move forward promptly, and deadlines imposed on the plaintiffs depend on these early dates for Ms Atas' pleadings in the defamation proceedings.

[10] In particular, Ms Atas will serve and file a defence in the 2010 Defamation Proceedings and in the 2018 Defamation Proceedings. There is already a defence filed in the 2016 Defamation Proceedings.

[11] Ms Atas wishes to pursue counterclaims in at least some of the defamation actions. She requires leave under s.140 of the Courts of Justice Act to do this, and before she can apply for that leave, she

needs *Chavali* permission from this court. The most practical way in which to proceed, in view of Ms Atas' concern about the continuing injunctions, is to permit Ms Atas to file counterclaims as part of her defences to the defamation proceedings, to direct that the plaintiffs need not defend the counterclaims pending further court order, and directing Ms Atas to provide a *Chavali* request for the counterclaims. In this way, the proposed claim is clearly delineated and the process of closing pleadings in the defamation proceedings will not be delayed unduly by the *Chavali* process. I set the date for the *Chavali* request at Ms Atas' suggestion – she can, of course, make the request earlier, in which case the schedule could be accelerated at the next case management conference. On this basis, order to go:

- (a) That Ms Atas serve statements of defence, which may include counterclaims, in the 2010 and 2018 Defamation Proceedings by July 13, 2018, and file those documents with the court by July 20, 2018;
- (b) That court fees be waived for Ms Atas for filing of the documents described in a., above;
- (c) That the plaintiffs need not deliver statements of defence to any counterclaims brought by Ms Atas in any of the three defamation proceedings pending further order from the case management judge;
- (d) Ms Atas shall provide a *Chavali* request in respect to any counterclaims she has asserted or does assert in any of the defamation proceedings by September 30, 2018;
- (e) Ms Atas indicates that she has motions she wishes to bring in the defamation proceedings, including motions before me to set aside or vary injunction orders currently in place. Ms Atas may make *Chavali* requests to take any of these steps; she will not be permitted to bring any of these motions before she has made such *Chavali* requests. I will give further directions about any such proposed motions at the next case conference, if any *Chavali* requests have been made by that time.
- (f) The plaintiffs shall serve their affidavits of documents in the defamation proceedings by August 31, 2018, on the following terms:
  - (i) They need not list and re-produce documents that have been filed in materials served on the injunction motions, but instead shall reference these previously filed documents in the affidavit of documents;
  - (ii) They shall list all other documents as required by the Rules, and shall provide one copy of each such producible document to Ms Atas, at their expense.



(iii) They need not list or produce documents relevant only to the counterclaim(s) pending further order of this court.

(g) Ms Atas has indicated that she wishes to pursue appeals of one, some or all of the interlocutory or interim injunctions. To do this would require a *Chavali* request (which has not been made), a motion pursuant to s.140(3) of the *Courts of Justice Act*, a motion for leave to appeal to the Divisional Court, and then, if leave be granted, the appeal itself. Given the length of time these orders have been in place, the alacrity with which these matters could proceed to trial, the relative costs involved, and the broadly discretionary nature of the injunction remedy, it seems to make no sense to spend time and money on interlocutory proceedings. However, if Ms Atas wishes to pursue any of these matters by way of appeal, she may make *Chavali* requests that she be permitted to do so. If and when such requests are made, I will address these issues further.

(h) Plaintiffs shall schedule a trial scheduling conference with Firestone J. on a date after the next case management conference.

(i) There is no point in these three defamation cases being mediated – it would be a waste of time. Order to go dispensing with the requirement for mediation. This direction is without prejudice to Firestone J., at the trial scheduling conference, directing mediation or a pretrial if he is of the view that these steps should take place.

(c) September 28, 2018 endorsement from a case management conference held on September 14, 2018, at paras. 44-46 (2018 ONSC 5804):

[45] ... There are three defamation proceedings against Ms Atas – the 2010 Defamation Proceedings, the 2016 Defamation Proceeding and the 2018 Defamation Proceedings. As of the time of the case management conferences, Ms Atas had not delivered statements of defence in two of these proceedings. She indicated that she also wishes to assert a counterclaim in one or both of these proceedings. I provided her with a deadline to serve and file the pleadings and she then asked for a fee waiver to file these pleadings. The conference ran long – it lasted an entire court day and we did not have time to address all outstanding matters. The Defamation Proceedings should proceed to disclosure, discovery and trial promptly, since the plaintiffs have interlocutory injunctions in two of the actions and an interim injunction in the third. There was no time for a further case management conference before the summer. Rather than delay filing of the Statements of Defence and Counterclaim by Ms Atas in order to consider a request for a fee waiver on proper materials, I exercised my discretion to grant the fee waiver summarily.

[45] In paragraph 11(a) of my endorsement of June 27, 2018, I directed Ms Atas to serve her outstanding statements of defence in the Defamation Proceedings by July 13, 2018, and to file those documents by July 20, 2018. These documents have been served but not filed. Ms Atas explained that, although I had waived the filing fee to file these documents, that waiver did not include the cost of commissioning an affidavit of service at the court office in order to file the pleadings. I asked Ms Atas what the charge was for commissioning an affidavit of service. She did not know because she did not ask. On the court web site the fee posted is \$20.

[46] Ms Atas shall forthwith file her statements of defence; if she needs to pay a fee to commission affidavits of service then she shall pay that fee, without prejudice to her applying to this court, on proper materials, after a case management conference, for an order that she be repaid these fees on the basis that they should be waived. I address the proper process for seeking fee waivers below.

- (d) October 9, 2018 direction for a further case management conference (2018 ONSC 5965, para. 3):

**October 19, 2018** Parties to the Defamation Actions are to attend a one hour case management conference before me, at 9 am, to settle the form of the order that the three actions be tried before the same trial judge, together, one after the other, or as the trial judge directs (September 28, 2018, paras. 31-32), and to set the schedule for affidavits of documents and examinations for discovery (September 28, 2018, para. 32). Ms Atas was ordered to file her statement of defence (and counterclaims, if she asserted any) by July 20, 2018 (June 27, 2018, paras. 9, 11(a)). She served them but did not file them because she felt she should not have to pay a \$20 fee to commission her affidavit of service. Ms Atas was then to make a *Chavali* request for any counterclaim she seeks to assert by September 30, 2018 (June 27, 2018, para. 11(d)). Ms Atas has not done this. Ms Atas was directed on September 14, 2018, to pay any fees necessary to swear her affidavit of service and file her pleadings “forthwith” (September 28, 2018, para. 46). I have no information that Ms Atas has done this. The fate of Ms Atas’ defence and her intended counterclaims will depend in part on whether and when she brings herself into compliance with previous orders respecting these issues, all of which will have to be addressed at the case management conference of October 19, 2018. If Ms Atas has not filed her statements of defence by the time of the case management conference, the plaintiffs may request that their claims continue by way of default proceedings. If Ms Atas has filed her statements of defence, and if they include a counterclaim, and if Ms Atas has not made a *Chavali* request in respect to the counterclaim, then the plaintiffs may ask the court to strike the counterclaims so that the main claims may move forward. The court’s scheduling directions in June 2018 were intended to facilitate putting a schedule in place in September 2018. That date was

moved to October 2018 because of Ms Atas' failure to comply with the June case management order; she should not expect a further scheduling delay by virtue of continuing non-compliance with this court's directions.

- (e) October 15, 2018: further direction re case management conference to be held on October 18, 2018 (2018 ONSC 6134, paras. 30-31):

The court previously indicated that on October 19, 2018, it would deal only with scheduling of steps in the Defamation Proceedings (not in respect to the interlocutory injunction, for which steps have been scheduled already and which will next be addressed at the case management conference on December 7, 2018, but in respect to the status of the pleadings, the status of any counterclaims brought by Ms Atas, signing the consent order that the trials be heard together or one after the other by the same trial judge, deadlines for affidavits of documents, dates for examinations for discovery, and any other issues bearing on scheduling these steps). The court, on October 19, 2018, will now also deal with the costs issues identified in this endorsement, and any issues that may have arisen as a consequence of any order that may be made by the Court of Appeal as a result of the review motion scheduled before that court on October 18, 2018.

Ms Atas must attend this conference on October 19, 2018. Counsel for the plaintiffs in the Defamation Proceedings are also expected to attend this conference.

- (f) Ms Atas advised the court that she was not going to attend the case management conference on October 18, 2018, and that she would participate no further in case management before this court. The court ordered her to attend the conference and advised her that if she breached the order, a bench warrant could be issued for her arrest to bring her before the court. Atas did not attend the case management conference on October 18, 2018. A bench warrant was issued for her arrest, and the conference proceeded in her absence. The court ordered Atas noted in default in the three Defamation Proceedings (the Babcock Action had not yet been started), and gave directions (a) for Atas to move to seek to set aside the notings in default, and (b) for motions for default judgment if the notings in default were not set aside. (2018 ONSC 6255)
- (g) On October 31, 2018, I refused to extend the time for Atas to move to set aside the noting in default, but also noted that she would not be precluded from bring her motion at any time: the deadline was a triggering event for the plaintiffs to be able to move for default judgment (2018 ONSC 6531).
- (h) On November 23, 2018 I scheduled return of Atas' motion to set aside the notings in default in the three Defamation Actions and gave directions about the fourth action (the Babcock Action), including directions for scheduling motions for summary

judgment in all four actions once Notices of Motion had been delivered for those motions (2018 ONSC 7044).

- (i) On December 7, 2018, I set aside the notings in default for the following reasons (2019 ONSC 71, paras. 48-51):

[48] I ordered Ms Atas noted in default in the three Defamation Proceedings on October 19, 2018, because of her failure to comply with this court's orders to file the statements of defence. I also gave directions for her to bring any motion to set aside the notings in default promptly. These motions did not come on for hearing until December 7, 2018.

[49] There is but one difficulty here. The plaintiffs seek broad relief against Ms Atas in respect to very serious allegations of malicious defamation online, and multiple breaches of court orders restraining Ms Atas from this conduct. The consequences for Ms Atas of losing these actions could be very serious. The court wants Ms Atas to have every reasonable opportunity to defend herself in these proceedings.

[50] And yet Ms Atas has proved herself ungovernable since the judgment in the s.140 application. In respect to the instant issue, her failure to file the defences – which apparently have been ready since the summer of 2018 – seems motivated by a desire to dispute with the court its jurisdiction and the merits of its various directions. Something had to be done to brought Ms Atas back to the table – and what has been done is the three notings in default and the citations for contempt accompanied by a short, sharp jail sentence for the most flagrant of Ms Atas' contempts of court. Studied and longstanding as Ms Atas' defiance has been of this court's case management orders, I still do not think that matters have reached such a pass that she should be precluded from defending the Defamation Proceedings, on the merits, if she wishes to do so.

[51] The three notings in default are set aside, and Ms Atas is to ensure that her statements of defence in the three Defamation Proceedings are filed forthwith, with copies of them thereafter provided to this court.

At the same case management conference, I made the following directions respecting the motions for summary judgment (2019 ONSC 71, paras. 52-54 and 63-65):

[52] Mr Caplan advises that his clients all wish to move for summary judgment in the Defamation Proceedings. Ms Atas states that she wishes to move to strike affidavits filed on the motions.

[53] Ms Atas shall serve and file her motion to strike affidavits by January 31, 2019. She shall pay the regular motions fee for this motion, or she shall apply for a fee waiver in accordance with this court's prior directions no later than January 25, 2019. The motion to strike shall be returnable before me on

February 15, 2019, at 10 am, for no more than half a day. Ms Atas is cautioned that she must include every basis on which she objects to the plaintiffs' motion materials in her motion returnable February 15<sup>th</sup>.

[54] Mr Caplan advises that he expects to receive further evidence around the end of January 2019 (respecting the source of various internet postings, obtained through legal process in California). If possible, the court asks that Mr Caplan serve any additional evidence upon which his clients rely on the motion for summary judgment before the return of Ms Atas' motion on February 15<sup>th</sup>. Ms Atas will not be expected to include objections to evidence filed by the plaintiffs hereafter in her motion on February 15<sup>th</sup>. However, the court expects that all parties will be to advise of all further steps that will be required after February 15<sup>th</sup> in order to ready the motions for summary judgment for a hearing on the merits.

...

[63] Ms Atas shall serve and file her statement of defence in the Babcock Defamation Action by January 31, 2019. Although it should not be necessary to do so, I note that there is no fee waiver of the filing fee for filing this statement of defence. If Ms Atas seeks a fee waiver for that filing fee, she shall have to apply for the waiver, in the manner provided in this court's prior endorsements, and she must do this no later than January 25, 2019 so that this court will be able to decide the issue in time for Ms Atas to proceed on the basis of this court's decision within the filing deadline of January 31<sup>st</sup>. If Ms Atas does not obtain a fee waiver in this way, then she will have to pay the applicable filing fee.

[64] Ms Atas has not filed any responding materials on the motion for an interlocutory injunction in the Babcock Defamation Action.<sup>4</sup> That motion shall proceed before me on Tuesday January 29, 2019, at 10:00 am. Ms Atas will not be permitted to file any evidence, having now missed the deadlines for doing so. The motion will proceed on the basis of the record filed by the moving parties. Ms Atas will be permitted to deliver a factum and to make oral argument, but she should understand that she will be restricted to making argument on the basis of the evidence before the court. All factums for this motion shall be provided to me, electronically, through my assistant, no later than January 25, 2018.

[65] In this decision I set aside the notings in default in the Defamation Proceedings previously ordered by this court. I require confirmation from Ms Atas that she has, in fact, filed her statements of defence in the Defamation

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<sup>4</sup> This was a typographical error in the endorsement. The interlocutory injunction motion in the Caplan Action was the motion scheduled for January 29, 2019. No injunction motion was brought in the Babcock Action.

Proceedings, now that the defaults have been lifted. She shall provide this confirmation, by email, attaching a copy of each of the statements of defence, by January 25, 2019.

At the same case management conference, I addressed Atas' failure to obtain permission to commence or continue claims. As described in the Judgment and addressed repeatedly in case management endorsements, Atas was required to seek permission to move for leave pursuant to s.140 of the *Courts of Justice Act*, what is referred to in the case law and the Judgment and endorsements as a "*Chavali* request". Despite being directed to make such requests multiple times in respect to her counterclaims in the Defamation Proceedings, she refused to do so. Finally, at the case management conference of December 7, 2018, I dismissed the counterclaims for failure to obtain leave pursuant to s.140 of the *Courts of Justice Act* and for failure to follow the court's directions to make a *Chavali* request in respect to those claims (2019 ONSC 71, paras. 32, 34):

[32] Enough is enough, to repeat the citation quoted at the start of the judgment of January 3, 2018. The defendants to Ms Atas' claims have been waiting many years to have these cases disposed of. The delay has been intolerable. And while there might be some basis to excuse long periods of delay prior to the judgment of January 3, 2018, there is no excuse for Ms Atas' failure to take any steps to move forward with her claims since the judgment was handed down. The court has been very patient with Ms Atas, because she is self-represented, because there is a great deal of litigation and Ms Atas has limited resources with which to pursue claims. But enough is enough.

...

[34] The counterclaims in the Defamation Proceedings are dismissed without costs. Ms Atas was required to make her *Chavali* requests in July, so that the pleadings could be finalized and the cases readied for trial. The plaintiffs should not be delayed further in prosecuting their claims because Ms Atas has chosen not to pursue her counterclaims in accordance with this court's directions. Mr Caplan shall prepare the dismissal orders for my signature.

- (j) In an endorsement in preparation of a case management conference to be held on May 31, 2019, I summarized the state of the litigation in the Defamation Proceedings as follows (2019 ONSC 3284):

[17] The following motions for summary judgment are pending before me:

- (a) Action CV-10-400035 (Stancer Gossin v. Atas)
- (b) Action CV-16-544153 (Dale & Lessman LLP v. Atas)
- (c) Action CV-18-594948 (Caplan v. Atas)

(d) Action CV-18-608448 (Babcock v. Atas)

The evidence tendered on these motions – substantially identical for each of the four motions – consists of affidavits filed previously in these proceedings. The notices of motions, with memory sticks containing copies of previously filed materials relied upon for the motions, were delivered in January 2019. I have no record of Ms Atas delivering responding materials for these motions for summary judgment. If Ms Atas has delivered responding materials, she is requested to bring a paper copy of those materials with her to the CMC.

- (k) At a case management conference held on May 31, 2019, the court addressed the filing of pleadings by Ms Atas as follows (2019 ONSC 3620, paras. 30-32):

[30] I understand that statements of defence have been served and filed in all the Defamation Proceedings other than the Babcock Action. In respect to the three defamation actions in which statements of defence have been filed, Ms Atas shall provide me with copies of her pleadings by July 5, 2019, by email sent to my assistant. I understand that some or all of these pleadings may contain counterclaims. That is of no moment now: the counterclaims have been dismissed by prior order of this court. Copies of the pleadings, as they have been filed with the court, are to be provided to me by July 5th. [footnote omitted]

[31] Ms Atas was ordered to file her defence in the Babcock Action by January 31, 2019. I understand that she has served her defence but she has not filed it. Ms Atas explained that her pleading includes a counterclaim, but she did not want to file the counterclaim and incur a filing fee for a counterclaim, if this court was just going to strike the counterclaim. Ms Atas has been told, repeatedly, that she must make a *Chavali* request if she wishes to commence or pursue a counterclaim. I confirmed this again at the case management conference on May 31<sup>st</sup>. Ms Atas then told me that she does not believe the Judgment precludes her from commencing and pursuing a counterclaim without first making a *Chavali* request and, if permitted, seeking and obtaining leave pursuant to s.140(3) of the *Courts of Justice Act*. There is no merit to this position: the Judgment covers every proceeding and every step in a proceeding, whether Ms Atas is a plaintiff or a defendant. Ms Atas understands this: indeed, it was one the bases on which she pursued her unsuccessful appeal of the Judgment.

[32] Ms Atas is to file her statement of defence in the Babcock Action by July 5, 2019. She is to provide this court with a copy of this pleading, as filed, by July 5, 2019. If Ms Atas does not complete this step on time, then she should expect that the Babcock Action will thereafter proceed by default without her further participation.

Also at the case management conference on May 31, 2019, I established a schedule for the motions for summary judgment in the Defamation Proceedings, as follows (2019 ONSC 3620, paras. 45-54):

[45] Mr Caplan advises that his materials on the motions for summary judgment in the four Defamation Proceedings are complete, subject only to the following:

- (a) An affidavit from US counsel relating to electronic evidence obtained in the USA; and
- (b) An expert report and related affidavit from an expert witness.

Mr Caplan advised that he could serve these materials by July 19, 2019; it is ordered that this be done by July 19<sup>th</sup>.

[46] When I asked Ms Atas about a deadline for responding materials on the motions for summary judgment, she raised concerns about the use that could be made of these materials in the contempt proceedings against her that are before Pollak J. Given the quasi-criminal nature of those proceedings, and the prospect that they may be pursued as matters of criminal, rather than civil, contempt, Ms Atas advised that she considered it a violation of her right to remain silent to be required to deliver responding materials to a motion for summary judgment or face the consequence of judgment being granted against her essentially by default.

[47] Mr Caplan advised that he was prepared to undertake – and to consent to an order – that the prosecution in the contempt proceedings not be permitted to use any evidence filed by Ms Atas in the civil proceedings in its case-in-chief in the contempt proceedings. Ms Atas was not satisfied that this concession protects her rights sufficiently.

[48] This is potentially a significant procedural issue, and not one the court will decide except on a proper motion, on the basis of the evidence filed on that motion, and full argument on the applicable law.

[49] The motion arises as an objection by Ms Atas in the civil proceedings to filing responding materials on a motion for summary judgment, or for that motion proceeding on the merits, in the face of her prosecution for contempt of court. In sum, it is a request by Ms Atas for a stay – at least of the summary judgment motions – and perhaps of the defamation proceedings themselves – until the disposition at trial of the contempt proceedings. In the absence of such a stay, or relief to the same effect, the court would ordinarily impose deadlines and proceed with the defamation proceedings, either by way of motions for summary judgment, or by way of a trial. Thus in my view it is for Ms Atas to move for this stay, or other relief she thinks appropriate.

[50] Ms Atas shall deliver her notice of motion and evidence in support of her motion for a stay, or other relief she thinks appropriate, respecting this



issue, by July 19, 2019. The court will provide further directions about this motion once it has Ms Atas' motion materials in hand.

[51] If Ms Atas does not deliver her motion materials by July 19<sup>th</sup>, as ordered, then the motions for summary judgment shall proceed. The moving parties' materials will be complete once Mr Caplan delivers the additional materials due on July 19, 2019. Ms Atas shall have until September 30, 2019 to deliver responding materials.

[52] I appreciate that this sounds complicated, and perhaps even inconsistent. Ms Atas says she will bring a motion to put a halt to these motions. I have said that the court will entertain this motion. And yet I have also stipulated a date by which Ms Atas must deliver her responding materials, assuming these matters are not stayed.

[53] Ms Atas has a long history of introducing procedural motions for the purpose of causing delay. The court has made no assessment of the potential merit of Ms Atas' stay motion, aside from concluding that, in the thumbnail description of it given at the case management conference, it raises serious issues, has some prospect of some success, and may involve important interests for Ms Atas. Ms Atas should be given a reasonable chance to bring this motion forward. However, if she fails to do so, then matters will proceed as if she had not raised this point: delay is not purchased by stating an intention to bring a motion. Once I have a chance to review the motion materials, I will give further directions that may include lifting or extending the due date for Ms Atas' responding motion materials.

[54] Mr Caplan asked me again to indicate that I will seize myself of the motions for summary judgment on the merits. I will not do so at this time: the request is premature. I do not know when these motions will be ready to proceed or how long they will take. It is not clear to me what efficiency, if any, will be gained by my hearing these motions. Indeed, I do not yet know if they will be opposed (Ms Atas' failure to file responding materials in the interlocutory injunction motion in *Caplan v. Atas* was, at least for the court, unexpected, and left the task of deciding the motion considerably simpler than if the motion had been defended robustly).

- (1) As noted above, I directed Atas to serve and file her statement of defence in the Babcock Action by July 5, 2019, and to provide a copy of her defence to this court by July 5, 2019. She did not send a copy of the defence to the court. On July 15, 2019, I directed as follows (2019 ONSC 4285, paras. 14-15):

[14] At the case management conference of May 31, 2019, I ordered Ms Atas to file her defence in the Babcock action by July 5, 2019, and to provide this court with a copy of her defence also by July 5, 2019: 2019 ONSC

3620. Ms Atas has not provided the court with a copy of this pleading, in violation of the court's direction.

[15] If Ms Atas has not filed her defence then the plaintiffs may requisition that she be noted in default in the Babcock action. If Ms Atas has filed her defence, she shall immediately provide a copy of it to my assistant, and should expect to be required to explain why she did not comply with the court's direction to provide this document by July 5<sup>th</sup>.

- (m) At a case management conference on October 4, 2019, Ms Atas did not attend, and sent an email to the court saying that she would not take part in any further case management conferences. The entire endorsement concerns the Defamation Proceedings and (a) why Atas was noted in default in the Babcock Action, and (b) why I directed that the motions for summary judgment proceed before me, without evidence from Atas (2020 ONSC 6152, paras. 1-14):

[1] A case management conference was held on October 4, 2019. Ms Atas did not attend. The case management conference proceeded in Ms Atas' absence and orders and directions were made. This endorsement sets out the directions given respecting the four defamation actions brought against Ms Atas. Separate endorsements will be released respecting other issues addressed at the case management conference, including Ms Atas' decision not to attend on October 4<sup>th</sup>, and not to take part in any further case management conferences.

[2] At the May 30, 2019 case management conference, Ms Atas stated that she wished to move for a stay of the defamation proceedings pending disposition of the contempt proceedings ongoing against her. I considered that there might be a tenable argument for the relief Ms Atas described and directed Ms Atas that, if she wished to seek that relief in the defamation proceedings, she deliver her motion materials in that regard by July 19, 2019. She did not do so. As of October 4, 2019 she still had not done so.

[3] I was mindful on May 30, 2019 that Ms Atas has a long history of saying that she is going to take certain steps in order to precipitate delay. I put it thusly in my endorsement from the case management conference of May 31, 2019:

If Ms Atas does not deliver her motion materials by July 19<sup>th</sup>, as ordered, then the motions for summary judgment shall proceed. The moving parties' materials will be complete once Mr Caplan delivers the additional materials due on July 19, 2019. Ms Atas shall have until September 30, 2019 to deliver responding materials.

I appreciate that this sounds complicated, and perhaps even inconsistent. Ms Atas says she will bring a motion to put a halt to these

motions. I have said that the court will entertain this motion. And yet I have also stipulated a date by which Ms Atas must deliver her responding materials, assuming these matters are not stayed.

Ms Atas has a long history of introducing procedural motions for the purpose of causing delay. The court has made no assessment of the potential merit of Ms Atas' stay motion, aside from concluding that, in the thumbnail description of it given at the case management conference, it raises serious issues, has some prospect of some success, and may involve important interests for Ms Atas. Ms Atas should be given a reasonable chance to bring this motion forward. However, if she fails to do so, then matters will proceed as if she had not raised this point: delay is not purchased by stating an intention to bring a motion. Once I have a chance to review the motion materials, I will give further directions that may include lifting or extending the due date for Ms Atas' responding motion materials. (2019 ONSC 3620, paras. 51-53)

[4] Ms Atas did not deliver responding motion materials for the motions for summary judgment in the three defamation actions in which such motions have been brought. Her deadline was September 30, 2019. These motions may now proceed without any responding evidence from Ms Atas.

[5] In respect to the fourth defamation action (the *Babcock* action), I ordered Ms Atas to file her defence in the *Babcock* action by July 5, 2019. Mr Caplan advises that he was served with a statement of defence and counterclaim, but that he has no knowledge of its having been filed. The Superior Court FRANK system and filing office advise that no statement of defence has been filed in the action (CV-18-608448).

[6] This requirement was reiterated in this court's endorsement of July 15, 2019, in the following terms:

At the case management conference of May 31, 2019, I ordered Ms Atas to file her defence in the *Babcock* action by July 5, 2019, and to provide this court with a copy of her defence also by July 5, 2019: 2019 ONSC 3620. Ms Atas has not provided the court with a copy of this pleading, in violation of the court's direction.

If Ms Atas has not filed her defence then the plaintiffs may requisition that she be noted in default in the *Babcock* action. If Ms Atas has filed her defence, she shall immediately provide a copy of it to my assistant, and should expect to be required to explain why she did not comply with the court's direction to provide this document by July 5<sup>th</sup>. (2019 ONSC 4285, paras. 14-15).

[7] Ms Atas has repeatedly failed to follow this court's directions to file pleadings and provide a copy to the court. I see no reason why the plaintiffs should be put to further expense and delay because of Ms Atas' failure to follow clear, simple directions. Ms Atas is hereby noted in default in the Babcock action.

[8] Mr Caplan has delivered motions for summary judgment in three of the defamation proceedings. No responding evidence has been filed. These motions shall proceed before me on November 15, 2019, 10 am.

[9] Ms Atas has now been noted in default in the *Babcock* action by this court. The plaintiffs in that action may move for default judgment before me on November 15, 2019, 10 am.

[10] Mr Caplan shall deliver a motion record for the motion for default judgment by October 15, 2019, if his clients wish to move for default judgment. Mr Caplan shall deliver one factum, covering the motions for summary judgment and the motion for default judgment; this factum shall be delivered by October 15, 2019. Mr Caplan shall deliver by November 8, 2019 a draft order in each of the defamation proceedings, setting out precisely the relief sought in each proceeding, whether by default or by way of summary judgment.

[11] Ms Atas may not file evidence on the motions for summary judgment: she was given her chance to do this and failed to do so. She may, however, provide a factum on the basis of the evidence before the court on the motions for summary judgment and she may make oral argument on the motions for summary judgment on November 15, 2019. Any factum Ms Atas wishes to rely upon should be delivered by November 8, 2019. I say "should be" because Ms Atas routinely fails to meet filing deadlines. If she is late with her factum, I may still permit her to deliver it, even on the day of the motion, but this will depend on the extent to which late delivery of the factum may work unfairness to the moving parties.

[12] Ms Atas may move to set aside the noting in default in the *Babcock* action, if she is so inclined. If she decides to do so, her motion materials should be delivered by November 8, 2019, and that motion should be returnable on November 15, 2019.

[13] Subsequent to the case management conference, but prior to release of this endorsement, Ms Atas received materials from Mr Caplan and communicated with the court about them. Most of that communication does not merit comment, however one point should be addressed. Ms Atas has indicated that she wishes to move before me for an order that I should recuse myself on the basis of bias or reasonable apprehension of bias. Ms Atas has been told repeatedly that there is a process she must follow if she wishes to

bring a motion. She must raise that issue at a case management conference, in order to obtain directions, or she must make a *Chavali* request to be permitted to bring the motion. Ms Atas decided not to participate in the case management conference. She has said repeatedly that she will not make a *Chavali* request to bring a recusal motion.

[14] On November 15, 2019, the court has scheduled up to a full day for argument of the motions for summary judgment and the motion for default judgment (and any motion to set aside the noting in default, if such a motion is brought). Ms Atas may raise any relevant arguments she wishes on these motions, but she may not deliver evidence except in accordance with the terms of this endorsement: she had her chance to deliver motion materials, did not do so, and the moving parties should not be delayed further.

[23] The motions did proceed on November 15, 2019, on the basis set out in the court's last endorsement (2020 ONSC 6152) and continued over two additional days for argument in December 2019.

[24] Ms Atas was noted in default in the Babcock Action after multiple deadlines to serve, file and provide the court with a copy of her pleading. After the court noted her in default on October 4, 2019, she was given a schedule to bring a motion to set aside the noting in default. She did not bring that motion.

[25] Ms Atas objected to filing evidence on the motions for summary judgment on the basis that to do so would compromise her right to remain silent in the motions against her for contempt of court. The court gave directions for her to bring a motion to seek a stay of the motions and the Defamation Proceedings on this basis. She failed to follow this process and never did serve motion materials seeking this relief.

[26] Ms Atas had most of the motion materials for the motions for summary judgment as early as January 2019. She was given a deadline of September 30, 2019 to file responding materials and she did not do so by that deadline or at all.

#### **(e) Atas' Assignment in Bankruptcy**

[27] In the fall of 2019, on the eve of the motions for summary judgment and default judgment, Atas made an assignment in bankruptcy. There is no doubt that Atas met the test for bankruptcy: her debts far exceeded her assets as a result of multiple unpaid costs orders against her totalling more than \$250,000 and she was without assets or income. There is also no doubt that the assignment in bankruptcy was tactical: Atas did it on the eve of the motions for judgment in these cases and then at the return of the motions she took the position that these proceedings were stayed as a result of her bankruptcy.

[28] The plaintiffs responded to this last-minute tactic by withdrawing their financial claims in the Defamation Proceedings against Atas, both as to damages and costs. They took the position that, as a result of the withdrawal of all financial claims, these actions could continue without an order to continue the proceedings in the bankruptcy proceedings. Atas' trustee in bankruptcy did

not oppose these proceedings continuing on that basis. Atas opposed, though she was unable to articulate a principled basis for her position: she seemed to think that the assignment in bankruptcy and the stay of proceedings was to benefit her, rather than to benefit her creditors and to facilitate the trustee's discharge of its duties.

[29] I accepted the plaintiffs' arguments that they did not need an order to continue these proceedings, in all the circumstances, and directed that these actions proceed on the basis of the withdrawal of financial claims. I gave reasons for this decision in writing on the day this issue was addressed (November 15, 2019). There is no need for me to supplement those reasons here.

[30] I then began to hear argument on the motions for judgment brought by the plaintiffs.

## **II – Interlocutory Injunctions**

[31] Interlocutory injunctions have been made against Atas in the Stancer Action, the Dale & Lessman Action and the Caplan Action. This section summarizes the history of those interlocutory injunctions.

### **(a) Stancer Action Injunction**

[32] Between March 17 and 29, 2010, Ms Atas allegedly posted defamatory statements on the internet about Messrs Stancer and Hatcher (among others), lawyers who acted against Atas in the Gomes/Kelly Mortgage Action. Atas stated in these postings (among other things) that Messrs Stancer and Hatcher should be disbarred and were guilty of mortgage fraud. On March 29, 2010, Stancer Gossin Rose LLP sued Ms Atas for damages and for an injunction in the Stancer Action.

[33] On April 9, 2010, Matlow J. granted an interim injunction restraining Ms Atas from making, publishing or causing to be published “any statements of any kind relating to Stancer Gossin Rose LLP or any of its partners, associates or employees”. On April 29, 2010, this order was continued on an interim basis by Newbould J. On May 12, 2010, this order was extended on an interlocutory basis by Strathy J. (as he then was) until “disposition of the Trial”. This interlocutory order is still in force (the “Stancer Action Injunction”).<sup>5</sup>

### **(b) Dale & Lessman Action Injunction**

[34] In 2016, after several years during which the primary focus of litigation activity was between Atas and Peoples Trust Company, a second round of internet attacks began. This time the attack was broader, both in terms of the victims of the attacks and in terms of the defamatory statements made against them. Professionals were still accused of incompetence, negligence, professional misconduct and fraud. This time, however, attacks were made against relatives of

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<sup>5</sup> Atas did not file evidence on the motion before Strathy J. and argued before him that she needed more time in which to do that. Strathy J. granted the injunction until trial subject to the provision that Atas could bring the injunction issue back before the court on proper materials. Aside from saying at various times that she wished to avail herself of this option, Atas never did take steps to bring the injunction motion back before the court, and so the interlocutory injunction granted by Strathy J. remained in place from 2010 up to the time this decision is released.

Atas' targets, including spouses, siblings and children. This round of attacks was focused on Peoples Trust Company, its officers, employees and agents, and its counsel, Ms Wallis, her law firm, and members of families of individuals targeted in these attacks. The nature of the attacks also shifted, from professional misconduct to allegations of sexual criminality, most frequently pedophilia or sexual predation.

[35] I granted an interlocutory injunction in October 2016 in much the same terms as the order granted in the Stancer Action, for the benefit of the plaintiffs in the Dale & Lessman Action.

**(c) Caplan Action Injunction**

[36] Counsel for the plaintiffs in this proceeding, Gary Caplan, was counsel for applicants in the s.140 application and came to take a leading role in that litigation (together with Ms Wallis for Peoples Trust). Atas commenced a third wave of defamatory publications against a broad range of people connected to her historic grievances, including Gary Caplan's brother, a reputable cardiologist living and practicing in the State of New Mexico in the United States of America. The impugned publications described Dr Caplan as a pedophile and child pornographer and included altered newspaper articles that made it look like established newspapers had so described Dr Caplan. The perpetrator used pictures of Dr Caplan that had been displayed on Dr Caplan's Facebook page including one referencing Dr Caplan's son, a young man with cystic fibrosis. Dr Caplan was alerted to the attacks by colleagues and patients, but he did not connect them to events in which his brother was involved in Ontario: it was a mystery to him as to why someone had targeted him for this malicious campaign of internet defamation.<sup>6</sup> Dr Caplan tried to engage by email and internet posts with the publisher of these posts, to appeal to his/her sense of decency, to no avail. One of the posts he found included an avatar picture of Ms Atas, but he did not know who she was or whether the name and image was real. Finally, after much effort, Dr Caplan did have an exchange of messages with a person at an account that was posting impugned messages. Since appeals to decency had proved ineffective, Dr Caplan posted a rude message to the account, which did prompt responses:

- "your name is Caplan?"
- "brother of Gary Caplan – attorney in Toronto?"
- [picture of Dr Caplan used with a "pedophile" caption]
- "will be shared"

The reference to Dr Caplan's brother prompted him to inquire of his brother, and at that point the pieces began to fall together.

[37] Upon investigation, it was discovered that Atas had mounted a campaign against several other members of Mr Caplan's family, including two sons-in-law (Messrs. Luth and Yov).

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<sup>6</sup> Restated Motion Record, vol. 2, tab 2, para 6 *et seq.*

[38] A similar attack was made on family members of Ms Wallis, the solicitor for Peoples Trust in the underlying litigation and in the s.140 application. Ms Wallis had long been a target of Ms Atas (including posts that are the subject matter of the Dale & Lessman Action). After a death in Ms Wallis' family, in relation to which Ms Wallis and her family members were named in an obituary, attacks began against every family member named in that obituary. For example, Ms Atas found that Ms Wallis' daughter, Natalie, worked as an underwriter at a bank, and sent emails to other bank employees defaming her.

[39] I granted an interim interim injunction against Atas in the Caplan Action on April 9, 2018, which I continued on an interim basis on May 1, 2018. On February 14, 2019, I granted the injunction on an interlocutory basis pending final determination of the action or other court order.<sup>7</sup>

[40] The terms of the injunction on the Caplan Action Injunction were broader than the prior injunction orders. I prohibited her from posting anything<sup>8</sup> online at all, on the basis that history had shown that orders restricted to publications about specific people would leave it open to Atas to broaden her campaign further without violating the order.

#### **(d) No Babcock Action Injunction**

[41] The Babcock Action was commenced in the fall of 2019, after I had granted the interim injunction in the Caplan Action. The plaintiffs in the Babcock Action did not seek an injunction on the basis that (a) the scope of the order made in the Caplan Action would protect them (if Atas abided by it) and (b) history to that point suggested that obtaining an injunction against Atas would provide no appreciable benefit to the plaintiffs and would lead to increased costs and delay.

#### **Summary**

[42] The plaintiffs in the Stancer Action have had the benefit of an interlocutory injunction since 2010. The plaintiffs in the Dale & Lessman Action have had the benefit of an interlocutory injunction since 2016. As of April 2019, Atas has been prohibited from publishing anything at all on the internet (other than trying to sell items on sites like Kijiji). All of these injunctions are framed to continue until final disposition of the Stancer Action, the Dale & Lessman Action and the Caplan Action respectively.

### **III – Contempt Proceedings for Alleged Injunction Breaches**

[43] I have cited Atas for contempt of court for defying various procedural orders. The details of those citations are set out in prior endorsements and are not repeated here. Atas has spent 74 days in jail, plus a day in custody at the courthouse, in connection with these findings of contempt. A sentence of six days for one of the findings of contempt was stayed pending appeal to the Court

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<sup>7</sup> The delay between the initial interim orders and the interlocutory order was to set repeated schedules for Atas to deliver responding materials which, as it turned out, she never did.

<sup>8</sup> I provided minor exceptions to the order to permit Atas to try to sell things online using sites like Kijiji.



of Appeal and I understand that appeal has yet to be heard: the balance of the sentence to be served for that citation for contempt is five days in jail.

[44] Plaintiffs in these proceedings have brought motions for findings of contempt of court against Atas: they claim that Atas has continued to publish statements about them on the internet in violation of the injunction orders. The first such motion was brought in 2016 in the Dale & Lessman Action and the second, in 2018, in the Caplan Action. These motions were referred to and have been case-managed by Pollak J. Over more than three years, Pollak J. has held numerous case conferences and motions, has appointed *amicus curiae* and invited the Attorney General to take carriage and control of the process. The Attorney General advised that the Crown reserves the right to intervene in the proceedings after the liability phase of the contempt trial is decided. I am advised that it is expected that the trial will take 20 to 30 days of court time, and that it is hoped that this trial may be heard in 2021, subject to the impact that the ongoing COVID-19 pandemic has on scheduling trials in Toronto.

#### **IV – Facts and Evidence On Which these Decisions Are Based**

##### **(a) Vexatious Litigant Judgment (January 2018)**

[45] As stated above, this court found Atas to be a vexatious litigant in the Judgment released in January 2018.<sup>9</sup> The Judgment compendiously reviews the history of litigation brought by, on behalf of, and against Atas. No purpose would be served recounting that history again here. However, a note of caution is in order.

[46] In the s.140 Application, Atas sought to litigate the merits of underlying litigation – some dozens of lawsuits. For obvious reasons she was not permitted to do that: it can hardly be reasonable to litigate the merits of dozens of vexatious proceedings in order to decide whether they are vexatious. However, the findings of fact made in the Judgment were based on the limited record before the court in that case. Atas was told that she would have an opportunity to adduce a full record in any underlying litigation that was permitted to proceed after disposition of the s.140 Application. Then, in the Judgment, the court set out a process by which Atas could seek permission to proceed with her other cases, if she wished to do so (Judgment, paras. 335-344, 357). She did not avail herself of that process, despite having deadlines extended several times, and despite being given clear warnings that she would have to take steps to advance those cases, or they would be disposed of and Atas would be precluded from trying to pursue them again in future.

[47] Given this context, this court circumscribed the effect of factual findings in the Judgment – they were findings made on the record before the court in that proceeding, for the purpose of deciding that proceeding (Judgment, paras. 331-334). As of the time the motions at bar were argued, the situation had changed. All of the underlying litigation had been disposed of, other than the Defamation Proceedings (the cases at bar). Atas, not having availed herself of opportunities to pursue the underlying litigation, is bound by the decisions in those cases, which may not be relitigated in defence of the Defamation Proceedings. This point, as it turns out, has little effect

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<sup>9</sup> *Peoples Trust v. Atas*, 2018 ONSC 58 (the “Judgment”).

on the decisions in the motions before this court, because Atas chose to file no evidence. Thus, there is, in any event, no evidence before the court that could be said to challenge the final disposition of the underlying litigation.

[48] Findings set out in the Judgment are, therefore, available for use in this proceeding. In particular, the history of the underlying litigation, as set out in the Judgment, may be incorporated by reference into this decision without repeating it here. On this basis, the facts that underlie the allegations against Atas in these proceedings are incorporated by reference from the Judgment as follows:

- (a) Atas' financing of the St George Street Property in 2003 (paras. 51-54);
- (b) Litigation arising from the 2003 financing of the St. George Street Property (paras. 55-80). As noted in the Judgment, Atas took the position that she would seek to reopen this old litigation and the Judgment provided her with a process by which she could seek to do this. Ms Atas did not avail herself of that process and is now foreclosed from doing so. Thus, it can now be said without qualification and I find that "the judgment of Pitt J. [in the Gomes/Kelly Mortgage Action is] final and authoritative, and not capable of challenge now." (Judgment, para. 75)
- (c) The refinancing of the Wycliffe Property with Peoples Trust in July 2005, and litigation arising from mortgage enforcement steps taken by Peoples Trust in connection with that mortgage (Judgment, paras. 81-96).
- (d) Litigation arising from the mortgage obtained from Peoples Trust in 2006 to refinance the St George Street Property (Judgment, paras. 97-111).
- (e) Progress in litigation involving Atas was delayed when Atas successfully requested that the PGT be appointed to represent her in six proceedings, and then months later brought a motion to discharge the PGT on the basis that she was able to represent herself. Events during this period (2010-2014) are set out in the Judgment, paras. 116-145.
- (f) Other legal proceedings commenced by Atas are set described in paras. 146-152 and paras. 217-218 of the Judgment.

[49] In the Judgment a process was established by which Atas could seek to continue with her litigation arising from mortgage enforcement steps in connection to the Wycliffe Property and the St George Street Property (Judgment, paras. 335-344, 357). Ms Atas did afford herself recourse to the process established to fix contested mortgage enforcement expenses claimed by Peoples Trust, and this court decided those issues summarily in the fall of 2019. Ms Atas did not avail herself of the process established in respect to the rest of the litigation arising out of the refinancing of the Wycliffe Property and the St George Property and all of that litigation has now been disposed of by this court.

**(b) Deemed Facts in the Babcock Action**

[50] In the Babcock Action, Atas has been noted in default. The allegations contained in the statement of claim in that action are deemed to be true. My findings of fact in that proceeding are anchored in the allegations in the statement of claim, and are also established by the affidavit evidence adduced by the plaintiffs on the motion for default judgment.

[51] The Babcock action is brought by 23 plaintiffs who are all connected, directly or indirectly – or are related to – persons connected with real estate firms in Hamilton, Ontario.

[52] The “Babcock Family” owned and operated a real estate brokerage in Hamilton between 1985 and 1997.<sup>10</sup>

[53] Atas was employed by the Babcock real estate brokerage firm as a sales representative for slightly more than two years, between December 1990 and January 1993.<sup>11</sup>

[54] Atas’ employment was placed on probation for two three-month periods (starting August 27, 1991 and on June 25, 1992) for not adhering to professional standards after the firm received complaints from clients and other salespersons.<sup>12</sup> In January 1993 the brokerage firm came to believe that Atas had committed further acts of serious professional misconduct, perhaps including fraud, and her employment was terminated.<sup>13</sup>

[55] On January 23, 1993, Atas telephoned the owner of the brokerage firm, John Babcock, and threatened him with reprisal if he reported her to local and professional regulators and professional bodies. Babcock contacted police, the matter was investigated, Atas was interviewed, and she was cautioned.<sup>14</sup>

[56] In 1997, the Babcocks sold their brokerage firm to Ralph Schmidt and Tom Rendall. The Babcocks refused to provide a favourable reference for her to the new owners, and the new owners declined Atas’ requests for employment in the firm.<sup>15</sup>

[57] John Babcock’s wife, Barbara, died in 1999. Shortly afterwards, John Babcock received the following anonymous letter in the mail at his home address:

Barbara Bab COCKSUCKER beloved shit/face of John Bab COCKSUCKER finally DIED after a short and evil life. The image of her bloated ugly corpse engulfed in flames tickles the soul. However, an incinerator would have been more appropriate, for that bloated piece of Garbage. The pain Bab COCKSUCKER endured in the final year of her short and evil life was lovely to witness. GOD BLESS<sup>16</sup>

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<sup>10</sup> Babcock Statement of Claim, para. 13.

<sup>11</sup> Babcock Statement of Claim, para. 14.

<sup>12</sup> Babcock Statement of Claim, para. 15.

<sup>13</sup> Babcock Statement of Claim, para. 16.

<sup>14</sup> Babcock Statement of Claim, para. 17.

<sup>15</sup> Babcock Statement of Claim, para. 18.

<sup>16</sup> Babcock Statement of Claim, para. 19.

[58] Roughly two weeks after John Babcock received this vile communication, several of his neighbours received anonymous letters in the mail which read as follows:

John Babcock of 53 Braemar Pl. has been seen roaming the neighborhood late at night and masturbating behind the bushes. Please beware and keep your doors and windows locked.<sup>17</sup>

Ms Babcock reported these incidents to police and investigation was opened into criminal stalking and harassment.<sup>18</sup>

[59] About three weeks later, in early May 1999, John Babcock received two more abusive communications, one in reference to his wife and the other calling him a “pervert”.<sup>19</sup> Then these communications seemed to end.

[60] Babcock was convinced that Atas had been behind the conduct described above, but after it ceased in 1999, he took no further steps in respect to it. From his perspective, the problem had gone away.

[61] Unbeknownst to the plaintiffs, starting in 2016, Atas started posting defamatory statements on the internet about the Babcocks and others related to the Babcocks. The publications started out calling plaintiffs “scammers”, “thieves” and as engaging in “fraud”. Over time the calumny grew to include calling plaintiffs “pedophiles” and “dangerous pedophiles”. The publications were made from several source accounts, and often included pictures of plaintiffs.<sup>20</sup>

[62] These publications were aimed at the Babcocks, the purchasers of the Babcock real estate brokerage firm, real estate agents who worked in Hamilton for RE/MAX brokerage firms, and family members (including spouses, siblings and children) of these people.<sup>21</sup>

[63] Plaintiffs became aware of the internet attacks in 2018, when an email was sent to members of a club to which John Babcock was associated, accusing him and his sons of being pedophiles and attaching links to prior internet publications making these accusations. The email was falsified to appear as if it came from an American who, it turns out, is or was a District Court Judge in West Virginia.<sup>22</sup> When John Babcock was alerted to this communication, and he in turn alerted his sons, they conducted internet searches and discovered the campaign that had been underway against them for two years.

[64] Initially the plaintiffs had no idea who was behind these attacks. As noted above, John Babcock had been harassed and defamed previously, and he had believed that Atas had been responsible for those attacks. But those events were more than fifteen years in the past. There had

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<sup>17</sup> Babcock Statement of Claim, para. 20.

<sup>18</sup> Babcock Statement of Claim, para. 21.

<sup>19</sup> Babcock Statement of Claim, para. 22.

<sup>20</sup> Babcock Statement of Claim, para. 49.

<sup>21</sup> Babcock Statement of Claim, para. 49-52.

<sup>22</sup> Babcock Statement of Claim, para. 48.

been no further dealings of any kind between Atas and Babcock and no reason for Babcock to believe that Atas had resumed and escalated her long-abandoned campaign.

[65] As the Babcocks investigated the campaign that had been undertaken against them, they discovered that others had also been targeted, leading them to look for further victims, to try to discover a pattern that could lead them to the identity of the person behind these attacks. And while searching for clues on the internet, they discovered information about Atas' attacks on plaintiffs in the three other Defamation Proceedings. The *modus operandi* appeared to be the same. The pieces fell together. It had to be her. No matter that no rational and reasonable person would do as Atas was apparently doing: to resurrect an old grievance and pursue it with a vengeance, against an ever-broadening group of victims: the ineluctable conclusion was that Atas had found a means for revenge against those with whom she was upset, and it had obviously given her a sense of satisfaction when wielded against the plaintiffs in the other Defamation Proceedings.

[66] The plaintiffs plead that the words used, the form of the messages, the platforms used for publication, the links to Atas providing some direct evidence that she published these statements, the timing of these publications relative to the defamatory publications published by Atas in the other Defamation Proceedings, and the steps taken to hide Atas' identity when she learned of evidence discovered by plaintiffs in the Defamation Proceedings identifying her as the author and publisher, all provide circumstantial evidence that Atas is the author and publisher of the impugned statements in this case.

[67] There is nothing in the record to explain why, after so many years, Atas became interested in Babcock again in 2016 and started her campaign against the Babcock Plaintiffs. An obvious inference is that Atas was pleased with the results of the other internet campaigns she had mounted – they gave her pleasure and she knew that they caused her victims hardship. At around the same time that she began her campaign that is the subject of the Dale & Lessman Action, she also started a fresh campaign against the Babcock Plaintiffs – using similar allegations, phraseology, avatars, pseudonyms and posting to the same sites.

[68] The facts alleged in the statement of claim in the Babcock Action include an allegation that Atas is the author of the impugned publication.

[69] I have cautioned myself that the facts deemed to be true in the Babcock Action by reason of Atas' default in that proceeding may not be treated as facts in the other Defamation Proceedings. However, plaintiffs in the Babcock Action have adduced evidence on this motion and, subject to considering the principles behind the permitted use of similar fact evidence, I may take the evidence into account in all of the Defamation Proceedings.

[70] The deemed facts in the statement of claim establish that Atas has engaged in a systematic campaign of internet defamation and harassment of the plaintiffs in the Babcock Action. Accordingly, there shall be default judgment granted in the Babcock Action in accordance with my analysis of the legal principles set out below.

**(c) Evidence Adduced on these Motions**

[71] In the other three Defamation Proceedings, the plaintiffs have moved for summary judgment. I review the law of summary judgment briefly, below. One principle reduces this court's fact-finding task on these motions: in a motion for summary judgment, a defendant may not rest on the allegations in her pleadings: she must adduce affirmative evidence to establish her allegations. In the lexicon of the cases, both parties "must lead trumps or risk losing". I am entitled to weigh the record before me on the basis that it includes, in some form, all of the evidence that would be available at a trial.

[72] The plaintiffs have placed a voluminous record before this court.<sup>23</sup> Atas has filed no evidence on these motions.<sup>24</sup> There is no issue about clashing evidence or credibility contests. The question before this court is whether the plaintiffs have proved their allegations on a balance of probabilities based on the record they have put before the court.

[73] I do not find it necessary to review in detail the tens of thousands of pages of evidence before me to explain my decision. I have read it all. There can be no doubt, on the record:

- (a) that the impugned publications were published on the internet;
- (b) that the publications are defamatory;
- (c) that the publications are intended to harass the people against whom they are targeted; and
- (d) that the publications are part of long-term campaigns to harass and defame the people against whom they are targeted.

[74] As I explain below, there is only one factual issue that requires analysis in these reasons: is it proved on a balance of probabilities that it was Atas who published or caused to be published the impugned publications.

[75] On the record before me, I have no doubt that it was.

[76] I explain why I have come to this conclusion after reviewing the legal test for the claims in defamation, later in these reasons. In summary, I have so concluded because the evidence is overwhelming that the impugned publications have all been made or directed by the same person.

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<sup>23</sup> Counsel advises that the aggregate record on these motions is comprised of more than 30,000 pages of evidence. 15 volume motion record filed in contempt proceedings in the Dale & Lessman Action (volumes are numbered 1-10, but volume 9 has 6 volumes); a "restated" five volume motion record for an interlocutory injunction sought in the Caplan Action; "restated" notices of motion in the Stancer Action, the Dale & Lessman Action and the Caplan Action; Notice of Motion for Default Judgment in the Babcock Action; Supplementary Affidavit of Guy Babcock, sworn January 25, 2019; Supplementary Affidavit of Luc Groleau, sworn February 1, 2019; Supplementary Affidavit of Luc Groleau, sworn March 7, 2019; The Affidavit of Michael Jason Lee, sworn June 6, 2019; Affidavit of Tom Warren, sworn June, 20 2019; Affidavit of Nadire Atas, sworn May, 17 2018; Transcript of the cross-examination of Nadire Atas, dated May 22, 2018.

<sup>24</sup> As noted in the previous footnote, an affidavit from Atas and a cross examination of her on that affidavit were filed on these motions, not by Atas, but by the moving parties. The affidavit and cross examination were originally filed in connection with the motion for an interlocutory injunction brought in 2018 by the Caplan Plaintiffs.

The evidence is similarly overwhelming that some of the publications were made or directed by Atas. These two findings, put together, lead to the ineluctable conclusion that Atas made or directed all the impugned publications.

**(d) Factual Findings and Disposition**

[77] On the totality of the evidence I find that Nadire Atas has long used anonymous and pseudonymous communications to respond to grievances she has – or believes she has – against other people. This started at least as early as the 1990’s, when her employment was terminated by John Babcock from the REMAX real estate brokerage firm he owned in Hamilton, Ontario. I find that Atas’ employment was terminated for alleged unprofessional conduct, including allegedly dishonest conduct incompatible with working as a real estate agent: according to Babcock, Atas forged extensions to a listing agreement.<sup>25</sup>

[78] I find that Atas contacted Babcock after the termination and threatened him if he reported her conduct to professional associations or regulators. Subsequently, Babcock sold his firm to another real estate brokerage firm owned by the Schmidt family. Atas sought employment with the firm after it was under new management, but her application was declined after Babcock refused to provide her with a positive reference. This precipitated another round of abuse aimed at Babcock.

[79] These early rounds of abuse, taking place in the 1990’s, with technology being as it then was, took place in writing, by way of “poison-pen” communications, taunting Babcock over the death of his wife and spreading malicious lies in Babcock’s neighbourhood that he was a sexual predator. I find that Atas was suspected of these communications at the time, that there was a reasonable basis for this suspicion, that the matters were reported to police, who made contact with Atas to interview her. Following these police interviews, the malicious communications ceased until 2016, a gap in the conduct of about twenty years.

[80] Starting in about 2010, Atas began a campaign of internet defamation focused on people involved in her litigation over the first financing of her property at St George Street. Atas had long been of the view that the original mortgage proceedings were wrongly decided – that there was an injustice in the court’s adjudication of the issues. She took the position that this injustice resulted from misconduct by her lenders, by their counsel, incompetence by her own (multiple) solicitors, and that all of this would be established on evidence. She complained and sued these people. The impugned publications were based on Atas’ allegations against these people. There is no evidence that there is anyone else involved in those matters would or could have made the impugned postings, which would have required knowledge of grievances that were peculiar to Atas.

[81] Atas soon found herself in a fresh round of conflicts with Peoples Trust Company, the lender that refinanced her debt on the St George St and Wycliffe properties. Two sets of mortgage enforcement proceedings ensued in defense of which Atas claimed misconduct by the lender, its

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<sup>25</sup> Babcock Affidavit, Restated Motion Record, vol. 5, tab 10.

lawyers, its property manager (in the case of the St George St. property), and her own (multiple) lawyers in defending her interests in that litigation.

[82] I find that Atas commenced a fresh round of defamatory internet publications in 2016, and at around the same time began a new campaign of similar publications against persons associated with her old conflict with Babcock. In respect to the Dale & Lessman Action, Atas admits to posting the impugned publications in her statement of defence and takes the position that the allegations are true. This defence is not available to Atas for two reasons: (i) she has adduced no evidence to prove the truth of these statements, and (ii) her defence of justification is now foreclosed by the final dismissal of all of the underlying litigation. Atas' defence of justification is a collateral attack on authoritative judicial decisions and has been finally decided against her.

[83] The facts alleged in the Babcock Action are true but are also established on the evidence put forward by plaintiffs in the Babcock Action. The Babcock campaign had been underway for two years before it came to Babcock's attention, and that only happened because Atas contacted a club of which Babcock was a member and brought the publications to the club's attention. This emphasizes the obvious underlying motive for Atas: to cause distress to her victims. She wanted to know that Babcock knew about the publications.

[84] Finally, I find that Atas commenced yet another campaign in 2018 against the Caplan plaintiffs, seeking redress against a lawyer who had taken a prominent role against her in the s.140 Application.

[85] There is evidence that defamatory publications have continued after the interim injunction was issued in the Caplan Action. On a civil standard of proof it is clear that these publications were made or directed by Atas. This is a relevant fact in considering the scope of relief to be granted in this case: together with Atas' defiance of court orders in the case management process, the court concludes that granting a permanent injunction, by itself, will not be sufficient to bring Atas' wrongful conduct to an end.

[86] Throughout, Atas has shown a pattern of seeking to create, prolong and escalate conflict with her adversaries, launching numerous repetitive lawsuits, seeking ever larger damages awards. She has maintained that she wishes to have her grievances adjudicated in a fair process, in fact she has used the litigation process to prolong conflict through endless procedural techniques. She herself sought to interrupt the process of litigation by having herself found in need of a litigation guardian by reason of mental illness, only to seek to have the appointment of the Public Guardian and Trustee terminated months after it had been appointed, ostensibly because she had recovered her mental health, but in reality because she had failed to understand that her litigation guardian would control her litigation and would be able to settle it without her consent. When the Public Guardia and Trustee sought court approval to do precisely that, Atas launched her motion to remove the PGT, a process replete with procedural manoeuvring that took nearly three years to complete, during which time almost no progress was made on the dozens of legal proceedings in which she was involved. On the eve of these motions, to delay or prevent the hearings, she made an assignment in bankruptcy.



[87] The plaintiffs raise one other factual issue that relates to their ability to use this judgment to remove defamatory postings that are under the control of courts outside Ontario. Counsel advises that in some American jurisdictions, the plaintiffs require an affirmative finding of the falsity of the impugned publications in order to get those publications removed. If this court does not make the requisite factual findings then, counsel advises, plaintiffs may be put to the expense of re-litigating issues that have been finally determined by this court.

[88] This request could pose a serious problem in many defamation cases. It is not for the plaintiffs to prove that the impugned statements are false. It is the defendant's burden to prove that they are true. In many cases where justification is contended, the court may make no more of a finding than that the defendant has failed to meet her burden to show that the statements are true. That is not the same thing as the court finding that the statements are false.

[89] However, in this case this issue is not so difficult. The allegations of professional misconduct against plaintiffs are precluded by authoritative decisions in the underlying litigation. There are already judicial decisions establishing the true version of the facts and the impugned statements are inconsistent with those facts. In respect to the other allegations, not grounded in the underlying litigation, they are patently false and without any evidentiary foundation. They were statements made for the purposes of harassment – made knowing the statements to be false. These two principles cover the range of publications excepting only those statements that are, on their face, not factual claims (naked abuse, such as calling a person a “twit”). Although the factual findings are not necessary in order to decide this case under Ontario law, I am satisfied that making such findings is an appropriate ancillary remedy available in this case.

[90] I find as a fact that all of the impugned publications are false, other than those that do not allege facts and are properly understood as empty statements of disapprobation,

[91] On the facts, Atas has done what the plaintiffs allege in the four Defamation Actions. Based on the legal analysis that follows, there shall be judgment for the plaintiffs on the motions for summary judgment.

## **Part 2: Law, Remedies and Final Orders**

### **Introduction**

[92] Atas has engaged in a vile campaign of cyber-stalking against the plaintiffs in the four actions, the goal of which has been retribution for longstanding grievances. As argued by the plaintiffs, the conduct falls in the area where the civil and criminal law intersect. The law should respond to this conduct to compensate victims, to express the law's disgust and firm rejection of the conduct, to punish for wrongful conduct, to deter Atas and others from this sort of conduct in future, and to bring Atas' wrongful conduct to an end.

[93] The law's response, thus far, has failed to respond adequately to Atas' conduct. It is evident that Atas enjoys the ongoing conflict. The history set out in the Judgment demonstrates that this is so. In the denouement to the Judgment (paras. 352-356), I noted that Atas' personal history did not emerge during the s.140 application, except narrowly glimpsed aspects of her life. More has emerged on these motions, but it is still not clear what Atas conceives as the benefit she obtains

from her conduct. At one point she was a qualified real estate professional and owned two income properties. Now she is destitute, lives in shelters, owns no property other than the clothes on her back and a cellphone, and is an undischarged bankrupt. She has already spent 74 days in jail for contempt of court unrelated to her alleged violations of the injunctions, and plaintiffs are seeking substantial jail sentences for Atas alleged breaches of the injunctions.

[94] In sum, there have been severe consequences for Atas for her conduct. These consequences address the court's concerns about general deterrence. Although Atas herself has not been deterred, the consequences she has suffered and may yet suffer would deter most people from doing what she has done. Those with assets and income would be deterred by the threat of financial ruin. Those with any eye to the future would be concerned about the damage to their reputation: Atas' prospects for obtaining financing, leasing a residence, securing employment, would all be impacted negatively by the public record of court decisions respecting her conduct. And, of course, most people value freedom and recognize the risk of incarceration associated with defying court orders.

[95] Compensation, though usually a primary goal of the civil justice system, is not available from a person such as Atas. On the record, Atas has been insolvent for years. She made an assignment in bankruptcy on the eve of these motions for judgment and monetary remedies have been abandoned by the plaintiffs as the price for proceeding with these motions without the delay of obtaining an order to continue from the bankruptcy courts.

[96] Expressions of the law's disapprobation in a civil proceeding are usually limited to awards of punitive and exemplary damages – claims that have been abandoned in this proceeding because of their futility and to avoid delay as a result of Atas' assignment in bankruptcy. Again, Atas' poverty leaves her judgment-proof.

[97] This leaves two closely related goals: specific deterrence and preventing Atas from continuing or repeating this conduct. The first aspect addresses Atas' motive force. The second addresses creating practical impediments to Atas repeating or continuing this conduct, whatever she may wish to do. This latter aspect is focused on efficacy and dispatch: remedies for the plaintiffs that could embroil them in further lengthy legal proceedings with Atas would be counter-productive: it is clear that provoking and continuing legal proceedings of any kind is something Atas seeks.

[98] The Statements of Claim in each of the four actions plead defamatory libel as a cause of action. In addition, the Statements of Claim in each of the Caplan and Babcock Actions plead common law 'harassment' and 'private nuisance'. All of the Statements of Claim seek "such further and other relief" as the court considers just.

[99] Online harassment, bullying, hate speech, and cyber stalking straddle criminal and civil law. Harmful internet communication has prompted many jurisdictions to amend or pass legislation to deal with the issue. The courts too have been challenged to recognize new torts or

expand old ones to face the challenges of the internet age of communication.<sup>26</sup> 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.

[100] In England, after it appeared that there was some movement toward the recognition of a common law tort of harassment, 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.

[101] In November 2017, the Law Reform Commission of Ontario published a consultation paper entitled ‘Defamation Law in the Internet Age’. One of its working papers, entitled ‘The Relationship between Defamation, Breach of Privacy, and Other Legal Claims Involving Offensive Internet Content’ was published by David Mangan in July 2017. Both the consultation paper and the working paper include extensive reviews of the law. Since final argument of these motions, the Law reform Commission of Ontario has published a Final Report.<sup>27</sup> To date, legislation has not been enacted in Ontario to address these issues.

[102] In 2018, Nova Scotia re-introduced the *Intimate Images and Cyber-Protection Act*.<sup>28</sup> ‘Cyber-bullying’ is defined, at section 3(c) of the *Act*, as follows:

“cyber-bullying” means 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, and may include (i) creating a web page, blog or profile in which the creator assumes the identity of another person, (ii) impersonating another person as the author of content or a message, (iii) disclosure of sensitive personal facts or breach of confidence, (iv) threats, intimidation or menacing conduct, (v) communications that are grossly offensive, indecent, or obscene, (vi) communications that are harassment, (vii) making a false allegation, (viii) communications that incite or encourage another person to commit suicide, (ix) communications that denigrate another person because of any prohibited ground of discrimination listed in Section 5 of the Human Rights Act,

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<sup>26</sup> The Book of Authorities contains a number of on line articles which are instructive on this point: see Mary Mullen, *Information Brief for the Minnesota House of Representatives*, “The Internet and Public Policy: Cybertorts and On Line Property Rights ( May 2018); DLA Piper, “Online Harassment: A Comparative Policy Analysis for Hollaback” (November 2016); Alice Marwick and Ross Miller, “Online Harassment, Defamation, and Hateful Speech: A Primer of the Legal Landscape”, (June 10 2014, *Fordham Center on Law and Information Policy Report*. See also David A. Potts, “Cyberlibel: Information Warfare in the 21<sup>st</sup> Century” Irwin Law Inc. (2011).

<sup>27</sup> Law 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>.

<sup>28</sup> The *Intimate Images and Cyber-Protection Act*, SNS 2017, c 7, (<http://canlii.ca/t/53dcv>). An earlier version of the Act was struck down in *Crouch v. Snell*, 2015 NSSC 340 (<http://canlii.ca/t/gmhjl>). See too the *Intimate Image Protection Act*, CCSM c I87, (<http://canlii.ca/t/52ksr>) which creates a statutory actionable tort.

or (x) communications that incite or encourage another person to do any of the foregoing.

[103] Section 6(1) of the *Act* gives the Court the following powers:

Where the Court is satisfied that a person has engaged in cyber-bullying or has distributed an intimate image without consent, the Court may make one or more of the following orders:

- (a) an order prohibiting the person from distributing the intimate image;
- (b) an order prohibiting the person from making communications that would be cyber-bullying;
- (c) an order prohibiting the person from future contact with the applicant or another person;
- (d) an order requiring the person to take down or disable access to an intimate image or communication;
- (e) an order declaring that an image is an intimate image;
- (f) an order declaring that a communication is cyber-bullying;
- (g) an order referring the matter to dispute-resolution services provided by the agency or otherwise;
- (h) an order provided for by the regulations;
- (i) any other order which is just and reasonable.

[104] As should be clear from this brief review, this is a developing area of the law. The law of defamation provides some recourse for the targets of this kind of conduct, but that recourse is not sufficient to bring the conduct to an end or to control the behaviour of the wrongdoer. The reasons that follow explain this conclusion, which provides a foundation for this court's conclusion that the common law tort of harassment should be recognized in Ontario. "Harassment" describes what Atas has been doing, and ordering Atas to stop harassment provides remedial breadth not available in the law of defamation.

[105] The balance of these reasons is structured as follows:

- (a) First, I review applicable principles of the law of summary judgment.
- (b) Second, I review applicable principles of the law of default judgment.
- (c) Third, I review the law of defamation and conclude that Atas has committed the tort of defamation against each of the plaintiffs.

- (d) Fourth, I review the law related to the common law tort of harassment and explain why this case is distinguishable from recent appellate authority finding that there is no need to recognize this tort in Ontario.
- (e) Fifth, I briefly review the test for the tort of invasion of privacy and conclude that the facts of this case does not meet the test for this tort, and conclude that (a) binding authority precludes this court from altering the legal test for this tort and (b) recognition of the tort of harassment will enable the court to provide an effective remedy for the plaintiffs without broadening the established test for the tort of wrongful invasion of privacy.
- (f) Sixth, I address numerous discreet arguments made by Atas in her factum and during oral argument.
- (g) Seventh and finally, I address remedies and draft orders provided by the plaintiffs.

### (a) Summary Judgment Principles

[106] The principles applicable on motions for summary judgment are set out in *Hryniak v. Mauldin*<sup>29</sup> and *Sweda Farms v. Egg Farmers of Ontario*.<sup>30</sup>

Prior to *Hryniak*, the test for summary judgment was: can a full appreciation of the evidence and issues required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?<sup>31</sup> Under this test, generally, in cases where there must be multiple findings of fact on the basis of testimony from a number of witnesses, and/or where there is a voluminous record, a motions judge will not be able to come to a “full appreciation” of the case without a trial. However, that does not mean that a substantial record, or numerous witnesses, will always preclude summary judgment. The focus is on the relationship of the record to the contested issues that have to be decided.<sup>32</sup>

The length and complexity of the statement of claim is of little significance on a motion for summary judgment. The plaintiffs must show that there is evidence to support their allegations.<sup>33</sup> A party may not rest on allegations in its pleadings on

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<sup>29</sup> *Hryniak v. Mauldin*, 2014 SCC 7.

<sup>30</sup> *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, aff'd 2014 ONCA 878, leave to appeal to SCC refused [2015] SCCA No. 97.

<sup>31</sup> *Combined Air Mechanical Services v. Flesch*, 2011 ONCA 764, 2011 CarswellOnt 13515 (C.A.) at paras. 50-51; Rule 20.04(2).

<sup>32</sup> *Combined Air Mechanical Services v. Flesch*, 2011 ONCA 764, para. 51, 2011 CarswellOnt 13515 (C.A.) at paras. 50-51; Rule 20.04(2); *Precious Metal Capital Corp. v. Smith*, 2012 CarswellOnt 5603 (C.A.) at paras. 10 and 12; leave to appeal refused 2012 CarswellOnt 14533 (S.C.C.).

<sup>33</sup> *New Solutions Extrusion Corp. v. Gauthier*, 2010 CarswellOnt 913 (S.C.J.); aff'd 2010 CarswellOnt 2966 (C.A.).

a motion for summary judgment. The party must “put its best foot forward” or “lead trumps or risk losing”.<sup>34 35</sup>

[107] *Hryniak* dispenses with the trial as the measuring standard against which a motion for summary judgment is measured:

Summary judgment motions come in all shapes and sizes, and this is recognized in the Supreme Court of Canada’s emphasis on “proportionality” as a controlling principle for summary judgment motions. This principle does not mean that large, complicated cases must go to trial, while small, single-issue cases should not. Nor does it mean that the “best foot forward” principle has been displaced; quite the reverse. If anything, this principle is even more important after *Hryniak*, because on an unsuccessful motion for summary judgment, the court will now rely on the record before it to decide what further steps will be necessary to bring the matter to a conclusion. To do this properly, the court will need to have the parties’ cases before it.

As I read *Hryniak*, the court on a motion for summary judgment should undertake the following analysis:

- (1) The court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial;
- (2) On the basis of this record, the court decides whether it can make the necessary findings of fact, apply the law to the facts, and thereby achieve a fair and just adjudication of the case on the merits;<sup>36</sup>
- (3) If the court cannot grant judgment on the motion, the court should:
  - (a) Decide those issues that can be decided in accordance with the principles described in 2), above;
  - (b) Identify the additional steps that will be required to complete the record to enable the court to decide any remaining issues;<sup>37</sup>
  - (c) In the absence of compelling reasons to the contrary, the court should seize itself of the further steps required to bring the matter to a conclusion.

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<sup>34</sup> *Combined Air Mechanical Services v. Flesch*, 2011 ONCA 764, para. 51, 2011 CarswellOnt 13515 (C.A.), at para 56; *Bhakhri, v. Valentin*, 2012 CarswellOnt 6667 (S.C.J.), para. 7; *Pizza Pizza v. Gillespie* (1990), 1990 CanLII 4023 (ON SC), O.J. No. 2011.

<sup>35</sup> *Sweda Farms v. Egg Farmers of Ontario*, 2014 ONSC 1200, paras. 24-25.

<sup>36</sup> *Hryniak v. Mauldin*, 2014 SCC 7, para. 4.

<sup>37</sup> *Hryniak v. Mauldin*, 2014 SCC 7, paras. 66-68, 76-78.

The Supreme Court is clear in rejecting the traditional trial as the measure of when a judge may obtain a “full appreciation” of a case necessary to grant judgment. Obviously greater procedural rigour should bring with it a greater immersion in a case, and consequently a more profound understanding of it. But the test is now whether the court’s appreciation of the case is sufficient to rule on the merits fairly and justly without a trial, rather than the formal trial being the yardstick by which the requirements of fairness and justice are measured.<sup>38</sup>

[108] Two points from this summary bear emphasis for these motions for summary judgment. First, the parties must put their “best foot forward” on these motions. They must adduce evidence and may not rest on the allegations set out in their pleadings. The plaintiffs have adduced a voluminous record to support their motion. Atas has adduced no evidence in her defence of these motions. This does not mean the plaintiffs should win the motion, solely because of Atas’ failure to place any evidence before the court. It is still for the plaintiffs to prove on a balance of probabilities that there are no issues for trial.

[109] Second, a point seldom discussed in the vast jurisprudence respecting summary judgment, the court is entitled to presume have placed before it “in some form” all of the evidence that will be available for trial. The court does not presume that the evidence on the motion is the “best evidence” or in the form of the evidence that would be tendered at a trial. Quite the contrary, hearsay evidence may be tendered in affidavits on information and belief on a motion for summary judgment, evidence that would not generally be admissible in this form at a trial unless a successful *Khan* application was brought.<sup>39</sup>

[110] It is expected that there will be fewer witnesses on a motion for summary judgment, and that some evidence may be presented in the form of will-says and other hearsay evidence that places a party’s case before the court in “summary” form: one of the tasks of the motions court will be to consider whether it is necessary to hear directly from witnesses whose evidence has been tendered in hearsay form, either through the use of the extended powers on a summary judgment motion, or by directing that the action, or some aspect of it, be tried.

[111] In these cases, where Atas has adduced no evidence at all, there is no conflict in the evidence before the court, and the risks associated with proceeding on a written record are greatly reduced. I have not found it necessary to use the ancillary powers available to a judge hearing a summary judgment motion: I am satisfied that I my “appreciation of the case is sufficient to rule on the merits fairly and justly without a trial” and without exercising any of the ancillary powers available to me pursuant to Rule 20.

### **(b) Default Judgment Principles**

[112] A defendant who has been noted in default is deemed to admit the truth of all allegations of fact made in the statement of claim: Rule 19.02(1). A defendant who has been noted in default

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<sup>38</sup> *Sweda Farms v. Egg Farmers of Ontario*, 2014 ONSC 1200, paras. 32-34.

<sup>39</sup> *R. v. Khan*, [1990] 2 SCR 531.

is not entitled to notice of any step in the action and need not be served with any document in the action, except where the court orders otherwise: Rule 19.02(3).

[113] Where a defendant has been noted in default, the plaintiff may move before a judge for judgment against the defendant on the statement of claim in respect to any claim for which default judgment has not been signed: Rule 19.05(1). Such a motion for judgment shall be supported by evidence given by affidavit if the claim is for unliquidated damages: Rule 19.05(2).

[114] A plaintiff is not entitled to judgment on a motion for judgment merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment: Rule 19.06.

[115] In the motion for default judgment in the Babcock Action, the plaintiffs have not relied solely on the allegations in their statement of claim and their deemed truth because of the noting in default. They have placed affidavits before the court to establish the facts upon which their claims are based. This they are entitled to do, and the court may receive and consider that evidence when deciding whether to grant default judgment.

### **(c) Defamation Law**

[116] There can be no doubt that the content of many of the thousands of postings allegedly posted on the internet by Atas are defamatory of the plaintiffs, their families and associates. The affidavits sworn by the plaintiffs contain many thousands of examples.

[117] On their face, the impugned postings are “of and about” the plaintiffs (identifying the plaintiffs by name, often also by reference to a photograph and other identifying information such as addresses or business associations).

[118] On their face, most of the impugned posting are defamatory of the plaintiffs, alleging that plaintiffs are (variously) dishonest, incompetent, have acted in violation of professional standards, have committed fraud, and, in some cases, are prostitutes, “sluts”, sexual predators, pedophiles (including, in some cases, pedophiles who take a public role in educating the public about the challenges and possibilities of persons suffering from pedophilia of rising above their desires and living constructive and law-abiding lives), members of organizations advocating sexual exploitation of children, such as NAMBLA (“North American Man-Boy Love Association”).

[119] A minority of the postings are not defamatory of the plaintiffs because the substance of these postings are abusive comments rather than factual allegations. Calling someone a “twit” or “stupid”, in the context in which the postings are presented, communicates no more than disapprobation and does not communicate a statement of fact that is either true or false: the plain meaning of this minority of postings is that the poster dislikes and/or disapproves of the target of the posting. These publications may be considered as part of a pattern of harassment but cannot ground liability in defamation. The vast majority of postings include serious defamatory statements, and the “merely abusive” comments are a form of rhetorical seasoning. There is no need to undertake a close analysis to separate defamatory words from the “merely abusive” words in the context of the overall mass of defamatory publications.



[120] The postings have been disseminated on the internet anonymously, pseudonymously, or by using false names. This has been done by placing the postings on internet sites that do not monitor or control the content of postings, including:

- Wordpress
- Ripoff Reports
- Reddit
- Pinterest
- Facebook
- Lawyerratingz
- Blogspot
- dozens of other less well known sites such as “cheaters.com” and “reportcheatingonline”

On the record before me, these sites may be viewed almost anywhere in the world by anyone with access to the internet. On these facts, by posting the impugned words, the person who posted them “published” the words within the meaning of the law of defamation.

[121] This leaves two sets of issues for this court to decide: (1) whether the plaintiffs have proved on a balance of probabilities that Atas is the author of, published, and/or caused to be published the defamatory words; and (2) whether a defence has been established for publishing these words.

**(1) Atas wrote, published and/or caused to be published the impugned words**

[122] Atas wrote and published the statements that are the subject-matter of the Dale & Lessman Action. She has so admitted in her statement of defence in that action, and so argued during oral argument.

[123] While Atas has attempted to publish her statements anonymously or pseudonymously in the other Defamation Proceedings, she is not sophisticated enough in respect to internet technology to entirely cover her tracks successfully. Further, she has, from time to time come forward and self-identified in efforts to prevent hosting sites from releasing information about the person who posted the impugned content.

[124] The affidavit of Luc Groleau<sup>40</sup> explains how Mr Groleau was able to link postings to Ms Atas. Mr Groleau, a plaintiff in the Babcock Action (a son-in-law of Mr Babcock), is an IT specialist, and was able to find out a great deal of relevant information by virtue of his expertise.<sup>41</sup>

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<sup>40</sup> Restated Motion Record, volume 5, tab 11 and Supplementary Motion Record, vol. 1, tab 4.

<sup>41</sup> Mr Groleau was not put forward as an expert witness. He has given evidence of his expertise (he would qualify as an expert if he was independent), and then explained in detail what he did to link posts to Atas. I am satisfied that I

As explained in detail in Mr Groleau's affidavits, many of the impugned postings are connected to Atas' pinterest account, including her picture and other identifying information. Much of this information was hidden in the coding rather than displayed on impugned postings, and so would not have been apparent to an unschooled poster. The reasonable inference is that Atas used her pinterest account as the basis of her internet presence, but used masking techniques (such as "gravatars") to make it appear that the postings were coming from some place other than from a person using her pinterest account.

[125] Also as explained in detail by Mr Groleau, the tactics used to post online changed after evidence was served in these proceedings describing the techniques Atas had used to that point. The change in masking tactics corresponds so closely with the dates this information was served on Atas to ground an inference that, after Atas learned how she had left clues tying her to impugned posts, she changed her tactics to try to avoid detection.

[126] One of the sites used to publish impugned reports is called "Ripoff Reports". The company that hosts "Ripoff Reports" is located in Arizona. Plaintiffs in the Stancer Action, Dale & Lessman Action and Caplan Action, contacted Ripoff Reports to request that defamatory content be removed and that metadata showing the source of the posts be provided to the plaintiffs. The Arizona company would not provide the metadata without a court order (as was its general practice) but advised that it would consider complying voluntarily with a court order from an Ontario court. On this basis, plaintiffs sought an order in the nature of a "Norwich Order" from this court, a request opposed by Atas before this court.

[127] Atas contacted Ripoff Reports in Arizona, by telephone, to oppose removal of the posted content or divulcation of metadata associated with those postings. Those postings included a full range of offensive content, covering allegations in the Stancer Action, the Dale & Lessman Action and the Caplan Action. The Ripoff Reports postings were posted using many of the aliases attributed to Atas.

[128] It was Atas who phoned in respect to these posts. She spoke to one of the directing minds at Ripoff Reports and clearly took the position that she had an interest in the impugned postings. She asked "why are these posts being taken down when they're true". There were eight such telephone conversations between Atas and Ripoff Reports. They were recorded. The recordings are part of the record before the court on these motions. It is Atas' voice on those calls. And the calls are attested to by the other party to those calls, Ed Magedson, in his affidavit evidence on these motions.<sup>42</sup>

[129] The metadata associated with the postings to Ripoff Reports provides addresses and computer ID's for the computers that sent the postings. One is located at a branch of the

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am able to understand and evaluate the information provided by Mr Groleau without receiving opinion evidence from an expert. By way of example, if a witness testified that information reflected in a bank account showed that certain amounts of money were directed to certain payees, so long as sufficient evidence was adduced as to how this information was gathered, it could be received by the court through a fact witness rather than an expert witness.

<sup>42</sup> Restated Motion Record, tab 8.

Scarborough Public Library, and another at a public terminal located at University of Toronto.<sup>43</sup> By her own evidence (obtained during cross examination on an injunction motion), Atas testified that she does not own a computer and accesses the internet by public computer terminals in libraries, at University of Toronto, and in “internet cafes”. Under surveillance, Atas was seen at a computer terminal at a library at University of Toronto, though she was not observed in the act of making any of the impugned postings.

[130] Analysis done by Mr Groleau and Mr Lee ties many of the impugned postings to Atas’ facebook page, her email address, her pinterest account, and an avatar she uses that is a picture of Atas. These correlations tie together posts made to multiple platforms about multiple victims and establishes a pattern of work done by Atas to disseminate her publications widely, under multiple fictitious names, to multiple platforms. There is a clear *modus operandi* here, and it is convincingly tied back to Atas.

[131] As stated above, most of the publications appear to have been made from public computers in the Toronto area. However, when plaintiffs sought publication information from the “Pinterest” web site, in legal proceedings in California, they received information that one of the accounts publishing this information belonged to a person calling herself (online) “Fayeth Cees”.<sup>44</sup>

[132] Plaintiffs retained a private investigator, Tom Warren, and he investigated the postings made under the name “Fayeth Cees”. In reviewing online information about this person, Mr Warren came to the view that her account appeared to be “genuine” – that is, that it was a real account, for a real person with an online presence beyond the publication of defamatory and harassing content at issue in these proceedings.

[133] On further investigation, Mr Warren was able to locate “Fayeth Cees”. He learned that this person works as a sex worker in northern Ontario. This person told Mr Warren that Atas had asked her to post impugned publications harassing and defaming plaintiffs and promised to pay her for doing that.

[134] Mr Warren gave evidence, by affidavit, describing his investigation, the statements made to him by “Fayeth Cees”, and explained that this person stopped communicating with him and would not provide an affidavit for these proceedings.

[135] In argument, Atas noted that Mr Warren provided information that “Fayeth Cees” has substance abuse issues. She argued that “she would say it is fabricated by Warren” – by which she argued that Mr Warren fabricated the evidence he attributes to “Fayeth Cees”.

[136] Atas then argued, presumably in the alternative, that “Fayeth Cees” was probably living “in a haze” induced by drugs. She argued that a “drug-addicted witness” would not be able “to do these things” (by which she meant navigate to the various internet sites and post the content posted

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<sup>43</sup> Affidavit of Michael Lee, Supplementary Record, vol., tab 5; Supplementary Record, vol. 2, tab 6.

<sup>44</sup> “Fayeth Cees” is a moniker for Robin Faith Corbiere.

by “Fayeth Cees”. Atas argued further that a drug-addicted witness would have to have “some sort of organization and ability to keep track.”

[137] On a motion, a party may adduce hearsay evidence on information and belief. This evidence is admissible, in the discretion of the court, and the weight to be placed upon it is a matter of discretion in all the circumstances of the case. For the following reasons I admit this evidence and accept it as true:

- (a) Mr Warren is a professional private investigator. He was retained and paid by plaintiffs, as would be the case with any private investigator retained in a case such as this, but he does not otherwise have any connection to the parties or issues in this case.
- (b) Mr Warren gives evidence in the affidavit of the steps he took to locate “Fayeth Cees”, and then to meet with her and talk to her. Mr Warren was not cross-examined on this evidence, and no evidence to the contrary was placed before the court. On the record before me, Mr Warren is a trustworthy witness, and I have no reason to doubt that he did what he says he did and had the conversations with “Fayeth Cees” that he describes.
- (c) I accept that Fayeth Cees is, herself, an inherently unreliable witness, and her evidence must be approached with caution. I say this not because she is a sex worker, or that she has substance abuse issues, but because, on her own statements, she agreed to accept money to post hateful and malicious statements on the internet about complete strangers.
- (d) The statements made by “Fayeth Cees” about what she did herself are not “double-hearsay” coming from Mr Warren: she has direct knowledge of these things and would be entitled to testify to them in person. Set out in Mr Warren’s affidavit, they are “single hearsay” – the kind of evidence that is permitted on information and belief in an affidavit, as described above.
- (e) The statements made by Fayeth Cees about her knowledge of and dealings with Atas are likewise first-hand evidence from Fayeth Cees, and Mr Warren’s evidence is hearsay on information and belief, admissible on this motion.
- (f) The statements attributed to Atas by Fayeth Cees, as reported by Mr Warren, are not double-hearsay for two reasons. First, they are material, not for the truth of the underlying contents of the statements, but for the fact that they were said by Atas to Fayeth Cees. Fayeth Cees has direct knowledge that the statements were said. Second, the statements attributed to Atas by Fayeth Cees are statements against interest made by a party to these proceedings and are admissible as “admissions”.
- (g) The words published by Fayeth are consistent in tone, content, and phraseology, to the other statements published by Atas. The similarities are so striking as to make it highly unlikely that two different unrelated persons would have independently published these materials. It is possible, of course, that the publications by Fayeth

Cees were republications by Fayeth Cees of prior publications by Atas. However, there is no evidence that would provide a foundation to make this a plausible explanation. The scope of the republished comments, against multiple unconnected victims, is far too great to persuade me that Fayeth Cees came across Atas' posts online and decided to republish them herself, for no apparent reason.

- (h) The targets of the posts by Fayeth Cees are all connected to Atas – they are Atas' opponents or persons chosen because of their proximity to her opponents or the underlying conflicts with her opponents. There is not a shred of evidence that "Fayeth Cees" herself has any connections of any kind to any of the victims.
- (i) The posts under the name of Fayeth Cees" were made after litigation had begun between plaintiffs and Atas, and arranging for publication of defamatory and harassing materials from some place distant from Toronto would serve to distract plaintiffs and make their task of proving Atas' authorship more expensive and time-consuming (which it was). Such conduct is in keeping with Atas' longstanding obsessive campaigns of harassment of plaintiffs, inside and outside the litigation process.
- (j) Atas did not give evidence denying the statements made by Fayeth Cees to Mr Warren.
- (k) Atas did not cross-examine Mr Warren, either in respect to Fayeth Cees herself (to cast doubt on the credibility of the statements made by Fayeth Cees to Mr Warren) or to impugn Mr Warren's credibility in support of the argument that Mr Warren himself fabricated the evidence attributed to Fayeth Cees.
- (l) It is understandable that Fayeth Cees would have little interest in being involved voluntarily in these proceedings. She told Mr Warren that she was unhappy with Atas because Atas never paid her as she had said she would, but beyond that, in the absence of being compelled as a witness in these proceedings, it is understandable and believable that Fayeth Cees would decide to stop communicating with Mr Warren and not willingly provide evidence herself in these proceedings.

[138] If Atas had given evidence to challenge the statements attributed by Fayeth Cees, it could have been open to either side to seek to examine Fayeth Cees as a witness in these proceedings. The plaintiffs were entitled to proceed on the basis of the information obtained from Fayeth Cees, and to present it through Mr Warren on information and belief, and Atas has not established a basis on which this court should reject this evidence.

[139] As set out in the second supplementary affidavit of Luc Groleau, it is clear that Atas' online attacks have continued in the face of injunction orders against her, attacks brought against an ever-widening group of people.<sup>45</sup>

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<sup>45</sup> Second Supplementary Affidavit of Luc Groleau, Supplementary Record, vol. 8.

[140] Mr Groleau is a son-in-law of Mr Babcock and, as it happens, has been an information technology specialist employed at IBM for nearly three decades. Mr Groleau has continued to keep track of Atas' internet harassment as the actions have moved forward. In his most recent internet searches, Mr Groleau has identified more than 80,000 unique search results attributable to Atas, related to some 3,747 online posts, on 77 different web sites, directed against 150 different victims. Since April 9, 2018, the date on which this court ordered Atas not to make further posts to the internet of any kind, Mr Groleau found 1,072 posts for which dates of posting can be verified.

[141] This information points to two conclusions. First, despite a broad order from this court to stop Atas from posting online, she has ignored the order and continued to do so. This conduct continued, and appeared to escalate, right up to the time that these motions were heard.

[142]

- (a) Atas has admitted to some of the publications;
- (b) Atas has motive to engage in the impugned conduct;
- (c) Atas has engaged in extensive other harassing behaviour against plaintiffs, behaviour that itself exhibits obsessive fixation on old grievances, out of all proportion to the underlying grievances;
- (d) many of the publications are linked to online accounts for which there is evidence that they belong to Atas, and no evidence to the contrary;
- (e) there is evidence, which I accept, that Atas paid another person to post some of the impugned publications from internet sites in northern Ontario, to create the impression that not all publications originate from the Toronto area;
- (f) most of the publications originate from the Toronto area, including publications about relatives who live outside Ontario (Quebec, Arizona and the United Kingdom);
- (g) where identifying information has been obtained by plaintiffs, computers used to publish the impugned publications were located in public libraries, a university, and internet cafes in Toronto, consistent with evidence that Atas has no fixed address and no access to a computer at a residence;
- (h) the style, format, use of language, structure and content of the impugned publications, including the defamatory words used (including unusual word choices ["twit", "skank"]) consistent errors of punctuation, spelling and diction, all tend to establish common authorship;
- (i) the escalation of campaigns are consistent among the Dale & Lessman, Caplan and Babcock Actions, and can be correlated to significant milestones in Atas' other litigation (for example, a wave of publications followed the completion of final argument in the s.140 application);

- (j) the accounts from which the publications originated are pseudonymous, and use dozens of different names or nicknames, but bear a striking resemblance in other respects;
- (k) the victims, as a group, have only one thing in common: they or someone close to them is in conflict with Atas. These are a disparate group, from a cardiologist in Arizona, an IT specialist in Quebec, a retired realtor in the UK, a bank employee in Toronto, realtors in Hamilton, trust company personnel in Toronto, and, of course, the many victims in the Toronto area with direct connections to Atas' underlying litigation;
- (l) where the publications are focused on Atas' grievances (as was the case in the Stancer Action and the Dale & Lessman Action and subsequent posts building on those allegations), the subject matter of the posts, themselves are matters that only Atas would care about, and things that very few people other than Atas would even know about (for example, allegations that the Stancer firm purported to act for clients without being retained by those clients; allegations that Wallis and Peoples Trust inflated mortgage enforcement costs and failed to account for attorned rents)

[143] The evidence is overwhelming when viewed in isolation in respect to the four proceedings. Taken altogether, there is a clear pattern and *modus operandi* here: this is a coordinated effort from a single source. I have no hesitation in finding that Atas posted or caused to be posted all of the impugned publications.

## **(2) There is No Defence Established for the Impugned Publications**

[144] In argument, Atas asserted the following defences:

- (a) The defamation claims are barred by the notice requirements of s.5(1) of the *Libel and Slander Act*.<sup>46</sup>
- (b) The impugned statements made of professional plaintiffs that they are dishonest, incompetent, have breached their professional duties, and that they have engaged in fraud, are true and therefore the defence of justification applies.<sup>47</sup>

### **(a) *Libel and Slander Act*, ss.5(1) and 6**

[145] In her defence to the Caplan Action, Atas pleads that the notice provisions under s.5(1), and the time provisions of s.6 of the *LSA* apply in these circumstances. I do not accept that argument.

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<sup>46</sup> *Libel and Slander Act*, R.S.O. 1990, c L. 12, ss. 5(1).

<sup>47</sup> Atas has pleaded other defences such as fair comment and qualified privilege. I do not address these defences separately since there is no evidence before the court in support of these defences.

[146] Section 5(1) of the *LSA* requires notice of any action for libel in a “newspaper” or in a “broadcast” to be delivered within 6 weeks:

No action for libel in a newspaper or in a broadcast lies unless the plaintiff has, within six weeks after the alleged libel has come to the plaintiff’s knowledge, given to the defendant notice in writing, specifying the matter complained of, which shall be served in the same manner as a statement of claim or by delivering it to a grown-up person at the chief office of the defendant.<sup>48</sup>

[147] Section 1(1) of the *LSA* defines “broadcasting” and “newspaper”:

“broadcasting” means the dissemination of writing, signs, signals, pictures and sounds of all kinds, intended to be received by the public either directly or through the medium of relay stations, by means of,

(a) any form of wireless radio electric communication utilizing Hertzian waves, including radiotelegraph and radiotelephone, or

(b) cables, wires, fibre-optic linkages or laser beams,

“newspaper” means a paper containing public news, intelligence, or occurrences, or remarks or observations thereon, or containing only, or principally, advertisements, printed for distribution to the public and published periodically, or in parts or numbers, at least twelve times a year.<sup>49</sup>

[148] In addition, s.7 of the *LSA* geographically limits its application to Ontario:

Subsection 5(1) and section 6 apply only to newspapers printed and published in Ontario and to broadcasts from a station in Ontario.

[149] For the notice requirement of section 5(1) to apply to this case, the online postings would need to meet the definition of “broadcast” under the *LSA*. Social media websites are not “newspapers.”

[150] The *LSA* contains a technical and exhaustive definition of “broadcast,” which, when passed in 1958, was intended to cover publications on radio and television. The Supreme Court of Canada in *Reference re Broadcasting Act*,<sup>50</sup> found that an internet communication was not necessarily a “broadcast,” and refused to include internet service providers within the statutory definition of “broadcasting” in the federal *Broadcasting Act*.

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<sup>48</sup> *Libel and Slander Act*, R.S.O. 1990, c L. 12, ss. 5(1).

<sup>49</sup> *Libel and Slander Act*, R.S.O. 1990, c L. 12, ss. 1(1).

<sup>50</sup> *Reference re Broadcasting Act*, 2012 SCC 4, paras 3-7.



[151] The Courts have repeatedly held that, due to the technical language of “broadcast,” expert evidence is required for the Court to determine whether any technology, including the internet, meets the definition of “broadcast.”<sup>51</sup>

[152] This approach was confirmed recently by the Divisional Court, in *Nanda v McEwan*, where the issue involved the application of the *LSA* to defamatory postings on the social media application ‘Whatsapp’. Having reviewed the case law on this issue, Justice Ricchetti stated:

These authorities make it clear that there must be clear, ample evidence for the court to make the determination whether the distributed statement(s) at issue in the particular case constituted a "broadcast" under the Act.<sup>52</sup>

[153] In *St. Lewis v. Rancourt*, the trial court held that the limitation period under section 5 of the *LSA* only applied only to newspapers printed and published in Ontario and to broadcasts from a station in Ontario and did not apply to defamatory blogs posted on the internet. On appeal the Court of Appeal held:

The appellant submits that, pursuant to s. 5(1) of the *Libel and Slander Act*..., the respondent was required to serve a notice of libel within six weeks of acquiring knowledge of the impugned blog posts. The first notice of libel was served more than three months after the first impugned blog post was published. The limitation period, however, applies “only to newspapers printed and published in Ontario and to broadcasts from a station in Ontario”: *Act*, s. 7. The burden of proof was with the appellant to establish that the blog posts fell within this definition under the *Act*. He called no evidence to establish that they did. The respondent was prepared to call expert evidence to address this issue, but, as the appellant did not lead any evidence, the respondent did not do so.<sup>53</sup>

[154] There is no evidence from Atas, let alone expert evidence, that the impugned publications constitute “broadcasts” under the *LSA* or that the online publications were broadcasts from a “station in Ontario.” Atas has failed to satisfy this onus.<sup>54</sup>

[155] There are other common-sense reasons why the Atas case demonstrates that the notice and limitation period provisions of the *LSA* do not and should not apply here. First, it is impractical and unfair to require a victim to deliver a fresh written notice for each and every one of thousands of malicious postings that this cyber stalker has posted with the click of a mouse.

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<sup>51</sup> *Nanda v. McEwan*, 2019 ONSC 125, at paras. 71 to 88 (Div. Ct.); *Romano v. D’Onofrio*, 2005 CarswellOnt 6725 (C.A.), at paras. 7 – 9; *Bahlieda v. Santa*, 2003 CarswellOnt 4012 (C.A.), at para. 6; *Shtائف v. Toronto Life Publishing Co.*, 2013 ONCA 405, at paras. 25 – 26; *St. Lewis v. Rancourt*, 2015 ONCA 513, at para. 8; *Kim v. Dongpo*, 2013 ONSC 442 (S.C.J.), at para. 25; *Warman v. Fromm*, 2007 CarswellOnt 9648 (S.C.J.), at paras. 76 – 92; and *Warman v. Grosvenor*, 2008 CarswellOnt 6629 (S.C.J.), at paras. 44 & 45.

<sup>52</sup> *Nanda v. McEwan*, *supra*, at para. 77

<sup>53</sup> *St. Lewis v. Rancourt*, 2015 ONCA 513, at para. 8

<sup>54</sup> See also *Levant v. Day*, 2019 ONCA 244 (<http://canlii.ca/t/hzd3v>, retrieved on 2019-10-10), which involved an appeal from a decision where the court below had concluded that the *LSA* did not apply to Twitter posts.

[156] Second, the public policy of the notice and the time period requirements of the *LSA* have no application to a cyber stalker such as Atas. Atas had no intention of correcting, retracting or apologizing for her defamatory postings. Her intention is to maliciously harm and vex her victims online, not to report or comment fairly and faithfully on them.

[157] Third, other than for some of the 2016 posts, Atas denies that she is the author of the online content. It would seem counterintuitive to provide statutory notice to a cyber stalker who denies that she is the perpetrator.

[158] Fourth, the short timeline to provide notice is inconsistent with the anonymity and pseudonymity available on the internet. Some “newspapers” publish on the internet, but not all internet publishers are “newspapers”.

[159] I am satisfied that this defence is not available to Atas.

### **(b) Defence of Justification**

[160] The Statement of Defence in the Dale & Lessman Action, Atas pleads justification: Atas admits to publishing the impugned words but pleads that they are true.

[161] In *Magno v. Balita Media Inc.*,<sup>55</sup> the court stated that justification is a complete defence which requires the defendant to prove the truth of all the defamatory statements. However, there can be no defence of justification if the pleading is completely devoid of particulars. Failure to plead particulars results in no evidence of truth being admitted and the defence fails. Here, Atas pleaded no particulars, filed no responding evidence on the motions for summary judgment, and hence her defence of justification/truth must fail.

[162] During oral argument, Atas argued that the issue on the motion for summary judgment in the Dale & Lessman Action is whether the statements are true, since she has pleaded that the statements are true. Atas has been told by this court, many times, during the case management process that she bears the burden of proving, on evidence, that the statements are true, and that it is not for the plaintiffs to prove the statements are false. In this context, Atas’ argument to the contrary at the motion is vexatious: arguing on the basis of a flawed legal analysis that has been explained to her many times.

### **(d) Harassment**

[163] The prevalence of online harassment is shocking. In Canada, as of October 2016, about 31% of social media users were harassed.<sup>56</sup> Studies<sup>57</sup> on the effects of cyber harassment show the potentially devastating impact of these attacks:

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<sup>55</sup> 2018 ONSC 3230, at paras. 41-44

<sup>56</sup> 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>.

<sup>57</sup> *Ibid.*

Online harassment has a unique effect on those who have been subjected to it, both in regard to their mental health and in regard to violations of their legal rights. Research suggests that online harassment effects are like the effect of harassment that occurs physically or verbally. For example, harassment, regardless of whether performed in person or online, can make victims “develop a variety of psychological, as well as somatic, symptoms”.

However, online harassment differs from other forms of harassment because it is an unstoppable intrusion. Perpetrators of online harassment do not allow their victims to escape their harmful action by entering their home or private domain. The victim cannot escape the harassment in the haven that is his or her own home. Moreover, the perpetrator can perform the harassment from anywhere remotely.

A 2014 study found that forty percent of victims of online abuse suffered damage to their self-esteem. Additionally, thirty percent of these victims reported a fear for their lives. This abuse can have such intense ramifications that twenty percent of these victims reported that they were even afraid to leave their home. Furthermore, victims of online harassment like cyberbullying face a high risk of depression, anxiety, and may increase the risk of the victim harming himself or herself. Most distressingly, cyberbullying victims were about twice as likely to have attempted suicide than those who have not been harassed in this manner. However, the victims of online harassment are not the only ones to suffer negative mental health effects from the behavior. The harassers themselves suffer from a variety of negative mental health effects. Cyberbullying offenders are more likely to have attempted suicide than non-performers. In conclusion, online harassment is an epidemic.

[164] The Statements of Claim in the Caplan Action and Babcock Action (issued March 29, 2018, and November 17, 2018, respectively) plead harassment as a cause of action. At the time of the issue of each, the Ontario Superior Court of Justice, in *Merrifield*, appeared to have recognized a common law tort of harassment in the employment law context.<sup>58</sup> On appeal, the Court of Appeal overturned the trial decision.<sup>59</sup> The Court of Appeal’s decision not to recognize the new tort was based on two critical conclusions. First, the Court concluded that the tort of intentional infliction of mental suffering was a sufficient remedy in the circumstances of *Merrifield*. Second, the court held that: “(w)e 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.”<sup>60</sup>

[165] In the end, the Court of Appeal “[did] not foreclose the development of a properly conceived tort of harassment that might apply in appropriate contexts, we conclude

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<sup>58</sup> *Merrifield v. Canada (Attorney General)*, 2017 ONSC 1333.

<sup>59</sup> *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205.

<sup>60</sup> *Ibid*, at para. 40

that Merrifield has presented no compelling reason to recognize a new tort of harassment in this case.”

[166] Except for the US, no other common law court has recognized the common law tort of harassment. Ontario does not have a comprehensive statute akin to the English, Manitoba and Nova Scotia legislation. There have been some developments, including recognition of the tort of intrusion upon seclusion.<sup>61</sup>

[167] In *Doe*, Justice Stinson stated as follows:

In recent years, technology has enabled predators and bullies to victimize others by releasing their nude photos or intimate videos without consent. We now understand the devastating harm that can result from these acts, ranging from suicides by teenage victims to career-ending consequences when established persons are victimized. Society has been scrambling to catch up to this problem and the law is beginning to respond to protect victims.

Each year, criminal courts in Canada deal with an increasing number of these cases. Unlike past decades, many child pornography cases now involve same-aged peers who share nude photos or sex videos with each other. Adults also suffer great harm from these acts. In 2014, Parliament responded by amending the Criminal Code to include a new offence of “publication of an intimate image without consent”: Criminal Code, R.S.C., 1985, c. C-46, as amended, s. 161.1. Under this new provision, anyone who publishes an intimate image of a person without that person’s consent is guilty of an offence and can be sentenced to up to five years in prison.

In November 2015, the Province of Manitoba enacted legislation to create the tort of “non-consensual distribution of intimate images”: see The Intimate Image Protection Act, C.C.S.M. c. I87, s. 11, which came into force on January 15, 2016. No other legislature has so far passed similar legislation. This case, therefore, raises legal questions about the availability of a common law remedy for victims of this conduct, and the legal basis upon which such claims might be founded. Counsel for the plaintiff informed the court that she had been unable to locate any reported decision in Canada concerning a victim seeking civil damages on these or similar facts and my research has not revealed one. This case is possibly the first.

For the reasons that follow, I have concluded that there are both established and developing legal grounds that support the proposition that the courts can and should provide civil recourse for individuals who suffer harm arising from this misconduct and should intervene to prevent its repetition.<sup>62</sup>

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<sup>61</sup> See, for example, Stinson J.’s decision in *Doe 464533 v N.D.*, 2016 ONSC 541.

<sup>62</sup> *Doe 464533 v N.D.*, 2016 ONSC 541, paras. 16-19.

[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, harrÿ 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*.<sup>63</sup> 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 caught by the first two branches of the test. It is not part of the test that the conduct be persistent and repetitive.

[170] I do not have evidence that the plaintiffs have suffered visible and provable illnesses as a result of Atas' conduct. One would hope that a defendant's harassment could be brought to an end before it brought about such consequences. To coin a phrase from Sharpe J.A., quoted by the Court of Appeal in *Merrifield*, "[T]he law of this province would be sadly deficient if we were required to send [the plaintiff] away without a legal remedy." The law would be similarly deficient if it did not provide an efficient remedy until the consequences of this wrongful conduct caused visible and provable illness.

[171] The plaintiffs propose, drawn from American case law<sup>64</sup> the following test for the tort of harassment in internet communications: 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.

[172] The facts of these cases clearly meet this stringent test.

[173] I am mindful that *Merrifield* is a recent case and strongly cautions against quick and dramatic development of the common law (para. 20). Often courts are not in the best position to address complex new legal problems (para. 21). As my brief review of legal developments in this area shows, this is a developing area of the law, legislatures have tried to fashion responses, and the issue has been under active recent consideration by the Law Commission of Ontario. It would be better if changes in this area of the law came from the legislature rather than a trial judge.

[174] However, the facts of the case before me are very different from the facts in *Merrifield*. They are much closer to the situation in which the Court of Appeal recognized the tort of intrusion on seclusion, *Jones v. Tsige*, in which Sharpe J.A. stated: "we are presented in this case with facts

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<sup>63</sup> *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 OR (3d) 474 (Ont. CA).

<sup>64</sup> See Marnie Shiels, 'Civil Causes of Action for Stalking Victims', Victim Advocate, Fall 2000, found at [www.victimsofcrime.org](http://www.victimsofcrime.org).

that cry out for a remedy”.<sup>65</sup> As I said at the outset, the law’s response to Atas’ conduct has not been sufficient, and traditional remedies available in defamation law are not sufficient to address all aspects of Atas’ conduct. Harassment, as a concept, is recognized in the criminal law.<sup>66</sup> It is well understood in the context of family law. In the Judgment I considered making a non-harassment order and rejected it because it had not been requested by the applicants.<sup>67</sup> The concept of “harassment” as wrongful conduct is known to the law and is a social ill. The concern, of course, on the other side of the question, is that people are not always on their best behaviour, and not all, or perhaps even most, conduct intended to annoy another person should be of concern to the law. It is only the most serious and persistent of harassing conduct that rises to a level where the law should respond to it.

[175] The facts of these cases fit within that description.

**(e) Invasion of Privacy**

[176] In my view these cases do not fit within the tort of invasion of privacy or “intrusion upon seclusion”. Atas has not invaded the plaintiffs’ private affairs or concerns (the second branch of the test).<sup>68</sup> She has persistently published false statements about a broad range of people to cause harm to her primary victims.

[177] Counsel for the plaintiffs pointed out the Atas did use images of some plaintiffs that she copied from the internet. I do not see this as a violation of the privacy of the plaintiffs: these pictures were placed on the internet: Atas did not invade their private affairs by copying or even using those photos. It was the repeated use of the photos, together with the false statements she made about plaintiffs that was the essence of her wrongful conduct. Use of the photos made the conduct worse, but the essence of the conduct was the harassment and defamation.

[178] I conclude that plaintiffs have not made out claims for invasion of privacy.

**(f) Limitations Issues**

[179] Atas argued that many of the claims in the Defamation Proceedings are barred by the *Limitations Act*. This defence cannot succeed.

[180] Atas has adduced no evidence respecting the limitation defences. In argument, she relied on dates on which publications are said to have been uploaded to the internet. Under the law of limitations, this information, which can be seen in the plaintiffs’ evidence, may establish a date of original posting, but does not assist in establishing the “date of discoverability” for the purposes of a limitations period.

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<sup>65</sup> *Jones v. Tsige*, 2012 ONCA 32.

<sup>66</sup> *Criminal Code of Canada*, RSC 1985, c. C-46, as am., s.264,

<sup>67</sup> *Peoples Trust v. Atas*, 2018 ONSC 58, paras. 326-330.

<sup>68</sup> *Jones v. Tsige*, 2012 ONCA 32, para. 71.

[181] Third, the publications are continuing. Atas has refused to facilitate removal of these postings and has taken steps to delay or prevent removal of these publications from the sites that still display them. There is no evidence that any of the impugned publications were removed from the internet before the Defamation Proceedings were commenced. On the record before me, the publication is ongoing, and the statements continue to be actionable.

**(g) Other Issues**

[182] Ms Atas raises numerous other issues. These may all be dealt with briefly because either (a) these issues have been decided already or (b) Atas failed to pursue these issues properly in the manner directed by the court.

**(i) The Right to Remain Silent**

[183] Atas took the position that the Defamation Proceedings should be stayed until the contempt proceedings are tried. She argued that either her defence of the Defamation Proceedings would be prejudiced by her exercise of her right to silence in the contempt proceedings, or her right to silence would be infringed by the requirement in the Defamation Proceedings that she “put her best foot forward” on the motions for summary judgment.

[184] This issue was raised by Atas on May 31, 2019 during a case management conference. This court recognized that the issue raised by Atas had sufficient merit to warrant a motion, and the court set terms by which Atas could move for a stay or other relief in the alternative. Atas failed to bring the motion in accordance with the court’s case management directions, or at all. By the return date of the motions for summary judgment in November 2019, Atas had still not brought this motion. When argument was not completed as scheduled, and argument was adjourned to be completed eventually on December 11, 2019, Atas had still not brought a motion for a stay on this basis.

[185] While this court is aware of the ongoing contempt proceedings, it has no evidence before it of the state of those proceedings, the prejudice that could be caused to Atas’ defence of those proceedings if she is required to defend the Defamation Proceedings, the practical effect of Atas’ defence of the Defamation Proceedings on her right to remain silent in the Contempt Proceedings, or the extent to which any prejudice to her right to remain silent could be ameliorated by a protective order in the Defamation Proceedings. This court has no record on which it could review the extraordinary delays in the Contempt Proceedings and the extent to which Atas has used the delay in those legal proceedings to continue to publish defamatory and harassing publications on the internet. In short, this court has no record upon which it can adjudicate a motion for a stay – a motion that was never brought in any event, despite the court giving directions so that the motion could be brought.

[186] In all the circumstances, whatever merit there may have been to Atas’ request for a stay or other relief to protect her right to silence, she is foreclosed from raising that issue on these motions because of her failure to bring the required motion.

**(ii) Allegations of Reasonable Apprehension of Bias**

[187] Atas has repeatedly raised an allegation that this court has shown a reasonable apprehension of bias against her during case management, in the s.140 Proceedings, in connection with the underlying proceedings, and in respect to the Defamation Proceedings. This issue was litigated in connection with the s.140 Application and was rejected in the Judgment (Judgment, paras. 229-284). The Judgment was affirmed on appeal and as a result the bias issue has been disposed of up to the time of judgment in the s.140 Application (January 2018).

[188] Atas requested to bring a stand-alone motion that this court recuse itself from further involvement in matters respecting Ms Atas. This court rejected that request but advised Atas that she could make a request for such relief in connection with any substantive step taken in these proceedings, and specifically, she was directed to raise the issue by way of a *Chavali* request or at a case conference. She did not do that. Ms Atas did not file responding materials on the motion, in which she could have filed evidence in respect to the allegation of reasonable apprehension of bias.

[189] There is no factual basis placed before the court upon which a reasonable apprehension of bias is shown. Having failed to adduce any evidence to support her allegations, this objection must fail.

[190] I note also that Atas has raised this allegation in respect to numerous judges before whom she has appeared, and numerous times in respect to me. She is well aware that she is required to adduce a record in support of such an allegation.

### **(iii) Case Management and Summary Judgment Motions**

[191] Ms Atas made the same argument in the s.140 Application: that this court could not case manage her litigation and preside on the s.140 application on the merits. This court decided that issue against Ms Atas in the Judgment (at paras. 234-249). That reasoning applies with equal force to this objection to my hearing these motions.

[192] Further, a motion for summary judgment can be “akin to a trial”<sup>69</sup> but it is not always so. How closely it resembles a trial depends on the circumstances of the case. Here, Atas has filed no evidence and she has conducted no cross examinations. No findings of credibility are required because of competing versions of the facts from the plaintiffs and the defendant. It is not the case that just because a case management judge has developed a familiarity with the case and the parties that s/he should not hear questions that go to the merits of the case.<sup>70</sup> It all depends on the circumstances, bearing in mind that the court must be and be seen to be an independent and impartial tribunal.

[193] The plaintiffs asked me to seize myself of these proceedings to trial, and in respect to the motions for summary judgment, several times during the case management process. I declined to do that, making it clear that I would decide whether I would hear the Defamation Proceedings on the merits based on all the circumstances at the time. It was not until Atas failed to file any

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<sup>69</sup> *Royal Bank of Canada v. Hussain*, 2016 ONCA 637, per Simmons J.A.

<sup>70</sup> *Trade Capital Corp v. Cook*, 2017 ONSC 3606, per Emery J.



evidence on the motions that I directed that I would hear the motions, an exercise of discretion based on principles of judicial economy and the absence of any impediment to my hearing the motions.

**(iv) Non-Compliance With Pleadings Rules**

[194] Ms Atas argued that the Statement of Claim in Babcock does not comply with the rules of pleadings, specifically R.25.06(1). This objection reflects Atas' approach to litigation generally: she rejects a linear process in order to narrow issues and then decide issues on the merits. The time to object to the form of the statement of claim was during the case management process. The issue would then have been dealt with in case management, either by a case management order or by scheduling a pleadings motion.

[195] In fact, Atas did prepare a statement of defence and counterclaim in the Babcock Action and apparently served it. She did not file it. She was directed to file it repeatedly and given several deadlines to do so. Still she would not file her pleading. She was told, finally, that if she did not file her pleading as directed, she would be noted in default. Not only did she not file a pleading, but she failed to attend a case management conference at which she had been ordered to appear and advised the court in writing that she would not participate further in case management of her proceedings.

[196] Atas objected that the defects in the statement of claim are obvious on their face: the plaintiffs plead and attach a great deal of evidence to their claim in violation of the principles that parties are to plead the facts concisely, and not the evidence. Atas argued that, as she is self-represented, the court had an obligation to identify this issue for her and to do something about it.

[197] Atas never raised a concern with the court that she was unable to plead a defence in the Babcock Action, and as noted above, apparently she did so. It was for her to raise issues with the pleading and she did not do so. Once she had been noted in default in the Babcock Action, she was not entitled to move to strike the statement of claim before obtaining an order setting aside the noting in default.

**(v) Setting Aside the Noting in Default**

[198] The court provided Atas with a process by which she could have sought to move to set aside the noting in default. She did not follow this process. She did not provide any evidence to satisfy the test to set aside an order noting her in default.

[199] At the motion she asked the court to set aside the noting in default. She did not bring a motion or put any evidence before the court in support of this request.

[200] For all of these reasons her request to set aside the noting in default was denied.

**(vi) Plaintiffs Adduced Further Evidence After Order Precluding Atas From Adducing Evidence**

[201] Atas argued that the plaintiffs were permitted from filing “additional and unfettered evidence” after the court ordered on October 23, 2019 that Atas could not file evidence, having failed to do so within court-imposed deadlines.

[202] Atas argued that she was “prejudiced” because of evidence filed by the plaintiffs after October 23, 2019.

[203] The additional evidence filed was to update the court on further alleged publications by Atas since the respondents’ evidence had been filed. There was nothing “unfettered” about the court permitting this evidence to be adduced.

[204] Atas delayed the interlocutory injunction motion in the Caplan Action for months on the basis that she wanted to file evidence. She never did. She said she would file evidence on the summary judgment motions, and then never did. By the time of the motions she was taking the position that she would not and could not file evidence because it would breach her right to silence. She did not ask to file responding evidence to the latest evidence filed by the plaintiffs, and could not have made such a request while also refusing to file any materials at all in order to maintain her right to silence. In all of these circumstances, there is no evidence that the late filed evidence caused Atas any prejudice.

**(vii) Plaintiff in Stancer Action is Dissolved**

[205] In oral argument, Atas advised that the plaintiff in the Stancer action, Stancer Gossin Rose LLP, has been dissolved. Therefore, she argued, there is no longer a plaintiff before the court with the capacity to maintain legal proceedings.

[206] I do not accept this argument. There is no evidence before the court that Stancer Gossin Rose LLP has been dissolved. Atas was given an opportunity to file evidence on the motion for summary judgment in the Stancer Action, and she chose not to do so. She cannot put evidence before the court during oral argument. Further, even during oral argument she did not tender any evidence to establish that her allegation, that the plaintiff had been dissolved, was, in fact, true.

**(viii) Request to Adduce Fresh Evidence**

[207] On Friday January 3, 2020, I committed Atas to jail for 74 days for contempt of court. Atas sought bail pending appeal from the Court of Appeal pending her appeal of this contempt decision. This motion was denied by Macpherson J.A. In the result, Atas was in jail for 74 days starting on January 3, 2020.

[208] Shortly after the suspension of ordinary court operations as a result of COVID-19, in mid-March 2020, the court received an email from Atas requesting a case management conference. My endorsement of March 27, 2020 addresses this request as follows:

[4] By email sent March 25, 2020, Ms Atas requested as follows:

... since the Courts are sort of ongoing, I would like to bring a short and simple motion (prefer it to be in writing) to open the motions heard by Justice

Corbett that began November 15, 2019. An ex-parte affidavit would be difficult due to the lock down which seems to be getting more stringent everyday. The following are just some of the issues I would like to include in my motion in writing:

- (a) A plethora of internet postings about the plaintiffs appeared on the internet dated January 3, 2020 - March 15, 2020 and certainly not by me.
- (b) Also, I spoke personally with Peter Racco. I was connected by his office to his cell phone while he was on his honeymoon. Peter Racco is named in Schedule " B " in the motions. Although Schedules " A " and " B " in the motions contain names of people who are dead and/or not plaintiffs to the claims, which I have already included in my submissions in Court, Peter Racco confirmed to me that he was unaware that court orders were sought in his name and that he has never heard of Gary Caplan or the law firm Mason Caplan Roti LLP and has never been contacted nor has he authorized Gary Caplan or anyone from the law firm Mason Caplan Roti LLP to seek orders on his behalf.
- (c) John David Coon is also named in Schedule " B " in the motions. He is a lawyer who was out of the country after being wanted for more than 5 years and arrested August 3, 2019 via an international flight to Vancouver. I believe he is still in custody. The Court can infer that neither Gary Caplan nor the law firm Mason Caplan Roti LLP have ever had any contact with John David Coon for the purposes of the motions began November 15, 2019.

[5] First, the courts are not “sort of ongoing”. The courts have suspended operations as a result of COVID-19, and only urgent matters are being heard, by direction of the Chief Justice.

[6] Second, the points raised by Ms Atas are not a “short and simple motion”. They appear to be a request to re-open evidence on four motions for judgment in which Ms Atas failed to file any responding evidence whatsoever. The motions did not “begin” on November 15, 2019; they began when the moving parties delivered motions materials, roughly two years ago. Final argument “began” on November 15, 2019, and was completed in December 2019. There is a stringent legal test for re-opening evidence after argument of a motion, while decision is under reserve. That motion would be neither “short” nor “simple”.

[7] Third, my direction was that, if Ms Atas has concerns or issues, she may schedule a case management conference through my assistant. I will not authorize her to bring a motion without first conducting a case management conference. If Ms Atas wishes the court to schedule a case management conference, I directed that she “describe, in detail, her proposed agenda for the case management conference”. In her email, Ms Atas states, “[t]he following are just some of the

issues I would like to include in my motion....” That will not suffice: if Ms Atas wishes the court to hold a case management conference, she must describe “all” the matters she wishes to raise, not just “some” of them.

[8] The request for permission to bring a motion is denied, without prejudice to such a request being made through the case management process, as previously directed.

[9] The court will consider any request made for a case management conference during the current suspension of court operations, but will not schedule the hearing of a case management conference during the suspension unless the court is satisfied that there is urgency for the conference, within the meaning of the directions given by the Chief Justice.

[209] Atas wrote again to the court on this topic purporting to bring a motion to reopen the motions for summary judgment, without notice to the other parties. The court’s endorsement dated April 9, 2020, states as follows (2020 ONSC 2201):

[1] Atas has written yet again. Now she sends the court a “notice of *ex parte* motion” and affidavit, asking to re-open the four motions under reserve.

[2] I previously declined to schedule Atas’ proposed motion without a case management conference. She then asked for a case management conference, but failed to provide a draft agenda specifying all the matters she wishes to address at the conference. Now she seems to ask the court to address her concerns on the merits without notice to or involvement of the other parties.

[3] Atas is a very experienced self-represented litigant. She is capable of understanding the court’s clear directions. If she wishes to make a *Chavali* request to be given permission to seek leave, in a motion, to bring the proposed motion, directions as to how to do that are set out in the Judgment of January 2018 and in innumerable endorsements since. I decline to repeat those instructions. If Atas wishes to have a case management conference convened, then she will comply with the directions given to her previously on this topic.

[4] The *ex parte* motion is dismissed – it is not a motion that should be brought without notice to the other side. This dismissal is without prejudice to any proper *Chavali* request Atas may make, or any proper request for a case management conference Atas may make, and is without prejudice to the underlying merits of the motion she seeks to bring.

[5] As of April 6, 2020, the court is able to schedule non-urgent matters. However, the court’s capacity to do business is limited during the COVID-19 suspension of ordinary court operations. If Atas ever does make

a proper request in respect to the issues she now raises, she should not expect that a case management conference will be scheduled prior to the resumption of normal court operations.

[210] Atas did eventually make a request for a case management conference in accordance with the directions provided by this court. That request was denied, and she was advised that the reasons for that denial would be set out in this decision: 2020 ONSC 3471, para. 13.

[211] I denied Atas' request for a case conference on the issue of adducing fresh evidence for the following reasons. Only one of her requests had any theoretical prospect of meeting the test to reopen evidence after the conclusion of argument. Atas' argument that dead people and persons who are not parties or have not authorized that remedies be sought in their names is not material to the proceeding. The plaintiffs made it clear in argument that they have included, as "protected parties" in their draft orders, everyone they have been able to identify as having been targeted by Atas. Ms Atas made her arguments about the propriety of such a remedy, and further information about who is encompassed in this category of persons will not affect the disposition of this case. Further, it was clear that all of this information was available at the time of the hearing. Ms Atas did not learn about it until later because she did not inquire about it until after the hearing. Parties must exercise due diligence to place their entire case before the court by the end of the hearing.

[212] The one issue raised by Atas that could have qualified as a basis to reopen the evidence concerned internet posts made while she was in jail. She said that she wished to place before the court evidence that defamatory postings continued during the 74-day period that she was incarcerated. This evidence, presumably, would also have established that Atas did not have access to the internet to post to the internet while she was in jail. Obviously, this information did not arise until after the hearing, and so was not available at the time of the hearing.

[213] I did not schedule a case conference on this issue because, nonetheless, this proposed fresh evidence could not have met the test for fresh evidence. First, I have found that Atas arranged to have another person upload posts to the internet at her direction. Second, it would be very easy for Atas to ask someone to use her account to upload posts while she was in jail, and such conduct would be entirely in keeping with her past behaviour. Third, Atas did not purport to have any other evidence related to these posts: just evidence that there were such posts and she was in jail at the time: she would place the burden on the plaintiffs to once again gather evidence on meta-data to prove her authorship. Fourth, Atas failed to put her best foot, or even a toe, forward on the motions for summary judgment, not even basic evidence denying her authorship of the impugned posts. For her to put in the fresh evidence, for it to have any force, she would have had to respond to all of the allegations, something she had failed to do when given the chance to do so.

#### **(h) Remedies**

[214] In their factum, the moving parties acknowledged that Atas is indigent and sought the following relief:

- (a) an order in the nature of mandamus compelling Atas to remove any and all of the offending hyperlinks, postings, tweets, photographs, depictions and materials

published in her own name, or any nickname, pseudonym, or alias, that she now uses, has used, with respect to the persons set out in Schedule ‘A’ to this Factum from any website. In support of the relief sought, the moving parties submit that the courts have ordered removed existing defamatory statements from the Internet.

- (b) An order in the nature of mandamus requiring that Atas issue a public retraction and apology to plaintiffs and other victims of her defamation and harassment, to be published online under the supervision of the Court at her own expense, within 30 days of the Order of the Court.
- (c) 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 of her defamation and harassment, together with their families and related persons, and business associates.
- (d) An order that upon the want of compliance by the defendant with the relief sought in the Judgment and Orders sought, that the right, title, interest and ownership of the defendant in the Offending Statements, postings, internet and email accounts as listed in Schedule ‘B’ to this Factum be and the same be transferred, without recourse, to such *amicus curiae*, independent supervising solicitor or expert so appointed by the Court in order to perform the removal of the Offending Statements and postings listed in Schedule ‘A’ to this Factum.

**(i) Atas’ Objections to the Requested Remedies**

[215] Atas raised the following arguments respecting the requested remedies:

- [1] Atas should not be compelled to apologize for her conduct: such a remedy is unduly coercive and would infringe her freedom of speech and freedom of conscience.
- [2] Plaintiffs’ draft orders include remedies for the benefit of persons who are not parties to the Defamation Proceedings. Remedies must be limited to those persons who have sued Atas.
- [3] Draft judgments contain terms that were not sought in the statements of claim and so are not available to the plaintiffs.
- [4] The court ought to refer conduct of counsel for the plaintiffs to the Law Society of Ontario “for failing to treat the court with candour”.
- [5] Various other arguments, none of which requires extensive reasons to address.

**(a) Permanent Injunctions**

[216] In *Astley v. Verdun*, 2011 ONSC 3651, Chapnik J. stated as follows:

Permanent injunctions have consistently been ordered after findings of defamation 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....<sup>71</sup>

[217] Atas did not address this issue in her written or oral arguments.

[218] The record establishes that Atas has continued to publish, and to cause to be published, defamatory and harassing publications on the internet after having been ordered not to do so. She has not adduced evidence to defend the Defamation Proceedings and has a long history of procedural misconduct in litigation: given the chance she will seek to re-open these proceedings and to continue with them indefinitely while continuing her wrongful conduct. As a result of Atas' bankruptcy and the resulting withdrawal of the plaintiffs' monetary claims in these proceedings, even as to costs, it is certain that plaintiffs will not receive any monetary compensation. This is a case where a permanent injunction should be ordered.

[219] The interlocutory injunction granted in the Caplan Action cast a wider net than the injunction sought by the plaintiffs. It simply banned Atas from posting anything at all on the internet, with a few minor exceptions to enable her to post items for sale. I would have given serious consideration to a permanent order of this nature, but with some misgivings: it would be akin to ordering someone to never use the telephone again.

[220] For someone who has done what Atas has done, I would not foreclose a complete prohibition. However, that is not what the plaintiffs have sought. An order shall issue in the terms requested by the plaintiffs for a permanent injunction. The "other victims" of Atas' conduct, as that phrase is used in the plaintiffs' requested remedy, must be listed in the formal order so that there is no ambiguity. The "families and related persons, and business associates" also protected by the order need not be listed: it is intended to foreclose Atas from carrying out a campaign against someone for the purpose of causing harm to the persons protected by the order and is a precise as it can be to achieve its purpose.

**(b) Apologies**

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<sup>71</sup> *Astley v. Verdun*, 2011 ONSC 3651, para. 21, citing *Hunter Dickinson Inc. v. Butler*, 2010 BCSC 939 (CanLII) at paras.75-79; *Griffin v. Sullivan*, 2008 BCSC 827 (CanLII) at paras. 119-127; *Newman v. Halstead*, 2006 BCSC 65 (CanLII) at paras. 297-301; *Cragg v. Stephens*, 2010 BCSC 1177 (CanLII) at paras. 34-35, 40. *Astley* was cited with approval in *Labine v. Webster*, 2019 ONSC 4023 (CanLII), (per Firestone J).

[221] The law in this area is developing and I acknowledge that some courts have ordered retractions and apologies as remedies for defamation.<sup>72</sup> I see a place for such orders, in some cases, but I see no utility in an apology here.

[222] First, Atas is not a public person whose word carries with it credibility or weight.

[223] Second, Atas did not publish the impugned words under her own name. She published them anonymously or pseudonymously, on internet sites understood not to exercise editorial control over published contents.

[224] Third, flooding the internet with apologies from the various identities used by Atas, to apologize for the thousands of posts made against dozens of people, would have the effect of drawing further attention to the impugned words and cause further damage.

[225] Fourth, it is generally understood that the plaintiffs' vindication comes from this court's judgment. This is not a case where an unqualified retraction from an established media source would further add to the credibility of the court's findings.

[226] Fifth, unlike some "apology" cases, the plaintiffs do not ask that the apology be published in reputable media sources. For example, in the *Ottawa-Carlton School Board* case, the defendants were ordered as follows:

An order in the nature of mandamus requiring the defendants to issue a public apology to the plaintiffs such apology to be published at the defendants' expense in the *Ottawa Sun* and the *Ottawa Citizen* within 60 days of the date of this judgment.<sup>73</sup>

This order responded to the very specific statements made by the defendants alleging serious misconduct by the plaintiffs, including violations of a fictitious court order.

[227] Atas also argued that a forced apology could, in effect, compel her to abandon her right to silence in the contempt proceedings, and could be used against her in those proceedings. The plaintiffs counter on the basis that the apology would be governed by and protected by the *Apology Act*.<sup>74</sup> In view of my conclusion that it would not be appropriate to order an apology in this case, I need not answer these questions.

### **(c) Order to Remove Impugned Content**

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<sup>72</sup> See Peter A. Downard, *The Law of Libel in Canada*, 4<sup>th</sup> ed. (Toronto: LexisNexis, 2018), paras. 15.1 – 15.27; David A. Potts, *Cyberlibel: Information Warfare in the 21<sup>st</sup> Century* (Toronto: Irwin Law, 2011), pp. 213-215; Brent T. White, "Say you're sorry: Court-Ordered Apologies as a Civil Right Remedy" (2006) Cornell L.R. 1261; *Ottawa-Carlton District School Board v. Scharf*, [2007] O.J. No. 3030.

<sup>73</sup> *Ottawa-Carlton District School Board v. Scharf*, [2007] O.J. No. 3030, para. 30(d).

<sup>74</sup> *Apology Act*, S.O. 2009, c.3.



[228] I accept that the court can order a defendant to remove offensive content on the internet.<sup>75</sup> Such an order will certainly not be effective in this case. First, Atas has shown already that she will not follow court orders. Second, as reflected in the record, Atas has posted to sites that have policies of not removing content simply on request. Third, it is not reasonable to suppose that Atas will even remember all the places and ways in which she has posted content wrongfully on the internet. Fourth, the proposed order requires Atas to undertake removal of content “at her own expense”. Atas is currently destitute and will use that circumstance to excuse her compliance with any steps that would cost a materials amount to pursue. Fifth, any remedy that by its nature will require ongoing involvement between plaintiffs and Atas will almost inevitably lead to conflict and further litigation. As explained in the Judgment, Atas seeks out conflict with her opponents, and seeks to extend and complicate that conflict. The court itself has an interest in seeing the overall conflict brought to an end. The alternative order proposed by the plaintiffs: vesting title to the postings in them, with ancillary orders enabling them to take steps to have the content removed, will be more effective for them.

#### (d) Scope of Orders

[229] Atas’ objection to the breadth of the proposed orders underlines one of the reasons this court concludes that a common law tort of harassment should be recognized. Atas’ goal has been to inflict harm and misery on her primary targets: persons such as Wallis and Caplan, who have been prime adversaries against her in the Underlying Litigation and the s.140 Application. When Atas was enjoined from publishing further defamatory comments about Wallis, she started to publish defamatory comments about members of Wallis’ family, including Wallis’ children. The purpose of this conduct may be inferred from all the circumstances: Atas had no grudge with the Wallis children: she had never met them or had anything to do with them. She attacked them in order to do harm to Wallis.

[230] An order that is limited in its scope to persons who have been harmed already would not prevent Atas from shifting her focus to a new set of victims associated with her primary victims. The cycle could be endless.

[231] Second, defamation litigation has been called the “sport of kings” for a reason. It is notoriously complex and expensive relative to the financial interests usually at stake. The instant story of vexatious litigation is eloquent testimony to what can befall a hapless victim of a person such as Atas: overall litigation has been underway for more than 15 years, and the litigation involving Peoples Trust and its professionals (including Wallis) is now more than ten years old. It is not over yet. Many victims of a person such as Atas – after seeking advice from counsel of what may be entailed in going to law over these issues – may well decide to let it go and hope that the harassment stops or that the perpetrator will shift her focus to others.

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<sup>75</sup> See, *Ottawa Carleton*, *supra*, at para. 30, and *Warman v. Fournier*, 2014 ONSC 412 (CanLII), But see also, *Rodrigues v Rodrigues*, 2013 ABQB 718 (CanLII), where the court, relying on *Brown on Defamation*, 2<sup>nd</sup> ed. Vol. 6, loose-leaf 2001 Release (Toronto Carswell, 1994) at p 26-55 and 26-56, refused to compel an apology and retraction from a party which was not a newspaper or broadcaster. *Quaere*: whether Atas is a ‘broadcaster’.

[232] Third, a person in the position of the primary victims – while feeling outraged and angry by Atas’ conduct, would also feel terrible that their entanglement with a person like Atas has brought harm to their friends and families. I see no reason why primary victims should not be able to take the lead in bringing this conduct to an end and then to ask the court to extend protective orders to all who have been besmirched by the perpetrator’s campaign of harassment, and a wider circle of potential victims against whom Atas might turn her sights in future.

[233] This third point also provides a basis for a remedial distinction among those who have sued and those who have not. I am not sanguine that other remedies (such as damages) would be available for the benefit of non-parties. Injunctive relief that protects the parties from harassment by conduct aimed at their friends, families and associates, seems a fair and measured response.

[234] The overall history makes it clear that Atas must be ordered to leave the plaintiffs alone, and that the order must be framed broadly to ensure that she does not do indirectly that which she has been restrained from doing directly.

**(e) Remedies Sought Not Claimed in the Statements of Claim**

[235] Atas argues that various remedies sought by the plaintiffs (such as an apology, production by her of her passwords and account information to enable plaintiffs to take steps to remove Atas’ publications from the internet) are not claimed in the statements of claim.

[236] I see no merit to this argument. In each statement of claim, the plaintiffs have claimed “such further and other relief” as the court considers just. The orders sought by the plaintiffs are properly ancillary to their main claims for damages (claims which were only abandoned after Atas made her assignment in bankruptcy). Atas argues in her factums that “[h]er pleadings and steps in the action would certainly have been different with different Prayer[s] for Relief.” There is no evidence to support this assertion and Atas was unable to provide the court with any reason why she would have defended the actions differently if (for example) an apology had been claimed in the statement of claim.

**(f) Orders Should Not Be Enforceable By or in Respect to Non-parties**

**(i) Enforcement by a Non-Party**

[237] Not all persons defamed and harassed by Atas are plaintiffs in one of the Defamation Action. The plaintiffs ask this court to order that classes of persons who are not plaintiffs receive the benefits of the orders granted in these cases and be entitled to enforce them.

[238] Atas argues that the law does not permit non-parties to enforce orders.

[239] In my view, for the reasons expressed above, the court is entitled to order Atas to desist from defaming and harassing non-parties where that conduct is part of a campaign of harassment directed against parties to these cases.

[240] On first principles, Ms Wallis will be entitled to enforce this order, even if subsequent harassing conduct is directed, not against her, but against another person for the purpose of harassing Ms Wallis.

[241] Another example illustrates why this approach to enforcement is both necessary and effective. Initially, back in the 1990's, Atas harassed Mr Babcock but sending him vile communications about his deceased wife. Mr Babcock's deceased wife cannot maintain an action in defamation, and she cannot be harassed, because she is dead. However, Mr Babcock himself can be harassed by vile words published about his deceased wife and should be able to enforce an order against Atas prohibiting her from such conduct.

[242] I do not find it necessary to decide, now, whether a non-party victim of Atas' conduct should be able to enforce this court's orders. I decline to order prospectively that they can. That question can be addressed if and when that issue ever arises.

**(ii) Precluding Conduct Against A Non-party**

[243] It follows from the discussion above that I see no impediment to prohibiting Atas from engaging in harassment and defamation of non-parties where that conduct is also harassment of a party to one of these actions. In my view that is one of the reasons it is necessary for the court to recognize the tort of harassment: to protect the plaintiffs from a broad range of wrongful conduct that includes harming others to cause damage to a plaintiff.

[244] Atas argued that this principle cannot apply to a person who is dead. I do not agree. As noted above, harassing a living person by waging a malicious campaign against a dead relative can be a form of harassment which the law can restrain in an appropriate case, such as the cases at bar.

**(g) Conduct of Plaintiffs' Counsel**

[245] Atas complains that counsel was aware of the decision in *Oesterlund* and should have brought it to the court's attention on the issue of whether these motions ought to have been heard before the contempt proceedings. Atas argues that this failure should lead the court to report counsel to the Law Society.

[246] There is no merit to this argument. The question of whether these motions ought to have awaited the contempt proceedings was raised by Atas but never litigated by her. If those issues had been litigated, then and only then would the plaintiffs have been called upon to argue the issue on the merits. The plaintiffs were never called upon to argue this issue. Counsel was not required to advance the issue on Ms Atas' behalf.

**(h) Orders and Costs**

[247] Counsel shall revise the draft orders to reflect this decision. The court shall schedule a ZOOM call to settle the form of the orders after receiving revised drafts from counsel. Because of the lengthy schedules, the draft orders were very long (each in a bound volume). Counsel need not transmit copies of the schedules again.

[248] Judgment for the plaintiffs in accordance with these reasons. As stated at the outset, the plaintiffs do not seek costs and none are ordered.

**(i) *Chavali* Permission to Appeal this Judgment**

[249] Pursuant to the Judgment and s.140 of the *Courts of Justice act*, Atas needs permission obtained from a Superior Court Justice to bring an appeal from this Judgment. She must obtain this permission before she commences an appeal.

[250] I remain the case management judge for any litigation in Ontario involving Atas. In that capacity, I direct Ms Atas that any request for permission to bring an appeal shall be decided by a judge designated by Regional Senior Justice Firestone. If Ms Atas seeks such permission, she shall do so by directing her request to Firestone R.S.J. with a request that he assign a Justice to decide the question.

[251] As a result of COVID-19, this decision is effective from the time an unsigned copy is sent to the parties by email; a signed version shall be provided to the parties in due course.

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D.L. Corbett J.

**Released:** January 28, 2021

**CITATION:** Caplan v. Atas, 2021 ONSC  
**COURT FILE NOS.:** CV-10-400035, CV-16-544153, CV-18-594948, CV-18-608448  
**DATE:** 20210128

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**D.L. Corbett J.**

**BETWEEN:**

Dr Joseph Caplan et al.

Plaintiffs

**- and -**

Nadire Atas

Defendant

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**JUDGMENT**

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**D.L. Corbett J.**

**Released:** January 28, 2021