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— Franks & Zalev - This Week in Family Law

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Weaponizing the Internet: The (New) Tort of Internet Harassment

Caplan v. Atas, 2021 CarswellOnt 1107 (S.C.J.) - Corbett J.

Caplan is not a family law case per se, but anyone that practises in the area should know about it . . . just in case.

The defendant, Atas, had engaged in over a decade of unrelenting online harassment through websites, emails, tweets, etc. The plaintiffs, including former employers, counsel that acted both for and against Atas over many years, reporters, etc., were the objects of Atas' harassment. In many of these cases, the harassment also extended to the plaintiffs' family members and associates.

The published allegations on the internet were particularly heinous. Atas targeted her victims through thousands of anonymous posts making claims of fraud and unethical conduct, prostitution, sexually deviant behaviour, and pedophilia. She posted on websites that do not control content, and she often included photos of the targeted individuals. As noted by Justice Corbett, "[s]erious mental illness must underlie [Atas'] conduct."

Justice Corbett found that Atas had "engaged in a vile campaign of cyber-stalking against the plaintiffs . . . the goal of which has been retribution for long standing grievances." Unfortunately, the law of defamation was ill-equipped to address the transgressions as Atas was impecunious, and the conduct in issue was not meant to defame; it was intended to cause fear, anxiety and misery *through* repeated publications of defamatory material online. Atas also proved to be resistant to change through orders for contempt. The tort of intentional inflection of mental suffering was also an insufficient answer given the requirement that the defendant suffer with a visible and provable illness - and, again, because Atas was judgment proof. The tort of inclusion upon seclusion also did not fit the situation as Atas did not actually invade anyone's privacy.

Therefore, relying on American case law, Justice Corbett created a new civil tort: the tort of internet harassment. In doing so, his Honour made it clear that this new tort was not meant to address "run-of-the-mill" harassment or conduct just meant to annoy; it would only apply to the most serious and persistent of harassing conduct that "rises to a level where the law should respond to it." It is meant to address conduct far beyond mere "character assassination." It is to address repeated conduct that is specifically meant to "cause fear, anxiety and misery."

In this case, Atas' conduct was so over-the-top, continuing, long-lasting, and outrageous, that the New York Times published an article about it (it's a great read and details the sleuthing efforts undertaken by counsel to identify Atas): https://www.nytimes.com/2021/01/30/technology/change-my-google-results.html.

A review of that article (or the decision) shows the basis for the test for this new tort:

- 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.

Because ordinary remedies would not suffice against an impecunious defendant, Justice Corbett also designed some tort-specific remedies, essentially designed to remove Atas' ability to weaponize the internet:

- He permanently enjoined Atas from communicating with any of the plaintiffs.
- He permanently enjoined Atas from disseminating, publishing, communicating or posting on the internet by any means with respect to the plaintiffs together with their families, related persons, and business associates.
- He vested title of the offensive postings to a court-appointed independent third party in order to take the necessary steps to have them removed.

As noted above, this is not a family case. But anyone that has been practising in the area for any length of time will surely want to know about this case while, at the same time, hoping they need never use it.

Sharing (actually not sharing) Post-Separation Increases in Income

Stoodley v. Stoodley, 2021 CarswellNfld 11 (C.A.) - Welsh, White, and Hoegg JJ.A.

In *Stoodley*, the Newfoundland and Labrador Court of Appeal joins the chorus of appellate authority cautioning that former spouses are ***not*** automatically entitled to share in post-separation increases in income. [See also: *Chalifoux v. Chalifoux*, 2008 CarswellAlta 211 (C.A.); *Jabora-Scott v. Scott*, 2011 CarswellNB 33 (C.A.); *Brooks v. Brooks*, 2014 CarswellNB 198 (C.A.); *Walker v. Maxwell* (2015), 64 R.F.L. (7th) 32 (B.C. C.A.); *Reid v. Gillingham* (2015), 60 R.F.L. (7th) 294 (N.B. C.A.); *Black v. Black*, 2015 CarswellNB 449 (C.A.); *Hersey v. Hersey* (2016), 87 R.F.L. (7th) 272 (Ont. C.A.); *Kohan v. Kohan* (2016), 77 R.F.L. (7th) 44 (Alta. C.A.); *Choquette v. Choquette* (2019), 25 R.F.L. (8th) 150 (Ont. C.A.); *Dungey v. Dungey* (2020), 48 R.F.L. (8th) 255 (Sask. C.A.).]

The issue was also well-summarized by Justice Chappel in *Thompson v. Thompson*, 2013 CarswellOnt 12392 (S.C.J.).

In *Stoodley* the Court of Appeal seems to go further than previous cases in limiting access to post-separation increases in income. Most previous cases speak of either (a) the need for a basis or "link" back to the marriage (usually grounded in compensatory principles) to allow for sharing in post-separation increases in income; or (b) emphasize the fact that the recipient spouse is only entitled to the marital standard of living. But *Stoodley* ties these two concepts together: there must be a link to the marriage, and the post-separation increase in income should only be looked at as a means to enable the recipient spouse to afford the standard of living enjoyed during the marriage. Cases that suggest a recipient spouse is entitled to an increase in the standard of living such as would have occurred in the normal course of cohabitation seem to be fading into history: *Marinangeli v. Marinangeli* (2003), 38 R.F.L. (5th) 307 (Ont. C.A.); *Elliot v. Elliot* (1993), 48 R.F.L. (3d) 237 (Ont. C.A.); *MacDougall v. MacDougall* (1973), 11 R.F.L. 266 (Ont. S.C.); *Linton v. Linton* (1990), 30 R.F.L. (3d) 1 (Ont. C.A.); *Martin v. Martin* (2006), 40 R.F.L. (6th) 32 (Ont. C.A.).

Keith and Dianne Stoodley, both now in their mid-to-late 50's, were married in 1992 and separated in 2014 (a 22-year marriage). Early in the marriage, the parties agreed that Dianne would leave her employment as an art therapist to stay home to care for the children (one was their biological child, and the other was Dianne's child from a previous marriage).

Keith's income generally trended upward during the marriage: from 2009 to 2014, his income ranged from $290,816 to $376,195 and averaged in the range of $340,000 before taxes. After separation, however, Keith moved to the UAE, whereupon his income between 2015 and 2019 ranged from $497,715 to $946,500 (an average of $790,144) - ***net***.

At trial in 2019, Keith was ordered to pay spousal support of $42,594 a month, retroactive to 2014 (such that $1 million in retroactive support was owing), with a built-in reduction provision:

> The spousal support shall reduce to $35,047 per month once the terms of the Property Order are satisfied and the Order for retroactive support is paid to [Dianne]. Spousal support shall be paid until [Keith] attains age 65 following which it shall be reviewed. An application to vary may be brought before he attains 65.

The reason for the reduction provision was that with support of $42,594 a month, Dianne would have net disposable income of $23,275, which would cover her monthly budget of $15,900 and allow for monthly savings of $7,374 to prepare for Keith's retirement. However, upon receiving the $1 million of retroactive spousal support, she would be better able to meet her own needs. And Keith's investment income would reduce accordingly.

Keith appealed the amount of support, taking no issue with entitlement or duration. (There were some other minor issues on appeal as well - but do we really want to know about travel points?)

The Court of Appeal started as any support matter should, with a consideration of the factors and objectives of spousal support in s. 15.2 of the *Divorce Act*.

Right from the start, the Court of Appeal stated the following proposition:

> [15] In a situation where the payor spouse's income increases substantially after the spouses have separated, the increase may, but not necessarily would, be relevant depending on the circumstances. In this case, **the relevance of [Keith's] significant increase in income would relate to assessing his ability to pay support to enable [Dianne] to maintain a lifestyle comparable to what she enjoyed during the marriage. On marriage breakdown it is desirable, to the extent possible, to allow the parties to maintain the lifestyle they enjoyed prior to the separation.**
>
> . . . . .
>
> [Keith's] significant increase in income after the separation engages, as a factor to be considered, spousal support that would be **sufficient to enable [Dianne] to maintain a lifestyle comparable to what she enjoyed during the marriage.** [emphasis added]

So that pretty much telegraphs the ending. Clearly Justice Welsh would not make a good murder mystery author.

In the court below, the trial judge had considered both the *Spousal Support Advisory Guidelines* ("*SSAG*") and the Revised User's Guide. The Court of Appeal approved of the use of the *SSAG*, but properly noted that the resulting ranges for support were meant to be but one factor in determining the appropriate amount of support: *Drover v. Drover*, 2020 CarswellNfld 56 (C.A.) at paras. 48 and 49. The Court of Appeal further correctly noted that, at incomes above $350,000 a year, cases require specific and individualized analysis, evidence, and argument. Hopefully, no one is still suggesting that in "over-$350,000 cases", the *SSAG* no longer apply. That is an over-statement that makes Professor Thompson's hair fall out. Rather, in such cases, the *SSAG formulas* are not as applicable or dependable as they are in below-$350,000 cases.

Finally, the Court of Appeal noted that the *SSAG* specifically refer to post-separation increases in income. Where an increase in the payor's income may be relevant to the amount of spousal support ordered, the case law generally supports the need for a link between the marriage and the increase in income. The task here was to provide Dianne with support that would enable her to maintain a lifestyle comparable to what she enjoyed during the marriage. (Curiously, the Court of Appeal said the task was to provide her with "compensatory support" that would enable her to maintain her lifestyle - but there are non-compensatory considerations here as well, of course.)

Again, from 2009 to 2014 (pre-separation), Keith's income ranged from $290,816 to $376,195, with an average of $338,356. This is where the trial judge started. Her calculations using the *SSAG*, based on an annual income of $290,816, resulted in a range of $8,724 to $11,633 for monthly spousal support. The trial judge then considered that Keith's average post-separation annual income between 2015 and 2019 was $790,144. Relying on that amount, while recognizing that the *SSAG* formulas have limited application for an income over $350,000, the trial judge awarded monthly spousal support of $42,594. The reduced monthly support payment of $35,047 was based on an income of $687,959.

This was a problem. In applying the *SSAG* to determine the amount of spousal support, the trial judge erred in considering *only* Keith's post-separation income. Keith's income had more than doubled after separation. While his post-separation income was a *relevant consideration* for the purpose of determining the amount of support sufficient for Dianne to maintain the lifestyle she enjoyed *during the marriage*, the mere fact that she was entitled to compensatory spousal support did *not* necessarily lead to the conclusion that spousal support should be based exclusively on Keith's post-separation income. This is an important statement as it clarifies that a compensatory claim - even a *strong* compensatory claim - does not *automatically* lead to an award of support based on post-separation increases in income.

Dianne was clearly entitled to compensatory spousal support based on her significant contributions to the home and children and Keith's career, and foregoing her own career and potential financial independence. However, as stated by the Court of Appeal (at paragraph 22):

> . . . While this factor supported a measure of compensatory spousal support to [Dianne], there is no evidence of special circumstances that would entitle her to an enhanced level of support beyond her entitlement to maintenance of the lifestyle she enjoyed during the marriage.

Given the clear compensatory entitlement here, query what such "special circumstances" might be? It was a 22-year marriage. There were two children. It was agreed that Dianne would give up her employment to stay home with the children. But this appears to be a clear message that an "ordinary" compensatory support claim will not be sufficient.

The Court of Appeal then went on to consider other factors relevant to determining an appropriate amount of spousal support, again, with a focus on ordering support sufficient to permit Dianne to maintain *the lifestyle she enjoyed prior to the separation*. Keith's increase in income after the separation is a relevant consideration to the extent that it puts him in the position of being able to augment the support he is able to provide to Dianne.

The trial judge calculated that, to maintain the standard of living Dianne had enjoyed during the marriage, she would need about $16,000 a month, and she had the ability to generate about $1,000 a month in income from her own assets.

Part of that $16,000 a month budget included $3,000 a month for travel, and the Court of Appeal spilled a fair amount of ink scrutinizing this expense. The trial judge found that Dianne's accustomed lifestyle included numerous "high-end" trips each year to exotic destinations, including first class travel and expensive purchases while away. And the trial judge accepted that Dianne's travel had been made possible for two reasons: (i) the accumulation of travel points through Keith's employment, and (ii) Keith's decision to prioritize travel over debt reduction.

However, the Court of Appeal noted Dianne's evidence was actually that most of the travel referenced by the trial judge occurred between 1995 and 2005 when Keith had to travel extensively for work. Furthermore, upon their separation, Dianne received half of the available travel points. Therefore, the evidence did not support an annual amount of $36,000 for travel. Other than joining Keith on his employment-related trips by accessing his accumulated travel points, Dianne did not travel extensively.

The trial judge had also included a substantial sum in the support award to allow Dianne to save:

> [205] On $42,594 . . . [Dianne] will have [net disposable income] of $23,275 (after taxes of $19,319). This will cover her monthly expenses of $15,900 and permit savings of $7,374 that will prepare her for [Keith's] retirement.

The trial judge theorized that both parties had to make plans for Keith's eventual retirement, and that the support order had to be sufficient to allow both parties the opportunity to set aside savings for this purpose.

The Court of Appeal noted the trial judge had provided no explanation for the specific amount of $7,374 per month for savings, and the Appeal Court suggested that the same goal could have been accomplished with a support award of indefinite duration which would then encompass post-retirement support. Of course, support would likely be varied upon Keith's retirement. This is contrary to the decision of the Ontario Court of Appeal in *Martin v. Martin* (2006), 40 R.F.L. (6th) 32 (Ont. C.A.), where a component for future savings was allowed.

The Court of Appeal noted that Dianne did not give evidence as to her ability to save on a lesser amount of support - but that could presumably have been inferred from Dianne's budget. Ultimately, the Court confirmed that, "[i]n the ordinary course, a recipient spouse would be expected to set aside savings for future needs to the extent possible. The flexibility that would permit prudent use of funds by the recipient spouse would be increased where the quantum of monthly support is significant, as in this case." Therefore the message on this issue of savings is a bit muddled. There is certainly nothing wrong with savings being a component of support, especially in high-end cases, and it is important that the assumed savings component be clearly set out for the future variation applications or reviews.

Having set out these considerations, the Court of Appeal then considered the appropriate level of projected expenses on which a support order should have been based. Total expenses of $16,000 per month (net) would equate to approximately $28,000 gross. This would not be realistic based on Keith's average monthly income during the last four years of marriage. Based on an average income in that period of $338,356, Keith would have had a monthly income of about $28,200, and a net monthly support payment of $15,000 would have consumed all of Keith's after-tax income at the time of separation.

In the meantime, Keith had proposed to pay support of $24,000 a month. The Court of Appeal commented:

> [38] . . . While that amount was significantly more than could have been expected based on his income at the time of separation, because the family chose to spend [Keith's] income as it was earned, [Dianne] enjoyed a lifestyle that was more luxurious than would otherwise have been expected. [Keith] is in a financial position which allows for a higher rate of support to permit [Dianne] to maintain a lifestyle similar to what she enjoyed during the marriage.

That is, had the family saved more and spent less, a lower support amount would have been justified, and Dianne would have participated in the saving through property division.

The Court agreed that amount would provide Dianne with an income that would accommodate her housing, transportation, daily living and personal care expenses at an appropriate level, with a generous allowance for clothing, travel, gifts and other items. That is, it would provide sufficient funds to permit Dianne *to maintain a lifestyle similar to what she enjoyed prior to the separation*, and would also allow for savings.

Finally, after undergoing this analysis, the Court said:

> [40] The result in this case demonstrates how, while an order for spousal support will be determined based on established legal principles, the application of those principles requires a very fact-specific analysis. *Given the unusual circumstances, the quantum of spousal support would not have precedential value*. [emphasis added]

Huh?

We're not entirely sure what "unusual circumstances" the Court of Appeal is referencing here. And no single case about spousal support has real precedential value as to the amount of spousal support, which is about as fact-specific a determination as there is. But we hope the Court of Appeal is not saying that its analysis does not lend itself to future cases.

As a result, by determining the amount of spousal support based on Keith's post-separation increase in income, the trial judge had erred in awarding monthly spousal support of $42,594 (to reduce to $35,047 after the property and retroactive support

orders were satisfied). Instead, the Court of Appeal ordered that Keith pay spousal support in the amount of $24,000 a month, commencing October 1, 2014, until age 65, following which support would be reviewed (with ordinary right to vary on a material change).

In summary, Keith owed retroactive support payments totalling about $390,000.

Although not the subject of significant comment, the Court of Appeal also determined that the trial judge had erred in valuing the RRSPs to be divided as of the date of judgment rather than as of the date of separation.

The trial judge rationalized that because Keith's employer had contributed $25,000 to Keith's RRSP as part of his income, there had to be an adjustment to the value of the RRSP for division. (The value of the parties' RRSPs had fluctuated considerably since the date of separation.) Therefore, the trial judge determined it would be most efficient to simply require Keith to roll to Dianne 48.37 percent of the value of the RRSPs at the time of judgment.

However, this was contrary to the decision in *Martin v. Martin* (1998), 42 R.F.L. (4th) 251 (Nfld. C.A.), wherein the Court discussed the difficulties inherent in determining the date for valuing RRSPs for purposes of division as an asset:

> [40] . . . Every effort should be made to make the division of property on marriage breakdown consistent with easily determined and simply stated principles. A consistent approach of valuation of RRSPs at the time of rollover would seem to me to be the clearer, simple way to achieve consistency of approach and therefore encourage settlement of issues by the parties themselves and avoid the complication of dealing with claims for constructive trusts in actions for division of matrimonial property. For this reason, as a general rule the content of the RRSPs should be determined at the date of separation but valued at the date of rollover or transfer. . . .

Here, there was no reason to depart from the general rule that RRSPs should be valued as of the date of rollover or transfer.

Virtual Cross-Examination Etiquette; Rule 1: Don't Lie

Kaushal v. Vasudeva et al., 2021 CarswellOnt 769 (S.C.J.) - Gilmore J.

This is not a family case, but the rules of virtual examinations apply to all cases. And *Kaushal* offers an important lesson - and severe consequences for the unscrupulous.

Kaushal was a case where the Applicant was seeking a fairly standard barrage of corporate relief. When time came for cross-examinations, they were set to proceed virtually over Zoom.

At the start of the cross-examination, as is good practise, the Applicant's lawyer asked the Applicant to confirm who was in the room with him. The Respondent's lawyer confirmed, on the record, that the only parties present were himself, the Respondent, and a Punjabi interpreter.

The cross-examination proceeded.

When the examination concluded, the Applicant realized that the Respondent's camera and microphone had not been "muted", whereupon the Applicant heard the Respondent's wife and son speaking (to the interpreter) about what happened during the cross-examination. The Applicant recorded the voices on his cell phone.

The exchange caught on tape included the following:

> a. The interpreter said, "When he's asked a question you confused him. You should have prepared him properly about what your answers were going to be."
>
> b. The son said, "We got the papers out last night at 10:00 pm."
>
> c. The interpreter said, "When you are sitting there doing 'this' it was hard for him."

d. The Respondent's wife said: "No, no, he still answered well and gave excellent answers."

From this exchange, the Applicant was convinced that the wife and son had listened in on the examination - a not unreasonable assumption.

The Respondent's lawyer insisted that no one was present in the room, and he put forward Affidavits from his legal assistant and the Respondent swearing that no one else was in the room. However, this was met with an Affidavit from the interpreter, who swore that the Respondent's wife and son were, in fact, in the room when the Respondent was being examined, and were furthermore prompting the Respondent's answers with hand and facial gestures throughout the examination. Uh-oh.

The Applicant moved to strike the Respondent's Affidavit for the main application as an abuse of the court's process and for engaging in misconduct during the cross-examination.

Rule 34.15 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides for sanctions where there has been misconduct during an examination. Those sanctions include striking out all or a portion of a person's evidence, including any Affidavit made by that person. Rule 38.12 permits the Court to strike a document on the ground that the document is an abuse of the process of the Court. And, of course, the Court has inherent jurisdiction to control its own process and to ensure there is no misuse of its procedure: *Behn v. Moulton Contracting Ltd.*, 2013 CarswellBC 1158 (S.C.C.).

According to Justice Gilmore:

> [60] The integrity of the fact-finding process must be maintained. This includes the fact-finding process on virtual cross-examinations. This mischief could only have happened on a virtual examination. In a face-to-face examination, examining counsel has control over who is and is not present at the examination.

Justice Gilmore found that the Respondent's misconduct amounted to an abuse of process, and she ordered that the Respondent's Affidavit be struck. She felt the Court had to send a "strong message" that interference in the fact-finding process this way - in any way - will not be tolerated. She found that this type of misconduct struck at the very heart of the integrity of the fact-finding process and that general deterrence was a factor. The Court had to send the clearest of messages to litigants and counsel involved in virtual examinations. A level of trust must exist since examining counsel is not in the room and the party being examined is often alone. When examining counsel asks if there is anyone else in the room, they must be able to have confidence that the answer they are given is correct.

While Justice Gilmore noted that this remedy might be perceived as harsh, it did not entirely preclude the Respondent from participating in the defence of his case. He would still be permitted, for example, to file evidence from third parties (other than from his wife or son) or experts' reports.

Finally, when it became clear that the Respondent's lawyer had every intention of continuing to represent the Respondent in the hearing of the main application in this matter, Justice Gilmore commented on the impropriety of his continued representation. However, while Her Honour stated that it would be "inappropriate" for the Respondent's counsel to continue, she did not order him off the record. We do not really understand why.

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