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New Invasion of Privacy Tort Recognized in Ontario

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Rapidly developing technology in the digital age is causing equally rapid evolution in the law. In 2012 the Ontario Court of Appeal recognized for the first time an invasion of privacy tort called "intrusion upon seclusion" in the case of *Jones v. Tsige*. The Court described the key features of this cause of action as follows:

a) the defendant's conduct must be intentional (including reckless);
b) the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns, and;
c) a reasonable person would regard the invasion as highly offensive causing distress, humiliation, or anguish.

However the Court was careful to define the tort narrowly, for fear of overreaching and creating an "unmanageable legal proposition that would […] breed confusion and uncertainty."

An Ontario judge has recently gone a step further by recognizing for the first time another invasion of privacy tort called "public disclosure of private facts." The case of *Jane Doe 464533 v. N.D.* involved a young woman who provided a sexually explicit video of herself to a former boyfriend. He in turn showed it to his friends and posted it online where it was viewable by the public. The video was taken down after three weeks but could have been downloaded by anyone during that time.

In 2014 Parliament passed the *Protecting Canadians from Online Crime Act*, which made "non-consensual distribution of intimate images" a crime. However courts had yet to fully grapple with this issue as it relates to civil liability.

In *Jane Doe 464533* Justice Stinson drew heavily on the reasoning of the Court of Appeal in *Jones v. Tsige*. Because the Court of Appeal had based its reasoning in part on a seminal 1960 article called "Privacy" by William L. Prosser, Justice Stinson did the same. In the article Prosser set out four potential torts related to invasions of privacy. One of the torts was "intrusion upon seclusion", the elements of which were adopted by the Court of Appeal in *Jones v. Tsige*. Another was "public disclosure of embarrassing private facts," which Justice Stinson similarly endorsed.

Justice Stinson defined the new tort as follows:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of the other's privacy if the matter publicized, or the act of the publication:
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> a) would be highly offensive to a reasonable person, and;
> b) is not of legitimate concern to the public.

In *Jones v. Tsige*, the Court of Appeal awarded the plaintiff relatively modest damages of $10,000. However in *Jane Doe 464533* Justice Stinson compared the nature of the violation to that which occurs in cases of sexual assault, and awarded a substantially higher amount. The plaintiff was granted $50,000 in damages, plus $25,000 in aggravated damages and a further $25,000 in punitive damages, for a total of $100,000.

The tort of "public disclosure of private facts" goes a long way towards bringing the civil law in line with the updated criminal law. However it is important to note that the defendant did not participate in the *Jane Doe 464533* case; the award was a default judgment. Had the defense appeared and argued the case fully, the cause of action, or the damages awarded, may have been quite different.

Whether the new cause of action is applied narrowly to cases with similar facts in the future, or is used in other contexts, remains to be seen. For example, could a celebrity sue a tabloid for publishing pictures of them in a bathing suit, arguing that such pictures are "not of legitimate concern to the public"? It remains to be seen, but for the time being this precedent will be available for anyone seeking (potentially significant) compensation for a similar invasion of privacy.

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