EMERGING TORTS TO DEAL WITH CYBERBULLYING BY "REVENGE PORN"

By V.A. (Bud) MacDonald, Q.C., Rosalia Nastasi and Bottom Line Research

The law is grappling with how to respond to cyberbullying on the internet commonly referred to as "revenge porn" – where intimate images are shared electronically without the consent of the person photographed, often resulting in public humiliation and shaming. Sometimes these actions result in charges of criminal harassment, or child pornography when young people are involved. There is also now a federal law *Protecting Canadians from Online Crime Act*, S.C. 2014, c. 31, which created an offence in the *Criminal Code* for those who publish or distribute an intimate image of a person without that person's consent.

In the civil context, some provincial legislatures have also created statues that protect privacy, such as in British Columbia, Manitoba, Saskatchewan and Newfoundland, where their respective *Privacy Act(s)* create a tort of the violation of privacy.

It appears that in Alberta there is no legislation that addresses cyber-bullying as between private individuals. The main forms of privacy legislation in Alberta are FOIP (*Freedom of Information and Protection of Privacy Act*) which address public bodies, and PIPA (*Personal Information Protection Act*), which addresses private businesses, non-profit organizations or professional regulatory organizations in Alberta.

The literature in this area indicates that Canadian law has been hesitant to acknowledge a common law right to privacy, whereas it is an accepted part of the law in countries like the United States. However, the literature also notes that the issue has often been left open, especially in the lower courts. However, in recent years two cases from Ontario have recognized torts which protect a right to privacy. In the seminal case of ***Jones v. Tsige***, 2012 ONCA 32, 287 O.A.C. 56 a tort for invasion of privacy on the basis of "intrusion upon seclusion" was recognized by the Ontario Court of Appeal where a bank worker spied on her husband's

new girlfriend's banking records. In the decision the Court recognized the importance of protecting privacy in our changing technological world and felt it was time to recognize such a tort in Canadian common law.

This decision was expanded upon recently by the Ontario Superior Court of Justice in recognizing another branch of the tort of invasion of privacy, this time for "public disclosure of embarrassing private facts", in ***Jane Doe 464533 v. N.D.***, 2016 ONSC 541, 128 O.R. (3d) 352. This case involved an ex-boyfriend who shared an intimate video of his former girlfriend online and to his friends. The elements of this tort are made out if publicity is given to a matter concerning the private life of another, and if the matter publicized or the act of the publication (a) would be highly offensive to a reasonable person; and (b) is not of legitimate concern to the public. The case also found liability against the defendant based on breach of confidence and intentional infliction of mental distress.

In ***Jones v. Tsige***, 2012 ONCA 32, 287 O.A.C. 56, the Ontario Court of Appeal recognized the existence of the tort of intrusion upon seclusion in the common law. In the action, the plaintiff Ms. Jones sued the defendant Ms. Tsige for invasion of her privacy in relation to her banking information. Ms. Tsige was an employee with the Bank of Montreal and was in a relationship with Mr. Jones, Ms. Jones's former husband. Ms. Jones did all of her personal banking with the Bank of Montreal. The evidence was that over a four-year period, Ms. Tsige accessed and reviewed Ms. Jones's personal banking records on her computer screen at work 174 times. Ms. Tsige was eventually caught and disciplined by her employer the bank. In her statement of claim, Ms. Jones asserted that her privacy interest in her confidential banking information had been irreversibly destroyed, and claimed damages for $70,000 for invasion of privacy. The court below had allowed Ms. Tsige's motion for summary judgment, finding there was no freestanding right to privacy at common law. The court below held that the existence of privacy legislation that protected certain privacy rights meant that any expansion of those rights should be dealt with by statute rather than the common law. Both of these findings were overturned on appeal.

The Court noted that privacy has been protected in the past through causes of action such as breach of confidence, defamation, nuisance and property rights, but there has been a debate about whether a cause of action in tort for invasion of privacy should exist, at para. 15:

> **The question of whether the common law should recognize a cause of action in tort for invasion of privacy has been debated for the past one hundred and twenty years. Aspects of privacy have long been protected by causes of action such as breach of confidence, defamation, breach of copyright, nuisance, and various property rights.** Although the individual's privacy interest is a fundamental value underlying such claims, the recognition of a distinct right of action for breach of privacy remains uncertain. As Adams J. stated in Ontario (Attorney General) v. Dieleman (1994), 117 D.L.R. (4th) 449 (Ont. Gen. Div.) at p. 688, after a comprehensive review of the case law, **"invasion of privacy in Canadian common law continues to be an inceptive, if not ephemeral, legal concept, primarily operating to extend the margins of existing tort doctrine**." [Emphasis added]

The Court of Appeal referred to an article by Prosser [William L. Prosser, “Privacy” (1960), 48 Cal. L.R. 383] which had surveyed American jurisprudence and found four different torts related to privacy, which have now been adopted in the *Restatement (Second) of Torts (2010),* at paras. 18-19:

> Professor Prosser's article picked up the threads of the American jurisprudence that had developed in the seventy years following the influential Warren and Brandeis article [S.D. Warren & L.D. Brandeis, “The Right to Privacy” (1890), 4 Harv. L. Rev. 193]. **Prosser argued that what had emerged from the hundreds of cases he canvassed was not one tort, but four, tied together by a common theme and name, but comprising different elements and protecting different interests.** Prosser delineated a four-tort catalogue, summarized as follows, at p. 389:
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> 1. **Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.**
> 2. **Public disclosure of embarrassing private facts about the plaintiff.**
> 3. **Publicity which places the plaintiff in a false light in the public eye.**
> 4. **Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.**

> Most American jurisdictions now accept Prosser's classification and it has also been adopted by the Restatement (Second) of Torts (2010). … [Emphasis added]

In this case, the most relevant tort was "intrusion upon seclusion", as Ms. Tsige had intruded on Ms. Jones's private affairs, but had not done anything publicly with that information.

The Court then canvassed case law from Ontario and other provinces and also considered federal and provincial legislation relating to privacy, before deciding whether the common law should recognize a cause of action for invasion of privacy.

The Court noted some cases had come close to accepting such a tort or had refused to strike claims which raised the tort as a cause of action. It also noted that Charter jurisprudence has identified privacy as being worthy of constitutional protection, especially in terms of s. 8's protection against unreasonable search and seizure, which protects bodily and territorial privacy, at paras. 39 and 41. There has also been recognition of informational privacy – which includes the claim of an individual to control when, how and to what extent information about themselves is communicated to others, at para. 41.

The Court also reviewed statutes that have been created to address privacy, including statutes that protect personal information and documents and health information. It rejected the argument that because such legislation exists, privacy is in the realm of the legislature and courts should refuse to recognize torts relating to privacy, at para. 49:

> **I am not persuaded that the existing legislation provides a sound basis for this court to refuse to recognize the emerging tort of intrusion upon seclusion and deny Jones a remedy. In my view, it would take a strained interpretation to infer from these statutes a legislative intent to supplant or halt the development of the common law in this area**: see Robyn Bell, "Tort of Invasion of Privacy - Has its Time Finally Come?" in Archibald and Cochrane (eds.), Annual Review of Civil Litigation (Toronto: Thompson Carswell, 2005) at p. 225. [Emphasis added]

The Court also reviewed the status of privacy in the law in the United States and in Commonwealth Jurisdictions.

Ultimately, the Court found it "appropriate" to confirm the existence of a right of action for intrusion upon seclusion. It held that recognition of this tort was an incremental step that was consistent with the role of the court to develop the common law "in a manner consistent with the changing needs of society", at para. 65. The Court's rationale is explained at paras. 66 to 69, reflecting an understanding of the worthiness of protecting privacy in the face of the technological changes that have occurred in our society.

After defining the elements of the cause of action, the Court found that it applied in this case, as Ms. Tsige had intentionally intruded upon Ms. Jones's private bank records, it amounted to an unlawful invasion of her private affairs, it would be viewed as highly offensive to the reasonable person, and it caused distress, humiliation or anguish. Damages of $10,000 were awarded.

Building upon this decision, an Ontario Superior Court Justice recently also recognized a tort for invasion of privacy, this time under the category of public disclosure of embarrassing private facts, in ***Jane Doe 464533 v. N.D.***, 2016 ONSC 541, 128 O.R. (3d) 352. The case involved a couple who had dated in high-school and then formally broke up before the female plaintiff went away for university in the fall of 2011. However, while she was away the plaintiff and defendant communicated regularly through the Internet and texting and continued to see each other when she returned home for visits. The defendant asked the plaintiff to make a sexually explicit video of herself for him, which she refused to do for some time. She eventually gave in to the requests in November 2011, under the assurance that the defendant would not show the video to anyone else. In early December 2011, the plaintiff learned the defendant had posted the video online on an Internet pornography website and shown the video to his male friends, who were also her acquaintances, and word of the video's existence was known by some of her friends. The plaintiff was distraught and asked the defendant's mother for help. The video

was removed from the website after being up for approximately three weeks. The plaintiff was devastated for weeks and had trouble sleeping and eating. She saw a counsellor at her school for over a year and a half to deal with the emotional fallout and depression that she experienced, and had suffered panic attacks.

In terms of liability, the Court noted that technology has allowed the bullying of persons through the release of nude photos or videos online and that devastating harm can result, such as suicides or career-ending consequences. It noted the law has begun to protect victims, with the criminal law dealing with increasing cases of this type every year. This particular case appeared to be the first of its type to seek civil damages on these types of facts. The Court canvassed both the established and developing legal grounds open to a plaintiff to pursue in such a case.

The developing legal ground that was discussed was based on the tort of invasion of privacy that was discussed in ***Jones v. Tsige***. It noted the four categories of the tort from the Prosser article and agreed with the Ontario Court of Appeal's comments on the rationale for recognizing a tort to protect privacy. In this case, the facts fell under Prosser's second category for the tort of invasion of privacy, which is "public disclosure of embarrassing private facts about the plaintiff". The elements of this tort were described with reference to the *Restatement (Second) of Torts (2010)* as follows, at paras. 41-42:

> While the facts of this case bear some of the hallmarks of the tort of "intrusion upon seclusion", they more closely fall within Prosser's second category: **"Public disclosure of embarrassing private facts about the plaintiff". That category is described by the Restatement (Second) of Torts (2010), at 652D, as follows:**
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> > **One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that**
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> > **(a) would be highly offensive to a reasonable person, and**
> > **(b) is not of legitimate concern to the public.**

The comment section of the Restatement elaborates on this proposition as follows:

> **Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.**

[Emphasis added]

The Court adopted the elements of the cause of action from the Restatement with one minor modification. A person will be liable for invasion of privacy if they give publicity to a matter concerning the private life of another, if the matter publicized or the act of the publication (a) would be highly offensive to a reasonable person; and (b) is not of legitimate concern to the public, at para. 46.

In this case, the defendant posted on the Internet a privately shared and highly personal video of the plaintiff without her consent. This made an aspect of the plaintiff's private life public and a reasonable person would find such conduct to be highly offensive. There was no legitimate public concern for him doing so. Therefore the cause of action was made out.

This case therefore builds on the tort of invasion of privacy in the common law in Canada.

In addition, the Court canvassed two existing causes of action for liability which could be used in a cyberbullying scenario to ground liability against a defendant. The first was the tort of breach of confidence. The plaintiff had provided the video in confidence and the defendant shared the video publicly in breach of the terms upon which he received it.

There are three elements to the tort, at para 21:

a) that the information must have the necessary quality of confidence about it;
b) that the information must have been imparted in circumstances importing an obligation of confidence; and
c) that there must be unauthorized use of that information to the detriment of the party communicating it.

In this case, the first element was met as the video was private and personal and had the necessary quality of confidence, at para. 22. The second element was also met as the video was given on the express basis that it would be treated confidentially, at para. 23. The third element was also made out. Although the detriment in this case was personal rather than commercial, there was no reason to distinguish between economic harm and psychological harm, at para. 24:

> **The third element of the tort, use of the information to the detriment of the party communicating it, is ordinarily considered in commercial circumstances, where the recipient has misused the confidential information for commercial advantage, at the expense or to the detriment of the other party. An essential element in any tort is harm to the plaintiff. I see no rational basis to distinguish between economic harm and psychological, emotional and physical harm, such as was experienced by the plaintiff in the present case**. In any event, the possible future adverse impact on the plaintiff's career and employment prospects arising from the possibility that the video may someday resurface also demonstrates actionable harm. [Emphasis added]

The other established ground of liability that was made out on the facts of the case was intentional infliction of mental distress. The test for this tort also has three elements, which were quoted at para. 26 as follows:

(i) conduct that is flagrant and outrageous;

(ii) calculated to produce harm; and

(iii) resulting in a visible and provable injury.

The Court again found that each of these elements had been made out. The defendant's conduct was flagrant and outrageous because he knew the plaintiff was reluctant to make the video and had done so on the assurance that it would be kept private. However the evidence showed that on the very day the plaintiff sent the video, the defendant posted it online. There was a clear violation of the defendant's promise to the plaintiff and a breach of her trust.

The second element requires it be shown that the defendant's actions would foreseeably cause harm to the victim of the type that was actually suffered, at para. 30. In this case, that meant the defendant either must have meant to produce the plaintiff's mental distress or have known this type of harm was likely to follow. The Court found it was 'entirely foreseeable' that posting an intimate video of a young woman, who had provided such a video confidentially, on a website and sharing it with peers would cause extreme emotional upset and psychological distress.

Finally, although actual physical harm did not result, significant psychological harm did result to the plaintiff which satisfied the third ground of visible and provable injury. The plaintiff had to be taken to a crisis centre, suffered from depression, and had to undergo extensive counselling. She remained emotionally fragile and was apprehensive about her future.

The damages awarded in the case were limited to a maximum of $100,000 as the plaintiff had filed under the simplified procedure at the court. In determining the appropriate amount, the Court noted there were no similar reported cases in Canada on these facts and agreed with plaintiff's counsel that awards for physical sexual battery where there was a significant psychological impact could be of "some assistance", at para. 52. The Court concluded that the actions of the defendant in this case offended and compromised the plaintiff's dignity and personal autonomy. The damages award needed to demonstrate to the victim and the wider

community the vindication of those fundamental rights. General damages of $50,000 were awarded, with the court contrasting Jane Doe's serious claim to the less serious breach of privacy in ***Jones v. Tsige***, where $10,000 was awarded, at para. 58.

A further $25,000 was awarded for aggravated damages due to the manner in which the act was committed, as it involved a direct breach of the plaintiff's trust and was an affront to the parties' relationship, which made the impact of the actions even more hurtful.

$25,000 in punitive damages was also awarded as the defendant had recklessly disregarded the plaintiff's rights and the potential impact of his conduct. The defendant had also failed to apologize, and had shown no remorse when the parties saw each other in person after the event.

The emerging case law therefore suggests the following causes of action to deal with cyberbullying by revenge porn: the tort of invasion of privacy (based on public disclosure of embarrassing private facts); the tort of intentional infliction of mental distress; the tort of breach of confidence, and defamation.

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