

Civil Litigation

Likely measure of damages for revenge porn and other invasion of privacy torts

By **Barb Cotton and Christine Silverberg**



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(November 9, 2021, 2:16 PM EST) -- **Overview of the invasion of privacy torts**

The influential article by William L. Prosser, "Privacy" (1960), 48 Calif. L. Rev. 383, articulated four potential common law torts for invasion of privacy, shaping the law of rights to privacy in North America by classifying the scope of such torts, and creating the foundation for recontextualizing invasion of privacy torts in the modern, more nuanced, world:

- intrusion upon the plaintiff's seclusion or solitude, or into his or her private affairs
- public disclosure of embarrassing private facts about the plaintiff
- publicity which places the plaintiff in a false light in the public eye
- appropriation, for the defendant's advantage, of the plaintiff's name or likeness.



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These common law invasion of privacy torts have been introduced into Canadian law in seminal jurisprudence from Ontario, including *Jones v. Tsige* 2012 ONCA 32 (intrusion upon seclusion), *Jane Doe 464533 v. D. (N.)*, 2016 ONSC 541 (public disclosure of private facts), *Jane Doe 72511 v. M.(K.)*, 2018 ONSC 6607 (public disclosure of private facts) and *V.M.Y. v. S.H.G.*, 2019 ONSC 7279 (publicly placing a person in a false light).

The common law tort of public disclosure of a private fact, as first delineated in the *Jane Doe* cases, is established if: (1) the defendant publicized an aspect of the plaintiff's private life; (2) the plaintiff did not consent to the publication; (3) the matter publicized, or the fact of its publication, is highly offensive to a reasonable person; and (4) the publication was not of legitimate concern to the public.

This new tort of public disclosure of a private fact encompasses revenge porn, commonly understood to mean the distribution of sexually explicit images or videos of individuals on the Internet without their consent. Justice Sally Gomery in *Jane Doe 72511 v. M.(K.)*, 2018 ONSC 6607 [*Jane Doe 72511 v. N.M.*, [2018] O.J. No. 5741] is eloquent in her description of revenge porn:

[123] Revenge porn can have devastating consequences. In the most extreme cases, where sexually explicit images of very young people have been shared without their consent, the victims have been driven to suicide because of their feelings of intense shame and social isolation. In every case, the victim is betrayed by someone they trusted. Something that may have been a celebration of their affection or sexual attraction for another person is used against them. They have forever lost their right to control who sees their body. Even if the posting is removed, copies remain as the result of downloads and sharing. They live with the fear that this single event will define how they are perceived and treated by family, friends and strangers for the rest of their lives.

Other privacy abuses covered by this tort could include the publication of financial records or health events or records by a disgruntled employee, ex-partner (see *Racki v. Racki*, 2021 NSSC 46, wherein

a former husband self-published a memoir that exposed his former wife's health difficulties), or estranged family member (see *Halley v. McCann* [2016] O.J. No. 4672, wherein an estranged sister tells family members of the plaintiff's crisis health treatment), for example, or possibly through the hacking of such confidential information from a computer and its subsequent publication on the Internet (see *Kaplan v. Casino Rama Services Inc.*, 2019 ONSC 2025; but see *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112).

The Alberta Court of Queen's Bench first recognized the common law tort of public disclosure of private facts as a new tort in Alberta in *E.S. v. Shillington*, 2021 ABQB 739. The Alberta Court of Queen's Bench has subsequently built on *E.S. v. Shillington*, in the recent decision of *LDS v. SCA*, 2021 ABQB 818 and this case, like *E.S. v. Shillington*, involved revenge porn.

Focus on measure of damages

Considered together with the seminal jurisprudence from Ontario, practitioners now have a fuller picture of the likely measure of damages that will be awarded as redress for invasion of privacy torts. In this three-part article we will review this jurisprudence, with a focus on the measure of damages awarded.

The first nominate common law tort for invasion of privacy was established in Canada in the Ontario case of *Jones v. Tsige*, as mentioned above, a case involving an invasion of informational privacy. The defendant had used her position as a bank employee to access and view the financial records of the former spouse of the man with whom she was in a relationship, on at least 174 occasions over the span of four years. The Ontario Court of Appeal found that this invasion of privacy amounted to the tort of intrusion upon seclusion and suggested that damages for the intentional tort should be capped at a modest amount, \$20,000.

Early cases awarding compensation for the intentional tort of public disclosure of private facts, including revenge porn, departed from this proposed cap, however, and awarded substantial damages. Thus, in the seminal decision of *Jane Doe 464533 v. D.(N.)* 2016 ONSC 541, Justice David G. Stinson awarded damages for revenge porn totalling \$100,000.

The plaintiff and defendant had had a romantic relationship in high school and lived in a small Ontario town. When the plaintiff went away to university, at age 18, the defendant pressured her to give him a sexually explicit video of herself, upon the assurance that only he would see it. Although reluctant, the plaintiff provided him with the video.

The defendant then proceeded that day to post the video to a porn site on the Internet under the title "college girl pleasures herself for ex boyfriends delight." The video was posted for approximately three weeks before it was removed.

The plaintiff became aware of the posting of the video through one of her friends. She was devastated, humiliated and distraught, and suffered serious depression and panic attacks. She had to defer her Christmas exams and was so upset she could barely sleep or eat. She sought crisis counselling and underwent counselling for over a year and a half.

More than four years later she was emotionally fragile and worried that the video would have an adverse impact on her employment, career and future relationships.

The plaintiff sued the defendant for, and was successful in proving, the torts of breach of confidence, intentional infliction of mental distress and invasion of privacy, encapsulated as the nominate tort of public disclosure of private facts. As her action was commenced under a simplified procedure her damages were limited to \$100,000. Justice Stinson stated:

[51] As I have mentioned, no reported cases have been found in which a Canadian court has been asked to award damages on facts such as these. In support of the damage award sought, plaintiff's counsel analogized this case to ones involving claims arising from physical sexual battery, with its attendant psychological impact and consequences: although the physical injuries may be modest and ones from which the victim may recover relatively promptly, the emotional and psychological effects of the offensive conduct are frequently severe and long-lasting. She submitted that, in many ways, this case is worse since not only was the plaintiff's

personal and sexual integrity violated through the posting of the video, that violation is ongoing, because the video may well have been copied and stored and is therefore quite possibly still being viewed. Moreover, the plaintiff in this case was exposed to public humiliation due to the fact that the video became known among members of her community, with consequent damage to her reputation.

Justice Stinson looked to damage awards in sexual battery cases by way of analogy and assessed the plaintiff's general damages at \$50,000. The damage cap proposed in *Jones v. Tsige*, 2012 ONCA 32 was found not to be appropriate because revenge porn involved "much more than an invasion of a right to information privacy" and was analogous to a sexual assault. Aggravated damages in the amount of \$25,000 were found to be warranted as the posting of the video amounted to a breach of trust and was an affront to their relationship.

Punitive damages in the amount of \$25,000 were also awarded as the defendant gave no consideration to the impact of his actions on the plaintiff, had not apologized and had shown no remorse.

[61] In relation to quantum, proportionality is an important consideration in making an award of punitive damages. Other factors include the blameworthiness of the defendant's conduct (high); the degree of vulnerability of the plaintiff (significant); the harm directed specifically at the plaintiff (again, significant). Importantly, I have found that the defendant acted with malice.

Jane Doe 464533 v. D.(N.), 2016 ONSC 541 involved a default judgment that was subsequently set aside [at *Jane Doe 464533 v. D.(N.)*, 2016 ONSC 4920, leave to appeal refused at *Jane Doe 464533 v. D.(N.)*, 2017 ONSC 127], and for this reason some have questioned its precedential value. The tort of public disclosure of private facts was reaffirmed as viable in Ontario in *Jane Doe 72511 v. M.(K.)*, 2018 ONSC 6607, however, and a large measure of damages was awarded in this subsequent case as well.

Jane Doe 72511 v. M.(K.), 2018 ONSC 6607 and *V.M.Y. v. S.H.G.*, 2019 ONSC 7279, and their measure of damages, will be examined in part two of this article, and in part three we will examine the recent Alberta authorities of *E.S. v. Shillington*, 2021 ABQB 739 and *LDS v. SCA*, 2021 ABQB 818.

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