

## Case In Point

# Ontario Court Issues Significant and Conservative Decision on Scope of Privacy Tort

**Date:** September 4, 2015

On August 31st, the Ontario Superior Court of Justice issued a significant decision on the scope of the common law privacy tort – both declining to recognize a cause of action based on “public disclosure of private facts” and articulating how the protection granted by the recognized “intrusion” tort is circumscribed by the interest in free expression.

The case involved a claim against the CBC that the plaintiff – a researcher and professor at Memorial University in Newfoundland – framed both in defamation and breach of privacy. The claim arose out of an investigative journalism program that the CBC aired about the plaintiff’s ethics. The plaintiff alleged wrongs arising out of the words the CBC used in its broadcast and the CBC’s “investigative techniques.” These techniques included receiving and using a confidential report from an anonymous source.

Justice Mew first declined to recognize a claim based on the alleged public disclosure of private facts (or false light publicity). He reasoned that the law of defamation adequately addressed the wrong at issue *in the case before him* in a manner that carefully balanced the competing interests at stake. He said:

The CBC defendants submit, and I agree, that to expand the tort of invasion of privacy to include circumstances of public disclosure of embarrassing private facts about a plaintiff, would risk undermining the law of defamation as it has evolved and been pronounced by the Supreme Court. To do so would also be inconsistent with the common law’s incremental approach to change.

Justice Mew did, however, allow the jury to consider the whether the CBC committed an intrusion upon the plaintiff’s seclusion because, unlike a defamation claim, an intrusion claim “focuses on the act of intrusion, as opposed to dissemination or publication of information.” This finding left the jury with a difficult exercise in balancing competing rights. In instructing the jury, Justice Mew articulated a kind of immunity for receiving confidential information from whistle-blowers (without the use of unlawful means) and drew upon the defamation defences to circumscribe the intrusion tort as follows:

If you conclude that the actions of the CBC did not breach any laws, were not actuated by malice, or did not fall outside the scope of responsible communication, there would be no basis upon which you can find the CBC defendants liable for invasion of privacy. As to what constitutes malice and responsible communication, you should apply the same considerations that pertain to the defences of fair comment and responsible communication described by me earlier in relation to the defamation claim. If you have considered those questions (4 and 5) and have concluded that the defence of responsible communication should succeed, then you should answer “No” to question 8, since it would be inconsistent with the recognition of the place of responsible communication in the balancing exercise that I mentioned just now if a journalist whose actions benefit from the protection of that defence in a defamation claim were to remain exposed to a claim for invasion of privacy arising from her journalistic activities. Put another way, the prerequisite that there must be no lawful justification for the invasion of a person’s private affairs or concerns will be hard, if not impossible, to satisfy if there has been a finding that such an invasion occurred during the course of responsible journalistic activities.



[\*Chandra v CBC\*, 2015 ONSC 5303 \(CanLII\)](#)

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