

Case In Point

Court Recognizes New Privacy Tort: “Public Disclosure of Embarrassing Private Facts”

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In a case that can only add to the risk of privacy claims faced by organizations, the Ontario Superior Court of Justice recently awarded damages based on the new tort of “public disclosure of embarrassing private facts.”

In [Doe 464533 v N.D.](#), the Court awarded damages to a plaintiff whose former boyfriend coaxed her to send him a sexually explicit video of herself. Despite promising the plaintiff confidentiality, the former boyfriend posted the video online. It was available for three weeks before being removed.

The former boyfriend did not defend the action, and the plaintiff moved for default judgment. She adduced evidence that the posting caused her to suffer depression and a psychological impact that the Court concluded was “significant and long-lasting.”

The Court awarded damages based on a variety of legal grounds, including breach of confidence and intentional infliction of mental suffering. Most significantly, it held that damages were warranted based on a yet-to-be recognized privacy tort.

While the Court of Appeal for Ontario recognized the “intrusion upon seclusion” tort in 2012 – a tort about the invasion of one’s private affairs – the disclosure or publication of private facts is not an “invasion.” The Court held that the wrong caused by the ex-boyfriend’s actions more closely aligned with a different tort – the so-called “public disclosure of embarrassing private facts” tort. The Court adopted this tort, with a modification, and framed it as follows:

I would essentially adopt as the elements of the cause of action for public disclosure of private facts the *Restatement (Second) of Torts (2010)* formulation, with one minor modification: 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 (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.
[modification shown by underlining]

On the question of damages, the Court awarded general damages of \$50,000, \$25,000 in aggravated damages and \$25,000 in punitive damages. It also ordered the former boyfriend to destroy all intimate images of the plaintiff in his possession and he was permanently prohibited from contacting the plaintiff and members of her family.

Although the facts in this case are extreme, the Court’s decision creates a new legal basis for privacy claims in Ontario. Broadly, it reflects the current interest of our courts in providing a remedy for privacy claims. The challenge with such “common law” (court-created) claims is that their parameters are very general and only defined over time on a case-by-case basis. Organizations should therefore be concerned. This is yet another reason for organizations to strive for strong information governance and privacy protection.