

Case In Point

Default Judgment Giving Rise to New Tort of “Public Disclosure of Embarrassing Private Facts” Set Aside

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Early in 2016, [we reported on a case](#) in which the Ontario Superior Court articulated a new private tort: “public disclosure of embarrassing private facts.”

The plaintiff in that case had been coaxed by a former boyfriend (the defendant) to send him a sexually explicit video of herself. Despite promising the plaintiff confidentiality, the defendant posted the video online. It was available for three weeks before being removed. Justice Stinson noted that the case “cried out for a remedy”, articulated the new tort and awarded damages.

Significantly, the defendant had failed to defend the action and had been noted in default. The judgment therefore arose out of a default motion brought by the plaintiff, in which she was ultimately successful.

The defendant subsequently brought a motion to set aside the default judgment. In an unreported September 2016 decision, Justice Dow set aside the finding of liability and the assessment of damages made by Justice Stinson on the basis that “the overall interests of justice” favoured granting the order. That decision was based in part on the finding of the motion judge that there were other factors that mitigated the statement “nor am I filing a defence so you can do what you need to” made by the defendant to the plaintiff. For example the defendant had participated in settlement negotiations but no agreement was reached because the defendant could not make immediate payment.

In this latest decision, the plaintiff brought a motion for leave to appeal the findings of Justice Dow. In dismissing the motion and ordering the defendant to deliver a statement of defence, the Ontario Superior Court took into account that the decision of Justice Stinson had significant legal conclusions, but only one party had participated. The Court stated:

[57] [...] I do not see the dismissal of this motion for leave to appeal as a discouragement of victims. Indeed, it is a matter of general importance that the facts in this case be the subject of a hearing on its merits so that the significant legal conclusions deriving therefrom will have more weight in future cases as opposed to findings made as a result of a hearing where only one side participated, albeit through the fault of the other side. The uniqueness of the case and the prospect for a decision on the merits making a contribution to the development of torts in an important area of the law is a compelling reason to conclude that it is a question of general importance that the

defendant have the opportunity to participate in a trial.

So where does this leave the new tort of “public disclosure of embarrassing private facts”? Because the default judgment has been set aside, the existence of the tort that Justice Stinson had recognized is now at least in significant doubt, although His Honour’s reasoning may still be considered and/or persuasive in future cases.

We will continue to monitor this case and report on any developments.

[*Jane Doe 464533 v N.D., 2017 ONSC 127 \(CanLII\)*](#)