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Civil Writes - CBA National Civil Litigation Section Newsletter

Canada's newest tort

By John Finnigan and Jessica Prince

In January, the Ontario Court of Appeal created a new right of action for breach of privacy in *Jones v. Tsige*¹. This new tort — called “intrusion upon seclusion” — provides monetary compensation for breaches of privacy without publication or pecuniary loss. It has been considered and rejected in two subsequent decisions, as both cases involved legitimate requests for private information.

Intrusion upon Seclusion

Jones v. Tsige involved two Bank of Montreal employees: Sandra Jones (“Jones”) and Winnie Tsige (“Tsige”). Tsige was dating Jones’ ex-husband, but the two women had never met. Contrary to bank policy, Tsige had surreptitiously looked at Jones’ banking records at least 174 times over a four-year period. When Jones discovered this, she advised her employer. After an internal investigation, Tsige admitted to viewing the records and she admitted that she had no legitimate reason for doing so.

Jones brought a claim against Tsige for damages in the amount of \$70,000 for, amongst other things, invasion of privacy and punitive and exemplary damages. Jones brought a motion for summary judgment and Tsige brought a cross-motion to dismiss the action. The motion judge held that there is no free-standing right to privacy in Ontario and dismissed the action, awarding costs against Jones.

The central issue for the Ontario Court of Appeal was whether the motion judge erred by dismissing Jones’ claim on the ground that Ontario law does not recognize the tort of breach of privacy.

Writing for an unanimous bench, Justice Sharpe held that the tort of intrusion upon seclusion — which is recognized in American jurisprudence — consists of three elements: (1) the defendant’s conduct must be intentional and this includes reckless conduct; (2) the defendant must have invaded, without lawful justification, the plaintiff’s private affairs or concerns; and (3) a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. Publication or dissemination of private affairs or information is not required. Proof of economic loss or harm is also not required.

The Court of Appeal gave a four-part rationale for the new tort: First, the case



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law, although not conclusive, supports the recognition of this cause of action. Second, rapid technological change that impacts people's privacy rights demands a legal response. Third, the common law is capable of incremental evolution. Finally, and most importantly, the facts in this case call out for a remedy.

Justice Sharpe emphasized that the tort will only arise for deliberate and significant invasions of privacy. Claims from individuals who are unusually sensitive about their privacy will be excluded. Justice Sharpe also noted that, although not relevant in this case, claims for privacy protection can give rise to competing claims, such as freedom of the press.

Areas over which an individual might have a reasonable expectation of privacy include: one's financial and health records, sexual practices and orientation, employment, diary or private correspondence,² electronic data bases that record the books we borrow or buy, the movies we rent or download, where we shop, where we travel, and communications by cell phone, e-mail or text message.³

Individuals may be awarded up to \$20,000 in damages if there has been no pecuniary loss. Justice Sharpe stated that aggravated and punitive damages are neither encouraged nor excluded.

The Court of Appeal found that Tsige had committed the tort of intrusion upon seclusion. Jones was awarded \$10,000 in damages. No aggravated or punitive damages were awarded. The Court declined to award costs to Jones, given the novel nature of the issues.

Establishing the Ambit of the Tort

The Ontario Arbitration Board (the "Board") considered this new tort in *Complex Services Inc. v. O.P.S.E.U., Local 278*.⁴ The matter concerned the balance between a disabled employee's right to accommodation and the employer's right to that employee's confidential medical information.⁵

In order to evaluate the employee's need for accommodation, the employer requested that the employee undergo a medical examination and turn over certain medical documentation.⁶ Counsel for the employee argued that such a request constituted a breach of the employee's privacy.⁷

The Board held that although *Jones v. Tsige* "reinforces the premium value of privacy in Canadian society... [it] does not establish an additional premium or value in that respect."⁸

The Board stated that *Jones v. Tsige* does not establish an absolute right to privacy. It "...does not stand for the proposition that asking for or even demanding that an employee disclose confidential medical information for a legitimate purpose constitute an improper or actionable intrusion on the employee's right to privacy."⁹

Ultimately, the Board decided that the employer had taken a reasonable approach to the employee's request for accommodation.¹⁰

The new tort was also considered in *Connolly v. Telus Communications Co.*,¹¹ in which the defendant provided the plaintiff with a cell phone contract. When setting up his contract, the plaintiff accidentally provided his deceased mother's Social Insurance Number ("SIN") as his own. The defendant eventually identified a discrepancy between the plaintiff's age and the SIN number sequence, and suspended the account. The defendant informed the plaintiff that in order to reactivate his account, he had to provide them with two pieces of identification via fax machine. The plaintiff refused and sued for, amongst other things, breach of privacy.

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Deputy Justice L. Gilbert of the Small Claims Court held that the defendant's request for identification did not constitute intrusion upon seclusion. Specifically, "[t]he Plaintiff... failed to prove any of the elements of the tort: a) the invasion was authorized... and it was not an invasion per se; b) there was nothing nefarious about the use of the SIN... c) there was no expectation of seclusion in that it was commercially reasonable to have the SIN... and d) there was no evidence of anguish..."¹²

While the above cases fall outside the bounds of this new tort, intrusion upon seclusion signals a judicial willingness to expand the common law to provide recourse for invasions of privacy in the digital age.

¹ *Jones v. Tsige*, 2012 ONCA 32. [*Jones*]

² *Ibid.*, at para. 72.

³ *Ibid.*, at para. 67.

⁴ *Complex Services Inc. v. O.P.S.E.U., Local 278*, 2012 CarswellOnt 3177 (Ont. Arb. Bd. Feb 22, 2012). [*Complex Services*]

⁵ *Ibid.*, at para. 2.

⁶ *Ibid.*, at para. 5.

⁷ *Ibid.*, at para. 96.

⁸ *Ibid.*, at para. 92.

⁹ *Ibid.*, at para. 93.

¹⁰ *Ibid.*, at paras. 91 and 124.

¹¹ *Connolly v. Telus Communications Co.* [2012] O.J. No. 465. [*Connolly*]

¹² *Ibid.*, at para. 43.

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