Public Disclosure of Private Facts: Recent Privacy Law Decisions

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In 2012 the Ontario Court of Appeal was presented, in the case of *Jones v. Tsige*, with a stark question: Does the common law of Ontario recognize a right to a civil action for damages for invasion of personal privacy?[1]

The answer to the question was held, at the time, to be properly answered in the affirmative, although questions about the scope of these claims do remain. The purpose of this brief paper is to outline typical privacy law remedies and highlight, in particular, the status of the law in Ontario in relation to scenarios involving public disclosure of private facts.

Background

Understandably, the wonders and perils of our new 'cyber age' are often the subject of social and industry discussion. Many of us are concerned about privacy because we are, intentionally or otherwise, continuously eroding it. Our basic vital statistics and financial data in particular are transmitted, collected and stored on a daily basis. At the same time, with the advent of social media, many have become desensitized and quite willing to disseminate private-life details or, alternatively, trust various providers to safeguard these bits of intimate data or communications.

As is often the case however, things do go wrong and we are constantly, through media sources, being made aware of security breaches, data leakage and the often-resulting scandals.

While it would be unfair to suggest that the law is once-again playing 'catch up', it certainly has been forced to grapple with these new realities within older, existing frameworks - yet at the same time it must ponder new means by which to address the problems of the cyber age. In many instances, courts are presented with facts that indeed "cry out for a remedy."[2]

Statutory Remedies

Legal standards and remedies for breach of privacy currently exist in statute and, to some degree, common law.

The *Personal Information Protection and Electronic Documents Act* (*PIPEDA*) is a federal statute regulating the collection, use and disclosure of personal information from individuals by private sector organizations.[3] It applies to organizations subject to federal jurisdiction as well as, by default, organizations in many provinces.[4]

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[1] *Jones v Tsige*, 2012 ONCA 32 at para 1, 108 OR (3d) 241.
[2] *Ibid* at para 69.
[3] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [*PIPEDA*].
[4] *Ibid*, s 4(1).

PIPEDA, in effect, creates a statutory standard, the breaches of which may be investigated by the Privacy Commissioner and ultimately heard by the federal court with respect to claims for damages or other remedies.[5] To date, the quantum of damages awards under *PIPEDA* have been relatively modest.

At the provincial level, Ontario's *Personal Health Information Protection Act* addresses the collection, use and disclosure of personal health information and allows for Superior Court proceedings for damages for "actual harm" suffered as a result of a contravention of that Act.[6] Some provinces have similar legislation.[7]

Certain provinces have moreover enacted general privacy legislation that provides for a tort of invasion of privacy.[8] In Quebec, the right to privacy is protected in its *Charter of Human Rights and Freedoms*.[9]

While these provisions undoubtedly facilitate the prosecution of civil claims it does appear that the statutes themselves provide limited practical guidance on what actions amount to unlawful invasions of privacy. Courts are further left with the challenge of balancing, in some cases, notions of public interest and fair comment which remind us of principles long-litigated in the realm of defamation.

The Common Law

The 2012 decision of *Jones v. Tsige* has quickly become a seminal case in Ontario in relation to the concept of invasion of privacy at common law. In this instance, the plaintiff brought an action for invasion of privacy after it was learned that her ex-husband's new spouse had been continuously peering into Jones' banking records in her capacity as an employee at the material bank. Justice Sharpe, writing for the court, introduced the dilemma as follows:

> The question of whether the common law should recognize a cause of action in tort for invasion of privacy has been debated for the past one hundred and twenty years. Aspects of privacy have long been protected by causes of action such as breach of confidence, defamation, breach of copyright, nuisance, and various property rights. Although the individual's privacy interest is a fundamental value

[5] *Ibid*, s 16.
[6] *Personal Health Information Protection Act*, SO 2004, c 3, Sch A, s 65(1).
[7] Provinces with similar legislation include New Brunswick (*Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05); Newfoundland and Labrador (*Personal Health Information Act*, SNL 2008, c P-7.01); Nova Scotia (*Personal Health Information Act*, SNS 2010, c 41); Alberta (*Health Information Act*, RSA 2000, c H-5); Saskatchewan (*The Health Information Protection Act*, SS 1999, c H-0.021); Manitoba (*The Personal Health Information Act*, CCSM, c P33.5); Quebec (*An Act Respecting the Protection of Personal Information in the Private Sector*, CQLR, c P-39.1); and British Columbia (*E-Health (Personal Health Information Access and Protection of Privacy) Act*, SBC 2008, c 38 (for certain designated databases)). Note that these statutes do not permit damages for "actual harm" suffered.
[8] Provinces which have enacted their own legislation are British Columbia (*Privacy Act*, RSBC 1996, c 373); Saskatchewan (*The Privacy Act*, RSS 1978, c P-24); Manitoba (*The Privacy Act*, CCSM 1987, c P-125); and Newfoundland and Labrador (*The Privacy Act*, RSNL 1990, c P-22).
[9] *Charter of Human Rights and Freedoms*, CQLR, c C-12, s 5. The *Civil Code of Quebec*, CQLR, c C-1991 also contains provisions relating to privacy under chapter III.

> underlying such claims, the recognition of a distinct right of action for breach of privacy remains uncertain.[10]

Justice Sharpe went on to adopt the helpful classification of American jurisprudence outlined by Professor Prosser in his famous *California Law Review* article of 1960. Specifically, Professor Prosser identified a four tort catalogue as follows: 1) intrusion upon the plaintiff's seclusion or solitude, or into his or her private affairs; 2) public disclosure of embarrassing private facts about the plaintiff; 3) publicity which places the plaintiff in false light in the public eye; and 4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[11]

In *Jones v. Tsige*, it was recognized that Ontario had already accepted the existence of tort claims for the fourth catalogued item, namely appropriation of personality or likeness. The debate in *Jones v. Tsige* was whether or not, given the facts, the common law should recognize a new tort for 'intrusion upon seclusion' representing the first item in Prosser's classification.

In setting out his rationale for recognizing the tort of 'intrusion upon seclusion' Justice Sharpe noted that the advance of technology and its repercussions on personal information had left Ontario in a position whereby certain wrongs could be without remedy. He observed:

> For over one hundred years, technological change has motivated the legal protection of the individual's right to privacy. In modern times, the pace of technological change has accelerated exponentially…The internet and digital technology have brought an enormous change in the way we communicate and in our capacity to capture, store and retrieve information. As the facts of this case indicate, routinely kept electronic data bases render our most personal financial information vulnerable. Sensitive information as to our health is similarly available, as are records of the books we have borrowed or bought, the movies we have rented or downloaded, where we have shopped, where we have travelled, and the nature of our communications by cell phone, e-mail or text message.
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> It is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form. Technological change poses a novel threat to a right of privacy that has been protected for hundreds of years by the common law under various guises and that, since 1982 and the *Charter*, has been recognized as a right that is integral to our social and political order…In my view, the law of this province would be sadly deficient if we were required to send Jones away without a legal remedy.[12]

Although the *Jones v. Tsige* case has been correctly heralded as the leading case on the tort of invasion of privacy in Ontario, Justice Sharpe's decision forewarned of future challenges:

> Foremost are claims for the protection of freedom of expression and freedom of the press…Suffice it to say, no right to privacy can be absolute and many claims

[10] *Supra* note 1 at para 15.
[11] William L. Prosser, "Privacy" (1960) 48:3 California Law Review 383 at 389.
[12] *Supra* note 1 at paras 67-69.

> for the protection of privacy will have to be reconciled with, and even yield to, such competing claims.[13]

These comments are particularly true when one considers the common law's struggle in Ontario, and perhaps elsewhere, with scenarios involving Prosser's second category: public disclosure of private facts.

Public Disclosure of Private Facts

Whereas the law of defamation has for many years sought to protect reputations in the case of the publication of false statements, the privacy law concept of 'public disclosure of private facts' is, to some degree, counterintuitive in that it involves the dissemination of true statements. The notion is that certain facts, even though true, are sufficiently intimate and private to be "nobody's business."[14]

Under Professor Prosser's formulation, the essential elements of the tort include: 1) sufficient publicity; 2) the facts must have been private; and 3) the disclosure must be offensive to a reasonable person of ordinary sensibilities.[15] It is not difficult to see the hallmarks of this potential common law tort overlapping with existing concepts pertaining to defamation.

In Ontario, prior to *Jones v. Tsige*, hints of this were evident in the 2008 case of *Nitsopoulos v. Wong*.[16] In *Nitsopoulos*, the plaintiffs complained that reporter Jan Wong surreptitiously posed as a maid at their home only to later describe her experiences in a series of articles entitled "Maid for a Month."[17] It was alleged that Wong's writings identified the plaintiffs and the content presumably embarrassed them.

The conundrum was that the lawsuit had been commenced well beyond the limitation period pursuant to the *Libel and Slander Act* and, as a result, the action was based, not on defamation, but rather on torts of deceit and invasion of privacy. The Globe and Mail defendants sought to strike the claim arguing that it was a complaint in relation to reputation which could not be "dressed up" to evade the defences available in a defamation action.[18]

Justice Aston felt that the tort of invasion of privacy could perhaps stand alone. It was noted that the law of defamation had not "cornered the market" on damages for reputational injury.[19] However, the Judge stopped short of stating that there was indeed a clear privacy-based tort for publication of what may well have been accurate facts (although it was recognized that a similar action had resulted in a damages award in the United Kingdom).[20]

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[13] *Ibid* at para 73.
[14] Rodney A. Smolla & Melville B. Nimmer, *Smolla & Nimmer on Freedom of Speech* (Thomson Reuters West, 1996) at § 24:5.
[15] *Supra* note 11 at 393, 394 and 396.
[16] *Nitsopoulos v Wong* (2008), 298 DLR (4th) 265, 169 ACWS (3d) 74 (Ont Sup Ct) [*Nitsopolous* cited to DLR].
[17] *Ibid* at para 4.
[18] *Ibid* at para 5.
[19] *Ibid* at para 15.
[20] *Ibid* at para 21. The United Kingdom case referred to was *Mosley v News Group Newspapers Ltd.* [2008] EWHC 1777 (Eng. Q.B.).

At a minimum, Justice Aston was prepared to allow the case to proceed, with respect to privacy, insofar at least as it might involve reporter Wong's alleged intrusion and surveillance, i.e., an 'intrusion upon seclusion' claim that was later recognized more clearly in *Jones v. Tsige.*

Similarly, prior to the *Jones v. Tsige* decision, in *Warman v. Grosvenor* Justice Ratushny was faced with a case involving a series of offensive internet postings focusing on a federal civil servant.[21] Although it is clear that most of the allegations could comfortably fit within the existing defamation rubric, complaints were made with respect to the public disclosure, on the internet, of the plaintiff's home address and geographical whereabouts. In this instance, Her Honour was of view that the damages claimed by the plaintiff for the tort of invasion of privacy were not "distinct from those flowing from the torts of defamation and assault."[22] As a result, no entitlement to damages for any tort of invasion of privacy was found.

Subsequent to the *Jones v. Tsige* decision in Ontario, numerous cases have arisen which readily adopt the 'intrusion upon seclusion' terminology. Some involve facts which do indeed involve intentional or arguably reckless disclosure of private information.[23]

In *Vertolli v. YouTube*, the Ontario Small Claims Court was asked to grapple with allegations of 'intrusion upon seclusion' when a police officer claimed a ticketed driver had posted a videotape of material events on YouTube.[24] Deputy Judge Klein found, as in *Jones v. Tsige*, that common law claims could stand outside of the statutory *PIPEDA* regime and, moreover, was of the view that the officer's claim did in fact disclose a reasonable cause of action which could proceed to trial.

In *Action Auto Leasing v. Gray*, the Ontario Small Claims Court was faced with an invasion of privacy claim raised by a defendant in a collections action.[25] The related complaint, brought by self-represented defendants, involved a voicemail message left on a family member's telephone indicating that the defendant's lease was in default and the amount thereof. Deputy Justice Winny, with reference to the *Jones v. Tsige* decision, was prepared to recognize the tort of "public disclosure of embarrassing private facts", allocating $100 damages.[26]

In *Craven v. Chmura*, Justice Broad of the Ontario Superior Court was faced with a motion for costs in the aftermath of extremely tragic circumstances.[27] The underlying facts involved estranged spouses, the murder of a child and the hostage taking of the child's mother. The estranged husband, as the suspect, was killed by police. The civil litigation involved what appears to have been a campaign by a relative of the deceased suspect to defame and humiliate the surviving spouse. The action was tried on the basis of libel and 'intrusion upon seclusion' before a jury. Although no details are provided, it does appear that certain actions of the

[21] *Warman v Grosvenor* (2008), 92 OR (3d) 663 at para 1, 172 ACWS (3d) 385 (Sup Ct).
[22] *Ibid* at para 67.
[23] The question that arises is whether any prospective tort of 'public disclosure of private facts' requires intentional acts or whether recklessness is sufficient. This may have relevance in particular to numerous class actions commenced and in some case certified relating to the allegedly negligent disclosure of personal data.
[24] *Vertolli v YouTube*, 2012 CanLII 99832 at para 5 (Ont Sm Cl Ct).
[25] *Action Auto Leasing v Gray* (2013), 226 ACWS (3d) 421 at para 12, 2013 CarswellOnt 2352 (Sm Cl Ct).
[26] *Ibid* at para 14.
[27] *Craven v Chmura*, 2015 ONSC 4843 at para 26, 2015 CarswellOnt 11937.

defendant were deemed to stand alone from the defamation claims and the jury rendered verdict accordingly.

In a decision rendered on August 31, 2015, Justice Mew of the Ontario Superior Court further contributed to the dialogue by finding that the tort of 'public disclosure of private facts' does not currently exist in Ontario. In *Chandra v. Canadian Broadcasting Corp*., the plaintiff claimed damages for invasion of privacy after the CBC disclosed embarrassing private facts in a documentary broadcast on CBC television.[28] The plaintiff argued that it was open for the court to clearly extend the common law to recognize the tort of 'public disclosure of embarrassing private facts', however, Justice Mew noted that the Court of Appeal in *Jones v. Tsige* had, at present, confined the remedy for invasion of privacy to 'intrusion upon seclusion.' In his view, the law in Ontario did not include public disclosure of private facts:

> There may well come a time when this court is presented with a case, the circumstances of which make it appropriate to consider further expansion of the law on invasion of privacy to incorporate more of the torts catalogued by Professor Prosser. This is not, however, such a case.[29]

Justice Mew recognized that to expand the tort of invasion of privacy to include 'public disclosure of private facts' would risk undermining the law of defamation.[30]

The Judge then examined whether the plaintiff could maintain a separate claim for 'intrusion upon seclusion' or whether the allegations were incorporated into the plaintiff's claim for defamation.[31] Justice Mew stated:

> The development of the law of defamation, and in particular, the efficacy of the defences of fair comment or responsible communication, would be significantly undermined if a plaintiff was able to avoid its effects by establishing in the alternative, on the basis of the same or related facts, a breach by the defendants of the plaintiff's right to be free from intrusion upon seclusion.[32]

Justice Mew commented on privacy, freedom of speech, and freedom of the press issues by holding that:

> [T]he collection of otherwise private information for journalistic purposes, absent malice on the part of the defendant, is lawful. Because a successful claim for intrusion upon seclusion must be pinned on conduct that is unlawful, the plaintiff cannot advance a claim for intrusion upon seclusion in circumstances analogous to those in which a media defendant can establish fair comment or responsible communication.

[28] *Chandra v Canadian Broadcasting Corp*., 2015 ONSC 5303 at para 1, CarswellOnt 13283.
[29] *Ibid* at para 44.
[30] *Ibid* at para 49.
[31] *Ibid* at para 50.
[32] *Ibid* at para 58.

> Conversely, if the plaintiff can establish that the CBC defendants have invaded the plaintiff's private affairs or concerns *without lawful justification*, it follows that even media defendants would remain potentially liable to a claim of intrusion upon seclusion.[33]

Justice Mew concluded by determining that properly instructed, the question of the commission of the tort of 'intrusion upon seclusion' could be put to the jury.

The *Chandra v. CBC* case has been heralded as opening the door to adding privacy related claims to defamation lawsuits.[34] It is nevertheless apparent that there remains an uneasy co-existence and Professor Prosser's catalogued tort of 'public disclosure of private facts' awaits a new case with more suitable facts.

Given the proliferation of privacy-based breaches and resulting claims, it is almost certain that an Ontario court will face a new request to consider this issue.[35]

[33] *Ibid* at paras 59 and 60.

[34] Tali Folkins, "Court opens door to adding privacy claims to defamation lawsuits", *Law Times* (14 September, 2015) online: Law Times <http://www.lawtimesnews.com/>.

[35] Indeed, just one month earlier, in July 2015, the Federal Court of Canada certified a class proceeding in *John Doe v Her Majesty*, 2015 FC 916, 2015 CarswellNat 3317. In that action, the plaintiffs pleaded the Crown publicly identified them as participants in the marijuana medical access program by sending letters in oversized envelopes through the mail system with the program's return address clearly depicted. Canada's Privacy Commissioner found, under the material federal legislation, that the complaints were well-founded. The class action plaintiffs sought to certify a class proceeding pleading a variety of causes of action including publicity given to private life. Recognizing that "this tort is truly novel in Canada" Justice Phelan held that like intrusion upon seclusion, it was a concept that should not be readily dismissed at an early stage of litigation. The class was certified.