CAN YOU KEEP A SECRET? THE COURTS RECOGNIZE A NEW TORT FOR PUBLIC DISCLOSURE OF PRIVATE FACTS

Posted on February 1, 2016

Categories: Insights, Publications

Internet and E-Commerce Law in Canada

The common law related to privacy rights continues to evolve in Canada. Just a few weeks ago, the Ontario Superior Court of Justice recognized a novel common law tort applicable to violations of privacy rights. This is the second new tort recognized by an Ontario court in approximately four years. In the earlier case, *Jones v Tsige*,[1] the Ontario Court of Appeal recognized the tort of "intrusion upon seclusion", which had a significant impact on privacy litigation in Canada, including providing grounds for numerous class action lawsuits related to privacy and data security breaches.[2] *Jones* also laid the groundwork for the recent case of *Jane Doe 464533 v ND*,[3] which will likely now be the seminal case for the tort of "public disclosure of private facts" in Canada.The

Facts

The plaintiff and defendant were in a romantic relationship during their final year of high school. The couple broke up before the plaintiff moved to another city to attend university, but continued to communicate regularly. The defendant asked the plaintiff to make a sexually explicit video of herself to send to him. At first the plaintiff refused. The defendant persisted for several months and reassured the plaintiff that no one else would ever see the video. When the plaintiff eventually sent a video to the defendant, he posted it online and shared it with several of his friends almost immediately. The video was online for three weeks before it was eventually removed.

When the plaintiff learned that the video had been posted and that several members of her own community had viewed it, she became mentally distraught. The plaintiff was unable to sleep, lost her appetite, could not focus on school and was eventually checked into a crisis intervention center at a hospital. For over a year after the video was posted, the plaintiff experienced serious depression and suffered from occasional panic attacks. The plaintiff gave evidence that she remains concerned that the video may impact her future employment and relationships.

Recognition of Liability for Public Disclosure of Private Facts

The Court acknowledged that the current state of technology enables predators and bullies to victimize others on a much larger scale than in the past.[4] It also noted that society is scrambling to catch up to the problem and that the law is only beginning to respond. While the Court found that the facts supported liability for both breach of confidence[5] and intentional infliction of emotional distress,[6] it noted that the unique harm caused by the publication of an intimate video requires its own civil remedy.[7]

Just four years earlier, in *Jones*, the Ontario Court of Appeal found that the defendant committed an invasion of privacy when she used her position as a bank employee to access the banking records of her husband's ex-wife. While the Court in *Doe* conceded that *Jones* is factually distinct from the present case, it considered the following passage regarding the recognition of new causes of action relating to invasion of privacy:

[t]he 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 underlying such claims, the recognition of a distinct right of action for breach of privacy remains uncertain.[8]

Like in *Jones*, the Court in Doe found that it was presented "with facts that cry out for a remedy."[9]

Upon review of Canadian and American case law and commentary, the Court in *Doe* recognized a cause of action for invasion of privacy on the basis of "publically disclosing the private facts of another". The elements of the new tort were stated as follows:

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.[10]

In applying these elements to the present case, the Court found that: (1) the defendant made public an aspect of the plaintiff's private life; (2) a reasonable person would find the act of publication to be highly offensive; and (3) there was no legitimate public concern justifying publication of the matter.[11]

Damages

Unlike in *Jones*, the Court in Doe did not seem concerned about imposing strict limits upon non-pecuniary damages. In *Jones*, the Court awarded $10,000 for a fairly significant intrusion into sensitive personal information (i.e., the plaintiff's financial and banking records), and placed a cap on non-pecuniary damages of $20,000. The present case was distinguished from *Jones* in that it involved something much more sensitive than an invasion of informational privacy.[12]

The Court found that the facts of this case presented a novel situation that is unprecedented by earlier privacy decisions. It was clear from the reasoning in the case that the Court was particularly offended by the defendant's conduct when committing the offence, and afterwards, which the Court describes as: "invasive", "degrading", "a breach of trust", and having been carried out with "malice".

In total, the plaintiff was awarded $100,000 (plus costs), which was the maximum allowable because the claim had been brought under Simplified Procedure. Although it is not possible to know for certain, the Court may have been prepared to award even greater damages in this case, if it had been able to do so. More specifically, the Court awarded the plaintiff $50,000 in non-pecuniary damages, $25,000 in aggravated damages, $25,000 in punitive damages and costs on a full indemnity basis of over $36,000.[13]

In coming to this damage award, the Court sought guidance from cases dealing with sexual assaults. The Court reasoned that, despite the fact that the present case does not involve physical touching, the injuries to the plaintiff's dignity and personal autonomy were tantamount to the harms that follow sexual assault. The purposes for the damage awards in this case included "vindication" of "fundamental, although intangible, rights which have been violated by the offender," as well as deterrence, "to dissuade others from engaging in similar harmful misconduct."[14]

Significance of Decision to the Development of Privacy Law

As with *Jones*, the Court's decision in *Doe* will likely have significant implications for privacy litigation in Canada. In particular, the plaintiffs in some class action lawsuits have already alleged something similar to "public disclosure of private facts", including the claim that has been filed in connection with the mailing to participants in the Marihuana Medical Access Program, which identified the program on the outside of the envelope. The confirmation that this is a recognized cause of action in Canada will likely impact the negotiations between the parties in this and other cases.

However, it will be interesting to see how the reasoning in Doe, and particularly the principles related to determining damages, will be applied in future cases. In particular, the reference to damages in sexual assault cases would seem to only be relevant to publicity of sexually explicit material.

What is clear, is that the common law of privacy has once again been expanded in Canada. Where *Jones* previously introduced a cause of action for invasion of privacy on the basis of *intrusion* into one's private life, *Doe* has now introduced another cause of action on the basis of *disclosure* of one's private life.

The Courts in both *Jones* and *Doe* recognized that technological developments in recent years create the potential for significant privacy violations, and accordingly, the Courts found it necessary for the law to evolve in order to provide recourses to victims.[15] Furthermore, in both cases, the Courts found that sufficient recourse

could not be found in applicable legislation. In *Jones*, the Court recognized that the *Personal Information Protection and Electronic Documents Act* applies to commercial activities, and therefore, did not apply to the defendant's actions (which were purely personal), and therefore the plaintiff would have no recourse in the absence of a civil remedy. In *Doe*, the Court noted that the Criminal Code provision prohibiting publication of an intimate image without consent[16] was not in force at the time that the defendant published the video of the plaintiff. Only Manitoba has specific legislation applicable to the conduct at issue in this case.[17]

Organizations would be well advised to consider *Doe*, going forward, when engaging in activities that could impact the privacy of individuals. This case is a further example of the quickly evolving privacy landscape in Canada and globally. Organizations that take steps now, to implement best practices with respect to handling personal information, will be best positioned to meet these evolving legal obligations.

by Lyndsay Wasser and Mitch Koczerginski

[1] *Jones v Tsige*, 2012 ONCA 32.[ps2id id='1' target='/]

[2] *Jones v Tsige*, 2012 ONCA 32 [*Jones*].[ps2id id='2' target='/]

[3] *Jane Doe 464533 v ND*, 2016 ONSC 541 [*Doe*].[ps2id id='3' target='/]

[4] *Jane Doe 464533 v ND*, 2016 ONSC 541 at para 16.[ps2id id='4' target='/]

[5] *Jane Doe 464533 v ND*, 2016 ONSC 541 at para 25.[ps2id id='5' target='/]

[6] *Jane Doe 464533 v ND*, 2016 ONSC 541 at para 33.[ps2id id='6' target='/]

[7] *Jane Doe 464533 v ND*, 2016 ONSC 541 at para 45.[ps2id id='7' target='/]

[8] *Jane Doe 464533 v ND*, 2016 ONSC 541 at para 35.[ps2id id='8' target='/]

[9] *Jane Doe 464533 v ND*, 2016 ONSC 541 at para 40.[ps2id id='9' target='/]

[10] *Jane Doe 464533 v ND*, 2016 ONSC 541 at para 46.[ps2id id='10' target='/]

[11] *Jane Doe 464533 v ND*, 2016 ONSC 541 at para 47.[ps2id id='11' target='/]

[12] *Jane Doe 464533 v ND*, 2016 ONSC 541 at para 52.[ps2id id='12' target='/]

[13] *Jane Doe 464533 v ND*, 2016 ONSC 541 at para 69.[ps2id id='13' target='/]

[14] *Jane Doe 464533 v ND*, 2016 ONSC 541 at para 56 and 62.[ps2id id='14' target='/]

[15] *See Jane Doe 464533 v ND*, 2016 ONSC 541 at para 16 and *Jones v Tsige*, 2012 ONCA 32 at para 67.[ps2id

id='15' target='/]

[16] *Criminal Code*, R.S.C., 1985, c. C-46.[ps2id id='16' target='/]

[17] *The Intimate Image Protection Act*, C.C.S.M. c. 187, s. 11.[ps2id id='17' target='/]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.