

ALBERTA RECOGNIZES PRIVACY TORT OF PUBLIC DISCLOSURE OF PRIVATE FACTS

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The Alberta Court of Queen’s Bench recently recognized the tort of public disclosure of private facts (“Public Disclosure”) for the first time.^[1]

While the case before the Court involved non-consensual disclosure of intimate images, Public Disclosure could be alleged in relation to the improper disclosure of other types of information, including financial or health information. Accordingly, the decision has implications for any organization that processes personal information, and serves as a good reminder to ensure that such information is appropriately protected from unauthorized disclosure.

Background

Near the end of a lengthy and abusive relationship, the defendant revealed to the plaintiff that he had been posting intimate photos of her online. The plaintiff had initially shared these photos with the defendant during the course of their relationship, on the understanding that they would not be distributed in any way.^[2]

The plaintiff suffered psychological injuries following the posting of the photos, including nervous shock, sleep disturbances, post-traumatic stress disorder, public embarrassment and humiliation, and other psychological and emotional suffering.^[3] The plaintiff commenced an action against the defendant seeking damages for Public Disclosure, among other causes of action.

Public Disclosure was first introduced in the seminal Ontario case, *Jones v Tsige*.^[4] In that case, the defendant exploited her position as a bank employee to repeatedly examine the private banking records of the plaintiff, her spouse’s ex-wife. Public Disclosure was subsequently [recognized by a Canadian court in another Ontario case, *Jane Doe v D \(N\)*](#), in which an abusive ex-boyfriend posted an intimate video of the plaintiff on a pornography website without her consent.^[5] Public Disclosure has also been recognized by a court in Nova Scotia in the context of an acrimonious divorce and custody dispute.^[6]

The Test for Public Disclosure

In deciding the recognize the tort of Public Disclosure, the Court established that Public Disclosure occurs

where:

1. the defendant publicizes an aspect of the plaintiff's private life;
2. the plaintiff did not consent to the publication;
3. the matter publicized, or its publication, would be highly offensive to a reasonable person in the position of the plaintiff; and
4. the publication was not of legitimate concern to the public.^[7]

The Court did not confine the application of the Public Disclosure to non-consensual disclosure of intimate images. Rather, it recognized the need to protect broader privacy interests in sensitive information, including financial, sexual, relationship and health information.^[8] If publicized information falls outside of these categories, a court may ask what a reasonable person would feel if they faced the same publicity as the plaintiff.^[9]

Outcome

The Court held that the plaintiff had established the elements of Public Disclosure in this case.^[10] In assessing the damages to be awarded, the Court reasoned that instances of sexually-based wrongdoing warrant higher damages awards, since they involve attacks on privacy and dignity, and often result in significant and long-lasting harm to the victim.^[11]

With this in mind, the Court awarded a combined \$155,000 in general, aggravated and punitive damages for Public Disclosure, breach of confidence and mental distress, in addition to significant damages for battery and the plaintiff's medical and moving costs to escape the abusive relationship.

The Court also ordered the defendant to make best efforts to return all images of the plaintiff in his possession and remove any of the offending images that he posted.^[12]

Implications for Organizations

Organizations doing business in Alberta that process personal information – be it of employees, customers or others – must use appropriate security safeguards to make sure that the information is adequately protected from unauthorized disclosure. Such safeguards may include, for example, measures to prevent and monitor employee snooping and training employees who have a business need to handle personal information to ensure they do not improperly disclose such information.

Though there is no finite list of what constitutes a matter of “private life”, at a minimum it includes sexual, relationship, financial and health information. This decision may therefore be relevant to organizations that are collecting or storing vaccination-related information of employees or customers. Disclosure of this health

information without the individual's consent could be actionable under the tort of Public Disclosure.

If you have any questions about how to protect personal information from unauthorized disclosure, the lawyers in our Privacy and Cybersecurity Group would be happy to assist you.

[1] [2021 ABQB 739](#). [**"Shillington"**]

[2] *Shillington*, para 10.

[3] *Shillington*, para 14.

[4] [2012 ONCA 32](#).

[5] [Jane Doe 464533 v D \(N\), 2016 ONSC 541](#). This case was a default judgment, and subsequently set aside, but the tort of Public Disclosure was reintroduced in *Jane Doe 72511 v. Morgan*, 2018 ONSC 6607 (*not available on CanLii*).

[6] [Racki v. Racki, 2021 NSSC 46](#).

[7] *Shillington*, para 68.

[8] *Shillington*, para 69.

[9] *Shillington*, para 69.

[10] *Shillington*, para 72-73.

[11] *Shillington*, para 90.

[12] *Shillington*, para 80.

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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.

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