

# SHEDDING "LIGHT" ON A NEW PRIVACY TORT

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Amidst calls for legislative reform and enhanced powers for privacy regulators, Canadian courts are playing their own part in expanding the scope of individuals' privacy rights. In particular, an Ontario court has recently recognized the privacy tort of "false light publicity".<sup>[1]</sup>

## The Facts

The case involved a family law dispute wherein a man engaged in a years-long cyberbullying campaign of his children, their mother and their grandparents.

The father's egregious actions included, among other things, creating websites, YouTube videos, Facebook posts, petitions and GoFundMe accounts alleging that his ex-wife was drugging and holding their daughter captive, forging documents and defrauding the government. The father arranged for posters including false allegations about his ex-wife and her family to be disseminated, and even went so far as to have these allegations spread to his ex-wife's church, workplace and community in the United Kingdom.

## The Test

The Court found that a person's right to privacy includes the right to control the way they present themselves to the world. The tort of false light publicity, which has previously been recognized in the United States, was therefore found to be actionable in Ontario.

Liability for false light publicity will exist where:

1. one gives publicity to a matter concerning another that places the other before the public in a false light;
2. the false light in which the other was placed would be highly offensive to a reasonable person; and
3. the publisher had knowledge of, or acted in reckless disregard as to, the falsity of the publicized matter and the false light in which the other would be placed.

Importantly, though the publicity may also be defamatory, defamation is not required in order for false light liability to exist. The Court helpfully distinguished that "[t]he wrong is in publicly representing someone, not as worse than they are, but as *other* than they are" (emphasis added).

Canadian courts have previously recognized other tortious invasions of privacy, including public disclosure of private facts (“**PDPF**”). False light publicity is distinguishable from PDPF in that the former involves false or misleading claims, whereas the latter involves true statements. As was the case here, in the course of creating false light publicity, a party may also publicly share some true facts and thus be liable for both causes of action.

Applying this test, the Court found that the father’s protracted course of cyberbullying would be highly offensive to the reasonable person. Further, in vindictively pursuing his own interests, the father was, at best, reckless of the false light in which his posts and campaigns would place the mother. His behaviour was intentional and calculated to produce the harm that was ultimately suffered by the mother, including interfering with the mother’s use of her home, computer and internet, and negatively impacting her health and feeling of safety. Accordingly, the test for false light publicity was satisfied.

### **The Damages**

In setting the damage award, the Court considered damages to be akin to those suffered as a result of defamation. The Court went on to consider those factors that are weighed in setting damages for defamation, including:

1. the nature of the false publicity and the circumstances in which it was made;
2. the nature and position of the victim of the false publicity;
3. the possible effects of the false publicity upon the life of the plaintiff; and
4. the actions and motivations of the defendant.

The Court found the father’s false publicity to be egregious in that it included, among other things, allegations of the mother performing criminal acts involving her children. The false publicity was deliberately widely disseminated on the internet and through targeting members of the mother’s community and church abroad. This resulted in serious side effects for the mother, caused her fear and humiliation, and impacted her social standing and position. The father’s lack of apology or retraction of his allegations (notwithstanding a court order requiring same) also weighed in favour of a considerable award of damages.

Therefore, in addition to significant damages for intentional infliction of mental suffering and punitive damages, the Court awarded the mother \$100,000 in damages for both false light publicity and PDPF.

### **Takeaways for Your Business**

It remains to be seen whether this new tort will withstand scrutiny by an appellate court and, if so, how it will be applied by future triers of fact.

For now, the stakes are higher than ever when it comes to the accuracy of public messages. Public

communications about individuals, such as press releases, internal or external notices about departing employees and marketing materials, should be subjected to increased scrutiny to ensure accuracy.

This decision suggests that potential liability increases where the publicity is spread on the internet, which the Court referred to as “instantaneous, seamless, interactive, blunt, borderless and far-reaching”. Accordingly, particular care should be taken when posting or publishing statements on company websites, social media platforms or elsewhere on the internet.

It remains to be seen whether companies will be held vicariously liable for false light publicity initiated by an employee towards a fellow employee, during working hours and/or using the company’s network or resources. In anticipation of potential litigation of this nature, businesses are advised to review and revise their acceptable use, social media and workplace harassment policies and to consider providing additional training to employees in this respect.

Finally, organizations should take this opportunity to review and refresh their policies with respect to the timely processing of requests from individuals to correct their personal information.

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[1] *Yenovkian v. Gulian*, 2019 ONSC 7279. [ps2id id='1' 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.

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