Entertainment & Media Law Signal

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Invasion of Privacy Tort in Ontario - Implications for Entertainment Lawyers

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The question of whether Ontario law recognizes a tort cause of action for invasion/breach of privacy has long been a contentious one - but it has finally been definitively settled in the affirmative. The Ontario Court of Appeal has confirmed in the case of *Jones v Tsige*, 2012 ONCA 32 that Ontario law admits a separate cause of action for what the court terms "intrusion upon seclusion". (As discussed in this post, the trial decision in *Jones v Tsige* had flatly declared that "there is no tort of invasion of privacy in Ontario".)

A number of other commentators have already opined on the decision (see Ha-Redeye, Sookman, Hayes, Gannon), so I would like to just summarize the highlights and then comment on the importance of the decision for entertainment lawyers. (I'd also like to give a shout-out to colleague John Craig, whose article "Invasion of Privacy and Charter Values: The Common Law Tort Awakens" 42 McGill Law Journal 355 was cited by the court in it reasons).

Elements of the Tort

The court is somewhat less clear than it could be on the precise elements of the new(-ish) tort. From the decision:

> [70] I would essentially adopt as the elements of the action for intrusion upon seclusion the *Restatement (Second) of Torts* (2010) formulation which, for the sake of convenience, I repeat here:
>
> > One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.
>
> [71] The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive *causing distress, humiliation or anguish*. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

I have italicized the language which gives rise to the confusion: it's somewhat fuzzy as to whether there are three elements to the tort (intentional/reckless conduct; intrusion on seclusion; highly offensive) or four elements (intentional/reckless conduct; intrusion on seclusion; highly offensive; causing distress/humiliation/anguish). While nothing in this case turned on the point, it's not difficult to conceive of situations which are offensive but do not cause distress, humiliation or anguish.

The case is also worth keeping a copy of because it provides a rather succinct overview of various legislative and common law attempts to protect privacy interests, and contains an appendix listing damages awards in various "invasion of privacy" circumstances.

Limitations on Tort and Damages

The court identifies the following limitations on the availability of the tort (in paras. 72 and 73):

- limited to only "intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive"

- subject to "competing claims" for things such as the protection of freedom of expression and freedom of the press It appears that a plaintiff could recover any demonstrated pecuniary losses, along with "symbolic" or "moral" damages which are capped at $20,000.

Implications for Entertainment Lawyers

When advising clients in the entertainment industry, particularly those who produce investigative reporting, news reports, memoirs, documentaries, docu-dramas, even "reality" TV - really anything which involves the depiction of actual living persons - Ontario lawyers will need to be cognizant of the demonstrated availability of the "intrusion upon seclusion" tort - something which previously was largely a marginal concern in the province.

There is, as Mark Hayes notes, "great uncertainty" about how and the extent to which free expression interests will be taken into account in an "intrusion upon seclusion" court action. How might a documentary or docu-drama make use of letters exchanged between two people, only one of whom is the primary subject to the movie? Could the other person bring an intrusion upon seclusion claim for revealing "private" thoughts and experiences? What kind of impact might revelations about an individual's sexual activities or orientation have (e.g., imagine a news report or book revealing that a politician privately practices activities that he or she emphatically denounces in public life)? What about a book or TV movie about a public figure which reveals that the person once attempted suicide - something which they had worked to keep private? Could showing that the finances of a public individual do not accord with their cultivated image (e.g., showing that a successful real estate mogul is in fact broke) be cause for a claim? Is the interest recognized by the intrusion upon seclusion tort a personal one which expires upon death (similar to defamation), or can it be acted upon by heirs (as seems to be the case with the appropriation of personality tort)?

Of course, none of these questions are unique to this new tort - most legal developments are "fuzzy" around the edges and so engender similar considerations. But because film and TV lawyers, in particular, need to consider not just potential liability for their clients, but also compliance with E&O insurance policy clearance requirements, a heightened sensitivity to the issue is called for.
