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INTRUSION UPON SECLUSION: ONTARIO RECOGNIZES TORT FOR INVASION OF PRIVACY



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The Ontario Court of Appeal has released its much-anticipated decision in ***Jones v. Tsige***, 2012 ONCA 32 [***Jones***] which recognizes the tort of "intrusion upon seclusion," acknowledging a right to sue when an individual's privacy is intentionally invaded by another individual.

In ***Jones***, Ms. Jones and Ms. Tsige were both employees of the Bank of Montreal. After discovering that Tsige had repeatedly accessed her personal financial information, Jones notified her employer, whose investigation revealed that Tsige had improperly accessed Jones's banking information on 174 occasions over a four-year period. Tsige was in a relationship with Jones's former husband and claimed to be following up on whether he paid child support. Although the bank disciplined Tsige for her misconduct, Jones also sued Tsige for invasion of privacy. The Ontario Superior Court dismissed the claim on the basis that no such tort existed at common law in Ontario, and reasoned that Ms. Jones should have made a complaint under the *Personal Information and Protection of Electronic Documents Act* ("**PIPEDA**") instead of pursuing a court action.

In overturning the Superior Court decision, the Ontario Court of Appeal rejected the conclusion that a tort for invasion of privacy should not be recognized on the basis that it would interfere with the statutory privacy regime already in place. The Ontario Court of Appeal concluded that **PIPEDA** governs organizations, and not individuals acting as "rogues". The Court of Appeal also underscored the difficulties stemming from the fact that if Jones's only recourse were to commence a **PIPEDA** complaint, she would have to file a complaint against her own employer, rather than the individual responsible for the wrongdoing.

Ultimately, the Ontario Court of Appeal concluded that the recognition of the tort of

intrusion upon seclusion serves a different purpose than the privacy legislation in Ontario, the primary purpose of which is to protect personal information in the hands of government institutions and private organizations. Such a statutory regime does not provide redress when the privacy rights of individuals are invaded by other individuals, acting in a personal capacity. The Ontario Court of Appeal concluded that in light of the extreme facts in ***Jones*** and in light of our age of rapid technological advancement, the time had come to recognize a tort that would render conduct of this nature actionable.

Elements of the Tort

The Ontario Court of Appeal identified the following elements of the tort:

1. The conduct must be intentional or reckless;
2. The defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and
3. A reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish.

The Ontario Court of Appeal held that it is not necessary to prove harm to an economic interest, nor is it a requirement of that the information be published, distributed or recorded, in order for the tort to be made out. Rather, the simple "investigation or examination into the private concerns" of another individual will constitute actionable conduct when it is done intentionally or recklessly, and when the nature of the invasion is objectively offensive.

The Ontario Court of Appeal stated that the threshold for actionable conduct is fairly high because the tort will only arise in circumstances where there has been a "deliberate and significant invasion of personal privacy".

Examples of actionable conduct provided by the Ontario Court of Appeal include intrusions into records relating to an individual's finances, health, sexual practices or orientation, employment, or an individual's private correspondence.

Unless the plaintiff has suffered a pecuniary loss, the Court of Appeal held that damages for the tort should be modest, and imposed a cap on damages of \$20,000. Jones was awarded \$10,000 in damages because Jones suffered no public embarrassment or other emotional or financial harm, and Tsige had apologized for her conduct. While the Ontario Court of Appeal declined to award them in **Jones**, the decision acknowledges that additional awards of punitive damages may be available in exceptional circumstances.

Does Alberta Recognize the Tort?

Although **Jones** is the first appellate-level decision in Canada to recognize the tort of intrusion upon seclusion, a statutory tort of this nature exists in British Columbia, Saskatchewan, Manitoba, and Newfoundland, as these jurisdictions have enacted *Privacy Acts* that create a tort of invasion of privacy in circumstances where a person "wilfully and without a claim of right" violates the privacy of another individual.

At the present time, the Alberta courts have not recognized a separate tort for breach of privacy. Instead, the Alberta Court of Queen's Bench recently dismissed a claim for breach of privacy on the basis that in there is no such tort at common law in Alberta: *Martin v. General Teamsters, Local Union No. 362*, 2011 ABQB 412 [**Martin**]. Similar to the Ontario Superior Court's ruling in **Jones**, the Alberta Court of Queen's Bench in **Martin** held that any damages claimed for a breach of privacy must first be pursued through a complaint to the Privacy Commissioner under the *Personal Information Protection Act* [PIPA].

However, applying the analysis in **Jones**, it is unlikely that PIPA would provide a remedy in circumstances where an individual acting in his or her personal capacity invades the privacy of another individual. As is the case with PIPEDA, the purpose of PIPA is to govern the collection, use and disclosure of personal information by organizations, not individuals. Section 3(a) of PIPA expressly states that the Act does not apply to individuals acting for "personal or domestic" purposes, and the definition of "organization" excludes individuals who are not acting in a commercial capacity.

An individual may seek to recover damages for an organization's breach of PIPA after completing the complaints process set out in PIPA. However, because an Order from Alberta's Privacy Commissioner is a prerequisite

to this remedy, PIPA must apply to the conduct. PIPA does not apply in the case of one individual invading the privacy of another individual. However, an Alberta court may well look to the analysis in **Jones** in considering the award of damages to an individual bringing an action after an organization has been found to have breached PIPA.

Unless Alberta courts recognize the tort of intrusion upon seclusion, there is arguably no remedy for an individual whose privacy is invaded by another individual. In light of the decision of the Ontario Court of Appeal in **Jones**, it may not be too long before another litigant brings an action to test whether the tort is available in Alberta.

What is the Likely Impact if the Tort is Recognized in Alberta?

If the tort of invasion of privacy is recognized by Alberta courts, individuals will have civil recourse against those who willfully and inappropriately access their personal information when the conduct is objectively offensive. In the case of individuals accessing personal information in the workplace or other institutional setting, in addition to facing discipline from employers or sanctions from professional regulatory bodies, individuals who inappropriately access personal information could also be liable for civil damages.

The decision will be of particular interest to employers concerned about vicarious liability for the actions of employees inappropriately accessing personal information. Although it did not explicitly rule on this point, the Ontario Court of Appeal's reasons in **Jones** certainly suggest that employers may not be held vicariously liable for this tort if they have in place appropriate privacy and employment policies that prohibit inappropriate access to personal information.

However, the decision in **Jones** did not limit the ambit of the tort to the workplace. Should the tort be recognized in Alberta, it may permit suits by neighbours, family members, or other persons improperly accessing an individual's personal information.

Although the Ontario Court of Appeal indicated its view that the high threshold of inappropriate conduct necessary to bring a successful action would not "open the floodgates" of actions of this sort, in Alberta there is likely to be uncertainty regarding both the existence of the tort and the parameters of the tort until Alberta courts weigh in on this developing area of the law. ▲

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