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Privacy poachers take big hit

By Cristin Schmitz

February 03 2012 issue

The Ontario Court of Appeal's creation of a potentially sweeping new tort for invasion of privacy will generate litigation and other revenue opportunities for a broad cross section of the Bar, lawyers predict.

The new U.S.-style common law cause of action, dubbed "intrusion upon seclusion" by the appeal court in its groundbreaking Jan. 18 judgment in *Jones v. Tsige*, now offers recourse against "highly offensive" online or other intrusions into "matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence," according to the decision.

But the contours of the tort, as outlined by Justice Robert Sharpe for the appeal panel, are considerably broader than that.

The novel cause of action now presents the prospect of non-pecuniary, pecuniary, and punitive damages, as well as injunctive relief, against those who, "without lawful justification," deliberately or recklessly intrude physically or otherwise on the plaintiff's seclusion or the plaintiff's "private affairs or concerns," in a manner that "a reasonable person would regard as highly offensive, causing distress, humiliation or anguish."

Based on the track record of privacy actions in Canada, the United States and Britain, commentators told *The Lawyers Weekly* the judgment's wording arguably could encompass a broad array of intrusions on privacy in the personal, commercial and governmental spheres.

These could include, for example:

- A landlord spying on a tenant;
- Private investigators tracking people;
- People accessing their spouses' or children's correspondence, diaries, e-mail, Facebook, banking or health information without permission;
- Employers surreptitiously monitoring employees via computer or other means;
- Abusive telemarketing or junk-faxing, or collection agencies making harassing telephone calls;
- Businesses or other organizations misusing, or recklessly failing to protect, sensitive confidential personal information;
- Paparazzi-type behaviour, such as the News International celebrity phone hacking scandal, which is costing Rupert Murdoch's media empire millions of dollars in settlements and legal fees.

A new tort for invasion of privacy will effect lawyers in a wide range of fields, says Christopher Du Vernet, who won the case in question. He is seen at his Mississauga, Ont. office. [Photo by Paul Lawrence for The Lawyers Weekly]
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"Those are just some of the areas," said Christopher Du Vernet of Du Vernet Stewart in Mississauga, Ont. "I think the case has enormous potential, and technology is going to drive this in new and greater directions because there are so many new ways of intruding upon seclusion — physical and informational and otherwise ... the sky is the limit."

At the Court of Appeal, Du Vernet successfully represented Sandra Jones, whose lawsuit against Winnie Tsige for snooping online through Jones's private banking records had been thrown out summarily last year by a judge who said inventing a new tort was a job for legislators.

Justice Sharpe justified the appeal court's recognition of a new tort that helps vindicate people's reasonable expectation of privacy as an "incremental" move, reflecting "the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form."

He held that bank worker Tsige's repeated surreptitious examination of Jones's records at the bank was intentional, and that it unlawfully invaded Jones's private affairs. The behaviour of Tsige, who was the common law partner of Jones's ex-husband, "would be viewed as highly offensive to the reasonable person and caused distress, humiliation or anguish," Justice Sharpe concluded.

He and Ontario Chief Justice Warren Winkler and, sitting ad hoc, Ontario Superior Court Associate Chief Justice Douglas Cunningham, went on to award Jones $10,000 in non-pecuniary damages (the court has capped such damages generally at $20,000 to preclude a flood of litigation). However, they denied her request for punitive damages and costs.

Consequently, Jones is considering whether to seek leave to appeal to the Supreme Court of Canada on the issues of damages and costs, Du Vernet told *The Lawyers Weekly*.

"While being entirely blameless in this situation, she has been left with a big [legal] bill," he pointed out. He argued that the court's modest non-pecuniary loss award, and refusal to award punitive damages, sends the wrong message to potential tortfeasors.

"It comes perilously close to a mere licence [to breach privacy], not a disincentive," he contended, "because there's lots of matrimonial and commercial clients that might be happy to pay $10,000 to get confidential information on an opponent. For many businesses, that would be chump change."

Tsige's counsel, Alex Cameron of Toronto's Fasken Martineau, said no decision had been made on whether to seek leave to appeal. "It's obviously a novel and significant development in terms of the common law, with major wide-ranging ramifications — potentially across many different industries, and potentially [the] public sector — across Canada."

Cameron questioned how the existence of the new common law tort will play out, given overlapping privacy legislation, such as the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA). Can a complainant now ignore PIPEDA recourse, and instead sue Ontario-based entities that intrude on his or her seclusion? "And what impact does that have on any sector that's subject to those kinds of [statutory] regimes?" Cameron asked.

Du Vernet suggested the new cause of action will generate work for litigators, as well as for lawyers who deal with media, information technology, family, privacy, tort, commercial, employment and consumer law. "I think it will have immediate effect, for example, in the entertainment area where celebrities now have a means to protect their privacy, where they have a reasonable expectation of it."

Class action practitioners said the ruling is salutary for their field.

The Court of Appeal's stipulation that proof of actual economic loss is not an element of the cause of action "is welcome news to plaintiffs' lawyers and works well in the class action context," commented Darcy Merkur of Toronto's Thomson, Rogers.

The court's rationale for creating the tort — i.e., to remedy a wrong that otherwise would go unredressed — "will indirectly have a profound impact on the class-action industry," Merkur added. "What I take from the case is simply that the courts will penalize wrong behaviour in a civil context, even if it means … establishing new torts."

Kirk Baert, of Toronto's Koskie Minsky, said the judgment may open the door to mass tort suits against companies or others for privacy invasions that affect many people whose potential claims would be too small to pursue individually. "Recognition of this tort is a good development. The question of the legality of the [privacy] policies of the institution raises a common issue, which could be determined by one judge, for the benefit of all."

Toronto media lawyer Brian Macleod Rogers said the judgment imposes a new burden on media outlets in Ontario. "In fact, this whole area is one I think any media lawyer would be telling their clients will be the next growing area of concern."

Daniel Burnett, the president of the Canadian Media Lawyers Association, said his group will seek to intervene if the Supreme Court reviews the decision. Burnett, of Vancouver's Owen Bird, said the media's experience with the statutory privacy tort in B.C. — which includes a "public interest" defence — has not been unduly onerous.

However, he questioned why the Court of Appeal imposed a cap on non-pecuniary damages of $20,000. (The appeal court left the door open to aggravated or punitive damages in "exceptional cases.")

"There have been awards [in B.C.] that have exceeded that — $35,000 to $40,000," Burnett said. "I can understand the court not wanting to let the [litigation] floodgates open, but at the same time it's always a little bit artificial to start saying: 'Regardless of what the circumstances are, you are going to get $20,000 as your top' … What if you applied that to the *News of the World* phone-hacking scandal? Would you actually put a $20,000 limit on that?"

(In that regard, actor Jude Law settled Jan 19 for about $200,000 plus legal costs.)

Counsel said that as the first Canadian appellate ruling to recognize a distinct common law tort of invasion of privacy, *Jones v. Tsige* is likely to influence how intrusion on seclusion is treated across Canada, including in those five jurisdictions that have statutory causes of action for privacy invasion: B.C., Manitoba, Saskatchewan, Newfoundland and Quebec.

The court left the question of what happens when a privacy claim clashes with a competing claim, such as freedom of the press, to a future case that raises the issue.

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