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Breach of Privacy: "Psychological Battery"

Following years of debate in Ontario, in 2012, our Court of Appeal officially recognized breach of privacy as an independent common law tort, but subject to modest damages. Two recent breach of privacy cases significantly departed from the recommended range of damages, and awarded amounts that materially exceed the top award proposed by the Court of Appeal.

Underlying these damages awards is the core of the tort of invasion of privacy: psychological battery.

Of significance, this tort does not require proof of economic or physical harm. Damages are intended to recognize the intangible nature of hurt feelings, embarrassment, humiliation, anguish, and mental distress. Typically, such moral damages are symbolic and should be modest.

The two recent cases addressed herein involve especially egregious violations of privacy initiating the court to follow damages awards from sexual battery cases. Despite the higher quanta, the damages were still intended to compensate the plaintiffs for psychological battery.

In *Jones v. Tsige*, the Court of Appeal recognized the tort of "intrusion upon seclusion" as a breach of privacy. This case involved repeat, unauthorized accessing of the plaintiff's personal banking information.

The Court of Appeal considered the symbolic nature of damages for an invasion of privacy, and set out numerous governing principles underlying such damages awards:

1. There is no requirement of economic harm;
2. Damages are to recognize the intangible nature of hurt feelings, embarrassment, humiliation, anguish and mental distress.
3. Predictability and consistency are paramount values to awards of symbolic or moral damages;
4. Absent proof of actual pecuniary loss, moral damages should be modest, up to \$20,000;
5. A required element of the tort is deliberate conduct that is reasonably regarded as highly offensive;

6. Neither awards of aggravated or damages are excluded or encouraged.

The court in *Jane Doe 46* departed from these principles. In *Jane Doe 46*, a first-year university student was persuaded to send an intimate video to her former boyfriend on the assurance that he would keep the video private. The boyfriend immediately broke his promise and posted the video to a pornography site. The plaintiff learned of the posting after a number of weeks, and suffered serious psychological consequences.

On uncontested affidavit evidence, Stinson J. found that the plaintiff had proven the necessary elements of three intentional torts: breach of confidence, intentional infliction of mental distress and invasion of privacy – “public disclosure of embarrassing facts”.

Justice Stinson determined damages based on sexual battery cases, rather than the principles set out in *Jones v. Tsige*.

Damages in sexual battery cases are compensatory and functional in nature intending to address three distinct issues: actual physical harm; solace to the victim to vindicate the victim’s physical autonomy and dignity; and compensation to account for the humiliating and degrading nature of the defendant’s conduct.

A similar approach was followed by the court in *T.K.L. v. T.M.P.*. In *TKL*, the court found both a breach of the British Columbia *Privacy Act* and a breach of fiduciary duty. The breach involved secret video recordings by a stepfather of his young adult daughter. The videos, taken when the plaintiff was in the bathroom, focused on the daughter’s breasts and genitalia, and filmed her engaged in intimate personal activity. On discovery of the video, the plaintiff suffered serious psychological harm.

The damages awarded in *Jane Doe 46* and in *TKL* were significantly higher than the \$10,000 awarded in *Jones v. Tsige*, and the recommended upper limit of \$20,000 for moral damages for breach of privacy. In *Jane Doe 46*, the court awarded \$100,000, including aggravated damages of \$25,000 and punitives of \$25,000. In *TKL*, the court awarded \$85,000, including aggravated damages of \$25,000.

Fundamentally, damages for both breach of privacy and sexual battery are grounded in the intangible nature of the harm to human dignity. This harm manifests as the psychological distress suffered by plaintiffs.

In *Jane Doe 46* and in *TKL*, the courts aligned the significant psychological harm suffered by these plaintiffs to the

psychological harm suffered by victims of sexual battery. The courts also linked the exploitation of the intimate personal affairs of the two young women with victims of sexual battery.

The noteworthy departure from the limit of \$20,000 for moral damages was justified due to the sensitivity of the information exploited and the severity of the consequences.

In both *Jane Doe 46* and in *TKL*, the courts also awarded aggravated damages due to the degrading conduct of the defendant – also following sexual battery cases.

Aggravated and punitive damages were not ruled out by the Court of Appeal in *Jones v. Tsige*. However, to warrant aggravated damages in an invasion of privacy case, a defendant's conduct will have to be particularly egregious. This is because a required element of the tort is deliberate and highly offensive conduct. Courts must be vigilant not to award duplicate damages for humiliating conduct in both general and aggravated damages.

These three cases demonstrate that the root of the tort of breach of privacy is psychological battery. In response to an unauthorized and deliberate invasion of privacy, damages are intended to vindicate intangible interests including humiliation, impaired human dignity and psychological distress. Of particular importance, no economic or physical harm is required to prove the tort.

Many breaches of privacy or cases of psychological battery will warrant only moral damages, not to exceed \$20,000, for the intangible harm caused by intentional, highly offensive conduct. However, in those cases where the defendant exploits or invades intimate personal affairs causing a plaintiff significant psychological harm, damages may be based on comparable sexual battery cases. Regardless of the quantum, at its core, damages in breach of privacy are awarded for psychological battery.