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Breach of privacy or plain old defamation? Ontario Court recognizes â€œfalse lightâ€• privacy tort

In the late 2019 decision in *V.M.Y. v S.H.G.,* Justice Kristjanson of the Ontario Superior Court of Justice for the first time recognized the tort of “publicity placing a person in a false light” in Canadian law. But do we need yet another invasion of privacy tort?

The case concerned cyberbullying and other online abuse by a man against his children and their mother and maternal grandparents in the context of a custody and access dispute. Among other things, the Court found that on various websites, the man had accused the mother and grandparents of violently abusing and drugging the children, and shared videos he had recorded of the children during court-ordered parenting time. This harassment appears to have been in breach of pre-existing court orders.

The Court was asked to grant a wide range of relief protecting the children, their mother and grandparents from further abuse and harassment. The applicants also sought damages for nuisance, harassment, intentional infliction of mental suffering, and most interestingly, invasion of privacy.

In considering this privacy claim, the Court reviewed the recent history of Ontario courts’ recognition of the American invasion of privacy “four-tort catalogue” from the *Restatement (Second) of Torts:* the 2002 decision of the Court of Appeal for Ontario in Jones v Tsige, recognizing intrusion upon seclusion; and *Jane Doe 464533 v N.D.* and *Jane Doe 72511 v N.M.* (both default judgments) recognizing the second tort in the “catalogue”, public disclosure of private facts about the plaintiff. As the Court noted, the fourth tort in the catalogue, appropriation of likeness, had already previously been recognized in Ontario.

After this brief review of the American privacy torts, the Court turned to the final remaining tort in the catalogue, “publicity placing a person in a false light”, and without much ado, concluded that “this is the case in which this cause of action should be recognized”. The Court adopted in whole the

statement of the element of the tort from the American *Restatement*, noting that a defendant who "gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if:

- a) the false light in which the other was placed would be highly offensive to a reasonable person, and
- b) the actor 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."

On the basis of the finding that the father had portrayed the mother and grandparents in a "false light", and in consideration of the particularly "egregious" nature of the false publicity, the Court awarded them $100,000.00 in damages on account of this tort (in addition to punitive damages and other damages for other torts).

While there is no question a remedy was needed in this case, we should ask whether recognition of this new tort was necessary. Terrible as it was, the conduct of the father in publicly making false statements described in the decision falls squarely within the framework of defamation. Had the case been pleaded, argued and determined on that basis, it seems unlikely that there would have been any substantial difference in the outcome. (Other torts, including public disclosure of private facts, addressed some of the other misconduct in the case, including unauthorized publication of videos of the children.)

Relying on existing well-established defamation law may advantage plaintiffs in such cases, including because falsity is presumed. Further, the damages awarded by the Court in this case also tracked closely the trend of larger defamation awards arising from campaigns of online harassment (e.g. *Rutman v Rabinowitz*). At the same time, the law of defamation already recognizes important defences for defendants. For instance, fair comment, qualified privilege and responsible communication on matters of public interest, all of which give defendants some zone to express themselves even in a manner that paints a plaintiff "in a false light".

Knowledge of the falsity of the statements made or recklessness as to it is an element of malice, proof of which will defeat these defences, but the line between recklessness and mere carelessness as to the truth is one that courts in defamation cases have long grappled (e.g. *Botiuk v Toronto Free Press* at paras. 96-97). Similarly, the defence of fair

comment requires the court to ask, in the words of the Supreme Court of Canada in *WIC Radio v Simpson* “could any person honestly express that opinion on the proved facts?”, not whether the speaker in fact was subjectively acting honestly.

The Court in V.M.Y. does contrast the “false light” privacy tort with the “public disclosure of private facts” tort, and notes “It would be absurd if a defendant could escape liability for invasion of privacy simply because the statements they have made about another person are false.” True enough, which is what the law of defamation has long recognized, at least in relation to negative falsehoods like those at issue in this case, i.e. “serious allegations online about S.H.G. and her family, including that she is a kidnapper, abuses the children, drugs the children, forges documents, and defrauds governments.”

More fundamentally, this case raises the question of whether the wholesale importation of American torts is the best approach to crafting remedies in Canadian law. Justice Sharpe noted in *Jones v Tsige* that the facts of that case “cried out” for a remedy but also offered other justifications, including earlier Canadian cases recognizing a right to privacy, scholarly writings and the imperative that the law change to accommodate advances in technology. Unfortunately, the Court’s decision in V.M.Y. does not contain any extensive discussion of the merits or demerits of recognizing this tort in Canadian law, consideration of whether an alternative remedy is available or weighing of the interplay of the tort with freedom of expression.

While the expression in this case was inarguably unworthy of protection, the breadth of the tort as expressed by the Court may well give future commentators on matters of public interest pause. The essence of the tort, as expressed by the Court, is that it is wrong to publicly represent someone, not as worse than they are, but as “other” than they are. To quote the decision: “it is enough for the plaintiff to show that a reasonable person would find it highly offensive to be publicly misrepresented as they have been. The wrong is in publicly representing someone, not as worse than they are, but as other than they are.”

What is the interest of Courts in limiting expression that describes someone inaccurately, but that does not defame them? It is not clear (to us at least) whether V.M.Y. is under appeal, but it seems likely that these and other questions about the entire suite of privacy torts will have to be answered by courts (including appellate courts) in future cases.