

New “intrusion upon seclusion”/invasion of privacy tort recognized in Ontario

In the decision of *Jones v. Tsige*¹, a unanimous panel of the Court of Appeal confirmed the existence of a cause of action for “intrusion upon seclusion”. In practice, this opens the door for Ontario plaintiffs to allege damages for breach of privacy.

The case before the Court involved Ms. Jones and Ms. Tsige. They did not know each other personally, but Ms. Jones had entered into a long-term relationship with Ms. Tsige’s ex-husband. Apprised of the relationship, Ms. Tsige used her resources as a bank employee to regularly access and review Ms. Jones’ private banking records over the course of four years.

Upon discovering that Ms. Tsige had been surreptitiously reviewing her finances, Ms. Jones issued a Statement of Claim in which she alleged that Ms. Tsige had committed the tort of invasion of privacy. Counsel for Ms. Jones brought a summary judgment motion, which was heard by Whitaker J. of the Superior Court of Justice. Counsel petitioned the Court to dismiss the action under Rule 20 of the *Rules of Civil Procedure*, arguing that the claim could not succeed because there is no such thing as a tort of invasion of privacy.

In reasons released in early 2011, Whitaker J. agreed, finding that “there is no tort of invasion of privacy in Ontario”. The plaintiff’s claim was accordingly dismissed.

Ms. Jones appealed to the Court of Appeal and was successful. In light of Ms. Jones successful appeal, the allegation of “intrusion upon seclusion” is recognized as a viable cause of action moving forward. In creating this new pigeon hole for potential litigation, the Court suggests it was taking “an incremental step that is consistent with the role of this court to develop the common law in a manner consistent with the changing needs of society.”

The new tort has three elements:

- “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.”

While this will inevitably foster new and heretofore impossible actions, the Court was quick to warn that this new tort has a very limited scope and ought not result in a deluge of litigation:

¹ 2012 ONCA 32

“These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded: it is 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.”

The Court also forewarned potential plaintiffs that the awards in successful intrusion upon seclusion cases should be modest but sufficient to mark the wrong that has been done. The Court suggested a range up to \$20,000.00. Ms. Jones was awarded \$10,000.00. This means that a case for breach of privacy, unaccompanied by any pecuniary or other loss, is within the jurisdiction of our Small Claims Courts.