

# “Intrusion Upon Seclusion” New Tort from Ontario Court Of Appeal

By Barry W. Kwasniewski\*

## A. INTRODUCTION

For over a century, courts in Ontario and other common law jurisdictions have grappled with the issue of whether individuals should have the legal right to sue for monetary damages for breaches of privacy. This debate has finally been determined in the recently released Ontario Court of Appeal decision in *Jones v Tsige*.<sup>1</sup> This newly recognized cause of action, which the court has identified as an action for “intrusion upon seclusion” is an important development in the privacy law of Ontario. For charities and not-for-profits, this case illustrates that care must be taken in matters involving the privacy of individuals who have any dealings with the organization.

## B. FACTS OF THE CASE

Sandra Jones and Winnie Tsige both worked at the Bank of Montreal. They worked at different branches of the bank and did not know each other, but Tsige was in a common law relationship with Jones’ former husband. In July 2009, Jones learned that Tsige had used her workplace computer at the bank to access Jones’ personal banking records at least 174 times over a period of four years. Tsige did not dispute that she accessed these records. Tsige claimed that she was in a financial dispute with Jones’ former husband and was accessing Jones’ records to confirm whether he was paying child support. However, Jones did not accept this explanation because she claimed that it was inconsistent with the timing of and frequency of Tsige accessing this information. Jones commenced a lawsuit and was seeking damages of \$70,000 for the invasion of privacy and breach of fiduciary duty (breach of fiduciary duty was later abandoned) and \$20,000 for punitive damages.

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<sup>1</sup> 2012 ONCA 32.

As Tsige admitted to accessing the records, the only issue to be decided was whether there was a cause of action for invasion of privacy. The motions Judge of the Ontario Superior Court of Justice concluded that there was no common law tort for the invasion of privacy in Ontario.<sup>2</sup> The Judge granted Tsige’s motion for dismissal of the action because, given there was no such tort, there was no genuine issue that required a trial. The motions judge also decided that Jones should pay Tsige’s court costs in the amount of \$35,000 because she had aggressively pursued the litigation and did not accept reasonable settlement offers from Tsige. Jones appealed both the dismissal and the cost awards to the Ontario Court of Appeal.

### **C. DECISION OF THE ONTARIO COURT OF APPEAL**

#### **1. Rationale for the “Intrusion upon Seclusion”**

The Ontario Court of Appeal overturned the lower court decision and finally and definitively confirmed the existence of a tort for “the intrusion upon seclusion”. The Court determined that the “recognition of such a cause of action would amount to an incremental step that is consistent with the role of this court to develop common law in a manner consistent with the changing needs of society.”<sup>3</sup> The Court explained that such a tort should be recognized because the case law supports such a cause of action, because technological change has historically motivated the legal protection of the individual’s right to privacy, because it is within the capacity of the common law to evolve to respond to problems caused by the routine collection of personal information that is easily accessible in electronic form, and finally, because the facts of this particular case “cry out for a remedy.”<sup>4</sup>

#### **2. The Court Defines the Tort**

The Court determined the elements of the intrusion upon seclusion as follows:

The defendant’s conduct must be intentional or reckless;

The defendant must have invaded, without lawful justification, the plaintiff’s private affairs or concerns; and

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<sup>2</sup> 2011 ONSC 1475.

<sup>3</sup> *Supra* note 1 at para 64.

<sup>4</sup> *Ibid* at para 69.

A reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish; however, proof of harm to an economic interest is not necessary.

The Court further explained that, in order to meet the elements of the tort, intrusions must be “highly offensive” when viewed objectively on the reasonable person standard. Such highly offensive intrusions may include, but are not necessarily limited to, intrusions into an individual’s financial or health records, sexual practices and orientation, employment, diary or personal correspondence. As such, claims that arise because individuals are sensitive or unusually concerned about their privacy will likely not meet the elements of the tort. Further, the Court cautioned that claims for the protection of privacy may give rise to competing claims of freedom of the press and freedom of expression. In such situations, the right to privacy will have to be reconciled and at times yield to the competing claims.

3. Damages

As proof of actual loss is not an element of the tort, the Court provided guidance on the appropriate approach to damages in such cases. In cases where there is no provable pecuniary loss, damage awards fall into a category described as “symbolic” or “moral damages.” Such damages are not awarded to compensate for actual loss, but instead “to vindicate rights or symbolize recognition of infringement.” The Court explained that the damages awarded for an intrusion upon seclusion where there is no pecuniary loss should be modest but sufficient to acknowledge the wrong. The Court set a maximum damage award at \$20,000 for such damages without pecuniary loss. The Court further noted that in exceptional and egregious cases, aggravated and punitive damages may be awarded.

In determining which factors should be considered in arriving at a damage award, the Court adopted the factors identified in the Manitoba *Privacy Act*:<sup>5</sup>

- 1) The nature, incidence and occasion of the defendant’s wrongful act;
- 2) The effect of the wrong on the plaintiff’s health, welfare, social, business or financial position;
- 3) Any relationship, whether domestic or otherwise, between the parties;

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<sup>5</sup> CCSM c P125, s 4(2).

- 4) Any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong; and
- 5) The conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant.

4. The Case “at Hand”

As Tsigé admitted to repeatedly accessing Jones’ personal records and as this intrusion met the elements laid out by the Court, Tsigé was found to have committed the tort of intrusion upon seclusion. Though Tsigé’s actions were deliberate, repeated and caused Jones distress, the Court found that, because Tsigé made genuine attempts to make amends and because Jones suffered no public embarrassment or harm, this case would fall in the middle range for damages. As such, the Court awarded Jones \$10,000 in damages. This win was bittersweet, however, because each party was ordered to pay their own court costs, which by this time would be substantial.

**D. CONCLUSION**

As previously noted, this case represents a significant step in the protection of individual privacy rights. An individual whose privacy has been, or is being, violated will no longer be required to show some other damage or violation in order to protect his or her privacy. The mere invasion of privacy is enough to found a cause of action. However, this case is also a cautionary tale for employees who have access to such personal information, as well as their employers who could be held vicariously liable for their actions. Employers would be well advised to ensure that they have a privacy policy in place, to confirm that employees know and understand the policy and to explain the legal and other repercussions for violations of the policy.