Ontario Court recognizes existence of new "revenge porn" privacy tort

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Stinson J. of the Ontario Superior Court of Justice has issued a landmark decision explicitly recognizing that the public disclosure of private images constitutes a privacy tort for which pecuniary damages may be sought before civil law courts.

Overview

On January 21, 2016, in *Doe 464533 v. D*., 2016 ONSC 514 (note: the names are redacted because of a publication ban issued in the same decision), the Ontario Superior Court of Justice (the "Court") formally recognized the existence of a so-called privacy tort, making available common law remedies to victims of non-consensual distribution of intimate images. For the first time in Canada, the Court applied the doctrines of breach of confidence, intentional infliction of mental distress and invasion of privacy to a case of an intentional privacy violation (the non-consensual posting on a website of an intimate video of the plaintiff), to arrive at the conclusion that the behaviour of the defendant in this case warranted awarding damages, injunctive relief and a publication ban. This case is important because it shows the growing concern by the civil and common law courts to provide an effective remedy to the growing number of victims of so-called *revenge porn*. Because of the pervasiveness of such shared images through social media, the consequences for victims of this practice are often devastating, both personal and professional — making it all the more essential that the courts offer a way to obtain satisfaction against the perpetrator.

Case summary

The plaintiff and the defendant ("D") were both 18 years old and romantically involved at the time of the events that gave rise to this case. After long hesitation and under continued pressure from the defendant, the plaintiff sent an intimate video of herself to him, on the explicit condition that only "D" would see the video. The same day, "D" posted the video on a pornographic website and shared the link with a couple of his friends, some of whom were also childhood friends of the plaintiff's. When the plaintiff found out that the video had been made public, she was devastated, humiliated and distraught, to the point where she suffered from severe depression and panic attacks.

The video was available online for about three weeks, after which it was removed by the defendant. However, there was no way of knowing how many times it had been viewed or downloaded. Moreover, the Court attached great importance to the possibility that copies of the video may still circulate and be shared on other platforms, even four years after the original upload of the video was removed.

The plaintiff argued that, while novel in Canadian law, the breach of confidence and trust by "D" warranted damages. Permitting someone who has been entrusted with confidential images to intentionally reveal them online and not providing a legal recourse to the victim, would be to leave a gap in the existing system of available remedies. As for the quantum of damages, the plaintiff argued that the Court should base itself on the quantum awarded in physical sexual battery cases, of which the lingering psychological effects are similar to the consequences experienced by the plaintiff in this case. As to "D", it should be noted that the defendant did not appear and made no representations before the Court, making the decision by the Court a default judgment.

The Court fully agreed with the plaintiff. It found that "D" had committed the tort of breach in confidence, since he knew that the video was private, that the plaintiff meant for it to remain that way, and that he had used the images to her detriment. The Court furthermore held that “D” had intentionally inflicted mental distress upon the victim and had invaded her privacy by making the private video available to the public. The Court also agreed with the point of view from the plaintiff that cases on physical sexual battery provide a good basis for determining a suitable monetary award in a case like this one, given the significant and ongoing impact of the publication of the private material on the plaintiff's emotional and psychological health, similar to the impact of sexual assault.

As a result, the Court awarded the plaintiff $141,708.03 in general, aggravated and punitive damages, and costs. The Court ordered all remaining copies of the video to be destroyed and furthermore issued an injunction prohibiting "D" to seek any form of contact with the plaintiff and her family. Lastly, because of the highly sensitive nature of the matter, the Court also retroactively anonymized the proceedings and ordered a publication ban of any detail that could lead to the identification of the plaintiff.

It should be noted that in civil law provinces such as Québec these types of lawsuits are not new, given that under the *Civil Code of Québec* it is considered an invasion of someone's privacy to use (including posting or making available) their name, image, likeness or voice for a purpose other than the legitimate information of the public. Still, the damages awarded in these types of *revenge porn* cases have never reached the amount awarded in this new landmark decision.

By

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