Ontario Court Adopts New Cause of Action to Combat Online Bullying

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The Ontario Superior Court ordered a man to compensate his ex-girlfriend after he posted an explicit video of her online without her consent.

In a case called *Doe 464533 v N.D.* [*Jane Doe*],[1] the Ontario Superior Court ordered a man to compensate his ex-girlfriend after he posted an explicit video of her online without her consent. In doing so, the Court explicitly adopted a new privacy tort and acknowledged the "devastating harm" that can result when the internet is used as a means for predators and bullies to victimize others. The decision, released on January 21, 2016, represents a new avenue through which the law is attempting to respond to protect victims of cyber-bullying.

Background

The claim in *Jane Doe,* arose when the plaintiff's ex-boyfriend, N.D., posted an intimate video of the plaintiff on a pornography website without her knowledge or consent. The plaintiff and N.D. had attended high school together and dated while they were both in grade 12; however, they broke up shortly after the school year ended.

In the fall of 2011, the plaintiff was attending university in another city, but the plaintiff and N.D. communicated regularly and would see each other when the plaintiff returned home to visit her parents. Around this time, N.D. also started asking the plaintiff to make a sexually explicit video of herself to send him. The plaintiff refused on multiple occasions, but she ultimately recorded a video of herself in November 2011.

Before the plaintiff sent the video to N.D., she expressed that she was unsure about sending the video. However, N.D. convinced the plaintiff to send the video and promised that no one else would see it. In December 2011, the plaintiff learned that the video had been posted to a pornography website on the same day that the plaintiff had sent the video. Further, the plaintiff learned that N.D. had been showing the video to individuals with whom she attended high school.

The plaintiff was "devastated, humiliated and distraught" when she found out the video had been made public. The Court held that the consequences arising from N.D.'s conduct were "significant and long-lasting" and included deferring school exams, loss of

sleep and appetite and failing to attend class. The plaintiff's mother even took her to a crisis centre because of concern for her daughter's mental health.

Invasion of Privacy

In its reasons, the Court reiterated that the right to privacy has been afforded constitutional protection and, in fact, is considered a value enshrined in the *Charter of Rights and Freedoms.* The Court also adopted language from an Ontario Court of Appeal decision recognizing technological change and the need for the common law to evolve to respond to the "novel threat to a right to privacy."[2]

With this in mind, the Court adopted a new privacy tort, public disclosure of private facts, and defined it as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of the other's privacy, if the matter publicized or the act of the publication (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

The Court held that "to permit someone who has been confidentially entrusted with such details — and in particular intimate images — to intentionally reveal them to the world via the Internet, without legal recourse, would be to leave a gap in our system of remedies." With this in mind, the Court found that N.D. had made public an aspect of the plaintiff's private life in a manner that a reasonable person would find highly offensive and for which there was no legitimate concern to the public. As such, the Court found that the plaintiff was entitled to damages.

The Court's Other Findings

In addition to its consideration of the tort of public disclosure of private facts, the Court also considered other causes of action for which the plaintiff was entitled to damages.

First, the Court held that this case engaged issues of confidentiality and privacy. In particular, the plaintiff's decision to send the video was premised on N.D.'s assurance that no one else would view it. The Court held that there had been a breach of confidence, which entitled the plaintiff to damages. The video created by the plaintiff was clearly confidential information and the plaintiff expressly communicated to N.D. that the video should be kept confidential. Finally, the Court held that the posting of the video was to the detriment of the plaintiff in that it caused psychological and emotional harm.

Second, the Court in this case also considered whether N.D.'s actions constituted intentional infliction of mental distress and concluded that they did. In this case, N.D.'s actions had been "flagrant and outrageous" in that he knew the plaintiff was hesitant to share the video, but he posted it online and shared it with friends nonetheless. In addition, it was clearly foreseeable that the actions of N.D. would cause harm, such as emotional upset and psychological distress, to the plaintiff. In fact, N.D.'s decision to make the video public caused the plaintiff "significant psychological harm."

Remedies

This action was brought under Simplified Procedure and, therefore, the plaintiff was limited to claiming damages of $100,000, plus costs and interest. The Court awarded the maximum, apportioned as follows: (1) $50,000 in general damages, (2) $25,000 in aggravated damages, and (3) $25,000 in punitive damages. Interestingly, in awarding damages, the Court compared the injuries suffered by the plaintiff and their lasting effect to those damages suffered by victims of sexual assault. Specifically, the Court stated, "The actions of the defendant in the present case offended and compromised the plaintiff's dignity and personal autonomy."

The Court also ordered injunctive relief, including directing N.D. to destroy all intimate images of the plaintiff, prohibiting him from publishing any intimate images of the plaintiff, and further prohibiting N.D. from communicating with the plaintiff or members of her immediate family.

Notably, this decision was made by way of default judgment, meaning the defendant, N.D., did not contest the allegations made against him by the plaintiff. As a result, it remains to be seen if the Court's findings, including the adoption of the tort of public disclosure of private facts, will withstand the test of a contested hearing or will be upheld by a higher court.

Conclusion

Legislatures and the courts continue to scramble to respond to the obvious harm caused by cyber-bullying. As noted in the Court's reasons, Manitoba has enacted legislation to create the tort of "non-consensual distribution of intimate images" and Parliament has amended the *Criminal Code* to include a new offence of "publication of an intimate image without consent", while anti-bullying legislation was adopted in Nova Scotia and subsequently struck down by the province's courts.

In *Jane Doe,* the Court took steps to both formally acknowledge the seriousness of cyber-bullying and provide a legal tool with which to address the problem. In doing so, it took the significant step of recognizing a new tort of public disclosure of private facts.

[1] 2016 ONSC 541.

[2] *Jones v. Tsige,* 2012 ONCA 32 at 67.

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