Ontario Superior Court recognizes new “false light” privacy tort

March 06, 2020

In the recent family law decision *Yenovkian v. Gulian*,[1] the Ontario Superior Court of Justice recognized a new invasion of privacy tort: “publicity which places the plaintiff in a false light in the public eye.” Although the scope of the new tort is not yet well-defined, the decision could have implications reaching outside the family law context, into employment law and beyond.

Facts

Yenovkian v. Gulian was a family law case involving a father who cyberbullied his ex-spouse, his children, his ex-spouse’s lawyer, and a judge. The cyberbullying campaign included websites, YouTube videos, online petitions, and emails with false accusations and misleading portrayals of the individuals in a negative light. The father also made several unsubstantiated accusations against his ex-spouse and her family to various authorities in the United States, the United Kingdom and Canada.

The court found that the father’s portrayal of his ex-spouse had resulted in serious harm, including a provable illness and legitimate concerns about how his ex-spouse might be treated by members of the public. The father was ordered to pay $300,000 in damages, in addition to family law awards.

Analysis

In coming to its decision, the court adopted a new invasion of privacy tort from American tort law: the tort of “publicity which places the plaintiff in a false light in the public eye.” This new tort is the last of four American privacy torts to be adopted into Canadian law: the others are intrusion upon seclusion, public disclosure of embarrassing private facts and appropriate of name or likeness for the defendant’s advantage.

The false light privacy tort will be met if:

1. an individual gives publicity to a matter concerning another before the public in a false light;

2. the false light in which the other was placed would be highly offensive to a reasonable person; and
3. the individual 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.

The court acknowledged that the false light privacy tort has significant overlap with the separate privacy tort of public disclosure of private facts. However, while the public disclosure of private facts tort involves true statements, the false light tort involves false or misleading claims.

The court explained that, while the publicity giving rise to this cause of action will often be defamatory, proof of defamation is not required. 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, because "the wrong is in publicly representing someone, not as worse than they are, but as other than they are." The value at stake is respect for a person's privacy and the right to control the way they present themselves to the world.

Takeway for employers

The recognition of this new tort is in line with a recent trend in Canadian privacy law, which provides individuals with more control over their public and online reputations. Employers may see increased litigation risk associated with privacy complaints.

Employers should train employees carefully on the public dissemination of information about customers or clients and ensure that employees do not post false or misleading information from company accounts. Employers should also be careful in their public or company-wide communications regarding current or former employees. Employers should ensure that any broadly disseminated statements do not contain inaccuracies or unfairly cast individuals in a misleading light.

So far, it is unclear whether companies will be able to use this new tort to make claims against individuals, including employees who maliciously publish false or misleading information about their former employers. Notably, in the United States, corporations are unable to sue under the false light privacy tort.

We can expect future decisions to provide further clarifications on the scope of this new tort and any available defences.

[1] 2019 ONSC 7279.

By

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