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WOMAN FILMED JOGGING WITHOUT CONSENT AWARDED FOR BREACH OF PRIVACY

By Esther Shainblum*

A. INTRODUCTION

In the case of *Vanderveen v Waterbridge Media Inc.*,[1] released on November 20, 2017, the Ontario Superior Court of Justice Small Claims Court (the "Court") considered a claim under the tort of intrusion upon seclusion when the plaintiff was filmed jogging on a walking trail without her consent. The Court awarded the plaintiff the sum of $4000 in damages after her image was used for commercial purposes without her knowledge or consent. This recent decision highlights the increasingly shifting and fluid boundaries between being public and being private and expands the elements of the tort of intrusion upon seclusion recently recognized in Ontario.

B. FACTS

Ms. Basia Vanderveen had been jogging in a public area in 2014 when she was videotaped by the defendant, Waterbridge Media Inc. ("Waterbridge"). According to her testimony, she shielded her face when she noticed the camera in order to signify that she did not wish to have her picture taken. A year later, a publicity video for a new condominium development appeared, which included a two second clip of Ms. Vanderveen jogging. When the plaintiff discovered that she was in the video advertisement, she was shocked and immediately requested that her image be removed from the video. After some apparently testy email exchanges, the video was removed from the developer's website and from YouTube.

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[1] 2017 CanLII 77435 (ON SCSM).

C. DECISION

Notwithstanding the removal of the video, the plaintiff felt that the video had "blasted her image to the world without her consent or permission". She was self-conscious about her weight, having had two babies, and felt that the image in the video was not the image that she wished to portray publicly. In its defense, Waterbridge took the position that the plaintiff's consent was not required because she had been filmed in a public space with no expectation of privacy, which it claimed was standard practice in the media industry. The defendant also stated that it was "impractical" for it to obtain consents from the large number of individuals who might be filmed in public settings.

The Court was not persuaded by these arguments. Applying the principles set out in the Ontario Court of Appeal decision in *Jones* v. *Tsige*,[2] the decision described the key features of the tort of intrusion upon seclusion as the intentional intrusion, without lawful justification, into a plaintiff's private affairs or concerns in a manner that a reasonable person would regard as highly offensive, causing distress, humiliation or anguish. In its reasons, the Court stated that it had no hesitation in concluding that the defendant had committed the tort of intrusion upon seclusion.

The defendant admitted having intentionally filmed the plaintiff and there was no legal justification for its having done so. The Court found that a reasonable person would find the privacy invasion to be highly offensive and that the plaintiff had testified as to the distress and humiliation it caused her. Expanding on the *Jones v. Tsige* decision, which held that snooping into bank account information constituted intrusion into seclusion, the Court further found that the elements of intrusion upon seclusion apply to the capturing of the persona or likeness of a person and using it for commercial purposes without consent. In its decision, the Court quoted from the Supreme Court of Canada decision in *Aubry v Les Editions Vice-Versa*,[3] as follows:

> Since the right to one's image is included in the right to respect for one's private life, it is axiomatic that every person possesses a protected right to his or her image. This right arises when the subject is recognizable. There is, thus, an infringement of the person's right to his or her image, and therefore fault, as soon as the image is published without consent and enables the person to be identified.[4]

[2] 2012 ONCA 32.
[3] [1998] 1 SCR 591, 1998 CanLII 817 (SCC).
[4] *Ibid* at para 53.

With respect to the quantum of damages, the Court stated that it is clear that "proof of actual loss is not required in a cause of action for intrusion upon seclusion",[5] and, applying the analysis in *Jones* v. *Tsige*, which stated that damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest but sufficient to mark the wrong that has been done, it awarded the plaintiff damages of $4000 plus $100 for appropriation of personality as a reasonable amount that would have been paid for an actor in similar circumstances.

D. CONCLUSION

Although this is a decision of the Small Claims Court, this case demonstrates that the body of case law supporting the right to privacy continues to grow. Although the *Vanderveen* case deals with using a person's image for commercial purposes without consent, it is possible that future decisions could further expand the scope of the tort of intrusion upon seclusion to encompass activities generally carried on by charities and not for profits. As this area of the law is in flux, it would be prudent for charities and not-for-profits who engage in any kind of filming, photography or videotaping activity, whether in public or private venues, to ensure that they have consent from all individuals whose images are being captured. It is further advisable that any complaint received from a member of the public regarding any use of their image be acted upon politely and swiftly.

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[5] *Supra* note 1 at para 22.