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## **ONTARIO COURT ORDERS DAMAGES RELATING TO 'REVENGE' VIDEOS POSTED ONLINE**

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*By Sean S. Carter\**

### **A. INTRODUCTION**

On November 2, 2018, the Ontario Superior Court of Justice delivered its decision in *Jane Doe 72511 v Morgan* (“*Jane Doe*”)<sup>1</sup> confirming the privacy tort of public disclosure of private facts which had been previously recognized in Ontario in *Jane Doe 464533 v N.D.* (the “N.D. Case”).<sup>2</sup> This decision reflects the increasing willingness of the civil courts, particularly in Ontario, to affirm the importance of privacy interests in emerging venues and platforms, particularly as the use of social media and online platforms becomes more prevalent.

### **B. CASE SUMMARY**

In the specific facts of *Jane Doe*, the plaintiff alleged the defendant, her ex-boyfriend, had abused her at his parents’ house and had published a sexually explicit video of the plaintiff on a pornographic Internet website without her knowledge or consent out of revenge after she had called the police and he was charged with and convicted of assault. Although the plaintiff was eventually successful in having the video taken down from the first website where it had been posted, by then the video had already been viewed

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<sup>1</sup> 2018 ONSC 6607.

<sup>2</sup> 2017 ONSC 127. For further information on this case, see Sepal Bonni, *February 2016 Charity & NFP Law Update*, “Ontario Court Recognizes New Invasion of Privacy Tort” online: Carters Professional Corporation <<http://www.carters.ca/pub/update/charity/16/feb16.pdf#sb1>>. The court’s decision in the N.D. Case was overturned on a technicality unrelated to the tort.

over 60,000 times, linked on at least ten different websites, and had been downloaded and shared an unknown number of times.

The plaintiff sought aggravated and punitive damages for assault and battery and public disclosure of private facts in the civil courts, in addition to the criminal complaint. As well, the plaintiff sought relief to require the destruction of any photos or videos of her that the defendant might still possess and a prohibition on their disclosure. The plaintiff not only sought damages against the alleged perpetrator himself, but also damages against the defendant's parents for negligence, primarily for witnessing the abuse and failing to take reasonable steps to protect her from him when she was at their house.

Regarding the privacy breach and the issue of whether the defendant was liable for posting the video without the plaintiff's knowledge or consent, the court followed the precedent established by the Ontario Court of Appeal in *Jones v Tsige*.<sup>3</sup> That case recognized the civil privacy tort of intrusion upon seclusion for the first time in Ontario and opened the door for the recognition of other breach of privacy common law torts.<sup>4</sup>

The court in *Jane Doe* also reviewed federal legislation, as well as instructive and binding Supreme Court precedents premised on the protection of privacy interests as a matter of public order and societal values. In this regard, the court confirmed the common law tort of public disclosure of private facts in Ontario, and found that all four elements of the tort, as set out in the N.D. Case, had been met in this case: i) the defendant publicized an aspect of the plaintiff's private life; ii) the plaintiff did not consent to the publication; iii) the matter publicized or its publication would be highly offensive to a reasonable person; and iv) the publication was not of legitimate concern to the public.<sup>5</sup>

This tort now seems to be well-established in Ontario.

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<sup>3</sup> 2012 ONCA 32.

<sup>4</sup> For further information *Jones v Tsige*, see Barry W Kwasniewski, *Charity & NFP Law Bulletin No. 277*, "“Intrusion Upon Seclusion” New Tort from Ontario Court of Appeal” (27 February 2012) online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2012/chylb277.pdf>>.

<sup>5</sup> *Supra* note 1 at paras 99 – 100.

## C. CONCLUSION

The *Jane Doe* case helps to provide a stark example of the more serious type of breaches of privacy which can occur, particularly that involving the highly intrusive and personal nature of “revenge porn” cases such as this one, as well as showing that wronged parties can have redress to the court pursuant to the tort of intrusion upon seclusion to help combat these situations. In awarding damages and other relief, the court in *Jane Doe* took into consideration the vulnerable position of the plaintiff because of her age and socio-economic conditions as an instructive and *de facto* aggravating factor when it came to assigning damages. The court granted all the relief requested by the plaintiff resulting in \$50,000 in general damages, \$25,000 for aggravated damages and \$25,000 in punitive damages.

Charities and not-for-profits should be aware of the potential implications of this decision, which are broad and may apply to more than “revenge porn” cases. To the extent that a charity or not-for-profit shares anyone’s personal information on social media or the Internet without their consent or knowledge, even where the *Personal Information Protection and Electronic Documents Act* does not apply, the conduct of the charity or not-for-profit may be caught by this common law tort of public disclosure of private facts. What type of private information is being shared improperly (and the associated moral outrage) will only impact the amount of liability, including quantum of damages or type of relief provided by the court. It is therefore critical to ensure that the requisite consent is obtained to publicly disseminate (or simply post online) what might be innocuous or ‘harmless’ information, images or videos to ensure that a charity or not-for-profit’s assets and programs are protected and able to continue unhindered.