The Ever Expanding Scope of Canadian Privacy Law: Recognizing Novel Grounds for the Protection of Private Information

Privacy is an amorphous concept. With its historical roots dug firmly in the dirt of philosophical discussion, its underpinnings stretch back thousands of years. The advent of the information era, coaxed by the explosive proliferation of the internet, has precipitated a gradual recognition that the line between the private and public realms is blurring. Our modern society is founded on an altogether all-encompassing system of electronic communications. Some of these communications are public, while others are not. Both are vulnerable to misappropriation and misuse, which begs an obvious question: to what length should such communications be protected from exploitation by another?

Enter the case of *Jane Doe 464533 v D(N)*,[1] in which the Ontario Superior Court of Justice faced this question with respect to private communications head on and delivered a decisive verdict: the common law can and must be used to address the risks associated with our society's growing dependence on technology. On this basis, the Court ruled that introducing the tort of "public disclosure of private facts" accomplishes this goal, compensating vulnerable individuals for the unwanted and unjustified use of their private information by another.

The Facts: the Unauthorized Dissemination of Sexually Explicit Content

In *Jane Doe*, the female plaintiff had been in a romantic relationship with the male defendant during their final year of high school. The couple's relationship ended prior to the plaintiff's enrolment in university. However, as the plaintiff transitioned into this new phase of her education, her relationship with the defendant lingered, eventually culminating in repeated requests by the defendant that the plaintiff make him a sexually explicit video. After consistent reassurances by the defendant that he would keep the video completely private, the plaintiff finally gave in to his request. Upon receiving the video, the defendant proceeded to immediately post it online. It remained online for a number of weeks before being removed.

The plaintiff sank into a severe depressive state when she learned of the video's online presence and brought a claim against the defendant seeking damages and injunctive relief. The defendant chose not to oppose the proceedings.

Bridging a Gap: the Need to Recognize a Novel Tort for the Public Disclosure of Private Facts

Until *Jane Doe* was delivered on January 12th, 2016, the state of privacy law in Canada remained significantly underdeveloped. In 2012, the case of *Jones v Tsige*[2] established, for the first time in Canadian law, a common law tort relating to invasion of privacy, referred to by the Court of Appeal as "intrusion upon seclusion". The tort of intrusion upon seclusion relates to instances wherein a defendant intentionally intrudes, physically or otherwise, upon the seclusion of another or his/her private affairs or concerns, assuming the invasion would be highly offensive to a reasonable person. By virtue of the Court of Appeal's explicit use of the term "intrusion", the tort of intrusion upon seclusion requires that there must be something in the nature of prying or meddling committed by a defendant in order for the cause of action to be made out. Therefore, the tort was unhelpful for the plaintiff in *Jane Doe* given that she had willingly provided the video to the defendant.

Still, the Court of Appeal in *Jones* recognized that other factual scenarios may support the adoption of novel grounds upon which torts relating to invasion of privacy could develop, identifying a number of separate prospective torts connected by a common theme and name – that is, privacy. It was on this basis that the Court in *Jane Doe* justified the formal recognition at law of a novel tort for public disclosure of private facts, a decision guided by the egregious conduct of the Defendant in conjunction with the obvious inability of the common law to come to the aid of the Plaintiff. The precise formulation of the test to be applied is 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.

In applying this test to the facts, the Court awarded $100,000.00 in damages to the plaintiff.

Analyzing the Implications: Evaluating the Scope and Value of Private Information

Jane Doe's impact on the development of Canadian privacy law as a whole is significant. Until now, resort to the common law as a means of seeking reparations for the unauthorized publication of

embarrassing personal information remained out of reach. In effect, the Court has augmented the foundation of privacy law by signalling that plaintiffs should not only be protected from active and intentional intrusions by others into their private affairs, but also from the general disclosure of information pertaining to such private affairs, even when it is willingly provided.

With respect to the potential quantum of damages awarded for this tort, it should be noted that the claim was brought under the Simplified Procedure, such that the damages award was capped at $100,000.00 – i.e., the monetary limit for the Simplified Procedure. In addition, although the full amount of the claim was awarded to the plaintiff, it should also be reiterated that the action was unopposed by the defendant. In other words, *Jane Doe* may not serve as a reliable predictive model for future claimants, as it is possible that the Court may have been prepared to award a greater or lesser amount had it been unrestrained by the monetary limit of the Simplified Procedure or, conversely, had it been faced with opposition from the defendant. Regardless, based on the test's formulation, future claims will almost certainly be brought forward that extend beyond the unauthorized sharing of sexually explicit content. The content would simply need to be of such a nature that its disclosure would be "highly offensive to a reasonable person." In this regard, the potential impact of *Jane Doe* will depend entirely on the types of content that will be found to meet the standard of being "highly offensive" to distribute, absent consent. Thus, while it is clear that our legal system is bending in the direction of expanding protections, the ambit of the common law's use as a tool to combat unwanted and invasive conduct remains undefined at this time.

As a final note, the test seems to incorporate an active element, providing that "One who gives publicity," may be subject to liability. However, it could be argued that the test does not import intention as an express requirement. Therefore, it is questionable whether an accidental leak of private information – for example, by a business serving as a custodian over private data – might attract the same potential for liability as an intentional distribution.

Ultimately, given the trajectory of Canadian privacy law, anyone dealing with private information in any capacity should be cognizant of the possible ramifications of misusing that information, whether intentionally or otherwise. Should that information be made public, you could find yourself in the unenviable position of having to oppose the alleged privacy rights of another – a position which, especially now, may place you at the foot of an uphill legal battle.

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[1] 2016 ONSC 541 (*Jane Doe*)

[2] 2012 ONCA 32 (*Jones*)

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