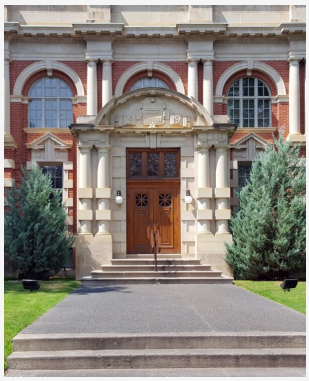
OSLER

Tort of 'Public Disclosure of Private Facts' recognized in Alberta in 'Revenge Porn' case

SEPTEMBER 28, 2021 4 MIN READ



Related Expertise

- Corporate and Commercial Disputes
- Corporate Governance
- Employment and Labour
- Privacy and Data Management

Authors: Brian Thiessen, KC, Adam LaRoche, Jenny Lee

Introduction

On September 16, 2021 the Court of Queen's Bench of Alberta released its decision in *ES v Shillington*[1] (Shillington), recognizing the tort of "public disclosure of private facts" and marking an expansion of common law privacy torts in the province.

Background

The plaintiff had provided intimate images to the defendant for private use. The defendant posted the plaintiff's intimate images on the internet without the plaintiff's consent. The plaintiff had suffered severe physical, emotional, and sexual abuse in a relationship with the defendant.

The plaintiff was recognized in certain photographs by her neighbour, who then spoke to the plaintiff about the photographs. The plaintiff's psychologist provided evidence of the plaintiff's resulting anxiety and other significant ongoing symptoms that negatively affected her life.

The defendant was noted in default, and the plaintiff sought damages for the tortious act of "public disclosure of private facts", in addition to breach of confidence, assault, sexual assault, battery, and intentional infliction of mental distress. The plaintiff also sought injunctive relief requiring the defendant to remove her private images from the public domain and not repost them.

Decision

Justice Inglis, writing for the Court of Queen's Bench of Alberta, penned Alberta's first judgment recognizing the tort of "public disclosure of private facts". In doing so, the Court adopted the exact same four-part test for the same tort recognized in Ontario, in *Jane Doe 72511 v Morgan*:[2]

1. the defendant publicized an aspect of the plaintiff's private life

2. the plaintiff did not consent to the publication
3. the matter publicized or its publication would be highly offensive to a reasonable person, and
4. the publication was not of legitimate concern to the public.

Judgment was also granted for assault, battery, sexual assault, intentional infliction of mental distress, and breach of confidence.

In *Shillington*, the Court heeded the Supreme Court of Canada's direction that new torts shall not be recognized unless they "reflect a wrong, be necessary to address that wrong, and be an appropriate subject of judicial consideration," as decided in *Nevsun Resources Ltd v Araya*.[3]

While Alberta's *Protecting Victims of Non-Consensual Distribution of Intimate Images Act*[4], passed in 2017 may otherwise have provided a statutory tort sufficient to address the wrong in the case at bar, the defendant's conduct in *Shillington* predated the introduction of that legislation. Accordingly, the rule against the retrospective application of statutes left the door open for the Court to recognize the common law tort, as previously recognized in Ontario.

The Court of Queen's Bench of Alberta granted the plaintiff's request for a permanent injunction and awarded monetary damages related to the publication of intimate images totalling $185,000, comprised of $80,000 in general damages, $25,000 in aggravated damages, $50,000 in punitive damages, and $30,000 in special damages.

Key Takeaways for Businesses

The Court did not limit the application of the tort of "public disclosure of private facts" to intimate or pornographic images – in fact, the Court specifically noted that privacy interests may arise in financial, relationship and health information, and that a reasonable person could be highly offended by their publication without consent.

It remains to be seen whether entrepreneurial counsel will try to stretch the application of Alberta's newest tort. If history is any indication, class action claims alleging the vicarious liability of employers for the tort of "intrusion upon seclusion" have been certified (for example, in *Evans v Bank of Nova Scotia*)[5], and so similar vicarious liability claims against companies for "public disclosure of private facts" may be on the horizon in Alberta.

In the authors' view, however, the tort should be narrowly interpreted, lest runaway claims for inadvertent or inoffensive disclosures of information against companies become the norm. Such disclosures would be handled more properly and efficiently by Alberta's existing private sector privacy legislation and regulator. The tort of "public disclosure of private facts" should be reserved for situations which are truly "highly offensive" and intentional, as was the case in *Shillington*.

---

[1] 2021 ABQB 739

[2] 2018 ONSC 6607.

[3] 2020 SCC 5.

[4] RSA 2017, c P-26.9.

[5] 2014 ONSC 2135.