Doe 464533 v N.D., 2016 ONSC 541 (CanLII)

Date: 2016-01-21
Docket: CV-12-464533
Citation: Doe 464533 v N.D., 2016 ONSC 541 (CanLII), <http://canlii.ca/t/gn23z>, retrieved on 2017-10-03

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COURT FILE NO.: CV-12-464533
DATE: 20160121

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
JANE DOE 464533	)	*Donna Wilson*, for the plaintiff
	)	
Plaintiff	)	
	)	
– **and** –	)	
N.D.		No one appearing for the defendant
Defendant		
	)	
	)	**HEARD at Toronto:** January 12, 2016

REASONS FOR JUDGMENT

PUBLICATION RESTRICTION NOTICE

The Court has ordered that any report or publication of or con cerning this matter or these reasons shall not contain any inf ormation that would identify the plaintiff and that in any such r eport or publication the defendant shall be referred to only by his initials.

STINSON J.

[1] This lawsuit arises out of the actions of the defendant, the plaintiff's ex-boyfriend, who posted an intimate video of her on a pornography website without her knowledge or consent. The defendant has failed to serve a statement of defence and has been noted in default. The plaintiff has therefore brought this motion for default judgment. In addition to seeking compensatory and punitive damages, the plaintiff seeks a permanent injunction to prevent any further such conduct by the defendant.

PROCEDURAL HISTORY

[2] The events in question occurred in the fall of 2011. The plaintiff's lawyer sent a demand letter to the defendant in February 2012. The defendant admitted having posted the video, but advised that it had been removed and that he did not consider that the plaintiff's claims for compensation had any merit. Discussions with the defendant and a lawyer consulted by him did not resolve the matter, however, and this action was commenced in September 2012. Negotiations continued between the lawyers until November 2013, from which time the defendant has represented himself.

[3] In August 2015, the defendant informed plaintiff's counsel that he was unwilling either to settle or to defend the action, and that she should "do what she had to." As a result, plaintiff's counsel noted the defendant in default. Despite the fact that, pursuant to rule 19.02(3) *of Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the defendant was not entitled to any further notice of the proceedings, plaintiff's counsel sent him a Notice of Motion for default judgment in hopes that he would reconsider his position in relation to a possible settlement. The defendant responded by faxing what purported to be a Notice of Motion for a motion in writing seeking to set aside his noting in default. He never followed through with that motion. In the face of that inaction, plaintiff's counsel set down her motion for default judgment. It came before me on January 12, 2016.

[4] At the conclusion of the hearing before me on January 12, 2016, I granted judgment in favour of the plaintiff, with reasons to follow. These are those reasons.

FACTS

[5] The factual background may be summarized fairly briefly. The parties went to high school together in a small Ontario city, where they started dating while they were both in Grade 12. Although they broke off that formal relationship, they continued to see each other romantically throughout the summer and the fall of 2011. By the fall of 2011, the plaintiff and the defendant were both 18 years old.

[6] In September 2011, the plaintiff was living in another city while attending university. Despite the fact that they had broken up in July 2011 and were no longer "boyfriend and girlfriend", she and the defendant communicated regularly by Internet, texting, and telephone and continued to see each other when she returned to visit her parents' home.

[7] In August 2011, the defendant began asking the plaintiff to make a sexually explicit video of herself to send to him. For some time, she refused to do so, but the defendant kept asking her repeatedly. He sent her several intimate pictures and videos of himself, and told her that she owed him a video of herself in return. She did not want to do so, but she

ultimately recorded an intimate video of herself in November 2011. Before she sent it to the defendant she texted him, telling him she was still unsure. He convinced her to relent, and reassured her that no one else would see the video. Despite her misgivings, due to pressure from the defendant, she "caved in" and sent the video to him.

[8] In early December 2011, the plaintiff learned that the defendant had posted the video she sent him on an Internet pornography website under the "user submissions" section of the website. As posted by the defendant, the video was titled "college girl pleasures herself for ex boyfriends (*sic*) delight." She further learned that the defendant had been showing it to some of the young men with whom they had attended high school. She later learned that the video had been posted online on the same day she had sent it to him, and that its existence had become known among some of her friends.

[9] The plaintiff was devastated, humiliated and distraught to discover what the defendant had done. She contacted the defendant's mother, with whom she had a positive relationship, and told her what had occurred. The mother determined that the defendant had posted the video, and advised the plaintiff that he had removed it from the website. The police were contacted but, in light of the plaintiff's age, they declined to become involved.

[10] The foregoing facts are undisputed. They confirm that the video was available online for approximately 3 weeks, before it was "removed". There is no way to know how many times it was viewed or downloaded or if and how many times it may have been copied onto other media storage devices (where it may remain) or recirculated.

[11] The consequences for the plaintiff arising from the defendant's conduct have been significant and long-lasting. She had to defer her Christmas exams because she was physically and mentally distraught over learning that the video had been posted online. She was so upset that she could not sleep and barely ate anything. She could not focus on school and skipped class and stayed in bed.

[12] When she went home over the Christmas break, she barely showered for days on end, never went out, and stayed in bed for pretty much the entire day. She could not fall asleep until between 4 and 6 a.m. because she was constantly thinking about what had happened. She had no appetite and would go days barely eating. Her mother was so concerned about her mental health that she took her to a crisis intervention centre at a hospital. She cried for most days and "had no emotion or life." In her words, she "felt like a very cold person and felt like everything in my life and all of my beliefs and morals had been stolen from me."

[13] She saw a counsellor at her school for over a year and a half to deal with the emotional fallout from the posting of the video. She experienced serious depression and emotional upset. On the occasions since the incident when she has encountered the defendant she has become emotionally distraught and unable to cope, sometimes collapsing. Her reactions in such situations resemble so-called "panic attacks". According to the plaintiff, when they have made eye contact the defendant has had "an insolent look on his face, as if he is proud of himself" and he has shown no remorse.

[14] The plaintiff remains conscious of the fact that the video was viewed by acquaintances of the defendant, that its existence is known to other members of her former social circle and has caused harm to her reputation. Even today, more than four years after the incident, she is emotionally fragile and worried about the possibility that the video may someday resurface and have an adverse impact on her employment, her career, or her

future relationships. She continues to be distraught about the incident and afraid that these feelings will haunt her for a long time to come.

[15] Despite these challenges, and to her credit, she has now finished her undergraduate studies and is attending a graduate program that will enable her to become a health care professional when she graduates. She remains worried, however, that the defendant's actions have put her future career in jeopardy should news of these events surface again.

ISSUES AND ANALYSIS

I - Liability

[16] In recent years, technology has enabled predators and bullies to victimize others by releasing their nude photos or intimate videos without consent. We now understand the devastating harm that can result from these acts, ranging from suicides by teenage victims to career-ending consequences when established persons are victimized. Society has been scrambling to catch up to this problem and the law is beginning to respond to protect victims.

[17] Each year, criminal courts in Canada deal with an increasing number of these cases. Unlike past decades, many child pornography cases now involve same-aged peers who share nude photos or sex videos with each other. Adults also suffer great harm from these acts. In 2014, Parliament responded by amending the *Criminal Code* to include a new offence of "publication of an intimate image without consent": *Criminal Code*, R.S.C., 1985, c. C-46, as amended, s. 161.1. Under this new provision, anyone who publishes an intimate image of a person without that person's consent is guilty of an offence and can be sentenced to up to five years in prison.

[18] In November 2015, the Province of Manitoba enacted legislation to create the tort of "non-consensual distribution of intimate images": see *The Intimate Image Protection Act,* C.C.S.M. c. I87, s. 11, which came into force on January 15, 2016. No other legislature has so far passed similar legislation. This case, therefore, raises legal questions about the availability of a common law remedy for victims of this conduct, and the legal basis upon which such claims might be founded. Counsel for the plaintiff informed the court that she had been unable to locate any reported decision in Canada concerning a victim seeking civil damages on these or similar facts and my research has not revealed one. This case is possibly the first.

[19] For the reasons that follow, I have concluded that there are both established and developing legal grounds that support the proposition that the courts can and should provide civil recourse for individuals who suffer harm arising from this misconduct and should intervene to prevent its repetition.

A. Breach of Confidence

[20] There can be little doubt that the decision by the plaintiff to provide the defendant with an intimate video of herself engages issues of confidentiality and privacy. They had a close personal and romantic relationship of some duration. It was on the basis of that relationship that she agreed to provide him with private images of her. The plaintiff's decision to send the video was premised upon the defendant's assurance that he alone would view it. His decision to share it publicly was a clear breach of the terms upon which it was communicated to him.

[21] In *Grant* v. *Winnipeg Regional Health Authority* [2015] M.J. No. 116 (C.A.), the Manitoba Court of Appeal summarized the law in relation to claims for breach of confidence as follows (at paras. 118-119):

> Tort law has recognized that a breach of confidence in certain circumstances may create a cause of action (see *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CanLII 34 (SCC), [1989] 2 S.C.R. 574; and *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, 1999 CanLII 705 (SCC), [1999] 1 S.C.R. 142). Courts have recognized that the unauthorized use of confidential information to the detriment of the party communicating it, and from which damages ensue, may lead to a cause of action. The elements required to make out the tort of breach of confidence are:
>
> a) that the information must have the necessary quality of confidence about it;
>
> b) that the information must have been imparted in circumstances importing an obligation of confidence; and
>
> c) that there must be unauthorized use of that information to the detriment of the party communicating it (see *H.R.G. v. M.S.L.*, 2007 BCSC 930 (CanLII), 75 B.C.L.R. (4th) 141; *Canada (Attorney General) v. Rundle (c.o.b. NEC Plus Ultra)*, 2013 ONSC 2747 (CanLII), 16 B.L.R. (5th) 269 (QL); and *Sabre Inc. et al. v. International Air Transport Association et al.*, 2011 ONCA 747 (CanLII) at para. 14, 286 O.A.C. 246).

[22] In my view, the video created by the plaintiff meets the first test, being confidential information. It had (to use the words of Lord Greene in *Saltman Engineering Co*. v. *Campbell Engineering Co.* (1948), 65 R.P.C. 203 (C.A.) as quoted in *Lac Minerals*) "the necessary quality of confidence about it". It was private and personal to the plaintiff and was not (until it was shared on the Internet and otherwise by the defendant) publicly available.

[23] The circumstances that led to the creation and communication of the video clearly demonstrate that it was communicated to the defendant on the express basis that he would treat it as confidential. Thus the second element is met.

[24] The third element of the tort, use of the information to the detriment of the party communicating it, is ordinarily considered in commercial circumstances, where the recipient has misused the confidential information for commercial advantage, at the expense or to the detriment of the other party. An essential element in any tort is harm to the plaintiff. I see no rational basis to distinguish between economic harm and psychological, emotional and physical harm, such as was experienced by the plaintiff in the present case. In any event, the possible future adverse impact on the plaintiff's career and employment prospects arising from the possibility that the video may someday resurface, also demonstrates actionable harm.

[25] I therefore conclude that the plaintiff has made out a cause of action for breach of confidence.

B. Intentional infliction of mental distress

[26] In *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 2002 CanLII 45005 (ON CA), 60 O.R. (3d) 474 (C.A.), Weiler J.A. adopted the test for intentional infliction of mental

distress, as set out by McLachlin J. in *Rahemtulla v. Vanfed Credit Union* (1984), 1984 CanLII 689 (BC SC), 51 B.C.L.R. 200 (S.C.). This test requires:

(i) conduct that is flagrant and outrageous;

(ii) calculated to produce harm; and,

(iii) resulting in a visible and provable injury.

[27] A malicious purpose is not required in order to establish this tort (see *Prinzo*, *supra*, at para. 44) although on the facts of this case I am prepared to infer that the defendant was motivated by malice, especially in light of the fact that he posted the video on the same day it was sent to him and further in light of his subsequent conduct.

(i) Flagrant and outrageous conduct

[28] The first question to ask is whether the defendant's conduct was flagrant and outrageous. The following facts are relevant to this issue. To begin with, the defendant knew that the plaintiff had been reluctant to make the video. He also knew that the plaintiff was hesitant to share with him such intimate and private images of herself. He persuaded her to do so on the basis of his express assurance that he alone would view the video. On the very day she forwarded it to him, the defendant posted the video online, in violation of the terms upon which he had received it. He also shared the video with his friends. This was not a mere act of inadvertence on his part, but rather a clear violation of the promise he made to the plaintiff and as well as a breach of the trust in him that motivated her to prepare and provide the video.

[29] On the basis of the foregoing facts, I am satisfied that the defendant's conduct was flagrant and outrageous The first element of the test is easily met on the facts of this case.

(ii) Calculated to produce harm

[30] This requirement is established where it is clearly foreseeable that the actions of the tortfeasor would cause harm to the victim: see *Prinzo, supra,* at para. 45 adopting the reasons in *Rahemtulla.* The Court of Appeal for Ontario stressed in *Piresferreira v. Ayotte*, 2010 ONCA 384 (CanLII) at paras.78-79 that although the extent of the harm need not be anticipated, the kind of harm must have been intended or known to be substantially certain to follow. Thus, the defendant must have either desired to produce the mental distress suffered by the plaintiff, or known that this type of harm was substantially certain to follow.

[31] In my view, it is entirely foreseeable that posting an intimate video of a young woman – who had provided it in the expectation that it would remain confidential – on a public website, and sharing the video with peers, would cause the person whose trust had been betrayed in this fashion extreme emotional upset and understandable psychological distress. I find this element of the tort is made out in this case.

(iii) Visible and provable injury

[32] The final element of the test is visible and provable injury. Except for the occasions when she has found herself unable to cope – including at least one time when, upon seeing the defendant, she collapsed to the ground – the defendant's conduct did not cause actual physical harm to the plaintiff. It is evident, however, that his conduct has caused significant

psychological harm. She was taken to a crisis centre due to the extent of her mental upset in the immediate aftermath. She suffered from depression. She underwent extensive counselling to help her cope with her situation. She remains emotionally fragile and vulnerable and is apprehensive about her future.

[33] I conclude that the defendant's actions caused in the plaintiff a visible and provable illness. It follows that the plaintiff has made out a claim for intentional infliction of mental distress.

C. Invasion of Privacy

[34] In *Jones v. Tsige,* 2012 ONCA 32 (CanLII), the Court of Appeal for Ontario recognized the existence of the tort of invasion of privacy in the context of intrusion upon seclusion. In that case, the Court found that the defendant had committed the tort of intrusion upon seclusion when she used her position as bank employee to repeatedly examine private banking records of her spouse's ex-wife. While that case dealt with a significantly different fact situation, many of the Court's comments are germane to this case, and I will therefore refer extensively to that decision.

[35] To begin with, the Court noted (at para. 15) that "[t]he question of whether the common law should recognize a cause of action in tort for invasion of privacy has been debated for the past one hundred and twenty years. Aspects of privacy have long been protected by causes of action such as breach of confidence, defamation, breach of copyright, nuisance and various property rights. Although the individual's privacy interest is a fundamental value underlying such claims, the recognition of a distinct right of action for breach of privacy remains uncertain."

[36] The Court went on to recognize as authoritative a seminal American legal article on the subject by William L. Prosser, "Privacy" (1960), 48 Cal. L. Rev., noting that "Prosser argued that what had emerged from the hundreds of cases he canvassed was not one tort, but four, tied together by a common theme and name, but comprising different elements and protecting different interests. Prosser delineated a four-tort catalogue, summarized as follows, at p. 389:

> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
>
> 2. Public disclosure of embarrassing private facts about the plaintiff.
>
> 3. Publicity which places the plaintiff in a false light in the public eye.
>
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.
>
> "

[37] The Court also noted (at para. 19) that "[t]he tort that is most relevant to this case, the tort of 'intrusion upon seclusion', is described by the *Restatement* [*Restatement (Second) of Torts* (2010)], at 652B as: 'One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.'"

[38] The Court went on to note (at para. 20) that "[t]he comment section of the *Restatement* elaborates this proposition and explains that the tort includes physical

intrusions into private places as well as listening or looking, with or without mechanical aids, into the plaintiff's private affairs. Of particular relevance to this appeal is the observation that other non-physical forms of investigation or examination into private concerns may be actionable. These include opening private and personal mail or examining a private bank account, 'even though there is no publication or other use of any kind' of the information obtained.'" The Court commented that if the plaintiff in *Jones* had a right of action, it fell into the first category of intrusion upon seclusion, described by Prosser as comprised of the following elements:

- there must be something in the nature of prying or intrusion;
- the intrusion must be something which would be offensive or objectionable to a reasonable person;
- the thing into which there is prying or intrusion must be, and be entitled to be, private; and
- the interest protected by this branch of the tort is primarily a mental one. It has been useful chiefly to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights.

[39] Later in its reasons, when considering the desirability of recognizing the tort of intrusion upon seclusion, the Court made a number of comments that are relevant to the issues in this case, including the following:

> 39 *Charter* jurisprudence identifies privacy as being worthy of constitutional protection and integral to an individual's relationship with the rest of society and the state. The Supreme Court of Canada has consistently interpreted the *Charter's* s. 8 protection against unreasonable search and seizure as protecting the underlying right to privacy. In *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, [1984] S.C.R. No. 36, at pp. 158-59 S.C.R., [page254] Dickson J. adopted the purposive method of *Charter* interpretation and observed that the interests engaged by s. 8 are not simply an extension of the concept of trespass, but rather are grounded in an independent right to privacy held by all citizens.
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> …
>
> 43 In *Hill v. Church of Scientology of Toronto* 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, Cory J. observed, at para. 121, that the right to privacy has been accorded constitutional protection and should be considered as a *Charter* value in the development of the common law tort of defamation. …
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> …
>
> 45 While the *Charter* does not apply to common law disputes between private individuals, the Supreme Court has acted on several occasions to develop the common law in a manner consistent with *Charter* values: [citations omitted].
>
> 46 The explicit recognition of a right to privacy as underlying specific *Charter* rights and freedoms, and the principle that the common law should be developed

> in a manner consistent with *Charter* values, supports the recognition of a civil action for damages for intrusion upon the plaintiff's seclusion ….
>
> …
>
> 67 For over 100 years, technological change has motivated the legal protection of the individual's right to privacy. In modern times, the pace of technological change has accelerated exponentially. Legal scholars such as Peter Burns have written of "the pressing need to preserve 'privacy' which is being threatened by science and technology to the point of surrender": "The Law and Privacy: the Canadian Experience", at p. 1. See, also, Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1967). The Internet and digital technology have brought an enormous change in the way we communicate and in our capacity to capture, store and retrieve information. As the facts of this case indicate, routinely kept electronic databases render our most personal financial information vulnerable. Sensitive information as to our health is similarly available, as are records of the books we have borrowed or bought, the movies we have rented or downloaded, where we have shopped, where we have travelled and the nature of our communications by cellphone, e-mail or text message.
>
> 68 It is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form. Technological change poses a novel threat to a right of privacy that has been protected for hundreds of years by the common law under various guises and that, since 1982 and the *Charter*, has been recognized as a right that is integral to our social and political order.
>
> 69 Finally, and most importantly, we are presented in this case with facts that cry out for a remedy. …

[40] The passage quoted immediately above most certainly applies to the case before me.

[41] While the facts of this case bear some of the hallmarks of the tort of "intrusion upon seclusion", they more closely fall within Prosser's second category: "Public disclosure of embarrassing private facts about the plaintiff." That category is described by the *[Restatement (Second) of Torts* (2010) at 652D 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 his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."

[42] The comment section of the *Restatement* elaborates on this proposition as follows:

> Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an

> actionable invasion of his privacy, unless the matter is one of legitimate public interest.

Although written in somewhat antiquated language, the concepts described are entirely apposite to this case. Among the illustrations offered by the *Restatement* is the following: "A publishes, without B's consent, a picture of B nursing her child. This is an invasion of B's privacy."

[43] Prosser listed the features of this tort as follows:

- the disclosure of the private facts must be a public disclosure, and not a private one;
- the facts disclosed to the public must be private facts, and not public ones; and
- the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities.

[44] Plainly, writing in 1960, Prosser was discussing events that might occur in a pre-Internet world, where the concepts of pornographic websites and cyberbullying could never have been imagined. Nevertheless, the essence of the cause of action he described is the unauthorized public disclosure of private facts relating to the plaintiff that would be considered objectionable by a reasonable person. In the electronic and Internet age in which we all now function, private information, private facts and private activities may be more and more rare, but they are no less worthy of protection. Personal and private communications and the private sharing of intimate details of persons' lives remain essential activities of human existence and day to day living.

[45] To permit someone who has been confidentially entrusted with such details – and in particular intimate images - to intentionally reveal them to the world via the Internet, without legal recourse, would be to leave a gap in our system of remedies. I therefore would hold that such a remedy should be available in appropriate cases.

[46] I would essentially adopt as the elements of the cause of action for public disclosure of private facts the *Restatement (Second) of Torts* (2010) formulation, with one minor modification: 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. [modification shown by underlining]

[47] In the present case the defendant posted on the Internet a privately-shared and highly personal intimate video recording of the plaintiff. I find that in doing so he made public an aspect of the plaintiff's private life. I further find that a reasonable person would find such activity, involving unauthorized public disclosure of such a video, to be highly offensive. It is readily apparent that there was no legitimate public concern in him doing so.

[48] I therefore conclude that this cause of action is made out.

II - Remedies

[49] The plaintiff seeks an award of damages, injunctive relief and certain procedural directions that will protect her identity. I will deal with each of these topics in turn.

A. Damages

[50] The plaintiff's action was commended under the Simplified Procedure and thus her damage claim is limited to $100,000. Plaintiff's counsel submitted that a much higher award was suitable, but conceded that she was restricted to the $100,000 limit.

[51] As I have mentioned, no reported cases have been found in which a Canadian court has been asked to award damages on facts such as these. In support of the damage award sought, plaintiff's counsel analogized this case to ones involving claims arising from physical sexual battery, with its attendant psychological impact and consequences: although the physical injuries may be modest and ones from which the victim may recover relatively promptly, the emotional and psychological effects of the offensive conduct are frequently severe and long-lasting. She submitted that, in many ways, this case is worse since not only was the plaintiff's personal and sexual integrity violated through the posting of the video, that violation is ongoing, because the video may well have been copied and stored and is therefore quite possibly still being viewed. Moreover, the plaintiff in this case was exposed to public humiliation due to the fact that the video became known among members of her community, with consequent damage to her reputation.

[52] Given the novelty of the plaintiff's claim, there is no Canadian case law to guide me in determining a suitable monetary award in this case. That said, in light of the nature of the wrong, the significant and ongoing impact of the defendant's conduct on the plaintiff's emotional and psychological health, and its similarity to the impact of a sexual assault, I agree that some assistance may be found in that category of cases.

[53] A leading decision regarding the principles underlying an award of damages for sexual battery is *B.M.G. v. Nova Scotia (Attorney General),* 2007 NSCA 120 (CanLII), where Cromwell J.A. (as he then was) gave what has become an authoritative account of the function and range of non-pecuniary damages in sexual battery cases. In that decision he said as follows (at paras. 127 – 135):

> 127 In the context of sexual assault and battery, the cases have recognized that there are fundamental, although intangible, interests at stake: the victim's dignity and personal autonomy. Thus, the award of damages should take a functional approach in relation to these interests in addition to the more familiar ones of pain, suffering and loss of enjoyment of life.
>
> 128 There is no doubt that sexual battery constitutes a deep affront to the victim's dignity. In *Norberg v. Wynrib*, 1992 CanLII 65 (SCC), [1992] 2 S.C.R. 226 at 265, LaForest J. echoed the words of Cory J. in *R. v. McCraw*, 1991 CanLII 29 (SCC), [1991] 3 S.C.R. 72 that "[i]t is hard to imagine a greater affront to human dignity than non-consensual sexual intercourse." To the same effect, Cory J. said in *R. v. Osolin*, 1993 CanLII 54 (SCC), [1993] 4 S.C.R. 595 at 669, that "[i]t cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence ... It is an assault upon human dignity."
>
> 129 The law also recognizes one of the purposes of the law of battery is to protect the individual's physical autonomy. As McLachlin J. (as she then was) observed in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 (CanLII), [2000] 1 S.C.R. 551 at paras. 10 and 14, battery is a violation of the victim's right to exclusive control of his or her person. The battery constitutes a

violation of the victim's bodily integrity and the loss is identified with the victim's personality and freedom. Most importantly, victims of such attacks, and "... those who identify with them tend to feel resentment and insecurity if the wrong is not compensated.": para. 14.

130 It follows from this, in my view, that an important function of the non-pecuniary damage award in a case of sexual battery is to demonstrate, both to the victim and to the wider community, the vindication of these fundamental, although intangible, rights which have been violated by the wrongdoer.

131 Another important aspect of the non-pecuniary damages award in sexual battery cases is the element of aggravated damages. As LaForest J. said in *Norberg* at p. 263, "... [a]ggravated damages may be awarded if the battery has occurred in humiliating or undignified circumstances." These damages are compensatory and are assessed "taking into account any aggravating features of the case and to that extent increasing the amount awarded." An award of aggravated damages must consider not only the effect of the wrong on the victim, but the nature of "... the entire conduct of the defendant ...": *Hill* at para. 189. (I should add that there has been no suggestion in this case that aggravated damages arising from the nature of the wrong-doer's conduct may not, in a sexual battery case, be awarded against a party who, like the Province in this case, is vicariously liable for that misconduct: see, for example, *Doe v. O'Dell* at para. 279).

132 In my view, an award of non-pecuniary damages in sexual battery cases ought to take into account the functions of the award. These are to provide solace for the victim's pain and suffering and loss of enjoyment of life, to vindicate the victim's dignity and personal autonomy and to recognize the humiliating and degrading nature of the wrongful acts.

(v.) Factors to be considered:

133 The courts have developed a non-exhaustive list of factors which may be considered in fashioning a non-pecuniary damages award in cases of sexual battery. These factors assist in making an award that serves the proper functions of non-pecuniary damages in sexual battery cases.

134 The Supreme Court in *Blackwater v. Plint*, 2005 SCC 58 (CanLII), [2005] 3 S.C.R. 3 at para. 89 approved the factors consider by the trial judge in that case: *W.R.B. v. Plint*, 2001 BCSC 997 (CanLII), [2001] B.C.J. No. 1446 (Q.L.) (S.C.) at para. 398 ff. These include:

> …
>
> *the circumstances of the assaults including their number, frequency and how violent, invasive and degrading they were;
>
> *the circumstances of the defendant, including age and whether he or she was in a position of trust; and
>
> *the consequences for the victim of the wrongful behaviour including ongoing psychological injuries.

> 135 Consideration of these factors, in my view, will assist in determining an appropriate amount of non-pecuniary damages to serve the functions of providing solace for the pain, suffering and loss of enjoyment of life flowing from the assaults, of demonstrating vindication of the victim's rights of personal dignity and individual autonomy and, with regard to aggravated damages, of appropriately recognizing the humiliating and undignified nature of the defendant's conduct.

[54] Justice Cromwell's analysis has been influential in Ontario. It was adopted by Chapnik J. in *Evans v. Sproule*, [2008] O.J. No. 4518 (Ont. S.C.). It was also adopted by Whitten J. in *K.T. v Vranich*, 2011 ONSC 683 (CanLII). In *Evans* the plaintiff was sexually assaulted by an on-duty police officer when she was 24. She suffered severe emotional and psychological injuries including post-traumatic stress disorder, depression, insomnia and failed relationships. She was awarded $100,000 in non-pecuniary damages, $40,000 for loss of earning capacity and a further $50,000 in aggravated damages, together with $25,000 in punitive damages and $12,432 for future therapy costs – a total award of more than $225,000. Justice Chapnik observed (at para 127): "each case turns on its own peculiar facts."

[55] In *K.T. v Vranich*, there was a single incident leading, subsequently, to panic attacks and ongoing distress. The plaintiff received $125,000 in general damages, which included $50,000 aggravated damages arising out of her personal distress and humiliation, and $25,000 in punitive damages.

[56] I recognize that, unlike the foregoing (and like) cases which involved actual battery of the plaintiff, there was no physical touching in the present case. That said, the plaintiff's resulting injuries bear striking similarities to those for which the courts have awarded compensation in these other cases. The actions of the defendant in the present case offended and compromised the plaintiff's dignity and personal autonomy. In my view, a non-pecuniary damage award in a case such as this should similarly "demonstrate, both to the victim and to the wider community, the vindication of these fundamental, although intangible, rights which have been violated by the wrongdoer."

[57] Turning to the factors approved by the Supreme Court in *Blackwater,* I note as follows:

- *The circumstances of the victim at the time of the events, including factors such as age and vulnerability.* The plaintiff was 18 years old at the time of the incident, a young adult who was a university student. Judging by the impact of the defendant's actions, she was a vulnerable individual.

- *The circumstances of the assaults including their number, frequency and how violent, invasive and degrading they were.* The wrongful act consisted of uploading to a pornographic website a video recording that displayed intimate images of the plaintiff. The defendant's actions were thus very invasive and degrading. The recording was available for viewing on the Internet for some three weeks. It is impossible to know how many times it was viewed, copied or downloaded, or how many copies still exist elsewhere, out of the defendant's (and the plaintiff's – and the Court's) control. As well, the defendant showed the video to his friends, who were also acquaintances of the plaintiff. Although there was no physical violence, in these circumstances, especially in light of the multiple times the video was viewed by others and, more importantly, the potential for the video still to be in

circulation, it is appropriate to regard this as tantamount to multiple assaults on the plaintiff's dignity.

- *The circumstances of the defendant, including age and whether he or she was in a position of trust*. The defendant was also 18 years of age. He and the plaintiff had been in an intimate – and thus trusting – relationship over a lengthy period. It was on this basis, and on the basis of his assurances that he alone would view it, that he persuaded her to provide the video. His conduct was tantamount to a breach of trust.

- *The consequences for the victim of the wrongful behaviour including ongoing psychological injuries*. As described above, the consequences were emotionally and psychologically devastating for the plaintiff and are ongoing.

[58] Having regard to these factors and the past and ongoing impact of the defendant's actions on the plaintiff, I would assess her general damages at $50,000. I am alert to the relatively modest ($10,000) award in *Jones v. Tsige*, and the cautionary comments of the Court of Appeal concerning claims for intrusion on privacy of the sort that formed the basis for the plaintiff's claim in that case. That was a much different situation, however: while it, too, was a case involving "invasion of privacy", the privacy right offended and the consequences to the plaintiff there were vastly less serious and offensive than the present case. For the reasons previously mentioned, this case involves much more than an invasion of a right to informational privacy; as I have observed, in many ways it is analogous to a sexual assault. Given the circumstances of this case, and in particular the impact of the defendant's actions, a substantially higher award is warranted here.

[59] This is a case where an award of aggravated damages is warranted, too. Such damages may be awarded where the damage to the plaintiff was aggravated by the manner in which the culpable act was committed. Here, the posting of the video amounted to a breach of the trust reposed by the plaintiff in the defendant that he would not reveal it to anyone else. This feature of the defendant's behaviour was an affront to their relationship that made the impact of his actions even more hurtful and painful for the plaintiff. I would award $25,000 on this account.

[60] The plaintiff also seeks punitive damages. Such an award may be appropriate where the defendant has acted in a high-handed or arrogant fashion or has recklessly disregarded the plaintiff's rights or the potential impact of the defendant's intentional conduct. Those are apt descriptions of the defendant's conduct here. He gave no consideration to the inevitable impact of his actions on the plaintiff. He has not apologized; indeed, according to the plaintiff, despite being aware of the harm he has caused, when they have encountered one another since the event, he has had an insolent look on his face, and has shown no remorse. No apology has been forthcoming. In my view, this is a case where an award of punitive damages is warranted.

[61] In relation to quantum, proportionality is an important consideration in making an award of punitive damages. Other factors include the blameworthiness of the defendant's conduct (high); the degree of vulnerability of the plaintiff (significant); the harm directed specifically at the plaintiff (again, significant). Importantly, I have found that the defendant acted with malice.

[62] Another consideration is the need for deterrence. While this case may be novel, it should serve as a precedent to dissuade others from engaging in similar harmful conduct.

A final consideration is the other penalties imposed on the defendant for the same misconduct. Here, the defendant faces no criminal sanctions: his acts took place before Parliament criminalized such conduct. The absence of a specific criminal sanction is no bar to an award of punitive damages in a civil case.

[63] Taking into account all the foregoing considerations, I would award the plaintiff punitive damages of $25,000, which in my view is proportionate in the circumstances.

B. Injunctive relief

[64] The plaintiff sought orders that would prevent a repetition of the defendant's conduct and further violations of her rights. I agree that such relief is appropriate to ensure that no further incidents of this nature occur. It is unclear whether the defendant still possesses any copies of the video or other intimate images of the plaintiff. To address that possibility, an order shall issue directing the defendant to immediately destroy any and all intimate images or recordings of the plaintiff, in whatever form they may exist, that he has in his possession, power or control. A further order shall issue permanently prohibiting the defendant from publishing, posting, sharing or otherwise disclosing in any fashion any intimate images or recordings of the plaintiff.

[65] The plaintiff further sought an order that the defendant be prevented from contacting her or members of her family, given the upset she has experienced and continues to experience due to his conduct. The plaintiff's parents have also experienced distress due to the defendant's actions. Since there is no need or proper reason for the defendant to be in contact with the plaintiff, I grant an order permanently prohibiting the defendant from communicating with the plaintiff or members of her immediate family, either directly or indirectly.

C. Procedural directions

[66] The plaintiff is understandably concerned that, by being forced to bring this action to obtain recourse against the defendant, she not attract further attention to herself and these events, with the potential for additional gossip, humiliation, damage to her reputation and emotional distress. She therefore commenced this action by means of a pseudonym, "Jane Doe." I retroactively grant her leave to do so. To distinguish her from similar pseudonyms, I direct that her pseudonym be amended to "Jane Doe 464533, and that the title of proceedings be amended for all future purposes so that the action and all documents will henceforth be titled as follows:

SUPERIOR COURT OF JUSTICE – ONTARIO

Between**:**

JANE DOE 464533

Plaintiff

-and-

N.D.

Defendant

[67] I further direct that any report or publication of or concerning this matter or these reasons, shall not contain any information that would identify the plaintiff. In furtherance of the objective of protecting the plaintiff's privacy, I also direct that in any such report or publication, the defendant shall be referred to by his initials only.

[68] Finally, pursuant to the authority contained in s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, I order that the original Statement of Claim and Motion Record for the present motion shall be sealed in the court file and separated from the public record, to be opened only upon the order of a judge of the Superior Court of Justice, to be sought on at least 21 days' notice to the plaintiff. I further order counsel for the plaintiff to, within 10 days, deposit with the court file a redacted version of the Statement of Claim from which all information that might identify the plaintiff shall have been removed.

CONCLUSION AND DISPOSITION

[69] For the above reasons, I grant judgment in favour of the plaintiff against the defendant for damages in the total amount of $100,000, plus pre-judgment interest in the amount of $5,500, for a total award of $105,500. I fix the plaintiff's costs of the action and the motion on a full indemnity basis at the all-inclusive sum of $36,208.73. This results in a total monetary award in favour of the plaintiff of $141.708.03.

[70] In addition, I grant the injunctive relief referenced above in paragraphs 64 and 65. I also make the procedural orders mentioned in paragraphs 66 to 68.

[71] Lastly, I wish to commend the plaintiff for her courage and resolve in pursuing the remedies to which she is entitled. She has experienced considerable psychological pain arising from the events in question, and has been called upon to relive and recount these events in the course of this litigation, thereby reviving painful memories. Given the lack of precedent in Canadian law for such a claim, she had no assurance of the outcome. Quite apart from the personal result for her, her efforts have established such a precedent that will enable others who endure the same experience to seek similar recourse.

_____

Stinson J.

Date: January 21, 2016

CITATION: Doe 464533 v. N.D., 2016 ONSC 541
COURT FILE NO.: CV-12-464533
DATE: 20160121

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JANE DOE 464533

Plaintiff

– and –

N.D.

Defendant

REASONS FOR JUDGMENT

Stinson J.

Released: January 21, 2016