

## Focus PERSONAL INJURY

# 'Revenge porn' brings \$100k in damages



Loretta Merritt

An Ontario judge has awarded damages for breach of confidence after the plaintiff shared an explicit video ("sexting") and her ex-boyfriend set out to inflict harm by publishing "revenge porn."

Technology has enabled predators and bullies to victimize young people by releasing nude photos or sex videos without consent. Society has been scrambling to catch up as we understand the harm that can result. The suicides of Amanda Todd and Rehteah Parsons have driven home the consequences. In 2014 Parliament amended the *Criminal Code* to create the offence of "publication...of an intimate image without consent."

In *Jane Doe 464533 v. N.D.* [2016] ONSC 541, Justice David Stinson awarded the plaintiff

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\$50,000 in general damages, \$25,000 in aggravated damages and \$25,000 in punitive damages against the ex who posted a sexually explicit video which he had promised to keep private.

Justice Stinson held the defendant liable on the basis of three separate torts:

- (1) breach of confidence;
- (2) intentional infliction of mental distress; and
- (3) invasion of privacy.

The court said the plaintiff's decision to provide intimate videos of herself to the defendant engaged issues of confidentiality and privacy. They had a long and close personal and romantic relationship

and it was on the basis of that and his promise of confidentiality that she agreed to provide the images. He clearly breached these terms. The court set out these elements of the tort of breach of confidence:

(a) 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.

The court set out the test for intentional infliction of mental distress as follows:

- (1) conduct that is flagrant and outrageous;
- (2) calculated to produce harm; and
- (3) resulting in visible and provable injury.

The court said that a malicious intent is not required. In finding that the defendant's conduct was flagrant and outrageous, the court said the defendant knew the plain-

tiff had been reluctant to make and send the video and he persuaded her based on his express assurances that he alone would view it. He intentionally posted the video online and shared it with friends, going beyond a mere act of inadvertence. The "calculated to produce harm" requirement is met when the harm is clearly foreseeable. It was entirely foreseeable that the plaintiff would suffer extreme emotional upset and psychological distress resulting in visible and provable psychological injury.

Justice Stinson cited *Jones v. Tsige* [2012] ONCA 32, where the court recognized the existence of the tort of invasion of privacy (intrusion upon seclusion). In that case the plaintiff used her position as a bank employee to repeatedly examine the private banking records of her spouse's ex-wife. In this case the court delineated four separate torts as follows:

(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; and

(4) appropriation, for the defendant's advantage of the damage of the plaintiff's name or likeness.

Justice Stinson found that the case fell most closely in the second category. The test being whether the matter publicized (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

The plaintiff's action was commenced under the simplified rules procedure and thus her claim was limited to \$100,000. The court considered the principles underlying awards of damages for sexual battery, and considered the following factors: The circumstances of the assault (number, frequency and nature e.g. how violent, invasive and degrading); the circumstances of the victim (including age and vulnerability); the circumstances of the defendant (including age and any position of trust); and the impact on the plaintiff (ongoing psychological injuries).

In awarding total damages of \$100,000, the court did not expressly reference the limit on damages under the simplified rule procedure, nor comment on the plaintiff's claim for an additional \$150,000 for "harm to reputation." In defamation cases, awards for harm to reputation are typically much higher than damages for pain and suffering for sexual assault. There have been reputation damages between \$400,000 and \$800,000.

This case signals the court's willingness to grant substantial damages where conduct is "tantamount to multiple assaults" on dignity. It is broad enough to include causes of actions in other circumstances such as publications of biographies or photographs taken by paparazzi, and could be used in claims against institutions that fail to safeguard sensitive information such as medical or banking records.

Loretta Merritt is a litigation lawyer with Torkin Manes.



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