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Ontario Recognizes False Light Tort of Invasion of Privacy

By Paige Backman

Hidden in the text of a strongly-worded family law case, *Yenovkian v. Gulian*, 2019 ONSC 7279, a new and timely tort based on invasion of privacy was recognized - *Publicity Placing Person in False Light*. This new tort is a recognition of a fourth (and final) type of tort already recognized in the United States in the *Restatement (Second) of Torts (2010) (the "Restatement")*.

One will be held liable for invasion of privacy pursuant to the tort of *publicity placing person in false light* if such person gives publicity to a matter concerning another that places the other before the public in a false light where: (a) the false light in which the other was placed would be highly offensive to a reasonable person; and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Ontario has previously recognized the three other types of invasion of privacy under the Restatement, including:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
2. public disclosure of embarrassing private facts about the plaintiff; and
3. appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Facts help shape law and the facts in *Yenovkian v. Gulian* included egregious behaviour of one parent spreading significant falsehoods and making threats against not only the ex-spouse, but his children, the ex-spouse's lawyer and a judge.

In recognizing the tort of publicity placing person in false light branch of invasion of privacy, Justice Kristjanson noted that while the new branch of invasion of privacy tort, publicity giving rise to this cause of action, will often be defamatory, defamation is not required. It was held that it is enough for the plaintiff to show that a reasonable person would find it highly offensive to be publicly misrepresented as they have been. The wrong is in publicly representing someone, not as worse than they are, but as other than they are.

Justice Kristjanson also recognized that this cause of action has some overlap with the tort of invasion of privacy based on public disclosure of private facts. The tort of publicity placing person in false light and the tort of public disclosure of private facts both include publicity which is highly offensive to a reasonable person. However, the principal difference between the two branches of invasion of privacy is that public disclosure of private facts involves true statements, whereas the publicity under the tort of publicity placing person in false light involves false or misleading claims. In addition, further distinguishing factors include that the tort of publicity placing person in false light requires that the defendant know or be reckless to the falsity of the information, while public disclosure of private facts involves a requirement that there be no legitimate public concern justifying the disclosure.

Direction on what behaviour (or absence thereof) will meet the standard of having knowledge or acting in a reckless disregard as to the falsity of the publicized matter will be critical. The impact of recognizing the tort of publicity placing person in false light is not only timely, but very important with the spread of false and offensive information about individuals over the Internet. The impact of this on journalists and those purporting to be journalists may be profound.

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