

Civil Litigation

Likely measure of damages for revenge porn, other invasion of privacy torts: Seminal Ontario cases

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(November 12, 2021, 2:23 PM EST) -- In part one of this series, we established the framework for tortious damages for revenge porn — the distribution of sexually explicit images or videos of individuals on the internet without their consent — and other invasion of privacy torts. We commenced our discussion of the damages meted out in the early cases for such torts, and in this part will continue looking at seminal Ontario jurisprudence.

Jane Doe 72511 v. M.(K.), 2018 ONSC 6607 [*Jane Doe 72511 v. N.M.*, [2018] O.J. No. 5741] was a revenge porn case that firmly anchored the new tort of public disclosure of private facts. The plaintiff and defendant met and started dating in high school, and after approximately four months the plaintiff became pregnant. The defendant accused her of ruining his life and began to verbally and physically assault her on an almost daily basis, dragging her up and down stairs, choking her, threatening her with a knife and forcing her out of the home.

All of this took place in the home of the defendant's parents, who took no steps to intervene and protect the plaintiff. One day, after the baby was born, the plaintiff left the home to catch a bus. The defendant chased after her, wrestled her to the ground, forced her into his car, dragged her back out of it by her feet and smashed her head against the car window. The plaintiff called the police and the defendant was arrested and later convicted of assault.

In retaliation, the defendant posted a video entitled "yellow hoe sucking a big one" on pornographic web sites. Her face was clearly visible in the video, although the defendant's face was not. When the plaintiff confronted him, he sent her a text saying "I have a criminal record for life ur a internet whore for life . . . fair trade." The video was viewed over 60,000 times before the plaintiff was successful in having it taken down.

Following these experiences, the plaintiff was depressed and anxious, and felt violated and alone. She experienced intense shame and anger. She was "sick with fear" that her son would see the video one day and worried that current and future coworkers, friends and others would come to know of it.

The plaintiff worried that she would be considered a bad mother, denied educational and social opportunities, and be forever stigmatized because of the video. She was unable to pursue other romantic relationships for fear that the video might resurface.

The plaintiff sued for damages for assault and for posting the video to the Internet, as it constituted the tort of public disclosure of private facts, and sought \$120,000 in total damages. She also sued the parents of the defendant on the theory they were liable as occupiers for not protecting her while in their home.

Neither of the defendants defended the lawsuit and the plaintiff thus moved for default judgment. She was awarded \$20,000 as against the defendant boyfriend for the assault and battery she

suffered, and the parents were held to be jointly and severally liable for this amount.

Justice Sally Gomery characterized the case as a classic case of revenge porn. She agreed with Justice David G. Stinson in *Jane Doe 464533 v. D.(N.)*, 2016 ONSC 541 that revenge porn was much more serious than the invasion of privacy tort of intrusion upon seclusion. Justice Gomery found that the defendant had been acting out of malice and had shown no remorse for his actions. In the result, she awarded general damages of \$50,000, aggravated damages of \$25,000 and punitive damages of \$25,000 for the posting of the video.

The nominate tort of publicly placing a person in a false light was recognized in the seminal Ontario case of *V.M.Y. v. S.H.G.*, 2019 ONSC 7279, and again a substantial amount of damages was awarded. This case was primarily concerned with parenting and access, child and spousal support and property division. It also considered what the appropriate judicial response should be to a campaign of aggressive cyberbullying by the defendant father against the plaintiff wife, her lawyers and a judge of the Ontario courts, as well as the defendant's campaign to post derisive images, videos, recordings and comments regarding the children online, while seeking financial contributions from the public for the campaigns, and public support.

The parties married in 2000, separated in 2016, and had two children, a 12-year-old daughter and a 9-year-old son. The daughter was on the autism spectrum and had special needs. The father was a music video director and a television show and documentary producer, while the mother assumed the role of a traditional housewife. Due to the father's work they lived in the United States, London and Toronto at various times. The father was abusive during the marriage.

In 2016, after the husband requested a divorce, the wife took the children to live in England at her parent's home. She was ordered to return the children to Canada in 2018 pursuant to the Hague Convention. She subsequently obtained from an Ontario court a temporary without prejudice custody order and permission to return to live in England with her children.

The husband set up two main websites, one focusing on the wife and her parents, and one devoted to "unseating" the Ontario judge who had been hearing the court matters. In addition to the websites, he posted videos on his YouTube channel, his Facebook page, and his Go Fund Me page to "save an abducted autistic girl from captivity" and had two online petitions seeking support to unseat the judge.

The materials posted to the Internet included photographs and videos of the children surreptitiously taken during Skype access sessions. The posting of the videos and images of the children was done contrary to a court order, and V.M.Y. refused to remove the posted materials, although ordered to do so by the court.

In the postings he accused the mother and her parents of kidnapping, child abuse, stealing money from the government, assault, drugging the children, slapping the children, death threats, "breaking countless laws," forging documents, and fraud. He maligned the daughter, stating she evidenced "mental degradation", had a "broken mind" and that her mental health was "incredibly damaged." A video of the son showed him cowering under a table while the father harangued him.

In the result of the trial, Justice Freya Kristjanson gave custody to the mother, with permission to live in England with the children, granted child and spousal support and ordered property division. The mother had also sued for damages in the amount of \$150,000 for nuisance, harassment, intentional infliction of mental suffering and invasion of privacy, and claimed punitive damages in the amount of \$300,000. The trial judge reviewed the nominate torts for invasion of privacy, and held that on the facts both the torts of public disclosure of private facts and publicly placing a person in a false light were made out.

Justice Kristjanson found that the tortious conduct of the father had caused a "visible and provable" illness in the mother. She had sought medical assistance as a result of the conduct, and was having nightmares, feeling ill and undergoing mental stress. She was prescribed medication for her sleep. She was hyper-vigilant and worried that her children would be taken from her, as the father had solicited support from the public for his campaigns.

The trial judge awarded \$50,000 for intentional infliction of mental suffering and \$100,000 for

invasion of privacy. She also awarded \$150,000 in punitive damages, in view of the "outrageous and egregious conduct [of the father] at the extreme of reprehensibility."

[198] As a spouse and parent of their children, a stay-at-home mother dependent on V.M.Y. until the attacks began, S.H.G. was and remains a vulnerable plaintiff. There are no other penalties V.M.Y. is likely to face for this conduct. V.M.Y. knew the conduct was wrong; had been informed by the court that it was wrong; but he persisted in the conduct. The harm of such publicly distributed invective to S.H.G. and to the system of administration of justice, through attacks on a judge, a lawyer and witnesses in litigation, is severe.

[199] This is the exceptional case. V.M.Y.'s conduct is reprehensible. The damage that he has inflicted upon S.H.G. is purposeful and premediated [*sic*]. On December 27, 2015, he threatened that if S.H.G. attempted to "take the children from [him]" or limit the time that he spends with the children he would "ensure that the damage done is irreparable" to S.H.G. and her family. V.M.Y. has been undeterred by court orders regarding online content that is abusive of S.H.G..

[200] V.M.Y.'s conduct must not only be punished but it should be denounced, and it should be deterred. A significant award of punitive damages may serve to deter V.M.Y., since the court orders have had no effect in deterring his conduct. It will also serve to warn other litigants, both represented and self-represented, that cyberbullying another party online, in family law proceedings where the interests of children are in issue, will not be tolerated.

This is part two of a three-part series. In part three we will examine the recent Alberta authorities of *E.S. v. Shillington*, 2021 ABQB 739 and *LDS v. SCA*, 2021 ABQB 818, and their measure of damages for revenge porn. Read part one: Likely measure of damages for revenge porn and other invasion of privacy torts.

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