

Civil Litigation

Likely measure of damages for revenge porn, other invasion of privacy torts: Alberta authority

By **Barb Cotton and Christine Silverberg**



Barb Cotton

(November 16, 2021, 1:18 PM EST) -- In parts one and two of this article 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 discussed the damages meted out in the seminal cases for such torts, and in this part will look at recent Alberta authority which adopts the common law tort of public disclosure of private facts, and the measure of damages awarded.

In *ES v. Shillington*, 2021 ABQB 739, Justice Avril B. Inglis confirmed that the tort of public disclosure of private facts was a viable tort in Alberta. The plaintiff was a battered woman, and sued for assault, sexual assault and battery, in addition to her claims for intentional infliction of mental distress, breach of confidence and public disclosure of private facts.



Christine Silverberg

The plaintiff sought general damages of \$80,000, aggravated damages of \$25,000 and punitive damages of \$50,000 for the invasion of privacy and infliction of mental distress torts. The defendant did not defend the claims and was noted in default.

The parties were in a romantic relationship from 2005 to 2016 and had two children together. The defendant was a member of the Canadian Armed Forces. After the defendant physically and sexually assaulted the plaintiff in 2016 she moved with the children to a shelter for women, and then to Alberta.

The testimony of the plaintiff was that prior to the relationship she was a happy person who appreciated her sexuality. She shared various photographs with the defendant during their relationship in which she was in varied states of undress and engaging in sexual activity, which was appropriate in her view as he was frequently away on deployment. She thought it was understood between them that the photographs would not be shared in any way.

When deployed to a high-risk situation, the defendant confessed to the plaintiff that he had posted her images online to pornography sites, and when she investigated she found the images were posted as early as 2006 and as late as 2018. The plaintiff experienced significant mental distress and embarrassment as a result of the postings, including nervous shock, psychological and emotional suffering, depression, anxiety, sleep disturbance and humiliation. She was unable to emotionally engage in another romantic relationship and was unable to enjoy a social life. She suffered from shame and guilt, and remained insecure and reactive. The plaintiff's psychologist provided evidence as to her psychotherapy treatment schedule and the injuries she suffered.

The plaintiff was awarded general damages of \$80,000, aggravated damages of \$25,000 and punitive damages of \$50,000 for the invasion of privacy torts. The court found that the defendant had been acting with malice and the publication of the images was another form of domestic abuse.

In addition, the plaintiff was awarded general damages of \$175,000, aggravated damages of \$50,000

and punitive damages of \$50,000 for "the violence perpetrated against her." Special damages in the amount of \$30,000 for medical expenses and the expenses of having to suddenly relocate to Alberta were also awarded.

The Justice concluded:

[115] The conduct of this Defendant through the course of his bonded, committed familiar relationship with the Plaintiff is appalling and warrants a significant response from the court. His physical and sexual abuse of the Plaintiff destroyed his family unit and significantly damaged the mother of his children. Those actions were traumatizing, humiliating and frightening to the Plaintiff. Also significantly traumatizing were the breaches to her privacy. The Defendant's actions are inexplicable and inexcusable. His actions were meant to control, degrade and humiliate the Plaintiff. While she has shown significant strength by leaving the relationship, seeking extensive treatment, carrying on with her life including single-handedly raising her children and successfully pursuing an education, the impact the Defendant has had remains present. It is most certain this his conduct will continue to affect the Plaintiff and her children for the foreseeable future.

The recognition in *ES v. Shillington* of the new tort of public disclosure of private facts was explicitly endorsed in the recent Alberta case of *LDS v. SCA*, 2021 ABQB 818, a decision of Justice R. Paul Belzil. The parties were in an intimate relationship from 2011 to 2014 and had one child. The plaintiff alleged it was an abusive relationship, with the defendant insisting on "sex on demand." When the plaintiff left the relationship, she commenced proceedings for child and partner support.

The plaintiff had given the defendant intimate "boudoir" photographs as a gift and had provided other sexually explicit photographs of herself in the course of the relationship. Some of these included images of sexual activity with the defendant. After the end of their relationship, the defendant hacked into her Facebook account and posted one of the boudoir photos online. He then hacked her e-mail account and sent the photo to her current boyfriend, along with a sexually suggestive e-mail.

As a result, the defendant was charged with the criminal offence of mischief and pled guilty. Later, when the plaintiff applied for employment, she discovered her name was linked with a pornographic website and her photographs had been posted online.

The plaintiff sued the defendant for breach of confidence, invasion of privacy and intentional infliction of mental distress, which Justice Belzil characterized as a revenge porn claim. The plaintiff claimed general damages of \$250,000, loss of income of \$250,000, aggravated damages of \$100,000, punitive damages of \$100,000 and special damages of \$25,000. The claim for intentional infliction of mental distress was held not to be made out as the plaintiff did not lead evidence to show she had sustained a visible and provable illness.

An Anton Pillar order was issued allowing the search of the defendant's iPhone for incriminating evidence. Justice Belzil found the defendant summarily liable for breach of confidence and public disclosure of private facts on the basis of circumstantial evidence.

In the result, Justice Belzil awarded general damages in the same amount as that awarded in *ES v. Shillington*, \$80,000. The defendant was found to have been motivated by malice, and aggravated damages of \$25,000 were awarded.

The trial judge characterized the actions of the defendant as outrageous, planned and deliberate. He attempted to conceal his conduct. The plaintiff was vulnerable, and the defendant's conduct was properly viewed as an attempt to control her after she had terminated the relationship. In view of the need to deter such conduct, punitive damages in the amount of \$25,000 were also awarded.

In summary, it appears that damages for revenge porn will be awarded in a significant amount across Canada, with general damages approximating \$80,000 and aggravated damages approximating \$25,000, if malice is found. The amount awarded for punitive damages may still be a wild card, depending on the egregiousness of the conduct of the defendant. Clearly the courts have characterized revenge porn as a form of domestic abuse, and they seem eager to send a message of deterrence. For this reason punitive damages may be substantial.

This is part three of a three-part series. Part one: Likely measure of damages for revenge porn and other invasion of privacy torts; part two: Likely measure of damages for revenge porn, other invasion of privacy torts: Seminal Ontario cases.

Barb Cotton is the principal of Bottom Line Research and assists solo, small and specialized lawyers with their research and writing needs. She can be reached at (403) 240-3142, cell (403) 852-3462 or e-mail barbc@bottomlineresearch.ca. Christine Silverberg is a Calgary-based lawyer with a diverse advocacy, regulatory and litigation practice. She can be reached at (403) 648-3011, christine@silverberglegal.com or through www.christinesilverberg.com.

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