

Legal update

Novel tort of “publicity given to private life” as foundation of a class action

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Class actions

Privacy and access to information

In previous commentaries we have noted that the tort of intrusion on seclusion could form the basis of future class actions in Canada. It did not take long for our prediction to come true nor for the Federal Court to certify a class action based not only on the tort of intrusion on seclusion but also on the additional tort of “publicity given to private life,” which it dubbed “novel.”

The facts are straightforward: plaintiffs are part of Canada’s Marijuana Medical Access Program run by Health Canada to which they were obliged to give their postal address as one of the conditions of admission to the program. Through an administrative error, Health Canada posted letters to plaintiffs in oversized envelopes making visible not only plaintiffs’ names but also the name of the program.

The Federal Court certified several causes of action that included two torts: intrusion on seclusion as described in *Jones v Tsige*, 2012 ONCA 32 (Can LII) as well as an additional tort that appears to be an extension of the first and is described in the *Restatement (Second) of Torts* as:

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. [cited at par 42 of the judgment]

While the court stopped short of unreservedly adopting the Restatement description of this tort as law in Canada, it noted at par. 42 of its judgment that it is a “concept that should not be readily dismissed at an early stage of litigation.”

Clearly our courts are reacting favourably to certification of privacy class actions based on new and evolving torts. It remains to be seen how courts on the merits will trace and define the parameters of these torts.

So stay tuned!

Read the judgment [here](#).

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