

A New Cause of Action for Invasion of Privacy

Those of us who practice adversarial matrimonial litigation are constantly dealing with the issue of one or both parties' unauthorized accessing of the other parties' private messages and emails.

Prior to January 2012 there was no statutory prohibition nor case law that restricted or punished this type of action, unless the information obtained was used for clearly illegal purposes such as fraud or identity theft.

However in a January 2012 decision of the Ontario Court of Appeal the Court created for the first time a new cause of action for this type of conduct called "intrusion upon seclusion".

In this situation a female employee of a bank used her work computer and accessed her ex-husband's new partner's banking records and financial information without consent.

The Court found that her willful and deliberate invasion of this private financial information was an unlawful act sufficient on its own to give rise to a separate cause of action.

The Court went on to identify three key features or elements that would be necessary to successfully support this claim;

1. the defendant's conduct, i.e., the act which intrudes upon the private affairs or concerns of the plaintiff- must be intentional (this includes conduct that is reckless);
2. the defendant must have invaded, without lawful jurisdiction, the plaintiff's private affairs or concerns; and
3. a reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish.

The Court also went on to state two additional considerations;

- (a) proof of harm to a recognized economic interest is not an element of the cause of action;
- (b) damages will ordinarily be measured by a modest conventional sum.

The Court was aware of the implications of starting down this road and therefore attempted to restrict the claims by stating that they would only arise for "deliberate and significant invasions of personal privacy-into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on a reasonable person standard, can be described as highly offensive".

Although it is clear that the Court is trying to restrict the use of this remedy, the reality is that many of the above restrictions are exactly the information that spouses seek to use against each other in hostile matrimonial contests.

This case is a relatively new decision and, to date, there have been few reported cases to consider it.

Complications will clearly occur when information is obtained contrary to the above restrictions but yet is relevant to important issues that the Court needs to consider, such as the best interest of children.

Typically the Court puts the best interest of children first and therefore would be hesitant to exclude improperly obtained evidence if it is necessary for the Court to hear it in order to determine what is in the best interest of the children.

This leaves open the possibility of a defense to this claim based upon reasonable excuse or the needs of children.

Further complicating the issue is the comment of the Court that, if successful, damages for intrusion of seclusion are to be a modest conventional sum.

It is once again clear that the Court is trying to restrict parties from launching into this type of action frivolously.

In the above referenced case the amount of damages awarded was \$10,000, no doubt far less than the cost of the litigation.

It therefore appears as a practical matter that to commence this sort of litigation solely on the basis of an award of damages for the alleged action will not be financially rewarding. It may however be reasonable to commence a counterclaim in a main action and introduce this evidence as part of that counterclaim.

Finally, as in many situations, this would appear to be a small first step to what will probably become a much wider and more successful range of cases dealing with what is essentially "invasion of privacy issues".

This article is not legal advice.