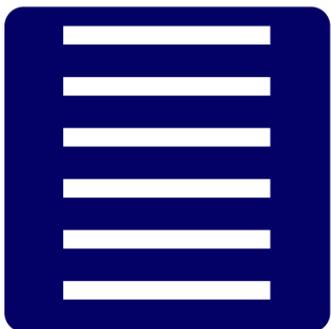


Helpful Guide to Understanding the Tort of Breach of Privacy Including Subsumed Wrongs



With the *Jones v. Tsige*, [2012 ONCA 32](#) decision, the Court of Appeal confirmed the tort law right to personal privacy in Ontario. Prior to this ruling, judges at trial level cases had routinely given conflicting decisions regarding a tort law right to personal privacy.

What is meant above by "a tort law right to personal privacy" is that it is now established that when a person wrongfully breaches the privacy of another, a legal right to sue exists. While the right to privacy has been embodied in statute laws (Acts passed by Parliament or the provincial legislature) until the *Jones* case, the validity of claims seeking remedy under tort law was questionable. Without getting too far off track, it is important to keep in mind that the statute law privacy rights were often restrictive. For example, the [Personal Information Protection and Electronic Documents Act](#) ("*PIPEDA*") may provide a right to report a breach of privacy to the [Office of the Privacy Commissioner of Canada](#) when the government or a business regulated by *PIPEDA* violates a person's privacy. However, *PIPEDA* lacks teeth when a person acting personally (as opposed to in the course of business) violates the privacy of another person. With breach of privacy established within tort law, persons may now sue to obtain compensation for the injury that arises from breach of privacy rather than merely relying on the right to complain about breach of privacy to a government agency that may only issue a demand to 'cease & desist' and possibly impose a fine but do little to put money in the pocket of the person whose privacy was breached.

Categories

Per paragraph 18 of the *Jones* case, it is suggested that the breach of privacy tort is actually made up of four distinctive wrongs as possible sub-torts:

- ▮ The intrusion upon seclusion or solitude or private affairs of a person;
- ▮ The public disclosure of embarrassing private facts about a person;



☰ The publicity which places a person in a false light in the public eye; and

☰ The appropriation of a person's name or likeness.

The first of the four distinctive wrongs within the breach of privacy tort appears to relate to matters such as voyeurism, spying, peeping tom behaviour, or even opening someone else's mail. This was the distinctive wrong in the *Jones* case which involved a bank worker viewing the financial records of another bank worker without authorization or a valid reason for doing so.

The second distinctive wrong appears to relate to matters such as unreasonably publicizing information that a person prefers to keep private. A key factor here to keep in mind is that the details publicized may be true. In the past, the tort of defamation was available to those persons whose reputation and feelings were harmed by other persons who publicized false information. The tort of breach of privacy appears to offer hope for remedy against persons who publicize true information, although it is important to note that in the *Jones* case spreading details contained within the improperly viewed financial records wasn't the issue. It will be interesting to see in time how this aspect of breach of privacy is handled by the courts - where will the line get drawn regarding what is fair commentary and what commentary goes too far.

The third distinctive wrong appears similar to the second distinctive wrong, the difference being that it is the way in which a person becomes publicly perceived. At first glance, it seems that what may be fair commentary about a person in a particular social circle is inappropriate commentary in other social circles. It will be interesting to see how this aspect of breach of privacy becomes better defined.

The last distinctive wrong appears to involve issues such as impersonation and perhaps identity theft. Again, future cases shall help refine these parameters.

Varied Factors in Determination of Damages Awards

in *Jones* at paragraph 87, it was stated that damages for intrusion upon seclusion, where a plaintiff is without pecuniary loss should be modest but sufficient to the wrong and suggests a range up to \$20,000 and adopted the following factors to assist in determining an appropriate award:

the nature, incidence and occasion of the defendant's wrongful act;

☰ The health, welfare, social, business or financial effects upon on the plaintiff;



- The relationship, whether domestic or otherwise, between the parties;
- The distress, annoyance or embarrassment suffered by the plaintiff; and
- The conduct before and after the wrong including any apology or offer of amends

In *Jones*, per paragraph 90, the Court of Appeal awarded \$10,000 in general damages whereas the conduct of the defendant involved an intrusion upon the banking information of the plaintiff in a manner that was deliberate and repeated and likely to provoke strong feelings and thereby deserving of damages in the middle of a \$20,000 range and whereas, distinguishable from the current case, the plaintiff was without actual loss or embarrassment or disclosure of the private information and an apology was issued.

Accordingly, in cases such as *Action Auto Leasing & Gallery Inc.*, [2013 CanLII 57491](#), where the transgression was deemed quite minor, only nominal damages were awarded:

15. In assessing damages for this issue, I note the comments in *Jones v. Tsighe*, supra, concerning damages in such cases, the very limited defence evidence in the case at bar and the fact that only one instance of embarrassing disclosure to just one individual is proved. I assess the damages at \$100 and apply that amount as a set-off against the plaintiff's claim.

In the matter of *Vanderveen v. Waterbridge Media Inc.*, [2017 CanLII 77435](#), an award of \$4,100 was issued whereas \$4,000 was awarded for breach of privacy and \$100 was awarded for appropriation of personality:

[24] The likeness of the plaintiff is on the screen for 2 seconds. The plaintiff was clearly upset about her image being publicly portrayed in a manner which she did not select or approve. It was imposed upon her. This was a for-profit commercial enterprise. Damages for this tort have an upper limit of \$20,000 where there has been no pecuniary loss.

[25] In the case of *Jones v. Tsighe*, damages in the amount of \$10,000 were awarded, the midway point of the upper limit amount of \$20,000 where the court found that the defendant's actions were "deliberate prolonged and shocking."

[26] In this case the filming resulted in a 2 second clip in a 2 minute video. The video was discontinued and removed from YouTube within one week.



[27] In the circumstances I believe that an award of damages in the amount of \$4,000 for the breach of privacy would be in line with the analysis of Sharpe J.

[28] I award damages of \$100 for the appropriation of personality. I take that to be a reasonable amount that is in the range of what would have been paid to an actor in similar circumstances.

As indicated within the various cases above, the range for damages and the varying weight of applicable factors, predicting non-pecuniary damages may be troublesome.