Assessing Damages for the Public Disclosure of Private Facts: The Case of *Jane Doe 464533 v ND*

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This case comment examines the recent Ontario trial decision of Jane Doe 464533 v ND*, which recognized a new tort of "public disclosure of private facts". Although recognition of the tort is welcome, the author argues that Stinson J's analysis of the damages in the case is deeply flawed. Instead of using sexual battery as a way of analysing the damages caused by this tort, defamation should be used. Both defamation and the tort of public disclosure of private facts share the same underlying interest: the protection of reputation. Further, the common law factors used to assess defamation damages are well-suited for assessing the damages caused by the tort of public disclosure of private facts. Aligning the damages awarded with the interest protected is an advisable goal as future litigants bring this tort to courts.*

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Introduction

Four years after recognizing the privacy tort of "intrusion upon seclusion" in *Jones v Tsige*,[1] Stinson J has followed suit in *Jane Doe 464533 v ND*[2] by recognizing another privacy tort: the tort of "public disclosure of private facts" (the Disclosure Tort). Although *Jane Doe* is only a trial decision, Stinson J explicitly intended that his analysis would set the tone for the tort's future.[3] The decision—and especially its discussion of damages—therefore deserves careful scrutiny.

This case comment focuses on Stinson J's approach to assessing the tort's damages. I argue that his damages analysis is incorrect because it analogizes the the Disclosure Tort to sexual battery rather than the more appropriate analogy, defamation. Defamation is the more appropriate analogue because the interest which it protects is the same interest protected by the new tort: reputation. It stands to reason that our understanding of the damages caused by this new tort should, likewise, be informed by the tort of defamation. Moreover, the factors used to assess damages in defamation are very amenable to the Disclosure Tort and should be adopted with necessary modification.

Before engaging in this scrutiny, however, it should be noted that recognizing this tort is a positive development for Ontario's law. The proliferation of technologies, like smartphones, has increasingly permitted Canadians to record embarrassing private facts about themselves and others. Simultaneously, the number of platforms available for publicly disclosing these private facts have surged. Websites ranging from YouTube to YouPorn exist to provide forums for public disclosure along the entire spectrum of human activity.

1. 2012 ONCA 32, 108 OR (3d) 241.
2. 2016 ONSC 541, 128 OR (3d) 352 [*Jane Doe*].
3. *Ibid.* Justice Stinson noted that, "[q]uite apart from the personal result for her, her efforts have established such a precedent that will enable others who endure the same experience to seek similar recourse". *Ibid* at para 71.

When these technological developments are combined with vindictiveness, the results are unsurprising. *Jane Doe* is typical: a young woman was victimized by the distribution of a sexually explicit video she had given to her ex-boyfriend. Now, with Stinson J's decision, other courts will have persuasive authority to find that this type of victimization (whether online or offline) is a compensable damage.

I. Facts and Decision

The facts of *Jane Doe* are straightforward. The plaintiff, referred to throughout the decision as Jane Doe, was convinced by her ex-boyfriend, the defendant, ND, to make a sexually explicit video of herself. Despite her misgivings, he reassured her that nobody else would see it. She relented and sent the video.[4] The ex-boyfriend then posted it online, on a public platform, and shared it with some individuals with whom both Jane Doe and ND had attended high school.[5] Although the defendant soon took the video off-line, the plaintiff was devastated and experienced serious depression.[6] Further, Jane Doe was concerned about the future impact of the video on her relationships and career prospects.[7] She sued for, *inter alia*, intentional infliction of emotional suffering, defamation, breach of copyright, breach of confidence and intrusion upon seclusion.[8] The defendant did not appear and the plaintiff was granted default judgment.

Justice Stinson considered several different torts in his decision, but most notably held that the tort of public disclosure of private facts now existed in Ontario and applied to the facts of this case. He adopted the formulation of the tort set out in the United States' Second Restatement of Torts, with "one minor modification":

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of the other's privacy, if the matter publicized or the act of the publication (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public [modification shown by underlining].[9]

4. *Ibid* at para 7.
5. *Ibid* at para 8.
6. *Ibid* at para 13.
7. *Ibid* at para 14.
8. *Jane Doe 464533 v ND*, 2016 ONSC 541, 128 OR (3d) 352 (Statement of Claim at para 1).
9. *Jane Doe*, *supra* note 2 at para 46 [emphasis in original].

Deciding that this test had been met, Stinson J then attempted to quantify the damages. Justice Stinson's analysis of Jane Doe's damages was premised on the belief that the plaintiff's harm was analogous to a sexual battery:

> Given the novelty of the plaintiff's claim, there is no Canadian case law to guide me in determining a suitable monetary award in this case. That said, in light of the nature of the wrong, the significant and ongoing impact of the defendant's conduct on the plaintiff's emotional and psychological health, and its similarity to the impact of a sexual assault, I agree that some assistance may be found in that category of cases.[10]

Justice Stinson then considered a number of sexual battery cases, quoting extensively from *G (BM) v Nova Scotia (Attorney General)*[11] and also citing *Evans v Sproule*[12] and *T (K) v Vranich*.[13] He ultimately awarded $50,000 in general damages, $25,000 in aggravated damages and an additional $25,000 in punitive damages.[14]

In July 2016, ND successfully moved to set aside Stinson J's decision, allowing the case to proceed to a full trial.[15] This puts both liability and the damages analysis back into question. The judge did not comment on either of these issues in his decision, which simply addressed whether the default judgment should be set aside.

II. Analysis

Given that the Disclosure Tort is a new cause of action, it is not surprising that Stinson J was forced to rely on analogies between the facts in *Jane Doe* and existing torts in order to quantify damages. However, courts should be careful to consider which interests are being protected by different torts when they look to them for assistance. A tort which protects one type of interest should not be used to help quantify damages for a tort which seeks to protect a very different type of interest; the harms at the centre of each tort will be of different natures and must be compensated in different ways. For instance, we

10. *Ibid* at para 52.
11. 2007 NSCA 120, 260 NSR (2d) 257.
12. 2008 CanLII 58428, [2008] OJ No 4518 (QL) (SC).
13. 2011 ONSC 683, [2011] OJ No 361 (QL).
14. *Jane Doe*, *supra* note 2 at paras 58–63.
15. *Jane Doe 464533 v ND*, 2016 ONSC 4920, 2016 CarswellOnt 21212 (WL Can), leave to appeal to Divisional Court refused, 2017 ONSC 127, 2017 CarswellOnt 163 (WL Can).

cannot look to nuisance, which protects individuals' interest in the enjoyment of their property, to inform how we think about physical damages caused by negligent misrepresentation. Both torts attempt to compensate an individual for harms, but how we quantify and conceive of those harms is quite different. Yet, this is precisely what Stinson J has done.

With respect, Stinson J's conclusion regarding the utility of sexual battery cases in assessing damages for the Disclosure Tort is not correct. Rather, defamation, which protects reputation, should be used. Given the success of ND's motion to set aside Stinson J's decision, the court will now have the opportunity to take a second look at this issue.

A. Sexual Battery: An Imperfect Analogy

Before discussing the utility of defamation, it is important to understand why sexual battery is not an appropriate analogy for assessing damages for the Disclosure Tort.

Unlike defamation, sexual battery is not concerned with reputation. Sexual battery, like ordinary battery, is designed to protect individuals' interest in physical autonomy. There must be an unconsented, unprivileged physical touch for the tort to have occurred.[16] In *Non-Marine Underwriters, Lloyd's of London v Scalera*, the leading Supreme Court of Canada decision on sexual battery, McLachlin J, as she then was, held for the majority that: "[t]he tort of battery . . . is aimed at protecting the personal autonomy of the individual. Its purpose is to recognize the right of each person to control his or her body and who touches it, and to permit damages where this right is violated."[17]

In *Jane Doe*, there was no physical touching and the video was consensually produced. Although Stinson J commented that ND's actions "offended and compromised the plaintiff's dignity and personal autonomy",[18] it is difficult to see how autonomy was affected. Autonomy refers to a person's right to be free from external influence or control.[19] Here, the video was consensually produced, so Jane Doe's autonomy interest was not affected at the moment of

16. *Reibl v Hughes*, [1980] 2 SCR 880 at 890, 114 DLR (3d) 1, cited in *Non-Marine Underwriters, Lloyd's of London v Scalera*, 2000 SCC 24 at para 6, [2000] 1 SCR 551 [*Non-Marine*].

17. *Non-Marine*, *supra* note 16 at para 15.

18. *Jane Doe*, *supra* note 2 at para 56.

19. "Autonomy" has been discussed extensively by the Supreme Court of Canada in the context of medical decision making. In *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331, the Court held that "[s]ecurity of the person encompasses 'a notion of personal autonomy

production. Justice Stinson may instead be referring to the video's *distribution* as the autonomy-infringing event. But this is not truly related to autonomy. Once a sexually explicit video is consensually transmitted, the subsequent act of distribution does not itself cause influence or control vis-à-vis the plaintiff. Indeed, there was no indication that ND, or anyone else, intended to use the video to coerce Jane Doe, or that he even intended to tell Jane Doe of its publication online. The act of distributing the video may negatively affect the plaintiff in other ways (i.e., it may impact reputation and result in emotional damage), but it does not impair the plaintiff's ability to freely make decisions. In other words, the "unconsented touch" is missing.

B. The True Interest Protected by the Disclosure Tort: Reputation

Rather than personal autonomy, the interest being protected by the new Disclosure Tort is reputation. This has been well established in the American history of the tort, which largely began with William L. Prosser's 1960 article, "Privacy".[20] Prosser surveyed several decades of American jurisprudence and concluded that the application of privacy in the case law indicated that the principle formed the foundation of four separate torts:

> (1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
> (2) Public disclosures of embarrassing private facts about the plaintiff.
> (3) Publicity which places the plaintiff in a false light in the public eye.
> (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[21]

Helpfully, Prosser indicated which interests were being protected by each of his four torts. He noted, for instance, that the interests protected by the tort of intrusion upon seclusion and those protected by the tort of public disclosure of private facts are "quite distinct".[22] The intrusion tort protected against mental distress, in order to "fill in the gaps left by trespass, nuisance,

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involving . . . control over one's bodily integrity free from state interference'" at para 64, citing *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 587–88, 82 BCLR (2d) 273. The *Canadian Oxford Dictionary* defines autonomy as "personal freedom or independence; freedom of the will". *Canadian Oxford Dictionary*, 2nd ed, *sub verbo* "autonomy".

20. William L Prosser, "Privacy" (1960) 48:3 Cal L Rev 383.
21. *Ibid* at 389.
22. *Ibid* at 398.

[and] the intentional infliction of mental distress".[23] On the other hand, the Disclosure Tort protects reputation:

> The interest protected is that of reputation, with the same overtones of mental distress that are present in libel and slander. It is in reality an extension of defamation, into the field of publications that do not fall within the narrow limits of the old torts, with the elimination of the defense of truth. As such, it has no doubt gone far to remedy the deficiencies of the defamation actions, hampered as they are by technical rules inherited from ancient and long forgotten jurisdictional conflicts, and to provide a remedy for a few real and serious wrongs that were not previously actionable.[24]

In addition to academic scholarship, American case law relating to the tort's elements also clearly connects the tort to reputation. The tort's requirement of "publicity" is one example.

Publicity has been widely interpreted to require that the disclosure be made to more than a single individual or small group of people.[25] For instance, in *Lemnah v American Breeders Services, Inc*, the Supreme Court of Vermont held that

> the reported decisions applying a standard of publicity similar to that embodied in the Restatement, and which the parties in this case agree correctly expresses the law applicable to plaintiff's claim of a tortious invasion of his privacy, have found that the communication must be to a group larger than several people.[26]

If reputation is understood to refer to a widespread belief held by a group about one's habits and character,[27] the tort's requirement of publicity makes sense. In order to impact reputation, which is a *widely* held belief, a damaging disclosure must also be widely made. Because a disclosure only to one person is

23. *Ibid* at 392.

24. *Ibid* at 398 [footnotes omitted].

25. United States case law appears to suggest that the disclosure must be to more than a single individual or small group of people. See e.g. *Beard v Akzona Inc*, 517 F Supp 128 (ED Tenn 1981) (in which a disclosure to five people was insufficient). See also *Dominguez v Davidson*, 266 Kan 926 (1999), citing *Ali v Douglas Cable Communications*, 929 F Supp 1362 (D Kan 1996) (which held that "publicity" meant that the private matter must be publicized such that it is substantially certain to become public knowledge).

26. 144 Vt 568 at 576 (Sup Ct 1984).

27. The *Canadian Oxford Dictionary* defines "reputation" as "what is generally said or believed about a person's or thing's character or standing". *Canadian Oxford Dictionary*, *supra* note 19, *sub verbo* "reputation". See also *Dias v O'Sullivan*, [1949] SASR 195 (SC) ("[r]eputation is the popular belief of the nature of a man's character" at 203).

unlikely to impact a widely held belief, the tort cannot be made out. Reputation is therefore central to the tort's requirement of publicity.

Finally, reputation also forms the basis of American courts' damages analyses for the Disclosure Tort. §652H of the *Restatement (Second) of Torts* outlines the recoverable damages for any of the four privacy torts recognized therein, including public disclosure of private facts:

> One who established a cause of action for invasion of privacy is entitled to recover damages for
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> (a) the harm to his interest in privacy resulting from the invasion;
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> (b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and
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> (c) special damage of which the invasion is a legal cause.[28]

In the context of the Disclosure Tort, §652H has been interpreted to cover harm to reputation. In *Vassiliades v Garfinckel's, Brooks Brothers*,[29] the Court of Appeal for the District of Columbia, commenting on §652H, held that

> [a] plaintiff whose private life is given publicity may recover damages for the harm to her reputation or interest in privacy resulting from the publicity and also for the 'emotional distress or personal humiliation . . . if it is of a kind that normally results from such an invasion and it is normal and reasonable in its extent.'[30]

Notably, the first *Restatement of Torts* was even more direct about the Disclosure Tort's relationship with reputation and defamation. It simply stated that damages "can be awarded in the same way in which general damages are given for defamation".[31]

Thus, like defamation, the Disclosure Tort is oriented towards protecting reputation and compensating the sorts of damages that may accrue when reputation is harmed (e.g., emotional distress or personal humiliation). Despite

28. *Restatement (Second) of Torts* § 652H (Am Law Inst 1977) [*Second Restatement*].
29. 492 A.2d 580 (DC App Ct 1985).
30. *Ibid* at 594, citing *Second Restatement*, *supra* note 28, cmt b.
31. *Restatement of Torts* § 867 (Am Law Inst 1939). See also Robert C Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort" (1989) 77:5 Cal L Rev 957.

his resort to sexual battery, Stinson J described the damages suffered by Jane Doe essentially in those terms:

> The plaintiff remains conscious of the fact that the video . . . has caused harm to her reputation. Even today, more than four years after the incident, she is emotionally fragile and worried about the possibility that the video may someday resurface and have an adverse impact on her employment, her career, or her future relationships.[32]

It seems quite clear from this quote that reputation was the key interest that had been harmed. We should therefore look to defamation, which also protects reputation, for inspiration on assessing and quantifying damages.

C. Canadian Defamation Damages

Once it is understood that reputation is at the heart of the new Disclosure Tort, the utility of Canada's jurisprudence on defamation damages becomes readily apparent. In fact, the factors used in Canada to assess defamation damages are, with minor modifications, very well suited to the Disclosure Tort. The courts should make use of the tools already at their disposal, rather than attempt to fashion new ones based on incorrect analogies.

The factors that enter into the assessment of damages in a defamation case were described by Cory J in *Hill v Church of Scientology* as "the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and 'the whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict'".[33] Every one of these factors is relevant to assessing damages for a public disclosure of a private fact. A disclosure may result in more or less damages due to the position and standing in the community of the plaintiff. In the age of viral videos, an individual with a higher standing in the community may suffer greater reputational damage by the posting of an embarrassing private video than a person with a lower standing, who will attract less attention.

The "nature of the libel" can easily be transformed into the "nature of the disclosure", which would assign more or less damages depending on how embarrassing or humiliating the disclosed private fact is.

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32. *Jane Doe*, *supra* note 2 at para 14.

33. [1995] 2 SCR 1130 at para 182, 24 OR (3d) 865 [*Hill*], citing Philip Lewis, ed, *Gatley on Libel and Slander*, 8th ed (London, UK: Sweet & Maxwell, 1981) at 592–93.

"Retraction", "apology" and "the whole conduct" of the defendant are also easily applied to the assessment of damages caused by the Disclosure Tort.

The "mode and extent of publication" is especially relevant for the Disclosure Tort. This factor permits the court to directly assess reputational damage by looking to the extent of the publication of the defamatory statement. A broader publication will produce a greater quantum of damages and a less extensive publication will produce a more limited quantum of damages.[34] This factor is clearly useful for measuring the damage caused by public disclosures of private facts. The greater the number of people to whom the disclosure is made, the greater the embarrassment and resulting reputational damage.

Publishing a private fact online, as occurred in *Jane Doe*, has the potential to be a very extensive publication. Canadian case law has indicated that online reputational harm will be treated very seriously. In *Barrick Gold Corp v Lopehandia*,[35] a majority of the Court of Appeal for Ontario considered a "prolonged" campaign of defamatory online posts accusing Barrick Gold Corporation of criminal misconduct.[36] The trial judge had ruled in Barrick's favor, finding the online posts defamatory, but Barrick appealed the damages award. In discussing the relevance of the internet in the case, the Court quoted an article titled "Silencing John Doe: Defamation and Discourse in Cyberspace":

> Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, they are communicated through a medium more pervasive than print, and for this reason they have tremendous power to harm reputation. Once a message enters cyberspace, millions of people worldwide can gain access to it. Even if the message is posted in a discussion forum frequented by only a handful of people, any one of them can republish the message by printing it or, as is more likely, by forwarding it instantly to a different discussion forum. And if the message is sufficiently provocative, it may be republished again and again. The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that "the truth rarely catches up with a lie".[37]

34. *Hill*, *supra* note 33 at paras 182, 184, 186. See also Halsbury's Laws of Canada (online), *Defamation*, "Defamation: Remedies: General Damages: Assessing General Damages: General Considerations" (IV.1(2)(a)) at HDE-193 "Purpose of Award of General Damages" (2013 Reissue).

35. [2004] 71 OR (3d) 416, 239 DLR (4th) 577 (CA) [*Barrick*, cited to OR].

36. *Ibid* at para 15.

37. Lyrissa Barnett Lidsky, "Silencing John Doe: Defamation & Discourse in Cyberspace" (2000) 49:4 Duke LJ 855 at 863–64 [footnotes omitted], cited in *Barrick*, *supra* note 35 at para 32.

The extraordinary breadth of an online publication, as compared to a traditional publication, warranted an increase in general damages to compensate for the resulting harm to reputation:

> [T]he motions judge failed to appreciate, and in my opinion misjudged, the true extent of Mr. Lopehandia's target audience and the nature of the potential impact of the libel in the context of the Internet. She was alive to the fact that Mr. Lopehandia "[had] the ability, through the Internet, to spread his message around the world to those who take the time to search out and read what he posts" and indeed that he had "posted messages on many, many occasions". However, her decision not to take the defamation seriously led her to cease her analysis of the Internet factor at that point. She failed to take into account the distinctive capacity of the Internet to cause instantaneous, and irreparable, damage to the business reputation of an individual or corporation by reason of its interactive and globally all-pervasive nature and the characteristics of Internet communications outlined in paragraphs 28-33 above.
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> Had the motions judge taken these characteristics of the Internet more fully into account, she might well have recognized Barrick's exposure to substantial damages to its reputation by reason of the medium through which the Lopehandia message was conveyed.[38]

The trial judge's failure to appreciate the unique challenge to reputation posed by the internet, among other failures, led the Court to move the general damages award from $15,000 to $75,000.[39] The SCC later approvingly cited both *Barrick* and the article referred to therein, in *Crookes v Newton*.[40]

Thus, while not all public disclosures of embarrassing private facts occur online, the factor "mode and extent of publication", identified in *Hill*, as well as recent Canadian defamation case law, is capable of helping judges to analyze damages in online Disclosure Tort cases like *Jane Doe*.

As mentioned above, the US authorities have traditionally taken the view that the damages awarded for a public disclosure of private facts should be assessed in the same manner as defamation damages. There is therefore nothing novel about taking the same approach in Canada. From the perspective of judges, such an approach would facilitate adjudication, because it would make available a very well developed body of case law upon which to draw. This reduces judges' workload and places them back into familiar territory, reducing the chances of an analytical misstep.

38. *Barrick*, *supra* note 35 at paras 44–45.
39. *Ibid* at para 67.
40. 2011 SCC 47 at para 37, [2011] 3 SCR 269.

Conclusion

Justice Stinson's decision to recognize the tort of public disclosure of private facts will likely be cited in similar future cases. It is therefore important that we correctly ascertain what interest is being protected by the tort. This will guide how the courts think about damages. Now that Stinson J's decision has been set aside and the case will move to a full trial, the Court has a second opportunity to get this thinking right and set a principled precedent for future cases.

This case comment has argued that the interest protected by the tort is reputation. Therefore, remedying reputational harm should be the focus in the damages analysis. In turn, this should direct the court's attention towards Canadian defamation case law and the factors used for assessing damages in defamation cases. These factors are easily applied to cases of public disclosure of private facts and can serve as useful guidance for courts. Drawing on this body of law will help judges to correctly grapple with this new tort.