A Common Law Right to Privacy

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Privacy Update

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A COMMON LAW RIGHT TO PRIVACY

BACKGROUND

Until very recently, a lawyer could state with confidence that there was no common law right to privacy in Canada. Several provinces had adopted statutory regimes for the protection of privacy, but the common law had not recognized a stand-alone cause of action.

Recent case law from Ontario has confirmed, however, that courts will recognize a common law cause of action for breach of privacy. On the other hand, a court in British Columbia refused to recognize a common law right to privacy due to the existing statutory regime. Although Alberta courts have not yet clearly recognized such a right, it is almost certainly only a matter of time before a pleading in privacy results in an award of damages.

This paper examines the development of a common law right to privacy, and discusses the general parameters of the cause of action, including damages.

INTERNATIONAL DEVELOPMENTS

The goal of the law of privacy is the protection of the private lives of individuals. Central to the notion of privacy is the ability of an individual to decide how much of him- or herself is shared with others, including the manner of sharing and the purpose for which it is shared.

The law in most common law jurisdictions has been reluctant to recognize a cause of action specifically designed to prevent invasions of privacy. Other torts such as trespass, assault, nuisance and intentional infliction of mental distress, and equitable actions for breach of confidence addressed very specific types of privacy interests, but refused to recognize a right to privacy tied to a unified rationale.

While it is useful to compare the privacy jurisprudence in a number of jurisdictions, it is important to recall the unique constitutional and legislative framework in each jurisdiction. For example, the First Amendment to the Constitution of the United States has arguably had a dramatic impact on the approach taken by American courts to privacy interests; generally, where privacy interests collide with free speech principles, the latter prevails.

The United Kingdom's approach, which for many years was similar to the Canadian approach, has been heavily influenced by the incorporation of the *European Convention on Human Rights* through the *Human Rights Act, 1998*.[1] British courts are increasingly looking to Strasbourg jurisprudence and

1 The possible repealing of which is currently being debated in the "Brexit" referendum to be held in June, 2016.

the Convention's explicit protection of both freedom of expression and privacy in developing a right to privacy.

United States of America

In 1890, two American lawyers (one of whom went on to be a Supreme Court justice) wrote an influential law review article calling for legal protection for what they termed an individual's right to be "let alone".[2] This article is often referred to as the foundation for the legal protection for privacy rights in the United States.

There are four recognized privacy rights in the US: intrusion upon seclusion, public disclosure of private facts, false light, and appropriation of name or likeness.

Courts in the US use the "reasonable expectation of privacy standard", and traditionally have considered that actions undertaken in a public space do not attract protection. Under this approach, it has been said that the "primary way for individuals to defend their privacy is through self-censorship and seclusion".[3] In essence, the traditional American approach favours a finding that once information enters the public realm, it loses any protection it might have acquired when it was private. This applies equally to persons. Once a person leaves the seclusion of his or her home, he or she has entered the public sphere, and cannot have a reasonable expectation of privacy. Therefore, every action undertaken by that individual is a public action.

This approach is illustrated in *McNamara v. Freedom Newspapers*, where a Texas appeals court dismissed an appeal of a decision to award summary judgment to the defendant newspaper. The defendant had taken and published a photograph of Mr. McNamara—a high school student—playing soccer. Unfortunately, at the moment the photograph was taken, Mr. McNamara's genitals were exposed. Mr. McNamara brought an action for invasion of privacy resulting from the publication. In affirming the dismissal of the action, the appeal court found that the publication of the photograph was protected by the First Amendment, and that such protection is not lost because of the subject's embarrassment. The Court specifically states that "[w]hen an individual is photographed at a public place for a newsworthy article and that photograph is published, the entity publishing the photograph is entitled to the protection of the First Amendment". Further, the Court notes that the photograph accurately depicted a "public event", and that Mr. McNamara was "voluntarily participating in a spectator sport at a public place".

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2 S. Warren & L. Brandeis "The Right to Privacy" (1890) 4 Harv. L. Rev. 193.

3 Elizabeth Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000) 50 U.T.L.J. 305 at 306.