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— Franks & Zalev - This Week in Family Law

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Birth Announcement: The Tort of Public Disclosure of Embarrassing Private Facts

Racki v. Racki (2021), 52 R.F.L. (8th) 1 (N.S. S.C.) - Coughlan J.

In *Jones v. Tsige* (2012), 6 R.F.L. (7th) 247 (Ont. C.A.), the Ontario Court of Appeal reviewed the American jurisprudence on torts relating to invasion of privacy, and explained that the American courts have actually recognized four separate privacy torts:

• **Tort #1**: Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.

• **Tort #2**: Public disclosure of embarrassing private facts about the plaintiff.

• **Tort #3**: Publicity which places the plaintiff in a false light in the public eye.

• **Tort #4**: Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

As we have previously discussed in *TWFL*, the first and third privacy torts (intrusion upon seclusion and publicly placing a person in a false light) have been recognized by courts in Canada (see the 2012-09-March 6, 2012 and 2020-08-March 2, 2020 editions of *TWFL*).

In *Racki*, Justice Coughlan of the Supreme Court of Nova Scotia concluded that the second privacy tort - public disclosure of embarrassing private facts - should also be recognized as part of the law of Canada.

While *Racki* is not the first Canadian case to consider the tort of public disclosure of embarrassing private facts, the other cases to consider it involved requests for default judgment [*Jane Doe 464533 v. D. (N.)*, 2016 CarswellOnt 911 (S.C.J.); and *Jane Doe 72511 v. Morgan*, 2018 CarswellOnt 18310 (S.C.J.)]. Justice Kristjanson also discussed the tort in *obiter* in her decision in *Yenovkian v. Gulian*, 2019 CarswellOnt 21614 (S.C.J.) which, as we discussed in the 2020-08-March 2, 2020 edition of *TWFL*, dealt with the tort of publicly placing a person in a false light (the third privacy tort).

The husband and wife in *Racki* were married from 2004 to 2017, and had one child together.

In 2018, the husband self-published a book - *Free Trials (and Tribulations): How to Build a Business While Getting Punched in the Mouth* - as a print on demand book that could be purchased through Amazon.

In the book, the husband disclosed that the wife had struggled with an addiction to sleeping pills, and had tried to commit suicide twice. While the wife acknowledged that the facts in the husband's book were true, her evidence was that this information was

private, it was not something she would share with strangers, and she "was horrified, humiliated and full of anguish" when she learned that the husband had disclosed her private information in his book.

The husband made other embarrassing allegations about the wife that she denied, including that she had forged his name on a number of cheques.

The wife sued the husband for damages for publicly disclosing her private information. After reviewing *Jones v. Tsige* and several other cases that have considered the various privacy torts, Justice Coughlan was satisfied that the tort of public disclosure of embarrassing private facts is part of the law of Canada:

> [25] Today a person's privacy is a precious commodity which is becoming harder to protect. Modern life infringes on all aspects of personal privacy. Technology, which changes rapidly, has made it possible to track all aspects of a person's life. We live in a world much different from just a decade or two ago. As society changes the law must evolve to meet changing circumstances. Existing causes of action, such as defamation with the defences available to such a claim, do not address the circumstances arising from the public disclosure of private facts. Considering all of the foregoing, it is appropriate to find the existence in Nova Scotia of the right of action for public disclosure of private facts of another.

Justice Coughlan explained that the tort has three elements:

- First, "[t]here must be publicity of the facts communicated to the public at large to become a matter of public knowledge."
- Second, the facts in issue must be "those to which there is a reasonable expectation of privacy."
- Finally, the "publicity given to those private facts must be considered, viewed objectively, as highly offensive to a reasonable person causing distress, humiliation or anguish."

His Honour also explained that if the plaintiff is able to prove all three elements of the tort, s/he does not need to prove actual damages because, "general damages, as in claims in defamation, are presumed by the publicity of the private facts and are awarded at large." See *Jones v. Tsige* at para. 71.

On the facts of this case, Justice Coughlan was satisfied that the wife had established that the husband had committed the tort by disclosing information about the wife's addiction to sleeping pills and suicide attempts, and made the following findings:

- The husband had published the book and promoted it on social media and by sending it to influencers, friends, and family (including the wife's adult daughter from a prior relationship).
- The wife had a reasonable expectation of privacy with respect to the facts of her struggles with sleeping pills and suicide attempts.
- Viewed objectively, the publicity that the husband gave to the wife's private information was "highly offensive to a reasonable person which would cause distress, humiliation or anguish."

However, he also found that the husband's allegation that the wife had forged cheques did not meet the test because the wife had denied that it was true. Accordingly, it was not a private "fact" about her, and "[a]ny action concerning the allegation would have to be by way of a claim of defamation with all the defences available to such a claim."

The husband also tried to argue that the wife's claim against him should be dismissed because his right to publish his book was protected by the right of freedom of expression, and that his goal of encouraging entrepreneurship and overcoming hardships was in the public interest.

While Justice Coughlan accepted that freedom of expression could be a defence to the tort of public disclosure of embarrassing private facts, he was not satisfied that the husband's decision to publicize the wife's private information was actually in the public interest:

> [38] The right to privacy is not absolute. It has to be weighed against competing rights including freedom of expression. In this case [the husband] has the right to publish a book to encourage entrepreneurship and overcome hardship. But the issue in considering the Book as a whole, is whether the publication of the private facts of [the wife's] addiction and suicide attempts is in the public interest.
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> [39] What is in the public interest was described by McLachlin C.J.C. in giving the majority judgment in *Grant v. Torstar Corp.*, 2009 SCC 61 at paras. 105 and 108:
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> > 105 To be of public interest, the subject matter "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached": Brown, vol. 2, at pp. 15-137 and 15-138. The case law on fair comment is "replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews": *Simpson v. Mair*, 2004 BCSC 754, 31 B.C.L.R. (4th) 285 (B.C.S.C.), at para. 63, *per* Koenigsberg J. Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.
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> > 108 The question then arises whether the judge or the jury should decide whether the inclusion of a particular defamatory statement in a publication was necessary to communicating on the matter of public interest. Is this question merely a subset of determining generally whether the publication is in the public interest? Or is it better treated as a factor in the jury's assessment of responsibility? Lord Hoffmann in *Jameel* took the view that determining whether a defamatory statement was necessary to communicating on a matter of public interest is a question of law for the judge, conceding, however, that this may require the judge to second-guess editorial judgment, and must be approached in a deferential way (para. 51).
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> [40] Considering the purpose of the Book, the publication of the facts of [the wife's] addiction and suicide attempts was not in the public interest, in that the facts were not required to advance the purpose of the Book about overcoming hardships and starting a business. [The husband] could have stated his relationship with his wife was falling apart without disclosing the facts his wife was addicted to sleeping pills and attempted suicide. Given the facts of this case [the husband's] right to freedom of expression does not prevail over [the wife's] privacy claim.

With respect to damages, Justice Coughlan looked to *Jones v. Tsige*. In that case, the Ontario Court of Appeal determined that if the plaintiff in a privacy tort case has not suffered a pecuniary loss, general damages should range from $0 and $20,000, and set out the following list of factors to assess where in the range a particular case should fall:

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

2. the effect of the wrong on the plaintiff's health, welfare, social, business or financial position;

3. any relationship, whether domestic or otherwise, between the parties;

4. any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong; and

5. the conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant.

We note, however, that it is not entirely clear in the existing case law whether the $20,000 cap on general damages for intrusion upon seclusion should actually apply to the tort of public disclosure of private information. As Justice Kristjanson noted in *Yenovkian*:

> [187] On damages for intrusion on seclusion, the Court of Appeal in *Jones v. Tsige* held at paragraphs 87-88 that damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest, in a range up to $20,000. The important distinction with the two invasion of privacy torts in issue here, however, is that intrusion on seclusion does not involve publicity to the outside world: they are damages meant to represent an invasion of the plaintiff's privacy by the defendant, not the separate and significant harm occasioned by publicity.
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> [188] The two *Jane Doe* cases have recognized that the cap on damages for intrusion upon seclusion may not apply to the other forms of invasion of privacy: [*Jane Doe 464533 v. D. (N.)*, 2016 CarswellOnt 911 (S.C.J.)] at para. 58; [*Jane Doe 72511 v. Morgan*, 2018 CarswellOnt 18310 (S.C.J.)] at paras. 127-132. In this case, as is in those, the "modest conventional sum" that might vindicate the "intangible" interest at stake in *Jones v. Tsige*, para. 71, would not do justice to the harm the plaintiff has suffered.

After considering the nature of the husband's (mis)conduct and refusal to abide by the wife's request to remove her private information from the book (even though it would have been easy for him to do so), Justice Coughlan ultimately decided that the wife was entitled to $18,000 for general damages. He also awarded the wife $10,000 in aggravated damages because he was satisfied that the husband was motivated by malice when he disclosed the wife's private information.

We've definitely not heard the last of this tort.

Experts: Judge Not the Credibility of Others Lest Ye Be Judged by the Court of Appeal

Parliament v. Conley, 2021 CarswellOnt 5797 (C.A.) - Huscroft, Nordheimer and Harvison Young JJ.A.

While *Parliament* is not a family law case, it is useful because the Ontario Court of Appeal offered a refresher for the bench, bar, and experts about the roles each properly plays when dealing with expert evidence: judges must exercise their gatekeeping role throughout the testimony of expert witnesses; experts must stick to the area of his or her expertise, "stay in their lane," and not become advocates; and counsel must object to inadmissible expert evidence.

This medical malpractice case involved 27 experts and a lengthy jury trial. Even though the jury found that the doctors had met the standard of care, the Court of Appeal allowed the appeal and ordered a new trial because one of the experts was found to have been a problem.

Credibility was a central issue in the case, particularly the credibility of the plaintiff's mother and the defendant doctors. The resolution of one particular factual dispute was critical to the issue of the appropriate standard of care.

Dr. Bruce was the defence's standard of care expert, and it was his evidence that proved problematic. In opining about whether the defendant doctors had met the standard of care, Dr. Bruce ignored the plaintiff's mother's evidence from her examination for discovery when he prepared his report because he did not think her recollection was accurate.

Uh-oh.

He also opined that the plaintiff's mother's memory was probably wrong.

Double uh-oh.

As a result, Dr. Bruce accepted the defendants' evidence over the plaintiff's mother's evidence when giving his opinion on whether the defendants had met the standard of care.

And triple uh-oh.

Unfortunately, plaintiff's counsel did not object to Dr. Bruce offering an opinion on the credibility and reliability of the witnesses during the trial, and the trial judge allowed Dr. Bruce to give evidence on it.

The Court of Appeal, understandably, took serious issue with this.

Conclusions as to the credibility or truthfulness of a witness are for the trier of fact. Credibility is not the proper subject of expert opinion: *R. v. Marquard*, 1993 CarswellOnt 995 (S.C.C.); *Whitfield v. Whitfield*, 2016 CarswellOnt 12018 (C.A.).

It is also clear that a trial judge's role as "gatekeeper" is not exhausted once a particular expert has been qualified as an expert and permitted to testify: *Bruff-Murphy v. Gunawardena*, 2017 CarswellOnt 9169 (C.A.) at paras. 62-66, leave to appeal refused, 2018 CarswellOnt 3656 (S.C.C.); *R. v. Sekhon*, 2014 CarswellBC 379 (S.C.C.). The trial judge must continuously ensure that the expert does not stray from their report and/or into opining on the credibility or reliability of other witnesses: *R. v. Abbey*, 2009 CarswellOnt 5008 (C.A.) at para. 62.

As Hourigan J.A. noted in *Bruff-Murphy*,

> [63] Where, as here, the expert's eventual testimony removes any doubt about her independence, the trial judge must not act as if she were functus. The trial judge must continue to exercise her gatekeeper function. After all, the concerns about the impact of a non-independent expert witness on the jury have not been eliminated. To the contrary, they have come to fruition. At that stage, when the trial judge recognizes the acute risk to trial fairness, she must take action.

This means that a trial judge must be continuously on guard that an expert's actual testimony does not overstep the appropriate scope of the expert evidence and that the expert does not become an advocate for the party by whom they are called. And that continuing gatekeeper role includes the discretion to exclude evidence at any point during the expert's testimony. This gatekeeper function continues throughout the expert's evidence.

In *Parliament*, the Court of Appeal found that the trial judge had not properly exercised the gatekeeper function during Dr. Bruce's evidence in circumstances where he exceeded his role as an expert when he opined on the credibility and reliability of the defendants and the plaintiff's mother.

An expert expressing an opinion on the credibility of witnesses is a breach of that expert's duty to be independent, and crosses the line from expert to advocate. This bears repeating: *an expert that expresses opinions on credibility has become an advocate*. Consider this when dealing with an expert accountant or business valuator or expert custody/access assessor (forgive our use of the old terminology, but "decision-making authority/parenting time assessor" is such a mouthful).

It is fine for an expert to base an opinion on different sets of hypothetical facts. But it is not the job of the expert to, independently, determine the facts on which to base their opinion.

What should the trial judge have done? The Court of Appeal found that the trial judge, in the continuing gatekeeper role (and in the context of a jury case), should have invited submissions from counsel regarding a mid-trial instruction to the jury that they ignore any of Dr. Bruce's opinions as to the credibility of other witnesses.

As noted above, plaintiff's trial counsel did not object to the admissibility of Dr. Bruce's opinion as to credibility. That argument was raised for the first time on appeal. As we know, generally, a party cannot raise an argument for the first time on appeal and cannot appeal where an objection was not taken below. The failure to object at trial is usually fatal to an appeal on that point: *K. (G.) v. K. (D.)*, 1999 CarswellOnt 1615 (C.A.), leave to appeal refused, 2001 CarswellOnt 1073 (S.C.C.).

However, a new trial may still be ordered in such cases, when the court is satisfied that a new trial is necessary in the interests of justice. In this case, the Court of Appeal found that a miscarriage of justice had occurred, and that the only appropriate remedy was to order a new trial.

So, Mr. Banker . . . the Court Told Me I Can't Pay My Mortgage . . . ?

A.R.J. v. Z.S.H. (2021), 53 R.F.L. (8th) 368 (B.C. S.C.) - Horsman J.

The parties were married in 1992 and separated in 2008. They had two children together.

At the time of the hearing before Justice Horsman, both children were attending UBC while living with the wife full time. Both children were also estranged from the husband, although the husband made it clear that he was not seeking to terminate support on that basis.

The husband was a surgeon, and earned a substantial income.

In 2015, the husband was ordered to pay the wife $10,000 a month in child support based on an income of $725,000 a year. He was also ordered to pay the wife $12,000 a month in spousal support until July 2020, at which point the spousal support payments would terminate.

In 2020, the husband brought an application to significantly reduce his child support payments to the wife on the basis that the children's remaining expenses could largely be covered by the more than $160,000 that was available to them from their RESPs, and because his income had fallen from $725,000 to $680,000 a year.

Although the wife remained unemployed, she earned significant income from her investments (almost $160,000 in 2018 and almost $200,000 in 2019).

Justice Horsman started by considering the husband's income for support purposes. The main issue the parties' experts could not agree on was how to deal with the approximately $50,000 a year in principal that the husband's company, 3A Holdings, had paid towards its long term debts.

There are two entirely reasonable ways of looking at this type of issue. On the one hand, the wife's expert argued that by paying down principal on money it had borrowed to purchase assets, 3A Holdings was increasing its equity in those assets. On the other hand, you cannot borrow money without making the necessary payments.

In *McKenzie v. McKenzie* (2014), 51 R.F.L. (7th) 84 (B.C. C.A.), and *Evanow v. Lannon* (2018), 9 R.F.L. (8th) 1 (B.C. C.A.), the B.C. Court of Appeal determined that when deciding how to deal with principal payments in a particular case, the court must determine whether the payor has provided "clear evidence" that the principal payments were "necessary to sustain the company as a viable enterprise", and were thus "not available" to pay support with. In both *McKenzie* and *Evanow*, the Court of Appeal found that funds devoted to the regular (and required) pay-down of mortgage principal were not "available" for support purposes. Banks like to get their money back.

However, in *McKenzie*, the Court of Appeal also noted that a payor does not need to "demonstrate that the business could not be run in a fashion that generates more available income" - for example by operating out of rented space rather than owned space. The court should not use the *Guidelines* to second guess business decisions or, as Justice Pitfield put it in *S. (L.) v. P. (E.)* (1997), 32 R.F.L. (4th) 75 (B.C. S.C.), to "place the largest available shovel in the company store in order to increase income for *Guideline* purposes to a level which the person against whom an order is to be made does not himself enjoy." See also the seminal case of *Kowalewich v. Kowalewich* (2001), 19 R.F.L. (5th) 330 (B.C. C.A.).

[For further discussion about *McKenzie* and *Evanow*, see the 2015-16-April 20, 2015 and 2018-31-August 6, 2018 editions of *TWFL*.]

In this case, Justice Horsman was satisfied that the husband had met his onus of showing that the principal payments were not available to pay support:

> [56] In the present case, the [husband's] companies similarly used income to pay down long-term debt, including mortgage debt, in the ordinary course of business. As in *Mackenzie* [*sic*], there is no evidence here that the companies acquired the debt or entered into the mortgages as part of a scheme to manipulate the [husband's] income for support purposes. There is no indication that the payments were the result of a decision to accelerate debt repayment.

> [57] The [wife] suggests that 3A Holdings and Medco could have used their retained earnings to retire the debt as opposed to using income to pay it down. There is no evidence before me of the consequences to the companies, including tax consequences, of withdrawing retained earnings by way of dividends in order to retire the debt. Furthermore, as held in *Mackenzie* [*sic*], the [husband] does not have the onus of demonstrating that the companies could not be run in a manner that would generate more income.
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> [58] I find that the [husband] has met the onus on him to establish that the principal debt repayments that [the husband's expert] excluded from income were necessary to sustain the companies as viable enterprises. It is not income available for child support purposes. I therefore prefer [the husband's expert's] income calculations for the years 2017 to 2019 over [the wife's expert's] income calculations.

This logic is quite unassailable, *especially* in the case of a mortgage that existed on the date of separation.

After determining the parties' respective incomes for support purposes (Justice Horsman found that the husband's income was $680,000 a year, and the wife's was $200,000), Justice Horsman then had to decide how much child support the husband should actually be paying in the circumstances, bearing in mind that the children were both over the age of majority (s. 3(2) of the *Guidelines*), and that the husband's income was over $150,000 a year (s. 4 of the *Guidelines*).

With both children in school full time and living with the wife, and the husband's income nowhere near the level that is typically required before courts will usually depart from the Tables, we would have expected Justice Horsman to have simply ordered the husband to pay Table support plus his proportionate share of the children's post-secondary school expenses (after deducting a reasonable contribution from the children). But that is not what happened.

Somewhat surprisingly, Justice Horsman decided to depart from the Tables, and ordered the husband to pay the wife $6,000 a month in child support, which was $2,413 a month less than the $8,413 provided by the applicable Table.

> [106] In the circumstances, I consider that an order for child support at a Table amount to be inappropriate for a number of reasons. **First, the only reason for the children's continued dependence, given that AN is about to turn 21 and AS is about to turn 19, is their enrollment in a post-secondary program**. While I acknowledge that both children continue to live with the [wife], they are also in the process of becoming independent adults. Both children are capable of working part-time and contributing to their own education and expenses. I acknowledge that the unique position of high income earning spouses must be accounted for in setting the level of child support. However, **I do not understand the case law to suggest that the adult children of high income earners are entitled to assume that their dependence will continue indefinitely as a result**. These children, at the ages of 21 and 19, should be encouraged in the direction of independence notwithstanding the relative wealth of their parents.
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> [107] **Second, there is not the same income disparity between the [husband] and the [wife] as existed at the time of the 2015 Order**. The [wife] . . . earns a significant annual investment income. She has graduated from university and is on the brink of pursuing a career in nutrition that she expects will be "satisfying" and "financially rewarding". As the [husband] points out, the *Guidelines* are based on the principle that the parties have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation: *Divorce Act*, s. 26(2). The [wife's] financial ability to contribute to the maintenance of the children has much improved since the 2015 Order.
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> [108] Finally, in considering the conditions, means and circumstances of the children, **it appears to me that monthly Table support in the amount of $8,413 would significantly exceed their actual needs**. The children's university tuition and books are covered by the funds in the RESP. The [husband] proposes that the parties should share any additional ongoing s. 7 expenses in proportion to their income. This would ensure that any future special or extraordinary expense for the children would also be covered. The children both live with the [wife] rent-free, and the [wife] does not have a mortgage on the home. Table support would significantly exceed the children's actual financial needs. [emphasis added]

While we understand Justice Horsman's reasoning, we are not certain that this part of the decision is correct given that:

- The children in this case were living at home with the wife and attending school full time to obtain their first degrees. Accordingly, their circumstances were almost identical to those of a child who is under the age of majority and attending high school while living full time with a parent. Arguably, there was nothing inappropriate with the "*Guideline* approach" in s. 3(2)(a).

- There was no evidence to suggest that either child had stayed in school longer than necessary in order to remain entitled to child support.

- The husband's income was not so high that it would justify a departure from the Tables.

- Although the children had substantial RESPs, those funds were already being used to help pay for their tuition and other direct post-secondary school expenses that the parents would have otherwise been responsible for under s. 7.

- It appears to be inconsistent with many of the cases that have considered child support for adult children who live at home while completing a first degree or diploma. For example, in *Rebenchuk v. Rebenchuk* (2007), 35 R.F.L. (6th) 239 (Man. C.A.), the Manitoba Court of Appeal noted that, "[t]he closer the circumstances of the child are to those upon which the usual *Guidelines* approach is based, the less likely it is that the usual *Guidelines* calculation will be inappropriate." See also *McClement v. McClement* (2017), 4 R.F.L. (8th) 267 (B.C. C.A.) at para. 12.

Perhaps Justice Horsman was thinking of the statement from the Supreme Court of Canada in *S. (D.B.) v. G. (S.R.)* (2006), 31 R.F.L. (6th) 1 (S.C.C.), to the effect that the presumptive Table amounts can be altered when they are "so in excess of the children's reasonable needs so as no longer to qualify as child support."

In any case, the more usual (and likely better) approach would have been to order Table child support but reduce the university expenses to which the husband was expected to contribute. This would have been more consistent with child support doctrine and would have been less likely to encourage payors to "give it a try" in the future.

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