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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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Contents

"Come [Back] Up and See Me Sometime" — When You're Actually Ready

Monter v. Licea (September 16, 2021), Doc. Newmarket FC-20-331 (Ont. S.C.J.) — Jarvis J. [Ont. S.C.J. currently unreported]

This endorsement was released by Justice Jarvis with respect to a Settlement Conference that was scheduled to take place the next day. The parties had not completed cross-examinations/questioning, they each claimed there was outstanding disclosure, and there was a motion booked for the end of September.

The case involved child support and property claims. The parties had not filed updated sworn Financial Statements, Net Family Property Statements or a Comparative Net Family Property Statement. And there had been no Rule 18 Offers to Settle exchanged. (Justice Jarvis noted that an offer in a Settlement Conference Brief is not a Rule 18 Offer to Settle.)

The father had made an offer in his Settlement Conference Brief simply suggesting that the "parties execute a 50-50 parenting plan" without any further details.

While we have, in previous issues, noted situations where counsel have been justifiably upset when, for example, materials are rejected for being a half-page over the limit — this is the sort of situation that makes judges justifiably upset. How could a meaningful Settlement Conference be held in such a situation?

Justice Jarvis was quite understandably annoyed in that counsel were either wholly unfamiliar with both the *Family Law Rules* and the recent province-wide Practice Direction dealing with family law — or had simply not complied. Justice Jarvis further suggested that the clients should not be charged for their lawyer's failure to follow court procedure.

Justice Jarvis noted that:

• parties in a family law case are entitled to one — not serial — Settlement Conferences;

• a Settlement Conference is not meant to deal with contested issues that require evidence and argument; and

• a Settlement Conference is not meant to provide incremental guidance from the court.

Rather, Settlement Conferences are meant to allow the court to help parties settle their cases with the benefit of full information. Otherwise, the Conference is a waste of precious court resources when such resources are at a premium.

His Honour determined there would be no useful purpose in having the scheduled Settlement Conference, and as he did in *Ni v. Yan*, 2020 CarswellOnt 14206 (S.C.J.) (see 2020-40, October 19, 2020 edition of *TWFL*), he vacated the date *ex proprio motu* (a little Latin can be fun).

His Honour essentially said "come back and see us some time" — after you've done what you need to do, including completing disclosure, questioning (if required), and exchanging Rule 18 Offers to Settle.

With the premium placed on court resources these days, we suspect this is going to happen more-and-more frequently.

COVID-19 Vaccination Update — A General Presumption in Favour of Vaccination: More about Needles

A.C. v. L.L., 2021 CarswellOnt 13587 (S.C.J.) — Charney J.

Another week, another COVID-19 vaccination case. Hopefully we are close to the point where everyone understands that, absent truly exceptional circumstances, a court is going to find that it is in a child's best interests to be vaccinated.

The parties in *A.C. v. L.L.* had 14-year-old triplets. One of the triplets, E, attended school in person, while the other two, P and J, attended online.

The parents agreed that P and J should attend school in person. However, the father insisted that they had to get the COVID-19 vaccine before they could go to school in person, while the mother was adamantly opposed to vaccination, and withheld the children's health cards and other government ID from the father to try to prevent him from having the children vaccinated.

In granting the father's motion to let the children be vaccinated, Justice Charney found that there is a "general presumption" that it is in a child's best interest to be vaccinated against COVID-19 before attending school in person, and that the mother had not adduced the type of "compelling evidence" that would be necessary to rebut the general presumption. This is a welcome development, as too much court time has been wasted arguing over vaccination issues:

> [28] . . . The responsible government authorities have all concluded that the COVID-19 vaccination is safe and effective for children ages 12-17 to prevent severe illness from COVID-19 and have encouraged eligible children to get vaccinated. These government and public health authorities are in a better position than the courts to consider the health benefits and risks to children of receiving the COVID-19 vaccination. **Absent compelling evidence to the contrary, it is in the best interest of an eligible child to be vaccinated.**
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> [29] This analysis and conclusion is consistent with the approach taken by other courts addressing vaccinations prior to COVID-19: *C.M.G. v. D.W.S.*, 2015 ONSC 2201, at para. 105; *A.P. v. L.K.*, at para. 276; *B.C.J.B. v. E.-R.R.R.*, 2020 ONCJ 438, at para. 180, aff'd, *B.C.J.B. v. E.-R.R.R.*, 2021 ONSC 6294, at paras. 49-53; *Chambers v. Klapacz*, 2020 ONSC 2717 at para. 7.
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> [30] The issue is not, as argued by the respondent mother, whether obtaining the vaccination is "crucial" to in-person attendance. That is not the legal test. **The question is whether it is in the best interests of the child. Given the government statements above, there can be no dispute that, as a general presumption, it is in the best interest of eligible children to get vaccinated before they attend school in person.**
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> [31] The respondent mother has adduced no evidence to contradict this general presumption or displace its application to P, J, and E. She certainly has adduced no evidence to suggest that it is in the children's best interest to not be vaccinated. [emphasis added]

Justice Charney also considered whether the mother's consent was actually necessary for the children to be vaccinated. In finding that parental consent was ***not*** actually required, Justice Charney relied on s. 4 of the *Health Care Consent Act*, S.O. 1996, c. 2 ("*HCCA*"), which creates a presumption that a person, *regardless of their age*, is capable of consenting to treatment:

> [39] . . . While medical decision making is an incident of parental custody, **if the minor is a "mature minor" and capable of providing informed consent under s. 4 of the *HCCA*, decisions regarding medical treatment may be made by the minor**. As indicated, the question is whether the health care provider administering the vaccine is satisfied that the young person is capable of understanding information about the vaccine. [emphasis added]

Since both of the parents agreed that the children in this case had capacity for the purposes of the *HCCA*, and as both parents indicated that they were prepared to abide by the children's wishes vis-à-vis the vaccine, it was not necessary for Justice Charney to consider the issue of capacity any further.

In the end, Justice Charney ordered that the children were authorized to receive the COVID-19 vaccine, and ordered the mother to give the father copies of the children's health cards. It would then be up to each child to decide whether or not they wanted to get the vaccine (P and J apparently both wanted the vaccine, but E did not).

This, of course, raises the interesting question as to how a court will deal with a situation where a parent wants to compel a child to get the vaccine against the child's wishes. The Supreme Court of Canada has previously decided that a "mature minor" can decide to refuse far more serious medical treatment: *Manitoba (Director of Child & Family Services) v. C. (A.)* (2009), 65 R.F.L. (6th) 239 (S.C.C.).

On the other hand, in *A.M. v. C.H.* (2019), 32 R.F.L. (8th) 1 (Ont. C.A.), the Ontario Court of Appeal determined that s. 4 does *not* prevent a court from ordering a child to undergo a therapeutic process, which is likely also a form of treatment for the purposes of the *HCCA*, without the child's consent. Arguably, the Court's reasoning in *A.M. v. C.H.* could be extended to vaccination cases. [For further discussion about *A.M. v. C.H.*, see Philip Epstein's comment in the 2019-40, October 7, 2019 edition of *TWFL*.]

That being said, even if a court were prepared to order a non-consenting child to get the COVID-19 vaccine, we strongly suspect that no health professional would be willing to administer it without the child's consent and/or in the face of active resistance to it from the child.

Public Disclosure of Embarrassing Private Facts in Wild Rose Country

ES v. Shillington, 2021 CarswellAlta 2211 (Q.B.) — Inglis J.

In *Racki v. Racki* (2021), 52 R.F.L. (8th) 1 (N.S. S.C.), Justice Coughlan of the Supreme Court of Nova Scotia concluded that the tort of public disclosure of embarrassing private facts is part of the law of Canada (well, at least part of the law of Nova Scotia). In that case, the husband self published a book that contained personal information about the wife. The Court found that the husband had, in fact, committed the tort, and ordered him to pay the wife $18,000 in general damages and $10,000 in aggravated damages.

In assessing the wife's damages, Justice Coughlan appears to have relied on (or at least been influenced by) the Ontario Court of Appeal's finding in *Jones v. Tsige* (2012), 6 R.F.L. (7th) 247 (Ont. C.A.), that "damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest but sufficient to mark the wrong that has been done" should generally not exceed $20,000.

However, as we discussed in the 2021-23, June 14, 2021 edition of *TWFL*, it is not clear that the $20,000 limit on general damages for intrusion upon seclusion actually applies to public disclosure of private facts (see also Justice Kristjanson's discussion about this issue in *Yenovkian v. Gulian*, 2019 CarswellOnt 21614 (S.C.J.) at paras. 187-188).

We now have an answer. In *ES v. Shillington*, Justice Inglis confirmed that the tort of public disclosure of private information is part of the law of Alberta, and that non-pecuniary damages for this tort are ***not*** limited to $20,000.

The parties in *ES* were in a romantic relationship for 11 years and had two children together. They separated in 2016.

The Defendant physically and sexually abused the Plaintiff during the relationship. Towards the end of the relationship, he also admitted that, without her consent, he had posted intimate and private photographs of her online. The Plaintiff found some of these postings online, including on various pornography sites.

After the parties separated, the Plaintiff commenced an action for damages. The Defendant did not defend the claim, and the Plaintiff had him noted in default. The matter then proceeded to an uncontested hearing before Justice Inglis.

Alberta has a statute (the *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c. P-26.9) that creates a cause of action for non-consensual distribution of images. However, the Plaintiff could not rely on the statutory regime because it only came into force after the events that gave rise to her claims had already occurred, and the rule against retrospective application of statutes prohibited the Plaintiff from relying on this statutory cause of action. Without recognition of the tort in common law, the Plaintiff would have no civil remedy even though it is now recognized as conduct requiring a legal response.

Furthermore, the *Act* only protected distribution of intimate images, and the term "intimate image" is narrowly defined in the *Act*, limiting the availability of this remedy to specifically defined images. While that definition would apply to the Plaintiff in this matter, the proposed tort could protect information not contemplated by this legislation in other cases. For example, the *Act* does not protect privately sharing such images, which is a potential gap in the statutory framework.

Accordingly, the only way that the Plaintiff could claim damages against the Defendant for distributing her private photographs was if the court was prepared to recognize a new privacy tort.

That is precisely what happened. Justice Inglis found that the tort of public disclosure of private information was part of the law of Alberta and that liability under the tort was governed by the following test:

> (a) the defendant publicized an aspect of the plaintiff's private life;
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> (b) the plaintiff did not consent to the publication;
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> (c) the matter publicized or its publication would be highly offensive to a reasonable person in the position of the plaintiff; and,
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> (d) the publication was not of legitimate concern to the public.

On the facts of the case, Justice Inglis had no difficulty concluding that the Plaintiff had established liability against the Defendant:

> [72] . . . By uploading the Plaintiff's explicitly sexual images to accessible websites the Defendant publicized an aspect of her private life; the Plaintiff did not consent to this action; the publication of the images is highly offensive to a reasonable person in the position of the Plaintiff; and, there is no legitimate concern to the public that warranted the publication.
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> [73] The Defendant is liable for this tort against the Plaintiff.

With respect to damages, Justice Inglis confirmed that the $20,000 limit on non-pecuniary damages for intrusion upon seclusion should *not* apply to claims for public disclosure of private information:

> [91] In *Jones*, 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, . . .
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> [92] In *Racki* the court considered the misconduct and the defendant's refusal to remove the private information from the book and awarded general damages of $18,000, along with $10,000 in aggravated damages (as the motive appeared to be malice). The private content in question was not photographs nor sexual in nature.

> [93] That award and **the range that *Racki* cited does not parallel these three causes of action or the facts in this case. The torts here are not just breaches of privacy or confidence. The Defendant attacked the personal and sexual integrity of the Plaintiff in a grossly public way with disregard for her dignity and the potential and real consequences she experienced.** He appears to have done so repeatedly and there is no evidence to suggest he has taken steps to rectify what he has done. [emphasis added]

The Plaintiff asked the Court for $80,000 in general damages, $50,000 in punitive damages, and $25,000 in aggravated damages. Justice Inglis granted this request in its entirety to compensate the Plaintiff for the significant pain, suffering, and embarrassment she had experienced at the hand of the Defendant and to condemn the Defendant's malicious and harmful conduct. In *addition*, her Honour also ordered the Defendant to pay the Plaintiff $175,000 in general damages, $50,000 in aggravated damages, $50,000 in punitive damages, and $30,000 in special damages for assault and battery and sexual assault, and to make all the best efforts to return any images of the Plaintiff to her, and remove any images that he posted online. This is a total damages award of $460,000 for this abhorrent conduct.

While no amount of money could ever compensate the Plaintiff for what the Defendant put her through, the availability of a civil remedy to deal with this type of horrific conduct that allows a court to order significant damages will deter others from engaging in similar behaviour, and at least help to provide some compensation for victims.

Virtual vs. in Person — Do You Prefer Live Theatre or the Movies?

WORSOFF v. MTCC 1168, 2021 CarswellOnt 13629 (S.C.J.) — Myers J.

In the jurisdiction where we practice (Ontario), there is a serious debate about the efficacy of virtual proceedings and when to return to doing things in person instead of virtually.

In *WORSOFF*, Justice Myers added his tech-savvy voice to the debate. In dealing with a dispute about whether an examination for discovery should be conducted virtually or in person, his Honour concluded that in most cases, it should not be necessary for discoveries to take place in person:

> [31] . . . The state of the art is evolving. Some real changes are happening with the potential to actually improve access to civil justice for the public. **I do not accept that the pandemic is over so we should all just go back to the way it was. That assumes that the "good old days" were actually good.**
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> [32] . . . As to the balance of convenience and any other relevant matters, **Mr. Marcovitch submitted that just because virtual procedures are "easier and more convenient" does not overcome the presumption that examination in person is the best way to examine a witness. *Au contraire* I say. Efficiency, affordability, and enhanced access to justice trump counsels' comfort and presumptions every time.** With the current pace of change, everyone has to keep learning technology. Counsel and the court alike have a duty of technological competency in my respectful view. Older judges and counsel may be behind younger counsel and the rest of society who use computers with greater regularity and sophistication than we do. But everyone in the civil litigation system in Ontario has had to learn to use the Civil Submissions Online portal and Caselines for example. Technological change affects everyone. Once upon a time, I had to learn how to use a Gestetner (Google it) and then a fax machine. **I do not accept that in person is just "better". It can be in some cases. But if counsel just prefers it because he or she is more comfortable with it, ought we to reject the printer because I liked my Gestetner (and Word Perfect for that matter)? The balance of convenience favours easier and more convenient processes with accompanying cost savings.**
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> [33] Most examinations for discovery are routine fare. They are often properly delegated to the most junior counsel. Most trials involve very limited use of discovery transcripts. Even if some feel that conducting discovery in person is "better", the degree of difference in a routine step is of little import in most cases.

> [34] If all agree to attend in person then the examination will be in person. But **I do not agree that examinations for discovery need to default to in person attendance because it is "better".** Counsel and parties should agree to the method of attendance that works for them in the circumstances. In each case the court can balance the relevant factors and assess the balance of convenience.
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> [35] It's now 2021. **Virtual proceedings have proven to be one of the first significant enhancements in access to justice since *Hryniak* was decided in 2014.** I am not discussing trials (and the savings available by expert witnesses testifying remotely) or even cross-examination on an affidavit out of court under subrule 34.01 (c) for that matter. But **I see no good reason to put the defendants to any increased risk of COVID-19 or to bring their lawyer to Toronto for one side's Simplified Procedure examinations for discovery in this case**. [emphasis added]

See y'all at the movies.

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