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— Franks & Zalev - This Week in Family Law

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Contents

This Week in Family Law: Privacy Edition

With increasing frequency, we are seeing family law cases involving allegations that one person has used social media to harass, intimidate, or bully another. As noted below, some Canadian jurisdictions have tried to address these issues with legislation. Others have, at least to date, forced the courts to consider these modern-day technology-based issues with reference to various common law remedies (such as defamation and libel) that were established over a century ago.

The two cases that we address this week, *Yenovkian v. Gulian* from Ontario and *Candelora v. Feser* from Nova Scotia, show how these types of issues are being dealt with in jurisdictions that have enacted cyber-bullying legislation, and those that have yet to do so.

Birth Announcement: The Tort of Publicity Placing a Person in a False Light

Yenovkian v. Gulian, 2019 CarswellOnt 21614 (Ont. S.C.J.) - Kristjanson J.

It is rare that we get to witness the birth of a new tort. But that is exactly what happened in *Yenovkian*, where the trial judge, Justice Kristjanson, determined that the tort of "publicly placing a person in a false light" is part of the law of Ontario. Her Honour also concluded that, unlike the tort of "intrusion upon seclusion", which the Ontario Court of Appeal adopted into the law of Ontario in 2012, significant damages can be awarded for publicity placing a person in a false light even if the claimant has not suffered any economic loss.

Justice Kristjanson had to consider this new tort because the evidence overwhelmingly showed that the husband's conduct had been egregious. For example, her Honour found that the husband had "engaged in years of cyberbullying against the mother, . . . on websites, YouTube videos, online petitions and emails", and had included "written and oral commentary accusing [the wife and her parents] of various illegal acts including kidnapping, child abuse, stealing money from the UK government, multiple 'felonies' against the UK, U.S. and Canadian governments, assault, drugging the children, slapping the children, death threats, 'breaking countless laws,' forging documents, fraud and abusing the children."

Yenovkian is now unquestionably the leading decision in the common law provinces that do not have statutory privacy legislation for obtaining damages from someone who posts offensive information about the claimant on the Internet. It may also be useful in provinces that already have privacy legislation, but that is not yet entirely clear and will ultimately depend on whether the courts in those provinces determine that the tort has been ousted by a statutory regime [see e.g. *Hynes v. Western Regional Integrated Health Authority*, 2014 CarswellNfld 343 (N.L. T.D.) at para. 23, where Justice Goodridge noted that the status of torts based on invasions of privacy "where a statutory cause of action for breach of privacy already exists, remains unsettled."]

The husband and wife in *Yenovkian* separated in Ontario in September 2016 after 16 years of marriage. They had two children together, one of whom had significant special needs. The marriage was not a happy one, and Justice Kristjanson found that the husband had abused the wife during the marriage.

The case descended into the abyss almost immediately after the parties separated. To briefly summarize a few of the major events that took place leading up to the trial in 2019:

• Almost immediately after the parties separated in 2016, the wife took the children to England and refused to return them to Ontario.

• The father responded by starting an Application in England under the *Hague Convention on the Civil Aspects of International Child Abduction* (the "*Hague Convention*"). He also reported the wife and her parents to the police in California (even though the children had not lived there since before the parties separated), England, and Toronto, and tried to involve the U.S. State Department and the FBI.

• In June 2018, the court in England granted the husband's *Hague* Application and ordered the mother to return the children to Ontario.

• When the wife and children returned to Ontario, the husband took the children and refused to return them to the wife or even tell her where they were. The wife responded by bringing an emergency motion to force the husband to return the children to her, and it was granted.

• In September 2018 (only about three months after the wife and the children returned), the court in Ontario granted the wife temporary sole custody and allowed her to return to England with the children pending the trial in Ontario.

Then things got bad.

Mr. Yenovkian created two websites about the family law case. The first website was dedicated to attacking the wife and her parents, and contained numerous inappropriate videos and statements about the parties' children. As Justice Kristjanson noted in her decision:

> [22] The court spent hours viewing the videos, websites, petitions and internet posts during the trial. A few examples will suffice. In one video, he states that his daughter is "stuttering" because her violent and abusive grandmother "kidnapped" and "drugged" his daughter. He specifically contrasts pictures of his daughter "before" and "after", with the clear inference that his daughter has declined. He calls his daughter "autistic" on the internet postings, even though Ms. Gulian testifies that they try to avoid labelling. He writes that his "autistic daughter" has been drugged with "opiates and other tranquilizers." In his posts he states he has documented the "mental degradation" of his child; the "before and afters" which show A.B.'s "broken" mind, that A.B.'s mental health is "incredibly damaged." Another online video depicts C.D. cowering under a table during a court-ordered access Skype call with Mr. Yenovkian and his mother, Sylvia Yenovkian, with Mr. Yenovkian loudly haranguing his son for not getting out from under the table.
>
> [23] Mr. Yenovkian has posted images and videos of Ms. Gulian and her parents with written and oral commentary accusing them of various illegal acts including kidnapping, child abuse, stealing money from the UK government, multiple "felonies" against the UK, U.S. and Canadian governments, assault, drugging the children, slapping the children, death threats, "breaking countless laws," forging documents, fraud and abusing the children. Both Ms. Gulian and Shahe Gulian denied the allegations, and I accept their evidence. One of his online petitions, entitled "Demand an End to Corruption in Family Law- Investigate the Gulian Family for Kidnapping, Fraud, and Child Abuse" has several online supporters who have signed the petition, many from the UK, one of whom posted that a young man gave her a flyer at the Armenian Church in the UK, others of whom said they knew the family personally.

The second website was created to support the husband's campaign to "unseat" the judge who made the temporary Order in September 2018 that allowed the wife and children to return to England. Justice Kristjanson provided the following description of this website:

> [28] On November 1, 2018, Mr. Yenovkian registered a website to "unseat" the Named Justice. On November 25, 2018, Mr. Yenovkian, in an email sent to his then lawyers and to his father, expressed his desire to "start a movement to get [Named Justice] unseated". The website states that it is "a site dedicated to the removal and punishment of a corrupt and Racist Anti-American Canadian judge named [Named Justice] and a corrupt lawyer named [one of Ms. Gulian's lawyers]." The website seeks the removal of the Named Justice from the bench and the removal from the bar of one of Ms. Gulian's lawyers. Mr. Yenovkian also started an online petition to remove the Named Justice, which appears to have been signed by third parties judging from the online comments.
>
> [29] He accuses the Named Justice of ruling with bias and extremism; being racist against U.S. citizens, ignoring evidence of child abuse; abuse of power; and calls her a judge who does not want to protect the law. He accuses the Named Justice and one of Ms. Gulian's lawyers of "corruption" and "collation", which I take to mean collusion. He accuses one of Ms. Gulian's lawyers of being a liar, unethical, playing dirty, who made the Children's Aid Society "ignore" child abuse and stopped the investigation of child abuse.

The husband also breached numerous court orders, sent many abusive emails to the wife, and tried to lay a private charge against the wife's mother for sexually assaulting him, being violent with him, threatening to have him killed, and abusing the parties' daughter.

Justice Kristjanson dealt with the various parenting and financial issues in her decision (not surprisingly given the father's conduct, she gave the mother sole custody of the children). She also provided a useful summary of the principles that apply when considering a request for a permanent restraining Order under s. 46(1) of the *Family Law Act* at paragraph 46 of her decision.

But *by far* the most interesting aspect of the case, and the reason that this case is a "must-read", is that her Honour created the new "privacy tort" of "publicity placing a person in a false light", and then used it to order the husband to pay the wife $100,000 in damages (in addition to $50,000 for intentional infliction of mental suffering, and $150,000 for punitive damages).

The courts have been grappling with whether and how tort law can be used to deal with privacy issues for many years. Justice Kristjanson's decision in *Yenovkian* is a further indication that, when necessary, courts in provinces that do not have privacy legislation are going to continue using tort law to try to deal with cases involving invasions of privacy that are clearly wrong but do sit comfortably within any of the already established torts.

The move towards using tort law to protect privacy rights stems predominantly from the Court of Appeal's *Jones v. Tsige* (2012), 6 R.F.L. (7th) 247 (Ont. C.A.), which was first discussed in the March 6, 2012, edition of this *Newsletter*. In *Jones*, the Ontario Court of Appeal had to decide whether torts for invasion of privacy were part of the law of Ontario. As part of its comprehensive analysis, the Court considered some of the American jurisprudence and academic literature on the issue, and indicated that the courts in the United States have actually recognized four separate privacy torts. In particular:

- **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.

The Court of Appeal found that "intrusion upon seclusion" (Tort #1 in the above list) is, in fact, a valid cause of action in Ontario, but did not address whether the same was true for the other three privacy torts.

In *Yenovkian*, however, Justice Kristjanson held that "publicity placing a person in false light" (Tort #3 in the above list), also forms part of the law of Ontario, and set out the elements that are required to make out this tort:

> [170] . . . I hold that this is the case in which this cause of action should be recognized. It is described in § 652E of the Restatement as follows:
>
> *Publicity Placing Person in False Light*
>
> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) **the false light in which the other was placed would be highly offensive to a reasonable person**, and
>
> (b) **the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.**
>
> [171] I adopt this statement of the elements of the tort. I also note the clarification in the Restatement's commentary on this passage to the effect that, while the publicity giving rise to this cause of action will often be defamatory,**defamation is not required. It is enough for the plaintiff to show that a reasonable person would find it highly offensive to be publicly misrepresented as they have been**. The wrong is in publicly representing someone, not as worse than they are, but as other than they are. The value at stake is respect for a person's privacy right to control the way they present themselves to the world. [emphasis added]

Justice Kristjanson had no difficulty concluding that, on the facts of this case, the elements of the tort of publicity placing a person in a false light had been established:

> [175] I find that the false light in which Mr. Yenovkian has placed Ms. Gulian would be highly offensive to a reasonable person. I have set out detailed findings of the false light publicity throughout this decision. Mr. Yenovkian has and continues to make serious allegations online about Ms. Gulian and her family, including that she is a kidnapper, abuses the children, drugs the children, forges documents, and defrauds governments. I find these statements to be false on the evidence before me.
>
> [176] Mr. Yenovkian has posted a video online of a person displaying posters of Ms. Gulian and her parents and the allegations at various locations in London, England. He established an online petition to persecute Ms. Gulian and her parents and enlisted the help of members of the public. He has spread his allegations on the internet and distributed them and links to the sites to friends, family members and business relations of Ms. Gulian and her parents, members of the Armenian community and her church.

Her Honour then went on to award the wife $100,000 in damages for the tort of publicity placing a person in false light, which was a significant amount since the wife had only claimed non-pecuniary damages:

> [191] In this case, the false publicity is egregious, involving alleged criminal acts including by Ms. Gulian against her children. The false publicity is widely disseminated on the internet, as well as through targeted dissemination to church friends and business associates. Ms. Gulian has suffered damage as a mother, as an employee, in the Armenian community, and in her church community. She is peculiarly vulnerable as the spouse of the disseminator of false publicity. The false publicity has had a detrimental effect on Ms. Gulian's health and welfare, humiliation, caused her fear, and could be expected as well to affect her social standing and position. Mr. Yenovkian has not apologized, nor has he retracted the outrageous comments despite court orders.
>
> . . .

> [193] On the tort of invasion of privacy (false light and public disclosure of private facts), I award damages of $100,000, considering the conduct here and the range in the cases identified in *Rutman v. Rabinowitz*, 2018 ONCA 80 and *Mina Mar Group Inc. v. Divine*, 2011 ONSC 1172, and the increased potential for harm given that the publicity is by way of the internet, which is "instantaneous, seamless, interactive, blunt, borderless and far-reaching": *Barrick Gold Corp. v. Lopehandia* (2004), 2004 CanLII 12938 (ON CA), 71 O.R. (3d) 416 (Ont. C.A.) at para. 31. I find that third parties have commented on the websites and signed the petitions in both the UK and the US, and that Mr. Yenovkian has sent targeting e-mails and caused the distribution of flyers in the UK driving people to the websites in addition to the mere fact of publication.

Since the husband did not appeal Justice Kristjanson's decision, it may be some time until we get appellate guidance about the new tort of publicity placing a person in a false light. But unless and until an appellate court says otherwise, the tort is available and can be used to claim damages without having to establish an actual monetary loss.

Cyber-Bullying in Nova Scotia

Candelora v. Feser, 2019 CarswellNS 905 (N.S. S.C.) - Arnold J.

This is the first case to consider the new Nova Scotia *Intimate Images and Cyber-Protection Act*, S.N.S. 2017, c. 7 (the "*Act*"). Nova Scotia is one of the few provinces to have legislation specifically directed toward cyber-bullying, which came about as a result of the tragic death of Rehtaeh Parsons in 2013. However, the provisions of the *Act* may inform the various common law privacy torts that are being relied upon in other jurisdictions (such as the tort of "Publicity Showing in False Light" that is discussed above, and "Intrusion upon Seclusion"); and the interpretation of other privacy legislation across the country (for example, *Privacy Act*, RSBC 1996, c 373; *The Privacy Act*, RSS 1978, c P-24; *The Privacy Act*, CCSM c P125; and *Privacy Act*, RSNL 1990, c P-22). Ontario does not yet have privacy legislation, but it should, as should other jurisdictions that do not yet have it.

The Applicant, Ms. Candelora, was involved in a family law dispute involving custody, access, and child support in her separation from the Respondent, Mr. Feser.

The parties had one child, and Mr. Feser had re-partnered with Ms. Dadas, who was also a Respondent.

The action was a result of alleged cyber-bullying relating to a prolific number of comments and images posted online on Facebook by the Respondents, and the resulting "comments" from third parties.

The Respondents did not dispute that they posted the comments on Facebook. However, they argued that their postings were justified for a variety of reasons, including that:

- the comments were "fair comment";
- the comments were made in the public interest;
- the Applicant "deserved" the comments and postings on account of her behaviour;
- the postings were protected speech under s. 2(b) of the *Charter of Rights and Freedoms*; and
- the postings on Facebook were private.

As the Facebook postings and comments were received as evidence at trial, the judgment includes pages of examples of the incessant posts, which were generally aggressive toward, and derisive and ridiculing of, the Applicant, and which included personal information about her. For example, the postings discussed the Applicant's income, her background, and the relationship between her and the Respondent, Mr. Feser, during their marriage.

While the Applicant was certainly not wholly blameless in the fight, the Respondents clearly made it their mission to "expose" the Applicant to the world. They went over the top. When the Applicant was asked about the impact of the postings on her, she provided the following response:

> Q: And Mr. Fellows asked you about the notion of, well just don't read these posts, don't look at them, the pictures, and you talked about how you tried that. What feelings did you have within you while you were going through day to day trying not to look at these postings?
>
> A: It's a constant agony. I just, I don't.
>
> . . .
>
> A: I feel in constant fear of my life. I spent 11 years married to a man that's sharing intimate information in text messages to somebody that's posting it on the internet and sharing it. I don't know. I fear sometimes for my own children's lives as well. I just want to live my life in peace and move on with this. I can't take, I can't take anymore posts. I don't know, I don't even know what to say really.

Section 2 of the *Act* describes its purpose:

> 2. The purpose of this Act is to
>
> > (a) create civil remedies to deter, prevent and respond to the harms of nonconsensual sharing of intimate images and cyber-bullying;
> >
> > (b) uphold and protect the fundamental freedoms of thought, belief, opinion and expression, including freedom of the press and other media of communication; and
> >
> > (c) provide assistance to Nova Scotians in responding to non-consensual sharing of intimate images and cyber-bullying.

Section 3(c) of the *Act* defines cyber-bullying:

> 3(c) **"cyber-bullying"** means an electronic communication, direct or indirect, that causes or is likely to cause harm to another individual's health or well-being where the person responsible for the communication maliciously intended to cause harm to another individual's health or well-being or was reckless with regard to the risk of harm to another individual's health or well-being, and may include
>
> > (i) creating a web page, blog or profile in which the creator assumes the identity of another person,
> >
> > (ii) impersonating another person as the author of content or a message,
> >
> > (iii) disclosure of sensitive personal facts or breach of confidence,
> >
> > (iv) threats, intimidation or menacing conduct,
> >
> > (v) communications that are grossly offensive, indecent, or obscene,
> >
> > (vi) communications that are harassment,
> >
> > (vii) making a false allegation,
> >
> > (viii) communications that incite or encourage another person to commit suicide,

> (ix) communications that denigrate another person because of any prohibited ground of discrimination listed in Section 5 of the *Human Rights Act*, or
>
> (x) communications that incite or encourage another person to do any of the foregoing . . .

As noted above, the bulk of Ms. Candelora's complaints involved Ms. Dadas' prolific Facebook postings about her, and to a lesser extent Mr. Feser's postings, and his alleged collusion with Ms. Dadas regarding the content of her postings.

Justice Arnold had little difficulty finding that the Facebook postings were "electronic communications". Section 3(e) of the *Act* describes electronic communications as "any form of electronic communication, including any text message, writing, photograph, picture recording or other matter that is communicated electronically." The Facebook posts clearly met that definition.

Justice Arnold next considered whether the Facebook postings were "direct or indirect." This was slightly less clear because the Facebook postings were not sent directly to the Applicant. Therefore, the Respondents argued that because the Applicant was also blocked from their Facebook friend list, the postings were "private". However, as Facebook posts have been held to have been "published" for defamation purposes, it is hard to suggest that similar postings would not amount to "direct or indirect" communication: *Mueller v. Livingstone*, 2019 CarswellNB 92 (Q.B.) and *Wilson v. Wilson*, 2019 CarswellOnt 15654 (S.C.J.).

Even where a party maintains only a private Facebook profile, it can surely be inferred that users intend to take advantage of Facebook's social networking capabilities so as to make personal information available to others. Adopting the words of the Ontario Superior Court of Justice in *Leduc v. Roman*, 2009 CarswellOnt 843 (Ont. S.C.J.), Justice Arnold stated:

> [54] . . . it is clear that Facebook is not used as a means by which account holders carry on monologues with themselves; it is a device by which users share with others information about who they are, what they like, what they do, and where they go, in varying degrees of detail. Facebook profiles are not designed to function as diaries; they enable users to construct personal networks or communities of "friends" with whom they can share information about themselves, and on which "friends" can post information about the user.

It did not assist the Respondent's argument that, at trial, Ms. Dadas proudly testified that she has 4900 Facebook friends, and that many of her posts or pictures receive hundreds of "likes".

Of course, it would obviously defeat the entire purpose of this legislation if a respondent could avoid a claim based on Facebook postings simply by "blocking" the very person s/he is posting about. That would be ridiculous.

The Applicant testified that Ms. Dadas' Facebook postings caused her significant psychological stress, and that the stress both affected her ability to work and had some impact on her physical health by exacerbating a pre-existing medical condition. Therefore, it was easy for the Court to find that the posts caused harm or were likely to cause harm.

It did also not require much by way of adjudicative gymnastics for Justice Arnold to find that the Respondents either maliciously intended to cause harm to the Applicant or were reckless. Ms. Dadas herself testified that she made her Facebook posts in "retaliation" for letters sent by the Applicant's lawyer on behalf of the Applicant in the course of the family proceeding. Mr. Feser reiterated Ms. Dadas' reasons for posting these comments about Ms. Candelora. Clearly the purpose of the posts was to intimidate, and Justice Arnold found that the Respondents' efforts to dissuade the Applicant from pursuing her custody rights through repeated venomous postings were properly categorized as "maliciously attempting to cause harm." The whole point of the posts was to bully the Applicant so that she would feel psychologically pressured into reversing her legal position.

The Court easily also found the following heads of conduct under s. 3(c) of the *Act*:

- Disclosure of sensitive personal facts or breach of confidence (in posting information about the Applicant's tax returns, personal expenses and other personal information);

• Threats, intimidation, or menacing conduct (in mounting "online attacks" every time the Applicant's lawyer would send a letter in the family proceedings);

• Communications that are grossly offensive, indecent, or obscene (in posts that referenced the Applicant in various offensive and degrading ways); and

• Communications that are harassment (by posting essentially every time the Respondents received a letter in the family law proceeding, and trying to harass the Applicant to dissuade her from pursuing litigation).

In sum, based on the evidence, Justice Arnold had little difficulty determining that the Respondents had engaged in "cyber-bullying".

Subsection 6(1) of the *Act* then lists nine orders the Court can make upon finding that "cyber-bullying" has taken place. And s. 6(7) lists 13 mandatory considerations for the court [including the catchall "any other relevant factor or circumstance" in s. 6(7)(m)]:

> 6 (1) Where the Court is satisfied that a person has engaged in cyber-bullying or has distributed an intimate image without consent, the Court may make one or more of the following orders:
>
> (a) an order prohibiting the person from distributing the intimate image;
>
> (b) an order prohibiting the person from making communications that would be cyber-bullying;
>
> (c) an order prohibiting the person from future contact with the applicant or another person;
>
> (d) an order requiring the person to take down or disable access to an intimate image or communication;
>
> (e) an order declaring that an image is an intimate image;
>
> (f) an order declaring that a communication is cyber-bullying;
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> (g) an order referring the matter to dispute-resolution services provided by the agency or otherwise;
>
> (h) an order provided for by the regulations;
>
> (i) any other order which is just and reasonable.
>
> . . .
>
> 6 (7) In determining whether to make an order under this Section and what order to make, the Court shall consider the following factors, if relevant:
>
> (a) the content of the intimate image or cyber-bullying;
>
> (b) the manner and repetition of the conduct;
>
> (c) the nature and extent of the harm caused;
>
> (d) the age and vulnerability of the person depicted in the intimate image distributed without consent or victim of cyber-bullying;
>
> (e) the purpose or intention of the person responsible for the distribution of the intimate image without consent or the cyber-bullying;
>
> (f) the occasion, context and subject-matter of the conduct;

(g) the extent of the distribution of the intimate image or cyber-bullying;

(h) the truth or falsity of the communication;

(i) the conduct of the person responsible for the distribution of the intimate image or cyber-bullying, including any effort to minimize harm;

(j) the age and maturity of the person responsible for distribution of the intimate image without consent or cyber-bullying;

(k) the technical and operational practicalities and costs of carrying out the order;

(l) the Canadian Charter of Rights and Freedoms; and

(m) any other relevant factor or circumstance.

Section 7 of the *Act* then sets out possible defences to an allegation of cyber-bullying. It states, in part:

7 (1) In an application for an order respecting the distribution of an intimate image without consent or cyber-bullying under this Act, it is a defence for the respondent to show that the distribution of an intimate image without consent or communication is in the public interest and that the distribution or communication did not extend beyond what is in the public interest.

7 (2) In an application for an order respecting cyber-bullying under this Act, it is a defence for the respondent to show that

(a) the victim of the cyber-bullying expressly or by implication consented to the making of the communication;

(b) the publication of a communication was, in accordance with the rules of law relating to defamation,

(i) fair comment on a matter of public interest,

(ii) done in a manner consistent with principles of responsible journalism, or

(iii) privileged . . .

As noted by Justice Arnold, "truth" is not a listed statutory defence.

Justice Arnold reviewed the mandatory considerations in s. 6(7) and determined that none of the statutory defences apply. In fact, he found the defences raised by the Respondents to be "generally baseless." Given the directive in s. 6(7)(i), his analysis does include a brief consideration of the freedom of speech provisions in s. 2(b) of the *Charter*, even though there was no government actor in this case and no constitutional challenge.

Therefore, in accordance with s. 6 of the *Act*, and being satisfied that the Respondents engaged in "cyber-bullying," Justice Arnold ordered that:

• The Respondents are prohibited from making any further communications that would be cyber-bullying;

• The Respondents must take down any communications that are cyber-bullying, including, but not limited to, Facebook postings that refer directly or indirectly to the Applicant or her lawyer;

• The Respondents must disable access to any communications that are cyber-bullying if such communications cannot be taken down; and

• The Respondents are prohibited from any communications, directly or indirectly, with the Applicant except through legal counsel or for the purpose of arranging access to the child of the marriage.

The Applicant also claimed damages, but as that claim was not fully canvassed at the trial, Justice Arnold ordered the parties to make submissions on damages at a later date. Therefore, there may be more to come. In the meantime, stay off of Facebook.

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