

# Ontario recognizes new privacy tort

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In a landmark decision, [Yenovkian v. Gulian](#), released December 19, 2019, the Ontario Superior Court of Justice recognized the privacy tort of “publicity placing a person in a false light” for the first time in Canada<sup>1</sup>.

## What you need to know

- Ontario law now recognizes the privacy tort of “publicity placing a person in false light”.
- This privacy tort goes beyond existing law on defamation. It protects an individual’s right to control how they are publicly presented to the world.
- The new tort will be established where a person is portrayed in a false light publicly, and:
  - the false portrayal would be highly offensive to a reasonable person; and
  - the wrongdoer knew the portrayal was false (or was reckless about its truth).
- This decision has important implications for public marketing campaigns, media and content publishers, as well as public statements by companies. The new tort expands the scope of civil liability for privacy complaints. In addition to regulatory risk, businesses may now see increased litigation risk associated with privacy complaints.

## Context in which tort was applied

As in previous cases that have recognized new privacy torts, the facts in *Yenovkian* were focused on the conduct of former intimate partners and cried out for a remedy not available under existing legal frameworks. Consistent with the development of common law privacy torts to date, the extent to which this tort can be extended to the business context remains to be seen.

The case involved a father’s conduct in a protracted family law dispute, which the Court described as “egregious”. The father had engaged in an abusive “cyberbullying campaign” of YouTube videos, pictures, online petitions, websites, and emails containing serious allegations (all of which were found to be false) and portraying the mother and her family in a negative light. He enlisted others to distribute negative posters to business associates of the mother’s family and members of her cultural and church communities in England. The father also made repeated,

unsubstantiated complaints to police and child protection authorities in Canada and England, and the children's school, disrupting the mother's life and her time with the children. He also attempted to bring a private criminal prosecution against the mother.

The Court found that the father's portrayal of the mother was false and that his conduct had resulted in serious harm, including a visible and provable illness and legitimate concerns about how the mother might be treated by members of the public at large and her own community. The father was ordered to pay \$300,000 in damages, in addition to family law support awards.

## The new tort

U.S. law has long recognized four separate torts relating to invasion of privacy. Prior to 2012, Canadian common law had only recognized one of those privacy torts on a very narrow basis. In *Yenovkian*, the Court accepted the formulation of the tort of "publicity placing a person in false light" as it currently exists in American law, following the recent, gradual adoption of other privacy torts in Ontario<sup>2</sup>.

The new tort will be established where a person is placed before the public in a false light, if:

- the false light in which the other was placed would be highly offensive to a reasonable person; and
- 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.

The Court explained that while the publicity giving rise to this cause of action will often be defamatory, proof of 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. This is because "the wrong is in publicly representing someone, not as worse than they are, but as other than they are"<sup>3</sup>. This tort is concerned with respect for the right of a person to control the way they present themselves to the world. The Court did not discuss whether, in matters of legitimate public concern such as news coverage of a public figure, "actual malice" is required as part of the second element of the test. Based on the broader development of common law privacy torts and defamation law in Canada, we can expect that some protections will be afforded to news media and other publications relating to matters of public concern, to balance freedom of expression concerns with privacy rights.

The Court's decision acknowledges that this new tort is required to fill a gap in Canadian law. Unlike the 1988 decision in *Parasiuk v Canadian Newspapers Co.*<sup>4</sup> where the Manitoba Court refused to acknowledge this tort given "the availability of the law of defamation to the plaintiff", the Ontario Court recognized that this tort goes beyond defamation. The separate privacy tort of "public disclosure of private facts" addresses the publication of private, true facts in circumstances that would be offensive to a reasonable person. In confirming the need for this new tort, the Court explained "[i]t would be absurd if a defendant could escape liability for invasion of privacy simply because the statements they have made about another person are false"<sup>5</sup>. Similarly, the new tort is required to address egregious conduct by defendants that portrays plaintiffs in a misleading way, even if the element of defamation that requires that the false statement would lower a plaintiff's reputation is not met.

## Implications for business

The recognition of this new tort is in line with a general trend in privacy law: providing individuals with more control over their personal information, including their public and online reputations. This decision has important implications for businesses, including:

- the potential for claims based on vicarious liability for employee misconduct;

- the use of social media platforms (and data analytics or artificial intelligence) to interact with and market to clients and prospective clients. For instance, incorrectly disclosing in a marketing campaign that a person likes a product or uses a service could attract liability if the ads misrepresented the individual and the company ought to have understood the negative consequences of the misstatement;
- raising the prospect of civil liability, in addition to existing regulatory penalties, if companies fail to give effect to customers' requests to correct personal information posted publicly on company platforms;
- increasing litigation risk if public announcements involving individuals are misleading. For example, press releases or companywide notifications about employee-related investigations or the departure or dismissal of a senior officer or director could prompt privacy tort claims along with defamation allegations if they are not properly vetted for accuracy and reputational impact.

The new tort also addresses the issue of what are known as “deepfakes” (in which videos created by artificial intelligence and deep learning either superimpose an individual’s face onto another person’s body or manipulate existing video and/or audio footage of a person). In its current formulation, the new tort does not require deepfake victims to prove economic harm<sup>6</sup>. As we discussed in a previous article, the risks associated with deepfakes can apply to businesses as well (read our analysis on deepfakes [here](#)). For example, a deepfake video of a senior officer making false statements could affect a company’s stock price.

While the decision did not explicitly address whether corporations can make a claim under this new tort, the Court emphasized that “the value at stake is respect for a person’s privacy right to control the way they present themselves to the world”<sup>7</sup>. This indicates that the tort is focused on protecting an individual’s right to privacy, not the reputation of a corporation. Such an interpretation would be in line with U.S. jurisprudence, where corporations cannot sue for false light.

There is no doubt that *Yenovkian* has brought the last of the four U.S. privacy torts to Ontario. While this represents a significant development in the common law, as with the gradual adoption of other privacy torts, we expect that courts in Ontario (and across Canada) will take some time to define its scope of application, including to corporate defendants and plaintiffs.

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<sup>1</sup> 2019 ONSC 7279

<sup>2</sup> See for example *Jones v. Tsige*, 2012 ONCA 32, *Jane Doe 464533 v. N.D.*, 2016 ONSC 541 and our bulletin “[Ontario Court Recognizes Another New Privacy Tort](#)”.

<sup>3</sup> *Yenovkian*, para. 171.

<sup>4</sup> [1988] 2 WWR 737 (MBQB).

<sup>5</sup> *Yenovkian*, para. 173.

<sup>6</sup> In *Aubry v. Éditions Vice-Versa Inc.*, the Supreme Court of Canada accepted that the right to one’s image is an element of the right to privacy under section 5 of the Québec Charter of Human Rights and Freedoms.<sup>10</sup> However, *Aubry* appears to have restricted the potential for such claims to celebrities or other individuals who profit from the reproduction of their likeness (akin to a property right).

<sup>7</sup> *Yenovkian* at para. 171.

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