



OLIVER HO

## THE NEW TORT ON THE BLOCK: PUBLICITY PLACING A PERSON IN FALSE LIGHT

For decades, the law has recognized the importance of telling the truth and refraining from saying things about others which are untrue; for the most part, society has recognized the harm that can arise from defamatory statements and has created a framework discouraging defamation. One of the defences to defamation has always been that the statement was true. However, a new tort has emerged that has an impact on the framework of both defamation and intrusion upon seclusion.

Today, many of us find ourselves social distancing, finding ways to work remotely, and using social media and other non-face-to-face means to communicate. The new tort of “Publicity Placing a Person in False Light” is important because it could, particularly in the present social circumstances we find ourselves in, capture many statements intentionally or unintentionally made.

Although the matter of *Yenovkian v Gulian*<sup>1</sup> involved a family law set of facts, the Court did acknowledge and address a cause of action that is related to both defamation and invasion of privacy.<sup>2</sup> Up until this December 2019 decision (a revised decision was issued in January 2020 to correct typographical and formatting errors), the proposed cause of action, while previously referred to by the Courts and in academia, had not actually been recognized by Canadian Courts as a tort. This decision changes that; the tort of “Publicity Placing a Person in False Light” is now a recognized tort.

The test for establishing this tort is that the plaintiff must show that:

- the false light in which the plaintiff was placed would be highly offensive to a reasonable person; and
- the defendant had knowledge of, or acted in reckless disregard as to, the falsity of the publicized matter and the false light in which the plaintiff would be placed.

<sup>1</sup> *Yenovkian v Gulian*, 2019 ONSC 7279

<https://www.canlii.org/en/on/onsc/doc/2019/2019onsc7279/2019onsc7279.html>

<sup>2</sup> *Ibid* at para 160

More specifically, the Court noted that while the publicity giving rise to this cause of action would often be defamatory, defamation was not required.<sup>3</sup> The Court noted that this cause of action could still be proven if in the course of creating publicity placing a person in a false light, the wrongdoer included true, but private, facts about the person (for example, in this case where the wrongdoer published details of the plaintiff's living situation with her parents, and about access visits to the plaintiff's/defendant's children; both of which were true, but private).<sup>4</sup>

In other words, despite facts being true, one must still be cautious about publishing such facts because it may be that the context of such publication will still result in liability by way of this new tort.

Oliver Ho is a partner with JSS Barristers. Among other areas, he is also a member of the Class Actions Group where he is leading a number of privacy breach-related class proceedings. Click [here](#) for Oliver's bio.

<sup>3</sup> *Ibid* at para 171

<sup>4</sup> *Ibid* at para 174