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Workplace Law E-ssentials

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Employers Beware: Privacy Tort Now Recognized in Ontario

Elements

The tort of *"intrusion upon seclusion"* is defined as *"intentionally intrud[ing] physically or otherwise, upon the seclusion of another or his private affairs or concerns... if the invasion would be highly offensive to a reasonable person".*

According to the Court of Appeal, the key features of this cause of action are (1) that the defendant's conduct is intentional or reckless; (2) that the defendant invaded the plaintiff's private affairs or concerns unlawfully; and (3) that a reasonable person would regard the invasion as highly offensive causing distress, humiliation, or anguish.

The Court emphasized that this new cause of action will not open the floodgates for claims based on minor breaches of privacy. Instead, a claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy, such as intrusions into financial or health records, sexual practices and orientation, employment, diary, or private correspondence that, viewed objectively by a reasonable person, can be described as highly offensive.

The Court also recognized that there may be limits to the availability of this tort where competing claims exist, specifically referencing freedom of expression and freedom of the press.

Damages

Proof of actual loss is not required to be entitled to damages for intrusion upon seclusion. In instances where the plaintiff suffered no pecuniary loss, the Court set a range of up to $20,000 based on the following factors:

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;

Meet Justin Tetreault

Justin D. Tetreault joined Grosman, Grosman, & Gale following his call to the bar in 2011.

Justin represents both employers and employees in all aspects of labour and employment law. He has acted or assisted in matters before labour arbitrators, the Ontario Labour Relations Board, the Ontario Human Rights Tribunal, and the Ontario Superior Court of Justice.

He has written several articles and papers on employment law issues. Recently, a paper he co-authored entitled "Electronic Evidence and Surveillance" was presented at the Ontario Bar Association's "10th Annual Current Issues in Employment Law" conference. Justin's articles on employment law have appeared in publications such as the Employment Bulletin and online for websites such as www.canadianlawyermag.com

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

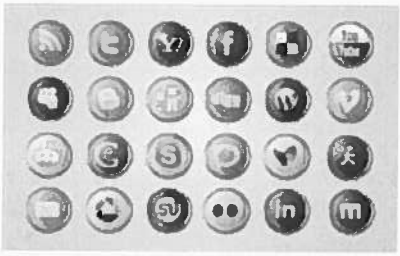
4. any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong; and

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

Conclusion

At this point, it is unknown what impact this decision will have on employer/employee relations and specifically how courts would view the competing claims of an employer when considering an employee's privacy interests. For instance, does monitoring an employee's work email qualify as an intrusion into their personal correspondence? What about conducting surveillance on an employee suspected of disability fraud? These questions remain to be answered and make it more important than ever for employers to have well drafted workplace policies, which expressly address (and appropriately limit), their employees' expectation of privacy.

The Social Media Phenomenon



There are other social networking sites, such as MySpace, LinkedIn and Twitter although Facebook is the most popular in North America. There are more than 500 million active users in over 170 countries and Facebook accounts for 1 out of every 7 minutes the world spends online. And just to show how completely this phenomenon has infiltrated all levels of the public, these social networking sites aren't the exclusive domain of the young computer geeks, a November 2011 study by Anatoliy Gruzd of the School of Information Management at Dalhousie University showed that people over the age of 55 were the strongest drivers of social networking growth. In comparing the fourth quarter of 2009 against the fourth quarter of 2010 they found that the percentage change year to year of total visits to social networking sites by those age 55 to 64 was a 48% increase, whereas the same period comparison of those aged 18 to 24 was -7%.

This revolutionary change in how we communicate and relate to each other has gone far beyond a medium through which friends and relatives can exchange photos and stories. Businesses have wholeheartedly jumped into the social networking phenomenon as they realize the power and reach of these vehicles. One will often see the Twitter and Facebook logos associated with companies' websites. Not to be outdone, LinkedIn has seen a huge increase in the professional and business people who have joined as a means of staying connected to the pulse of the business community.

Justin earned his Juris Doctor from the University of Toronto in 2010. During his legal studies, Justin summered with the National Hockey League Players' Association, where he was actively involved in salary arbitration cases between NHL players and their clubs.

He also holds a B.A. (Honours) in Law and Justice/Political Science from Laurentian University (Algoma University College). In 2007, Justin won the Law and Justice Award for achieving the highest graduating average in his program.

Actively involved in politics, Justin has worked on Parliament Hill and at Queen's Park, including a summer spent at the Ontario Ministry of the Attorney General, where he became closely acquainted with Ontario's human rights system.

Justin is a member of the Law Society of Upper Canada, Ontario Bar Association, and Canadian Bar Association.

For employers the size and speed of the growth of social networking has presented some potential problems or challenges, along with the opportunity for increased exposure and reach. How does the employer protect its interests in the use of its property, ensuring that its employees are actually focused on work activities during the day rather than communicating with friends online? What about the employer protecting its reputation or confidential information or the privacy of other employees?

For the employee, privacy interests arise.

We have now seen a number of civil actions and arbitrations involving impacts to the employment relationship through social networks. A review of some of these seminal decisions reveals that the courts and arbitrators are simply applying existing legal employment law principles to the new fact scenarios resulting from employees using this relatively new medium of communication, the social network. That is, after all, the beauty of the common law.

Before summarizing some of the cases which have been decided involving this new medium, we ought to define what we mean by social media. All of us have at least a passing familiarity with what would constitute social networking sites including companies like Facebook, Twitter, MySpace and LinkedIn. Beyond those entities there is a broader more inclusive set of online communication which would include the internet itself and web-based media such as blogs that we can characterize as social media.

A couple of decisions reflect the consequences of employees utilizing social media to disseminate confidential information of their employers. First, in Chatham-Kent v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 127, [2007] O.L.A.A. No. 135 (Clarke Grievance), the arbitrator ruled that a personal care worker at a nursing home was dismissed for cause because she breached the confidentiality agreement she had signed, by publishing pictures of and text content about various residents at the home, without their consent. Although the grievor argued that she had intended her blog site to be private, the arbitrator pointed out that the instructions that accompanied the creation of the blog clearly warned that unless the grievor selected certain privacy settings the blog would be open to all internet users.

The British Columbia Supreme Court ruled against a departing employee, in Northcott v. Abbott, [2004] B.C.J. No. 1965. The defendant was responsible for running a website for the plaintiff employer. The defendant violated his confidentiality agreement by announcing on that website that the company was changing owners. Mr. Abbott then set up his own website and lured the plaintiff's customers to his website. The Court ruled that those actions of the defendant caused 80% of the plaintiff's loss of business and awarded $1,584,600 in damages, plus $100,000 in punitive damages.

Meet Bill Gale

William R. Gale, Mus. Bac., LL.B, joined the firm in 1984 and became a partner in 1989. Bill's specialty and the focus of his practice involve negotiating and drafting executive contracts.

Referred to by the National Post's business magazine as "an executive agent", Bill navigates the increasingly complex nature of executive compensation, reducing agreements to concise written documents on behalf of his clients.

His background in music has made him a natural go-to advisor for several well-known arts organizations that rely on him for employment advice, legal representation and advocacy.

What's On Our Schedule

On February 28, 2012, Mark Fletcher will be speaking at the Insight Disability Claims Management and Litigation Conference on the topic of Reviewing Employer and Employee Rights and Obligations in Disability Claims.

On May 14, 2012, Natalie MacDonald will be teaching at Osgoode Hall on "HR Law for for HR Professionals - Termination for Caue"

On September 20, 2012, Natalie MacDonald will co-chair the Law Society of Upper Canada's Conference:

An employee who was dismissed for cause for transmitting pornographic and racist material over the company's network using the company's computer was found to have violated the company's Code of Conduct by the Alberta Court of Appeal which upheld the employee's dismissal for just cause in Poliquin v. Devon Canada Corporation, [2009] ABCA 216. The Court stated:

"Employers have the right to set the ethical, professional and operational standards for their workplaces. Doing so not only falls within an employer's management rights, it also constitutes an integral component of corporate good governance. The workplace is not an employee's home; and employees have no reasonable expectation of privacy in their workplace computers. It therefore follows that while employers may permit employees limited personal use of workplace computers, the employer is entitled to restrict the terms and conditions on which that use may be permitted."

New Lawyer Practice Series - Employment Law.

Norm Grosman writes regularly for Workopolis. To read Norm's latest article, click HERE.

One issue which has and will continue to arise frequently is whether social media activities outside work hours and utilizing the employee's own computer will constitute activities which may conflict with duties to the employer and thus, potentially, cause negative or even actionable consequences to the employment relationship. The courts will apply existing legal principles involving when employees' activities outside the workplace impact on their employers' rights, or perhaps the rights of fellow employees.

In trying to control the potential for harm to the employer or its employees, and in grappling with the loss of productive work time to employees who spend significant portions of their day online with social media, some employers have gone so far as to ban the use of social media in the workplace completely. By creating policies which block access to social media on the employers equipment and prohibit discussions of work or other employees or the identification of the employer when employees are using social media outside work hours, employers may create a Big Brother environment which conveys a lack of trust in their employees.

A better solution may be found in the models created by IBM and Intel which have created policies which encourage their employees to utilize social media. As is the case with most employment policies the key is clear communication of the rules, guidelines and consequences for misuse or breach.

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