CITATION: Jane Doe 72511 v. Morgan, 2018 ONSC 6607
COURT FILE NO.: 17-72511
DATE: 2018/11/02

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Jane Doe 72511	)	
Plaintiff	)	John E. MacDonell for the plaintiff
– and –	)	
Nicholas Morgan, Alan Morgan and Florence Morgan	)	No one appearing for the defendants
Defendants	)	
	)	**HEARD:** June 15, 2018

JUSTICE SALLY GOMERY

Overview

[1] The plaintiff Jane Doe 72511 ("Jane") seeks default judgment against her former boyfriend Nicholas Morgan ("Nicholas") and his parents Alan and Florence Morgan (the "Morgans") for damages arising from his abusive behaviour towards her and his posting, without her knowledge and consent, of a sexually explicit video of her on a pornographic internet website.

[2] Jane and Nicholas met in high school and began dating in December 2012. After Jane realized she was pregnant with Nicholas' baby in May 2013, their relationship deteriorated. He accused her of ruining his life and began seeing other women. One night when Jane was seven months pregnant, Nicholas dragged her down the stairs of his parents' home, choked her, threatened her with a knife, and forced her out of the house.

[3] Jane gave birth to a son, MK, in November 2013. Nicholas' physical and verbal abuse of Jane escalated. He would often drag her up or down the stairs, throw her around, cover her mouth with his hand and choke her. Nicholas' parents, the Morgans, witnessed his verbal and physical abuse because it took place at their home. They did nothing to stop it or to prevent further attacks.

[4] One day in March 2014, after Jane left the Morgans' house to catch the bus, Nicholas chased after her, wrestled her to the ground, forced her into his car, dragged her back out of it by her feet, and smashed her head against the car window. Jane phoned the police. Nicholas was arrested and later convicted of assault.

[5] In June 2016, Jane learned through a friend that Nicholas had, without her knowledge or consent, posted a sexually explicit video of them on a pornography website. The video, entitled "yellow hoe sucking a big one", had been posted in March 2014 and was linked to ten other pornographic websites.[1] Jane's face was clearly visible in the video while Nicholas' face was not. When Jane confronted Nicholas about the video, he admitted that he uploaded it as revenge for Jane calling the police. He sent her a text saying that "I have a criminal record for life ur a internet whore for kife … fair trade".

[6] Although Jane persuaded the website administrator to take the video down, it had by then been viewed over 60,000 times. It is impossible to know how many times it was downloaded and shared. Jane says that she is haunted by the possibility that her son, employers, friends and potential romantic partners have seen or will see the video. She remains depressed and angry.

[7] In this lawsuit, Jane seeks general, aggravated and punitive damages from Nicholas for assault and battery and public disclosure of private facts. She also seeks an order requiring Nicholas to destroy any photos or videos of her and prohibiting him from publicly disclosing any such materials. Jane seeks damages for negligence against the Morgans, because as occupiers of their house they failed to take any reasonable steps to protect her from Nicholas' violent behaviour when she was in their house.

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[1] I have reproduced all text messages as they were written.

[8] Since neither Nicholas nor the Morgans have defended the lawsuit, Jane has moved for default judgment. For the reasons that follow, I conclude that Jane is entitled to judgment against all defendants.

Facts

[9] Since the defendants have not filed a statement of defence and have been noted in default, they are deemed to have admitted the truth of all allegations of fact made in the statement of claim (rule 19.02(1)). I also rely on evidence in the form of the plaintiff's sworn affidavit dated February 1st, 2018.

[10] Jane and Nicholas became friends in high school in 2011 and began dating in December 2012. In February 2013, Jane became pregnant with Nicholas' child. Jane and Nicholas realized she was pregnant in May 2013. Their relationship soured. Nicholas began to sleep with other women. He and Jane had many heated arguments. He said that she had trapped him and was ruining his life. Jane and Nicholas nonetheless decided that they would remain together so that Nicholas could be a father to their child.

The first serious incident of physical abuse

[11] The first serious incident of physical abuse occurred in September 2013. Jane was then about seven months' pregnant. She was spending the night at the Morgans' house. The Morgans and Nicholas were all out when Jane went to bed.

[12] When Nicholas returned to his parents' house, he woke Jane up and yelled "get up, get out of my house" and "I'll kill you, I'll drag you out of here," or words to that effect. Nicholas grabbed Jane and dragged her from the room and down a flight of stairs, tearing her shirt. He left her at the bottom of the stairs on the floor, where she vomited.

[13] Jane overheard Nicholas speaking on the phone with a woman who was waiting outside in Nicholas' car. Nicholas approached Jane with a knife, pointing it at her and telling her to leave. She begged him to stop and told him that he was hurting their child. Nicholas pinned Jane against the wall and choked her. She then told Nicholas that she would leave but needed a few

minutes to get ready. In response, Nicholas said that he would tie her up in the basement. He dragged Jane down another flight of stairs and found some rope. Jane fought back and Nicholas went upstairs. When he returned, he said he had called her a cab and told her, "you get out of here". Nicholas gave the driver money for the cab ride and pushed Jane out of the door. Jane saw the other woman in Nicholas' car and went over to confront her. Nicholas then grabbed Jane from behind and threw her against the back of the cab. Jane left.

Continued abuse between September 2013 and March 2014

[14] Jane avoided Nicholas for about a month after the September 2013 incident because she was afraid of him. Despite this, believing that their child should have a father, she reconciled with him in late October 2013. Jane gave birth to their son MK in November 2013.

[15] In January 2014, Nicholas began to abuse Jane almost daily. He would frequently choke her, throw her around the house, drag her up or down stairs, and cover her mouth with such force that it left bruises.

[16] Nicholas also verbally abused Jane. He made derogatory remarks about her. He would often tell Jane to go kill herself. He was easily provoked and would become enraged by trivial things.

[17] The Morgans frequently witnessed Nicholas' abusive behaviour because it took place at their house. On numerous occasions, Nicholas' father saw him choking Jane or dragging her down stairs. The Morgans also saw the bruises caused by Nicholas' physical abuse. Nicholas' mother asked how she had got her bruises and Jane told her that Nicholas had given them to her. Despite this, the Morgans did nothing to intervene in Nicholas' abuse of Jane, except to occasionally tell him to "get off that girl".

Events in March 2014

[18] On an unspecified date in March 2014, Jane and MK were spending the night at the Morgans' house. Nicholas arrived home at approximately 4:00 a.m. His return woke Jane, who

asked him to care for their child the next day so she could study. She was at this time nearing the completion of high school through an outreach centre for single mothers.

[19] The next morning, Jane left the house to catch the bus. Nicholas chased after her. He drove to the bus stop where Jane was waiting, got out of the car and wrestled her to the ground. He forcibly removed her shoes so that she would be forced to return to his parents' home. When Jane did not return to the house on foot, Nicholas forced Jane into his car. She was upset, angry, and crying. Nicholas grabbed her head and smashed it into the passenger side window. Jane pulled the mirror down and, seeing that she was bleeding, ripped off the sun visor in shock.

[20] Nicholas was angry that Jane had damaged the car. He parked in the driveway and came around to her side of the car. Jane tried to lock the doors so that he could not hurt her but he dragged her out of the car by her feet and shoved her into his parents' house. Jane yelled, "if you keep this up I will call the police". Nicholas responded that he did not care and that calling the police would not stop him. He said that he would kill Jane if she kept "doing this stuff".

[21] Nicholas' father Alan had remained with MK at the Morgans' house when Nicholas left to chase after Jane. After Nicholas dragged Jane, bleeding, through the garage and into the house, Alan came downstairs and began to argue with him. Jane used this opportunity to call the police. When she told Nicholas and Alan what she had done, Nicholas went upstairs, stole money from Alan, and left. The police came to the house and took statements from Alan and Jane. Nicholas was later charged with and convicted of assault.

Verbal abuse and threatening texts after March 2014

[22] As a result of the March 2014 assault, the Children's Aid Society became involved. Nicholas was prohibited from living with or having contact with Jane or MK. Jane moved into a women's shelter. She completed her high school education and graduated in June 2014.

[23] Nicholas began demanding that Jane visit the Morgans' house so that he could see MK. Struggling with the demands of single parenthood and hoping to foster a bond between Nicholas and MK, Jane gave in to these demands. During her visits to the Morgans' house, Nicholas continued to make derogatory comments about Jane. He also sent her threatening text messages.

He told Jane to kill herself or that he would kill her. In November 2015, Jane told Nicholas that the text messages were a crime and were illegal. The text messages stopped.

Jane learns about the video

[24] On or about June 2016, Jane was told by a friend that a sexually explicit video of her was publicly available on an internet pornography website, www.xvideos.com.

[25] Jane searched for the video online and found it. The video was entitled "yellow hoe sucking a big one". Jane's face is clearly visible throughout the video as she performs oral sex on Nicholas, whose face is never seen in the video. The video is just over two minutes long.

[26] The video was made before Jane found out she was pregnant. She was not a minor at the time, and consented to the making of the video. She did not however consent to its disclosure to other people or its posting on the internet.

[27] Jane contacted xvideos, informed the website administrator that she had not consented to the video's posting, and requested that it be taken down. The website administrator removed the video. By this time, however, the video had already been viewed over 60,000 times, posted on or connected to at least ten different websites, and downloaded an unknown number of times.

[28] Jane confronted Nicholas about the video. He admitted that he uploaded it in March 2014. He told Jane that he posted the video as revenge for her calling the police and having him charged with assault. In a text message to her on September 22, 2016, Nicholas stated, "I have a criminal record for life ur a internet whore for kife…fair trade".

[29] In another text exchange, Jane told Nicholas that he could be criminally charged for uploading the video. Nicholas replied that he did not use his name or her name when uploading the video so there would be no liability. He said she would be a "cunt" if she took any legal steps, and threatened to post nude photos of her online if she did so ("I still have nude of u incase u wanna pissme off"; "I'll go on the dirty his time").

The impact of these events on Jane

[30] Following her experiences with Nicholas, Jane states that she has felt depressed, violated, and alone. She continues to experience intense shame and anger. She will never know who has seen or will see the video and what it has caused or will cause people to think, do, or say. Although she has received psychotherapy, she remains depressed and anxious.

[31] Jane says she is "sick with fear" that MK will see the video one day. She worries that her current and future co-workers, friends, and others know or will also come to know of it. She worries that she will be considered a bad mother, denied educational, employment, and social opportunities, and forever stigmatized because of the video She says that she has been unable to pursue other romantic relationships for fear that it may resurface and ruin a budding relationship.

Issues

[32] There are six questions I must answer:

(1) Is Nicholas liable for damages for assault and battery?

(2) Are the Morgans liable for negligence?

(3) Is Nicholas liable for damages for posting the video without Jane's knowledge or consent?

(4) Can Jane claim for breach of confidence or intentional infliction of mental distress even though these causes of action are not mentioned in her statement of claim?

(5) If the defendants are liable, what are Jane's damages?

(6) Is Jane entitled to an injunction to prevent Nicholas from further distribution of photos or videos?

(1) Is Nicholas liable for damages for assault and battery?

[33] The tort of battery involves the intentional infliction of unlawful force on another person.[2] The court must conclude that the defendant intended to, and did in fact, make physical

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[2] *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at p. 246.

contact, and that that this contact was harmful or offensive.[3] The law creates liability for battery because we "recognize the right of each person to control his or her body and who touches it, and … permit damages where this right is violated".[4]

[34] I find that Nicholas battered Jane on multiple occasions:

- In September 2013, when Jane was seven months' pregnant, he dragged out the bedroom where she had been sleeping and down a flight of stairs, pinned her against a wall, choked her, dragged her down another flight of stairs, pushed her out the door, grabbed her from behind, and threw her against a car.
- On many occasions between November 2013 and March 2014, when he choked her, dragged her up and down stairs, threw her across the room, choked her and covered her mouth with such force that it left bruises.
- In March 2014, he wrestled her to the ground outside, removed her shoes, forced her into his car, smashed her head against the car window, dragged her by her feet out of the car, and physically forced her through the garage and into his parents' house.

[35] Nicholas repeatedly made harmful physical contact with Jane's body. He bruised her, tore her clothing, and made her vomit and bleed. The absence of any medical records showing the extent of the injuries does not mean that the battery did not happen. I have no reason to doubt Jane's unchallenged evidence. Nicholas was criminally charged and convicted for the March 2014 incident.

[36] The tort of assault is "the intentional creation of the apprehension of imminent harmful or offensive contact".[5] Put more simply, it is the threat of battery. The tort of assault exists to protect individuals not only from actual physical harm but from the fear of physical harm.[6]

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[3] Linden and Feldthusen, *Canadian Tort Law*, 8th ed. (Markham, Ont.: LexisNexis Butterworths, 2006) ("*Canadian Tort Law*"), at p. 44. This description of the component elements of battery has been used in *Shaw v. Shaw*, 2012 ONSC 590 ("*Shaw*"), at para. 45, and *Constantini v. Constantini*, 2013 ONSC 1626 ("*Constantini*"), at para. 30.
[4] *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 SCR 551, at para. 15.
[5] *Canadian Tort Law*, at pp. 46-47. Once again, this definition was adopted in *Shaw* and *Constantini*.
[6] *Canadian Tort Law*, at pp. 46-47.

[37] I find that Nicholas assaulted Jane on several occasions. He assaulted her in September 2013, when he threatened to kill her if she did not leave the house immediately, approached her with a knife, and threatened to tie her up in the basement. He committed a further civil assault in In March 2014, when he again threatened to kill her. On each of these occasions, he threatened her with physical harm.

[38] Nicholas is accordingly liable for both assault and battery of Jane.

(2) Are the Morgans liable for negligence?

[39] Jane claims that Alan and Florence are liable in gross negligence, or alternatively in negligence, for their son's assault and battery of her. Given my conclusions on the negligence claim, I do not need to consider the claim for gross negligence.

[40] In order to recover from the Morgans for negligence, Jane must establish that:

a) They owed her a duty of care;
b) They breached that duty; and
c) Jane sustained injuries and damages as a result of the Morgans' negligence.[7]

(a) Did the Morgans owe Jane a duty of care?

[41] Jane contends that the Morgans owed her a duty of care under the *Occupier's Liability Act*,[8] because Nicholas' assault and battery against her took place at their house.

[42] Under section 1 of the *OLA*, an occupier includes "a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises". Under section 3(1), an occupier:

> owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

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[7] *Mustapha v. Culligan of Canada Ltd*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3.
[8] R.S.O. 1990, c. O.2 (the "*OLA*").

[43] This duty is subject to an exception in section 4(1) of the OLA. Under that section, an occupier does not have a duty of care with respect to risks willingly assumed by persons who enter the premises. This exclusion has not been interpreted liberally.[9] A plaintiff will be found to have willingly assumed a risk only where:

> knowing of the virtually certain risk of harm, in essence bargained away his right to sue for injuries incurred as a result of any negligence on the defendant's part. The acceptance of risk may be express or may arise by necessary implication from the conduct of the parties, but it will arise … only where there can truly be said to be an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to.[10]

[44] So, in order for the Morgans' duty to Jane to be vitiated under s. 4(1) of the *OLA*, Jane must have accepted that Nicholas would physically harm her and that she would have no right to sue him or his parents for her injuries.

[45] In *R. v. Jobidon*, the Supreme Court of Canada ruled that a person cannot consent to intentional application of force causing serious hurt or non-trivial bodily harm.[11] A person may consent to participate in sporting activities that might result in injury at the hands of another player, on the assumption that the rules and usual practices of the game would be observed. [12] A person may also consent to a schoolyard scuffle that could give rise to trivial injuries. But, as a matter of public policy, a person cannot agree to assume the risk that they will be physically battered or threatened with bodily harm. I see no reason why this principle should not apply in the context of activity that gives rise to civil liability for battery and assault, as opposed to activity that might rise to a criminal charge. As a result, I conclude that Jane could not have voluntarily assumed the risk that Nicholas would physically harm her while she was a guest at the Morgans' home.

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[9] *Waldick v. Malcolm*, 70 O.R. (2d) 717 (C.A.), aff'd [1991] 2 S.C.R. 456 ("*Waldick*"), at para. 39, citing J. Victor Di Castri, *Occupier's Liability* (Toronto: Carswell, 1981), at 229.
[10] *Dubé v. Labar*, [1986] 1 S.C.R. 649, at para. 6.
[11] *R v. Jobidon*, [1991] 2 S.C.R. 714 ("*Jobidon*"), at paras. 125-132.
[12] *Jobidon*, at paras. 125-132.

[46] I conclude that the Morgans met the definition of an occupier of their house under the *OLA*, and that they owed Jane a duty to take reasonable care to ensure she was reasonably safe while on the premises.

(b) Did the Morgans breach their duty of care to Jane?

The applicable standard of care

[47] As set out in section 3(1) of the *OLA*, an occupier owes a duty to take "such care as in all the circumstances of the case is reasonable to see that persons entering on the premises … are reasonably safe" while on the premises. The particular standard of care, and whether that standard has been met, is a question to be determined on the facts of the case.[13]

[48] An occupier is liable under the OLA when they fail to take reasonable steps to prevent foreseeable harm caused by someone on the premises.[14] Physical injury caused by other persons may be foreseeable where the occupier knew that:

- the person who caused the harm has a history of violence;[15] or
- the person who caused the harm and their victim had previously had a confrontation.[16]

[49] The facts in *Van Hartevel* are analogous to those in this case. In *Van Hartevel*, the B.C. Supreme Court held the owner of a building liable for a physical assault on a tenant by the building manager. The building manager had a criminal record, including two prior convictions for assault. Months prior to the incident, based on previous interactions with him, the tenant wrote to the building's owner asking that the manager be kept away from him. The court found that the owner knew about the manager's violent history and prior convictions and about his previous confrontations with the tenant. In these circumstances, the court concluded that owner

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[13] *Waldick*, at para. 19.
[14] *Waldick,* at para. 19.
[15] *Van Hartevelt v. Grewal,* 2012 BCSC 658, [2012] B.C.J. No. 906 ("*Van Hartevelt")*, at para. 67.
[16] *Millar v. Waring*, [2009] O.J. No. 1865 (ONSC) ("*Millar*"), at para. 224; *Van Hartevelt,* at para. 73.

could have reasonably foreseen the risk of physical injury to the tenant by the manager, and that the owner was therefore liable in negligence under the B.C. *Occupier's Liability Act*.[17]

[50] Similarly, in *Millar*, an occupier was found liable for a physical altercation between her brother and her neighbours. Jean Millar owned a rental property next to her own home. The tenants caused damage to the property and sometimes became very drunk, to the point where she had called the police several times. The tenants also had confrontations with Jean's brother, David Millar.

[51] On one particular night, the tenants were drinking heavily and became belligerent. They made abusive telephone calls to Ms. Millar and she became concerned for her safety. Instead of calling the police, she asked her brother to come over. After he arrived, he got into a physical fight with the tenants and suffered serious injuries. The court found that Ms. Millar was negligent and had breached her duty of care under the *OLA* by calling her brother instead of the police:

> She did not explain to him the true nature of the situation and the danger inherent in it. I find that if she had called the police rather than her brother, the police would have responded in a timely and prompt manner, as they did when they were called after the fact, and Mr. Millar would not have suffered his debilitating injuries. She clearly owed him a duty of care as an invitee to her property. Though the extent and nature of the injuries were not specifically foreseeable by her, I find that Jean Millar could have and should have foreseen that her brother could likely be injured if he arrived at the scene. I find that the injuries sustained were a natural and probable result of her failing to call the police with a 911 call in a timely way that evening instead of calling her brother to come to protect her.[18]

The Morgans' breach of the standard of care

[52] I find, based on the evidence, that:

- the Morgans frequently witnessed Nicholas' physical and verbal abuse of Jane;

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[17] R.S.B.C. 1996, c. 337.
[18] *Millar*, at para. 230.

- on numerous occasions, Alan Morgan walked into a room where Nicholas was choking Jane or dragging her down stairs; and,
- the Morgans saw bruises caused by Nicholas' physically violent behaviour to Jane. Once, Florence Morgan asked Jane how she had gotten the bruises, and Jane told her that Nicholas had given them to her.

[53] The Morgans clearly knew about Nicholas's abuse of the plaintiff while in their home. They saw it occur. They also saw Jane's bruises. They heard Nicholas say degrading and threatening things to her. In light of this, it was reasonably foreseeable to both Alan and Florence Morgan that Nicholas would assault and batter Jane, as he had in the past.

[54] Knowing of the risk of ongoing injury to Jane, the Morgans had a duty to take reasonable care to keep her safe while she was in their home. When they first witnessed him physically abusing her, they could have called the police or intervened to prevent further violent acts against Jane. They took no steps, however, to intervene or prevent Nicholas' abuse. Instead, they confined their involvement to sometimes yelling at Nicholas to "get off that girl".

[55] I find that the Morgans were negligent and breached their duty as occupiers under the *OLA*.

[56] I do not think, nor did Jane contend, that the Morgans are liable for Nicholas' posting of the sexually explicit video. He apparently used his mother's computer to do this, but there is nothing to suggest that the Morgans knew about the video, or that they could have reasonably foreseen that their son would post it as revenge for his arrest for assaulting Jane.

(c) Did Jane suffer injuries or damages as a result of the Morgans' negligence?

[57] Jane suffered injuries and damage as a result of the Morgans' failure to take reasonable steps to protect her in their home. Had they intervened, she would not have suffered physical and emotional harm by their son.

[58] I accordingly conclude that the Morgans are jointly liable, with Nicholas, for Jane's damages as a result of Nicholas' assault and battery of Jane.

(3) Is Nicholas liable for damages for posting the video without Jane's knowledge or consent?

[59] Jane asks the court to find Nicholas liable for public disclosure of private facts based on his posting of the sexually explicit video of her on the internet without her knowledge or consent.

[60] This is a somewhat novel case. There is no Ontario law establishing a civil right of action for the posting of intimate images without consent. In *Jones v. Tsige*, the Ontario Court of Appeal established a right of action for a related tort, intrusion on seclusion, but declined to rule on whether Canadian law should recognize other torts based on breaches of privacy.[19] Prior to this case, one other Ontario court considered a claim like this one in *Jane Doe 464533 v. N.D.* [20] In that case, Stinson J. issued a default judgment, later set aside, concluding that a defendant who posted intimate images without consent was liable for public disclosure of private facts.

[61] In considering whether Jane has a right of action against Nicholas for posting the video, I will review the decisions in *Jones v. Tsige* and *Jane Doe 464533*, then consider whether, based on accepted legal principles, a tort for public disclosure of private facts should be recognized in Ontario. If I conclude that it should be, I will determine Nicholas' liability on the evidence in this case.

Jones v. Tsige

[62] In *Jones v. Tsige*, the Ontario Court of Appeal recognized a new tort for breach of privacy based on a defendant's unauthorized access to a plaintiff's private information. In so doing, the Court observed that:

> Privacy has long been recognized as an important underlying and animating value of various traditional causes of action to protect personal and territorial privacy. Charter jurisprudence recognizes privacy as a fundamental value in our law and specifically identifies, as worthy of protection, a right to informational privacy that is distinct from personal and territorial privacy. The

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[19] *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241 ("Jones v. Tsige").
[20] *Jane Doe 464533 v. N.D.*, 2016 ONSC 541, 128 O.R. (3d) 252 ("*Jane Doe 464533*").

> right to informational privacy closely tracks the same interest that would be protected by a cause of action for intrusion upon seclusion. [21]

[63] Sandra Jones and Winnie Tsige worked for the same bank. They did not know each other, but Tsige was romantically involved with Jones' former husband. As a bank employee, Tsige had access to Jones' banking information. Using this access, she looked into Jones' banking records at least 174 times over a period of four years. The information displayed included transactions details as well as personal information such as date of birth, marital status and address. Tsige simply looked at the information. She did not publish, distribute or record it in any way.

[64] After discovering what Tsige had done, Jones sued her for breach of privacy. Her claim was summarily dismissed by a motions judge on the grounds that her cause of action was not recognized in Ontario. On appeal, the Ontario Court of Appeal allowed Jones' appeal and granted summary judgment in her favour for damages in the amount of $10,000.

[65] In the absence of any established or statutorily-created tort in Ontario for invasion of privacy, the Court of Appeal in *Jones v. Tsige* adopted the elements of the tort of intrusion on seclusion set out in William Prosser's influential 1960 article on privacy law. [22] This was one of four breach of privacy torts identified by Prosser, which include:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.

2. Public disclosure of embarrassing private facts about the plaintiff.

3. Publicity which places the plaintiff in a false light in the public eye.

4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

[66] The Court of Appeal adopted the definition of intrusion on seclusion set out in the *Restatement (Second) of Torts (2010)*:

> One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for

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[21] *Jones v. Tsige*, at para. 66.
[22] William L. Prosser, "Privacy" (1960), 48 Cal. L. Rev. 383, cited in Jones v. Tsige, at para. 16.

> invasion of his privacy, if the invasion would be highly offensive to a reasonable person.

[67] To establish an intrusion on seclusion, the Court of Appeal held that the plaintiff must prove that: (1) the defendant's conduct was intentional or reckless; (2) the defendant invaded, without lawful justification, the plaintiff's private affairs or concerns; and (3) a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.[23] Proof of economic lass was not required, but, given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily only attract modest damages.

[68] The Court of Appeal declined to decide whether the other breach of privacy torts described by Prosser should be recognized in Ontario. As Sharpe J.A. explained:

> [A]s a court of law, we should restrict ourselves to the particular issues posed by the facts of the case before us and not attempt to decide more than is strictly necessary to decide that case. A cause of action of any wider breadth would not only over-reach what is necessary to resolve this case, but could also amount to an unmanageable legal proposition that would, as Prosser warned, breed confusion and uncertainty.

[69] Despite this, the principles relied upon by the Court in *Jones v. Tsige* would apply equally to other potential causes of action for breach of privacy.

[70] First, in *Jones v. Tsige* the Court of Appeal emphasized that privacy interests underlie various rights protected under the *Canadian Charter of Rights and Freedoms*. While the *Charter* does not apply to private disputes, courts should develop the common law in a manner consistent with *Charter* values.[24]

[71] Second, the Court of Appeal rejected the argument that recognizing a tort for invasion of privacy would interfere with regimes established through existing federal and provincial legislation. As noted by Sharpe J.A., "invasion of privacy" is not defined in any provincial privacy act. As a result:

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[23] *Jones v. Tsige*, at para. 71.
[24] *Jones v. Tsige*, at para. 46.

> The courts in provinces with a statutory tort are left with more or less the same task as courts in provinces without such statutes … [E]xisting provincial legislation indicates that when the legislatures have acted, they have simply proclaimed a sweeping right to privacy and left it to the courts to define the contours of that right.[25]

[72] Third, in concluding that a right of action for intrusion on seclusion should be recognized, the Court emphasized that the common law must respond to problems created by new technologies:

> For over 100 years, technological change has motivated the legal protection of the individual's right to privacy. In modern times, the pace of technological change has accelerated exponentially. Legal scholars such as Peter Burns have written of "the pressing need to preserve 'privacy' which is being threatened by science and technology to the point of surrender… . The Internet and digital technology have brought an enormous change in the way we communicate and in our capacity to capture, store and retrieve information. As the facts of this case indicate, routinely kept electronic databases render our most personal financial information vulnerable. Sensitive information as to our health is similarly available, as are records of the books we have borrowed or bought, the movies we have rented or downloaded, where we have shopped, where we have travelled and the nature of our communications by cellphone, e-mail or text message.[26]

[73] Finally, the Court invoked the longstanding principle that there is no right without a remedy. Had it not accepted the existence of a tort of intrusion on seclusion, Jones would have been deprived of any recourse in the face of an intentional breach of her privacy rights by Tsige:

> Finally, and most importantly, we are presented in this case with facts that cry out for a remedy. While Tsige is apologetic and contrite, her actions were deliberate, prolonged and shocking. Any person in Jones' position would be profoundly disturbed by the significant intrusion into her highly personal information. The discipline administered by Tsige's employer was governed by the principles of employment law and the interests of the employer and did not respond directly to the wrong that had been done to Jones. In my view, the law of this province would be sadly deficient if we were required to send Jones away without a legal remedy.[27]

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[25] *Jones v. Tsige*, at para. 54.
[26] *Jones v. Tsige*, at para. 67 (cites omitted).
[27] *Jones v. Tsige*, at para. 69.

Jane Doe 464533

[74] In *Jane Doe 464533*, Stinson J. granted default judgment for damages based on the posting of an intimate video on a pornography website without the plaintiff's knowledge or consent. He held the defendant N.D. liable on three alternative causes of action: breach of confidence, intentional infliction of mental distress, and invasion of privacy.[28] After Stinson J. released his decision, N.D. moved successfully to set it aside, on the basis that the defendant had an arguable defence on the merits and that it would be in the interests of justice to allow the case to proceed to a full hearing.[29]. This does not make Stinson J.'s analysis of invasion of privacy less important or persuasive.

[75] Like Jane and Nicholas, Jane Doe 464533 and N.D. met in high school and dated for a while. After they broke up, they remained friends and stayed in touch. At about this time, N.D. began asking the plaintiff to make a sexually explicit video of herself to send to him. N.D. had sent her several intimate pictures and videos of himself and told her that she "owed him" a video of herself in turn. The plaintiff eventually gave in and recorded a video. Before sending it to N.D., she texted him, telling him she was still unsure. He convinced her to send it to him, reassuring her that no one else would see it. Based on these reassurances, the plaintiff sent the video to N.D..

[76] Three weeks later, the plaintiff learned that N.D. had posted the video to an internet pornography site the same day he had received it. The video was entitled "college girl pleasures herself for ex boyfriends delight". The plaintiff also learned that N.D. shown it to their former high school classmates. She took steps to have the video removed from the site, but was "devastated, humiliated and distraught" by what N.D. had done.

[77] After finding that the defendant's posting of the sexually explicit video was a breach of confidence and an intentional infliction of mental distress, Stinson J. considered whether a cause of action for invasion of privacy should also be recognized on the facts of the case. He reviewed

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[28] *Jane Doe 464533*, at paras. 20 to 48.
[29] *Jane Doe 464533 v N.D.*, 2017 ONSC 127 (CanLII) (Div. Ct.).

the Court of Appeal's decision in *Jones v. Tsige*, focussing in particular on the constitutional status of the right of privacy and the need for courts to fashion adapt remedies to address problems caused by technological change. He concluded that, just as the Court of Appeal recognized the tort of intrusion on seclusion in that case, it was appropriate to recognize Prosser's second breach of privacy tort, public disclosure of embarrassing private facts, on the facts of *Jane Doe 464533*.

[78] In the *Restatement (Second) of Torts* (2010), this tort is described as follows:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.[30]

[79] The comment section of the *Restatement* offers the following rationale and scope of the tort:

> Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When those intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinarily reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.[31]

[80] Stinson J. noted that Prosser's description of the tort did not anticipate the development of social media and the internet, but that recognizing it would give courts the necessary remedy for an intentional breach of privacy enabled by these technologies:

> Plainly, writing in 1960, Prosser was discussing events that might occur in a pre-Internet world, where the concepts of pornographic websites and cyberbullying could never have been imagined. Nevertheless, the essence of the cause of action he described is the unauthorized public disclosure of

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[30] Cited in *Jane Doe 464533*, at para. 41.
[31] *Jane Doe 464533*, at para. 42.

> private facts relating to the plaintiff that would be considered objectionable by any reasonable person. In the electronic and Internet age in which we all now function, private information, private facts and private activities may be more and more rare, but they are no less worthy of protection. Personal and private communications and the private sharing of intimate details of persons' lives remain essential activities of human existence and day to day living.
>
> To permit someone who has been confidentially entrusted with such details – and in particular intimate images – to intentionally reveal them to the world via the internet, without legal recourse, would be to leave a gap in our system of remedies.[32]

[81] Stinson J. concluded that the elements of the cause of action for public disclosure of private facts in the *Restatement* should be adopted, with one minor modification:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of the other's privacy, if the matter publicized or the act of the publication (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public. [Modification shown by underlining.][33]

[82] Having recognized this tort, Stinson J. went on to find that N.D. was liable for public disclosure of the intimate video of the plaintiff. He held that N.D. had made public an aspect of the plaintiff's private life, and that a reasonable person would find the unauthorized public disclosure of such a video to be highly offensive. He also found that there was no legitimate public concern that justified N.D.'s actions.

Should a tort of public disclosure of private facts be recognized?

[83] In 2014, Parliament enacted Bill C-13, the *Protecting Canadians from Online Crime Act*. It added the offence of publication of an intimate image without consent to the *Criminal Code*.[34] An intimate image includes a video recording in which the person depicted is engaged in an explicit sexual activity. Someone convicted of this offence may be sentenced to up to five years in prison.

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[32] *Jane Doe 464533*, at paras. 44 and 45.
[33] *Jane Doe 464533*, at para. 46.
[34] Section 162.1 of the *Criminal Code*, which came into force on March 9, 2015.

[84] Where misconduct is identified as wrong, harmful and antithetical to an orderly society such that it attracts a criminal sanction, it makes sense that the same misconduct should give rise to a civil remedy. For example, in the case at bar, Nicholas was convicted for his criminal assault of Jane in March 2014, and she has a civil remedy (battery) against him for this same conduct. The criminal charge is based on the collective interest in deterring and sanctioning violent and anti-social behaviour. The civil remedy allows the victim to recover damages for their injury.

[85] Parliament's criminalization of the publication of an intimate image without consent recognizes that this behaviour is highly offensive and should give rise to a civil remedy for a person who suffers damages as a result of it. The only question is how this is best accomplished.

[86] I conclude that the best way of fashioning a civil remedy is to adopt the tort of public disclosure of private facts in Ontario. In doing so I rely on the same reasoning that led the Court of Appeal to recognize the related tort of intrusion on seclusion in *Jones v. Tsige*.

[87] The adoption of this tort is consistent with *Charter* values. In *R. v. Dyment*, a case cited in *Jones v. Tsige*, La Forest J. stated that "privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order". As observed by Justice L'Heureux-Dubé, privacy is "an essential component of what it means to be 'free'".[35]

[88] It is difficult to conceive of a privacy interest more fundamental than the interest that every person has in choosing whether to share intimate or sexually explicit images and recordings of themselves. Every person should have the ability to control who sees images of their body. This is an important part of each individual's personal freedom to decide how they share the most intimate aspects of themselves, their sexuality and their bodies. A cause of action which protects this privacy interest is rooted in our deepest values as a society. Failing to develop the legal tools to guard against the intentional, unauthorized distribution of intimate

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[35] *R. v. O'Connor*, [1995] 4 S.C.R. 411, [1995] S.C.J. No. 98, at para. 113.

images and recordings on the internet would have a profound negative significance for public order as well as the personal wellbeing and freedom of individuals.

[89] The Supreme Court has already recognized that control over a person's image is consistent with *Charter* values. Twenty years ago, in *Aubry v. Éditions Vice-Versa inc*., the Supreme Court of Canada confirmed that the right to one's image is an element of the right to privacy under s. 5 of the Quebec *Charter of Human Rights and Freedoms*.[36] In *Aubry*, the defendant published a picture of a woman in a public place and published it in a magazine dedicated to the arts. There was no suggestion that the photo itself, or the text accompanying it, was in any way defamatory. The plaintiff was however clearly identifiable in the photograph, and her permission was not sought before it was published. A majority on the Court concluded that "the artistic expression of the photograph, which was alleged to have served to illustrate contemporary urban life, cannot justify the infringement of the right to privacy it entails". The Court furthermore noted that this interpretation of the right to privacy in a person's image under the Quebec *Charter* "is consistent with the liberal interpretation given to the concept of privacy … in past judgments of this Court".[37]

[90] I am not suggesting that the civil remedy upheld in *Aubry* would be available in this case in the absence of an equivalent common law tort. Section 5 and 49 of the Quebec *Charter* create a much broader remedy for unauthorized use of personal images than what is sought in this case. The Supreme Court's recognition of the compatibility of a right to privacy in a person's image with other privacy rights in *Aubry* is nonetheless important. It shows that protection of an individual's image is a component of their personal privacy interest.

[91] The recognition of a civil right of action arising from the unauthorized posting of intimate or sexually explicit images or recordings is not incompatible with any statutory scheme for the protection of privacy rights. It would, on the contrary, complement the statutory framework already in place in s. 162.1 of the *Criminal Code*.

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[36] [1998] 1 S.C.R. 591 ("*Aubry*").
[37] *Aubry*, at para. 51.

[92] I have considered whether it is up to the provincial legislature to create a statutory remedy to address circumstances like those in this case, and that its failure to do so represents a conscious policy decision with which the courts should not interfere. I reject this argument for the same reason that the Court of Appeal rejected it in *Jones v. Tsige*. Manitoba is the only Canadian province which has enacted legislation creating a statutory tort of non-consensual distribution of intimate images.[38] As noted in *Jones v. Tsige*, privacy laws in other provinces recognize a broad right to privacy but leave it to the courts to determine whether any particular invasion of one person's privacy by another will give rise to any remedy. Given this legislative context and the need to identify legal remedies for the social ill of revenge porn, I cannot conclude that the absence of an Ontario equivalent to the Manitoba *Intimate Image Protection Act* prevents the court from recognizing a tort for public disclosure of private information.

[93] A cause of action for public disclosure of private facts represents a constructive, incremental modification of existing law to address a challenge posed by new technology. As Stinson J. aptly observed in *Jane Doe 464533*:

> In recent years, technology has enabled predators and bullies to victimize others by releasing their nude photos or intimate videos without consent. We now understand the devastating harm that can result from these acts, ranging from suicides by teenage victims to career-ending consequences when established persons are victimized. Society has been scrambling to catch up to this problem and the law is beginning to respond to protect victims.[39]

[94] A strength of the common law is its ability to evolve and adapt to changing circumstances. Of course new remedies should not simply be invented willy-nilly. But the tort of public disclosure of private facts is hardly new or novel. It has existed in U.S. law for decades. Despite its vintage, it is well-suited for use in the context of internet posting and distribution of intimate and sexually explicit images and recordings. It is the cousin to another privacy tort already recognized in Ontario, intrusion on seclusion. As such it is an appropriate, proportionate legal response to a growing problem enabled by new technology.

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[38] *Intimate Image Protection Act* C.C.S.M. c. 187. This law came into force on January 15, 2015.
[39] *Jane Doe 464533*, at para. 16.

[95] Finally, failing to provide a remedy in this case would deprive Jane of any meaningful recourse in the face of a deliberate and flagrant breach of her privacy rights. In *Jones v. Tsige*, the Court of Appeal characterized Tsige's actions in accessing Jones' personal banking records as "deliberate, prolonged and shocking", and said that the case cried out for a remedy. But, in that case, Tsige took no steps to record, publish or distribute the plaintiff's information, and Jones suffered no long-term damages as a result of the breach of her privacy rights. In the case at bar, the explicit video that Nicholas posted without Jane's knowledge of consent remained online for over two years, and was viewed over 60,000 times. The damage suffered by Jane is profound and still ongoing. How can the court deny her a remedy in these circumstances?

[96] I conclude that Jane has a cause of action against Nicholas for the public disclosure of private facts without her consent. In *Jones v. Tsige*, the Court of Appeal recognized the need for civil remedies to protect the privacy of personal information. I see no reason why this protection should not extend to prevent the unauthorized publication of intimate images, given the privacy rights at stake and the serious harm caused by such publication.

Is Nicholas liable for public disclosure of private information on the evidence here?

[97] I agree with the elements of the cause of action proposed by Stinson J. which for convenience sake I will reproduce again here:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of the other's privacy, if the matter publicized or the act of the publication (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

[98] I accept Stinson J.'s modification to the description of the tort in the *Restatement*, because it is important to emphasize that a sexually explicit videotape is not in itself necessarily "highly offensive". There is nothing inherently wrong about taking intimate photos of an adult or filming consensual sex between adults, or agreeing to participate in such photos or recordings. What is wrong is the non-consensual publication or sharing of a photo or recording of someone who did not want to share it with anyone else.

[99] To establish liability, the plaintiff must therefore prove that:

(a) the defendant publicized an aspect of the plaintiff's private life;

(b) the plaintiff did not consent to the publication;

(c) The matter publicized or its publication would be highly offensive to a reasonable person; and

(d) The publication was not of legitimate concern to the public.

[100] Jane has proved all of the elements of the tort. In posting the sexually explicit video of her, Nicholas publicly disclosed an aspect of her private life. She did not consent to this. A reasonable person would consider the posting of the video highly offensive, because the video showed Jane's face and body and allowed strangers to see her engaged in sexual activity. The title given to the posting was also degrading and racist. There was nothing about the video that gave the public a legitimate interest in its publication.

[101] I accordingly conclude that Nicholas is liable to Jane for his public disclosure of her private information.

(4) Can Jane recover damages for breach of confidence or intentional infliction of mental distress even though these causes of action are not mentioned in her statement of claim?

[102] On the motion for default judgment, Jane's counsel asked that I also find Nicholas liable for breach of confidence and intentional infliction of mental distress as a result of his posting of the sexually explicit video. In *Jane Doe 464533*, Stinson J. found the defendant liable for all three torts.

[103] In her statement of claim, Jane does not plead that Nicholas is liable for breach of confidence or intentional infliction of mental distress. Relying on *Watson v. TrojanOne Ltd.*, however, her counsel says that this omission does not matter so long as the constituent elements of each tort are alleged.[40]

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[40] 2016 ONSC 2740 ("*Watson v. TrojanOne*"), at paras. 9 and 10.

[104] I am not sure that *Watson v. TrojanOne* stands for the broad proposition that a plaintiff may seek default judgment for causes of action that are not mentioned in the statement of claim. Even if it does, any claim by Jane for these additional causes of action cannot succeed, because she has not alleged all of the essential elements of each tort.

[105] In a breach of confidence claim, a plaintiff must allege that confidential information was imparted in circumstances "importing an obligation of confidence".[41] In her statement of claim, Jane does not provide any explanation of how Nicholas came into the possession of the sexually explicit video. She simply alleges Nicholas uploaded the video to a pornographic website without her knowledge or consent. This is sufficient for the purpose of an action for public disclosure of private information, but not for an action for breach of confidence.

[106] In an action for intentional infliction of mental distress, a plaintiff must allege that the defendant's conduct resulted in a visible and provable injury.[42] No such injury is mentioned in Jane's statement of claim.

[107] I accordingly cannot find Nicholas liable for these additional causes of action.

(4) What are Jane's damages?

[108] Jane seeks $120,000 in total damages. She seeks $20,000 in general damages jointly and severally from Nicholas and the Morgans for Nicholas' repeated assault and battery. She seeks $50,000 in general damages, $25,000 in aggravated damages and $25,000 in punitive damages from Nicholas for the posting of the video on the internet.

Jane's damages for assault and battery

[109] Jane's affidavit paints a vivid description of an abusive relationship between September 2013 and March 2014. She describes how Nicholas frequently choked her, dragged her up and down stairs, threw her around and covered her mouth with such force that it left bruises. When she was seven months pregnant, he dragged her down a flight of stairs as she vomited, threatened

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[41] *Grant v. Winnipeg Regional Health Authority*, [2015] M.J. No. 116, at paras. 118-19.
[42] *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (Ont. C.A.).

her with knife and rope, then finally pushed her physically out of the house. In March 2014, he attacked her after she tried to leave his parents' house, wrestling her to the snow-covered ground, removing her shoes, forcing her into his car, smashing her head against the car door, and dragging her, bleeding, out of the car by her feet and then forcing her through a garage and back into the house.

[110] These physical attacks were accompanied by verbal abuse. Nicholas would fly into unprovoked rages. He called Jane degrading names and told her she should kill herself. More than once, he threatened to kill her or injure her.

[111] As a result of this physical and verbal abuse, Jane says she lived in an atmosphere of fear from January 2014 to March 2014. She describes how, during the September 2013 incident, she was "sick, bruised, half-naked with no money for bus fare". After Nicholas physically pushed her out of the Morgans' house, she went to her aunt's house and cried for hours. During the March 2014 attack, Nicholas left Jane outside in the snow without shoes. She tried to lock the car door so he would not hurt her. When she threatened to call the police, Nicholas said that he did not care and that calling the police would not stop her. He said that he would kill Jane if she kept "doing this stuff".

[112] Jane says that she was assaulted, battered, violated physically and emotionally and humiliated as a result of Nicholas' conduct. She sought psychological therapy both during and after her pregnancy.

[113] In *Constantini v. Constantini*, Parantz J. did an extensive review of damages awards in cases of assault and battery between spouses.[43] In some cases, the victim suffered serious and permanent physical injuries, attracting general damage awards of approximately $66,000 to $170,000.[44] In *G.(D. v. M. (R.)*, a woman who had been assaulted and battered by her husband

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[43] 2013 ONSC 1626 ("*Constantini*").
[44] *Megeval v. Megeval*, [1997] B.C.J. No. 2454; *Shaw v. Shaw*, 2012 ONSC 590; *Bird v. Kohl*, 2012 BCSC 1424. In each of the cases I have referred to, I have adjusted the amount of the damages awarded to reflect inflation.

after a night of drinking was awarded about $38,000.[45] In that case, however, the defendant also sexually assaulted the plaintiff.

[114] A lower range of general damages has typically been awarded where domestic violence has not resulted in any permanent physical injury. Cases with some similarity to this one include:

- *Valenti v. Valenti*: [46] the defendant husband punched his wife in the face and head, and forced her head into the walls of the hallway. She was kicked and forced into a vehicle, where he struck her in the face. She was terrified and tried to leave the vehicle. Her eyes were swollen shut, and she suffered post-traumatic stress disorder. Adjusted for inflation, the trial judge awarded the plaintiff $15,000.00 in general damages, and about $8000 in aggravated and punitive damages.
- *S. (L.N.) v. K. (W.M.)*:[47] over the 16 years they lived together, the defendant abused the plaintiff by "pushing, hitting, kicking, choking, hair pulling, throwing to the floor, banging head on floor or on walls, while accompanied by threats (occasionally to kill) and highly abusive language that can only be described as vulgar, humiliating and demeaning." The plaintiff had bruises and soreness and thought about killing herself. The trial judge awarded her general damages now equivalent to $21,500 for physical and mental abuse.
- *Wandich v. Viele*:[48] In the last two years of a three-year marriage, the defendant husband physically assaulted the plaintiff seven to nine times. On one occasion, he grabbed her by the throat, banged her head against the wall, pulled her hair, and punched her in the stomach. Other incidents included threatening, choking, some bruising, and a nose bleed. The plaintiff was awarded just over $7000.

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[45] 2012 SKQB 296, [2012] S.J. No. 494.
[46] [1996] O.J. No. 522 (Ont.Gen.Div.).
[47] 1999 ABQB 478, 246 A.R. 60.
[48] (2002), 24 R.F.L. (5th) 427 (Ont. S.J.).

- *Van Dusen v. Van Dusen*:[49] the defendant husband tormented the wife throughout their 17-year marriage. Some of his abuse took in front of their children. On the date of separation, the husband threw a glass of water over the wife, grabbed her by the hair, repeatedly called her a "fucking bitch", dragged her through the house by her shoulders, neck, and hair, struck her in the face with the palm of his closed hand, and, when she fell to the ground, he jumped on top of her. The wife suffered swelling and bruising to her face and bruising to her body as a result, as well as emotional upset. She was awarded roughly $17,000 in general and aggravated damages for this incident.

[115] In *Constantini*, the parties lived together for a year then were married for three years. After they separated, the defendant husband broke into the plaintiff's house one night, told her that she "deserved to die", choked her, and banged her head against the wall and floor. Based on the authorities set out above, Pazaratz J. awarded the plaintiff general damages of about $16,000 for assault and battery.

[116] I have also considered general damages awarded in occupiers' liability cases where a plaintiff has been physically attacked. These cases, which I discussed earlier in the analysis of the Morgans' liability under the *OLA*, resulted in higher general damages awards. In *Millar*, the plaintiff lost the use of his right eye and had other permanent physical disabilities after he was attacked with a sledgehammer. He recovered over $215,000 in general damages. In *Van Hartevelt*, the occupiers were ordered to pay general damages of approximately $38,000. In that case, the building manager pummelled the plaintiff with his fists, causing him to fall to the ground, and then kicked him in the ribs. The plaintiff had possible fractured ribs, multiple abrasions and contusions, a closed head injury, a severely strained right hip and post-traumatic anxiety.

[117] I do not see why assault and battery by a spouse should attract a lower range of damages than attacks by any other defendant. Violence by a partner may in fact be a more traumatic event than violence by a stranger. Spousal violence violates the trust that we are taught to have in our partners. It often involves repeated verbal and physical abuse. It typically occurs at home, the

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[49] 2010 ONSC 220, [2010] O.J. No. 313.

place where we should feel the most safe and secure. A battered spouse may be left not only with bruises but with an inability to trust other people or ever really feel safe.

[118] The factors that argue for a higher range of general damages in this case are as follow:

- Nicholas repeatedly abused Jane physically and verbally over a period of six months. The March 2014 is the incident that led to Nicholas' criminal conviction, but he also assaulted and battered Jane in September 2013 and in the period from January to March 2014. The damages awarded should reflect this entire history.
- The award must compensate Jane not only for Nicholas' battery but also for his repeated assaults. Since battery follows an assault and may leave a more tangible injury, it is natural to focus on the consequences of the physical attack. But this focus may allow a defendant to escape any real consequences for threatening physical violence, even though the law recognizes assault as a separate tort. A person who both fears and suffers physical attacks over several months is entitled to an award that reflects both assault and battery.
- Nicholas' assault and battery was accompanied by conduct that terrified, degraded and humiliated Jane. He told her that she should kill herself. He forced her out of the house in the middle of the night so he could invite another woman inside. He engaged in casual violence towards Jane in front of his family. He chased her down when she tried to leave. He told her that it was pointless to call the police. Little wonder that she says she felt "depressed, violated and alone".

[119] There are other factors in this case that argue for a lower general damages award. Nicholas' assault and battery of Jane did not leave Jane with any permanent physical injuries. She has furthermore not produced any medical records or records of psychological counselling. In her affidavit, she focuses on the impact of Nicholas' posting of the sex video on the internet, and does not specify what injuries result from the assault and battery. She does say that she obtained psychological counselling before and after MK's birth, years before she learned about the internet posting.

[120] Weighing these factors and the caselaw on the range of damages, I conclude that Jane should is entitled to the full amount of general damages of $20,000 that she has claimed from Nicholas. I would in fact have awarded her up to $25,000 if a higher amount had been sought. This amount is in the higher range of damages awarded in cases involving violence against spouses that do not result in any permanent physical injury. It is appropriate due to the repeated, ongoing nature of Nicholas' physical and verbal abuse and Jane's vivid evidence on the terrifying nature of the incidents in September 2013 and March 2014. Even in the absence of any permanent physical injury, I am persuaded that this experience has left Jane with significant emotional and psychological trauma. A lesser award would not adequately compensate Jane for what she experienced when she was pregnant with MK and in the months that followed his birth.

[121] The Morgans are jointly and severally liable for damages for Nicholas' assault and battery because they failed to take any meaningful steps to ensure Jane's safety in their home. It is not clear on the evidence that they witnessed any instances of assault and battery by Nicholas prior to September 2013. However, given that the $20,000 award is less compensation than Jane is entitled to, I conclude that the Morgans should be jointly liable for this full amount.

Damages for breach of privacy

[122] This is a classic case of what is commonly referred to as "revenge porn".[50] Nicholas has admitted, through his text to Jane, that he posted the sexually explicit video of her on a pornographic website as payback for her decision to call the police in March 2014. In his words, "I have a criminal record for life ur a internet whore for kife [sic] … fair trade". After Jane told Nicholas that he could be criminally charged for the video posting, he threatened to post other nude photos of her on the internet: "I still have nude of u incase u wanna pissme off. Ill go on the dirty his [sic] time".

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[50] Some legal scholars view the term "revenge porn" as problematic, because it overlooks other reasons for sharing intimate images, such as financial gain, and may eroticize the harm caused by the posting of intimate images; see Clare McGlynn, Erika Rackley and Ruth Houghton, "*Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse*", (2017) 25: 1 Fem. Leg. Stud. 25, at p. 29. On the other hand, in my view the term "cyber-bullying" risks understating the seriousness of the conduct in a case like this; see Jane Bailey, "*Canadian Legal Approaches to 'Cyberbullying' and Cyberviolence: an Overview*", (2016) University of Ottawa Working Paper, at p. 6. Although I have tried to avoid using either term in this decision, I have used the term "revenge porn" because, despite its actual and potential shortcomings, it describes exactly what occurred in this particular case.

[123] Revenge porn can have devastating consequences. In the most extreme cases, where sexually explicit images of very young people have been shared without their consent, the victims have been driven to suicide because of their feelings of intense shame and social isolation. In every case, the victim is betrayed by someone they trusted. Something that may have been a celebration of their affection or sexual attraction for another person is used against them. They have forever lost their right to control who sees their body. Even if the posting is removed, copies remain as the result of downloads and sharing. They live with the fear that this single event will define how they are perceived and treated by family, friends and strangers for the rest of their lives.

[124] As Justice M. M. Rahman eloquently observed in a case where unauthorized, sexually explicit videos of a young woman, C.S., were posted on the same website that the video of Jane was posted:

> There is a popular saying that "the internet never forgets." C.S.'s images became available as torrents. That means they remained available to others even though the offender removed them from the websites to which he had originally uploaded them. There is no way to know how many people have access to the images. Every time someone views one of these images, C.S.'s privacy and dignity are violated. C.S. must live with the knowledge that strangers anywhere in the world may view her private images whenever they choose to. She has lost control over a very private part of her life forever. She faces the potential violation of her privacy, by total strangers, in perpetuity.[51]

[125] In her affidavit, Jane describes the impact that the posting of the video has had on her:

> The video has been viewed tens of thousands of times and has been downloaded and likely shared many times. This means that even though I persuaded www.xvideos.com to take down the video after 60,000 views, it is still out there on other website and will be out there forever. (…)
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> I worry that my current and future coworkers, friends and tens of thousands of strangers know of the video or will come to know of it. … I am distraught and worried that I will be thought a bad mother, be denied educational,

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[51] *R. v. A.C.*, 2017 ONCS 317, at para. 20.

> employment and social opportunities, and forever stigmatized because of the video.
>
> I am sick with fear that one day my son will see the video.
>
> I am unable to pursue other romantic relationships because I worry that the video might resurface and ruin a budding relationship. I worry that the video could impede or preclude a professional career if it became known to an employer. I have felt depressed, violated and alone. I have felt shame and anger and will never know who has seen or will see the video and what it has caused or will cause people to think, do and say with respect to me.

[126] Jane's fears are justified. She and Nicholas went to the same high school and so share a common social circle. At least one of Jane's friends knew about the video; that is how Jane found out about it. There is every reason to assume that others in Jane's social circle know about it as well. But the video's impact go well beyond this. Jane's face was clearly visible on the video. Given the amount of time it was posted and the number of times it was viewed, she may well be recognized from the video for years to come by employers, coworkers, family members, neighbours and strangers.

[127] In *Jones v. Tsige*, the Court of Appeal capped the range of general damages for intrusion on seclusion at $20,000. It held that only modest damages were appropriate given the intangible nature of the interest protected. Applying these factors, the Court of Appeal awarded Jones $10,000 in general damages. It did not award her any aggravated or punitive damages.

[128] In *Jane Doe 464533*, Stinson J. based the damages award on awards granted in civil claims for sexual assault. In his view, the damages suffered were comparable "in light of the nature of the wrong, the significant and ongoing impact of the defendant's conduct on the plaintiff's emotional and psychological health, and its similarity to the impact of a sexual assault".[52] He wrote:

> I recognize that … there was no physical touching in the present case. That said, the plaintiff's resulting injuries bear striking similarities to those for which the courts have awarded compensation in these other cases. The actions of the defendant in the present case offended and compromised the

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[52] *Jane Doe 464533*, at para. 52.

> plaintiff's dignity and personal autonomy. In my view, a non-pecuniary damage award in a case such as this should similarly "demonstrate, both to the victim and to the wider community, the vindication of these fundamental, although intangible, rights which have been violated by the wrongdoer".[53]

[129] Stinson J. then reviewed the factors approved by the Supreme Court of Canada in *Blackwater v. Plint*, a sexual abuse case.[54] The factors included:

- *The age and vulnerability of the victim*. When the video was posted, the plaintiff was an 18-year old university student.
- *The number, frequency and nature of the assaults*. Stinson J. characterized the defendant's actions in posting the video as "very invasive and degrading". There was no way to know how many times it had been viewed, copied and downloaded. The defendant showed the video to his friends, who were also acquaintances of the plaintiff. The judge concluded that: "Although there was no physical violence, in these circumstances, especially in light of the multiple times the video was viewed by others and, more importantly, the potential for the video still to be in circulation, it is appropriate to regard this as tantamount to multiple assaults on the plaintiff's dignity."[55]
- *The defendant's age and whether he was in a position of trust.* The defendant was also 18 years old, and had been in an intimate, and thus trusting relationship with the plaintiff over a long period of time. He had specifically assured the plaintiff that, if she sent him the video, he would not share it with anyone else. The posting of the video was therefore a breach of trust.

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[53] *Jane Doe 464533*, at para. 56, quoting from Cromwell J.A. (as he then was) in *G. (B.M.) v. Nova Scotia (Attorney General)*, 2007 NSCA 120, at para. 130.
[54] [2005] 3 SCR 3.
[55] *Jane Doe 464533*, at para. 57.

- *The consequences of the wrongful behaviour on the victim, including psychological injuries*. Stinson J. described the consequences to Jane Doe 464533 as "emotionally and psychologically devastating" and ongoing.

[130] Weighing these factors, Stinson J. awarded the plaintiff $50,000 in general damages, $25,000 in aggravated damages, and $25,000 in punitive damages, for a total of $100,000. He did not adhere to the $20,000 limit set in *Jones v. Tsige* because, in his view:

> the privacy right offended and the consequences to the plaintiff there were vastly less serious and offensive than the present case. … [T]his case involves much more than an invasion of a right to information privacy; as I have observed, in many ways it is analogous to a sexual assault. Given the circumstances of this case, and in particular the impact of the defendant's actions, a substantially higher award is warranted here.[56]

[131] I agree with Stinson J. that the breach of the plaintiff's privacy rights in a case like this are much more serious than in an action for intrusion on seclusion. The factors that argue for a higher damages award in *Jane Doe 464533* also exist in this case. In fact, in many ways, this is a much more serious case:

- Jane was in high school when the video was posted. She was a single mother on social assistance. These circumstances made her highly vulnerable.
- The posting of a sexually explicit video on an internet pornography site without a participant's consent is degrading and invasive. What makes the situation much worse is that the video was online for a very long time and viewed over 60,000 times. I also infer that Nicholas shared the video with his friends, based on his text message to Jane saying that he was better off having a criminal record than "all my friends knowing my tongue game Looool".
- The posting of the video has had a serious, long-term impact on Jane's psychological well-being, her ability to form relationships, and her trust in those around her. She fears that it has also compromised her future job prospects and her ability to be a good parent.

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[56] *Jane Doe 464533*, at para. 58.

[132] In these circumstances, I conclude that Jane's damages are much more significant than those that would typically be awarded for intrusion on seclusion or another similar breach of privacy. The internet never forgets. Her dignity and personal autonomy have been, and will continue to be, compromised by Nicholas' actions. As stated by Justice Cromwell, the damages award must "demonstrate, both to the victim and to the wider community, the vindication of these fundamental, although intangible, rights which have been violated by the wrongdoer".[57]

[133] I must also consider whether aggravated damages should be awarded to the award of general damages.

[134] Aggravated damages may be awarded if a battery has occurred in "humiliating or undignified circumstances".[58] These damages are not awarded in addition to general damages. Rather, general damages are assessed "taking into account any aggravating features of the case and to that extent increasing the amount awarded".[59] Like general damages, aggravated damages are compensatory.

[135] In *Hill v. Church of Scientology of Toronto*, the Supreme Court of Canada expanded on the principles governing the award of aggravated damages. [60] Although these comments were made in the context of a libel action, they are relevant in the circumstances of this case. Writing for the unanimous court, Cory J. wrote that:

> Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement. The nature of these damages was aptly described by Robins J.A. in *Walker v. CFTO Ltd.*, *supra*, in these words at p. 111:
>
> > Where the defendant is guilty of insulting, high-handed, spiteful, malicious or oppressive conduct which increases the mental distress -- the humiliation, indignation, anxiety, grief, fear and the like -- suffered by the plaintiff as a result of being defamed, the plaintiff may be entitled to what has come to be known as "aggravated damages".

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[57] *G.(B.M.) v. Nova Scotia (Attorney General)*, 2007 NSCA 120, at para. 130.
[58] *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 ("*Norberg v. Wynrib*").
[59] *Norberg v. Wynrib*, citing *N. (J.L.) v. L. (A.M.)* (1988), 47 C.C.L.T. 65 (Man. Q.B.), at p. 71.
[60] [1995] 2 SCR 1130 ("*Hill v. Church of Scientology*").

> These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature. Their assessment requires consideration by the jury of the entire conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of the trial. They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant.[61]

[136] Justice Cory went on to say that a court awarding aggravated damages must find that the defendant was "motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff".[62]

[137] Based on the test I have adopted, liability for public disclosure of private facts requires the court to find that the defendant's conduct was "highly offensive". This element of the tort does not mean that an aggravated damages award will be appropriate in every case where the cause of action is made out. There must be something more.

[138] In this case, I conclude that there was something more. Nicholas was motivated by actual malice. His conduct increased Jane's humiliation and anxiety. He aggravated the damage to Jane's reputation by posting the video to a pornographic website, giving it a degrading title ("yellow hoe sucking a big one"), and showing it or sharing it with his friends. He further added to Jane's distress after she discovered the video by taunting her and threatening to post further nude images of her online.

[139] I conclude that Jane is entitled to general damages of $50,000, and an additional amount of $25,000 for aggravated damages. I therefore order Nicholas to pay $75,000 in general and aggravated damages to Jane for his posting of the video on the internet.

[140] Punitive damages are awarded for malicious, high handed, arbitrary or highly reprehensible misconduct that falls outside the standards of decent behaviour.[63] Punitive

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[61] *Hill v. Church of Scientology*, at paras. 188 and 189.
[62] *Hill v. Church of Scientology*, at para. 190.
[63] *Whiten v. Pilot Insurance*, 2002 SCC 18 (CanLII), [2002] 1 S.C.R. 595, at para. 36.

damages are exceptional. Their function is not to compensate the plaintiff for harm or loss suffered. The objectives of punitive goals are instead to punish the defendant, denounce their conduct, and deter similar behaviour in future.[64] Punitive damages are only awarded when the compensatory damages awarded are insufficient to accomplish the objectives of punishment, deterrence, and denunciation.[65]

[141] I have already found that Nicholas acted maliciously. His conduct was highly offensive and inconsistent with standards of decent behavior. He has shown no remorse for his actions. On the contrary, when Jane discovered the video, he sent her texts telling her to "fuck off" and threatened to humiliate her further by distributing other nude images.

[142] In my view, the compensatory damages already awarded are not sufficient to accomplish the objectives of punishment, deterrence and denunciation. Punitive damages are necessary here to emphasize the seriousness of Nicholas' malicious actions and to deter others from similar behaviour. Revenge porn is an assault to the victim's personal agency and sense of self-worth. Nicholas posted the video with the purpose of making Jane an "internet whore for life". This must be sanctioned.

[143] I accordingly order Nicholas to pay Jane $25,000 in punitive damages.

(6) Is Jane entitled to other remedies?

[144] At the hearing of the motion, the plaintiff sought orders directing Nicholas to destroy any and all nude photos, intimate images or sexually explicit recordings he may have of Jane, and prohibiting him from publishing, posting, sharing or otherwise disclosing in any fashion any nude, intimate or sexually images or recordings of Jane. He also sought an order retroactively amending the title of proceedings so that the plaintiff's name would appear as "Jane Doe 72511" on all pleadings, and sealing her affidavit in support of the default judgment.

[145] Although these orders were not sought in the statement of claim or motion for default judgment, they are all appropriate in the circumstances of this case. I granted the order

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[64] *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, at para. 197.
[65] *Carr v Ottawa Police Services Board*, 2017 ONSC 4331 (CanLII), at para. 249.

amending the title of proceedings and sealing the affidavit at the time the motion was argued. I am now granting the other orders requested as well.

Conclusions

[146] Nicholas is liable for assault and battery and public disclosure of private information. He must pay Jane $20,000 in general damages for his verbal and physical abuse, and a total of $100,000 for the posting of the video ($75,000 in general and aggravated damages, and $25,000 in punitive damages).

[147] The Morgans are jointly and severally liable for Jane's damages from the assault and battery, because as occupiers of their house they had a duty to take reasonable steps to keep her safe while she was there, and they negligently failed to do so.

[148] Nicholas must destroy any other nude, intimate or sexually explicit images or recordings of Jane in his possession. He is prohibited from publishing, posting, sharing or otherwise disclosing in any fashion any nude, intimate or sexually explicit images or recordings of Jane.

[149] Finally, Jane is entitled to costs on this motion and the action. According to the bill of costs submitted by her counsel, her actual costs are $7777.89, consisting of $7556.48 in counsel fees and $211.41 in disbursements. This is an eminently reasonable amount taking into account the work done and the experience of counsel involved. Jane won the motion and the action, despite the lack of clear precedent for her claim. She obtained all of the damages she sought against the defendants.

[150] I conclude that Jane is entitled to recover costs on a partial indemnity basis, and order the defendants to pay her $5000 for fees, inclusive of HST, and $211.41 for disbursements, for a total of $5,241.41.

Justice Sally Gomery

Released: November 2, 2018

CITATION: Jane Doe 72511 v. Morgan, 2018 ONSC 6607
COURT FILE NO.: 17-72511
DATE: 2018/11/02

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Jane Doe 72511

Plaintiff

– and –

Nicholas Morgan, Alan Morgan and Florence Morgan

Defendants

REASONS FOR JUDGMENT

Justice S. Gomery

Released: 2018/11/02