

Advertisers Beware

Advertising | Litigation | Litigation & Dispute Resolution | Ontario | Small Claims Court

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How much is your physical image worth if it is used in an advertisement without your permission? A recent decision of the Ontario Superior of Justice (Ottawa Small Claims Court) addressed this question in a case involving a promotional video: *Vanderveen v Waterbridge Media Inc.*, 2017 CanLII 77435 (ON SCSM).

The dispute arose after the plaintiff was jogging on a walking trail and was briefly videotaped by a company filming a sales promotion for a condominium developer. A two-second (but clearly identifiable) clip of the plaintiff wound up in the publicity video which was subsequently seen by a friend and brought to her attention. The plaintiff sued the advertising company for damages for unauthorized use of her image. She did not, at least in the reported decision, sue the condominium developer who paid for the video. The video was shot in 2014 but the plaintiff didn't learn about it until October 2015. The video was removed from the developer's website and Youtube within a week of receiving the plaintiff's complaint.

The basis for the plaintiff's civil claim was the fairly recent and developing tort formally known as "intrusion upon seclusion" (more commonly referred to as invasion of privacy), outlined by the Ontario Court of Appeal in *Jones v. Tsige*, 2012 ONCA 32 (CanLII). The elements of the tort are conduct that is (i) intentional or reckless; (ii) that invades a person's private affairs or concerns without lawful justification; and (iii) that a reasonable person would regard as "highly offensive causing distress, humiliation or anguish". If these elements are established, a plaintiff need not provide that she has suffered an out-of-pocket economic loss. However, the Court of Appeal stated that damages resulting from the tort will ordinarily be measured by "a modest conventional sum" capped at \$20,000.

There was some discussion in the decision about whether the clip of the plaintiff was simply one that she did not wish to be "portrayed publicly" as she was unhappy with her physical state at the time of the video. However, one might question why that is relevant if the primary issue is whether or not consent was actually provided. If it wasn't, then it shouldn't matter whether one 'looks good' in an image captured and used for commercial purposes without one's consent.

The defendant company also argued that it was impractical to obtain consent when filming in public locations where someone may have had no reasonable expectation of privacy. This position was rejected. In the Court's view, "the important right to privacy prevails over any non-public interest, commercially motivated and deliberately invasive activity".

In the result, the Court awarded the plaintiff \$4,000 as general damages for intrusion upon seclusion and \$100 for "appropriation of personality," the latter amount apparently being what it would have cost to pay for a professional actor in similar circumstances.

There are other recourses in Canada relating to the protection of privacy, including Provincial and Federal legislation and complaints to the applicable Privacy Commissioner. But the case at hand represents one example of a private litigant seeking a form of monetary compensation from a Court for unauthorized use of their image.

While the damage award of \$4,000 may not be much of a deterrent for a commercial party, the case raises an interesting question as to how far will courts go in protecting the images of people videotaped in public places. Court decisions may hinge on the meaning given to the phrase "legal justification".

A damage award of \$4,000 may not however be much of a deterrent for a commercial party depending on the context of the uses of an image.

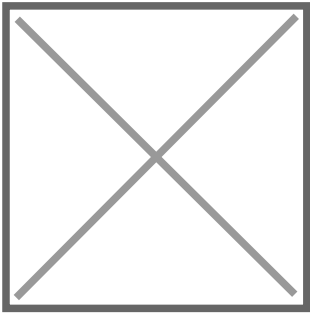
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