**SALACIOUS SELFIES AND DEFAMATORY DISSEMINATION –**

**COMPUTER MISUSE**

**Introduction**

There is no general tort of invasion of privacy[[1]](#footnote-1) nor is there a statutory cause of action protecting individual’s personal information and the misuse of it[[2]](#footnote-2). There are many other causes of action that can bring relief in related circumstances, including breach of confidence[[3]](#footnote-3), wrongful disclosure and/or misuse of private information[[4]](#footnote-4), harassment, nuisance, libel and malicious falsehood[[5]](#footnote-5).

We are now in the digital age. What was difficult and expensive is now commonplace. Information and communication are literally at our fingertips. We can share personal and public data within seconds to anyone around the world. The traditional arts (if we can call them that!) of film are no longer commonplace. Hard copy is dead or nearly so. The internet, digital photography, message boards, websites, blogs, computers and smartphones are ubiquitous and comprise the root of the greater part of our awareness of the world.

The traditional torts remain. We, as Attorneys-at-Law, are now forced to grapple with the evidential burdens that arise as a result of the new arts of communication. The anonymity that many enjoy as a result of the digital age is now used by some to hide their identities while they inflict intentional and malicious damage to others, be it friend, celebrity or enemy. It is now much easier to defame, insult or embarrass people and accordingly, it happens more often.

The sad fact is that several Commonwealth jurisdictions have not taken the steps, as in some places, to change the law of evidence regarding actions taken by electronic means. The approach taken in proving a claim would accordingly vary depending on the circumstances.

The most common complaint I address at my office revolve around the misuse of personal photographs – “the selfie” – and the oftentimes salacious content of same. These photographs are normally made and sent to a client’s loved one for personal enjoyment during the course of their romantic relationships. Unsurprisingly, these photographs are often used for a different purpose when the relationships come to an end and are used to embarrass and ridicule the subject therein.

It was for this reason the Courts refashioned the specific causes of action of wrongful misuse of private information and more specifically, breach of confidence. I have found in practice that it is easier to prove a breach of confidence and therefore is normally the route I recommend for these types of matters.

**History of breach of confidence**

It is arguable that most of the early cases on breach of confidence focused on commercial relationships and government secrets.

The movement towards individual privacy has been precipitated by both the advancement of human rights (of privacy) over the years as well as the recognition of the aforementioned growth of the internet, particularly, social media and its various platforms.

The courts of the United Kingdom have developed the area in tandem with the protection afforded under its human rights obligations whilst the Australian jurisprudence has more focussed on protecting the privacy of personal information and thus have created a new impetus in this area.[[6]](#footnote-6)

In the Caribbean and specifically from the Trinidad and Tobago jurisdiction, the judgment in **Therese Ho v Lendl Simmons** adopted the Australian position and applied the equitable cause of action of breach of confidence.

The essential elements of an action in equity for breach of confidence are: -

1. That the information was of a confidential nature.
2. That it was communicated or obtained in circumstances imparting an obligation of confidence.
3. That there was an unauthorized use of the information

The cause of action is applicable to images of a person even where the images were created by the person sought to be restrained from disclosing.

**Remedies**

**Injunctive relief**

This remedy is only useful where the distribution of the images has not been so extensive or far reaching that to grant same would serve no useful purpose. In most cases the difficulty is that the extent of publication is widespread as communication is done with the swipe of a finger or the push of a button.

**Equitable Compensation**

In addition to or in substitution of injunctive relief the Court can compensate by awarding equitable compensation in the form of damages.

In awarding equitable compensation the Court uses its inherent jurisdiction in equity to make orders for monetary compensation as an appropriate means to remedy a purely equitable wrong.[[7]](#footnote-7)

The award under this tort like most torts seeks to put the innocent party in the position he/she would have been but for the misuse of the confidential information.

From the authorities[[8]](#footnote-8) the following is clear (a) the aggrieved party is entitled to general damages as well as aggravated damages for emotional and mental distress (b) In assessing damages, personal injuries awards provide a useful guide. (c) There is no need to prove psychiatric injury to support the case of mental and/or emotional distress.

It should be noted that there is also authority supporting the principle that failure on the part of Claimant to take care of his/her information or interest may lead to his claim being defeated.[[9]](#footnote-9)

The above has been subject to criticism as :-

1. Generally, damages are not recoverable as a common law remedy for mental or emotional distress falling short of psychiatric injury.
2. Awards of equitable compensation has been associated with property and economic interest and is not available for personal injury.[[10]](#footnote-10)

There is also authority for the award of exemplary damages. The Court of Appeal of New Zealand in Aquaculture Corporation v New Zealand Green Mussel Co. Ltd. postulated that in principle exemplary damages may be awarded for breach of confidence.[[11]](#footnote-11) The Canadian case of Norberg *v* Wynrib also supports this position*.[[12]](#footnote-12)*

This position has been met with disapproval. In Mosley -v- Newsgroup Newspapers*[2008] EWHC 1777 (QB) Eady J stated, "...*[E]xemplary damages are not admissible in a claim for infringement of privacy since there is no existing authority whether statutory or common law to justify such an extension and indeed it would fail the tests of necessity and proportionality*."* This position finds support in the case of Harris v Digital Pulse Pty Ltd.[[13]](#footnote-13)

Harris case seems to treat the issue as one of fusion between the common law and equity. It has stated that the availability of exemplary damages at common law but not in equity can be a source of legal incoherence.[[14]](#footnote-14)

**Way Forward- Need for legislative intervention**

The law on breach of confidence is at a watershed in that commercial secrets/confidential information have evolved and developed into protection of private information. There has been judicial willingness particularly in the Australian jurisdiction to develop the action for breach of confidence to protect private interests. It is submitted that the approach of the courts has been generally sympathetic to individuals and it is in these circumstances judges have been prepared to extend the reach of the breach of confidence to create a remedy.

Given the pace of technological change it has become necessary that the legislature takes control. Associate Professor David Ralph a media law expert at University of Sydney Law School commenting on the case of Wilson v Ferguson said the case “indicates that a breach of confidence might provide a remedy for addressing a lot of personal privacy concerns.”

He also lamented that there are damages when one uses existing causes of actions to new situations they do not fit, may distort the law and produce unintended consequences.

Mr. Ralph is quoted as saying “my own view is that privacy is a value worth protecting, it’s worth protecting directly and we should think about that in a broader more comprehensive way”.

Given the uncertainty of the law particularly in the area of the extent of equitable compensation remedies, there is need to create a generalized tort that is far more wide ranging with its focus being on the intrusion into the individual’s private life as opposed to a breach of trust between the parties.

The legislation should: -

1. Define the categories of personal relationships which may include the passing of confidential information
2. Facilitate for not only actual but also threatened misuse of the confidential information
3. Define the liability of Third party recipients of the confidential information
4. Place obligations on Innocent Recipients of confidential information
5. Provide for damages for mental and emotional distress.
6. Provide for exemplary damages so that same could act as a deterrent.

In closing I would like to quote Justice Seepersad in Therese Ho case.

“Given the rapid pace with which the face and fabric of the society has changed and cognizant of the infinite reach of social media, it cannot be denied that the privacy of the person is under attack and there is dire need for the enactment of statute to afford protection for citizens’

“Online conversations and the dissemination of information over the internet initiate an open ended forum. The internet is a comprehensive and cohesive database and there is really no anonymity in relation to the use of same. Photographs uploaded unto the internet can be retrieved forever. The impact upon an individual’s privacy is tremendous and the absence of clear and cohesive legislation to protect our citizen’s privacy and to punish those who violate the rights of others can cause us to descend into a bottomless pit of anarchy.”

1. Wainwright v Home Office [2004] 2 AC 406 [↑](#footnote-ref-1)
2. It is arguable that there are provisions in various Caribbean Constitutions. [↑](#footnote-ref-2)
3. Ho v Simmons CV2014-1949 [↑](#footnote-ref-3)
4. Douglas v Hello! Ltd [2001] QB 967, [2001] 2 All ER 289, CA; A v B plc [2002] EWCA Civ 337, [2003] QB 195, [2002] 2 All ER 545; Campbell v MGN Ltd [2004] UKHL 22, [2004] 2 AC 457, [2004] 2 All ER 995; McKennitt v Ash [2006] EWCA Civ 1714, [2008] QB 73, [2007] EMLR 113; HRH Prince of Wales v Associated Newspapers [2006] EWCA Civ 1776, [2008] Ch 57, [2007] 2 All ER 139. [↑](#footnote-ref-4)
5. Kaye v Robertson [1991] FSR 62, (1990) Times, 21 March CA [↑](#footnote-ref-5)
6. Hitchcock v TCN 9 (2000) NSWSC 198; Australian Broadcasting Corporation v Lenah Game Meats Pty.(2000) 208 CLR 1991; Giller v Procopets (2008)24 VR 1; Wilson v Ferguson [2015] WASC 15 [↑](#footnote-ref-6)
7. Professor Cameron Stewart [↑](#footnote-ref-7)
8. Giller v Procopets & Wilson v Ferguson Ho v Simmons Supra [↑](#footnote-ref-8)
9. Fractionated Care Technology Ltd. v Ruiz-Avila [1988] 1 Qd 51 [↑](#footnote-ref-9)
10. Meagher Gummow& Lehane’s Equity, Doctrines and Remedies(5th Edition) [23-605] [↑](#footnote-ref-10)
11. (1990) 3 NZLR 299 [↑](#footnote-ref-11)
12. (1992) 92 DLR (4th) 440 [↑](#footnote-ref-12)
13. ([2003) 56 NSWLR 298](http://138.25.65.22/cgi-bin/LawCite?cit=%282003%29%2056%20NSWLR%20298) [↑](#footnote-ref-13)
14. ##  Hughes, David A --- "A Classification of Fusion After Harris v Digital Pulse" [2006] UNSWLawJl 15

 [↑](#footnote-ref-14)