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@CanadaCreep and Privacy: Developing the Tort of Invasion of Privacy

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As I prepared to write a blog post about the future of privacy the story broke of @CanadaCreep, the Twitter account with 17,000 followers that posted photos and videos of unsuspecting women around Calgary. The kicker was that the material focused on women's breast, genital and buttocks regions, including upskirting videos (video up women's skirts). A 42-year-old Calgary man was criminally charged for the upskirting videos, specifically voyeurism, distributing voyeuristic recordings, and possessing and accessing child pornography. However, there are currently no charges related to the other pictures, the bulk of them that focused on specific regions of the female body that were under layers of clothing and not visible to the public. This is unnerving and confusing, because while we expect to be viewed casually when we are out in public, we don't expect specific body parts to be photographed and distributed to the world. It's classically objectifying, but more than that, it communicates the message that the second women walk out the door their bodies aren't theirs.

In terms of privacy it raises an enduring question in privacy law, which is whether we have a right to privacy in public and if so, the boundaries of such a right. At a more fundamental level, the question is the role of the law to remedy this kind of social problem. So much in the arenas of free speech and privacy is regulated by social norms—shunning, shaming, public debate and so on (but see "Online Shaming and the Right to Privacy" (2017) 6(1) *Laws* at 3). The law is a blunt tool that is often reserved for the most extreme cases. However, the law also has an expressive function to communicate the kind of society we want to live in. Hate speech laws are quintessential expressive laws, communicating to the public that hate speech is an unacceptable social harm. The problem with privacy law in Canada is that it has received insufficient attention outside scholarly and civil society circles to coherently develop as a body of law. This has had two effects: (a) minimal laws or unclear laws to address the warp-speed social harms wrought by internet communications; and (b) a problem of access to justice, because unclear laws, high costs of litigation and limited remedies make litigation unfeasible.

My focus here is on private law, and whether any of the women photographed could sue for the tort of invasion of privacy. The short answer is likely no. We have minimal rights to privacy in public in Canada, although that area of law is developing. This means Canadians are at a crossroads of opportunity concerning our development of privacy law. We can go the direction of our southern neighbour, which has minimal privacy protections in public, or take cues from Europeans, who have a stronger right to privacy in general, including in public places.

The larger point, which is the main purpose of this post, is that Canada is woefully behind in developing privacy law, particularly in the context of private law. We have significant privacy protection through data protection legislation and the excellent work of our privacy commissioners (federally see *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 (PIPEDA) and the *Privacy Act*, RSC 1985, c P-21). However, the privacy commissioners are not all things privacy. Indeed, their offices are flooded with complaints that are outside the narrow scope of their mandate and their offices operate under already strained resources.

Equally, privacy is protected through section 8 of the *Canadian Charter of Rights and Freedoms*, but the root of this protection in search and seizure laws has made the development of the law in this area deeply tied to criminal cases. In contrast, in Europe the individual's right to privacy in the *European Convention on Human Rights*, 1950 is more broadly about the "right to respect for his private and family life, his home and his correspondence" (Article 8). This has more readily allowed the development of privacy law in Europe outside the criminal context. Some of the major cases to come out of the European Court of Human Rights (ECtHR) are related to private actions for invasions of privacy.

By putting before the court scenarios that are unrelated to, for example, warrantless searches of cell phones, the more nuanced scenarios of our day to day lives are unpacked by the courts. Thus, for privacy in public, the ECtHR has examined the right to privacy of Princess Caroline of Monaco concerning pictures published in a magazine of her out and about with her family (*von Hannover v Germany* No 1, [2004] ECHR 294 and No 2, [2012] ECHR 228). The Court discussed a "zone of interaction of a person with others, even in a public context, which may fall within the scope of private life" (No. 2, para 95). In *Peck v United Kingdom*, [2003] ECHR 44, the Court considered the right to privacy concerning disclosure on a TV programme of CCTV footage of a man walking down a street moments after having attempted suicide. Here the Court commented that the footage was seen by far more people than the individual could have imagined when he was walking down that road (para 62). This is not to say that Europe has solved the privacy conundrum, but rather that it is at least in the muck figuring it out.

In a private law context in Canada, while we historically had piece-meal cases on privacy, the major case that introduced a right to privacy in a tort context was *Jones v Tsige*, 2012 ONCA 31 (CanLII). The Court introduced the four-part privacy test from American tort law: intrusion on seclusion, publication of private facts, false light invasion of privacy and appropriation of personality. This test (crafted by William Prosser) has received significant criticism in the United States (see, for example, here and here) and we should not import this test without scrutiny. Since *Jones*, the tort of publication of private facts was successfully applied to a situation of revenge pornography in *Doe 464533 v ND*, 2016 ONSC 541 (CanLII). However, the case continues to wind its way through the courts. In *Jones* a recommended cap of $20,000 was imposed for damages, and we await the final result in *Doe*. Provinces are leading in codifying a right of action for non-consensual sharing of intimate images, such as Manitoba's *Intimate Image*

Protection Act, CCSM c I87 and Alberta's recently passed *Protecting Victims of Non-Consensual Distribution of Intimate Images Act*, RSA 2017, c P-26.9.

The costs of litigation, combined with the potentially limited remedies, are insufficient to the task of addressing the kinds of privacy harms that are happening online. What is needed is clarity of laws, speedy resolution of complaints, and a technological enforcement measure, such as content removal, flagging of content, scrubbing from search results and so on. This kind of techno-legal resolution is also underexplored in Canada, although I await with interest the Supreme Court of Canada judgment on *Equustek Solutions v Google*, concerning worldwide delisting of a search result.

While intermediaries readily remove content for revenge pornography, a situation like @CanadaCreep, with the exception of the upskirting videos, does not obviously violate Twitter's Terms of Service. Looking at other social media, the Facebook Files, detailed by *The Guardian*, show a narrow conception of revenge pornography. In any event, offloading all responsibility to intermediaries is ill-advised. Their role is beyond the scope of this post, but suffice it to say that content management is a major issue for these companies. 500 million tweets are sent per day. YouTube receives 200,000 flags for content to review per day. Facebook receives 2 million complaints per week. If Canada wants these companies to comply with Canadian privacy law, we need a more coherent body of law to guide them and we should be hesitant to wholly outsource standard setting in this area to private companies.

Piece-meal provincial case law on privacy is insufficient to the privacy problems we face online. In order to adequately address these social harms, we need federal attention to the development of privacy law through a commission or task force. Last week the Liberal government unveiled its gender-based violence strategy, which includes creation of a centre that, among other things, will address online abuse of children. Privacy concerns will naturally thread through that work. This highlights a common problem with government attention to privacy problems. It is always folded into assessment of a pressing social issue, such as gender-based violence, national security or revenge pornography. Thus piece-meal development of the law continues, when what is needed, particularly for the development of private law in this area, is holistic tackling of the subject matter.

The problems identified above are compounded by the practical obstacles complainants face in accessing a resolution. As Ethan Katsh and Orna Rabinovich-Einy commented in *Digital Justice*, "[o]ne of the oldest maxims of law is that 'there is no right without a remedy'" (at 15). I am currently preparing a paper for the Law Commission of Ontario's project on defamation reform in the digital age on alternative ways to reform online defamation disputes. While the paper narrowly focuses on defamation law, it has relevance to the wider field of online abuse and privacy, because of the inadequacy of traditional remedies through the courts, at least sometimes, to address the harms of this kind of abuse. I explore a variety of remedial mechanisms to

complement court actions, from ways to incentivize corporate responsibility, to streamlining court processes, to creation of ombudsman services, and creation of online tribunals modelled on British Columbia's Civil Resolution Tribunal.

We are at a crossroads of opportunity in the area of privacy law. Both the law and methods of resolution are underdeveloped, yet the harms continue to multiply. Federal attention to the development of this body of law through a lens of access to justice and dispute resolution would provide much needed clarity to the law and signal the standards expected of internet users and the companies that provide the platforms through which we socialize.

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