0001 [ST: 147] [ED: 100000] [REL: 96] (Beg Group) **Composed:** Fri Apr 17 09:56:25 EDT 2020
XPP 9.3.1.0 SC_05905 nllp 8008
VER: [SC_05905-Local:09 Mar 20 11:49**][MX-SECNDARY:** 28 Feb 20 08:40**][TT-:** 23 Sep 11 07:01 loc=can unit=08008-ch0006**]** 20

Creating a Revenge Porn Tort for Canada

Emily Laidlaw

Hilary Young[*]

I. INTRODUCTION

Revenge porn — or more accurately, the non-consensual disclosure of intimate images ("NCDII") — cries out for legal redress. Its harms have been documented,[1] including humiliation, fear and distress, reputational harm, job loss, stalking and harassment . Yet invading someone's privacy and intentionally causing emotional distress are already tortious. In addition, in five Canadian provinces, NCDII is a tort[2] and throughout the country it is a crime.[3] One might reasonably ask whether new legal tools are needed to remedy NCDII or whether existing laws are adequate.

We were approached by the Uniform Law Conference of Canada[4] ("ULCC") to address a number of issues around an NCDII tort, including whether one is actually needed. We concluded that new law is desireable — not because NCDII would otherwise be lawful, but because a tailored tort could help provide access to justice to plaintiffs in ways that existing civil and criminal laws cannot. In particular, it could help provide relatively quick, cheap and efficient takedowns of non-consensual intimate images on the Internet. In addition, it could provide for compensatory damages without the need to engage privacy law's complex balancing

---

[*] Emily Laidlaw is an Associate Professor of Law at the University of Calgary. Hilary Young is an Associate Professor of Law at the University of New Brunswick. The authors wish to thank the Uniform Law Conference of Canada for inviting them to address the topic and for their invaluable feedback on earlier draft proposals. Emily Laidlaw wishes to thank Madison Fulton, Eric Rayment-Law and Nicholas Austin for their excellent research assistance. Hilary Young wishes to thank Colleen Thrasher and Chantalle Briggs for their excellent research assistance. This research was funded in part by the Social Sciences and Humanities Research Council.

[1] See, *e.g.*, Danielle Citron, *Hate Crimes in Cyberspace* (Cambridge, MA: Harvard University Press, 2014), at 6-10.

[2] *The Intimate Image Protection Act*, C.C.S.M. c. I87; *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c. P-26.9; *The Privacy Act*, R.S.S. 1978, c. P-24*; Intimate Images and Cyber-protection Act*, S.N.S. 2017, c. 7; *Intimate Images Protection Act*, R.S.N.L. 2018, c. I-22.

[3] *Criminal Code*, R.S.C. 1985, c. C-46, s. 162.1.

[4] The Uniform Law Conference of Canada is a law reform body that works toward harmonizing the laws of Canada's provinces and territories, as well as recommending changes to federal laws. See online: <https://www.ulcc.ca/en/>.

act or without the existence of a remedy depending on tangential considerations such as who took the photograph.[5] We ultimately recommend two separate statutory torts in relation to NCDII: a fast-track proceeding and a more traditional action for damages.

The fast-track proceeding would be strict liability, with the plaintiff only having to prove that an intimate image of her has been distributed by the defendant. Remedies would be declaratory and injunctive, requiring the defendant to remove content and, more realistically, leading Internet intermediaries to remove content and de-index search engine results.

The action for damages would be a more traditional tort, in that the defendant could defeat the claim by showing an absence of fault (no intent to distribute or no knowledge of the contents) or by establishing another defence, such as consent to distribute the image. The plaintiff would also have to adduce evidence in relation to harm and to the defendant's conduct in order to obtain more than nominal damages.

This article briefly makes the case for a new set of laws, then sets out the proposed elements and defences. It also addresses certain procedural issues, such as publication bans on the plaintiff's identity. Space constraints do not permit a full exploration of every aspect of the proposed torts, so we focus on recommendations that are potentially controversial or that diverge from the approach taken in existing NCDII torts. We hope that these proposals spur discussion and, ultimately, legislative change.

II. THE NEED FOR AN NCDII TORT

That certain forms of NCDII should be unlawful is, we believe, uncontroversial. The more difficult question is whether existing laws are adequate. These laws include the crime of publishing an intimate image without consent;[6] NCDII torts in Nova Scotia, Saskatchewan, Alberta, Manitoba and Newfoundland and Labrador;[7] common law and statutory privacy torts;[8] the tort of intentional infliction of nervous

[5] Copyright protects creative works and generally grants rights in the use of photographs to the photographer. See *Copyright Act*, R.S.C. 1985, c. C-42, ss. 2 and 13(1). See also *Allen v. Toronto Star Newspapers Ltd.*, [1995] O.J. No. 3473, 26 O.R. (3d) 308 (Ont. Gen. Div.). Thus, while copyright law can be useful in the NCDII context, that is only true if the person depicted took the photo.

[6] *Criminal Code*, R.S.C. 1985, c. C-46, s. 162.1.

[7] *Intimate Image Protection Act*, C.C.S.M. c. I87; *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c. P-26.9; *Privacy Act*, R.S.S. 1978, c. P-24; *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c. 7; *Intimate Images Protection Act*, R.S.N.L. 2018, c. I-22.

[8] See, *e.g.*, *Privacy Act*, R.S.B.C. 1996, c. 373, s. 1(1) and *Jones v. Tsige*, [2012] O.J. No. 148, 2012 ONCA 32 (Ont. C.A.).

shock;[9] the action in breach of confidence;[10] and copyright law.[11] That NCDII is a crime should not preclude tort liability, since NCDII is not only a public wrong but also a private one. A civil action offers certain advantages for victims of NCDII, including access to remedies, lower burden of proof and control over the litigation process.

Copyright law can be effective in addressing NCDII but cannot be a complete answer for several reasons. Most problematically, copyright usually belongs to content creators, meaning copyright in an image would be owned by the person who took the photograph or video. Thus, copyright is only helpful to redress NCDII if the plaintiff took the image herself. This will often not be the case.

Intentional infliction of nervous shock may also be made out in certain cases of NCDII. Its elements are: (i) conduct that is flagrant and outrageous; (ii) calculated to produce harm; and (iii) resulting in a visible and provable injury.[12] The intent requirement is made out where psychological harm was objectively foreseeable[13] — it need not be desired or subjectively intended. Indeed, an act of NCDII was found to constitute intentional infliction of nervous shock (among other torts) in *Jane Doe 464533 v. D. (N.)*.[14]

There are, however, barriers to using intentional infliction of nervous shock to deal with NCDII. One is the need for a recognized psychological injury. "Mere anguish or fright" is not enough.[15] That said, the threshold of provable psychological injury is lower for intentional than for negligent infliction of nervous shock.[16] Another barrier is the relatively heavy evidentiary onus placed on the plaintiff.

Breach of confidence has been argued successfully in NCDII cases,[17] but its

---

[9] See, *e.g.*, *Clark v. Royal Canadian Mounted Police*, [1994] F.C.J. No. 576, [1994] 3 F.C. 323 (F.C.T.D.).

[10] See, *e.g.*, *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] S.C.J. No. 83, [1989] 2 S.C.R. 574 (S.C.C.).

[11] See note 5.

[12] *Rahemtulla v. Vanfed Credit Union*, [1984] B.C.J. No. 2790, [1984] 3 W.W.R. 296, at paras. 52-56 (B.C.S.C.).

[13] *Clark v. Royal Canadian Mounted Police*, [1994] F.C.J. No. 576, [1994] 3 F.C. 323, at paras. 62-63 (F.C.T.D.).

[14] [2016] O.J. No. 6876, 2016 ONSC 4920 (Ont. S.C.J.). Note, however, that this default judgment decision was set aside.

[15] *Clark v. Royal Canadian Mounted Police*, [1994] F.C.J. No. 576, [1994] 3 F.C. 323, at para. 61 (F.C.T.D.).

[16] *Id.*, at para. 66.

[17] *Jane Doe 464533 v. D. (N.)*, [2016] O.J. No. 382, 128 O.R. (3d) 352, 2016 ONSC 541, at paras. 20-25 (Ont. S.C.J.). This is the same case mentioned above that was set aside. See note 14. See also the Australian cases *Giller v. Procopets*, [2004] VSC 113 (S.C.V.) and *Wilson v. Ferguson*, [2015] WASC 15 (S.C.W.A.).

applicability is somewhat uncertain, given that the case law on breach of confidence in the privacy context is underdeveloped in Canada.[18] Further, its equitable origins complicate the issue of damages, which are usually only available for economic losses.[19]

NCDII can be conceptualized as a breach of privacy and may run afoul of statutory[20] and common law privacy torts. Though the statutory privacy torts are broad, it is unclear whether or to what extent the common law privacy tort of intrusion upon seclusion extends to misuses of private information (which NCDII would be). In at least one NCDII case, however, an Ontario court extended the tort to include public disclosure of embarrassing private facts about the plaintiff.[21] Regardless, these torts are complex, require significant balancing of interests and are hard to invoke without legal representation. We believe that the specific sexualized and non-consensual nature of NCDII permits it to be dealt with more straightforwardly, without having to engage as much with free speech considerations, for example.

Finally, as noted above, five provinces already have NCDII torts. While there is overlap between them, there is no uniform approach. Rather than simply recommending one as a model for other Canadian jurisdictions, we believe they can all be improved.

Another issue around the need for a tort relates to the existence of extra-judicial mechanisms for dealing with NCDII. For most victims of NCDII, the cheapest, fastest and most effective way to achieve redress is to communicate to an intermediary or platform[22] that an image breaches the platform's terms of service.

---

[18] See Philip Osborne, *The Law of Torts*, 5th ed. (Toronto: Irwin Law, 2015), at 460. Regarding using breach of confidence in NCDII cases generally, see Ari Ezra Waldman, "A Breach of Trust: Fighting Non-Consensual Pornography" (2017) 102 Iowa L. Rev. 709, at 732.

[19] But see *Wilson v. Ferguson*, [2015] WASC 15, at paras. 72-85 (S.C.W.A.), in which the Supreme Court of Western Australia discussed whether damages were available in equity for non-economic losses and found that they were.

[20] This does not refer to privacy statutes concerning data protection, but rather to statutory formulations of privacy torts, evident in British Columbia's *Privacy Act*, R.S.B.C. 1996, c. 373, ss. 1 and 3, and Saskatchewan's *Privacy Act*, R.S.S. 1978, c. P-24, s. 2.

[21] See *Jane Doe 464533 v. D. (N.)*, [2016] O.J. No. 382, 128 O.R. (3d) 352, 2016 ONSC 541, at paras. 41-48 (Ont. S.C.J.). Recall this was a default judgment that was later set aside in *Jane Doe v. D. (N.)*, [2016] O.J. No. 6876, 2016 ONSC 4920 (Ont. S.C.J.).

[22] Definitions of "intermediary" and "platform" vary and this article does not explore them in depth. By "intermediary" we mean a company that facilitates transactions between third parties. "Platforms" are intermediaries that operate in multiple markets and facilitate transactions between multiple groups. Platforms tend to be intermediaries with significant power in the marketplace. See Organisation for Economic Co-operation and Development, *The Role of Internet Intermediaries in Advancing Public Policy Objectives* (OECD Publish-

Major intermediaries like Google, Twitter, Instagram and YouTube all have terms of service that prohibit NCDII.[23] While the speed with which these matters are dealt with varies, this is a faster mechanism than most legal proceedings. It is free and requires no legal assistance. There are, however, drawbacks to this approach. For example, decisions to remove images apply only to a particular intermediary — an individual cannot be ordered to remove a post or not to post elsewhere, nor does the process affect other intermediaries. Second, an intermediary may not think that its terms of service have been violated. For example, if an image was initially posted with consent but that consent was later withdrawn, Google will likely not de-index or remove it.[24] Third, there is generally little if any transparency, due process or right to appeal the decisions of intermediaries regarding the application of their terms of service.

In addition, in our conversations with practitioners it was reported that intermediaries do not always take down content alleged to be unlawful.[25] If pornography does not breach the terms and conditions of use, for example, then consent becomes the central point of inquiry to decide whether to take content down, something an intermediary is ill-equipped to assess. A court order provides clarity that the content is unlawful and can instruct that content should be taken down by third party providers.

Consider how takedown requests works on two platforms: Facebook and Google. Adult nudity, sexual activity in general and NCDII specifically, violate Facebook's Community Standards.[26] Generally, users can report images by clicking a report option next to the image (the ". . ." at the top right-hand corner of a post) and selecting from the menu of items. NCDII falls under the heading "Something Else".

---

ing, 2011), at 20; European Commission, "Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy" (September 24, 2015); Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford: Oxford University Press, 2016), at paras. 2.04-2.07.

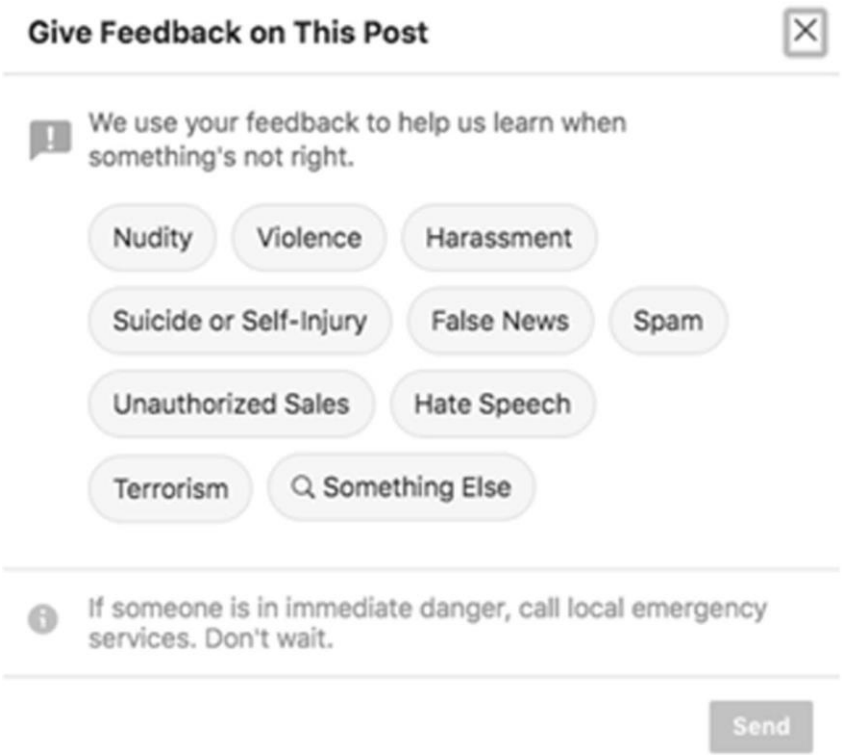
[23] See, *e.g.*, Facebook's policy, online: <https://www.facebook.com/communitystandards/sexual_exploitation_adults> and Twitter's policy, online: <https://help.twitter.com/en/rules-and-policies/intimate-media>.

[24] See Google Blogger Help Centre, online: <https://support.google.com/blogger/contact/private_info?id=&url=>.

[25] Reports are anecdotal, based on conversations with practitioners, and influenced our thinking on how best to facilitate access to justice. See David Kaye, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, A/HRC/38/35, at paras. 22-25. See also Facebook's "Community Standards Enforcement Report", online: <https://transparency.facebook.com/community-standards-enforcement>.

[26] See Facebook's "Community Standards Enforcement Report", ss. 8 and 14, online: <https://www.facebook.com/communitystandards/sexual_exploitation_adults> and <https://www.facebook.com/communitystandards/adult_nudity_sexual_activity/>.

0006 [ST: 147] [ED: 100000] [REL: 96] **Composed:** Fri Apr 17 09:56:25 EDT 2020
XPP 9.3.1.0 SC_05905 nllp 8008
VER: [SC_05905-Local:09 Mar 20 11:49**][MX-SECNDARY:** 28 Feb 20 08:40**][TT-:** 23 Sep 11 07:01 loc=can unit=08008-ch0006**]** 0



There is no easy path to communicate a court order with Facebook to compel content takedown. Plaintiffs or their lawyers would simply have to contact counsel at the corporate offices.

In contrast, Google removes NCDII in narrower circumstances.[27] It removes "non-consensual explicit imagery" if it infringes Google policies or if content removal is otherwise deemed appropriate.[28] An image does not infringe Google policies if the person depicted consented to posting it, if she is not identifiable, or if she received payment for the publication or otherwise benefitted from its circulation. Removal might be justified where there is a threat of wider dissemina-

[27] Google only removes certain content, such as spam, malware and phishing, harassment, bullying, impersonation, or disclosure or private information or nude images. See online: <http://support.google.com/legal/answer/3110420?hl=en>. Its policy for removing content is set out online: <https://support.google.com/legal/troubleshooter/1114905?hl=en>.

[28] If the content does not violate Google policies, Google will "review it and take action as necessary. We may also let the person know that there was a request sharing of the imagery" (<https://support.google.com/blogger/answer/7540088?visit_id=637007077301050871-1567633342&rd=1>).

tion, or might not be justified where the image is newsworthy or attracts a strong public interest.[29] A court might determine content is unlawful in circumstances that would not infringe Google's terms of service, making a court order necessary for content removal.

Google provides an online form to share court orders, provided they are not directed at Google.[30] If they are, the process is similar to Facebook's: plaintiffs or their lawyers would have to contact counsel at corporate offices.

Based on the above, while notifying an intermediary will often remain the cheapest, quickest and most effective step individuals can take when NCDII is communicated via an intermediary, additional legal tools are arguably necessary.

III. CAN ANY LAW BE EFFECTIVE?

There is no point in recommending a new tort if it cannot provide effective remedies. Some online content is beyond the reach of Canadian law because it is controlled by people outside the jurisdiction and with no Canadian assets. But in many other circumstances, the law can be effective, either because defendants have a presence in Canada or because content is transmitted through sites owned by corporations that will obey local laws and assist in their enforcement. The question we address is: What form should a law take so as best to ensure effective redress for victims of NCDII?

People may want to bring an NCDII tort action for several reasons. They may want an award of damages. They may want a court to vindicate them by acknowledging that they were wronged. But most people's primary concern is to obtain a takedown — the removal of content from the Internet or, alternately, de-indexing certain websites so that they do not appear in search engine results.[31] Further, obtaining such takedowns should be cheap and quick. If they are not cheaply obtained, takedowns will remain out of the reach of many victims of NCDII and this is an access to justice problem. If takedowns are not obtained quickly, the harm of NCDII is more likely to happen and is likely to be greater. It may be that the content will spread beyond the reach of Canadian courts or become more difficult to contain, or it may be that the image will become known to people in the

---

[29] Online: <https://support.google.com/blogger/answer/7540088?visit_id=636887089911140837-1804988280&rd=1>.

[30] Online: < https://support.google.com/legal/troubleshooter/1114905?hl=en#ts=1115645%2C3331068%2C1115795>.

[31] See, *e.g.*, Claire Reilly, "Revenge porn crackdown proposes new laws for abusers and websites" (May 22, 2017), online: *CNET* <https://www.cnet.com/news/australian-government-revenge-porn-crackdown-proposes-new-laws-abusers-websites/> and Adrienne N. Kitchen, "The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment" (2015) 90:1 Chicago-Kent L. Rev. 247, at 251: "Most victims want the offensive material removed and civil suits almost never succeed in removing the images due to the sheer magnitude of dissemination".

plaintiff's social circle, such that most of the harm to be done by NCDII will already have been done. In addition, the takedown orders themselves should be effective, meaning that they can be enforced against the relevant entities.

There is no perfect solution for achieving cheap, quick and effective takedowns. Attempts to make access to justice cheaper often mean a trade-off in effectiveness; achieving greater speed may mean a less effective remedy. For example, a small claims court proceeding is generally faster and cheaper than a superior court proceeding, but the inability of small claims courts to order injunctions makes that approach less effective.

Finally, there are costs to the justice system to take into account. Creating a specialized tribunal, in particular an online tribunal similar to British Columbia's Civil Resolution Tribunal, is an ideal way for parties to achieve cheap, quick and effective justice. Such a recommendation was made to the Law Commission of Ontario to reform defamation law, in particular, and for online harms more generally.[32] However, such a tribunal would necessitate significant investments of time, money and innovation, which makes it less feasible at this time, and beyond the scope of what the ULCC asked us to address. Other costs to the justice system might include making significant changes to traditional legal norms (e.g., allowing small claims courts to grant injunctions), which could affect the willingness of provinces to adopt proposed laws.

Our primary recommendation is to create a fast-track NCDII tort that could proceed by way of an action or perhaps by application.[33] The evidentiary burden on the plaintiff would be minimal and the primary remedies would be declaratory and injunctive, though nominal damages could be awarded. The goal is to give most victims of NCDII what they most want, as cheaply and quickly as possible.

We recognize that some plaintiffs will want damages. We therefore recommend that, in addition, there be a more traditional tort that places a greater onus on plaintiffs, which will take longer to litigate, and more likely require the assistance of counsel, but which could result in significant damages awards.

IV. A FAST-TRACK TORT

We recommend legislation creating a fast-track NCDII action. Its only elements

---

[32] Emily Laidlaw, "Are We Asking Too Much from Defamation Law? Reputation Systems, ADR, Industry Regulation and other Extra-Judicial Possibilities for Protecting Reputation in the Internet Age: Proposal for Reform", Report commissioner by the Law Commission of Ontario (September 2017), online: <http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw.pdf> or Emily Laidlaw, "Re-Imagining Resolution of Defamation Disputes" (2019) 56 Osgoode Hall L.J. 162.

[33] This will depend on the rules of court in each province. The existence of the defence of consent means that there would presumably have to be the ability to examine and cross-examine witnesses. In some provinces, this could be done by affidavit evidence on an application whereas in others this may not be possible.

would be that: (a) the defendant distributed (b) an intimate image (c) of the plaintiff. There would be no requirement to prove fault or loss. There would be no requirement to show that the image was non-consensually distributed. Fault should play a role in an action for compensatory damages, but not under the fast-track tort, whose main purpose is to obtain quick content takedowns.

There should be a defence that (d) the image was distributed with consent. If distributed with consent, the conduct is not wrongful. There should also be a defence of (e) public interest and certain other enumerated defences (good faith disclosure to law enforcement, *etc*.). The remedies would be primarily declaratory and injunctive, though nominal damages could be available.

Before examining the elements, defences and procedural considerations in detail, we note that this proposal is similar to Ireland's provision for a declaratory remedy in section 28 of the *Defamation Act 2009*.[34] Pursuant to section 28, a claimant can elect to apply for a declaratory order that a statement is false and defamatory. Choosing this route forecloses a traditional cause of action[35] and damages cannot be awarded.[36] However, a court may make an order to correct the defamatory statement or prevent publication or further publication.[37]

The advantage of a declaratory remedy is that it is potentially swift. However, the burden on the plaintiff in Ireland remains high. The plaintiff must prove that the statement is defamatory, that there is no defence, and that a request for an apology, correction or retraction was made and an adequate response was not received.[38] In *Lowry v. Smith*,[39] the court stated *in obiter* that section 28 imposes a high burden on plaintiffs, because plaintiffs must satisfy the court that there is no defence to the application:

> It is unsurprising that there have been few such application since this decision. On this analysis, [proceedings under section 28] are almost impossible for an applicant to win, and if [s]he brings the application but fails, then [s]he has no other remedy thereafter.[40]

The Irish experience and the fact that NCDII is simpler than defamation lead us to recommend a simple tort with a relatively low onus of proof on the plaintiff. In addition, the fast-track option should not preclude a separate action for damages, as that may dissuade some people from using the fast-track proceeding at all.

---

[34] *Defamation Act 2009* (Ireland), No. 31 of 2009, s. 28.

[35] *Id.*, s. 28(4).

[36] *Id.*, s. 28(8).

[37] *Id.*, s. 28(6).

[38] *Id.*, s. 28(2).

[39] [2012] IR 400.

[40] *Id.*, at paras. 34-35. See discussion about the burden in *Gilroy & Anor v. O'Leary*, [2019] IEHC 52 (H.C.); see also *Defamation Act 2009* (Ireland), No. 31 of 2009, s. 28(2)(a).

1. Elements

(a) Distribution

Recommendation:

Distribution should be defined in terms of making images available to others. No knowledge or intent to distribute should be included in the definition.

The definition of distribution in existing NCDII legislation is a good starting point. For example, Manitoba's *Intimate Image Protection Act* defines distribution as follows:

> 1 (2) For the purpose of this Act, a person distributes an intimate image if he or she knowingly publishes, transmits, sells, advertises or otherwise distributes or makes the image available to a person other than the person depicted in the image.[41]

The language of publishing and making available is relatively consistent with the definition of publication in defamation (although it is unclear whether defamation requires *knowing* distribution).[42] The crux of distribution is to make content available to third parties; it is not possession, authorship or endorsement.

However, we recommend against requiring "knowing" publication. This is essentially a fault requirement, and we intend for the fast-track procedure to be strict liability. We make this recommendation in order to make the tort easier for plaintiffs to litigate — they will not have to prove the defendant knew they were distributing particular images. As a consequence, however, compensatory damages are not available (unlike in the Canadian NCDII statutes). The point is that distributing an image can be declared wrongful, and the image can be ordered taken down, regardless of the defendant's knowledge or intent.

This raises the question of whether Internet intermediaries would be caught by this fast-track tort. Based on the definition of distribution proposed, they likely would. Yet we believe that Internet intermediaries should generally not be liable for NCDII. Their lack of knowledge is not relevant to the tort as we have described it, but in a fast-track proceeding for takedowns, there is little advantage to making intermediaries potential defendants. This is particularly so given that there is reason to believe that companies like Google and Facebook may resist attempts to find them liable, whereas they would be willing to obey a court order that resulted from a finding of liability against someone else.[43]

The fast-track proceeding would allow the plaintiff to obtain a declaratory order that the image is unlawful and enable the plaintiff to seek removal of the image from online providers, and/or an injunction against (non-intermediary) defendants ordering they remove images. These routes allow the plaintiff or defendant, depending on

---

[41] C.C.S.M. c. I87, s. 1(2).

[42] See Emily Laidlaw & Hilary Young, "Internet Intermediary Liability in Defamation" (2019) 56 Osgoode Hall L.J. 112, at 117-18.

[43] This information is anecdotal, obtained from conversations with practitioners.

the order, to send the order to an intermediary's corporate counsel and request content takedown. Most intermediaries' terms of service prohibit posting unlawful content, and a court order is compelling evidence their terms have been breached.

Further, in principle, most major intermediaries comply with local law.[44] Intermediaries will scrutinize a court order to make a determination whether to comply. This is partly because these platforms are global and navigate different cultural and legal approaches to freedom of expression. Sometimes companies are pressured to remove content under vague laws or in circumstances that do not comply with international human rights principles (*e.g.*, content that is critical of the state, blasphemous, offensive).[45] As a result, sometimes companies resist content removal. None of these are concerns for the narrow tort proposed here.

The question remains whether it is ever appropriate for intermediaries to be liable for NCDII. We have proposed a definition of distribution that would tend to capture the acts of intermediaries (they distribute intimate images) while suggesting they should not be liable. To complicate things further, it may be that some intermediaries *should* be liable, namely those that are primarily devoted to hosting content such as NCDII.

There are several possibilities for dealing with the intermediaries problem. First, intermediaries could be explicitly excluded from liability. For example, section 8 of the U.S. Draft *Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act*[46] excludes intermediaries from liability, stating that the legislation is to be interpreted as consistent with existing intermediary liability legislation, namely section 230 of the *Communications Decency Act*.[47] This approach makes sense in the U.S., where intermediaries receive broad immunities in relation to third party content, but makes perhaps less sense in Canada, which has no equivalent of section 230 of the *Communications Decency Act*.

Second, liability could be limited to a narrow subset of intermediaries, "the very worst actors": "sites that encourage cyber stalking or non-consensual pornography and make money from its removal *or* that principally host cyber stalking or non-consensual pornography."[48] Third, an intermediary could be provided a safe

---

[44] David Kaye, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, A/HRC/38/35, at para. 22. See general discussion at paras. 22-25.

[45] *Id.*, at paras. 13-21, 23.

[46] National Conference of Commissioners on Uniform State Laws, Draft *Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act* (2018) [hereinafter the "U.S. Draft *Intimate Images Act*"].

[47] 47 USC (1996).

[48] Danielle Citron, *Hate Crimes in Cyberspace* (Cambridge, MA: Harvard University Press, 2014), at 177.

harbour from liability, which it could lose if it did not take "reasonable steps to address unlawful uses of its services".[49]

Our preference is for the first of these (intermediaries explicitly excluded) for the fast-track tort. This is to keep matters as simple as possible by avoiding litigation over whether an intermediary has taken reasonable steps, for example. We also recommend this approach on the assumption that compliance with an injunction will not depend on whether an intermediary is a named defendant. In other words, there is little to gain from naming the intermediary as a defendant in the fast-track proceeding. Our recommendation is different for the action for compensatory damages (see Section V.2(b) below).

(b) "Intimate Image"

Recommendation

The definition of "intimate image" should be grounded in the concept of privacy and include altered images, near-nude images and other images of a similar nature (toileting, dressing and undressing, and upskirting), but should exclude most wholly original content.

All Canadian NCDII legislation uses the same definition of "intimate image":

> "intimate image" means a visual recording of a person made by any means, including a photograph, film or video recording,
>
> (i) in which the person depicted in the image
>
> (A) is nude, or is exposing his or her genital organs or anal region or her breasts, or
>
> (B) is engaged in explicit sexual activity,
>
> (ii) which was recorded in circumstances that gave rise to a reasonable expectation of privacy in respect of that image, and
>
> **(iii)** if the image has been distributed, in which the person depicted in the image retained a reasonable expectation of privacy at the time it was distributed.[50]

We agree that the concept of privacy is relevant to the definition of "intimate image" and recommend something like provisions (ii) and (iii) above. However, two

---

[49] Robert Chesney & Danielle Keats Citron, "Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security" (2019) 107 Cal. L. Rev. 1753, <doi:10.2139/ssrn.3213954>, quoting Danielle Keats Citron & Benjamin Wittes, "The Internet Will Not Break: Fixing Section 230 Immunity for Bad Samaritans" (2017) 86 Fordham L. Rev. 401.

[50] *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c. P-26.9, s. 1(b); *Privacy Act*, R.S.S. 1978, c. P-24, s. 7.1; *Intimate Image Protection Act*, C.C.S.M. c. I87, s. 1(1); *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c. 7, s. 3(f); *Intimate Images Protection Act*, R.S.N.L. 2018, c. I-22, s. 2.

issues concerning the definition of "intimate image" require elaboration: whether it should capture altered images, and whether something less than full nudity (*e.g.*, an image of someone wearing underwear) should be included.

(i) Altered Images or Recordings

It is increasingly common for altered images, video or sound, colloquialy known as "deepfake" technology, to be created for the purpose of causing harm to an individual. As Robert Chesney and Danielle Citron identified:

> Fueled by artificial intelligence, digital impersonation is on the rise. Machine-learning algorithms (often neural networks) combined with facial-mapping software enable the cheap and easy fabrication of content that hijacks one's identity—voice, face, body. Deep fake technology inserts individuals' faces into videos without their permission. The result is "believable videos of people doing and saying things they never did".[51]

The technology came to the public's attention when a series of fake pornography images and videos were created and distributed, using the faces of celebrities, such as Emma Watson and Natalie Portman, superimposed on the bodies of other individuals. In order to create a deepfake, a perpetrator usually needs access to hundreds of images of the victim.[52] User-friendly applications like Fake App work best with multiple images of the subject(s),[53] though technology is now enabling realistic deepfakes to be created from a single image,[54] as well as making it easier to create higher quality deepfakes.[55] Popular social media groups are devoted to

---

[51] Robert Chesney & Danielle Citron, "Deep Fakes: A Looming Crisis for National Security, Democracy and Privacy" (February 21, 2018), online: *Lawfare* <https://www.lawfareblog.com/deep-fakes-looming-crisis-national-security-democracy-and-privacy> and the scholarly article of the same name, Robert Chesney & Danielle Keats Citron, "Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security" (2019) 107 Cal. L. Rev. 1753.

[52] Adam Dodge & Erica Johnstone, "Using Fake Video Technology to Perpetrate Intimage Partner Abuse" (April 25, 2018), Domestic Violence Advisory, online: *Without My Consent* <https://withoutmyconsent.org/blog/2018-04-25-a-new-advisory-helps-domestic-violence-survivors-prevent-and-stop-deepfake-abuse/>.

[53] See report by Kevin Roose, "Here Come the Fake Videos, Too" (March 4, 2018), online: *The New York Times* <https://www.nytimes.com/2018/03/04/technology/fake-videos-deepfakes.html>, first cited in Robert Chesney & Danielle Citron, "Deep Fakes: A Looming Crisis for National Security, Democracy and Privacy" (February 21, 2018), online: *Lawfare* <https://www.lawfareblog.com/deep-fakes-looming-crisis-national-security-democracy-and-privacy>.

[54] Mindy Weisberger, "Watch Mona Lisa come to life in startling 'deepfake' videos" (May 28, 2019), online: *NBC News* <https://www.nbcnews.com/mach/science/watch-mona- lisa-come-life-startling-deepfake-videos-ncna1010871>.

[55] Robert Chesney & Danielle Citron, "Deep Fakes: A Looming Crisis for National Security, Democracy and Privacy" (February 21, 2018), at 5-8, online: *Lawfare* <https://

discussing how to create fake pornography videos of people they know, often ex-partners.[56] The victims are usually women, which is true of NCDII generally.[57]

The victims of deepfake sex videos can experience significant emotional harm. The videos or images can appear realistic and can result in the same real-world consequences as traditional NCDII, such as reputational harm, loss of employment, stalking, harassment, *etc*. The effect on victims includes sexual objectification without consent, feelings of shame and humiliation, and undermining of victims' agency to consent to all aspects of their sexual experiences.[58]

We recommend that the definition of "intimate image" include altered images. Ireland's proposed *Harmful Communications and Digital Safety Bill*[59] provides a useful template, although it is a criminal statute. It defines "intimate image" (in the relevant part) to mean "a visual recording of a person made by any means including a photographic, film or video recording *(whether or not the image of the person has been altered in any way) . . .*".[60]

We are mindful that some forms of altered images — even ones that involve nudity — may serve a public interest. One can imagine a scenario where a politician's head is superimposed on someone else's naked body for the purpose of satire or parody. Our proposed public interest defence, discussed in Section IV.2(b) below, would provide a defence for altered images created and shared for the

---

www.lawfareblog.com/deep-fakes-looming-crisis-national-security-democracy-and-privacy>.

[56] Adam Dodge & Erica Johnstone, "Using Fake Video Technology to Perpetrate Intimage Partner Abuse" (April 25, 2018), Domestic Violence Advisory, at 5-6, online: *Without My Consent* <https://withoutmyconsent.org/blog/2018-04-25-a-new-advisory-helps-domestic-violence-survivors-prevent-and-stop-deepfake-abuse/> gave the example of a Reddit group with 100,000 users.

[57] As Mary Anne Franks and Ari Ezra Waldman identify, the targets are disproportionately women and LGBTQ: "Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions (2019) 78 Md. L. Rev. 892, at 893-94. On NCDII, see Danielle Keats Citron & Mary Anne Franks, "Criminalizing Revenge Porn" (2014) 49 Wake Forest L. Rev. 345, at 353. See also general statistics of sharing of intimate images discussed in Derek E. Bambauer, "Exposed" (2014) 98 Minn. L. Rev. 2025, section I.

[58] See Robert Chesney & Danielle Citron, "Deep Fakes: A Looming Crisis for National Security, Democracy and Privacy" (February 21, 2018), online: *Lawfare* <https://www.lawfareblog.com/deep-fakes-looming-crisis-national-security-democracy-and-privacy>, in particular 16-20; Adam Dodge & Erica Johnstone, "Using Fake Video Technology to Perpetrate Intimage Partner Abuse" (April 25, 2018), Domestic Violence Advisory, at 4-5, online: *Without My Consent* <https://withoutmyconsent.org/blog/2018-04-25-a-new-advisory-helps-domestic-violence-survivors-prevent-and-stop-deepfake-abuse/>.

[59] *Harmful Communications and Digital Safety Bill 2017* (Ireland), Bill 5 of 2017.

[60] *Id.*, s. 2 (emphasis added). Scotland has a similar definition: *Abusive Behaviour and Sexual Harm (Scotland) Act 2016*, 2016 asp 22, s. 3(2).

purposes of political expression, newsworthiness, parody or similar. This is therefore no reason to exclude deepfakes from the definition of "intimate image".

We do recommend, however, that the definition of intimate image be restricted to images that give the impression of capturing the plaintiff's actual likeness or behaviour, as opposed to paintings or drawings that are images of the plaintiff but do not purport to depict reality.[61] Wholly original content, such as paintings and drawings, was excluded from the U.S. Draft *Intimage Images Act* because the potential harm was of a different character than that of photos and videos.[62] We agree that, in most cases, the harm is of a different character. Wholly original content might be hateful and humiliating, but it does not involve a breach of trust in a moment of vulnerability that as readily implicates sexual autonomy. In addition, it does not reflect on the plaintiff in the way that photographs or videos do. We are also mindful that these may be forms of artistic expression. That said, drawn or painted images could be so realistic as to give the impression of being photographs or videos, in which case they should be included, as they replicate the harms of deepfakes.

In light of our proposal that the tort place the onus of proving consent on the defendant, and given the option of a simple strict liability procedure, excluding wholly original content that does not purport to depict reality, such as drawings and paintings, from the definition of intimate images is justified. For such content, other causes of action might be suitable, such as invasion of privacy, defamation or intentional infliction of emotional distress.[63]

(ii) Near-Nude Images

Currently, all Canadian NCDII legislation defines "intimate image" in terms of nudity — where the individual is "nude, or is exposing his or her genital organs or anal region or her breasts", or in terms of explicit sexual activity.[64] The U.S. Draft *Intimate Images Act* similarly restricts its definition to images of "uncovered" areas of the body, and restricts the list to "genitals, pubic area, anus, or female

---

[61] This does not consider the availability of a criminal charge for such drawings, taking into account *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45, 2001 SCC 2 (S.C.C.) (unlike in *Sharpe*, the drawings here are not for private use but are shared).

[62] National Conference of Commissioners on Uniform State Laws, Draft *Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act* (2018), Prefatory Note at 5.

[63] The availability of other causes of action influenced the thinking of the drafters of the National Conference of Commissioners on Uniform State Laws, Draft *Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act* (2018), Prefatory Note at 1.

[64] *Intimate Image Protection Act*, C.C.S.M. c. I87, s. 1(1); *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c. P-26.9, s. 1(b); *Privacy Act*, R.S.S. 1978, c. P-24, s. 7.1; *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c. 7, s. 3(f); *Intimate Images Protection Act*, R.S.N.L. 2018, c. I-22, s. 2(b).

post-pubescent nipple".[65] Other intimate parts of the body were excluded, because "it is not uncommon for buttocks and parts of the female breast other than the nipple to be displayed in public (for example, at beaches and nightclubs)".[66]

In contrast, some jurisdictions use a broader definition that includes images of: intimate parts of the body covered in underwear; toileting; dressing or undressing; and upskirting. New Zealand defines "intimate visual recording" as:

> **intimate visual recording—**
>
> (a) means a visual recording (for example, a photograph, videotape, or digital image) that is made in any medium using any device with or without the knowledge or consent of the individual who is the subject of the recording, and that is of—
>
> (i) an individual who is in a place which, in the circumstances, would reasonably be expected to provide privacy, and the individual is—
>
> (A) naked or has his or her genitals, pubic area, buttocks, or female breasts exposed, partially exposed, or clad solely in undergarments; or
>
> (B) engaged in an intimate sexual activity; or
>
> (C) engaged in showering, toileting, or other personal bodily activity that involves dressing or undressing; or
>
> (ii) an individual's naked or undergarment-clad genitals, pubic area, buttocks, or female breasts which is made—
>
> (A) from beneath or under an individual's clothing; or
>
> (B) through an individual's outer clothing in circumstances where it is unreasonable to do so; and
>
> (b) includes an intimate visual recording that is made and transmitted in real time without retention or storage in—
>
> (i) a physical form; or
>
> **(ii)** an electronic form from which the recording is capable of being reproduced with or without the aid of any device or thing.[67]

New Zealand's law notably also captures recordings that are transmitted without storage. Scotland and Ireland use broader definitions than Canadian NCDII legislation, but these are criminal statutes. Ireland's proposed law defines intimate

---

[65] National Conference of Commissioners on Uniform State Laws, Draft *Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act* (2018), s. 2(7)(a).

[66] *Id.*, at 2, Prefatory Note.

[67] *Harmful Digital Communications Act 2015* (New Zealand), 2015/63, s. 4.

image to include intimate parts covered by underwear.[68] Scotland broadly frames the crime as disclosure or threatened disclosure that shows an "intimate situation", which includes parts covered only by underwear.[69] The potential breadth of these definitions of intimate image is tempered by the criteria that the image was recorded in circumstances giving rise to a reasonable expectation of privacy (Ireland and New Zealand) and that the disclosure was done intentionally (or recklessly) to cause fear, alarm or distress (Scotland).[70]

Including images of underwear in the definition of "intimate image" might be too broad and lead to liability for non-blameworthy conduct, such as posting pictures from the beach. However, to constitute an "intimate image" it must be recorded in circumstances giving rise to a reasonable expectation of privacy. This acts as an important restraint on the definition of "intimate image", and would have the effect of excluding typical beach pictures from the definition. In another scenario, an individual might share a near-nude intimate photo, which an ex-partner discloses to third parties in order to hurt the plaintiff. The latter scenario is similar in nature to sharing nude images and may cause significant harm to the individual depicted. Under current Canadian legislation, distributing such an image would not be actionable as NCDII, although a claim for invasion of privacy might succeed.

We recommend a definition of intimate image similar to the New Zealand definition, to include near-nude photos, toileting, dressing and undressing, and upskirting photos that were taken or shared in circumstances where there was a reasonable expectation of privacy. In principle, such photos are similar to nude intimate images in terms of the blameworthy conduct and the harm caused by their disclosure. It would be preferable for similar acts to be captured under the same legal framework.

(c) "Of the Plaintiff"

Recommendation

While the plaintiff must prove she is depicted, it should not be a requirement that the plaintiff be identifiable.

One issue is whether the cause of action should apply only where the subject of the photo is identifiable to a third party — either from the image itself or from information connected to the image (*e.g.*, the bedroom in the background is recognizable). Such a narrow definition would exclude certain harmful conduct from the tort's scope. For example, a person might take a selfie of intimate parts of

---

[68] *Harmful Communications and Digital Safety Bill 2017* (Ireland), Bill 5 of 2017, s. 2(a)(i): "of the person's genital or anal region or in the case of a female of her breasts (whether genital or anal region or, as the case may be, the breasts are covered by underwear or are bare)".

[69] *Abusive Behaviour and Sexual Harm (Scotland) Act 2016*, 2016 asp 22, ss. 2-3.

[70] *Id.*, s. 2(1); *Harmful Communications and Digital Safety Bill 2017* (Ireland), Bill 5 of 2017, s. 2(b); *Harmful Digital Communications Act 2015* (New Zealand), 2015/63, s. 4(a)(i).

her body and share it with a partner, who distributes it to others without consent. The person knows it is her body even if no one else knows. Further, the person may live in fear that she will be identifiable at some point in the future, whether because someone pieces together it is her, or because the person who posted the image identifies it as her.

The U.S. Draft *Intimate Images Act* explicitly states the intimate image must be identifiable to a third party.[71] "Identifiable" is defined in the Act as recognizable from the image or from the image and "identifying characteristic[s] displayed in connection with the the intimate image".[72]

This narrow approach to intimate images might be rooted in the particular balancing in the United States between the First Amendment right to freedom of expression and other rights, and the narrow conception of the tort of privacy. Academic discussion of how to draft an effective NCDII law does not question the need for the person to be identifiable.[73]

In contrast, all Canadian NCDII legislation uses the same definition of intimate image, which does not focus on the issue of whether the individual is identifiable in the image. Instead, the legislation refers to a "person depicted in the image".[74]

Despite the apparent flexibility of the definition of intimate image in Canadian legislation, the definition is actually unclear. "[D]epicted in" might be interpreted to mean that the plaintiff must be identifiable. The term is not defined in any of the Canadian legislation. The U.S. Draft *Intimate Images Act* defines "depicted individual" as "an individual whose body is shown in whole or in part in an intimate image".[75] Based on this definition, "depicted" would likely be interpreted to mean that part of the plaintiff's body is shown, rather than requiring her to be identifiable from the image. Nevertheless, there is some ambiguity in the definition which we seek to avoid.

Legislation should be clear that a plaintiff does not need to be identifiable *to a*

---

[71] National Conference of Commissioners on Uniform State Laws, Draft *Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act* (2018), s. 3(2)(b) (emphasis added): [A] depicted individual *who is identifiable* and who suffers harm from a person's intentional disclosure or threatened disclosure of an intimate image . . . has a cause of action against the person if . . .

[72] *Id.*, s. 2(4).

[73] Mary Anne Franks, "Drafting an Effective 'Revenge Porn' Law: A Guide for Legislators" (August 17, 2015), online: <http://dx.doi.org/10.2139/ssrn.2468823>.

[74] *Intimate Image Protection Act*, C.C.S.M. c. I87, s. 1(1); *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c. P-26.9, s. 1(b)(i); *Privacy Act*, R.S.S. 1978, c. P-24, s. 7.1(a); *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c. 7, s. 3(f); *Intimate Images Protection Act*, R.S.N.L. 2018, c. I-22, s. 2(b).

[75] National Conference of Commissioners on Uniform State Laws, Draft *Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act* (2018), s. 2(2).

third party as an element of the tort. It is enough that the plaintiff can prove that she is the person depicted in the image. We come to this conclusion for the following reasons.

Restricting the cause of action to images of identifiable people focuses on only one aspect of the harms of NCDII, namely reputational harms. The logic of that approach is that if no one knows you are the person in the image, there is no reputational harm and therefore no cause of action. However, we reject a reputation-based approach in principle and for practical reasons. In principle, it is under-inclusive of the social harms of NCDII. Explicitly including images of unidentifiable people in the cause of action recognizes both reputational harms and invasions of privacy that flow from NCDII. It also recognizes that sexual identity and sexual objectification are at issue regardless of whether the individual is identifiable, and a person can experience severe emotional distress from the distribution of such an image regardless of whether the image is identifying.

In practice, an apparently unidentifiable person may later be identified and may fear being identified. Time is of the essence to prevent further distribution of an image (to the extent possible). Waiting until a plaintiff is identifiable forces her to wait until the worst damage possible is inflicted before she can act.

(d) Injury/Harm

Recommendation

There should be no injury or harm element.

There should be no injury or harm element. Many torts require proof of injury — they are not actionable *per se*. This makes sense where torts are primarily aimed at compensation and the fault standard is carelessness. There are, however, a number of torts that are actionable *per se* and these tend to be intentional torts where the wrong consists of the infringement of a right, regardless of injury. This is the case with battery, for example, where the wrong consists of infringing the right to bodily autonomy.

No existing Canadian NCDII torts require proof of harm. The U.S. Draft *Intimate Images Act* does require that the plaintiff suffer harm.[76] However, it defines harm to include emotional distress, and it is difficult to imagine litigation for NCDII that does not involve the plaintiff suffering emotional distress.

We recommend against requiring proof of harm in both the fast-track procedure and the action for compensatory damages for two reasons — one principled and one practical. In principle, the nature of the wrong is the infringement of the right not to have such images published and is akin to a breach of the right to privacy. Even in the absence of any suffering or loss on the part of the plaintiff, NCDII involves the infringement of a right. Therefore, no proof of injury should be required.

Second, as a practical matter, injury — at least in the form of emotional distress

[76] *Id.*, s. 3(b).

— will effectively always be present. Requiring the plaintiff to prove this is unnecessarily burdensome.

(e) Threats

The cause of action should include threats to distribute intimate images.

No Canadian jurisdiction explicitly includes threats in its NCDII statute,[77] except to the extent that Nova Scotia includes threats generally within its definition of cyber-bullying.[78] The threat to distribute an intimate image is itself treated as cyber-bullying, and the court may, among other things, make an order prohibiting a person from distributing the intimate image.

We believe that legislation should explicitly provide a remedy for the threat to distribute an intimate image. For example, individual A might threaten to distribute a photo if individual B breaks up with him or her, or fails to comply with other demands. Such threats are increasingly common and are evident in domestic abuse, where technology is used to exert power and control (*e.g.*, control and monitoring of computer use; control of Internet of Things devices to turn on and off lights, and lock and unlock doors).[79] It is evident in other online contexts, including predatory behaviour by strangers or breaches of trust by friends, who convince an individual to share an intimate image and then threaten to share such images (*e.g.*, sextortion or threats of toxic tagging).[80]

There is support for providing recourse for threats to distribute NCDII. The U.S. Draft *Intimate Images Act* imposes liability for "threatened disclosure of an intimate image that was private".[81] Similarly, Australia's *Enhancing Online Safety Act*[82]

---

[77] The relevant provision in each piece of legislation is the definition of distribution: *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c. P-26.9, s. 2; *Privacy Act*, R.S.S. 1978, c. P-24, s. 7.3(2); *Intimate Image Protection Act*, C.C.S.M. c. I87, s. 11(2); *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c. 7, s. 3(d); *Intimate Images Protection Act*, R.S.N.L. 2018, c. I-22, s. 4. Threatened disclosure is not addressed in any of the other provisions.

[78] *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c. 7, s. 3(c).

[79] See Nellie Bowles, "Thermostats, Locks and Lights: Digital Tools of Domestic Abuse" (June 23, 2018), online: *The New York Times* <https://www.nytimes.com/2018/06/23/technology/smart-home-devices-domestic-abuse.html>.

[80] In the case of Amanda Todd, a stranger convinced Amanda to share an intimate image and then threatened disclosure repeatedly over several years, including distributing the image to her peers.

[81] National Conference of Commissioners on Uniform State Laws, Draft *Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act* (2018), s. 3(b)

> : . . . a depicted individual who is identifiable and who suffers harm from a person's intentional disclosure or threatened disclosure of an intimate image that was private without the depicted individual's consent has a cause of action against the person if the person knew [or acted with reckless disregard for whether]:

creates a civil cause of action for threats to post an intimate image without consent, although the provision more narrowly targets distribution online.[83]

If threats were excluded from legislation, an injunction would still be available to prohibit distribution of an intimate image. However, it is our view that, in principle, threats should be included. The threat of disclosure of an intimate image is itself potentially harmful, and there are torts in relation to other kinds of threats,[84] which helps to justify making threats to distribute NCDII tortious.[85] Including threats of distribution within the NCDII torts makes it easier to get an order prohibiting distribution of the image, since the tort will already have been committed and the injunction sought is not *quia timet*. We acknowledge, however, that in certain circumstances, such as cases of domestic abuse, individuals will be unlikely to pursue a civil claim, and that making threats tortious would largely be ineffective against individuals out of jurisdiction.

2. Defences

Recommendation

The defences for both the fast-track NCDII tort and the tort for compensatory damages should include consent, public interest and certain other enumerated defences (good faith disclosure to law enforcement, etc.). Fault-based defences should apply only to the action for compensatory damages.

(a) Defence of Consent

Recommendation

Consent should be a defence to both NCDII torts. Knowledge of (a lack of) consent and (non-)recklessness as to consent should not be elements or defences. Consent should explicitly be revocable.

Although NCDII is, according to its name, a tort of *non-consensual* disclosure, most existing Canadian NCDII statutes focus on lack of *knowledge* of consent rather than on whether there is, in fact, consent. The clearest expression of this is found in the Manitoba and Alberta statutes, whose language is almost identical:

---

(1) the depicted individual did not consent to the disclosure;

(2) the intimate image was private; and

(3) the depicted individual was identifiable.

[82] *Enhancing Online Safety Act 2015* (Australia), No. 24, 2015.

[83] *Id.*, s. 44B: (1) A person (the ***first person***) must not post, or make a threat to post, an intimate image of another person (the ***second person***) on: (a) a social media service; or (b) a relevant electronic service; or (c) a designated internet service; . . .

[84] For example, the tort of assault relates to threats of physical contact and is actionable regardless of whether physical contact actually resulted.

[85] For example, see the discussion in Ben Robinson & Nicola Dowling, "Revenge Porn Laws 'Not Working', Says Victims Group" (May 19, 2019), online: *BBC News* <https://www.bbc.com/news/uk-48309752>.

> A person who distributes an intimate image of another person knowing that the person depicted in the image did not consent to the distribution, or being reckless as to whether or not that person consented to the distribution, commits a tort against that other person.[86]

The same requirement of publishing with knowledge of lack of consent would seem to exist in Saskatchewan, although the statutory language is problematically unclear, in our opinion. While section 7.3(1) says it is a tort to distribute an intimate image without consent, the statute defines lack of consent solely in terms of lack of *knowledge* of consent (or recklessness):

> 7.3 (1) It is a tort for a person to distribute an intimate image of another person *without that other person's consent*.
>
> (2) A person who distributes an intimate image commits the tort mentioned in subsection (1) against the person depicted in the image *in any of the following circumstances*:
>
> (a) the person *knows* that the person depicted in the image did not consent to the distribution;
>
> **(b)** the person *is reckless* as to whether or not the person depicted in the image consented to the distribution. [87]

To further confuse matters, in Saskatchewan, "the defendant must establish that he or she had reasonable grounds to believe that he or she had ongoing consent for distribution of that intimate image".[88] This places the onus on the defendant, but since reasonable grounds to believe and (non-)recklessness are not obviously the same thing, it is unclear what the plaintiff has to prove, if anything, with regard to consent.

The Nova Scotia statute also defines consent in terms of knowledge of consent or recklessness as to knowledge.[89] Interestingly, while actual consent appears not to be a defence to NCDII in Nova Scotia, it *is* for cyber-bullying other than NCDII, as provided for in section 7 of the Nova Scotia legislation. This is presumably because non-consent is effectively incorporated into the definition of NCDII.

The consent inquiry in most provinces with NCDII statutes would seem therefore to be solely a question of whether the defendant *knew* there was consent or was reckless as to consent (a subjective inquiry) rather than whether there was actually consent, assessed objectively.

---

[86] *Intimate Image Protection Act*, C.C.S.M. c. I87, s. 11(1); see also *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c. P-26.9, s. 3.

[87] *Privacy Act*, R.S.S. 1978, c. P-24, s. 7.3(1), (2) (emphasis added).

[88] *Id.*, s. 7.5(2).

[89] *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c. 7, s. 3(d); see also National Conference of Commissioners on Uniform State Laws, Draft *Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act* (2018), s. 2(1).

Consider an example in which the defendant misheard the plaintiff. They discussed uploading a sex video to a website. The plaintiff at first agreed but then changed her mind. She was clear about this, but unfortunately the defendant did not hear the plaintiff change her mind and there followed a misunderstanding in which each thought the other understood that the video would (defendant) or would not (plaintiff) be uploaded. On an objective approach to consent, the plaintiff's clear words may lead to a finding that there was no consent. But on an approach focused on knowledge of consent, the defendant should be found to lack such knowledge and not be liable. In the scenario above, it is also not obvious that the defendant was reckless as to consent, since there was a conversation explicitly addressing consent in which consent was given.

This example is not meant to address whether liability should result on these facts, but to point out the difference between consent, knowledge of consent and recklessness as to consent.

Although we address below why we believe consent should not be defined in terms of knowledge of consent (or recklessness), even assuming the knowledge-based approach were appropriate, it is unclear what this means. Does it mean that there was no consent, objectively, and the defendant knew it, or that the defendant honestly believed there was no consent? The confusion seems to arise from borrowing the language of knowledge of consent from criminal law without also borrowing the element of consent itself. (Were that element present, the question of whether knowledge of consent means there actually *is* consent would not arise since consent would have to be proven separately.) It is somewhat unclear under most provincial NCDII statutes whether consent itself needs to be established, but as a matter of statutory interpretation, it would seem not.

In assessing which approach to take to consent, we take as our starting point that in tort, consent is assessed objectively. It is a question of whether, on the facts, a reasonable person would think there was agreement.[90] For example, consent as a defence to intentional torts such as battery is a question of whether a reasonable person would think there was consent in the circumstances, not of whether the defendant understood there to be consent or was reckless.

Criminal law, which generally requires subjective *mens rea*, is more likely to assess consent subjectively. For example, consent to sexual contact is defined in terms of the complainant's subjective agreement — did she agree, in her mind,[91] and

---

[90] In the sexual battery context, see *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] S.C.J. No. 26, 2000 SCC 24, at paras. 53, 108 (S.C.C.) and *Nelitz v. Dyck*, [2001] O.J. No. 64, 52 O.R. (3d) 458, at para. 36 (Ont. C.A.). In the health care context, see, *e.g.*, *Toews (Guardian ad litem of) v. Weisner*, [2001] B.C.J. No. 30, 2001 BCSC 15, at para. 19 (B.C.S.C.).

[91] *Criminal Code*, R.S.C. 1985, c. C-46, s. 273.1(1); see also *R. v. Ewanchuk*, [1999] S.C.J. No. 10, [1999] 1 S.C.R. 330, at para. 26 (S.C.C.).

honest but mistaken belief in consent (again, a subjective inquiry) is a defence even if there was no consent.[92]

Requirements of subjective knowledge, belief or recklessness are more consistent with criminal law and its *mens rea* requirement. Tort law's objective and more plaintiff-friendly approach is justifiable because tort is less concerned with blameworthiness than criminal law and imposes less stigma on defendants.

We therefore recommend that the NCDII torts simply include a defence of consent and make no reference to knowledge of, or recklessness as to consent. This is not only consistent with tort and justifiable given the lesser stigma and available remedies, but it is simpler and clearer than the approach to consent in existing Canadian NCDII torts.

Some may think this too harsh on defendants — that there should be some defence of honest mistaken belief. The Canadian NCDII statutes that define consent in terms of knowledge and recklessness are subjective and could be interpreted as creating a defence of honest but mistaken belief. In our view, this is not necessarily what those statutes intended, but even if it were, we would recommend against a defence of honest but mistaken belief. In tort, unlike in criminal law, honest but mistaken belief is never, as far as we are aware, a defence, unless the mistaken belief is also *reasonable*. For example, the Ontario *Health Care Consent Act, 1996* states that:

> 29 (1) If a treatment is administered to a person with a consent that a health practitioner believes, *on reasonable grounds* and in good faith, to be sufficient for the purpose of this Act, the health practitioner is not liable for administering the treatment without consent.[93]

This reflects the view that it is wrongful to interfere with someone's right to bodily autonomy even if the defendant believed there was consent, unless an objective test of reasonableness is met. A related example is the defence of self-defence, which is grounded in the actual *and reasonable* belief of the defendant that she or he was faced with imminent and serious bodily harm.[94] It is not sufficient that the defendant honestly believed she or he was in danger — that belief must be reasonable.[95]

The question therefore arises whether, in addition to consent, there should be a defence of honest *and reasonable* belief in consent. On the one hand, this would reflect the language of the *Health Care Consent Act, 1996* and provide some defence

---

[92] Honest mistaken belief negates *mens rea*: *R. v. Ewanchuk*, [1999] S.C.J. No. 10, [1999] 1 S.C.R. 330, at paras. 48-49, 26 (S.C.C.).

[93] S.O. 1996, c. 2, Sched. A, s. 29(1) (emphasis added).

[94] Allen M. Linden *et al.*, *Canadian Tort Law*, 11th ed. (Toronto: LexisNexis Canada, 2018), at 101. We are grateful to Jamie Lee for providing this example.

[95] This is true of self-defence in criminal law too. See *Criminal Code*, R.S.C. 1985, c. C-46, s. 34(1).

for well-intentioned defendants where there was no subjective consent. On the other hand, however, a defence of honest and reasonable belief in consent adds nothing. Where consent itself is assessed objectively, it is hard to imagine how there could be no consent (a reasonable person would not think there was permission) but the defendant could nevertheless have a reasonable belief in consent. Consent and reasonable belief in consent involve identical inquiries: would a reasonable person think there was consent in the circumstances.

One might think that liability for recklessness as to consent would have the same effect as a reasonableness requirement and so language such as that in the existing NCDII statutes covers the same range of conduct. As a practical matter, this may be so. Nevertheless, recklessness is about what the defendant knew and intended. *Black's Law Dictionary* defines "recklessness" as "conduct whereby the actor does not desire harmful consequences but nonetheless foresees the possibility and consciously takes the risk".[96] A reasonableness assessment is not concerned with what the defendant knew or believed, only what a reasonable person would have understood.

Thus, our preference is to simply provide for a defence of consent. If the defendant honestly believed there was consent but a trier of fact determines he was unreasonable to have so concluded, then liability should follow. Consent should not depend on subjective knowledge or recklessness. We have no objection to including a defence of honest and reasonable belief in consent, as in the *Health Care Consent Act, 1996*. This may provide greater certainty in case triers of fact are inclined to assess consent subjectively. However, if the law of consent is properly applied, such a defence adds nothing.

We have not yet addressed why consent should be a defence — that is, why the defendant should have the onus of proving it. In the Canadian NCDII statutes, the onus of proving lack of knowledge of consent would seem to fall on the plaintiff, since it is part of the definition of the tort itself. But there are principled and practical reasons why the defendant should have to prove consent, should he wish to do so.

Principled reasons include that the focus of this tort should be on the wrongfulness of posting such images. As with defamation and misuse of private information, the crux of the NCDII tort is the infringement of a right not to have certain content distributed. Unlike negligence, for example, the focus is not on blameworthiness but rather on interference with this right. The Supreme Court in *Non-Marine Underwriters, Lloyd's of London v. Scalera* stated: "To base the law of battery purely on the principle of fault is to subordinate the plaintiff's right to protection from invasions of her physical integrity to the defendant's freedom to act . . .".[97] And while this doesn't preclude considering consent, it supports defining the elements of the tort to exclude (lack of) consent.

---

[96] *Black's Law Dictionary*, 7th ed. (St. Paul, MN: West Group, 1999).

[97] [2000] S.C.J. No. 26, 2000 SCC 24, at para. 10 (S.C.C.).

There are also practical reasons to make consent a defence. Where NCDII is being litigated, distribution will more often than not have been non-consensual and traumatizing. Making consent a defence amounts to a presumption of non-consent that the defendant must rebut, rather than putting plaintiffs to the effort and expense of proving they did not consent to having intimate images shared.[98]

And while one might think that the plaintiff is better placed to prove whether she consented, this misrepresents the nature of consent in tort: the issue is objective rather than subjective. It asks whether a reasonable person in the circumstances would think there was permission, not what the plaintiff subjectively intended. The defendant is as well-placed as the plaintiff to establish that.

Thus, in our view, the intentional distribution of these images should be *prima facie* tortious just as any non-trivial touching is a *prima facie* battery. The defendant should have the onus of proving consent, should he wish to avail himself of that defence. An honest belief in consent should not serve as a defence unless that belief is also reasonable, which is effectively the same as saying that there *was* consent, assessed objectively.

A final note about consent relates to the ability to revoke it. In our view, the tort should provide for consent to be revocable. Again, this is consistent with the law of consent in tort generally. Consent to medical treatment may, for example, be revoked, as can consent to sexual contact. That consent is revocable may be implicit in the existing Canadian NCDII torts, though none of them makes it explicit. The ability to revoke consent would be limited by any contractual arrangements, though it should be possible for someone to breach their contract by revoking consent, subject to paying damages.[99]

One difficulty relates to what happens if consent is revoked after an image has consensually been distributed; for example, where an intimate image is posted to a website with consent but the plaintiff later changes her mind. For the fast-track tort, revoking consent means that for publications from the point of revocation on, consent cannot be relied on as a defence. Continued distribution of the image is tortious and an injunction for removal may be ordered (again, subject to paying damages for breach of contract, if the image were distributed subject to a contract). While the defendant has done nothing wrong in initially distributing the image, continued publication after consent has been revoked is wrongful (subject to other

---

[98] "Utilizing this standard in a civil cause of action against revenge porn would create one less hoop for a victim to jump through before attaining relief and can also cut down on the length of the trial": Jessica Pollack, "Getting Even: Empowering Victims of Revenge Porn with a Civil Cause of Action" (2016) 80 Alb. L. Rev. 353, at 379.

[99] An interesting question, beyond the scope of this article, is what the measure of damages for breach of contract should be. It may be appropriate to allow the person depicted to pay reliance damages (usually the fee paid to the plaintiff for the use of the image) rather than expectation damages (the profit that would have been earned from distribution of the image).

defences). Thus, allowing consent to be revoked simply means that the defendant can be ordered to take an image down (and an intermediary will likely take it down).

This discussion of consent has been lengthy, in large part because of our disagreement with the approach to consent in existing NCDII tort statutes. However, the recommended approach is simple and consistent with tort principles: consent, assessed objectively, should be a complete defence and revocable.

(b) Public Interest

All Canadian provinces provide a substantively identical defence for images in the public interest:

> It is a defence to an action for non-consensual distribution of an intimate image to show that the distribution of the intimate image is in the public interest and does not extend beyond what is in the public interest.[100]

In contrast, the U.S. Draft *Intimate Images Act* provides an extensive list of defences. In particular, the Act provides a defence for good faith disclosures concerning law enforcement, legal proceedings, medical education or treatment, matters of public interest or concern, or investigations of misconduct. The relevant provisions are as follows:

> 4 (b) A person is not liable under this [act] if the person proves that disclosure of, or a threat to disclose, an intimate image was:
>
> (1) made in good faith in
>
> (A) law enforcement;
>
> (B) a legal proceeding; or
>
> (C) medical education or treatment;
>
> (2) made in good faith in the reporting or investigation of:
>
> (A) unlawful conduct; or
>
> (B) unsolicited and unwelcome conduct;
>
> (3) related to a matter of public concern[101] or public interest; or
>
> (4) reasonably intended to assist the depicted individual.

---

[100] *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c. P-26.9, s. 6; *Privacy Act*, R.S.S. 1978, c. P-24, s. 7.6; *Intimate Image Protection Act*, C.C.S.M. c. I87, s. 13; *Intimate Images Protection Act*, R.S.N.L. 2018, c. I-22, s. 8; *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c. 7, s. 7 (also extends to cyber-bullying).

[101] The language of public concern is specific to American law. It was included in the National Conference of Commissioners on Uniform State Laws, Draft *Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act* (2018), at 10, to ensure it complied with the First Amendment.

. . . . .

> (e) Disclosure of, or a threat to disclose, an intimate image is not a matter of public concern or public interest solely because the depicted individual is a public figure.[102]

Defences for both the fast-track tort and the action for compensatory damages should include those listed in the U.S. Draft *Intimate Images Act*. Without a broader set of defences, there is a risk that the legislation will unintentionally capture content that should not result in liability. For example, an image may be shared for medical treatment, or to report a crime, or to seek help for a victim of NCDII. And while these may often fall within the definition of public interest, making these defences explicit provides greater certainty and may dissuade complainants from proceeding with unmeritorious claims. For the fast-track tort, most of these defences would be irrelevant as the focus is content takedown. However, we recommend that these defences be available for both torts, since they may occasionally be relevant to the fast-track tort.

3. Remedies

(a) Declaratory Relief

A declaration by a court that distribution of an image is illegal not only vindicates the plaintiff's reputation but will often be sufficient to get an intermediary to take down or de-index the image (that is, to remove the site with the image from search engine results). This is because intermediaries will generally voluntarily take down content, or de-index, if presented with evidence that content is unlawful. Superior courts have inherent jurisdiction to grant declaratory relief and so legislation need not specify this, but we wished to emphasize that declaratory relief will often be sufficient to ensure content takedowns.

(b) Injunctions

Plaintiffs could file a motion for an interlocutory injunction as soon as an originating document is filed, although in the fast-track proceeding, it may be possible to deal with the matter on its merits almost as quickly. The usual *RJR-MacDonald* rules for interlocutory injunctions should apply.[103] The free speech concerns grounding a more conservative approach to interlocutory defamation injunctions do not arise and so a *Bonnard v. Perryman* approach to injunctions should be rejected).[104] Similarly,

---

[102] *Id.*, s. 4(b), (e).

[103] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17, [1994] 1 S.C.R. 311 (S.C.C.). Note that for mandatory injunctions, which may be ordered in NCDII cases, the accessibility threshold in *RJR MacDonald* was modified to a "strong *prima facie* case" even for cases that do not involve pure speech: see *R. v. Canadian Broadcasting Corp.*, [2018] S.C.J. No. 5, [2018] 1 S.C.R. 196, 2018 SCC 5, at para. 15 (S.C.C.).

[104] *Bonnard v. Perryman* held that because of free speech concerns, interlocutory injunctions should only be granted in defamation cases when it is clear that the speech is

the usual rules for permanent injunctions should apply.

(c) Damages

For the fast-track proceeding there are reasons for and against making any damages available. Ultimately, we recommend that nominal damages be available. This will make this proceeding more appealing to plaintiffs than if damages were not available at all, and is justified because the plaintiff will have satisfied a court that she has been legally wronged. However, given the simple and strict liability nature of this fast-track tort, there should be no possibility of compensatory, aggravated or punitive damages: the focus of the inquiry is not on fault or injury. A plaintiff wanting greater-than-nominal damages should proceed under the more traditional tort action proposed below.

A plaintiff who avails herself of the fast-track proceeding should not be prevented from seeking compensatory damages in a separate action for compensatory damages, but subject to *res judicata* and any nominal damages being subtracted from a later damages award. Again, this helps promote use of the relatively quick and cheap fast-track mechanism by not foreclosing the option of suing for damages.

4. Procedural Matters

(a) Superior versus Small Claims Court

Recommendation:

The fast-track proceeding should be heard in superior court.

We considered limiting the fast-track proceeding to small claims court, but rejected this approach for one reason: they cannot grant injunctions. They are limited to actions for debt or damages, the recovery of personal property, and compensation for goods or services, with a certain maximum dollar value.[105] They tend to specifically exclude causes of action that are similar to NCDII, such as libel.[106] And while it would be constitutionally permissible for the legislatures to grant small claims courts (or a special tribunal) the power to address NCDII and to grant injunctions,[107] we believe this would constitute too great a change to the role

---

defamatory and that there are no realistic defences (*Bonnard v. Perryman*, [1891] 2 Ch. 269, at 284). This rule was adopted into Canadian law in *Canada Metal Co. v. Canadian Broadcasting Corp.*, [1974] O.J. No. 1836, 3 O.R. (2d) 1, 44 D.L.R. (3d) 329, at 344 (Ont. H.C.J.).

[105] See, *e.g.*, *Small Claims Act, 2016*, S.S. 2016, c. S-50.12, s. 3(1).

[106] See, *e.g.*, *Small Claims Act*, R.S.N.L. 1990, c. S-16, s. 3(2).

[107] Courts have tended to find that granting powers of section 96 courts to non-section 96 courts is constitutional so long as there is no attempt to remove that power from a section 96 court. See *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, [2014] S.C.J. No. 59, [2014] 3 S.C.R. 31, at para. 29 (S.C.C.): "Although the bare words of s. 96 refer to the appointment of judges, its broader import is to guarantee the core jurisdiction of provincial superior courts: Parliament and legislatures can create inferior courts and

of small claims courts — particularly if the power to grant injunctions were not limited to interlocutory injunctions.[108]

That said, a province willing to be ambitious about NCDII and to expand small claims jurisdiction or create a tribunal can take comfort in the fact that there is precedent for non-section 96 courts having the power to order permanent injunctive relief. The British Columbia Civil Resolution Tribunal ("CRT"), for example, can make a wide range of orders. In the CRT, strata disputes may lead to what is effectively injunctive relief, such as orders regarding custody of a pet.[109] Note, however, that the CRT's jurisdiction over motor vehicle claims is being challenged in court, which helps illustrate that shifting a section 96 court's powers to a tribunal is controversial.[110]

Assuming, however, that altering the jurisdiction of small claims courts or creating a new tribunal is too expensive or disruptive, a fast-track superior court action is the next best thing. It could still be cheap and relatively quick — especially if some effort is made to create public legal education materials explaining how to file an originating document, how to request an interlocutory injunction and/or hearing on the merits as quickly as possible, *etc*. And there is no doubt that injunctive relief from a superior court is the most effective remedy possible.

(b) Anonymity/Publication Bans

Recommendation:

Publication bans on adult plaintiffs' identities should be available when in the interests of justice. There should be a presumptive ban on the identities of minor plaintiffs, rebuttable only if minors wish to be identified.

All Canadian NCDII torts provide explicitly for publication bans on the plaintiff's identity. This recognizes that the publicity associated with such actions could cause the plaintiff significant additional harm and could prevent plaintiffs from seeking access to justice at all.[111] There are effectively two different approaches to

---

administrative tribunals, but '[t]he jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution' (*MacMillan Bloedel*, at para. 15)." See also *MacMillan Bloedel Ltd. v. Simpson*, [1995] S.C.J. No. 101, [1995] 4 S.C.R. 725, at 751 (S.C.C.).

[108] Non-judges sometimes have the power to grant relief that amounts to an interlocutory injunction. For example, Case Management Masters in New Brunswick may make temporary orders in relation to family law matters; for example, custody of children. See *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 56.2 and Schedule C.

[109] *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25, s. 48. The strata example is from personal communication with the CRT's director, Shannon Salter.

[110] Richard Zussman, "Trial Lawyers Association of B.C. Set to Take Government to Court over ICBC Changes" (March 31, 2019), online: *Global News* <https://globalnews.ca/news/5116333/trial-lawyers-association-bc-constitutional-challenge-icbc-changes/>.

[111] See, *e.g.*, Ben Robinson & Nicola Dowling, "Revenge Porn Laws 'Not Working',

publication bans. In Saskatchewan, Alberta and Manitoba, a ban will be imposed where one is in the interests of justice.[112] The equivalent provision of the Newfoundland and Labrador NCDII legislation is virtually identical to Saskatchewan's except that it also makes publication bans mandatory for minors.[113]

Nova Scotia's approach is different in that, rather being grounded in the interests of justice, a publication ban will be ordered where the plaintiff requests one, as well as being mandatory for minors.[114] This has the advantage of not imposing a blanket ban on someone who may wish to be identified, while also not requiring the issue of the appropriateness of a ban to be litigated, which may be costly for the parties. It has the disadvantage, however, of leaving the decision entirely up to the plaintiff, rather than considering the public interest in disclosure. The public interest in open courts is therefore not even considered under Nova Scotia's approach.

In our view, publications bans should be available and discretionary rather than mandatory for adults, since some plaintiffs may be willing to be publicly identified. The more difficult question is whether they should be ordered whenever requested by plaintiffs, or whether there must be an inquiry into whether a ban serves the interests of justice. As a practical matter, little likely turns on this. We expect courts will readily find that a ban serves the interests of justice when one is requested.

That said, there may be situations in which a publication ban is not warranted, despite one being requested. The open court principle is fundamentally important, and the default is that court proceedings should be open to the public.[115] In addition, in the Internet era there are situations in which a publication ban is ineffective because the identity of an individual is already well known and continues to be reported by non-Canadian sources. (The publication ban on Rehtaeh Parsons's name is an example.[116]) Statutory publication bans are subject to Charter oversight and

---

Says Victims Group" (May 19, 2019), online: *BBC News* <https://www.bbc.com/news/uk-48309752>, suggesting that in the U.K., denying anonymity to complainants may reduce the number of criminal NCDII complaints or investigations.

[112] *Privacy Act*, R.S.S. 1978, c. P-24, s. 7.8; *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c. P-26.9, s. 9; *Intimate Image Protection Act*, C.C.S.M. c. I87, s. 15.

[113] *Intimate Images Protection Act*, R.S.N.L. 2018, c. I-22, s. 10.

[114] *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c. 7, ss. 8, 9.

[115] In *B. (A.) v. Bragg Communications Inc.*, [2012] S.C.J. No. 46, [2012] 2 S.C.R. 567, at para. 11 (S.C.C.), the Supreme Court stated: The open court principle requires that court proceedings presumptively be open and accessible to the public and to the media. This principle has been described as a "hallmark of a democratic society" (*Vancouver Sun (Re)*, [[2004] S.C.J. No. 41,] [2004] 2 S.C.R. 332, at para. 23) and is inextricably tied to freedom of expression.

[116] See, *e.g.*, Jennifer McGuire, "#YouKnowHerName – Behind the legal fight to name Rehtaeh Parsons" (March 25, 2015), online: *CBC News* <https://www.cbc.ca/newsblogs/community/editorsblog/2015/03/youknowhername.htm>.

must be justified under section 1.[117] In this context, considerations under section 1 include the burden on the plaintiff (delay and resources) in having to meet a discretionary test, the scope of the ban, whether it is temporary or permanent, its effect on trial fairness and the public interest.[118] In *Toronto Star Newspapers Ltd. v. Canada*,[119] the constitutionality of a mandatory publication ban on the evidence adduced at bail hearings was upheld. Despite the effect on the public's access to information, the ban was narrowly tailored, temporary, promoted trial fairness and relieved the accused of the burden of having to argue for the ban.

A ban on plaintiffs' identities whenever requested by plaintiffs is relatively narrow in scope. Given the serious harm that could result and the presumed lack of effect on trial fairness, such a ban is arguably justifiable in a free and democratic society. Nevertheless, given the ban's permanence and the fact that it would not permit consideration of the public interest, it may not be minimally impairing.

We recommend a flexible and principled approach that requires consideration of the interests of justice before granting a publication ban. This largely reflects the common law approach[120] and would not require legislation. That said, a presumption in favour of a ban on request or other language stressing the importance of publication bans to access to justice for NCDII may be warranted.

The situation with minors is different. There will virtually never be any compelling reason to disclose, against her wishes, the name of a minor who alleges NCDII. In theory, the "interests of justice" test should be able to account for this, but the practical consequence of that approach is that the issue will need to be litigated, and defendants may argue against a publication ban in order to achieve a tactical advantage. In our view, therefore, minor plaintiffs should be entitled to a publication

---

[117] The leadings cases on the constitutionality of publications are *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.) (for discretionary bans) and *Toronto Star Newspapers Ltd. v. Canada*, [2010] S.C.J. No. 21, [2010] 1 S.C.R. 721 (S.C.C.) (for mandatory bans). In the *Toronto Star* case, the constitutionality of a mandatory publication ban on the evidence produced at bail hearings was upheld.

[118] *Toronto Star Newspapers Ltd. v. Canada*, [2010] S.C.J. No. 21, [2010] 1 S.C.R. 721, at paras. 21-60 (S.C.C.).

[119] [2010] S.C.J. No. 21, [2010] 1 S.C.R. 721 (S.C.C.).

[120] The test at common law for a publication ban was set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835, at 839 (S.C.C.) (emphasis added):

> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

ban on their identities if they want one.[121]

The Canadian jurisdictions that have separate anonymity rules for minors all have mandatory publication bans on the identities of minor plaintiffs. In our view, however, minors should be able to waive the ban. A capable 17-year-old who does not wish to bring her claim anonymously should not be forced to do so. The criminal sexual assault context has shown that imposing publication bans, while well-intentioned, can be oppressive to claimants.[122] A rule that leaves it up to the minor to decide properly balances the concerns about the open court principle, the practical consequences of requiring the matter to be litigated and concerns about imposing bans on those who don't want them.

To be clear, this issue relates only to the plaintiff's identity and not to other aspects of a case. The usual common law test should govern the use of publication bans of other facts about a case.

To summarize, we have recommended a fast-track proceeding whose elements are that the defendant communicated an intimate image of the plaintiff, and whose defences are consent, public interest and certain enumerated defences. Lack of intent to publish and lack of knowledge would not be defences since the tort is one of strict liability. The available remedies are declaratory relief, injunctions and nominal damages.

V. A TORT ACTION FOR COMPENSATORY DAMAGES

The requirements for liability in an action for compensatory damages for NCDII should be more robust than in an action primarily for declaratory and injunctive relief. This is not because a damages award is inherently more harmful to a defendant than an injunction but because an award of compensatory damages is only justified, in our view, where fault is established, whereas a takedown is justified regardless of fault. Further, evidence of fault and harm is needed to be able to properly quantify damages.

1. Elements

The elements of the action for damages should be the same as those proposed for the fast-track proceeding: (a) the defendant distributed (b) an intimate image (c) of the plaintiff.

2. Defences

Defences should include those in the fast-track proceeding (consent, public interest,

---

[121] Note that in *B. (A.) v. Bragg Communications Inc.*, [2012] S.C.J. No. 46, [2012] 2 S.C.R. 567, at para. 14 (S.C.C.), the Supreme Court of Canada identified the plaintiff's youth as a factor justifying a publication ban on her identity. So too was the sexualized nature of the invasion of privacy: "It is not merely a question of her privacy, but of her privacy from the relentlessly intrusive humiliation of sexualized online bullying . . .".

[122] See, *e.g.*, Andrew Duffy, "Sex assault victim asks court to lift publication ban in her case" (January 24, 2019), online: *Ottawa Citizen* <https://ottawacitizen.com/news/local-news/sex-assault-victim-asks-court-to-lift-publication-ban-in-her-case>.

disclosure to law enforcement, *etc*.) and there should be additional defences related to the absence of fault, including lack of intent and the absence of knowledge.

(a) Lack of Intent

Recommendation:

Intent to publish the relevant image should be required, but should be presumed (i.e., lack of intent to publish is a defence).

Torts generally require fault — causing harm is usually considered insufficient for tort liability. Instead, the defendant must have done something intentionally or carelessly. For liability in the action for damages for NCDII, intent should be required. The nature of the wrongdoing is more consistent with intentional torts like invasion of privacy, defamation,[123] intentional infliction of nervous shock and battery than with torts of carelessness. Further, seldom will publishing intimate images be done carelessly. One could imagine scenarios in which one carelessly stores images and someone else sees them, but we focus on intentional conduct. In any event, the tort of negligence may apply to such carelessness.[124]

Requiring intent could mean requiring intent to publish an image; intent to publish with knowledge that there was no consent; or intent to harm the plaintiff.

We can eliminate proof of intent to harm for some of the same reasons that proof of harm should not be required (see Section IV.1(d) above): intent to harm is not essential to the wrongful act. Images are sometimes posted because the defendant wants to make money or to entertain.[125] Such conduct should lead to liability. Further, an intent to harm requirement would likely serve little purpose as such intent would likely be readily inferred from a deliberate act of publishing such images — at least so long as constructive intent counts as intent. None of the civil statutes we canvassed requires intent to injure, though some criminal prohibitions on NCDII do.[126]

---

[123] While defamation is not generally categorized as an intentional tort, it does require intent to publish, in much the same way that we recommend for NCDII.

[124] The only difficulty with bringing an action in negligence in relation to NCDII is negligence's requirement of a certain kind of injury. Personal injury and damage to property count, as does psychological injury that reaches a certain threshold (see *Saadati v. Moorhead*, [2017] S.C.J. No. 28, [2017] 1 S.C.R. 543, at paras. 31, 37 (S.C.C.)). It is somewhat unclear whether the kinds of emotional upset, humiliation and reputational harm that are likely to flow from NCDII are injuries negligence law would recognize. Arguably they often will be, given the recognition that psychological injuries do not have to be diagnosed or fall within a recognized *Diagnostic and Statistical Manual of Mental Disorders* ("DSM") category (*Saadati*, at paras. 31-33). In addition, reputational injury is compensable in negligence (*Young v. Bella*, [2006] S.C.J. No. 2, [2006] 1 S.C.R. 108, at para. 56 (S.C.C.)).

[125] See Mary Anne Franks, "Drafting an Effective "Revenge Porn" Law: A Guide for Legislators" (August 17, 2015), at 7, online: <http://dx.doi.org/10.2139/ssrn.2468823>.

[126] For example, *Harmful Digital Communications Act* (New Zealand), 2015/63, s.

As for intent to distribute or publish, of the Canadian jurisdictions that have legislated in this area, only Manitoba and Alberta require such intent.[127] The Saskatchewan, Newfoundland and Labrador and Nova Scotia statutes and the U.S. Draft *Intimate Images Act* tort do not.[128]

We recommend that intent to distribute or publish be required. Thus, accidentally distributing should not result in liability. This is consistent not only with the NCDII legislation in Manitoba and Alberta, but with the law of defamation and privacy, which require intent to publish.[129] The crux of the NCDII tort is not creating or possessing such images: it is distributing them, just as the crux of defamation is publishing a libel. Intent should be required, as where there was no intent to publish there is effectively no wrongdoing.[130] Note also that where an image is accidentally distributed, the fast-track proceeding is available, as it is strict liability, and an injunction can be obtained. The plaintiff is not left without a remedy.

Intent to distribute should relate to the specific image or images and to publication of the kind at issue (*e.g.*, on a website or by showing an image to friends). Thus, Internet intermediaries will rarely be liable under the action for compensatory damages because they generally do not have knowledge of, and therefore do not intend to distribute, specific images.

Intent to distribute should include others' authorized republications. Whether it should include republications that were not authorized but were the natural and probable result of the original publication is less clear. That is, where an individual

---

22(1)(a) makes it an offence to cause harm by posting digital communications, but only where the person posts "with the intention that it cause harm to a victim". The relevant Canadian *Criminal Code* provision does not require intent to harm: *Criminal Code*, R.S.C. 1985, c. C-46, s. 162.1.

[127] *Intimate Image Protection Act*, C.C.S.M. c. I87, s. 1(2); *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c. P-26.9, s. 2.

[128] See *Privacy Act*, R.S.S. 1978, c. P-24. For example, s. 7.2 is virtually identical to *Intimate Image Protection Act*, C.C.S.M. c. I87, s. 1(2) and *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c. P-26.9, s. 2 except that it does not include the word "knowingly".

[129] That intent to publish is required in defamation is well established. See Allen M. Linden *et al.*, *Canadian Tort Law*, 11th ed. (Toronto: LexisNexis Canada, 2018), at 761. The statutory and common law privacy torts are considered intentional torts. The B.C. statute, for example, states that it is a tort "for a person, willfully and without a claim of right, to violate the privacy of another" (*Privacy Act*, R.S.B.C. 1996, c. 373, s. 1(1)), and *Jones v. Tsige*, [2012] O.J. No. 148, 2012 ONCA 32 (Ont. C.A.), the leading case on the common law privacy tort, defines the tort in terms of intentional intrusions (at para. 19). These references to intent presumably exclude accidental communication of private information from the scope of the torts.

[130] It may be that carelessness with regard to publishing is wrongful, but, as noted above, we leave such cases for the law of negligence to address.

posts an image to a website, and it is likely that images on that site will be reposted elsewhere, should that individual be held liable not only for his original post, but also for the reposting? While this may often be best dealt with as a matter of damages, the threshold for liability matters. For example, it may be that the defendant's initial distribution was outside the limitations period but a republication was within it.

Holding the defendant liable for repetitions that are the natural and probable result of the original publication would be consistent with the law of defamation,[131] but the rule is not uncontroversial.[132] We believe that there should be no automatic liability for foreseeable republication. Rather, the issue is best addressed as a matter of accessory liability.[133]

(b) Knowledge

Recommendation:

Knowledge of the contents distributed should be required but rebuttably presumed.

Existing Canadian NCDII torts tend to define "distribution" to mean *knowing* distribution.[134] Presumably this means something like distribution with knowledge of that image and that it is being distributed. The defamation experience suggests more clarity in the statutory language may be desirable, both as to the knowledge requirement between the plaintiff and individual defendant, and because intermediaries can be captured, depending on how widely a provision is drafted.[135] For example, does one have to be aware of specific content in order to knowingly transmit it or is it enough that you have given permission to third parties to publish

---

[131] See *Pritchard v. Van Nes*, [2016] B.C.J. No. 781, 2016 BCSC 686, at para. 78 (B.C.S.C.). There is relatively little scholarship on the issue of "natural and probable result", but it presumably sets a threshold higher than mere foreseeability, which would capture almost any republication.

[132] See, *e.g.*, Emily Laidlaw, "*Pritchard v Van Nes*: Imposing Liability on Perpetrator Zero of Defamatory Facebook Posts Gone Viral" (May 18, 2016), online: *University of Calgary Faculty of Law Blog* <ablawg.ca/2016/05/18/pritchard-v-van-nes-imposing-liability- on-perpetrator-zero-of-defamatory-facebook-posts-gone-viral/>.

[133] Emily Laidlaw & Hilary Young, "Internet Intermediary Liability in Defamation: Proposals for Statutory Reform", Report commissioned by the Law Commission of Ontario (July 2017), at 32, online: <http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw-and-Young.pdf>.

[134] See, *e.g.*, *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c. P-26.9, s. 2; *Intimate Image Protection Act*, C.C.S.M. c. I87, s. 1(2); and *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c. 7, s. 3(d). But see *Intimate Images Protection Act*, R.S.N.L. 2018, c. I-22, s. 3, which does not define distribution in terms of knowing distribution.

[135] Emily Laidlaw & Hilary Young, "Internet Intermediary Liability in Defamation" (2019) 56 Osgoode Hall L.J. 112, at 116-20.

what they like? Does YouTube "knowingly" publish NCDII given that it allows people to upload content that sometimes includes NCDII? Or does one have to be aware of the specific image and knowingly transmit that particular image? Presumably, the latter is what section 1(2) of the Manitoba Act[136] intends.

Even assuming knowledge of the specific image is required, would notice after the fact and a failure to remove the image be sufficient? Again, the defamation context is instructive. There is a doctrine in defamation law called publication by omission.[137] Plaintiffs have argued that Internet intermediaries, such as Facebook, that fail to take down defamatory content after notice are themselves liable in defamation because by failing to remove content, they have intentionally published it. Whether this argument could apply to a NCDII tort must be addressed.

We recommend that a lack of knowledge of specific content distributed should be a defence. Defamation law is moving toward a definition of publication that incorporates knowledge. And Manitoba and Alberta's NCDII torts incorporate knowledge into the definition of distribution.

We prefer to keep distinct the issues of distribution and knowledge, because we believe the plaintiff should have to prove the defendant distributed but not that he had knowledge. Lack of knowledge should be a defence for the defendant to prove. We are of this view because publication will rarely be without knowledge, so it would seem burdensome to require the plaintiff always to affirmatively prove knowledge. Further, the plaintiff is less able than the defendant to prove what the latter knew. Finally, it is common for intentional torts to place the onus on defendants to disprove intent (which is related, in this context, to knowledge). The trespass torts, for example, can be defended by showing a lack of intent or carelessness: the onus is on the defendant, not the plaintiff.[138] (That said, this approach is not universal in tort: plaintiffs have the onus of proving intent in some intentional torts such as intrusion upon seclusion.)

However, it may be justifiable for there to be special rules for intermediaries. Although Internet intermediaries contribute to the harm of NCDII and have considerable power to prevent and remediate it, their role is usually not comparable to that of those who upload or otherwise intentionally distribute these images. They should therefore generally be immune from liability in NCDII. That said, it may be justifiable for intermediaries to be liable in narrow circumstances where their

---

[136] *Intimate Image Protection Act*, C.C.S.M. c. I87.

[137] See Emily Laidlaw & Hilary Young, "Internet Intermediary Liability in Defamation" (2019) 56 Osgoode Hall L.J. 112, at 118-20.

[138] "[T]here can be no doubt that, as a whole, Canadian law has taken the view that the onus lies upon the defendant to disprove the mental element requisite for the tort of trespass": Frank Bates, "Accident, Trespass and Burden of Proof: A Comparative Study" (1976) 11 Ir. Jur. 88, at 96. See also *Dahlberg v. Naydiuk*, [1969] M.J. No. 75, 10 D.L.R. (3d) 319, 72 W.W.R. 210 (Man. C.A.).

contribution to the harm is more direct and egregious. It is beyond the scope of this article to address intermediary liability issues in detail. We refer readers to our report on Internet intermediary liability in defamation.[139] It may be justifiable to depart from the broad immunity we propose in defamation law and carve out a narrow liability for intermediaries that host NCDII. Proposals for law reform include liability for sites that encourage posting of NCDII and/or principally host such content,[140] or an immunity contingent on reasonable management of unlawful use of the intermediary's site.[141] Additional work is needed to craft a narrow exception to the general rule that Internet intermediaries are not responsible for third party NCDII.

3. Remedies

The Canadian NCDII torts provide for a range of remedies. For example, the Manitoba statute states:

> 14 (1) In an action for the non-consensual distribution of an intimate image, the court may
>
> (a) award damages to the plaintiff, including general, special, aggravated and punitive damages;
>
> (b) order the defendant to account to the plaintiff for any profits that have accrued to the defendant as a result of the non-consensual distribution of the intimate image;
>
> (c) issue an injunction on such terms and with such conditions that the court determines appropriate in the circumstances; and
>
> **(d)** make any other order that the court considers just and reasonable in the circumstances.[142]

---

[139] See Emily Laidlaw & Hilary Young, "Internet Intermediary Liability in Defamation" (2019) 56 Osgoode Hall L.J. 112.

[140] Danielle Citron, *Hate Crimes in Cyberspace* (Cambridge, MA: Harvard University Press, 2014), at 177.

[141] Robert Chesney & Danielle Keats Citron, "Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security" (2019) 107 Cal. L. Rev. 1753, citing Danielle Keats Citron & Benjamin Wittes, "The Internet Will Not Break: Fixing Section 230 Immunity for Bad Samaritans" (2017) 86 Fordham L. Rev. 401. See the U.K. proposal for a statutory duty of care on online companies enforced by an independent regulator: United Kingdom Department of Digital, Culture, Media & Sport, *Online Harms White Paper* (April 8, 2019).

[142] *Intimate Image Protection Act*, C.C.S.M. c. I87, s. 14(1). The *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c. P-26.9 has a similar provision at s. 7(1), as does *Intimate Images Protection Act*, R.S.N.L. 2018, c. I-22, s. 9(1) and *Privacy Act*, R.S.S. 1978, c. P-24, s. 7.7(1). Note that *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c. 7, s. 6 lists a wide range of orders that may be made, but in our view, it is unnecessary to enumerate so precisely the kinds of orders that can be made. Injunctive relief is equitable and discretionary, and judges understand their powers to grant

A provision like this may be sufficient for the purposes of an NCDII action for compensatory damages, but we offer the following commentary.

(a) Damages

A range of damages should be available. NCDII legislation should probably be silent as to how to quantify damages, as in the existing Canadian NCDII statutes. For greater certainty, however, we reject the approach to general damages in defamation that focuses not only on the harm done but also on the conduct of the defendant.[143] In our view, this confuses compensatory and punitive damages. Damages awarded because of the defendant's conduct should fall under the heading of punitive, or perhaps aggravated, but not general damages.[144]

Considerations relevant to general damages should include whether or to what degree the plaintiff is identifiable, the nature of the image, the nature and size of the audience to whom the image was distributed, and the effect on the plaintiff (embarrassment, distress, *etc*.). This need not be an exhaustive list.

Ideally, aggravated damages would not be permitted. Aggravated damages are provided for explicitly in the Canadian NCDII statutes. At common law, they "may be awarded in circumstances where the defendants' conduct has been particularly high handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety".[145] However, where general damages are provided for based on the conduct of the defendant or the effect of the defendant's conduct on the plaintiff, they almost invariably duplicate either compensatory damages or punitive damages or both and

---

appropriate injunctive relief. The risk of listing types of orders, even while providing for "any other order which is just and reasonable", is that the types of possible orders may be narrowed by statutory interpretation to reflect the examples provided in the statute.

[143] The way to quantify general damages in defamation is set out in *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130, at para. 182 (S.C.C.): [Triers of fact] are entitled to take into their consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and "the whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict. They may take into consideration the conduct of the defendant before action, after action, and in court at the trial of the action," and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case. They should allow "for the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused." They should also take into account the evidence led in aggravation or mitigation of the damages.

[144] Of course, the defendant's bad conduct can increase the harm to the plaintiff, justifying greater compensatory damages. However, the focus should be on the harm rather than on the defendant's conduct so as to avoid duplication of damages.

[145] *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130, at para. 188 (S.C.C.).

lead to overcompensation. Ray Brown has therefore argued against aggravated damages in defamation.[146]

We expect punitive damages will often be awarded in NCDII cases and, indeed, may often constitute a majority of a damages award. The common law rules governing punitive damages should apply.

Special damages should be recoverable where they can be established.

VI. A NON-TORT MECHANISM TO COMBAT NCDII

Although this article focuses on new tort actions, we also considered non-tort approaches to the problem of NCDII. We mention one of these here. A statute could simply require intermediaries to take down intimate images on request of the person depicted in them. The law would presumably have to be federal, as it would regulate communications. It should require content hosts, which refers to companies that provide storage services for content accessed by third parties,[147] to remove images and search engines to de-index search results. The requester would have to attest that the image is of her and that there is no contractual basis for its distribution, nor is she aware of any other legal authority to distribute it. The intermediary would then have to confirm that the relevant image is an intimate one and that it appears to be an image of the requester. (Perhaps the formal declaration that the image is of the requester would be sufficient for such confirmation.) The image would then have to be removed immediately. Notice would be given to the original poster, who would have the option of requesting it be put back because it meets one of several criteria which would mirror defences in the NCDII tort — essentially public interest or a contractual basis for distribution. Notably, there would be no requirement to prove or even state that the image is non-consensually distributed. People should be able to change their minds about the distribution of intimate images, subject to certain exceptions discussed in the section on revoking consent.

In crafting such a law, recourse could be had to Canada's notice-and-notice regime in copyright law.[148]

The major advantage of such a law is that it wouldn't require fault or even to identify the distributor of the image. It would simply focus on taking down intimate images, regardless of who posted them and regardless of whether the initial distribution was wrongful. It would be fast, cheap and relatively effective.

---

[146] Raymond Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2d ed. (Toronto: Thomson Reuters Canada, 2017) (loose-leaf updated 2016, release 1), ch. 25 at 79: "A separate award of aggravated damages is a pernicious development in the law; it is absurd in theory and mischievous in practice".

[147] See, *e.g.*, Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford: Oxford University Press, 2016), at 2.50; and Karine Perset, *The Economic and Social Role of Intermediaries* (Organisation for Economic Co-operation and Development Publishing, 2010), at 9, online: <https://www.oecd.org/internet/ieconomy/44949023.pdf>.

[148] *Copyright Act*, R.S.C. 1985, c. C-42, ss. 41.25-41.27.

This is admittedly an expression-infringing law, but in our view it is justified by the harm that distribution of such images does, when weighed against the generally minimal expressive value of distributing such images. It is also justified by the need for a cheap and quick takedown. Note, however, that such a rule would only apply to intermediaries with a Canadian presence and so would be of little use when an image is hosted on an individual's site or a site with no Canadian presence. Even then, however, search engine de-indexing should provide some assistance.

We raise this idea to begin a discussion and we recognize that a number of issues would need to be resolved. For example, how would these rules would apply if there were more than one person depicted in the image? There are likely also division of powers issues in legislating in this way.

VII. CONCLUSION

The law has been criticized as being ineffective in addressing the non-consensual distribution of intimate images. The sense is that once an image is out there, it cannot be recalled or un-distributed. Further, the law is slow, expensive and complex, making civil actions unattractive to those who just want to minimize the damage that NCDII has wrought.

While new laws can never be a complete solution to the problem of NCDII, we are convinced that better laws can better achieve justice. In particular, a fast-track proceeding focused on quick, cheap and effective takedowns and de-indexing of NCDII can make a real difference to the lives of many people. Even more effective would be some kind of specialized tribunal for online harms, but our recommendations reflect a realistic compromise between the *status quo* (expensive, slow, complicated) and what we might be able to do in the absence of financial, political and division of powers constraints. In our view, the proposed causes of action are fair, would often be effective and are feasible to enact and deploy.