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Sexual Aggression and The Civil Response

P. Voula Kotoulas and Sienna Molu*

I. INTRODUCTION

This past year has seen a significant change in our collective awareness of harassment and sexual aggression, primarily in the workplace. On an almost daily basis, we are learning of yet another sexual aggressor and the swift and severe repercussions of this alleged sexual misconduct. Social media has been flooded with thousands of personal experiences of harassment and sexual abuse of one form or another, showing just how commonplace these incidents are in our society. There has been what has been described as a "seismic shift" in what behaviour is tolerated in the workforce.[1] The response to these allegations has also shaped the way people view victims who come forward.[2] One commentator has opined that for perhaps the first time in history, powerful aggressors are falling, "like dominos", and victims are being believed.[3] The #MeToo movement has been described as the fastest-moving social change seen in decades[4] and its founders and other "silence breakers" were named Time Magazine's 2017 Person of the Year.[5]

This movement has started an important discourse, and society is listening and acknowledging the harm caused to vulnerable persons by sexual aggression, whether in its physical form or on an online platform in the form of

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* P. Voula Kotoulas is an associate at Forbes Chochla LLP and practises in all areas of civil defence litigation with a focus on professional liability and municipal liability. Sienna Molu is an associate at Forbes Chochla LLP and practises in all areas of civil defence litigation. The authors are grateful to Stuart Forbes, Q.C. for his insight and editorial assistance.

1 Sarah Almukhtar et al., "After Weinstein: 50 Men Accused of Sexual Misconduct and Their Fall From Power" *The New York Times* (22 December 2017), online: <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html>.

2 Stephanie Zacharel, Eliana Dockterman & Haley Sweetland, "2017 Person of the Year: The Silence Breakers" *Time* (18 December 2017), online: <http://time.com/time-person-of-the-year-2017-silence-breakers/>.

3 See for example: Jessica Bennett, "The #MeToo Moment: When the Blinders Come Off" *The New York Times* (30 November 2017), online: <https://www.nytimes.com/2017/11/30/us/the-metoo-moment.html>.

4 Jonah Engel Bromwich, "'The Silence Breakers' Named Time's Person of the Year for 2017" *The New York Times* (6 December 2017), online: <https://www.nytimes.com/2017/12/06/business/media/silence-breakers-time-person-of-the-year.html>, quoting Time Magazine editor in chief, Edward Felsenthal.

5 Zacharel, *supra* note 2.

cyberbullying and the non-consensual dissemination of intimate images (“revenge porn”). With this new wave of support, one can anticipate that more victims will have the courage to come forward and that our civil justice system will adapt to this new, rapidly-changing legal landscape.

This paper provides an overview and update on civil claims for sexual misconduct and revenge porn.[6]

II. RESORT TO CRIMINAL JUSTICE SYSTEM MAY NO LONGER SUFFICE

In 2016, a high-profile acquittal in *R. v. Ghomeshi*[7] resulted in widespread negative public reaction. Many had significant concerns with the accused not testifying at his criminal trial when the complainants were vilified in cross-examination. We regularly heard the phrase “survivors must be believed”.[8] There was general concern that this decision would discourage victims from reporting sexual assaults to the police.

Some believe the criminal justice system cannot do the “heavy lifting” required in nuanced sexual assault cases.[9] Despite some heartening legal reforms, including rape-shield laws[10] and the expansion of the definition of sexual assault beyond rape, conviction rates remain quite low. For example, a 2012 analysis of self-reported sexual assault data and court statistics found that less than one per cent of sexual assaults experienced by women lead to a conviction.[11] In addition, a February 2017 investigative series by the *Globe and Mail* reported that nearly 20 per cent of sexual assault allegations, or about 5,000 per year, are dismissed as “unfounded” by police investigators.[12] A 2014

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6 For an in-depth overview of civil sexual assault see Loretta P. Merritt, “Civil Sexual Assault” in Todd L. Archibald & Randall Scott Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Carswell, 2010).

7 *R. v. Ghomeshi*, 2016 ONCJ 155 (C.J.).

8 Don Stuart, “Ghomeshi: Dangers in Overreacting to this High Profile Acquittal” (2016) 27 Criminal Reports (7th) 45.

9 Zosia Bielski, “How Sexual Assault Survivors Look Beyond Police, Courts for Justice” *The Globe and Mail* (12 November 2017), online: < https://www.theglobeandmail.com/life/how-sexual-assault-survivors-look-beyond-police-courts-forjustice/article33893684/ > .

10 Section 276 of Canada’s *Criminal Code*, R.S.C. 1985, c. C-46, known as the “rape shield,” clearly bans using a woman’s sexual history to prove the “twin myths” of rape — that she is untrustworthy or more likely to have consented to the sexual acts in question.

11 Holly Johnson, “Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault” in Elizabeth E. Sheehy, eds., *Sexual Assault in Canada* (Ottawa: University of Ottawa Press, 2012) 613.

12 Robyn Doolittle, “Unfounded” *The Globe and Mail* (3 February 2017), online: < https://www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/ > .

survey by the Department of Justice found that lack of trust in the judicial system was the second most common reason, next to shame, for women choosing to not come forward.[13] These statistics are quite troubling, the concern being that there is a real expectation by many victims that they will not be believed.

Others argue that this area of criminal justice needs a drastic overhaul, and that judges, lawyers and police officers need retraining to rid the system of its "combative stand" toward victims of these violent crimes.[14] Rape myths continue to linger in courtrooms, as was vividly demonstrated by a former Alberta judge, when he asked a 19-year-old complainant why she "couldn't just keep [her] knees together" to prevent an alleged rape.[15] That same month, a Nova Scotia judge acquitted a taxi driver who was charged with sexual assault on the basis that his passenger, although heavily intoxicated, was capable of consent. Police had found the man with his pants unbuttoned and holding the woman's urine-soaked underwear, while she lay unconscious and half-naked in the back of his cab.[16]

There is also the real concern for re-traumatization of victims as they enter the criminal justice system. In the article "The Inhospitable Court", Elaine Craig reviews the transcripts of several sexual assault criminal trials to highlight the process faced by complainants.[17] For example, in *R. v. Khaery*[18] the complainant was being subjected to a violent sexual assault when four police officers arrived on the scene, responding to a 911 call from a roommate. The police officers entered the bedroom, shouted at the accused to stop and when he would not, physically pulled him off the complainant as she screamed for help.[19] In this case, there were four eye witnesses to the attack, plus testimony from her roommate and physical evidence of her injuries from the Sexual Assault Response Team at the hospital where she was taken. Despite this additional evidence, the cross-examination of the complainant stretched over five days.[20] The complainant was so distraught after the first day of cross-examination that

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13 Star Editorial Board, "Senate Should Pass Bill to Train Judges in Sexual Assault Law: Editorial" *The Toronto Star* (26 October 2017), online: <https://www.thestar.com/opinion/editorials/2017/10/26/senate-should-pass-bill-to-train-judges-in-sexual-assault-law-editorial.html>.

14 Johnson, *supra* note 11.

15 *R. v. Wagar*, 2014 CarswellAlta 2756 (Prov. Ct.), reversed 2015 CarswellAlta 1968 (C.A.) (WL) and *R. v. Wagar*, 2015 ABCA 327 (C.A.).

16 "Read the Full Decision From The Judge Who Said 'Clearly A Drunk Can Consent'" *CBC News* (3 March 2017), online: <http://www.cbc.ca/news/canada/nova-scotia/halifax-cab-driver-sex-assault-acquittal-judge-decision-transcript-1.4008375>.

17 Elaine Craig, "The Inhospitable Court" (2016) 66 U. Toronto L.J. 197.

18 *R. v. Khaery*, 2014 ABQB 676 (Q.B.).

19 *Ibid.*

20 Craig, *supra* note 17.

she failed to return the next day and a warrant was issued for her arrest. Over the five-day cross-examination, defence counsel accused her of lying about the entire assault and focused on minor inconsistencies in her testimony and the statements she gave to police two years before. Defence counsel also advanced a conspiracy theory as between the complainant and her roommate, which the trial judge characterized as "nothing more" than a "bald allegation".[21]

Although criminal defence lawyers have come under fire for these aggressive cross-examinations, it is their duty to ask the tough and often distasteful questions to ensure that the system only convicts those who have been proven guilty beyond a reasonable doubt.[22] However, with the rape shield laws noted above, in most cases the only evidence available for defence counsel to test is that of the complainant and these intense cross-examinations are an unfortunate byproduct. Some argue that the trial judge could take a more proactive role and limit repetitive and lengthy cross-examinations in order to create a more "hospitable" court;[23] however, the outcome when that occurs appears often to be an appeal on the basis of an apprehension of bias. Ultimately, what is needed is a balance between the interests of avoiding wrongful convictions and the preservation of a process that is considerate of victims.

Victims of sexual misconduct have different needs and will have differing views about their own experience and the preferred outcome. For some, that will mean pursuing a criminal conviction and for others it will take a different form altogether. As such, it is important that victims of sexual abuse are provided a number of legal options to best match their needs.[24] Accordingly, it is imperative that we continue to see legal reforms in the criminal justice system, but also developments in the way such matters are handled in the civil courts.

III. CIVIL CLAIMS FOR SEXUAL MISCONDUCT

The civil process puts power back in the hands of the victim and provides an opportunity for accountability, rather than simply punishing the perpetrator. The plaintiff in the civil action controls the decision to sue, chooses the facts to be introduced, determines the legal theory to be argued, and can testify as to the affect of the assault.[25] Most notably, the burden of proof is much lower in a

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[21] *Ibid.*

[22] Jody Berkes, "The Role of Criminal Defence Counsel in Sexual Assault Trials" *Ontario Bar Association* (17 March 2016), online: < https://www.oba.org/JUST/Features_List/2016/The-Role-of-Criminal-Defence-Counsel-in-Sexual-Ass > .

[23] Craig, *supra* note 17.

[24] Bruce Feldthusen, "Holding Society Accountable" The Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse" (2000) 12:1 Canadian Journal of Women and the Law.

[25] Feldthusen, "The Civil Action for Sexual Battery: Therapeutic Jurisprudence?" (1993) 25 Ottawa L. Rev. 203.

civil matter, as it requires a plaintiff to prove that the assault took place on a "balance of probabilities" and not "beyond a reasonable doubt". In stark contrast to the criminal system, the civil process often requires the defendant to give evidence about the assault itself. At a minimum, the discovery transcript of the defendant can be read into the record as part of the plaintiff's case.

Some have argued that the civil system is preferable to the criminal system, since it allows for more comprehensive results[26] as a victim may bring a claim in tort, seek damages for the assault and/or battery, seek lost wages, and also allege a breach of human rights legislation.[27] Feldhusen has also described the "empowering" effect of the civil lawsuit, and its potential "therapeutic value".[28]

Significantly, the recent removal of a limitation period for sexual assault cases in some jurisdictions and the relaxed limitation periods in others means that victims often may be able to pursue these claims on their own terms, and in their own time. This is an important development, as it is well accepted that sexual assault survivors may take many years to come forward for a variety of reasons, which may include misplaced guilt and shame, suppressed memory, and a desire to not revisit horrific acts.[29]

That is not to say that the civil system provides perfect justice. There are a number of challenges to victims: the prosecution of civil claims can be quite costly, time-consuming, and stressful. In addition, a plaintiff's sexual past and history becomes relevant in a way it may not be in criminal courts. Further, there are concerns in the way in which non-pecuniary damages are quantified, particularly for adult victims, in that the assessments are wide-ranging (as will be discussed later in this paper). For those who do not have the capacity to fund litigation, an unfortunate consequence of historically lower non-pecuniary damages awards is that there may be unwillingness to take on these cases on contingency, which raises access to justice issues.

One way forward is for civil courts to recognize the serious consequential harm that is caused by sexual assault, harassment and exploitation in our society and to assess non-pecuniary damages in a range that more accurately reflects the harm and often permanent psychological impacts on all aspects of a victim's life.

Most civil actions for sexual misconduct are brought under the established torts of sexual assault, sexual battery, and the intentional infliction of mental

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[26] See e.g. Catharine A. McKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Press, 1979) and Gillian Demeyere, "Common Law Actions for Sexual Harassment: The Jurisdiction Question Revisited" (2003) 28 Queen's L.J. 637.

[27] See e.g. s. 46.1 of Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19.

[28] Feldthusen, *supra* note 25.

[29] S. Birman, "Sexual Assault Victims No Longer Face Limitation Periods for Advancing Civil Claims" *Thomson Rogers* (19 March 2016), online: <https://www.thomsonrogers.com/resources/no-limitation-periods-for-sexual-assault-victims/>.

suffering. Recently, Ontario and other jurisdictions have recognized a separate tort of harassment.

1. Sexual Assault and Battery

Sexual assault or abuse is typically considered to be physical contact of a sexual nature with another person without that person's consent. In some circumstances, it is not necessary for the perpetrator to touch or even verbally threaten the victim. A person's act or gesture, without words, force, or any physical contact, can constitute a threat to apply force of a sexual nature.

The tort of assault protects one's right to be free from the *threat* of imminent, physical harm.[30] The tort of battery protects one's right to be free from offensive physical contact.[31]

The tort of battery requires the plaintiff to prove, on a balance of probabilities, that the defendant intentionally made physical contact with the plaintiff in a sexual manner. The burden then shifts to the defence, to establish either an absence of intention or consent.[32] The consent must be genuine and not extorted by duress, force, deceit or fraud, or given under the influence of drugs.[33]

Liability for battery is not restricted to situations where the harmful consequences were foreseeable. A defendant is liable for *all* consequences of the battery, whether or not they were intended or foreseeable.[34]

The purpose and features of the tort of battery were considered by the Supreme Court of Canada in *Non-Marine Underwriters, Lloyd's London v. Scalera*.[35] McLachlin J. (as she then was), writing for the majority, stated at paragraph 15 as follows:

> The tort of battery is aimed at protecting the personal autonomy of the individual. Its purpose is to recognize the right of each person to control his or her body and who touches it, and to permit damages where this right is violated. The compensation stems from violation of the right to autonomy, not fault. When a person interferes with the body of another, a *prima facie* case of violation of the plaintiff's autonomy is made out. The law may then fairly call upon the person thus implicated to explain, if he can. If he can show that he acted with consent, the *prima facie* violation is negated and the plaintiff's claim will fail.

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30 Lewis N. Klar, *Tort Law*, 6th ed. (Toronto: Thomson Reuters, 2017) at 49.
31 *Ibid.* at 52.
32 *B. (R.) v. S. (E.) (Litigation guardian of)*, 2017 ONSC 7866 (S.C.J.) [*B. (R.) v. S. (E.)*].
33 *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 (S.C.C.) at paras. 26 and 121, additional reasons 1992 CarswellBC 338 (S.C.C.).
34 Elizabeth K.P. Grace & Susan M. Vella, *Civil Liability for Sexual Abuse and Violence in Canada* (Toronto: Butterworths, 2000) at 11.
35 *Non-Marine Underwriters, Lloyd's London v. Scalera*, [2000] 1 S.C.R. 551 (S.C.C.).

Strictly speaking, there is no tort of sexual assault or sexual battery, but the term "sexual" is commonly used to distinguish such assault and battery from that which does not involve sexual contact.[36]

Both assault and battery are intentional torts of commission, not omission, and are based on positive or affirmative acts.[37] While both torts typically occur together, it is possible for each to be committed separately.[38] For example, in *H.C. v. G.C.C.,* the Court found the plaintiff had been subjected "to both the fear of unwanted sexual advances and physical violence from her father and the actual physical attacks and sexual violations".[39]

(a) Recognition of harm

Recent developments in this area of law include escalating damages awards,[40] and allegations that were once thought to be "minor" are now being taken more seriously. For example, in the recent decision of *B. (R.) v. S. (E.) (Litigation Guardian of)*,[41] the plaintiff alleged that she met with the defendant to prepare for a criminal matter in which the defendant was representing her. The plaintiff alleged that during this first meeting the defendant engaged in non-consensual touching, by cupping her breasts, hugging her, touching her under her shirt, and attempting to kiss her.

The plaintiff made a report to the police; criminal charges were laid and the defendant pleaded guilty to assault. The sentencing judge found that at the time of the assault, the defendant was suffering from Alzheimer's. In the civil matter, the factors the court considered were that the defendant was in a position of trust as her lawyer, the assault took place during a first meeting, and that as a client, the plaintiff was vulnerable. The touching was sexual, unwanted, and an invasion of the plaintiff's personal dignity and autonomy. The assault took place on one occasion only. However, the consequences to the plaintiff's psychological integrity were significant. The Court held that the tort of sexual battery had been established. Further, the defendant breached his fiduciary duty as the

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[36] Grace & Vella, *supra* note 34 at 8.

[37] John G. Fleming, *The Law of Torts*, 9 ed. (Sydney: The Law Book Co. Ltd., 1998) at 29-30.

[38] Grace & Vella, *supra* note 34 at 7.

[39] *H.C. v. G.C.C.*, 1998 CarswellOnt 3162, [1998] O.J. No. 2543 (Gen. Div.).

[40] For example, in the 2012 decision of *M.B. v. Deluxe Windows*, 2012 ONCA 135 (C.A.), leave to appeal refused *B. (M.) v. 2014052 Ontario Ltd.*, 2012 CarswellOnt 11944 (S.C.C.), the Ontario Court of Appeal upheld an award granting more than $300,000 in general and aggravated damages to a woman who suffered from depression and post-traumatic stress following repeated sexual assaults against her by her supervisor. The Human Rights Tribunal of Ontario awarded $150,000 to a migrant worker in the workplace sexual assault case of *T. (O .P.). v. Presteve Foods Ltd.*, 2015 HRTO 675 (Human Rights Trib.).

[41] *B. (R.) v. S. (E.), supra* note 32.

plaintiff's lawyer. The Court ordered non-pecuniary damages in the amount of $70,000, plus $5,000 for the cost of psychological counselling.

In *Silvera v. Olympia Jewellery Corporation*,[42] the plaintiff had worked as a receptionist for the defendant corporation for one and a half years. She was terminated after a two-week absence following dental surgery. The plaintiff sued her former employer and supervisor, alleging sexual assault and battery by the supervisor, which included repeated grabbing of her breasts and buttocks, and attempting to put his hands down the front of her shirt. She continued to work at Olympia, since she felt "trapped" as a single mother who needed to support her daughter. The trial judge found the supervisor engaged in several acts of battery, breached his fiduciary duty to the plaintiff, did not fulfil his duty of care under the *Occupiers' Liability Act,* and engaged in racial and sexual harassment under the *Human Rights Code*.

The plaintiff was awarded a total of $312,056.56 as follows: the defendants were jointly and severally liable for $206,711.93 for the supervisor's conduct, broken down as $90,000 for general and aggravated damages, $10,000 for punitive damages, $30,000 for breach of the *Human Rights Code*, $42,750 for costs of future therapy care, $37.18 for the subrogated OHIP claim, and $33,924.75 for future lost income; in addition Olympia was ordered to pay Ms. Silvera $90,344.63 for wrongful termination; and the defendants were to jointly and severally pay Ms. Silvera's daughter $15,000 in damages under the *Family Law Act*.

These two decisions are significant, in that they signal a strong condemnation by the court of this kind of misconduct and sexual aggression, particularly in the workplace. In years past, this behavior, in our view, would have garnered lower damages awards. The *Silvera* decision also exemplifies the benefits of a comprehensive and compensative award that is only available in the civil arena.

(b) Consent

Another important development is the intensifying discussion surrounding sexual misconduct and consent and what may or may not vitiate consent. In Linden and Feldthusen, *Canadian Tort Law*,[43] the authors explain that not all forms of fraud will undermine consent to sexual touching. The key question is whether the deceit goes to the "nature and quality of the act".

Cases of fraud as to "the nature and quality of the act" have included circumstances where, for example, a choir master had sexual intercourse with a young student under the pretense that it would improve her singing[44] and where a woman consented to sexual intercourse under the belief that it would cure

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[42] *Silvera v. Olympia Jewellery Corporation*, 2015 ONSC 3760 (S.C.J.) [*Silvera*].

[43] Linden and Feldthusen, *Canadian Tort* Law, 10th ed. (Toronto: LexisNexis, October 2015) at 82.

[44] *R. v. Williams* (1922), [1923] 1 K.B. 340 (Eng. Ct. of Crim. App.).

certain physical disorders.[45] Fraud pertaining to the identity of the sexual partner will also undermine consent.[46]

More recently, the Supreme Court of Canada in *R. v. Hutchinson*[47] upheld the sexual assault conviction of a Nova Scotia man who had poked holes in a condom, although the complainant had not consented to unprotected sex, and she became pregnant. This decision built on the *R. v. Mabior*[48] case in which the Supreme Court upheld the criminal conviction of sexual assault where the accused failed to disclose his HIV-positive status before intercourse. The Supreme Court reaffirmed (at least in the criminal context) that consent to sexual activity is to be viewed subjectively, from the point of view of a complainant. Further, the Supreme Court held that, for consent to be vitiated by fraud there must be dishonesty, which can include the non-disclosure of important facts; and deprivation or risk of deprivation in the form of serious bodily harm that results from the dishonesty.[49]

In *Hutchinson*, the majority held that depriving a woman of the choice whether to become pregnant is equally as serious as the "significant risk of serious bodily harm" standard set in earlier decisions, sufficient to establish fraud vitiating consent:

> [The] concept of "harm" does not encompass only bodily harm in the traditional sense of that term; it includes at least the sorts of profound changes in a woman's body — changes that may be welcomed or changes that a woman may choose not to accept — resulting from pregnancy.[50]

Essentially, this decision turned on the sexual autonomy of a woman, and her ability to control her own body. The majority found that removing effective birth control without her knowledge was a sufficiently serious deprivation to constitute fraud.

In the civil law sphere, an attempt at a reverse spin on *Hutchinson* can be found in *P.P. v. D.D.*,[51] where an Ontario doctor sued his former partner for "emotional harm" after she became pregnant, following what he termed "recreational sexual intercourse." In particular, the plaintiff alleged the

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45 *R. v. Harms* (1943), [1944] 2 D.L.R. 61 (Sask. C.A.).

46 In *R. v. Crangle*, 2010 ONCA 451 (C.A.), leave to appeal refused 2010 CarswellOnt 9683 (S.C.C.), the Ontario Court of Appeal upheld a criminal conviction for sexual assault where the complainant mistakenly believed her sexual partner was her boyfriend when it was in fact his identical twin brother and where the twin was reckless or willfully blind as to whether his identity was clear to the complainant.

47 *R. v. Hutchinson*, 2014 SCC 19 (S.C.C.) [*Hutchinson*].

48 *R. v. Mabior*, [2012] 2 S.C.R. 584 (S.C.C.).

49 *Hutchinson*, *supra* note 47 at para. 67.

50 *Ibid.* at para. 70.

51 *P.P. v. D.D.*, 2016 ONSC 258 (S.C.J.), additional reasons *P. (P.) v. D. (D.)*, 2016 CarswellOnt 1566 (S.C.J.), affirmed *P. (P.) v. D. (D.)*, 2017 ONCA 180 (C.A.).

misrepresentation of the defendant vitiated his consent to sexual intercourse. His action including his claims of sexual battery and fraudulent misrepresentation, was dismissed. However, the Court agreed that sexual battery is found when there is no consent, and the consent has to be meaningful, voluntary, and genuine. The Ontario Court of Appeal upheld the dismissal of the claim on the basis that there was no serious risk of bodily harm to the appellant. The Court found that the intercourse between the two known partners occurred consensually on many occasions. The appellant's consent to sexual activity was meaningful, voluntary, and genuine. He consented to unprotected sex and was fully informed as to the respondent's identity and as to the nature of the sexual act in which the parties voluntarily participated. The touching involved was wanted and would have occurred in the same way except that, but for the alleged misrepresentation, the appellant would have used a condom. The Court of Appeal concluded that not wearing a condom did not increase the appellant's risk of serious physical injury[52] and dismissed the appeal.

Some commentators applaud the *P.P.* decision, since it acknowledges a woman's reproductive autonomy. Others express concern about the analysis relying so heavily on the requirement of bodily harm in order to vitiate consent.

In the United States, there has been much discussion recently around sexual assault in the form of "stealthing" or the non-consensual removal of a condom during otherwise consensual intercourse.[53] Apparently, some men do so for increased pleasure on their part or due to a belief of masculine supremacy and an inherent right to "spread their seed".[54] There are online communities devoted to this practice where men share tips on how to do so without detection. Apart from the fear of specific bad outcomes such as pregnancy and sexually transmitted infections, most victims see this act as a disempowering, demeaning violation of a sexual agreement.[55] This "consent violation" is in many ways a threat to a person's bodily agency and a dignitary harm. Some consider this act as "rape-adjacent" and opine that the appropriate remedy ought to consider the act itself as violent.[56]

As the law stands in Canada, a civil claim is likely to be successful for an act such as "stealthing" on the basis of vitiated consent, where the deception puts one at a "significant risk of bodily harm". However, if the perpetrator does not have a sexually transmitted disease or there is no real risk of pregnancy (based on age, fertility, or gender), a finding of sexual assault may not be supported in

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[52] *Ibid.* (Ont. C.A.) at para. 84.
[53] Alexandra Brodsky, "Rape-Adjacent: Imagining Legal Responses to Nonconsensual Condom Removal" (2017) Columbia Journal of Gender and Law, Vol. 32, No. 2.
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*

the law. As such, it potentially creates different standards for different classes of victims.

Some commentators advocate that the law should consider not just the physical harm that may result from deception, but also how that deception compromises the idea of consent.[57] This approach was taken by the minority of the Supreme Court of Canada in *Hutchinson* where the minority held that the deliberate and undisclosed thwarting of the agreement as to how the intercourse was to take place turned the sexual activity into a non-consensual act, regardless of its consequences.[58] The discussion is not about what vitiates consent, but whether there was any consent in the first place. The concern is to uphold a person's right to sexual autonomy and physical integrity. Writing for the minority, Abella J. (as she then was), stated:

> A person consents to *how* she will be touched, and she is entitled to decide what sexual activity she agrees to engage in for whatever reason she wishes. The fact that some of the consequences of her motives are more serious than others, such as pregnancy, does not in the slightest undermine her right to decide the manner of the sexual activity she wants to engage in. It is neither her partner's business nor the state's.[59]

The majority in *Hutchinson* considered this approach and held that it would likely open the floodgates and would see the criminalization of acts that should not attract the "heavy hand of the criminal law".[60]

2. Intentional Infliction of Mental Suffering

The tort of the intentional infliction of mental suffering is sometimes pleaded in sexual abuse cases, either concurrently with, or in the alternative to, other intentional torts such as assault and battery. This tort can make actionable certain conduct, not otherwise encompassed by the more commonly pleaded torts of assault and battery. An example given includes a person who is intimidated and sexually harassed through repeated telephone calls or emails where there is no actual physical contact or an apprehension of imminent physical contact.[61] This tort can also be relied on by secondary victims as long as they suffer nervous shock which is caused by the abuse and was reasonably foreseeable.[62]

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[57] Malone Mullin, "'Stealthing' Could be Considered Assault Say Experts About Secret Removal of Condom During Sex" *CBC News* (3 May 2017), online: <http://www.cbc.ca/news/health/stealthing-condoms-legal-concerns-1.4088491>.

[58] *Hutchinson*, *supra* note 47 at para. 76.

[59] *Ibid.* at para. 88.

[60] *Ibid.* at para. 46.

[61] Grace & Vella, *supra* note 34 at 11.

[62] *S. (J.) v. Clement*, 1995 CarswellOnt 1703, [1995] O.J. No. 248 (Gen. Div.), additional reasons 1995 CarswellOnt 2962 (Gen. Div.).

According to *Boucher v. Wal-Mart Canada Corp.*,[63] the test for intentional infliction of mental suffering has three elements. The defendant's conduct must have been (i) flagrant and outrageous, (ii) calculated to harm the plaintiff and (iii) it must have caused the plaintiff to suffer a visible and provable illness. In that decision, the Court found that the plaintiff's supervisor "belittled, humiliated and demeaned the plaintiff continuously and unrelentingly, often in front of co-workers, for nearly six months." This constituted flagrant and outrageous conduct. The Court of Appeal found the tort of intentional infliction of mental suffering had been made out and affirmed the jury's award of $100,000. The Court found Wal-Mart had "paid lip service" to its open door and violence and harassment policies. By failing to enforce these policies to bring an end to the manager's misconduct, the Court found that Wal-Mart's actions justified a separate and substantial award for aggravated damages ($200,000). The Court reduced the punitive damages awards against the manager from $100,000 to $10,000 and against Wal-Mart from $1 million to $100,000.

In the 2017 decision of *Merrifield v. Canada (Attorney General)*,[64] Vallee J. found that the plaintiff had proven the tort of intentional infliction of mental suffering notwithstanding the absence of medical evidence. She was satisfied that the plaintiff suffered from depression and post-traumatic stress disorder as a result of the prolonged harassment and bullying of the plaintiff by his supervisors.[65] Vallee J. also noted that amounts awarded for damages for this tort have "increased significantly since the 1990s". She awarded non-pecuniary damages in the amount of $100,000. Vallee J. did not award punitive damages, opining that this amount was sufficient to denounce and deter the defendant's conduct.

However, in *Colistro v. Tbaytel*,[66] the Court dismissed the plaintiff's claim for intentional infliction of mental suffering despite finding that there was credible medical evidence supporting a visible and provable illness. While saying that "a reasonable person aware of all the facts could find the conduct of Tbaytel to be flagrant and outrageous", Fregeau J. stated the evidence did not establish that the conduct was calculated to produce harm or that the company knew "it was substantially certain" that its conduct would precipitate post-traumatic stress disorder and depression. However, Fregeau J. held that "should liability ultimately be found" for intentional infliction of mental distress, the plaintiff should be entitled to an additional $573,000 in non-pecuniary damages and past and future economic loss. This decision is now under appeal.

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63 *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419 (C.A.).
64 *Merrifield v. Canada (Attorney General)*, 2017 ONSC 1333 (S.C.J.) [*Merrifield*].
65 *Ibid.* at para. 848.
66 *Colistro v. Tbaytel*, 2017 ONSC 2731 (S.C.J.) [*Colistro*].

3. Harassment

Following the Supreme Court of Canada's decision in *Janzen v. Platy Enterprises Ltd.*,[67] allegations of sexual harassment could be litigated under provincial and federal human rights legislation prohibiting discrimination in employment on the basis of sex. Previously, it was necessary to show the sexual harassment had led to adverse job-related consequences for the victim of the harassment.

In the civil context, some jurists have written that it is unclear whether harassment has been established as a civil tort in Canadian law. In addition, while several decisions had found that there was no such tort, other decisions had been decided on the assumption that the tort of harassment did exist, but without setting out its elements;[68] in others, sexual harassment is in fact a recognized tort.[69]

In Ontario, courts have held that "there is no freestanding tort of harassment",[70] and more recently, that the tort of harassment was a "still-developing tort"[71] and a "live legal issue".[72] However, it was not until this past year where harassment, including workplace harassment, was found to be an independent cause of action in Ontario.[73]

In *Merrifield v. Canada (Attorney General)*,[74] the plaintiff had joined the RCMP in 1998. He alleged as part of his claim that after he ran for political office, his supervisors started making unjustified and unwarranted decisions about him based on allegations that had no merit. The plaintiff alleged that his superiors harassed and bullied him, damaged his reputation, impaired his career advancement, and caused him to suffer severe emotional distress including depression. As a result, he was off work for significant periods of time. The plaintiff commenced his claim against the RCMP as well as the individual supervisors who had participated in the allegedly harassing activities. The plaintiff's evidence at trial was largely accepted by the trial judge.

Justice Brown agreed that harassment is a tort upon which a civil claim can be commenced. He considered the prohibition in s. 46.1(2) of the Ontario *Human Rights Code* against bringing a civil claim solely on an infringement of a right

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67 *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 (S.C.C.).

68 *Wexler v. Carleton Condominium Corp. No. 28*, 2015 CarswellOnt 20652 (S.C.J.), additional reasons 2016 CarswellOnt 6003 (S.C.J.), reversed *Norma Wexler v. Carleton Condominium Corporation No. 28*, 2017 CarswellOnt 15271 (Div. Ct.) (WL).

69 See for example, *Lajoie v. Kelly*, [1997] 3 W.W.R. 181 (Man. Q.B.).

70 *Desjardins v. Society of Obstetricians and Gynecologists of Canada*, 2012 ONSC 7294 (S.C.J.), additional reasons 2013 CarswellOnt 5784 (S.C.J.).

71 *McIntomney v. Evangelista Estate*, 2015 ONSC 1419 (S.C.J.).

72 *John v. Cusak*, 2015 ONSC 5004 (S.C.J.).

73 *Merrifield*, *supra* note 64.

74 *Ibid.*

under the *Act*.[75] However, Brown J. noted that in this case, the plaintiff did not plead a violation of the *Human Rights Code* when claiming damages for harassment. His claim was based on the common law tort of harassment. Based on the jurisprudence before the Court, Brown J. was satisfied that the tort of harassment does exist, and that it has been recognized as a cause of action in Ontario.

Brown J. adopted the following test for the tort of harassment which had been set in an earlier decision in British Columbia[76] and had been favourably considered in Ontario:[77]

a) Was the conduct of the defendants toward the plaintiff outrageous?
b) Did the defendants intend to cause emotional stress or did they have a reckless disregard for causing the plaintiff to suffer from emotional stress?
c) Did the plaintiff suffer from severe or extreme emotional distress?
d) Was the outrageous conduct of the defendants the actual and proximate cause of the emotional distress?

Brown J. held that this test was closely aligned with the well-established tort of intentional infliction of emotional distress, except that "harassment" did not require an as clearly established causal connection between the conduct and a medically diagnosed condition.

Brown J. found that over a period of seven years, the plaintiff's career was damaged by a pattern of conduct on the part of his superiors, which caused him emotional and medical stress and upset, despite his efforts to address all issues fairly with the force. Brown J. found the defendants' actions to be outrageous and flagrant. He awarded $100,000 in non-pecuniary damages for harassment and intentional infliction of mental harm.

Although the decision of the Alberta Court of Queen's Bench in *Al-Ghamdi v. Alberta*[78] was released shortly after *Merrifield,* the Court there held that it was not clear whether harassment is a recognized tort. This relatively new tort would benefit from appellate review. Until that time, arguably, the *Merrifield* decision opens the door for harassment complainants which cannot identify a specific protected ground under human rights legislation, and may now more confidently seek compensation for the tort of harassment.

In *Colistro*,[79] Fregeau J. gave a rather stern warning for employers on what not to do following harassment allegations in the workplace. In that case, the employer knowingly rehired an executive who had previously sexually harassed

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75 See e.g. s. 46.1 of Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19.
76 *Mainland Sawmills Ltd. v. IWA-Canada, Local 1-3567 Society*, 2006 BCSC 1195 (S.C.).
77 *McHale v. Ontario*, 2014 ONSC 5179 (S.C.J.) at para. 44.
78 *Al-Ghamdi v. Alberta*, 2017 ABQB 684 (Q.B.) at para. 136, additional reasons 2017 CarswellAlta 2519 (Q.B.).
79 *Colistro*, *supra* note 66.

the plaintiff. Fregeau J. held that this constituted constructive dismissal and awarded damages against the employer. Additionally, Fregeau J. awarded $100,000 for the employer's bad faith conduct.

Further, the recent amendments[80] to the Ontario *Occupational Health and Safety Act* created new obligations for employers to take reasonable steps to prevent and address sexual harassment in the workplace. In light of these amendments and the recent change in the social climate, employers would be wise to be proactive in ensuring their workplaces are free of harassment, and know what steps to take if harassment is alleged.

4. Developments in Vicarious Liability for Sexual Wrongdoing in the Workplace

It is well-settled that an employer can be found vicariously liable for an employee's acts when, in discharging his or her employment duties, the employee inadvertently causes loss or damage to an innocent third party. For example, the employer of a grocery-store worker who negligently left a mop on the floor of an aisle of the store would normally be found vicariously liable for the damage suffered by a customer who tripped over the mop, even if the employer was not itself negligent or otherwise at fault.[81]

However, the more challenging issue is when an employer should be found vicariously liable for an unauthorized, intentional wrong, such as sexual assault, committed by an employee.

In *Bazley v. Curry,* the Supreme Court of Canada articulated the test for vicarious liability of an employee's unauthorized, intentional wrong as "whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability".[82] The Supreme Court of Canada also provided a non-exhaustive list of factors to determine the sufficiency of this connection:

- The opportunity that the enterprise afforded the employee to abuse his or her power;
- The extent to which the wrongful act may have furthered the employer's aims;
- The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
- The extent of power conferred on the employee in relation to the victim;

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[80] Bill 132, *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment)* S.O. 2016 C.2 [*Bill 132*].

[81] *Ivic v. Lakovic*, 2017 ONCA 446 (C.A.) at para. 10, leave to appeal refused *Tanja Ivic v. Velibor Boro Lakovic, et al.*, 2018 CarswellOnt 1628 (S.C.C.) [*Ivic*].

[82] *Bazley v. Curry*, [1999] 2 S.C.R. 534 (S.C.C.).

- The vulnerability of potential victims to wrongful exercise of employee's power.[83]

McLachlin J. (as she then was), while writing for the Court, explained the two major policy rationales for the imposition of vicarious liability, generally. The first is victim compensation, since vicarious liability improves the chances that the victim can recover from a solvent defendant. The second rationale is the deterrence of future harm.[84]

Subsequent decisions have indicated that the test in *Bazley* must be applied with serious rigour.[85]

In the recent decision of the Ontario Court of Appeal in *Ivic v. Lakovic*,[86] the appellant alleged that she was sexually assaulted by her driver while in a taxi. She had just left a party and was inebriated and feeling unwell. The Court set out the principles of vicarious liability and reiterated that:

- Most commonly, an employer is found vicariously liable for an employee's acts when: (a) those acts were committed in the course of the employee's employment duties; and (b) they inadvertently result in loss or damage to an innocent third party.
- A "wrong that is only coincidentally linked to the activity of the employer and duties of the employee cannot justify the imposition of vicarious liability on the employer . . . the fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability".[87]

This decision confirms that there must be a "strong connection" between what the employer was asking the employee to do and the assault. In this case, the Court of Appeal held the employer did not "materially" increase the risk of the appellant being assaulted by the driver by permitting him to drive the taxi. The alleged acts were only coincidentally connected to the taxi company and the company did not confer any power on the driver over the appellant. Furthermore, the employer had rules that sought to prevent any physical contact with customers. The Court concluded that the *Bazley* factors did not support the imposition of vicarious liability and that the appellant had not demonstrated how the broader policy rationales of fair compensation and deterrence would have been furthered by imposing liability. The claim against the employer was dismissed. Leave to appeal has been refused by the Supreme Court of Canada.[88]

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[83] *Ibid.* at para. 41.
[84] *Ibid.* at paras. 30-32.
[85] *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570 (S.C.C.) at para. 30; *Ivic*, *supra* note 81 at para. 37.
[86] *Ivic*, *supra* note 81.
[87] *Ibid.* at paras. 10 and 23.
[88] *Tanja Ivic v. Velibor Boro Lakovic, et al.*, 2018 CarswellOnt 1628 (S.C.C.) (WL).

In *Lorian v. 1163957799 Quebec Inc., c.o.b. as Calypso Water Park et al.*,[89] the plaintiff sued her employer, claiming that it was vicariously liable for a sexual assault she suffered at the hands of her supervisor at an employer-sponsored staff party. The party took place at a theme water park operated by the employer. The employer provided food, beverages, and access to the grounds, while employees were permitted to bring in their own alcohol. The Court, on a motion to strike the pleading, considered the *Bazley* analysis and held the pleading could support a finding of vicarious liability in this case, since the employer materially enhanced the risk to employees. The party took place at a large water park where supervision would be inherently difficult and employees could easily become isolated and vulnerable. Further, the employer allowed alcohol to be consumed at the party without taking steps to control consumption, for example, by hiring a professional bartender.

The recent decision of *Doyle v. Zochem*[90] illustrates the importance of conducting proper investigations into allegations of sexual misconduct. Ms. Doyle was the plant manager and health and safety coordinator at a plant of approximately 50 employees for nine years. She was the only woman who worked in the plant. Over the course of her employment, the Court found that she was subjected to sexual harassment by the plant maintenance manager. This harassment included referring to her breasts by various nicknames, staring at her breasts and pretending he was taking pictures of them, telling her she needed to have sex more often, and referring to a piece of equipment as a tool he would use to tie her up to better "get at her".[91] The manager also displayed photographs of scantily clad women in his office.

Ms. Doyle told the manager that his behaviour was unwelcome. She also complained to a third-party company hired by the employer in 2010 to conduct an employee survey on violence and harassment. Their survey pointed out a culture of bullying, verbal abuse, and intimidation. It suggested the employer implement a training plan to combat this environment. The employer refused. Ms. Doyle turned to the assistant general manager and complained again of the manager's continuing sexual harassment of her. Unbeknownst to Ms. Doyle, a decision had already been made to terminate her employment.

The assistant general manager conducted a "cursory" investigation into Ms. Doyle's complaint and the Court found it utterly deficient. Trimble J. made the following critiques:

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89 *Lorian v. 1163957799 Quebec Inc., c.o.b. as Calypso Water Park et al.*, 2015 ONSC 2417 (S.C.J.), additional reasons *Lorion v. 1163957799 Quebec Inc.*, 2015 CarswellOnt 7879 (S.C.J.).

90 *Doyle v. Zochem*, 2017 ONCA 130 (C.A.) [*Doyle*].

91 *Ibid.* at para. 8.

- The Assistant General Manager had no experience or training in conducting workplace investigations;
- The investigation took only one day;
- Ms. Doyle was not interviewed or given an opportunity to provide a written statement;
- During Ms. Doyle's termination meeting it was suggested to her that she was being irresponsible, since the Manager's reputation was on the line, inferring that she should abandon her claim of sexual harassment;
- The Investigator's notes showed a clear bias against Ms. Doyle; and
- Ms. Doyle was terminated without cause only five days after the investigation. The trial judge found that Ms. Doyle's gender and sexual harassment complaint were likely the most significant reasons for why she was terminated.[92]

Trimble J. also found that the employer "mangled the termination process" by recruiting employees to "dig up dirt" to discredit her and creating poor performance reviews, among others.[93]

Ms. Doyle was awarded 10 months of reasonable notice, $60,000 in moral damages and $25,000 in human rights damages. The Court of Appeal upheld the trial decision and further awarded costs to Ms. Doyle in the amount of $40,000 "on the basis that the employer's conduct in pursuing this appeal was a continuation of its oppressive conduct toward Doyle".[94]

These decisions emphasize the importance for employers and organizations to have clear sexual assault policies in place prohibiting such acts. Employers must be proactive in condemning these actions and also taking immediate steps to investigate allegations of sexual abuse or harassment.

In Ontario, the recent amendments to the *Occupational Health and Safety Act*[95] require an employer to thoroughly investigate any known incidents of harassment or abuse, even if a formal complaint is not filed. Investigations must be conducted in a reasonable and objective manner; otherwise, the Ministry of Labour can order that a third party conduct an investigation at the employer's expense.

5. Damages for Civil Sexual Misconduct

In the context of sexual assault and battery, the jurisprudence has recognized that there are fundamental, although intangible, interests at stake: the victim's dignity and personal autonomy. Thus, the award of damages should take a

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92 Jennifer Costin, "A Costly Lesson in How Not to Conduct a Workplace Harassment Investigation" *Siskinds* (14 November 2017), online: <https://www.siskinds.com/workplace-harassment-investigation/>.

93 *Doyle*, *supra* at note 90 at para. 16.

94 *Ibid*. at para. 57.

95 *Bill 132*, *supra* note 80.

functional approach in relation to these interests in addition to the more familiar ones of pain, suffering, and loss of enjoyment of life.[96] The purpose of such an award is meant to provide solace for the victim's pain and suffering and loss of enjoyment of life, to vindicate the victim's dignity and personal autonomy, and to recognize the humiliating and degrading nature of the wrongful acts.[97]

The factors to be considered for non-pecuniary damages in cases of sexual assault were reviewed by Cromwell J.A. (as he then was) in *G. (B.M.) v. Nova Scotia (Attorney General)*, and include:

a) The circumstances of the victim at the time of the events, including factors such as age and vulnerability;
b) The circumstances of the assault, including their number, frequency and how violent, invasive and degrading they were;
c) The circumstances of the defendant, including age and whether he or she was in a position of trust; and
d) The consequences for the victim of the wrongful behaviour, including ongoing psychological injuries.[98]

The underlying consideration in all of these factors is the extent to which the abuse harms the plaintiff.[99]

Assessing non-pecuniary damages of a victim of sexual violence is challenging. As the British Columbia Court of Appeal noted:[100]

> To assess damages for the psychological impact of sexual abuse on a particular person is like trying to estimate the depth of the ocean by looking at the surface of the water. The possible consequences of such abuse presently are not capable of critical measurement.

The calculation of damages for sexual assault can be complicated by the existence of other sources of trauma.[101] However, the Supreme Court of Canada has held that there must be an untangling of the various sources of damage and trauma, as the plaintiff is only entitled to be compensated for loss that is caused by the actionable wrong.[102]

Non-pecuniary damages awards for sexual misconduct are fact-specific and generally range between $10,000 and $125,000. More egregious cases have seen

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96 *Silvera*, *supra* note 42 at para. 124.
97 *Ibid.* at para. 126.
98 *G. (B.M.) v. Nova Scotia (Attorney General)*, 2007 NSCA 120 (C.A.) [*G. (B.M.)*]; *Silvera*, *supra* note 42.
99 Merritt, *supra* note 6 at 479.
100 *S.Y. v. F.G.C.* (1996), 78 B.C.A.C. 209 (C.A.).
101 Merritt, *supra* note 6.
102 *Blackwater v. Plint*, 2005 SCC 58 (S.C.C.) at para. 74.

damages awards as high as $300,000.[103] Notably, the cap on non-pecuniary damages does not apply to sexual abuse cases.[104]

Aggravated damages in sexual abuse cases have ranged between $10,000 and $60,000, with the median being around $25,000.[105]

Punitive damages in sexual abuse cases have ranged between $4,000 and $50,000, the latter amount being reserved for "serious cases of sexual assault", often involving prolonged, repeated and violent abuse of a child by a parent.[106]

One of the concerns some commentators have is that non-pecuniary damages awards for sexual misconduct and abuse continue to be wide-ranging. For example, an award of $325,000 in non-pecuniary damages was made in *Singh v. Bains*,[107] a case involving anal and vaginal rape of a minor over several years. But this high award is in stark contrast to an award made a few years later of only $35,000 to a young woman who was the victim of sexual touching by her stepfather during her adolescence.[108]

Overall, we are seeing increasing damages assessments across the country, which evidences the civil courts' willingness to recognize the serious consequential harm that is caused by sexual assault, harassment and exploitation in our society.

6. Limitation Periods

A noteworthy development in this area of the law is the trend towards more relaxed and forgiving limitation periods for sexual abuse cases, or no limitation periods at all. Due to the profound psychological effects of abuse, claims are often brought many years after the abuse has occurred. As a result, the law relating to limitation periods has had to adapt to take into account the specific needs of victims of sexual abuse and misconduct.[109]

The Supreme Court of Canada liberalized the limitation period for sexual abuse claims in the 1992 decision in *M. (K.) v. M. (H.)*[110] and held that the limitation period does not begin to run until the plaintiff is reasonably capable of discovering the wrongful nature of the defendant's acts. Typically, that is not until he or she has received counselling.

Since the *M. (K.)* case, most Canadian jurisdictions have changed their limitations legislation to allow victims to sue for compensation for sexual assault

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[103] *M.B. v. Deluxe Windows*, 2012 ONCA 135 (C.A.), leave to appeal refused *B. (M.) v. 2014052 Ontario Ltd.*, 2012 CarswellOnt 11944 (S.C.C.); *G. (B.M.)*, *supra* note 98.

[104] See *S.Y. v. F.G.C.* (1996), 78 B.C.A.C. 209 (C.A.) at para. 55; Grace & Vella, *supra* note 34 at 210.

[105] Grace & Vella, *supra* note 34 at 210.

[106] *Ibid.* at 213.

[107] *Singh v. Bains*, 2008 BCSC 823 (S.C.), additional reasons 2009 CarswellBC 523 (S.C.).

[108] *R.D. v. G.S.*, 2011 BCSC 1118 (S.C.).

[109] Merritt, *supra* note 6 at 461.

[110] *M. (K.) v. M. (H.)*, (*sub nom.* M. c. M.) [1992] 3 S.C.R. 6 (S.C.C.).

years (and sometimes decades) after the assault occurred.[111] In British Columbia, Manitoba, New Brunswick, Saskatchewan and the Yukon, the legislation states that there is no limitation period for sexual assaults.

In Ontario, there were further amendments to the *Limitations Act* effective March 9, 2016, to remove all limitation periods for civil claims for sexual assault, domestic violence, and child abuse.[112] These amendments are retroactive. Accordingly, individuals and employers are now open to sexual misconduct claims that could have arisen decades ago. Similar amendments were made in Alberta effective May 4, 2017.[113] In that province, the language used was intentionally broad and inclusive to ensure that "sexual misconduct" included sexual harassment, sexual exploitation, stalking, indecent exposure, voyeurism, or distributing sexually explicit photographs without consent.[114]

In the recent decision of *Doe v. Weinstein*,[115] Monahan J. clarified whether the recent amendments to the *Limitations Act* in Ontario applied to defendants other than the perpetrator. Weinstein's former assistant, Barbara Schneeweiss, is alleged to have been a "knowing facilitator" of the sexual assaults that took place 17 years earlier. Schneeweiss brought a motion to strike the claim and argued that the exemption in the legislation did not apply to the claims against her, which were in negligence and breach of duty, and not "in relation to sexual assault." Monahan J. considered the legislative intent of the amendments and noted that they addressed "broad systemic problems relating to sexual harassment and assault."[116] In addition, the purpose of the amendments is to ensure that "where a proceeding involves a claim for civil liability arising from or relating to a sexual assault, that proceeding cannot be barred by the *Limitations Act*."[117] This encompasses proceedings against persons other than the perpetrator of the sexual assault regardless of the nature of the claim (i.e. whether for breach of duty, vicarious liability or otherwise, provided that the connection with a sexual assault is established).[118] Monahan J. held that all of

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[111] See for example the legislation in British Columbia (*Limitation Act,* SBC 2012, c 13, s. 3(1)(k)), Saskatchewan (*The Limitations Act*, S.S. 2004, c. L-16.1, s. 16), Manitoba (*The Limitation of Actions Act*, C.C.S.M. c. L150, s. 2.1), Northwest Territories (*Limitations of Action Act,* R.S.N.W.T. 1988, c. L-8 s.2.1), Newfoundland and Labrador (*Limitations Act*, S.N.L. 1995, c. L-16.1 s. 8(2)), Nova Scotia (*Limitation of Actions Act,* S.N.S. 2014, c. 35, s. 11) and the Yukon (*Limitation of Actions Act,* R.S.Y. 2002, c. 139 s. 2(3)).

[112] *Limitations Act*, *2002*, c. 24, Sched. B., s. 16.

[113] *Limitations Act,* R.S.A. 2000, c. L-12.

[114] Alberta, Legislative Assembly, *Hansard*, 29th Leg, 3rd Sess (22 March 2017) at 455-456 (Robert Wanner).

[115] *Doe v. Weinstein*, 2018 ONSC 1126 additional reasons 2018 CarswellOnt 6390 .

[116] *Ibid.* at para. 24.

[117] *Ibid.* at para. 26.

[118] *Ibid.* at para. 25.

the allegations against Schneeweiss are "in relation to" Weinstein's assaults and therefore, are not statute barred.

Interestingly, a recent decision by the Ontario Superior Court may pave the way for lawsuits based on sexual assault to be brought beyond the two-year limitation period following one's death pursuant to the *Trustee Act*.[119] Historically, the *Trustee Act* required a civil action for damages to be started within two years from the date of death. The jurisprudence indicated there was no flexibility with this timing. However, in the recent decision of *Fox v. Narine*, Lederer J. concluded that since the limitation period for sexual assault was removed in Ontario, the strict two-year limitation period following the death of a victim no longer applied.[120] This raises the possibility that a lawsuit based on sexual assault can be brought at any time, no matter how long after the death of a prospective plaintiff or defendant. The implications of this decision are far-reaching. Previously, estate administrators could assume that once two years had passed from the date of death, there could be no further claim for damages brought against the estate. This is no longer the case. However, a plaintiff may have no ability to recover where the estate's assets have been fully depleted within the two years (where no notice has been given of the claim within the two years of death).

7. Some Anticipated Implications to the Insurance Industry

The anticipated rise in sexual misconduct reporting is also relevant to insurers and underwriters as sexual harassment generally will trigger coverage under an employment practices liability ("EPL") policy. Nearly all EPL policies include a bodily injury exclusion and so claims for sexual assault and rape will generally not be covered. The same is true for the "conduct" exclusion generally seen in such policies, which excludes coverage for deliberate criminal acts. However, the harassment claim itself is not generally excluded. We anticipate there will be heavier EPL underwriting scrutiny, including the collection of information on an employer's work environment and harassment policies in determining whether to cover a risk and also in considering the appropriate premium.

Further, the broad language in coverage clauses in older policies of commercial general liability insurance and the absence of clear exclusionary language raises the potential for indemnity arising from claims for sexual abuse many years past. Although the exclusion of claims for sexual assault has become fairly standard language since the mid to late 1980s, claims may still arise based on allegations of sexual misconduct that pre-date same.

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[119] *Trustee Act*, R.S.O. 1990, c. T.23.
[120] *Fox v. Narine*, 2016 ONSC 6499 (S.C.J.).

IV. REVENGE PORN

Pornography and technology share a synergetic relationship, with the former being dependent on the latter for its independent growth and success. However, technology also provides a platform for unprecedented sexual aggression and harassment, as evidenced by the rise of cyberbullying and "revenge porn".[121] The non-consensual dissemination of intimate images and the resulting invasion of privacy, loss of reputation, and infliction of psychological harm demand an appropriate remedy.

Revenge pornography is the act of posting revealing or sexually explicit images of a person on the Internet, typically by a former sexual partner, without the consent of the subject, in order to cause them distress or embarrassment. The original content may have been created consensually; however, once distributed, the act of disclosing a private, sexually explicit image to someone other than the intended audience transmutes a private image into public sexual entertainment.[122] Although the term "revenge porn" suggests the motive for the dissemination of non-consensual images is vengeance, that is not always the case. Many perpetrators are motivated by a desire to entertain, to make money or to achieve notoriety.[123]

Victims of revenge porn face significant challenges, primarily due to its prevalence, reach and impact. It is estimated that as many as 3,000 websites feature revenge porn, and intimate material is also widely distributed without consent through social media, blogs, emails and texts.[124] To illustrate the extent of the problem on social media alone, Facebook recently reviewed more than 54,000 reports of revenge porn and "sextortion" in a single month, leading to the disabling of 14,000 accounts.[125]

The pervasiveness of revenge porn is due in part to the fact that, until recently, there were no real legal consequences for these acts.

1. Triggering Events to Canadian Criminal Code Amendments

In 2011, a then 15-year-old resident of Cole Harbour, Nova Scotia, Rehtaeh Parsons, was allegedly raped by four young boys. One of the perpetrators subsequently captured an image of the rape and texted it to two other

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[121] Taylor Linkous, "It's Time for Revenge Porn to Get a Taste of its Own Medicine: An Argument for the Federal Criminalization of Revenge Porn", (2014) 20 RICH. J.L. & TECH. 14, online: < http://jolt.richmond.edu/v20i4/article14.pdf > .

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

[123] *Ibid*. at 2.

[124] *Ibid*.

[125] Nick Hopkins, "Facebook flooded with 'sextortion' and 'revenge porn', files reveal", *The Guardian* (22 May 2017), online: < https://www.theguardian.com/news/2017/may/22/facebook-flooded-with-sextortion-and-revenge-porn-files-reveal > .

individuals.[126] It was not long before this image went viral. Parsons was bullied and taunted at school and "suddenly shunned by almost everyone she knew".[127] She transferred to a new school, but the harassment continued. On April 4, 2013, two years after the initial incident, Parsons attempted suicide by hanging herself in her home, resulting in her falling into a coma and later being taken off life support.[128] At the conclusion of the police investigation, sexual assault charges were not laid, as it was decided that there was insufficient evidence to proceed with the charges and that there was no realistic prospect of conviction.[129] Instead, two perpetrators involved were charged with distributing child pornography.[130]

Amanda Todd was only in seventh grade when she dove deep into the cyber-world, meeting new people on webcam to broaden her horizons. Through one of her interactions with a foreign man online, he flattered her to a point that resulted in her flashing her breasts on camera.[131] One year later, a man contacted Todd on Facebook, making threats of circulating the image of her if she did not "put on a show" for him. The anonymous man knew an alarming number of Todd's personal details, including her address, school, friends, relatives, and the names of her family members.[132] When she refused his demands, he posted the partially nude photographs of Todd to social media. Shortly thereafter, her nude photographs had gone viral, compelling Todd to change schools several times due to severe bullying and teasing.[133] After a failed suicide attempt, Todd took her own life several months later.[134]

These tragic events resulted in societal outrage and calls for legal reform. The federal government was quick to announce that it would take efforts to combat cyberbullying and several provinces took steps to introduce legislation that would make it an offence to share intimate images without consent. More recently, we have seen the creation of a new tort to address this unfortunate phenomenon.

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[126] Josh Visser, "'The Justice System Failed Her': Nova Scotia Teenager Commits Suicide after Being Raped, Bullied: Mother" *National Post* (9 April 2013), online: <http://nationalpost.com/news/canada/the-justice-system-failed-her-nova-scotia-teenager-commits-suicide-after-being-raped-bullied-mother>.

[127] *Ibid.*

[128] "A Chronology of the Rehtaeh Parsons Case" *Global News* (13 August 2013), online: <https://globalnews.ca/news/777152/a-chronology-of-the-rehtaeh-parsons-case> [*Chronology*].

[129] Visser, *supra* note 126.

[130] *Chronology*, *supra* note 128.

[131] Ryan Grenoble, "Amanda Todd: Bullied Canadian Teen Commits Suicide after Prolonged Battle Online and in School" *Huffington Post* (12 October 2012), online: <http://www.huffingtonpost.ca/entry/amanda-todd-suicide-bullying_n_1959909>.

[132] *Ibid.*

[133] *Ibid.*

[134] *Ibid.*

2. Criminal Code Amendments

In 2014, the federal government introduced Bill C-13, *Protecting Canadians from Online Crime Act*, which was proclaimed in force on March 9, 2015. The bill was part of the federal government's initiative against cyberbullying, and criminalized the publication of an intimate image without consent.

Section 162.1 of the *Criminal Code*,[135] provides:

> 162.1(1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty
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> (a) of an indictable offence and liable to imprisonment for a term of not more than five years; or
> (b) of an offence punishable on summary conviction.

The *Criminal Code* defines intimate images as visual recordings of a person made by any means, including photographic, film or video recordings, in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity, in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and, in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.[136]

Section 162.1 of the *Criminal Code* has been considered in only a handful of cases. A recent application of this provision is found in the case of *R. v. A.C.*[137] The complainant in that case had "Googled" her name and discovered that there were private videos of herself engaging in sexual intercourse, together with nude photographs posted online with her face clearly visible. The accused posted these images on several websites without consent. In addition, the accused tagged the complainant's name and city of residence to the images. Despite efforts to remove the images, they remained on the Internet in the form of "torrents". The complainant gave evidence of the psychological harm it caused, along with her inability to work for long periods of time. She also worried about future job prospects, where online searches of candidates are conducted during the interview process. The accused ultimately pleaded guilty and was sentenced to five months imprisonment, followed by 12 months of probation and community service.

While the criminalization of revenge porn is an important development in the law, particularly for general deterrence, it continues to have its limits. A

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[135] *Criminal Code*, R.S.C., 1985, c. C-46.
[136] *Ibid.*, s. 161.1 (2).
[137] *R. v. A.C.*, 2017 ONCJ 317 (C.J.).

claimant may still have no recourse to address the images remaining online, together with the psychological harm caused.

3. Developments in Tort Law

Recently, the common law has expanded the privacy tort, opened the door to common law recourse for the dissemination of private images and revenge porn, and raised the bar on non-pecuniary damages awards.

(a) Intrusion upon seclusion

The decision in *Jones v. Tsige*[138] is groundbreaking, as the Ontario Court of Appeal recognized the new privacy tort of "intrusion upon seclusion." Given the modern privacy issues that exist, the Court of Appeal indicated that the common law had to evolve in order to respond accordingly.

Jones involved an employee at the Bank of Montreal who accessed and reviewed another employee's personal bank accounts over a period of four years on 174 different occasions. When the plaintiff was made aware of the unauthorized access to her accounts, she commenced an action in the Ontario Superior Court of Justice seeking general, punitive and exemplary damages, in addition to a permanent injunction to restrain any similar conduct in the future. The plaintiff claimed that because of the unauthorized and improper access to her bank accounts the defendant had committed the tort of invasion of privacy. The action was dismissed by the Superior Court of Justice, relying on *Euteneier*,[139] holding that Ontario does not recognize a cause of action for invasion of privacy.

The Ontario Court of Appeal began its analysis in *Jones* by indicating that the question of whether the common law should recognize a cause of action in tort for invasion of privacy has been debated for the past 120 years. Justice Sharpe, writing for the Court, conducted a thorough review of the case law and international commentary surrounding the tort of invasion of privacy. In particular, Sharpe J. reviewed William Prosser's authoritative analysis of the four-tort catalogue, summarized as follows:

a. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
b. Public disclosure of embarrassing private facts about the plaintiff;
c. Publicity which places the plaintiff in a false light in the public eye; and
d. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[140]

Sharpe JA. concluded that, "Ontario has already accepted the existence of a tort claim for appropriation of personality and, at the very least, remains open

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[138] *Jones v. Tsige*, 2012 ONCA 32 (C.A.) [*Jones*].
[139] *Euteneier v. Lee* (2005), 77 O.R. (3d) 621 (C.A.), additional reasons 2005 CarswellOnt 6906 (C.A.), leave to appeal refused 2006 CarswellOnt 2123 (S.C.C.).
[140] *Jones*, *supra* at note 138 at para. 18.

to the proposition that a tort action will lie for an intrusion upon seclusion".[141] Thus, the tort of intrusion upon seclusion was accepted, being described as follows:

> [The] tort includes physical intrusions into private places as well as listening or looking, with or without mechanical aids, into the plaintiff's private affairs. Of particular relevance to this appeal, is the observation that other non-physical forms of investigation or examination into private concerns may be actionable. These include opening private and personal mail or examining a private bank account".[142]

The three elements for the new tort of intrusion upon seclusion are: (1) the defendant's conduct must be intentional or reckless; (2) the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and, (3) a reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish.[143]

The third prong of the test serves the purpose of preventing the opening of the floodgates of privacy tort claims; the intrusion must be highly offensive on a reasonable person standard.[144] Sharpe JA. also reiterated that proof of harm to a recognized economic interest is not an element of this cause of action.[145]

The Court of Appeal stated that it was appropriate for it to confirm the existence of a right of action for intrusion upon seclusion, since recognition of such a cause of action would amount to an incremental step that is "consistent with the role of this court to develop the common law in a manner consistent with the changing needs of society".[146]

This decision was seminal in its protection of privacy rights due to its anticipated application across diverse legal fields and affect on privacy legislation, and also in its affirmation that the common law should reflect *Charter* values.[147] Further, this decision has opened the door to the recognition of the privacy tort of public disclosure of private facts.

(b) Public disclosure of private facts

In *Jane Doe 464533 v. D. (N.)*,[148] on a motion for default judgment, Stinson J. of the Ontario Superior Court of Justice recently recognized a new cause of action, namely, the privacy tort of "public disclosure of private facts." This was

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[141] *Ibid*. at para. 24.
[142] *Ibid*. at para. 20.
[143] *Ibid*. at para. 71.
[144] *Ibid*. at para. 72.
[145] *Ibid*. at para. 71.
[146] *Ibid*. at para. 65.
[147] Robyn M. Bell, "Tort of Intrusion upon Seclusion: An Incremental Step in Privacy Law" in Todd L. Archibald & Randall Scott Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Carswell, 2015).
[148] *Jane Doe 464533 v. D. (N.)*, 2016 ONSC 541 (S.C.J.) [*Doe*].

the first case of its kind in Canada. However, the default judgment of Stinson J. has since been set aside[149] and the plaintiff's motion for leave to appeal has been dismissed.[150]

In *Doe*, the plaintiff was romantically involved with the defendant, while they were both in high school. The plaintiff moved away for university; however, the two maintained their relationship through long-distance communication. While apart, the defendant pressured the plaintiff to make an intimate video for him. Although she had reservations about same, the plaintiff eventually agreed. A month following receipt of the video, the plaintiff discovered that the defendant had posted the intimate video on a pornographic website and had shown the video to some of the plaintiff's former classmates. The video remained on the website for approximately three weeks before it was removed. There was no way of knowing how many times it was viewed, shared, downloaded, or copied. The plaintiff was devastated, humiliated and distraught and the consequences to her were described as "significant and long-lasting". She also worried that the video might resurface and harm her career and future relationships.

The plaintiff commenced an action claiming compensatory and punitive damages along with a permanent injunction. The defendant did not file a statement of defence and had been noted in default. On a motion for default judgment, Stinson J. recognized that the modern state of technology enables the victimization of individuals by perpetrators on a significantly higher level.[151] He found that the case at bar supported liability for breach of confidence and intentional infliction of emotional distress; however, the publication of intimate and explicit content required a definitive civil remedy.[152] Stinson J. noted:

> To permit someone who has been confidentially entrusted with such details — and in particular intimate images — to intentionally reveal them to the world via the Internet, without legal recourse, would be to leave a gap in our system of remedies. I therefore would hold that such a remedy should be available in appropriate cases.[153]

Following a thorough review of the jurisprudence, along with the seminal American legal article on the subject by William Prosser, Stinson J. recognized a new cause of action for invasion of privacy on the grounds of "publicly disclosing private facts of another". The elements of the tort were defined as:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of the other's privacy, if the matter publicized or the

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[149] *Jane Doe 464533 v. D. (N.)*, 2016 ONSC 4920 (S.C.J.), leave to appeal refused 2017 CarswellOnt 163 (S.C.J.).
[150] *Jane Doe 464533 v. D. (N.)*, 2017 ONSC 127 (S.C.J.).
[151] *Doe*, *supra* note 148 at para 16.
[152] *Ibid.* at paras. 25, 33 and 45.
[153] *Ibid.* at para. 49.

> act of the publication a) would be highly offensive to a reasonable person, and b) is not of legitimate concern to the public.[154]

Stinson J. held the plaintiff did not have to prove the information was actually downloaded, shared, viewed, or copied in order to succeed. It is therefore not a defence to plead that the information was removed immediately, or that there is no evidence that the posting was in fact viewed.

Stinson J. held that the defendant's posting of the video was akin to sexual assault, noting "[T]his case involves much more than an invasion of a right to informational privacy; as I have observed, in many ways [it] is analogous to a sexual assault".[155] He also found the defendant committed the existing torts of breach of confidence and intentional infliction of mental distress. He considered the factors for non-pecuniary damages in cases of sexual assault[156] and awarded the plaintiff approximately $142,000 in damages. He recognized that in this case there was no physical touching, but the plaintiff's resulting injuries bore "striking similarities" to an assault:

> The actions of the defendant in the present case offended and compromised the plaintiff's dignity and personal autonomy. In my view, a non-pecuniary damage award in a case such as this should similarly "demonstrate, both to the victim and to the wider community, the vindication of these fundamental, although intangible, rights which have been violated by the wrongdoer."[157]

Stinson J. also issued a mandatory injunction ordering the defendant to immediately destroy any and all intimate images or recordings of the plaintiff in his possession, power or control. In addition, a further order was issued permanently prohibiting the defendant from publishing, posting, sharing or otherwise disclosing in any fashion any intimate images or recordings of the plaintiff. The defendant was also permanently prohibited from communicating with the plaintiff or members of her immediate family.

Lastly, due to the highly sensitive nature of the matter, Stinson J. retroactively anonymized the proceedings and ordered a publication ban of any detail that could lead to the identification of the plaintiff.

The decision of Stinson J. was the first time a Canadian court had set a monetary award in a case involving the non-consensual distribution of intimate images. Although the findings of liability and assessment of damages in the ruling have since been set aside and the matter is back on a trial list, it provides an opinion by a judge that this tort exists and that it warrants a large damages award. We will have to wait and see how the law develops and whether victims

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[154] *Ibid.* at para. 46.
[155] *Ibid.* at para. 58.
[156] See note 98.
[157] *Doe*, *supra* note 148 at para. 56.

will have legal recourse for the dissemination of private images in the common law.

Going forward, courts ought to consider the comments of the Ontario Court of Appeal in the recent decision of *Rutman v. Rabinowitz*,[158] particularly with respect to awarding damages in the "Internet context". This was a defamation case involving an unrelenting online campaign to defame the plaintiff. The online postings included statements that the plaintiff was being investigated for money laundering and tax fraud. In awarding $700,000 in damages, despite the plaintiff being unaware of any actual reputational harm, the Court stated:

> . . . the pernicious effect of defamation on the Internet, or "cyber libel", distinguishes it, for the purposes of damages, from defamation in another medium. Consequently, while the traditional factors to be considered in determining general damages for defamation remain relevant. . .they must be examined in light of the Internet context of the offending conduct.[159]

The Court held that the assessment of damages must be evaluated in the context of the "unique and somewhat insidious nature of Internet defamation" and in light of the fact that the defamatory statements at issue were "instantly available to an unknown number of recipients."[160]

Similarly, intimate images disseminated online are "instantly available to an unknown number of recipients". The "Internet context" analysis ought to be transposed to the consideration of the privacy tort of public disclosure of private facts in order to validate and acknowledge the effects of the offending conduct, whether or not there is evidence of actual harm.

4. Norwich Orders

In some instances of the dissemination of intimate images, the perpetrator is unknown. This may be due to hacking or some other unauthorized sharing of images.

A *Norwich* Order may be sought to obtain the identity of the perpetrator(s), to evaluate whether a cause of action exists, to plead a known cause of action, to trace assets, or to preserve evidence or property.[161]

This is a pre-action discovery mechanism that essentially "unmasks" the perpetrator by requiring the discovery of someone who is not a party to

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[158] *Rutman v. Rabinowitz*, 2018 ONCA 80 (C.A.), additional reasons 2018 CarswellOnt 4195 (C.A.).

[159] *Ibid.* at para. 68.

[160] *Ibid.* at para. 70.

[161] For an excellent overview of *Norwich* Orders see Robert J. Currie, "Cross-Cutting Conflicts: Developments in the Use of Norwich Orders in Internet Defamation Cases" in Todd L. Archibald, ed., *Annual Review of Civil Litigation*, (Toronto: Thomson Carswell, 2016).

contemplated litigation in order to assist the potential claimant in advancing his or her legal rights against the ultimate wrongdoer.[162]

The Ontario Court of Appeal has held that the following factors are to be considered in an application for *Norwich* relief:[163]

(i) Whether the applicant has provided evidence sufficient to raise a valid, *bona fide* or reasonable claim;
(ii) Whether the applicant has established a relationship with the third party from whom the information is sought such that it establishes that the third party is somehow involved in the acts complained of;
(iii) Whether the third party is the only practicable source of the information available;
(iv) Whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure (expenses or damages); and
(v) Whether the interests of justice favour the obtaining of the disclosure.

A *Norwich* Order is an equitable remedy and the factors are to be applied flexibly and will vary as the particular circumstances of each case require.

For example, in *York University v. Bell Canada Enterprises*,[164] the university brought a successful application for an order requiring Bell and Rogers, as ISPs, to disclose information necessary to obtain the identity and whereabouts of anonymous authors of libelous emails and website postings.

In *Olsen v. Facebook Inc.*,[165] the applicants sought production of identifying information associated with Facebook accounts posting allegedly defamatory comments about them. The Court affirmed that the reasonableness of an expectation of anonymity must be assessed on a case-by-case basis. The Court granted the *Norwich* order in part.

Generally, *Norwich* relief is sought in defamation cases but it is anticipated that in this age of Internet anonymity, we will likely see an increasing reliance on this relief by some victims of revenge porn. Internet anonymity ought not to shield perpetrators from accountability.

5. The Legislated Response

The following Canadian jurisdictions have enacted legislation addressing the non-consensual dissemination of intimate images:

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[162] *Ibid.*
[163] *Gea Group AG v. Ventra Group Co.*, 2009 ONCA 619 (C.A.) at para. 51, additional reasons 2009 CarswellOnt 7755 (C.A.); *1654776 Ontario Ltd. v. Stewart*, 2013 ONCA 184 (C.A.), leave to appeal refused 2013 CarswellOnt 13049 (S.C.C.) (WL).
[164] *York University v. Bell Canada Enterprises* (2009), 99 O.R. (3d) 695 (S.C.J.).
[165] *Olsen v. Facebook Inc.*, 2016 NSSC 155 (S.C.).

(a) Manitoba

Lori Douglas, the former Associate Chief Justice of the Manitoba Court of Queen's Bench, saw her career end due to the non-consensual dissemination of her intimate photographs by her then-husband, Jack King.[166] The chronicle began in 2010 when Alex Chapman, a former client of King's, filed a complaint with the Law Society of Manitoba alleging that he had been sexually harassed by Douglas.[167] Thereafter, Chapman went to the CBC with his story, including nude photographs taken of Douglas by King, allegedly to lure Chapman to engage in a sexual encounter with Douglas.[168] The Canadian Judicial Council ("CJC") subsequently launched an investigation into the allegations against Douglas, on the primary grounds that she failed to disclose the existence of these images when she applied for an appointment to the bench.[169]

The matter proceeded in a convoluted series of events that lasted years, beginning with an initial round of hearings in Winnipeg.[170] Thereafter, the matter proceeded in Federal Court, where Douglas alleged that the CJC's inquiry committee was biased.[171] As such, the original committee resigned and a new one was empaneled. Douglas subsequently chose to retire before the new committee could hold substantive hearings. Upon resignation, there was a stay of the proceedings regarding the explicit photographs and the allegations as against her.

These events called for a response and, in November 2015, Manitoba was the first province to enact legislation to create the statutory tort of "non-consensual distribution of intimate images". *The Intimate Image Protection Act [IIPA],* which came into force on January 15, 2016, created a privacy tort directed specifically at enhancing protection for those victimized by revenge porn.[172] The *IIPA* states that, "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".[173] Such an action may be brought without proof of damage.[174]

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[166] Mary Agnes Welch, "Former Judge Lori Douglas Opens Up about the Hurt Caused by CJC Hearing" *Winnipeg Free Press* (5 January 2016), online: < https://www.winnipeg-freepress.com/local/Lori-Douglas-364299101.html > .

[167] *Ibid.*

[168] *Ibid.*

[169] Christie Blatchford, "Christie Blatchford on Lori Douglas Scandal: Lesson May be that Even Judges aren't Immune to Power of Sex Pictures and the Web" *National Post* (24 November 2014), online: < http://nationalpost.com/opinion/christie-blatchford-real-lesson-of-lori-douglas-scandal-may-be-that-even-judges-arent-immune-to-power-of-sex-pictures-and-the-web > .

[170] Welch, *supra* note 166.

[171] *Ibid.*

[172] *The Intimate Image Protection Act*, C.C.S.M., c. 187.

The *IIPA* empowers the court to award damages to the plaintiff, to issue an injunction on publication of the image, to prohibit publication of the name of the person depicted in the image, or to make any other order that is just.[175]

The common argument surrounding revenge porn lies in the fact that generally, the sexually explicit content is voluntarily given to the tortfeasor. The *IIPA* unambiguously addresses this by stating that persons do not lose their reasonable expectation of privacy where they consent to another person recording their image or provide their image to another person "in circumstances where that other person knew or ought reasonably to have known that the image was not to be distributed to any other person".[176] The only statutory defence available is that the distribution of the intimate image is in the public interest (and does not go beyond what is in the public interest).

In addition to the *IIPA,* Manitoba's general privacy legislation has been amended to incorporate provisions which provide that "a person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person".[177]

(b) Nova Scotia

In response to the alleged acts of sexual humiliation and cyberbullying against Reteah Parsons, Nova Scotia enacted the *Cyber-safety Act*, S.N.S. 2013, c. 2 in 2013. This legislation was ultimately struck down by the Nova Scotia Supreme Court in *Crouch v. Snell*.[178] McDougall J. found that the legislation violated sections 2 (the right to freedom of thought, belief, opinion and expression) and 7 (right to life, liberty and security of the person) of the *Canadian Charter of Rights and Freedoms*, and that such violations could not be demonstrably justified. McDougall J. described the overreaching definition of "cyberbullying" as a "colossal failure".[179]

On October 26, 2017, the Nova Scotia legislature subsequently enacted the *Intimate Images and Cyber-Protection Act*, S.N.S. 2017, c. 7. The purpose of this *Act* is "to create civil remedies to deter, prevent and respond to the harms of non-consensual sharing of intimate images and cyberbullying; uphold and protect the fundamental freedoms of thought, belief, opinion and expression, including freedom of the press and other media of communication; and, provide assistance to Nova Scotians in responding to non-consensual sharing of intimate images and cyberbullying".[180]

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[173] *Ibid.*, s. 11(1).
[174] *Ibid.*, s. 11(2).
[175] *Ibid.*, s. 14.
[176] *Ibid.*, s. 12.
[177] *The Privacy Act*, C.C.S.M., c. P125, ss. 2(1), 3(d).
[178] *Crouch v. Snell*, 2015 NSSC 340 (S.C.).
[179] *Ibid.* at para. 165.

The reasonable expectation of privacy is incorporated within this *Act*, which states that "a person depicted in an intimate image does not lose the person's expectation of privacy in respect of the image if the person consented to another person recording the image in circumstances where the other person knew or ought reasonably to have known that the image was not to be distributed to any other person".[181]

Furthermore, a person depicted in an intimate image does not lose his or her expectation of privacy in respect of the image if the person provided the image to another person in circumstances where the other person knew or ought reasonably to have known that the image was not to be distributed to any other person.[182]

(c) Alberta

On August 4, 2017, the *Protecting Victims of Non-Consensual Distribution of Intimate Images Act*, SA 2017, c. P-26.9 came into force in Alberta. This *Act* defines the tort of distribution of non-consensual images and provides recourse for victims who have had their intimate images distributed without consent. As in Manitoba, the statutory tort extends to individuals who are reckless as to whether there was consent regarding the distribution.[183] There is also no requirement of proof of damages.[184]

An essential element of the *Act* is that is endorses an expectation of not only privacy, but consent. Pursuant to section 5, "in an action for the distribution of an intimate image without consent, a person depicted in the images does not lose the expectation of privacy in respect of the image if that person (a) consented to another person recording the images, or (b) provided the image to another person, in circumstances where that other person knows or ought reasonably to have known that a person depicted in the image did not consent to further distribution of the image".[185]

This legislation goes beyond that in Manitoba to also prohibit the profiting from such images.

(d) Saskatchewan

On October 31, 2017, Saskatchewan introduced legislation creating new legal options for victims of revenge porn. *The Privacy Amendment Act, 2017*, has not yet come into force.[186]

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[180] *Intimate Images and Cyber-Protection Act*, S.N.S. 2017, c. 7., s. 2.
[181] *Ibid.*, s. 4(1).
[182] *Ibid.*, s. 4(2).
[183] *Protecting Victims of Non-Consensual Distribution of Intimate Images Act*, S.A. 2017, c. P-26.9, s. 3.
[184] *Ibid.*, s. 4.
[185] *Ibid.*, s. 5.

These amendments to the *Privacy Act* will allow a person to bring a civil suit where his or her intimate images have been distributed without their consent. It will also shift the onus of proof to the person disseminating the image, requiring them to show that they had a reasonable basis to conclude consent had been granted for them to do so.[187]

In addition, a plaintiff will have the option to bring their lawsuit in the Small Claims Court, which was previously prohibited for a claim under *The Privacy Act*.

(e) British Columbia

Though not specifically intended to combat revenge porn, British Columbia's general privacy legislation incorporates provisions that arguably capture instances of same. *The Privacy Act,* R.S.B.C. 1996, c. 373, provides that the unauthorized use of the name or portrait of another is a tort, actionable without proof of damage.[188] The *Act* specifically identifies the tort as being actionable, "for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose".[189] A portrait is defined in the act as "a likeness of another deliberately disguised to resemble the plaintiff or a caricature".[190]

(f) Quebec

Quebec's *Civil Code*[191] contains provisions that capture the essence of protection regarding revenge porn. Namely, "the privacy of a person may not be invaded without the consent of the person or without the invasion being authorized by law".[192] Moreover, pursuant to s. 37, "every person who establishes a file on another person shall have a serious and legitimate reason for doing so. He may gather only information which is relevant to the stated objective of the file, and may not, without the consent of the person concerned or authorization by law, communicate such information to third persons or use it for purposes that are inconsistent with the purposes for which the file was established. In addition, he may not, when establishing or using the file,

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[186] Saskatchewan Progress of Bills, 28th Legislature, 2nd Session: Published on January 8, 2018.

[187] Government of Saskatchewan, News Release, "Legislation Introduced to Support Victims of "Revenge Porn" (31 October 2017), online: < https://www.saskatchewan.ca/government/news-and-media/2017/october/31/privacy-amendment-act > .

[188] *The Privacy Act*, R.S.B.C. 1996, c. 373, s. 3(2).

[189] *Ibid.*, s.3(2).

[190] *Ibid.*, s.3(1).

[191] *Civil Code of Quebec*, S.Q. 1991, c. 64, s. 36.

[192] *Ibid.*, s. 35.

otherwise invade the privacy or injure the reputation of the person concerned".[193]

(g) Newfoundland and Labrador

The *Privacy Act*[194] of Newfoundland and Labrador is general privacy legislation that may apply to occurrences of revenge porn. Therein, invasion of privacy "is a tort, actionable without proof of damage, for a person, willfully and without a claim of right, to violate the privacy of an individual".[195]

The *Act* further states that, "the nature and degree of privacy to which an individual is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a violation of the privacy of an individual, regard shall be given to the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties".[196]

Among examples included in the *Act* relating to instances constituting invasion of privacy are "listening to or recording of a conversation in which an individual participates, or listening to or recording of messages to or from that individual passing by means of telecommunications, otherwise than as a lawful party to them; and, the use of the name or likeness or voice of an individual for the purposes of advertising or promoting the sale of, or other trading in, property or services, or for other purposes of advantage to the user where, in the course of the use, the individual is identified or identifiable and the user intended to exploit the name or likeness or voice of that individual".[197]

6. The Social Media Response

In response to the increasing acts of revenge porn, on June 19, 2015, Google indicated that "it will start to censor unauthorized nude photographs from its influential Internet search engine in a policy change aimed at cracking down on a malicious practice known as "revenge porn"".[198] This allows individuals who have had their nude photographs posted online without permission to contact Google to prevent links to same from appearing in the search engine.[199]

Traditionally, Google has resisted such efforts to eliminate online content from its search engine; however, an exception was made, given the increasing

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[193] *Ibid.*, s. 37.
[194] *The Privacy Act*, R.S.N. 1990, c. P-22.
[195] *Ibid.*, s. 3(1).
[196] *Ibid.*, s. 3(2).
[197] *Ibid.*, s. 4.
[198] "Google Declares War On Revenge Porn, Will Censor Results" *Huffington Post* (19 January 2015), online: <http://www.huffingtonpost.ca/2015/06/19/google-revenge-porn_n_7624866.html>.
[199] *Ibid.*

instances of the unauthorized dissemination of sexually explicit images that are predominantly posted by jilted partners or extortionists.[200]

Additionally, in an attempt to combat revenge porn, Facebook has initiated a pilot program in Australia whereby they are asking users for nude photographs to tackle the phenomenon.[201] In essence, individuals who have shared intimate or sexually explicit images with partners and fear they may be exposed through non-consensual distribution, are given the means to use Facebook Messenger to send the images to be "hashed".[202] The term "hashed" in the relevant circumstances is the process of converting the image into a unique digital fingerprint, allowing same to be identified and create a block on any attempts to re-upload the same image.[203]

The process being tested in the Facebook pilot comprises two stages: first the users must complete an online form on the e-Safety Commissioner's website outlining their concerns; and then, once completed, they will be asked to send the content they are concerned about to themselves on Facebook Messenger.[204] The e-Safety Commissioner's Office will then notify Facebook of their submission and subsequently, a community operations analyst will hash the image to prevent future resurfacing of same.[205] Facebook noted that the images will be retained for a short period of time before being destroyed to ensure the policy is being properly enforced. Although this is the latest development from Facebook to protect individuals' privacy, it is not the first tool that they have developed.

Prior to this Australian pilot, Facebook released reporting tools that allows users to flag intimate or sexually explicit photographs posted without consent to "specially trained representatives" who form part of the Community Operations Team. These specialists then "review the image and remove it if it violates [Facebook's] community standards".[206] Accordingly, upon removal of the image, photo-matching technology is used to guarantee that the image is not disseminated again.[207] The PhotoDNA technology was developed by Microsoft in 2009, ultimately making it possible to identify illegal images, even if they have been tampered with. The Facebook, Google and Twitter platforms all use this hash database to ascertain and eliminate illegal images.[208]

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[200] *Ibid.*
[201] Olivia Solon, "Facebook Asks Users for Nude Photos in Project to Combat 'Revenge Porn'" *The Guardian* (7 November 2017), online: < https://www.theguardian.com/technology/2017/nov/07/facebook-revenge-porn-nude-photos > .
[202] *Ibid.*
[203] *Ibid.*
[204] Solon, *supra* note 201.
[205] *Ibid.*
[206] *Ibid.*
[207] *Ibid.*
[208] *Ibid.*

The use of hash technology is significant and provides victims with a remedial tool to combat revenge porn.

V. CONCLUSION

There is a paradigm shift in our collective response to sexual aggression in its various forms, including a heightened understanding of the ramifications of physical sexual misconduct and its online counterpart, revenge porn. The expectation is that our legal systems will adapt to this rapidly changing landscape.

The trend towards the removal of a limitation period for sexual assault cases in some jurisdictions and the relaxed limitation periods in others provides victims an opportunity to pursue these claims in their own time. Victims need to be reasonably capable of discovering the wrongful nature of the perpetrator's acts, which usually is not possible until the victim has received counselling many years later. It would be beneficial if limitation periods for all forms of sexual misconduct were removed in every jurisdiction, to provide uniformity in the justice available to all victims in Canada.

The debate surrounding sexual misconduct and consent is an important one. However, the analysis should not rely so heavily on the requirement of bodily harm in order to vitiate consent, as this creates different standards for different classes of victims.

It is imperative that civil courts continue to acknowledge the serious consequential harm caused by sexual aggression and assess the non-pecuniary damages in a range that more accurately reflects same. Sexual assaults can have long-lasting effects, particularly where the abuse occurs when the victim is a child. As we continue to learn more about these effects, the courts must continue to adapt accordingly.

In instances of revenge porn, damages ought to be assessed in the "Internet context" and take into account the fact that the intimate images are instantly available to an unknown number of recipients. The pernicious effect of online dissemination should set it apart from other forms of invasion of privacy. Technology has created new forms of communication and with it, new forms of abuse. There is a real need for an effective remedy to the growing number of victims of revenge porn, which would deter potential perpetrators from engaging in this prevalent form of abuse that, until recently, attracted no real legal consequences.

Our civil system is in a unique position to provide victims with comprehensive and compensative justice. Legislation and the common law must continue to evolve, in light of this new discourse on sexual aggression, new forms of communication, and the modern privacy issues that exist, to the meet the "changing needs of society".[209]

[209] *Jones*, *supra* note 138 at para. 65.