Revenge porn:

IS IT TIME FOR A STATUTORY PRIVACY TORT?

SHOULD A FEDERAL TORT FOR AN INTERFERENCE IN PRIVACY BE ESTABLISHED TO PROVIDE MECHANISMS FOR VICTIMS TO DEAL WITH REVENGE PORN? BY ROSHAAN RAINA

SNAPSHOT

- A new wave of tortious privacy breaches is growing both internationally and domestically. The true extent of suffering by victims of revenge porn has not adequately been appreciated or researched.
- There are two key cases: *Giller v Procopets* (2008) 24 VR 1 and *Wilson v Ferguson* [2015] WASC 15.
- Criminalisation and common law remedies need to operate concurrently, as damages currently flowing from the existing common law regime are insufficient.

Revenge porn is the malicious disclosure of sexually explicit material without the consent of the victim by a vengeful ex-partner.[1] The explicit material is initially created and shared within the confines of an intimate relationship, with a reasonable expectation of privacy.

The meaning of "revenge porn" in the media has since broadened.[2] Opportunistic hackers[3] can compromise computers[4] and steal material from databases, or hijack a user's webcam[5] – secretly capturing such images or video. In these cases, perpetrators are not always motivated by vengeance – but instead act out of a "desire for profit, notoriety, or entertainment".[6]

On 17 June 2015, more than 400 women and teenagers from South Australia became victims of non-consensual pornography (more commonly but sometimes inaccurately known as "revenge porn") when hundreds of explicit images appeared on an American forum without their permission. On 23 June 2015, more than 700 women from Queensland similarly found themselves victims.

The material is not just uploaded to websites, but can also be distributed by social media, email, text messages and hard copies.[7] The power of the internet magnifies the "prevalence, reach and impact"[8] – and the damage flowing from such disclosures.

The immortality of online digital media, coupled with the difficulty of tracking down and removing such material, prolongs the already extreme humiliation for victims. A takedown notice to every single website hosting the explicit material is not feasible – the data will continue to reside on such servers.[9] Essentially, the internet never forgets.[10]

Effects on victims

Original posters often remain anonymous, while victims suffer immediate, devastating and irreversible harm.[11]
A recent survey conducted in the US revealed some startling statistics about the victims:

- 90 per cent were women
- 68 per cent were 18-30 years old
- 93 per cent said they suffered significant emotional distress
- 82 per cent suffered significant impairment in social, occupational and other areas
- 42 per cent sought psychological services
- 42 per cent thought of legally changing their name
- some quit their job/school; others were fired or expelled
- 51 per cent had contemplated suicide and some had taken their own life.[12]
- These figures strongly suggest significant harm which touches many facets of a victim's life, with far-reaching consequences beyond immediate and extreme humiliation, or even economic loss.

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Approaches in Australia

The regulation of privacy in Australia can be described as a patchwork that is "complex, contradictory and uneven"[13] on account of the differing approaches employed at the state and federal levels.

The Hon Michael Kirby proposed the introduction of a limited privacy tort in 1979. However, he considered that even if a statutory tort were introduced, it would only be used by the "very rich, very determined, and very patient".[14] Despite recommendations by the Australian Law Reform Commission (ALRC) on two occasions, in 2008[15] and again in 2014,[16] as well as a Cabinet issues paper released in 2011,[17] there has been very little traction at the federal level.

The *Privacy Act 1988* is only useful to victims proceeding against larger organisations, as it regulates the use of information by governments and organisations with annual turnovers in excess of $3 million rather than individuals.

The Office of the Attorney-General considers that "police have the firepower to prosecute revenge pornographers",[18] citing the federal *Criminal Code Act* which provides offences for using a telecommunications carriage service to either make a threat or to "menace, harass or cause offence".[19]

As it stands, this has led to a situation where the Attorney-General's Office justifies its inaction by relying on the Australian Federal Police, which in turn insists that it does not investigate such cases – and instead advises victims to contact the websites concerned at first instance.[20]

Victoria recently introduced laws that penalise a person who "maliciously distributes internet images of another person without their consent" and "threatens to distribute internet images of another person without their consent"[21] – offences punishable with maximum sentences of one and two years' imprisonment respectively. Victoria also has stalking provisions which criminalise online harassment or the publishing material relating to the victim.[22]

South Australia introduced similar "filming offences" which created the offence of distributing an invasive image, as well as making it unlawful to engage in humiliating or degrading filming, or indecent filming.[23] Queensland also has legislation for unlawful stalking.[24] Northern Territory is awaiting input from its own law reform committee before drafting relevant legislation.[25]

In NSW, the Standing Committee on Law and Justice recently published a report[26] recommending the introduction of a statutory cause of action in NSW for serious invasions of privacy, and supports the remedies proposed in the ALRC's 2014 recommendations.[27] If adopted, legislatively translated and enacted, a plaintiff in NSW would not need to prove that they suffered actual damage in order to bring an action in tort.[28]

Victims could potentially claim copyright over the published material where they are the author of the material (being the person that captured the image or video),[29] but this would only be applicable in the case of "selfies" and victims would not have a claim to copyright over images captured by someone else.

Giller v Procopets

In *Giller v Procopets*[30] the parties were formerly in a de facto relationship. The defendant recorded some of their sexual encounters on video tape – not all of which were made with her knowledge or fresh consent. After their breakup, the defendant tried to show the video tape footage to the plaintiff's friends, family and employer. When the plaintiff learned of this, she sued her former de facto partner alleging breach of privacy, breach of confidence and intentional infliction of mental harm.

The plaintiff was only successful on appeal. She was awarded $40,000 in damages of which $10,000 was for humiliation and distress suffered. The Court of Appeal awarded damages for distress caused by the defendant's breach of confidence without formally recognising a tort of privacy.

Justice Marcia Neave (with President Chris Maxwell in agreement) held that it was unnecessary to decide whether the law recognised a tort of invasion of privacy. Justice David Ashley held that a generalised tort of invasion of privacy was not yet recognised in Australia, but that the plaintiff was entitled to equitable compensation.[31]

This case was significant because it followed domestic precedent for recovering damages for non-economic loss resulting from a breach of confidence, similar to prior English decisions.[32]

Doe v ABC (Doe)[33] is to be distinguished as the defendant was found liable for contravening the *Judicial Proceedings Reports Act 1958* in its broadcast of the identifiable details of a rape victim in three separate radio bulletins. Recently, Justice Kelly in *Sands v State of South Australia*[34] was also critical of the reliance on *Lenah Game Meats*[35] by the Court in *Doe*.

Grosse v Purvis[36] may also be distinguished as Justice Skoien, although boldly recognising an individual's right to privacy as actionable at civil law and awarding damages for an invasion of the plaintiff's privacy, framed his approach to privacy by reference to the stalking offences contained in the Queensland *Criminal Code*.[37]

Wilson v Ferguson

Wilson v Ferguson[38] concerned a claim brought by the plaintiff against her ex-boyfriend. At the time, they worked at the same mine.

In the course of their relationship, they both created and exchanged explicit material (photographs and videos of each other) either naked or partially naked, and in some cases engaging in sexual activities. This material was taken and sent via their mobile phones. On occasions that the defendant took explicit photographs, they were done so with the plaintiff's express consent.

At one stage during the course of the relationship, the defendant came across the plaintiff's unguarded mobile phone in their home, and, on accessing it, discovered a trove of videos the plaintiff took of herself nude, and on at least one occasion, engaging in sexual activity. The defendant, without the plaintiff's permission, emailed the videos to himself, and subsequently informed the plaintiff of what he

had done. On learning this, she became upset and angry. An argument ensued, at the conclusion of which, the defendant agreed that no one else would see the videos.

When their relationship eventually ended, the defendant uploaded 16 explicit photographs and two explicit videos to his Facebook page. In doing so, he shared this material with approximately 300 Facebook friends, many of whom also worked at the mine and were also friends and co-workers of the plaintiff. This predictably humiliated and horrified the plaintiff. During this ordeal, the defendant repeatedly taunted the plaintiff via text message. The plaintiff took leave without pay, only returning 10 weeks later.

Breach of confidence

Justice Mitchell, relying in part on *Giller v Procopets*, awarded the plaintiff $35,000[39] for the humiliation and distress she suffered as a direct result of the non-consensual publication of the explicit material. This award was significant as the plaintiff's turmoil was (incredibly) not considered to rise to the level of a psychiatric injury. The plaintiff was also awarded $13,404 in lost wages from unpaid sick leave.

His Honour was careful to point out that by awarding damages for embarrassment and distress in this equitable claim for breach of confidence, this did not constitute an extension making compensation for non-economic loss available for breaches of other equitable obligations.

Conclusion

Consider that the average life expectancy of a 30-year old Australian woman is 88.06 years.[40] Given the immortality of data on the internet, such a victim would potentially have to endure nearly six decades of residual embarrassment, shame and anxiety.

The judicial *de rigueur* of taking special care to award damages proportionate to those awarded for pain and suffering in personal injury cases is an out-dated approach to awards that does not adequately take into account the magnitude and the permanence of the harm done to victims in such cases.

Although many legal commentators hailed the victim's recovery of damages in *Grosse v Purvis*, *Giller v Procopets*, and most recently *Wilson v Ferguson* as significant and meaningful advancements for the recovery of damages for such a tort – the sad reality is that $35,000, $40,000 or even $108,000 cannot reasonably be considered to adequately restore those plaintiffs, after all the humiliation they endured.

In view of the above, the significant shortfall in damages awarded to such victims should neither be endured nor ignored. ■

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1. Mary Anne Franks, "How to Defeat 'Revenge Porn': First Recognize It's about Privacy, Not Revenge" (22 June 2015), *Huffington Post*, http://goo.gl/i5r1fR.
2. Note 1 above.
3. Note 1 above.
4. "Scammers catch porn users with 'ransomware'", 19 August 2013, News.com.au, http://goo.gl/0zslJ7.
5. Andrew Silke, "Webcams taken over by hackers, charity warns", 20 June 2013, British Broadcasting Corporation, http://goo.gl/xbM9V7.
6. Note 1 above, p1.
7. Note 6 above.
8. Note 6 above.
9. See Chip le Grand, "It's now or never for action of a privacy tort: Kirby", 2 December 2011, *The Australian*, http://goo.gl/IrXRmZ.
10. Jonathon Penney, "Deleting Revenge Porn" on Policy Options, *Institute for Research Public Policy* (November 2013), http://goo.gl/tjMQje; Rachel Budde, "Taking the Sting out of Revenge Porn: Using Criminal Statutes to Safeguard Sexual Autonomy in the Digital Age" (2014) *Georgetown Journal of Gender and the Law* (forthcoming) 5.
11. Note 1 above, p2.
12. *Revenge Porn Statistics* (2014) Cyber Civil Rights Initiative, http://goo.gl/HOMCLP.
13. Anne O'Rourke, "The Right to Privacy" (2005) 71, *Issues*, pp17-18.
14. Note 9 above.
15. Australian Law Reform Commission, "For Your Information: Australian Privacy Law and Practice", Report No 108, 2008.
16. Australian Law Reform Commission, "Serious Invasions of Privacy in the Digital Era", Final Report No 123, 2014.
17. Department of the Prime Minister and Cabinet, "A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy", Issues Paper (September 2011).
18. This quote was provided by a spokesperson from the Office of the Attorney-General. See Miles Godfrey, "Revenge porn spreading like wildfire", 22 November 2013, *The Australian*, http://goo.gl/aycf3b.
19. *Criminal Code Act 1995* (Cth) ss474.15 and 474.17.
20. Note 18 above.
21. *Summary Offences Act 1966* (Vic), ss41DA and 41DB.
22. *Crimes Act 1958* (Vic), ss21A, 21A(2)(b) and 21A(2)(ba).
23. *Summary Offences Act 1953* (SA), pt 5A, ss26C, 26B and 26D.
24. *Criminal Code 1899* (Qld), s359B.
25. Jill Poulsen, "Northern Territory about to get revenge porn legislation", 29 April 2016, NT News http://goo.gl/ToDPPq.
26. NSW Standing Committee on Law and Justice, "Remedies for the serious invasion of privacy in NSW", Final Report No 57, 3 March 2016.
27. Note 16 above.
28. Note 26 above, 65, citing Note 16 above, p131.
29. *Copyright Act 1968* (Cth), ss35(2) and 10(1).
30. *Giller v Procopets* [2008] VSCA 236.
31. See also *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63. Cf *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* [1937] HCA 45.
32. See *Campbell v MGN Ltd* [2004] UKHL 22; *Murray v Big Pictures (UK) Ltd* [2008] 3 WLR 1360.
33. *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281.
34. *Sands v State of South Australia* [2013] SASC 44.
35. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63.
36. *Grosse v Purvis* [2003] QDC 151.
37. See *Grosse v Purvis* [2003] QDC 151 [416-20], citing Criminal Code 1899, ss 359B and 359E.
38. *Wilson v Ferguson* [2015] WASC 15.
39. The Court took particular care to ensure this award component was proportionate to damages awarded for pain and suffering and loss of amenity in personal injury type cases. See also Tom Darbyshire, *Damages Awarded for "Revenge Porn"*, 30 January 2015, Kott Gunning, http://goo.gl/kTc4ZJ.
40. Vincents Chartered Accountants, *Litigation Tables – 2016*, http://goo.gl/9P14GE 10.