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NONCONSENSUAL DISCLOSURE OF INTIMATE IMAGES (NCDII) TORT

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Non-Consensual Disclosure of Intimate Images (NCDII) Tort
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Summary

Fast-track NCDII Tort	NCDII Tort for Compensatory Damages
Elements: • The Plaintiff must prove that the defendant distributed an intimate image of the plaintiff. • No requirement to show non-consensually distributed. • Strict liability: lack of intent to publish and lack of knowledge would not be defences. • Cause of action for threat to distribute. • Defences: consent, public interest and other enumerated defences (e.g. good faith disclosure to law enforcement). • Remedies: declaratory relief and injunctions, nominal damages when appropriate. • Superior court proceeding.	Elements: • Elements the same as for fast-track NCDII except that the absence of fault would be a defence and remedies would include compensatory damages.
Recommendations *Distribution should be defined in terms of making images available to others. No knowledge or intent to distribute should be included in the definition.* *The definition of intimate image should include altered images, near-nude images and other images of a similar nature (toileting, dressing and undressing and upskirting), but should exclude wholly original content.* *While the plaintiff must prove she is depicted, it should not be a requirement that the plaintiff be identifiable by a third party, meaning that the person in the image is recognizable to a person other than the one depicted in the image.* *The defences for both the fast-track NCDII tort and the tort for compensatory damages should include consent, public interest and certain other enumerated defences (good faith disclosure to law enforcement etc.). Additional fault-based defences should apply only to the action for compensatory damages.* *Consent should be a defence to both NCDII torts. Knowledge of (a lack of) consent and (non) recklessness as to consent should not be elements or defences. Consent should explicitly be revocable.*	

There should be a presumptive ban on the identities of minor plaintiffs, rebuttable only if minors wish to be identified.

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

There should be no injury or harm element.

For the tort action for compensatory damages, intent to publish the relevant image should be required, but should be presumed (i.e., lack of intent to publish is a defence).

1. Introduction

[1] Invasions of privacy, infringements of copyright and intentionally causing emotional distress are all already torts and the non-consensual disclosure of intimate images (NCDII) is criminal. One of the primary rationales for creating a uniform NCDII tort is to provide a more effective mechanism for victims of NCDII to obtain what they most want: removal of the content from the internet (to the extent possible) or de-indexing search engine results. Plaintiffs may be interested in damages, and we recommend mechanisms for obtaining damages. However, our proposal is primarily guided by the goal of facilitating quick, cheap and effective takedowns and de-indexing of NCDII. Specifically, we recommend two separate NCDII torts: a simpler fast-track proceeding primarily for declaratory and injunctive relief, and a more traditional action for compensatory damages.

[2] Before setting out these causes of action in detail, we set out why we believe there is a need for two distinct torts.

[3] Some online content is beyond the reach of Canadian law because it is controlled by people outside the jurisdiction and with no Canadian assets. But in many other circumstances, the law can be effective, either because defendants have a presence in Canada or because content is transmitted through corporations that will obey local laws and assist in their enforcement. The question we address is, assuming law can be effective, what form should it take so as best to ensure effective redress for victims of NCDII?

[4] People may want to bring an NCDII tort action for several reasons. They may want an award of damages. They may want a court to vindicate them by acknowledging that they were wronged. But most people's primary concern is to obtain a takedown – the removal of content from the internet or, alternately, de-indexing certain websites so that they do not appear in search engine results.[1] Further, obtaining such takedowns would ideally be cheap and quick, and the takedown orders themselves would be effective.

[5] If they are not cheaply obtained, takedowns will remain out of the reach of many victims of NCDII and this is an access to justice problem. If takedowns are not obtained quickly, the harm of NCDII is more likely to happen and is likely to be greater. It may be that the content will spread beyond the reach of Canadian courts, or become more difficult to contain, or it may be that the image will become known to people in the plaintiff's social circle, such that most of the harm to be done by NCDII will have already been done. Finally, the concept of effectiveness relates to enforceability and to the number and kind of defendants to whom a takedown order applies. There is no perfect solution for achieving cheap, quick and effective takedowns. Attempts to make access to justice cheaper often mean a tradeoff in effectiveness; or achieving greater speed may mean a less effective remedy. For example, a small claims court proceeding is generally

faster and cheaper than a superior court proceeding, but the limited remedies a small claims court can order make that approach less effective.

[6] Finally, there are costs to the justice system to take into account. Creating a specialized tribunal, in particular an online tribunal similar to British Columbia's Civil Resolution Tribunal, is an ideal way to achieve a cheap, quick and effective remedy. Such a recommendation was made to the Law Commission of Ontario to reform defamation law, in particular, and for online harms more generally.[2] However, such a tribunal would necessitate significant investment (on many fronts including, time, money and innovation), which is outside the remit of this project. Other costs to the justice system might include making significant changes to traditional legal practices (e.g., allowing small claims courts to grant injunctions), which could affect the willingness of provinces to adopt proposed laws.

[7] Our primary recommendation is to create a fast-track NCDII cause of action that could be heard expeditiously. In some jurisdictions this might include by way of application, with the matter determined based on affidavit evidence. The evidentiary burden on the plaintiff would be minimal and the primary remedies would be declaratory and injunctive, though nominal damages could be awarded. The goal is to give most victims of NCDII what they most want, as cheaply and quickly as possible.

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

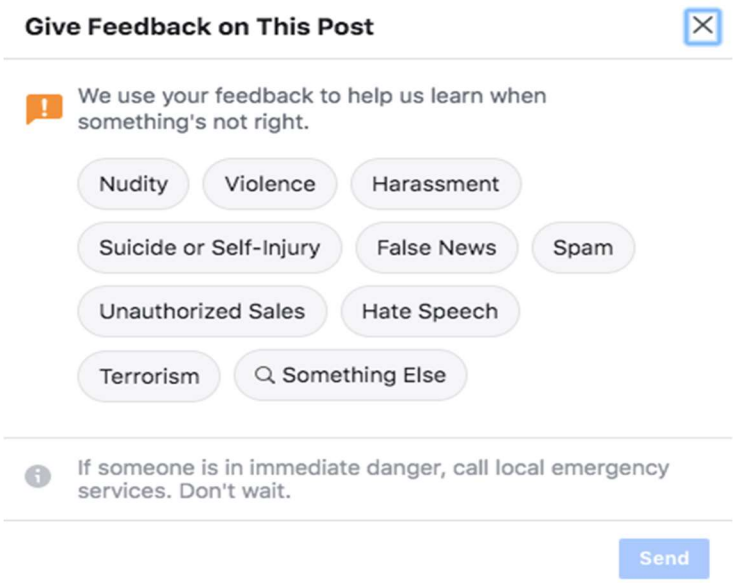
2. The Status Quo

[9] For most victims of NCDII, the cheapest, fastest and most effective way to achieve redress is to communicate to a platform that an image breaches the platform's terms of service.

[10] Major intermediaries like Google, Twitter, Instagram and YouTube all have terms of service that prohibit NCDII.[3] While the speed with which these matters are dealt with varies, this is a faster mechanism than most legal proceedings. It is cheap (free) and requires no legal assistance. There are, however, downsides to this approach. For example, decisions to remove images apply only to a particular intermediary – an individual cannot be ordered to remove a post or not to post elsewhere, nor does the process affect other intermediaries. Second, an intermediary may not think that its terms of service have been violated. For example, if an image was initially posted with consent, but that consent was later withdrawn, Google will likely not de-index or remove it.[4] Third, there is generally little if any transparency, due process or right to appeal the decisions of intermediaries regarding the application of their terms of service.

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

[12] It is useful to illustrate how a takedown request works on two platforms: Facebook and Google. Adult nudity and sexual activity in general, and NCDII specifically, violate Facebook's Community Standards.[5] Generally, users can report images by clicking a report option next to the image (the "…" at the top right-hand corner of a post), and select from the menu of items. NCDII is listed under the heading "Something Else".



[13] There is no easy path to communicate a court order with Facebook to compel content takedown. A plaintiff or his/her lawyer would simply have to contact counsel at the corporate offices. In contrast, Google provides an online form to share court orders, provided they are not directed at Google.[6] In the latter scenario, the process is similar to Facebook; a plaintiff or his/her lawyer would have to contact counsel at corporate offices.

[14] In contrast, Google removes NCDII in narrower circumstances.[7] It removes "non-consensual explicit imagery" if it infringes Google policies or content removal is otherwise deemed appropriate.[8] It does not infringe Google policies if a complainant consented to posting the image/video, the complainant is not identifiable, or if the complainant received payment for the publication or otherwise benefitted from its circulation. Removal might be justified where there is a threat of publication, or might

not be justified where the image is newsworthy or attracts a strong public interest.[9] Depending on Canadian law, a Court might determine content is unlawful in circumstances that would not infringe Google's terms of service, making a court order an important avenue for content removal.

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

3. A Simple "Fast-Track" Tort

[16] We recommend that the ULCC create a model fast-track NCDII action. Its only elements would be that: (a) the defendant distributed (b) an intimate image (c) of the plaintiff. There would be no requirement to prove fault or loss. There would be no requirement to show that the image was non-consensually distributed.

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

[18] Before examining the elements, defences and procedural considerations in detail, we note that this proposal is similar to Ireland's provision for a declaratory remedy in s. 28 of the *Defamation Act 2009*.[10] Pursuant to s. 28, a claimant can elect to apply for a declaratory order that a statement is false and defamatory. Choosing this route forecloses a traditional cause of action[11] and damages cannot be awarded.[12] However, a court may make an order to correct the defamatory statement or prevent publication or further publication.[13]

[19] The advantage of a declaratory remedy is that it is potentially swift. However, the burden on the plaintiff in Ireland remains high. Section 28 requires that the plaintiff satisfy the court that the statement is defamatory, that there is no defence, and that a request for an apology, correction or retraction was made and not provided, or sufficiently provided.[14] In *Lowry v Smith*,[15] the Court stated *in obiter* that s. 28 imposes a high burden on plaintiffs, because plaintiffs must satisfy the court that there is no defence to the application:

[20] It is unsurprising that there have been few such application since this decision. On this analysis, they [s. 28] are almost impossible for an applicant to win, and if [s]he brings the application but fails, then [s]he has no other remedy thereafter.[16]

[21] The Irish experience, and the fact that NCDII is simpler than defamation, lead us to recommend a simple tort with a relatively low onus of proof on the plaintiff.

[22] We take no position as to whether the fast-track proceeding is conceived of as a separate cause of action or as a provision of a single statutory tort of NCDII (as in the Irish *Defamation Act 2009*), so long as the onus on the plaintiff for obtaining declaratory and injunctive relief is less than the onus for obtaining compensatory damages.

Elements:

a) Distribution

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

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

> 1(2) For the purpose of this Act, a person distributes an intimate image if he or she knowingly publishes, transmits, sells, advertises or otherwise distributes or makes the image available to a person other than the person depicted in the image.[17]

[24] The language of publishing and making available is relatively consistent with the definition of publication in defamation, which may be helpful in interpreting the statute (although it is unclear whether defamation requires *knowing* distribution).[18] The crux of distribution is to make content available to third parties; it is not possession, authorship or endorsement. Existing definitions capture this meaning reasonably well.

[25] Whether the examples in the statutes (transmits, sells, advertises…) are helpful can be addressed by legislative drafters. The language of distributing or making available may be sufficient.

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

[27] This raises the question of whether internet intermediaries would be caught by this simple tort. Based on the definition of distribution proposed, they likely would. Yet we see serious problems with holding internet intermediaries accountable for NCDII in

most cases. Further, there is reason to believe that companies like Google and Facebook may resist attempts to find them liable, whereas they would be willing to obey a court order that resulted from a finding of liability against someone else.

[28] In practice, a plaintiff's action would be against the individual who shared the intimate image. The fast-track would allow the plaintiff to obtain a declaratory order that the image is unlawful and enable the plaintiff to seek removal of the image from online providers, and/or an injunction against the defendant ordering he/she seek removal of the image. Any of these routes pave the way for the plaintiff or defendant, depending on the order, to send the order to counsel at the corporate offices of an intermediary and request content takedown. Most terms and conditions of a site prohibit posting of unlawful content, and so a court order is compelling evidence their terms have been breached.

[29] Further, in principle, most major intermediaries comply with local law.[19] Intermediaries will scrutinize a court order to make a determination whether to comply. Partly, this is because these platforms are global and they are navigating different cultural and legal approaches to the right to freedom of expression as against other rights. Sometimes companies are pressured to remove content under a law that is vague or in circumstances that do not comply with international human rights principles (e.g. content that is critical of the state, blasphemous, offensive).[20] As a result, sometimes companies resist content removal. None of those are concerns for the narrow tort proposed here.

[30] There remains the question whether it is appropriate for intermediaries to be liable for distributing intimate images in narrow circumstances. We are, in particular, concerned with intermediaries that are primarily devoted to hosting content such as NCDII. There are several possibilities. First, intermediaries could be explicitly excluded. For example, the US Draft *Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act* (US Draft *Intimate Images Act*) excludes intermediaries from liability, stating that the legislation is to be interpreted as consistent with existing intermediary liability legislation, namely the *Communications Decency Act*, section 230.[21] Second, liability could be limited to a narrow subset of intermediaries, "the very worst actors": "sites that encourage cyber stalking or non-consensual pornography and make money from its removal *or* that principally host cyber stalking or non-consensual pornography."[22] Third, an intermediary could be provided a safe harbour from liability, which it could lose if it did not take "reasonable steps to address unlawful uses of its services".[23]

[31] Our preference is for the first of these (intermediaries explicitly excluded) for the simple fast-track tort. Our recommendation is different for the action for compensatory damages (see s. 4(b) below).

b) "Intimate Image"

Recommendation
The definition of intimate image should include altered images, near-nude images and other images of a similar nature (toileting, dressing and undressing and upskirting), but should exclude wholly original content.

[32] All Canadian NCDII legislation uses the same definition of intimate image:

> "intimate image" means a visual recording of a person made by any means, including a photograph, film or video recording,
> (i) in which the person depicted in the image
> (A) is nude, or is exposing his or her genital organs or anal region or her breasts, or
> (B) is engaged in explicit sexual activity,
> (ii) which was recorded in circumstances that gave rise to a reasonable expectation of privacy in respect of that image, and
> (iii) if the image has been distributed, in which the person depicted in the image retained a reasonable expectation of privacy at the time it was distributed.[24]

[33] A few issues arise concerning the definition, namely whether the definition should capture altered images, and whether a broader definition is appropriate to include other forms of sexual intimacy.

(i) Altered Images or Recordings

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

> Fueled by artificial intelligence, digital impersonation is on the rise. Machine-learning algorithms (often neural networks) combined with facial-mapping software enable the cheap and easy fabrication of content that hijacks one's identity—voice, face, body. Deep fake technology inserts individuals' faces into videos without their permission. The result is "believable videos of people doing and saying things they never did.[25]

[35] The technology came to the public's attention when a series of fake pornography images and videos were created and distributed, using the faces of celebrities super-imposed on the bodies of other individuals. In order to create a deepfake, a perpetrator usually needs access to hundreds of images of the victim.[26] User-friendly applications like Fake App work best with multiple images of the subject(s).[27] Thus, creation of deepfakes is currently easiest where the perpetrator has access to a treasure trove of

images, such as public figures or through personal relationships. The technology, however, is evolving. Machine learning is enabling realistic deepfakes to be created from a single image[28] and other technological innovations are enabling creation of deepfakes of a higher quality with ease and speed.[29] Thus, deepfakes present a profound legal challenge in general, and specifically for NCDII. Popular social media groups are devoted to discussing how to create fake pornography videos of people they know, often ex-partners.[30] The victims are usually women, a gendered issue similarly seen with nude NCDII.

[36] The victims of deepfake sex videos can experience significant emotional harm. The videos or images can appear realistic and can result in the same real-world consequences as traditional NCDII, such as reputational harm, loss of employment, stalking, harassment etc. The effect on the victim include sexual objectification without consent, feelings of shame and humiliation, and undermining of the victim's agency to consent to all aspects of his/her sexual experiences.[31]

[37] We recommend that the definition of intimate images be amended to include altered images. Ireland's proposed *Harmful Communications and Digital Safety Bill*[32] provides a useful template, although it is a criminal statute. It defines intimate images (in the relevant part) to mean "a visual recording of a person made by any means including a photographic, film or video recording (**whether or not the image of the person has been altered in any way**)…" [emphasis added].[33] We are mindful that some forms of altered images serve a public interest. One can image a scenario where a politician's head is put on another body for the purpose of parody. Our proposed public interest defence would provide a defence for altered images created and shared for the purposes of political expression, newsworthiness, parody or similar.

[38] However, we recommend that the definition of intimate images be restricted to altered images and not wholly original content, such as nude drawings or paintings of individuals.[34] Such content was excluded from the *US Draft Intimate Images Act* because the potential harm was of a different character.[35] We agree, although note the US Draft law does not explicitly include altered images in its definition of intimate images either. Wholly original content might be hateful and humiliating, but it does not involve a breach of trust in a moment of vulnerability for the individual that as readily implicates sexual autonomy, although one can imagine a scenario where someone draws and distributes a realistic and sexually explicit picture of an individual, which includes identifying marks, such as a birthmark. Such a drawing would potentially have the same characteristics of vulnerability, intimacy and humiliation. That said, sending an individual's boss a drawing of them engaged in a sex act, for example, reflects poorly on the drawer more so than the subject, unless the image is indiscernible to a real image. We are also mindful that these are forms of artistic expression. In light of our proposal that the tort include a reverse onus for consent, and the option of a fast-track strict liability procedure, excluding wholly original content from the definition of intimate images is justified. For such content, other causes of action might be suitable, such as invasion of privacy, defamation or intentional infliction of emotional distress.[36]

(ii) Near-nude Images and Similar

[39] Currently, all Canadian NCDII legislation defines intimate images as restricted to depictions of nudity – where the individual is "nude, or is exposing his or her genital organs or anal region or her breasts", or images of explicit sexual activity.[37] The US similarly restricts its definition to "uncovered" areas of the body, and purposefully restricts the list to "genitals, pubic area, anus, or female post-pubescent nipple".[38] Other intimate parts of the body were excluded, because "it is not uncommon for buttocks and parts of the female breast other than the nipple to be displayed in public (for example, at beaches and nightclubs)".[39]

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

intimate visual recording—

(a) means a visual recording (for example, a photograph, videotape, or digital image) that is made in any medium using any device with or without the knowledge or consent of the individual who is the subject of the recording, and that is of—

(i) an individual who is in a place which, in the circumstances, would reasonably be expected to provide privacy, and the individual is—

(A) naked or has his or her genitals, pubic area, buttocks, or female breasts exposed, partially exposed, or clad solely in undergarments; or

(B) engaged in an intimate sexual activity; or

(C) engaged in showering, toileting, or other personal bodily activity that involves dressing or undressing; or

(ii) an individual's naked or undergarment-clad genitals, pubic area, buttocks, or female breasts which is made—

(A) from beneath or under an individual's clothing; or

(B) through an individual's outer clothing in circumstances where it is unreasonable to do so; and

(b) includes an intimate visual recording that is made and transmitted in real time without retention or storage in—

(i) a physical form; or

(ii) an electronic form from which the recording is capable of being reproduced with or without the aid of any device or thing.[40]

[41] New Zealand notably also captures recordings that are transmitted without storage. Scotland and Ireland use broader definitions than Canadian NCDII legislation, but note these are criminal statutes. Ireland's proposed law defines intimate image to include intimate parts covered by underwear.[41] Scotland broadly frames the crime as disclosure or threatened disclosure that shows an "intimate situation", which includes

parts covered only by underwear.[42] The potential breadth of these definitions of intimate image is tempered by the criteria that either the image was recorded in circumstances giving rise to a reasonable expectation of privacy (Ireland and New Zealand) or that the disclosure was done intentionally (or recklessly) to cause fear, alarm or distress (Scotland).[43]

[42] We are concerned that an image that includes underwear might be too wide and capture non-blameworthy conduct, such as posting pictures from the beach. One can imagine a scenario where an individual posts pictures of friends at the beach, and one individual objects to the picture posted (for whatever reason). However, it would be rare for an individual to sue under these circumstances, although possible. Further, and importantly, to be actionable such an image must be recorded in circumstances giving rise to a reasonable expectation of privacy. This acts as an important restraint on what intimate images are actionable, and would have the effect of excluding typical beach pictures from the definition. In another scenario, an individual might share a near-nude intimate photo, which an ex-partner discloses to third parties. The latter scenario is similar in the nature to the blameworthy act targeted with nude intimate images and causes similar harm to the individual depicted. Under current Canadian legislation, such an image would not be actionable as a NCDII, although a claim for invasion of privacy would be potentially available.

[43] We recommend a definition of intimate image similar to the New Zealand definition, to include misconduct that is similarly intimate and sexual in nature, namely near-nude photos, toileting, dressing and undressing, and upskirting photos, that were taken or shared in circumstances where there was a reasonable expectation of privacy. In principle, such photos are similar to nude intimate images in terms of the blameworthy conduct and the harm caused by their disclosure. In practice, it would be preferable for similar acts to be captured under the same legal framework. Otherwise, an individual whose near-nude intimate image was shared by an ex-partner would not be able to avail him/herself of the NCDII tort we are proposing, but could in relation to a nude photo.

c) "Of the Plaintiff"

Recommendation
While the plaintiff must prove she is depicted, it should not be a requirement that the plaintiff be identifiable by a third party, meaning that the person in the image is recognizable to a person other than the one depicted in the image.

[44] One issue is whether the cause of action should apply only to images where the subject of the photo is identifiable by a third party. By identifiable, we refer to situations where the individual is identifiable from the image, or through information connected to the image (e.g. the bedroom in the background is recognizable). Such a narrow definition would mean certain harmful scenarios would not be captured by the tort. For example, a person takes a selfie of intimate parts of her body and shares it with a partner, who distributes it to others without consent. The person knows it is her body even if no one

else knows it is her. Further, the person may live in fear that she will be identifiable at some point in the future, whether because someone pieces together it is her, or the person who posted the image identifies it as her.

[45] The US Draft *Intimate Images Act*[44] explicitly states the intimate image must be identifiable to a third party:

> 3(2)(b) Except as otherwise provided in Section 4, a depicted individual who is identifiable and who suffers harm from a person's intentional disclosure or threatened disclosure of an intimate image that was private without the depicted individuals' consent has a cause of action against the person if the person knew [or acted with reckless disregard for whether]:
>
> (1) The depicted individual did not consent to the disclosure;
> (2) The intimate image was private; and
> (3) The depicted individual was identifiable.[45]

[46] Identifiable is defined as follows:

> 2(f) "Identifiable" means recognizable by a person other than the depicted individual:
>
> (A) From an intimate image itself; or
> (B) From an intimate image and identifying characteristic displayed in connection with the intimate image.[46]

[47] This narrow approach to intimate images might be rooted in the particular balancing in the United States between the First Amendment right to freedom of expression and other rights, and the narrow conception of the tort of privacy. Discussion of how to draft an effective NCDII law does not seem to question the need for the person to be identifiable.[47]

[48] In contrast, all Canadian NCDII legislation uses the same definition of intimate image, which does not focus on the issue of whether the individual is identifiable in the image. Instead, the legislation refers to a "person depicted in the image".[48]

[49] One key difference is that all Canadian legislation roots NCDII in the right to privacy (*i.e.* the recording was in circumstances giving rise to a reasonable expectation of privacy).[49] The US Draft *Intimate Images Act* does not mention privacy in the definition of intimate image,[50] although privacy is otherwise littered throughout the draft legislation. This anchoring, in Canadian legislation, of the cause of action in the concept of privacy more readily enables an interpretation of intimate image that includes non-identifiable recordings, because the right to dignity captured by privacy is most readily implicated in this type of disclosure.

[50] Despite the apparent flexibility of the definition of intimate image in Canadian legislation, we conclude that the definition is currently unclear. The use of the language

"depicted in" might be interpreted to mean identifiable. The term is not defined in any of the legislation. An informative explanation of the term depicted is provided in the US Draft Law, which defines it as "an individual whose body is shown in whole or in part in an intimate image."[51] Based on this definition, "depicted" might be interpreted widely to mean any part of the body, rather than parts of the body that make a person identifiable. Nevertheless, we are unsatisfied with this uncertainty.

[51] We conclude that legislation should be explicit that a plaintiff does not need to be identifiable *to a third party* as an element of the cause of action. It is enough if the person knows it is him/her and can prove to the court that they are the person depicted in the image. We come to this conclusion for the following reasons.

[52] Restricting the cause of action to images of identifiable people focuses on only one aspect of the harms of NCDII, namely reputational harms. A cause of action for identifiable people is concerned with the harm to reputation that flows from being exposed in the community. The logic of that approach is that if no one knows it is you, there is no potential reputational harm and therefore no cause of action. However, we reject this approach in principle and for practical reasons. In principle, it is under-inclusive to the social harms of NCDII. Explicitly recognizing a cause of action for unidentifiable NCDII enables a cause of action for both reputational harms and invasions of privacy. It also recognizes that sexual identity and sexual objectification are at issue for both types of images, and there is no reason in principle to protect one group over another, as both can experience severe emotional distress from distribution of such an image. In practice, there are many scenarios at the margins that do not justify such a narrow definition. In particular, the person might fear being identified in the future. In such a scenario, if the ULCC recommends a fast-track process, time is of the essence to arrest further distribution of an image (to the extent possible). Waiting until a complainant is identifiable forces a complainant to wait until the worst damage possible is inflicted before a complainant can act.

d) Injury/Harm

Recommendation
There should be no injury or harm element

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

[54] The existing Canadian NCDII torts do not require proof of harm. The US Draft *Intimate Images Act* does, however, require that the plaintiff suffer harm.[52] That said, it

defines harm to include emotional distress, and it is difficult to imagine litigation for NCDII that does not involve the plaintiff suffering emotional distress.

[55] We recommend against requiring proof of harm in both the fast-track and more complex versions of the tort for two reasons – one principled and one practical. In principle, the nature of the wrong is at least arguably an infringement of the right not to have such images published and is akin to a breach of the right to privacy. Even in the absence of any suffering or loss on the part of the plaintiff, NCDII involves the infringement of a right. Therefore no proof of injury should be required.

[56] Second, as a practical matter, injury – at least in the form of emotional distress – will effectively always be present. Requiring the plaintiff to prove this is unnecessarily burdensome.

Defences:

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

e) Defence of Consent

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

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

> 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.[53]

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

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

[59] To further confuse matters, in Saskatchewan "the defendant must establish that he or she had reasonable grounds to believe that he or she had ongoing consent for distribution of that intimate image".[54] This provision seems to create a reverse onus, but since reasonable grounds to believe and (non-)recklessness are not the same thing, it is unclear what the plaintiff has to prove, if anything, with regard to consent.

[60] The Nova Scotia statute also defines consent in terms of knowledge of consent or recklessness as to knowledge.[55] Interestingly, while actual consent appears not to be a defence to NCDII in Nova Scotia, it *is* for cyber-bullying other than NCDII, as provided for in s.7 of the Nova Scotia Act. This is presumably because non-consent is effectively incorporated into the definition of NCDII.

[61] The consent inquiry in most provinces with NCDII statutes would seem therefore to be solely a question of whether the defendant *knew* there was consent or was reckless as to consent (a subjective inquiry) rather than whether there was actually consent, assessed objectively. Consider an example in which the defendant misheard the plaintiff. They discussed uploading a sex tape to a website. The plaintiff at first agreed but then changed her mind. She was clear about this, but unfortunately the defendant did not hear the plaintiff change her mind and there followed a misunderstanding in which each thought the other understood that the tape would (defendant) or would not (plaintiff) be uploaded. On an objective approach to consent, the plaintiff's clear words may lead to a finding that there was no consent. But on an approach focused on knowledge of consent, the defendant would be found to lack such knowledge and would not be liable. In the scenario above, it is also not obvious that the defendant was reckless as to consent, since there was a conversation explicitly addressing consent in which consent was given.

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

[63] Although we address below why we believe consent should not be defined in terms of knowledge of consent (or recklessness), even assuming the knowledge-based approach were appropriate, it is unclear what this means. Does it mean that there was no

consent, objectively, and the defendant knew it, or that the defendant honestly believed there was no consent? The confusion seems to arise from borrowing the language of knowledge of consent from criminal law without also borrowing the element of consent itself. (Were that element present, the question of whether knowledge of consent means there actually *is* consent would not arise since consent would have to be proven separately.) It is somewhat unclear under most provincial NCDII statutes whether consent itself needs to be established, but as a matter of statutory interpretation, it would seem not.

[64] In considering how the ULCC model tort should incorporate consent, we take as our starting point that in tort, consent is assessed objectively. It is a question of whether, on the facts, a reasonable person would think there was agreement.[56] For example, consent as a defence to intentional torts such as battery is a question of whether a reasonable person would think there was consent in the circumstances, not of whether the defendant understood there to be consent or was reckless.

[65] Criminal law, which generally requires subjective *mens rea,* is more likely to assess consent subjectively. For example, consent to sexual contact is defined in terms of the complainant's subjective agreement – did she agree, in her mind,[57] and honest but mistaken belief in consent (again, a subjective inquiry) is a defence even if there was no consent.[58]

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

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

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

> **29** (1) If a treatment is administered to a person with a consent that a health practitioner believes, <u>on reasonable grounds</u> and in good faith, to be sufficient for the purpose of this Act, the health

> practitioner is not liable for administering the treatment without consent.[59] [underlining added]

[69] This reflects the view that it is wrongful to interfere with someone's right to bodily autonomy even if the defendant believed there was consent, unless an objective test of reasonableness is met. A related example is the defence of self-defence, which is grounded in the actual and reasonable belief of the defendant that s/he was faced with imminent and serious bodily harm.[60] In other words, it is not sufficient that the defendant honestly believed he was in danger – that belief must be reasonable.[61]

[70] The question therefore arises whether, in addition to consent, there should be a defence of honest *and reasonable* belief in consent. On the one hand, this would reflect the language of the *Health Care Consent Act* and provide some defence for well-intentioned defendants where there was no actual consent.

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

[72] One might think that liability for recklessness as to consent would have the same effect as a reasonableness requirement and so language such as that in the existing NCDII statutes covers the same range of conduct. As a practical matter this may be so. Nevertheless, recklessness is about what the defendant knew and intended. Black's Law Dictionary defines "recklessness" as : "conduct whereby the actor does not desire harmful consequences but nonetheless foresees the possibility and consciously takes the risk."[62] A reasonableness assessment is not concerned with what the defendant knew or believed, only what a reasonable person would have understood.

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

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

[75] Principled reasons include that the focus of this tort should be on the wrongfulness of posting such images, not on fault. As with defamation and misuse of private information, the crux of the NCDII tort is the infringement of a right not to have certain content distributed. Unlike negligence, for example, the focus is not on blameworthiness but rather on interference with this right. The Supreme Court in *Scalera* stated: "To base the law of battery purely on the principle of fault is to subordinate the plaintiff's right to protection from invasions of her physical integrity to the defendant's freedom to act".[63] And while this doesn't preclude considering consent, it supports defining the elements of the tort to exclude (lack of) consent.

[76] *Scalera* also justifies making consent a defence rather than an element on the basis of battery's directness requirement. Whereas negligence, which emphasizes fault, involves indirectly caused harm, trespass requires directness. The majority cites Ruth Sullivan:

> . . . where the injury complained of is an immediate consequence of the defendant's act, it is intuitively sound to require compensation from the defendant unless he offers a defence. In cases of direct interference, the relationship between the defendant's will, his decision to act, and the injury to the plaintiff is both simple and clear; there are no competing causal factors to obscure the defendant's role or dilute his factual responsibility. The question of his moral and legal responsibility is thus posed with unusual sharpness: as between the defendant who caused the injury and the plaintiff who received it, other things being equal, who shall pay?...[64]

[77] We view the injury of NCDII as the immediate consequence of posting intimate images and find Sullivan's logic persuasive.

[78] There are also practical reasons to make consent a defence. Where NCDII litigation is taking place, distribution will more often than not have been non-consensual and traumatizing. Making consent a defence amounts to a presumption of non-consent that the defendant must rebut, rather than putting plaintiffs to the effort and expense of proving they did not consent to having intimate images shared.[65]

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

[80] Thus, in our view, the intentional distribution of these images should be *prima facie* tortious just as any non-trivial touching is a *prima facie* battery. The defendant

should have the onus of proving consent, should he wish to avail himself of that defence. An honest belief in consent should not serve as a defence unless that belief is also reasonable, which is effectively the same as saying that there *was* consent, assessed objectively.

[81] A final note about consent relates to the ability to revoke consent. In our view, the tort should provide for consent to be revocable. Again, this is consistent with the law of consent in tort generally. Consent to medical treatment may, for example, be revoked, as can consent to sexual contact. That consent is revocable may be implicit in the existing Canadian NCDII torts, though none make it explicit.

[82] One difficulty relates to what happens if consent is revoked after an image has consensually been distributed – for example where an intimate image is posted to a website with consent but the plaintiff changes her mind. In our view, revocation of consent should impose on the defendant an obligation to take reasonable steps to retrieve and make inaccessible any images still accessible to others. But where an image was distributed with consent and consent was not revoked before distribution, there should be no liability for continued distribution that could not be prevented through reasonable efforts.

[83] This discussion of consent has been detailed and complex, but this was thought necessary because of our disagreement with the approach to consent in existing NCDII tort statutes. However, the recommended approach is quite simple and consistent with tort principles: consent, assessed objectively, should be a complete defence.

f) Public Interest

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

> It is a defence to an action for non-consensual distribution of an intimate image to show that the distribution of the intimate image is in the public interest and does not extend beyond what is in the public interest.[66]

[85] In contrast, the US Draft *Intimate Images Act*[67] provides an extensive list of defences. In particular, the Act provides a defence for good faith disclosures concerning law enforcement, legal proceedings, medical education or treatment, matters of public interest or concern, or investigations of misconduct. The relevant provisions are as follows:

> 4(b) A person is not liable under this [act] if the person proves that disclosure of, or a threat to disclose, an intimate image was:
>
> (1) made in good faith in
>
> (A) law enforcement;
>
> (B) a legal proceeding; or

> (C) medical education or treatment;
> (2) made in good faith in the reporting or investigation of:
> (A) unlawful conduct; or
> (B) unsolicited and unwelcome conduct;
> (3) related to a matter of public concern[68] or public interest; or
> (4) reasonably intended to assist the depicted individual.
> …
> (e) Disclosure of, or a threat to disclose, an intimate image is not a matter of public concern or public interest solely because the depicted individual is a public figure.[69]

[86] In principle, we conclude that the defences should include the defences in the US Draft *Intimate Images Act*. Without a broader set of defences, there is a risk that the legislation will unintentionally capture behaviour that is not morally blameworthy. For example, an image may be shared for medical treatment, or to report a crime, or to seek help for a victim of NCDII. In all of these circumstances, making explicit that such conduct is a defence provides greater certainty and may dissuade complainants from proceeding with an illegitimate claim.

Remedies:

g) Declaratory Relief

[87] A declaration by a court that distribution of an image is illegal not only vindicates the plaintiff's reputation but will often be sufficient for an intermediary to take down or de-index the image. This is because intermediaries will generally voluntarily take down content, or de-index search engine results, if presented with a court's declaration that content is unlawful. Such declaratory relief should explicitly be available in both the fast-track NCDII proceeding and the action for compensatory damages.

h) Injunctions

[88] Plaintiffs could file a motion for an interlocutory injunction as soon as an originating document is filed. The usual *RJR MacDonald* rules for interlocutory injunctions should apply, and we can assume that the balance of convenience will generally favour the plaintiff.

[89] One might ask whether, rather than the *RJR MacDonald* test,[70] the rules from *Canadian LibertyNet*[71] for obtaining interlocutory injunctions would apply. That case indicated that for injunctions involving pure speech, *RJR MacDonald* is inappropriate as it makes interlocutory injunctions too readily available: the balance of convenience will generally favour the plaintiff and insufficient consideration will be given to the defendant's and the public's interest in free speech.[72] Even assuming NCDII constituted "pure speech", this could be addressed explicitly in the legislation. However, we are

inclined to think that judges should be given enough credit to recognize that the free speech concerns are minimal in NCDII and that an interlocutory injunction will generally be warranted.

[90] As for permanent injunctions, the usual rules should apply. It would be neither advantageous nor wise to try to alter the courts' discretionary powers to order permanent injunctions.

i) Damages

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

[92] A plaintiff who avails herself of the fast-track proceeding should not be prevented from seeking compensatory damages in a separate action for compensatory damages, but subject to *res judicata* and any nominal damages being subtracted from a later damages award.

Procedural Matters

j) Superior v. Small Claims Court

[93] We considered limiting the fast-track proceeding to small claims court, but rejected this approach for one reason: small claims courts are statutorily limited in their subject-matter jurisdiction and in the remedies they can grant. In particular, they cannot grant injunctions. They tend to be limited to actions for debt or damages, the recovery of personal property, and compensation for goods or services, with a certain maximum dollar value.[73] They tend to specifically exclude causes of action that are similar to NCDII, such as libel.[74] And while it would be constitutionally permissible for the legislatures to grant small claims courts the power to deal with NCDII and to grant injunctions,[75] we believe this would constitute too great a change in the role of small claims courts – particularly if the power were not limited to interlocutory injunctions.[76]

[94] That said, if the ULCC were interested in a small claims or special tribunal model, there is precedent for non-Section 96 courts having the power to order permanent injunctive relief. The British Columbia Civil Resolution Tribunal, for example, can make a wide range of orders. For example, strata disputes may lead to what is effectively injunctive relief, such as orders regarding custody of a pet.[77] Note, however, that the

CRT's jurisdiction over motor vehicle claims is being challenged in court, which helps illustrate that shifting a s.96 court's powers to a tribunal is not uncontroversial.[78]

[95] Thus, unless there is desire to significantly change the jurisdiction of small claims courts, a small claims court proceeding for NCDII is a non-starter. A standalone tribunal would in some ways be ideal, but we recognize that this may be too expensive/disruptive.

[96] The fast-track proceeding could still be cheap and relatively quick – especially if some effort is made to create public legal education materials explaining how to file an originating document, how to request an interlocutory injunction as quickly as possible, etc. And there is no doubt that injunctive relief from a superior court is the most effective remedy possible.

[97] The more traditional NCDII action for damages could be pursued in small claims or superior court.

k) Anonymity/Publication Bans

Recommendation:
Publication bans on adult plaintiffs' identities should be available when in the interests of justice (i.e., common law default – no need to legislate).
There should be a presumptive ban on the identities of minor plaintiffs, rebuttable only if minors wish to be identified.

[98] All Canadian NCDII torts provide for publication bans on the plaintiff's identity. This recognizes that the publicity associated with such actions could cause the plaintiff significant additional harm and could prevent plaintiffs from seeking access to justice at all.[79] There are effectively two different approaches to publication bans. In Saskatchewan, Alberta and Manitoba, a ban will be imposed where one is in the interests of justice.[80] The Newfoundland Act is virtually identical to Saskatchewan's except it also makes publication bans mandatory for minors.[81]

[99] Nova Scotia's approach is different in that, rather being grounded in the interests of justice, a publication ban will be ordered where the plaintiff requests one (as well as being mandatory for minors).[82] This has the advantage of not imposing a blanket ban on someone who may wish to be identified, while also not requiring the issue of the appropriateness of a ban to be litigated, which may be costly for the parties. It has the disadvantage, however, of leaving the decision entirely up to the plaintiff, rather than considering the public interest in disclosure. The public interest in open courts is therefore not even considered under Nova Scotia's approach.

[100] In our view, publications bans should be available and discretionary rather than mandatory for adults, since some plaintiffs may be willing to be publicly identified. The more difficult question is whether they should be ordered whenever requested by

plaintiffs, or whether there must be an inquiry into whether a ban serves the interests of justice. As a practical matter, little likely turns on this. We expect courts will readily find that a ban serves the interests of justice whenever one is requested.

[101] That said, there may be situations in which a publication ban is not warranted, despite one being requested. The open court principle is fundamentally important, and the default is that court proceedings should be open to the public.[83] In addition, in the internet era there are situations in which a publication ban is ineffective because the identity of an individual is already well known and continues to be reported by non-Canadian sources. (The publication ban on Rehteah Parsons' name is arguably an example.)[84] Statutory publication bans are subject to *Charter* oversight and must be justified under s.1.[85] In this context, considerations under s. 1 include the burden on the plaintiff (delay and resources) in having to meet a discretionary test, the scope of the ban, whether it is temporary or permanent, its effect on trial fairness, and the public interest.[86] In *Toronto Star v Canada,* the constitutionality of a mandatory publication ban on the evidence adduced at bail hearings was upheld. Despite the effect on the public's access to information, the ban was narrowly tailored, temporary, promoted trial fairness and relieved the accused of the burden of having to argue for the ban.

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

[103] We prefer a flexible and principled approach that requires consideration of the interests of justice before granting a publication ban. This is the default at common law and so the legislation would not have to explicitly state that publication bans are available when in the interests of justice. That said, a presumption in favour of a ban on request or other language stressing the importance of publication bans to access to justice for NCDII may be warranted.

[104] The situation with minors is different. There will virtually never be any compelling reason to disclose, against her wishes, the name of a minor who alleges NCDII. In theory, the "interests of justice" test should be able to account for this, but the practical consequence of that approach is that the issue will need to be litigated, and defendants may argue against a publication ban in order to achieve a tactical advantage. In our view, therefore, minor plaintiffs should be entitled to a publication ban on their identities if they so wish.[87]

[105] The Canadian jurisdictions that have separate anonymity rules for minors all have mandatory publication bans on the identities of minor plaintiffs. In our view, however, minors should be able to waive the ban. A capable 17-year old who does not wish to bring her claim anonymously should not be forced to do so. The criminal sexual assault context has shown that mandatory publication bans can be oppressive to

claimants. A rule that leaves it up to the minor to decide properly balances the concerns about the open court principle, the practical consequences of requiring the matter to be litigated and concerns about imposing bans on those who don't want them.

[106] To be clear, this issue relates only to the plaintiff's identity and not to other aspects of a case. The usual common law test should govern the use of publication bans in such situations. A model statute should include a rule about publication bans only on the plaintiff's identity.

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

l) Threats

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

[108] No Canadian jurisdiction explicitly includes threats in its NCDII statute, [88] except to the extent that Nova Scotia includes threats generally within its definition of cyberbullying.[89]

[109] In Nova Scotia, the threat to distribute an intimate image is treated as cyber-bullying, and the Court may, among other things, make an order prohibiting a person from distributing the intimate image.

[110] We believe that legislation should explicitly provide a remedy for the threat to distribute an intimate image. There is support for providing recourse for threats. The civil cause of action in the US Draft *Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act*[90] includes "threatened disclosure of an intimate image that was private".[91] Similarly, Australia's *Enhancing Online Safety Act*[92] creates a civil cause of action for threats to post an intimate image without consent, although the provision more narrowly targets distribution online.[93]

[111] An injunction would be available to prohibit distribution of an intimate image regardless of whether a cause of action for a threat to distribute is created. However, in principle, we conclude a separate cause of action is justified. The threat of disclosure of an intimate image is potentially harmful without actual distribution of the image, justifying access to the fast-track NCDII tort and/or a potential damages award.[94] For example, individual A might threaten to distribute the photo if individual B breaks up with him/her, or fails to comply with whatever demands individual A imagines. Such threats are increasingly common. It is evident in domestic abuse, where technology is used to exert power and control (e.g. threats to share intimate images, control and

monitoring of computer use, control of internet of things devices to change turn on and off lights, lock and unlock doors).[95] It is evident in other online contexts, including predatory behaviour by strangers or breaches of trust by friends, who convince an individual to share an intimate image and then threaten to share such images (e.g. sextortion or threats of toxic tagging).[96] While this behaviour may be a criminal act, we see no reason to limit the cause of action in tort law to cases of distribution. Including threats of distribution within the NCDII torts provides an avenue for a complainant to obtain an order prohibiting distribution of the image in the first place. We acknowledge that in certain circumstances, in particular cases of domestic abuse, individuals will be unlikely to pursue a civil claim, and that this would largely be ineffective as against individuals out of jurisdiction.

4. A TORT ACTION FOR COMPENSATORY DAMAGES

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

Elements

[113] In brief, the elements of the action for damages should be the same as for the fast-track proceeding: (a) the defendant distributed (b) an intimate image (c) of the plaintiff.

Defences

[114] Defences should be the same as for the fast-track proceeding except that there should be additional defences related to the absence of fault.

a) Lack of intent

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

[115] Torts generally require fault – causing harm is usually considered insufficient for tort liability. Instead, the defendant must have done something intentionally or carelessly. For liability in the action for damages for NCDII, intent should be required. The nature of the wrongdoing is more consistent with intentional torts like invasion of privacy, defamation,[97] intentional infliction of nervous shock and battery than with torts of carelessness. Further, seldom will publishing intimate images be done carelessly. One could imagine scenarios in which one carelessly stores images and someone else posts

them, for example, but we focus on intentional conduct. In any event, the tort of negligence may apply to such carelessness.[98]

[116] The NCDII tort should therefore be an intentional tort, but this could mean requiring intent to publish an image; intent to publish with knowledge that there was no consent; or intent to harm the plaintiff.

[117] We can eliminate proof of intent to harm for some of the same reasons that proof of harm should not be required (see the "harm" section below): intent to harm is not essential to the wrongful act. Images are sometimes posted because the defendant wants to make money or to entertain.[99] Such conduct should lead to liability. Further, an intent to harm requirement would likely serve little purpose as such intent would likely be readily inferred from a deliberate act of publishing such images – at least so long as constructive intent counts as intent. None of the civil statutes we canvassed requires intent to injure, though some criminal prohibitions on NCDII do.[100]

[118] As for intent to distribute or publish, of the Canadian jurisdictions that have legislated in this area, only Manitoba and Alberta require such intent.[101] The statutes in Saskatchewan, Newfoundland, Nova Scotia, and the US Draft *Intimate Images Act* tort do not.[102]

[119] We recommend that intent to distribute or publish be required. Thus, accidentally distributing should not result in liability. This is consistent not only with the legislation in Manitoba and Alberta, but with the law of defamation and privacy, which require intent to publish.[103] The crux of the NCDII tort is not creating or possessing such images, it is distributing them, just as the crux of defamation is publishing a libel. Intent should be required, as where there was no intent to publish there is effectively no wrongdoing.[104] Note also that where an image is accidentally distributed, the fast-track proceeding is available, as it is strict liability, and an injunction can be obtained.

[120] Intent to distribute should relate to the specific image or images and to publication of the kind at issue (e.g. on a website or by showing an image to friends). Thus, internet intermediaries should not be liable because they generally do not have knowledge of, and therefore cannot intend to distribute, specific images.

[121] Intent to distribute should include others' authorized republications. Whether it should include republications that were not authorized but were the natural and probable result of the original publication is less clear. That is, where an individual posts an image to a website, and it is likely that images on that site will be reposted elsewhere, should that individual be held liable not only for his original post, but also for the reposting? While this may often be best dealt with as a matter of damages, the threshold for liability matters. For example, it may be that the defendant's initial distribution was outside the limitations period but a republication was within it.

[122] Holding the defendant liable for repetitions that are the natural and probable result of the original publication would be consistent with the law of defamation,[105] yet the rule is not uncontroversial.[106] We believe that defendants should be responsible for distribution that was the natural and probable result of their act of distribution because to do otherwise shields the defendant from responsibility for harm he predictably caused, limits the number of defendants a plaintiff has access to and, most importantly, requires the plaintiff to act in relation to an instance of distribution that itself may not spread sufficiently to affect her. In other words, it may be the predictable republication of images that causes enough harm to spur the plaintiff to action rather than the initial publication.

b) Knowledge

Recommendation:
Knowledge of the contents distributed should be required but rebuttably presumed

[123] Existing Canadian NCDII torts tend to define distribution to mean *knowing* distribution. Presumably this means something like intent to distribute a specific image (*i.e.,* with knowledge of that image and that it is being distributed). The defamation experience suggests more clarity in the statutory language may be desirable, both as to the knowledge requirement between the plaintiff and individual defendant, and because intermediaries can be captured, depending on how widely a provision is drafted.[107] For example, does one have to be aware of specific content in order to knowingly transmit it or is it enough that you have given permission to third parties to publish what they like? Does YouTube "knowingly" publish NCDII given that it allows people to upload content that sometimes includes NCDII? Or does one have to be aware of the specific image and knowingly transmit that particular image? Presumably the latter is what s. 1(2) of the Manitoba Act intends.

[124] Even assuming knowledge of the specific image is required, would notice after the fact and a failure to remove the image be sufficient? Again, the defamation context is instructive. There is a doctrine in defamation law called "publication by omission".[108] Plaintiffs have argued that internet intermediaries, such as Facebook, that fail to take down defamatory content after notice are themselves liable in defamation because by failing to remove content, they have intentionally published it. Whether this argument could apply to a NCDII tort must be addressed.

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

[126] We prefer to keep distinct the issues of distribution and knowledge, because we believe the plaintiff should have to prove the defendant distributed but not that he had knowledge. Lack of knowledge should be a defence for the defendant to prove. We are

of this view because publication will rarely be unintentional, so it would seem burdensome to require the plaintiff always to affirmatively prove intent. Further, the plaintiff is less able than the defendant to prove what the latter intended. Finally, it is common for intentional torts to place the onus on defendants to disprove intent. The trespass torts, for example, can be defended by showing a lack of intent or carelessness: the onus is on the defendant, not the plaintiff.[109] (That said, this approach is not universal in tort: plaintiffs have the onus of proving intent in some intentional torts such as intrusion upon seclusion.)

[127] However, it may be justifiable for there to be special rules for intermediaries. It is beyond the scope of this report to address intermediary liability issues in detail, but we refer the ULCC to our report on internet intermediary liability in defamation.[110] Although internet intermediaries contribute to the harm of NCDII and have considerable power to prevent and remediate it, their role is usually not comparable to that of those who upload or otherwise intentionally distribute these images. However, we believe there should either be an exception for sites that encourage posting of NCDII and/or principally host such content,[111] or a more general duty on intermediaries to reasonably manage posting of NCDII on their sites.

Remedies

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

> 14(1) In an action for the non-consensual distribution of an intimate image, the court may
>
> (a) award damages to the plaintiff, including general, special, aggravated and punitive damages;
>
> (b) order the defendant to account to the plaintiff for any profits that have accrued to the defendant as a result of the non-consensual distribution of the intimate image;
>
> (c) issue an injunction on such terms and with such conditions that the court determines appropriate in the circumstances; and
>
> (d) make any other order that the court considers just and reasonable in the circumstances.[112]

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

c) Injunctions

[130] As indicated several times in this report, injunctive relief is what most plaintiffs will want and making injunctive relief easier to obtain is, in our view, a justification for creating both new NCDII torts. Injunctive relief should be available under both the fast-track action for injunctive relief and in an action for compensatory damages. See the discussion of injunctions above for more detail.

d) Damages

[131] In what we've been calling the action for compensatory damages, a range of damages should be available. We consider here whether there should be any caps on damages and the factors that should be considered in quantifying damages.

[132] We recommend against a cap on non-economic compensatory (*i.e.,* general) damages. The reasons to have one are that general or "pain and suffering" damages are inherently arbitrary and tend to increase over time.[113] Common law invasion of privacy and personal injury have such caps.[114] There are caps on general damages in defamation in some jurisdictions (e.g. the UK and Australia).[115]

[133] That said, the case for caps is strongest where there is a strong countervailing free speech or other interest. In defamation and privacy, for example, the threat of large general damages awards can chill legitimate speech. In personal injury, caps help keep insurance premiums low. Given the low expressive value of most intimate images (or at least non-consensually distributed ones), the chilling effect argument is unconvincing.

[134] Further, such a cap is unlikely to make much difference in the context of an NCDII tort as significant punitive damages will likely be common and will not be subject to such a cap.

[135] As for how general damages should be quantified, the legislation could be silent, as in the existing Canadian NCDII statutes. For greater certainty, however, we reject the approach to general damages in defamation that focuses not only on the harm done but also on the conduct of the defendant.[116] If our view, this confuses compensatory and punitive damages. Damages awarded because of the defendant's conduct should fall under the heading of punitive, or perhaps aggravated, but not general damages.[117]

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

[137] Ideally, aggravated damages would not be permitted. Aggravated damages are provided for explicitly in the Canadian NCDII statutes. At common law, they "may be awarded in circumstances where the defendants' conduct has been particularly

high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety".[118] However, where general damages are provided for based on the conduct of the defendant or the effect of the defendant's conduct on the plaintiff, they almost invariably duplicate either compensatory damages or punitive damages or both and lead to overcompensation. Ray Brown had therefore argued against the category in defamation.[119]

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

[139] Special damages should, of course, be recoverable where they can be established.

5. OTHER STATUTORY MECHANISMS TO COMBAT NCDII

6. Although likely beyond the scope of the ULCC's mandate, we also propose a non-tort approach to the problem of NCDII. A statute could simply require intermediaries to take down intimate images on request of the person depicted in them. The law would presumably have to be federal, as it is a kind of communications regulation. It should require content hosts, which refers to companies that provide storage services for content accessed by third parties,[120] to remove images and search engines to de-index search results. The requester must attest that the image is of her and that there is no contractual basis for its distribution, nor is she aware of any other legal authority to distribute it. The intermediary would then have to confirm that the relevant image is an intimate one and that it appears to be an image of the requester. (Perhaps the declaration that the image is of the requester would be sufficient for such confirmation.) The image would then have to be removed immediately. Notice would be given to the original poster, who has the option of requesting it be put back because it meets one of several criteria which would mirror defences in the NCDII tort – essentially public interest or a contractual basis for distribution. Notably, there would be no requirement to prove or even state that the image is non-consensually distributed. People should be able to change their minds about the distribution of intimate images, subject to certain exceptions.

7. In crafting such a law, recourse could be had to Canada's notice-and-notice regime in copyright law.[121]

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

9. This is admittedly an expression-infringing law, but in our view, it is justified by the harm that distribution of such images does, when weighed against the generally minimal expressive value of distributing such images. It is also justified by the need for

a cheap and quick takedown. Note, however, that such a rule would only apply to intermediaries with a Canadian presence and so will be of little use when an image is hosted on an individual's site or a site with no Canadian presence. Even then, however, search engine de-indexing should provide some assistance.

10. On the assumption that these suggestions are outside the ULCC's present mandate, we do not explore them further here. We recognize, however, that a number of issues would need to be resolved, such as how these rules would apply if there were more than one person in the image.

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[1] See e.g. Claire Reilly, "Revenge porn crackdown proposes new laws for abusers and websites" (22 May 2017), online: *Cnet* < www.cnet.com/news/australian-government-revenge-porn-crackdown-proposes-new-laws-abusers-websites/ > and "Most victims want the offensive material removed and civil suits almost never succeed in removing the images due to the sheer magnitude of dissemination" (Adrienne N Kitchen, "The need to criminalize revenge porn: how a law protecting victims can avoid running afoul of the first amendment" (2015) 90:1 Chicago-Kent L Rev 247 at 251.)

[2] Emily Laidlaw, "Are we asking too much from defamation law? Reputation systems, ADR, Industry Regulation and other Extra-Judicial Possibilities for Protecting Reputation in the Internet Age: Proposal for Reform" (September 2017) Law Commission of Ontario, http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw.pdf or Emily Laidlaw, "Re-Imagining Resolution of Defamation Disputes" (2019) 56 Osgoode Hall LJ 162.

[3] See e.g. Facebook's policy at: www.facebook.com/communitystandards/sexual_exploitation_adults and Twitter's policy at: help.twitter.com/en/rules-and-policies/intimate-media.

[4] support.google.com/blogger/contact/private_info?id=&url=

[5] see ss 8 and 14: www.facebook.com/communitystandards/sexual_exploitation_adults and www.facebook.com/communitystandards/adult_nudity_sexual_activity/.

[6] support.google.com/legal/troubleshooter/1114905?hl=en#ts=1115645%2C3331068%2C1115795.

[7] Google removes content only in specific circumstances, such as spam, malware and phishing, harassment, bullying, impersonation, or disclosure or private information or nude images. See support.google.com/legal/answer/3110420?hl=en and its policy for removing content is set out here: support.google.com/legal/troubleshooter/1114905?hl=en.

[8] If the content is not against Google policies, Google will "look at your request and take action as necessary. We'll also let the person know that there was a request to stop sharing." support.google.com/blogger/contact/private_info?id=&url=

[9] support.google.com/blogger/answer/7540088?visit_id=636887089911140837-1804988280&rd=1.

[10] *Defamation Act 2009* (Ireland), s 28.

[11] *Ibid*, s 28(4).

[12] *Ibid*, s 28(8).

[13] *Ibid*, s 28(6).

[14] *Ibid*, s 28(2).

[15] *Lowry v Smith*, [2012] IR 400.

[16] *Ibid at* paras 34-35; See discussion about the burden in *Gilroy & Anor v O'Leary*, [2019] IEHC 52; See *Defamation Act*, *supra* note 10, s 28(2)(a).

[17] *The Intimate Image Protection Act*, CCSM c I87, s 1(2) [*Manitoba Act*].

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

[19] David Kaye, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/HRC/38/35 (Kaye), para 22. See generally discussion at paras 22-25.
[20] *Ibid*, paras 13-21; 23.
[21] Draft *Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act,* National Conference of Commissioners on Uniform State Laws, 2018, s 8 [US Draft *Intimate Images Act*]; *Communications Decency Act* 1996, 47 USC, s 230.
[22] Danielle Citron, *Hate Crimes in Cyberspace* (Cambridge, Massachusetts: Harvard University Press, 2014) at 177.
[23] Bobby Chesney & Danielle Citron, "Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security" (2019, Forthcoming) 107 Cal L Rev (DRAFT) at 40. < DOI: 10.2139/ssrn.3213954 >.
[24] *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, RSA 2017, c P-26.9, s 1(b) [*Alberta Act*]; *The Privacy Act*, RSS 1978, c P-24, s 7.1 [*Saskatchewan Act*]; *Manitoba Act*, *supra* note 17, s 1*; Intimate Images and Cyber-protection Act*, SNS 2017, c 7, s 3(f) [*Nova Scotia Act*]; *Intimate Images Protection Act*, RSNL 2018, c I-22, s 2 [*Newfoundland and Labrador Act*]; Collectively [CAN NCDII Legislation].
[25] Robert Chesney & Danielle Citron, "Deep Fakes: A Looming Crisis for National Security, Democracy and Privacy" (21 February 2018), online: *Lawfare* < www.lawfareblog.com/deep-fakes-looming-crisis-national-security-democracy-and-privacy > and the draft scholarly article of the same name, *supra* note 23.
[26] Adam Dodge & Erica Johnstone, "Using Fake Video Technology to Perpetrate Intimage Partner Abuse" (25 April 2018), Domestic Violence Advisory, online (pdf): *Without My Consent* <withoutmyconsent.org/sites/default/files/blog_post/2018-04-25_deepfake_domestic_violence_advisory.pdf >.
[27] See report by Kevin Roose, "Here Come the Fake Videos, Too" (4 March 2018), online: *New York Times* <www.nytimes.com/2018/03/04/technology/fake-videos-deepfakes.html> first cited in Chesney & Citron*, supra* note 21.
[28] Mindy Weisberger, "Watch Mona Lisa come to life in startling 'deepfake' videos" (28 May 2019), online: *NBC News* <www.nbcnews.com/mach/science/watch-mona-lisa-come-life-startling-deepfake-videos-ncna1010871>.
[29] Chesney & Citron, *supra* note 23 at 5-8.
[30] Dodge & Johnstone, *supra* note 26 at 5-6, gave the example of a reddit group with 100,000 users.
[31] See Chesney & Citron, *supra* note 23, in particular 16-20; See Dodge & Johnstone, *supra* note 26 at 4-5.
[32] *Harmful Communications and Digital Safety Bill 2017* (Ireland), Bill 5 of 2017 [*Ireland Act*].
[33] *Ibid*, s 2; Scotland has a similar definition: *Abusive Behaviour and Sexual Harm (Scotland) Act*, 2016 asp 22, s 3(2) [*Scotland Act*].
[34] This does not consider the availability of a criminal charge for such drawings, taking into account *R v Sharpe*, 2001 SCC 2 (unlike in *Sharpe*, the drawings here are not for private use but shared).
[35] US Draft *Intimate Images Act*, *supra* note 21, Prefatory Note at 1.
[36] The availability of other causes of action influenced the drafters' thinking in the US Draft *Intimate Images Act*, *supra* note 21, Prefatory Note at 1.
[37] CAN NCDII Legislation, *supra* note 24.
[38] US Draft *Intimate Images Act*, *supra* note 21, s. 2(7)(a).
[39] *Ibid* at 2, Prefatory Note.
[40] *Harmful Digital Communications Act* (New Zealand), 2015 No 63, s 4 [*New Zealand Act*].
[41] *Ireland Act*, *supra* note 32, s. 2(a)(i): "of the person's genital or anal region or in the case of a female of her breasts (whether genital or anal region or, as the case may be, the breasts are covered by underwear or are bare)".
[42] *Scotland Act, supra* note 33, ss 2-3.

[43] *Ibid*, s 2(1); *Ireland Act*, *supra* note 32, s 2(b); *New Zealand Act*, *supra* note 40, s 4(a)(i).

[44]US Draft *Intimate Images Act*, *supra* note 21.
[45] *Ibid*, s 3(2)(b).
[46] *Ibid*, s 2(f).
[47] Mary Anne Franks, "Drafting an Effective "Revenge Porn" Law: A Guide for Legislators" (2015), DOI: 10.2139/ssrn.2468823.

[48] CAN NCDII Legislation, *supra* note 24.
[49] In the context of the *Criminal Code* provision on NCDII, see research of Moira Aikenhead, arguing that the provisions are too narrow. By focusing on situations of reasonable expectation of privacy, it distracts from the unique harm of being sexually objectified against one's will; See discussion, Ian Burns, "Study suggests 'revenge porn' law being interpreted too narrowly in court" (9 May 2018), online: *The Lawyer's Daily* <www.thelawyersdaily.ca/articles/6459/study-suggests-revenge-porn-law-being-interpreted-too-narrowly-in-court>.
[50] US Draft *Intimate Images Act*, *supra* note 21, s 2(7).
[51] *Ibid*, s 2(2).
[52] US Draft *Intimate Images Act*, *supra* note 21 at s 3b.
[53] *Manitoba Act*, *supra* note 17 at s 11(1); See also the *Alberta Act, supra* note 24 at s 3.
[54] *Saskatchewan Act*, *supra* note 24, s 7.5(2).
[55] *Nova Scotia Act*, *supra* note 24 , s 3(d); See also US Draft *Intimate Images Act*, *supra* note 21, s 2(c).
[56] In the sexual battery context, see *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 at paras 53 [*Scalera*], 108 and *Nelitz v. Dyck*, 2001 52 O.R. (3d) 458, 139 O.A.C. 117 at para 36. In the health care context, see e.g. *Toews v. Weisner and South Fraser Health Region*, 2001 BCSC 15 at para 19.
[57] *Criminal Code*, RSC 1985, c C-46 at s. 273.1(1); See also *R v Ewanchuk*, 1999 SCC 711 at para 26 [*Ewanchuk*].
[58] Honest mistaken belief negates *mens rea*. *Ewanchuk*, *supra* note 57 at paras 48-49.
[59] *Health Care Consent Act, 1996*, SO 1996, c 2, Sch A at 29(1).
[60] Linden et al, *Canadian Tort Law* 11th ed. (Toronto: LexisNexis, 2018) at 101. We are grateful to Jamie Lee for providing this example.
[61] This is true of self-defence in criminal law too. See *Criminal Code, supra* note 57 at s 34(1).
[62] *Black's Law Dictionary* 8th ed.
[63] *Scalera, supra* note 56 at para 10.
[64] *Ibid* at para 11, citing Ruth Sullivan, "Trespass to the Person in Canada: A Defence of the Traditional Approach" (1987) 19 *Ottawa L Rev* 533 at 562.
[65] "Utilizing this standard in a civil cause of action against revenge porn would create one less hoop for a victim to jump through before attaining relief and can also cut down on the length of the trial." Jessica Pollack, "Getting Even: Empowering Victims of Revenge Porn with a Civil Cause of Action" (2016) 80 Alb L Rev 353 at 379.
[66] *Alberta Act,* supra note 24, s 6*; Saskatchewan Act, supra* note 24, s 7.6; *Manitoba Act*, *supra* note 17, s 13; *Newfoundland and Labrador Act*, *supra* note 24, s 8; *Nova Scotia Act*, *supra* note 24 s. 7 (extends to cyberbullying too).
[67] US Draft *Intimate Images Act*, *supra* note 21.
[68] The language of public concern is specific to American law. It was included in the US Draft *Intimate Images Act* to ensure it complied with the First Amendment: *US Civil Remedies for Unauthorized Disclosure of Intimate Images Act: with prefatory note and comments*, 10.
[69] US Draft *Intimate Images Act*, *supra* note 21, s 4(b) and (e).
[70] *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, 111 DLR (4th) 385 at 334:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an

> assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[71] *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 SCR 626, 157 DLR (4th) 385.
[72] *Ibid* at paras 47-49.
[73] See e.g. *The Small Claims Act, 2016*, SS 2016, c S-50.12 at s 3(1).
[74] See e.g. *Small Claims Act*, RSNL 1990, c S-16 s 3(2).
[75] Courts have tended to find that granting powers of Section 96 courts to non-Section 96 courts is constitutional so long as there is no attempt to remove that power from a s. 96 court. See *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at paras 29–30: "Although the bare words of s. 96 refer to the appointment of judges, its broader import is to guarantee the core jurisdiction of provincial superior courts: Parliament and legislatures can create inferior courts and administrative tribunals, but '[t]he jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution' (MacMillan Bloedel, at para. 15)". See also *MacMillan Bloedel Ltd v Simpson,* [1995] 4 SCR 725 at 751, 191 NR 260.
[76] Non-judges sometimes have the power to grant relief that amounts to an interlocutory injunction. For example, Case Management Masters in New Brunswick may make temporary orders in relation to family law matters – custody of children, for example. See *Judicature Act*, RSNB 1973, c J-2, s 56.2 and Schedule C.
[77] *Civil Resolution Tribunal Act*, SBC 2012, c 25 at e.g. s 48. The strata example is from personal communication with the CRT's director, Shannon Salter.
[78] Richard Zussman, "Trial Lawyers Association of B.C. set to take government to court over ICBC changes" (31 March 2019), online: *Global News* <globalnews.ca/news/5116333/trial-lawyers-association-bc-constitutional-challenge-icbc-changes/>.
[79] See e.g. Ben Robinson & Nicola Dowling, "Revenge porn laws 'not working', says victims group", online: *BBC News* <www.bbc.com/news/uk-48309752>, suggesting that in the UK, denying anonymity to complainants may reduce the number of criminal NCDII complaints or investigations.
[80] *Saskatchewan Act, supra*, note 24 at s 7.8. See also *Manitoba Act*, *supra,* note 17 at s 15; *Alberta Act*, *supra* note 24 at s 9.
[81] *Newfoundland and Labrador Act*, *supra* note 24 at s. 10.
[82] *Nova Scotia Act*, *supra* note 24 at ss 8, 9.
[83] In *A.B. v. Bragg Communications Inc.,* 2012 SCC 46 at para 11 [*Bragg Communications*], the Supreme Court stated:

> The open court principle requires that court proceedings presumptively be open and accessible to the public and to the media. This principle has been described as a "hallmark of a democratic society" (*Vancouver Sun (Re)*, 2004 SCC 43 (CanLII), [2004] 2 S.C.R. 332, at para. 23) and is inextricably tied to freedom of expression.

[84] See e.g. Jennifer McGuire, "#YouKnowHerName – Behind the legal fight to name Rehtaeh Parsons" (25 March 2015), online: *CBC News* <www.cbc.ca/newsblogs/community/editorsblog/2015/03/youknowhername.html>.
[85] The leadings cases on the constitutionality of publications are *Dagenais v Canadian Broadcasting Corp.,* [1994] 3 SCR 835 (for discretionary bans) and *Toronto Star Newspapers v Canada,* [2010] 1 SCR

721 [*Toronto Star*] (for mandatory bans). In the *Toronto Star* case, the constitutionality of a mandatory publication ban on the evidence produced at bail hearings

[86] *Toronto Star, ibid*. at paras 21-60.

[87] Note that in *Bragg Communications, supra* note 83, the Supreme Court of Canada identified the plaintiff's youth as a factor justifying a publication ban on her identity. So too was the sexualized nature of the invasion of privacy: "It is not merely a question of her privacy, but of her privacy from the relentlessly intrusive humiliation of sexualized online bullying" (at para 14).

[88] The relevant provision in each piece of legislation is the definition of distribution: *Alberta Act*, *supra* note 24, s 2; *Saskatchewan Act*, *supra* note 24, s 7.3(2); *Manitoba Act*, *supra* note 17 s 11(2); *Nova Scotia Act*, *supra* note 24, s 3(d); *Newfoundland and Labrador Act*, *supra* note 24, s 4. Threatened disclosure is not addressed in any of the other provisions.

[89] *Nova Scotia Act*, *supra*, note 24 at s. 3(c).

[90] US Draft *Intimate Images Act*, *supra* note 21.

[91] *Ibid*, s 3(b): "…a depicted individual who is identifiable and who suffers harm from a person's intentional disclosure or threatened disclosure of an intimate image that was private without the depicted individual's consent has a cause of action against the person if the person knew [or acted with reckless disregard for whether]: (1) the depicted individual did not consent to the disclosure; (2) the intimate image was private; and (3) the depicted individual was identifiable."

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

[93] *Ibid*, s 44B: "(1) A person (the ***first person***) must not post, or make a threat to post, an intimate image of another person (the ***second person***) on:

(a) a social media service; or
(b) a relevant electronic service; or
(c) a designated internet service…"

[94] For example, see discussion here Robinson & Dowling, *supra* note 79.

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

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

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

[98] The only difficulty with bringing an action in negligence in relation to NCDII is negligence's requirement of a certain kind of injury. Personal injury and damage to property count, as does psychological injury that reaches a certain threshold (see *Saadati v. Moorhead*, 2017 SCC 28 at paras 31, 37 [*Saadati*]). It is somewhat unclear whether the kinds of emotional upset, humiliation and reputational harm that are likely to flow from NCDII are injuries negligence law would recognize. Arguably they often will be, given the recognition that psychological injuries do not have to be diagnosed or fall within a recognized *Diagnostic and Statistical Manual of Mental Disorders* (DSM) category (*Saadati*). In addition, reputational injury is compensable in negligence (*Young v. Bella*, 2006 SCC 3 at para 56).

[99] See Franks, *supra* note 47 at 7.

[100] For example, the *New Zealand Act*, *supra* note 40, s 22 (1)(a) makes it an offence to cause harm by posting digital communications, but only where the person posts "with the intention that it cause harm to a victim". The relevant Canadian *Criminal Code* provision does not require intent to harm. See *Criminal Code*, *supra* note 57, s 162.1.

[101] *Manitoba Act*, *supra* note 17 at s 1(2); *Alberta Act*, *supra* note 24 at s 2.
[102] See *Saskatchewan Act*, *supra* note 24. For example s 7.2 is virtually identical to s 1(2) of the *Manitoba Act* and s 2 of the *Alberta Act* except that it does not include the word "knowingly".
[103] That intent to publish is required in defamation is well-established. See Linden et al, *supra* note 60 at 761. The statutory and common law privacy torts are considered intentional torts. The BC statute, for example, states that it is a tort "for a person willfully and without claim of right, to violate the privacy of another". E.g. *Privacy Act,* RSBC 1996 c 373 s 1(1). *Jones v Tsige,* 2012 ONCA 32 [*Jones*], the leading case on the common law privacy tort, defines the tort in terms of intentional intrusions (at para 19).
[104] It may be that carelessness with regard to publishing is wrongful, but as noted above, we leave such cases for the law of negligence to address.
[105] See *Pritchard v. Van Nes*, 2016 BCSC 686 at para 78. There is relatively little scholarship on the issue of "natural and probable result", but it presumably sets a threshold higher than mere foreseeability, which would capture almost any republication.
[106] See e.g. Emily Laidlaw, "*Pritchard v Van Nes*: Imposing Liability on Perpetrator Zero of Defamatory Facebook Posts Gone Viral" (18 May 2016), online: *University of Calgary Faculty of Law Blog* <ablawg.ca/2016/05/18/pritchard-v-van-nes-imposing-liability-on-perpetrator-zero-of-defamatory-facebook-posts-gone-viral/>.
[107] Laidlaw & Young, *supra* note 18 at 116-120.
[108] *Ibid* at 118-120.
[109] "[T]here can be no doubt that, as a whole, Canadian law has taken the view that the onus lies upon the defendant to disprove the mental element requisite for the tort of trespass" (Frank Bates, "Accident, Trespass and Burden of Proof: A Comparative Study" (1976) 11 Irish Jurist 88 at 96). See also *Dahlberg v Naydiuk* (1969), DLR (3d) 319, 72 WWR 210.
[110] Laidlaw & Young, *supra* note 18.
[111] Citron, *supra* note 22 at 177.
[112] *Manitoba Act*, *supra* note 17 at s 14(1). The *Alberta Act*, *supra* note 24 has a similar provision at s 7(1), as does the *Newfoundland and Labrador Act*, *supra* note 24 at s 9(1) and the *Saskatchewan Act*, *supra* note 24 at s 7.7(1). Note that the *Nova Scotia Act*, *supra* note 24 at s 6, lists a wide range of orders that may be made, but in our view, it is unnecessary to enumerate so precisely the kinds of orders that can be made. Injunctive relief is equitable and discretionary, and judges understand their powers to grant appropriate injunctive relief. The risk of listing types of orders, even while providing for "any other order which is just and reasonable", is that the types of possible orders may be narrowed by statutory interpretation to reflect the examples provided in the statute.
[113] At least this is the case with general damages in defamation. See Hilary Young, "The Canadian Defamation Action: An Empirical Study" (2017) 95 Can Bar Rev 591 at 612-613.
[114] See *Jones*, *supra* note 103 at para 87 and *Andrews v. Grand & Toy Alberta Ltd*., [1978] 2 SCR 229, 83 DLR (3d) 452 at 233.

[115] See *Defamation Act 2005* s 35(1) in 5 of 6 Australian states (s 33(1) in South Australia) set a cap of $250,000 on non-economic damages in defamation. These amounts have been increased to reflect inflation and as of July 1, 2019 will be $407,500. (NSW Government Gazette No 55 of 31 May 2019.) For the UK there is a quasi-cap of £275,000. See *Simmons v Castle* [2012] EWCA Civ 1039.

[116] The way to quantify defamation damages is set out at para 182 of *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, 126 DLR (4th) 129 [*Hill*]:

> [Triers of fact] are entitled to take into their consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and "the whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict. They may take into consideration the conduct of the defendant before action, after action, and in court at the trial of the action," and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case. They should allow "for the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused." They should also take into account the evidence led in aggravation or mitigation of the damages.

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

[118] *Hill*, *supra* note 116 at para 188.

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

[120] See, for example, Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford University Press, 2016), 2.50 and Karine Perset (OECD), *The Economic and Social Role of Intermediaries* (2010) at 9, DOI: 10.1787/5kmh79zzs8vb-en.

[121] *Copyright Act*, RSC 1985, c C-45 at ss 41.25-41.27.