



Northern Ireland
Assembly



Knowledge Exchange Seminar Series (KESS)

Criminalising Revenge Pornography in Northern Ireland: Laws and Lessons from England and Wales and other Common Law Jurisdictions

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Revenge pornography encapsulates the act of online distribution or publication of sexually explicit private images or films of an ex-girlfriend, boyfriend, or partner, without their consent; with a view to humiliating or causing distress for a perceived wrong or slight.

Whilst revenge pornography predates the Internet, the ubiquitous Internet, the social media and the proliferation of mobile digital devices for capturing intimate images, have exacerbated the problem.

The epidemics of revenge pornography led to its criminalisation in England and Wales in April 2015, via sections 33-35 of Criminal Justice Act 2015; and subsequently in Northern Ireland in February 2016, via sections 51-53 of Justice Act, (Northern Ireland) 2016. The criminalisation of revenge porn helped highlight the seriousness of the problem, and led to successful prosecution of 206 people in England and Wales within a year of the enactment of the Criminal Justice Act 2015.

In Northern Ireland, there is as yet, no reported prosecution for revenge pornography under sections 51-53 of Justice Act (Northern Ireland) 2016. However, in 2016, two revenge pornography cases were heard by the Queen's Bench Division of Belfast High Court, in which the plaintiffs sought civil remedies. (*AY a minor acting as next Friend v. Facebook (Ireland Limited & others*, [2016] NIQB 76; and *MM v. BC, RS and Facebook Ireland Limited*, [2016] NIQB 60).

Whilst drawing on legislative and judicial responses to revenge pornography in England and Wales and other common law jurisdictions, this presentation critically reviews the provisions of sections 51-53 of the Justice Act (Northern Ireland) 2016, and highlights its inherent weaknesses. The presentation also highlights civil remedies that could be available to victims of revenge pornography; and explores the legal responsibility of social media platforms, and the extent to which technical measures could be deployed alongside existing legal measures to combat online revenge pornography.

Key words: Criminalising revenge pornography; adequacy of criminal remedies for revenge pornography; civil remedies for revenge pornography; technical solutions to revenge pornography.

WHAT IS REVENGE PORNOGRAPHY?

Revenge pornography refers to consensual or non-consensual creation of private sexual images; and non-consensual distribution of private sexual images as an act of 'revenge' or sexual gratification often by a partner, an ex-partner, an acquaintance or a total stranger.

The use of the term 'revenge pornography' or 'revenge porn' in mainstream media for framing non-consensual distribution of lawful or unlawful private sexual images, has been criticised as an anomaly, which unduly focuses on the perpetrator's 'revenge' motives, with a hint of "choice and legitimacy", rather than highlighting the harm caused to the victims.¹ According to Clare McGlynn et al., revenge pornography is a form of sexual abuse, and should be framed as such: "image-based sexual abuse".²

Even so, whilst revenge pornography is undeniably a form of sexual abuse that invariably causes harm to victims, there is no denying the motives of the perpetrators, which include punishing, bullying, harassing, shaming, intimidating, or belittling their victims.

REVENGE PORNOGRAPHY AND THE INTERNET

Although revenge pornography predates the Internet, it has been exacerbated by Internet ubiquity, and the proliferation of powerful and sophisticated mobile digital devices for surreptitious or consensual capturing of intimate photos and films, which are instantly and easily upload-able unto the World Wide Web, where there is a flourishing market for the distribution of non-consensual intimate photos and films.³

In other words, revenge pornography on Internet platform is a form of cyber-bullying, which "involves the use of information and communication technologies such as e-mail, cell phone and pager text messages, instant messaging, defamatory personal Web sites, and defamatory online personal polling Web sites, to support deliberate, repeated, and hostile behaviour by an individual or group, that is intended to harm others."⁴

HARM CAUSED TO VICTIMS.

Revenge pornography has been linked to serious psychological harm and mental health problems in victims. For example, an in-depth qualitative interview conducted by Samantha Bates, established a link between revenge pornography and anxiety, depression, suicidal thoughts and several other mental health problems amongst female victims.⁵

COMBATING REVENGE PORNOGRAPHY: CRIMINALISATION IN NORTHERN IRELAND

¹ Clare McGlynn and Erika Rackley, "Image-Based Sexual Abuse", *Oxford Journal of Legal Studies*, (2017), at 3-4.

² *Id.*, at 4.

³ Scott R. Stroud, "The Dark side of the Online Self: A Pragmatist Critique of the Growing Plague of Revenge Porn," *Journal of Mass Media Ethics*, Volume 29, Issue 3, (2014), 168-183, at 170.

⁴ Bill Belsey, "Cyberbullying: An Emerging threat to the 'Always On' Generation," cited in Karim Razza, "Cyberbullying: An Analysis of the European Framework on Cyberbullying," *Computer and Telecommunications Law Review*, (2015), at 193.

⁵ Samantha Bates, "Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors," *Feminist Criminology*, Volume 12, Issue 1 (January 2017), at 22-42.

Revenge pornography was criminalised in Northern Ireland via sections 51-53 of the Justice Act (Northern Ireland) 2016. Section 51(1) (a) (b) of the Act makes it an offence to disclose a private sexual photograph or film of an individual who appears in the photograph or film without their consent, and with the intention of causing that individual distress. However, it is not an offence under section 51(2) of Act, if the disclosure of private sexual photograph or film is made solely to the individual who appears in the photo or film. The clear implications are that only disclosures of private sexual photos or films made to third parties, with intent to cause distress would constitute an offence under section 51(1) (a) (b) of the Act.

Under section 51(3) of the Act, it is a defence for a person charged with an offence to prove that he or she reasonably believed that the disclosure was necessary for the purposes of preventing, detecting or investigating crime. Ostensibly, this provision would facilitate professional handling and disclosure of private sexual photographs and films by law enforcement agents for the purposes of preventing, detecting or investigating crime.

Under section 51(4) (a) (b) of the Act, it is a defence for a person charged with an offence to prove that the disclosure was made in the course of, or with a view to the publication of journalistic material; and that he or she reasonably believed that in the particular circumstances, the publication of the journalistic material was, or would be, in the public interest. This defence is for disclosure of private sexual photographs and films in news reporting by journalists, on grounds of reasonable beliefs that the disclosure is in the public interest.

Under section 51(5) (a) (b) of the Act, it is a defence for a person charged with an offence to show that he or she reasonably believed that the private sexual photographs or films had previously been disclosed for a reward by the individual liable for an offence under section 51(1) (a) (b) or another person; and that he or she had no reason to believe that the previous disclosure for a reward was made without the consent of the individual who appeared in the private sexual photographs or films. This defence is for persons who came into possession by purchasing or offering other considerations for private sexual photographs or films that were originally disclosed without the consent of the individuals in the photographs or films. The defence clearly acknowledges the legitimate market in legal pornography, and would not criminalise or punish someone who purchased private sexual photographs or films without a reason to believe that the original disclosure was made without the consent of the individual who appeared in the private sexual photographs or films.

Under section 51(6) of the Act, it suffices that journalists who seek defence under section 51(4) (a) (b); and buyers who seek defence under section 51(5) (a) (b); are able to adduce sufficient evidence in support of their defence. It is incumbent on the prosecution to rebut the evidence and prove “beyond reasonable doubt” to the contrary.

SENTENCING

Under section 51(9) (a) (b) of the Act, a person guilty of an offence is liable on conviction to imprisonment for a term not exceeding 2 years or a fine or both. On summary conviction, a person found guilty of an offence is liable to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum (or both).

INHERENT WEAKNESSES IN THE PROVISIONS OF SECTIONS 51-53 JUSTICE ACT (NORTHERN IRELAND) 2016.

1. Section 51(1) (b) expressly requires that the person charged with an offence under the Act must have “the intention of causing that individual distress.” Also, section 51(8) requires that “...a person charged with an offence... is not to be taken to have disclosed a photograph or film with the intention of causing distress merely because that was a natural and probable consequence of the disclosure.” Thus, the prosecution must prove beyond reasonable doubt that there is an intention or ‘*mens rea*’ to cause distress, notwithstanding that the disclosure of private sexual photographs or films is inherently liable to cause distress, or has already caused distress. This is an anachronism that requires proof of “the intention of causing that individual distress”, but not the disclosure of private sexual photographs or films as such; thus raising the bar for the prosecution, and invariably whittling down the effectiveness of the Act in combating revenge pornography.
2. Under section 51(2) of Act, it is not an offence if the disclosure of private sexual photograph or film is made solely to the individual who appears in the photo or film. The clear implications are that only disclosures of private sexual photos or films made to third parties, with intent to cause distress would constitute an offence under section 51(1) (a) (b) of the Act. There appears to be a presumption that the private sexual photographs or films were taken with the consent of the victims, and could not have been taken without victims’ consent, thus justifying punishing unauthorised disclosure, but not unauthorised making of the photographs or films in the first instance? The disclosure to the victims should certainly be an offence, if the private sexual photographs or films of the victims were made surreptitiously?
3. The defence afforded law enforcements under section 51(3) to disclose private sexual photographs or films for the purposes of preventing, detecting or investigating crime, could exacerbate the distress suffered by the victims from the original unauthorised disclosure, unless it is done sensitively and with due regards to the privacy and dignity of the victims.
4. The defence afforded journalists under section 51(4) (a) (b) to disclose private sexual photographs or films on grounds of reasonable beliefs that the disclosure is in the public interest, begs the question as to whether it could ever be in the public interest to disclose private sexual photographs or films in news reporting?

CRIMINALISATION OF REVENGE PORNOGRAPHY IN ENGLAND AND WALES

Sections 51-53 of the Justice Act (Northern Ireland) 2016 are modelled on sections 33-35 of the Criminal Justice Act 2015 for England and Wales, and the provisions of both legislations are substantially similar.

Whilst there are no reported criminal prosecutions for revenge pornography in Northern Ireland, there were over 200 recorded prosecutions as at September 2017 in England and Wales since the Act came into force in April 2015.⁶ One of the more recent cases at the Court of Appeal Criminal Division is *Regina v. Amar Bostan*, [2018] EWCA Crim. 494; in which Justice Andrew Baker reduced the 3 months sentence imposed by the Wood Green Crown Court on the

⁶ Joselyn Ledward and Jennifer Agate, “Revenge Porn and Section 33: The Story So Far,” *Entertainment Law Review*, Volume 28, Issue 2, (2017), 40-42, at 40.

appellant to 2 months due to the nature of the image and its limited disclosure. The appellant had pled guilty for sending a topless photo of his 17 year old ex-girlfriend to her mother, “in a moment of madness” and in revenge for contacting his new girlfriend.

Prior to the enactment of the Act, victims had relied on disparate legislations that range from section 1 of the Malicious Communications Act 1998; section 127 of the Communications Act 2003; sections 2 and 4 of the Harassment Act 1997; to the tort of misuse of private information.

BEYOND PROSECUTION: CIVIL REMEDIES FOR REVENGE PORNOGRAPHY VICTIMS.

Invariably, revenge pornography victims are vulnerable to emotional and mental problems, which may not be sufficiently assuaged or compensated by the successful criminal prosecutions of the perpetrators. Also, recourse to urgent civil reliefs such as an injunction may be imperative, to prevent the publication of a potentially damaging private sexual photographs or films.

- (a) **Civil Injunction:** An injunctive order could be granted to prevent the disclosure of potentially damaging private sexual photographs or films; or to preserve crucial evidence that could be used for future civil or criminal prosecutions. For example, in *J.P.H. v. XYZ Persons Unknown [2015] EWHC (QB)*, Justice Popplewell granted an interim non-disclosure order to restrain the disclosure or publication of a number of photographs and videos which portrayed nudity and sexual activity. The claimant was a professional actor whose former lover had threatened to publish the said materials online in revenge for ending their relationship. In Northern Ireland, a similar order was granted to protect potential evidence from destruction or tampering in *MM v. BC, RS and Facebook Ireland Limited, [2016] NIQB*. The 14 year old plaintiff alleged that she was a victim of revenge pornography, and sought court order to restrain the defendants from destroying, modifying or altering her sexualised photos published by the defendants on Facebook, for future evidential uses.
- (b) **Misuse of Personal or Private Information:** Victims of revenge pornography could resort to the tort of misuse of private information as a cause of action. In *J20 v. Facebook Ireland Limited, [2016] NIQB 98*, the court ruled that the plaintiff had a reasonable expectation of privacy in respect of the religion of his children, and that reference to his children on Facebook postings, constituted a misuse of private information.
- (c) **Breach of Confidence:** Victims of revenge pornography could sue for breach of confidential information. In *Wilson v. Ferguson, [2015] WASC 15*, Justice Mitchell of the Supreme Court of Western Australia, ruled that the defendant breached confidential information, by publishing nude photographs and videos of himself and the plaintiff on Facebook to approximately 300 friends. The sexually explicit materials had been published in revenge for the breakup of their relationship. The plaintiff became distressed and depressed and was unable to return to work. The plaintiff was awarded equitable compensation of \$13,404 for the economic loss suffered from unpaid leave taken in the aftermath of the Facebook publication. Additionally, the court awarded \$35,000 for the anxiety, embarrassment and depression suffered by the plaintiff.
- (d) **Remedies under the Harassment Act 1997:** Victims of revenge pornography could also seek compensation under section 3(1) of the Harassment Act 1997. Under section

3(2) of the Act, victims could be awarded damages for anxiety caused by the harassment and any financial loss resulting from the harassment.

- (e) **Remedies under Data Protection Legislation:** Victims of revenge pornography could sue for breach of data protection legislation, because private sexual photographs or films would constitute personally identifiable information and processing of personally identifiable information under sections 10 and or 13 and 14 of the Data Protection Act 1998. (*Max Mosley v. Google Inc.*, [2015] EWHC 59.)
- (f) **Remedies under Copyright Legislation:** Photographs are artistic works under section 4(2) (b) of the Copyright, Designs and Patents Act 1988 as amended; whilst films are protected under section 5B of the Copyright, Designs and Patents Act 1988 as amended. Additionally, provided that the originality condition was satisfied under section 1(1) (a), films could qualify as dramatic works under 3(1) of the Copyright, Designs and Patents Act 1988 as amended. (*Norowzian v. Arks Limited and Guinness Brewing Worldwide Limited (No.2)* [1999] EWCA Civ. 3014). However, revenge pornography victims could only sue for damages if they were the authors of the private sexual photographs or films under section 9 of the Copyright, Designs and Patents Act 1988 as amended.
- (g) **Technical Solutions and Liability of Internet Service Providers/Social Media Platform Operators:** Internet Service Providers (ISPs) and social media platform operators are legally obliged to expeditiously remove private sexual photographs or films upon notification. Their immunity from liability for user-generated contents under Articles 12, 13 and 14 of Directive 2000/31/EC on Electronic Commerce, is dependent on whether or not they actively contributed to the promotion of the offensive contents, and whether or not offensive contents are expeditiously removed upon notification. (*Max Mosley v. Google Inc.*, [2015] EWHC 59); (*Delfi AS v. Estonia*, ECtHR 64669/09 2015). In addition, Internet Service Providers could deploy filtering software to block the upload and disclosure of private sexual photographs and films. For example, Facebook is currently trialling a filtering technology in Australia that would require volunteer subscribers to submit explicit images for tagging, with the aim of establishing a massive database against which any future revenge pornographic materials could be automatically matched and blocked.⁷

CONCLUSIONS

The criminalisation of revenge pornography in Northern Ireland is timely and justified. However, the key provisions are inherently weak, due to exceptions granted to law enforcements, journalists and third parties who have lawfully purchased copies, not knowing that the original disclosures were made without authorisation. Also, the requirement that there must be an intention to cause the victims distress, notwithstanding that distress is caused naturally by the unauthorised disclosure; arguably undermine the effectiveness of the legislation. The paper highlights alternative complementary civil remedies in injunctions, data protection law, copyright law, breach of confidence, Harassment Act and the tort of misuse of private or personal information that could come in handy for victims of revenge pornography.

⁷ Andy Phippen and Margaret Brennan, "Protecting Yourself from Revenge Pornography: Share Your Images before Your Abuser Does!" *Entertainment Law Review*, Volume 29, Issue 2, (2018), at 33-36.

