

Strict Liability for Viewers in Tort Law of Naked Photos Without Others' Permission?

Mingming Hai¹

¹ Faculty of Law, University of Macau, Macau

Correspondence: Mingming Hai, Faculty of Law, University of Macau, Macau.

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Abstract

The infringement of Private rights tort law is elaborated by specific laws and regulations but is not perfect. Especially in the field of network, the existing legal loopholes have not been filled up so far, and thus become the focus of discussion. Given that the major aim of tort law is to recompense victims for damages, holding individual viewers accountable is not acceptable since it would not properly fulfill the goal of tort law. This paper mainly discusses whether collecting and view someone's naked photos without others' permission should be regarded as strict liability, and to compensate the infringed and establish an investigation system.

Keywords: gender justice, human right, privacy right, strict liability

1. Introduction

In 2014, a collection of private photos of celebrities was leaked on the Internet. A dozen of celebrities, including American actress Jennifer Lawrence, found their intimate and explicit photos posted on various websites and Internet message boards. (Marwick A, 2017)¹ There are reports that hackers have invaded private photos from Apple's iCloud network data store, and that an anonymous uploader claimed to have a large number of nude photos of female celebrities. This theft and distribution of private celebrity photos has once again brought Internet torts into the spotlight. Upon this incident, Jennifer Lawrence said "Anybody who looked at those pictures, you're perpetuating a sexual offense". This essay aims to discuss whether the viewers of unauthorised dissemination of nude and intimate images, such as the ones in the case of Jennifer Lawrence, could be liable in tort to the relevant victims. The first section of the essay examines the current tort laws and cases regarding individual privacy and unauthorised dissemination of nude and intimate images. The second section of the essay discusses whether viewers of unauthorised dissemination of nude and intimate images can be held as liable. The last section of the essay discusses the circumstances in which such liability is desirable.

2. Viewers of Unauthorised Dissemination of Nude and Intimate Images

Tort law mainly involves civil faults that infringe the rights and interests of others in personal, property, reputation, business and other aspects. (S. F Deakin, Angus Charles Johnston & Basil Markesinis, 2003) Although this kind of wrong behavior may have the nature of criminal behavior, the purpose of tort litigation is quite different from the purpose of criminal litigation.² The main purpose of the former is to compensate the victim for the loss, while the main purpose of the latter is to punish the offender. Relatively speaking, tort law guarantees a relatively small range of rights, including personal freedom, private property rights, reputation rights and economic rights. (J. A Jolowicz & Tom Ellis Lewis, 1967) The legal rules governing personal freedom, private property rights and reputation rights were developed earlier; the legal rules for safeguarding economic rights and interests were developed in more recent times. Tort can be divided into intentional tort, negligence or negligent tort. The remedy for tort is to compensate for the damage caused by the tort. The four elements necessary for successful tort cases are duty of care, breach of duty, causation and damages. To prove that a party

is at fault, the claiming party must first prove whether the other party has the duty of care. If one party has a duty of care and violates the duty, the claiming party has damage, and then proves that the breach of the obligation and the damage of the claimant have a causal relationship, which can constitute a tort.

Tort law is a common tool used for the protection of privacy. However, there is currently no general tort of invasion of privacy. In the US, unauthorised dissemination of nude and intimate images falls into the category of public disclosure of private facts. The public disclosure of private facts refers to the publication of the private affairs of another person when the disclosures would be highly offensive to a reasonable person. (G. Edward White, 2006) Different from defamation, in a case of public disclosure of private facts, the disclosed private facts may be true, but is especially private. The four elements to a private facts claim are public disclosure, private fact, offensive to a reasonable person, and not newsworthy. Only the broadcast to a broad audience would constitute as public disclosure. In general, the publication of information on a website or a blog would satisfy this element. Private facts are defined as facts that were not revealed to the public previously and are not of legitimate public concern. Not being a matter of public concern also determines that the information is not newsworthy. Further, the publication of such facts would be considered as offensive to a reasonable person with ordinary sensibilities. In this case, the private information in the form of private photos of Jennifer Lawrence, as well as a number of other celebrities, has been made public through the Internet. Such private photos are offensive and not newsworthy. Therefore, it is undoubted that the publication of such information should be considered as a tort of public disclosure of private facts. In *Wainwright v Home Office*³, Lord Hoffmann suggested that the gap in the tort law for the protection of privacy could be fulfilled by judicious development of existing causes of action such as breach of confidence or with claims under the UK Human Rights Act 1998 for breach of Art 8 of the ECtHR.

3. Liable to Negligence

While the dissemination of private photos can be ruled as a tort, this essay focuses on the issue of whether the viewers of such photos can be held as liable. Note that torts can either be intentional, which is performed purposefully, as well as unintentional, which is caused by a lack of reasonable care. Intentional torts are the intentional acts that are reasonably foreseeable to cause harm to an individual. (John G. Fleming, 1967) This apparently cannot be applied to the viewers of private images, who may or may not know whether the images were private, not to mention to foresee the cause of harm to the victims. Therefore, if the viewers of unauthorised dissemination of nude and intimate images could be considered as liable to tort, they could only be considered as liable to negligence, which is conduct that falls below a reasonable standard of care for the safety of others. It could be argued that the unintentional viewing of unauthorised dissemination of nude and intimate images have caused the victims of such images to experience emotional distress and psychiatric injury.

According to the observations of Percy and Walton, negligence has three meanings. It can refer to a psychological state held by the legal subject that deliberately corresponds to intentional, the behavior of the perpetrator as careless conduct, or to the actor's violation of the law's required cautious obligations. Some scholars regard negligence as an independent category of tort, which can be subdivided different categories depending on the nature of the tort. Negligent subcategories are still developing, such as professional negligence that has developed in recent years. Negligence sometimes overlaps with other tort types. For instance, accidental break in of private territory may be considered as negligence as well as a trespass. The British negligence system is not formed according to the provisions. On the contrary, the British negligence is mainly developed from a large number of historical cases. In one specific case environment, the judge evaluates whether the conduct of the perpetrator is in conformity with the standard, and when the perpetrator constitutes negligence and under what circumstances his conduct is justified. The set of judicial practices regarding negligence is developed with cases. Generally speaking, the English courts consider the following elements as to whether a defendant's conduct constitutes negligence: (1) Whether the defendant has a duty of care to the plaintiff; (2) if the answer is affirmative, consider whether the defendant violated the breach of duty of care; and (3) the defendant violated his duty of care, and (4) whether this violation caused damage to the plaintiff, (5) whether there was a causal connection between the damage and the defendant's conduct. In terms of damage, it is also considered whether the damage was too remote for the provision of relief.

4. Multiplicity of Contexts in Case Law

Whether the viewers of unauthorised dissemination of nude and intimate image can be considered as negligence is determined by whether the above-mentioned elements are in place. Firstly, for holding the viewers of private images as negligent, the duty of care must be established. The duty of care is the primary element for determining whether an act can constitute as negligence. In general, a three-step test is used to determine the existence of duty of care. The negligence of the British tort law has evolved through a large number of cases. Previous to 1932, although there were cases involving negligence, in general, these cases did not form a general negligence rule. After *Donoghue v Stevenson*⁴, the British negligence tort law basically adopted a stricter

standard. After the *Anns v Merton LBC*, the court's inspection standard was greatly broadened, but this situation was quickly reversed by the House of Lords at *Murphy v Brentwood DC*⁵. In Lord Bridge's view, the elements of the duty of care should include: (1) the foreseeability of damage; (2) the proximity of the relationship between the original defendants, and (3) the fairness, justice, and reasonableness. Only by satisfying these three elements can it be determined that a duty of care exists.

Care means that a person must use reasonable care and skill to engage in activities. If a person's behavior is lower than the standard of conduct required by law, then the person should bear the corresponding legal responsibility. As early as *Blyth v Birmingham Waterworks Co.* 53⁶, Judge Alderson B said that negligence is the failure to engage in rational people's conduct in accordance with the norms that usually guide people's behavior, or to engage in acts that cautious and rational people would not do. Lord Porter also said that negligence is that in a case of cautious duty, the defendant failed to meet the level of care required by law. The standard of caution is objective, abstract, based on the assumption of "reasonable person". The judge does not have to observe the subjective ability of each defendant, but only pays attention to whether the defendant's behavior conforms to the criteria of "rational person". The level of caution required by law is often proportional to the risk that may arise. The greater the risk, the more cautious the parties should be. In general, the magnitude of the risk should be determined by two factors: the likelihood of the damage occurring and the severity of the damage. To identify a negligent act depends not only on the rationality of the act but also on the likelihood of the damage occurring. If the perpetrator clearly knows that his or her actions may cause damage to certain special persons, he or she must be extra cautious.

Strictly speaking, risks cannot be fundamentally eliminated, and some risks can only be greatly reduced by huge cost. This is called the cost of caution. However, the real problem is that if you spend a lot of money chasing the risk, it will inevitably increase the social cost. For example, to reduce traffic accidents, the speed of the expressway is limited to 20 km/h instead of 120 km/h, which will greatly reduce the efficiency of the highway and increase the social cost. Therefore, when deciding on the duty of care, the judge should weigh the prudent costs required to reduce the risk and the losses that may be recovered. However, if there is no difficulty and no cost is required to eliminate a small risk, the agent cannot ignore the risk, otherwise it constitutes negligence. The social effects pursued by the accused in the conduct of the act can be used to test whether the act is justified and reasonable. In general, if the defendant acts in a normal way that others would adopt in similar situations, it may not be considered negligent. By the same token, if the defendant's actions deviate from the usual practice, it may constitute negligence.

Reflecting upon the duty of care and breach of duty of care elements of negligence in the English tort law and previous cases, the viewing of unauthorised dissemination of nude and intimate images could hardly constitute as negligence. Primarily, it is questionable whether a duty of care exists in a specific case of viewing of unauthorised dissemination of nude and intimate images, as the viewers of the images lacks proximity to plaintiff. (Stychin C, 2012) Furthermore, as previously mentioned, care means that a person must use reasonable care and skill to engage in activities, with a level of caution to avoid causing risks for others. In the case of viewing of unauthorised dissemination of nude and intimate images, the viewers may be cautious in their online behavior, while still encountering the problematic images. The expected level risk is very low for individual viewers, and so is the likelihood of the damage occurring in the case of viewing information made public on the Internet. Therefore, from the elements of duty of care and breach of duty of care, holding viewers of unauthorised dissemination of nude and intimate images liable for tort is unlikely.

Furthermore, the British tort law pursues the principle of "no damage, no action", that is, the plaintiff's lawsuit must be based on the fact that it has suffered damage. (Charlesworth J, et al, 2002) Accordingly, the plaintiff is obliged to submit evidence to the court that it has suffered some damage. The damage may be personal injury, or the property damage of the plaintiff or the loss of reputation. There are two most important issues regarding damage in the UK Tort Law (Keren-Paz T, 2019): one is whether there is a causal relationship between the defendant's negligent act and the plaintiff's damage; the second is whether the damage suffered by the plaintiff is too distant to receive any relief. Regardless of how serious the defendant's conduct is, if the act does not cause the plaintiff to suffer damage, the defendant is not liable for the damage of the plaintiff. However, causal relationships in real life are often complex and diverse, and the apparent causes are often not the real cause. At this point, the judge should analyze whether the defendant's behavior is one of the real reasons for the damage. The judge is concerned not whether the defendant's conduct is the sole cause or the important cause of the damage. All the judge cares about is that if the defendant's behavior is not the real cause of the plaintiff's damage, the defendant should not bear any legal responsibility to the plaintiff. Because there is no connection between the defendant's actions and the damage. If the conclusion is reversed, the court needs to compare the defendant's actions with other factors and see whether the defendant's conduct is legally sufficient enough to cause damage to the plaintiff. The test adopted by the English courts is to consider whether "the plaintiff would not have suffered the damage but for the defendant's negligence". It must be pointed out that the "if no" test is a

hypothesis, and the judge examines “what might happen” rather than “what happened”. After weighing the various possibilities, the court can determine whether the responsibility of the defendant is true if it proves that something is most likely to happen (Keren-Paz T, 2018). On the other hand, the test is a necessary but not sufficient condition for the defendant to assume legal responsibility. If there is no defendant’s behavior, the loss would also occur, and the defendant’s behavior is irrelevant in terms of causality.

Therefore, even if it can be established that the individual viewing of unauthorised dissemination of nude and intimate images is a breach of care, it is unlikely to establish a causal relationship between the damage experienced by the victim of unauthorised dissemination of nude and intimate images and the action of individual viewers. On the other hand, the viewers’ behavior is more or less irrelevant in terms of causality. Furthermore, the issue of remoteness should also be considered. Historically, the English courts have established two different criteria for defining the defendant’s scope of responsibility, that is, the defendant is responsible for the “direct” consequences of his actions or the defendant is only responsible for his “foreseeable” consequences. (Green L, 1961) The direct loss is the loss caused by the defendant’s behavior itself without the intervention of other factors, whether the defendant reasonably foresees the loss or the loss is the result of the defendant’s fundamental surprise. In *Re Polemis and Furness, Withy & Co. Ltd* case⁷, the defendant’s shipper accidentally slipped the plank into the sea while carrying cargo on the ship, causing a spark that floated on the surface of the sea and burned the plaintiff’s ship. Bankes LJ, the judge of this case, believes that if the breach of cautious care constitutes negligence and the damage is a direct consequence of the negligence, the foreseeability of damage is irrelevant. However, in the famous *The Wagon Mound (No. 1)* case⁸, the Judicial Committee of the Privy Council established a new standard of inspection. The Privy Council believes that the inspection of damages should be foreseeability⁹. As far as the facts of the case are concerned, although the damage is directly caused by the negligence of the appellant’s staff, as a rational person, he cannot foresee such damage, so the appellant is not liable for the damage.

5. Conclusion

To conclude, from examining tort laws and cases regarding negligence, it is argued that viewers of unauthorised dissemination of nude and intimate images could not be held liable in tort to the relevant victims. The four elements necessary for successful tort cases are duty of care, breach of duty, causation and damages. Primarily, it is arguable whether individual viewers of the images that have been made public have duty of care for the victim. Further, the individual viewers have not directly caused the damage to victims by the mere action of viewing the images online. Overall, such liability would not be desirable, as only a large amount of viewers would be able to cause damage to the victims, consequently making it impossible to determine the liability of individual viewers. Considering the primary function of tort laws is to compensate the victim for the loss that have been caused, holding individual viewers responsible would not be desirable as it would not be effective in fulfilling the function of tort law. Therefore, Jennifer Lawrence’s claim “Anybody who looked at those pictures, you’re perpetuating a sexual offense” is more of a moral appeal rather than a legal one.

Conflicts of Interest

The author declares no conflict of interest.

References

- Charlesworth J, et al, (2002). *Charlesworth & Percy on Negligence*.
- S. F Deakin, Angus Charles Johnston and Basil Markesinis, (2003). *Markesinis and Deakin’s Tort Law*, Clarendon Press.
- John G. Fleming, (1967). The Role of Negligence in Modern Tort Law, *Virginia Law Review*, 53.
- Fletcher G, (1972). Fairness and Utility in Tort Theory, *Harvard Law Review*, 85.
- Green L, (1961). Foreseeability in Negligence Law, *Columbia Law Review*, 61.
- J. A Jolowicz and Tom Ellis Lewis, (1967). *Winfield On Tort*, Sweet & Maxwell.
- Keren-Paz T, (2019). No-fault (Strict Liability) for Injuries from Innovative Treatments: Fairness or also Efficiency? *Law, Innovation and Technology*.
- Keren-Paz T, (2018). Compensating Injury to Autonomy in English Negligence Law: Inconsistent Recognition. *Medical Law Review*, 26(4), 585–609.
- Marwick A, (2017). Scandal or Sex Crime? Gendered Privacy and the Celebrity Nude Photo Leaks, *Ethics and Information Technology*, 19.
- Stychin C, (2012). The Vulnerable Subject of Negligence Law, *International Journal of Law in Context*, 8.

Weir J, (1964). Negligence—Duty of Care—Foreseeability, *The Cambridge Law Journal*, 22.

G. Edward White, (2006). Tort Law in America, Oxford University Press.

¹ The usual disclaimer applies.

² Ibid.

³ [2003] UKHL 53; [2004] 2 AC 406.

⁴ [1932] All ER 1

⁵ [1990] 21 Con LR 1

⁶ [1843-60] All ER 478

⁷ [1921] All ER Rep 40

⁸ [1961] 1 All ER 404

⁹ Ibid, para.115-117

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