

# Revenge Porn: The Liability Risks & How to Manage Them



Co-workers Caroline and Neil began dating in November 2012. During the course of their relationship, they'd "sext" explicit photos of themselves on their mobile phones. After they broke up in August, Neil posted 16 of Caroline's photos on his Facebook page. Among his over 300 Facebook friends were several of his and Caroline's co-workers. Caroline was so upset that she didn't return to work until October. Neil got fired a week after posting the photos.

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Revenge porn is the 21<sup>st</sup> century version of sexual harassment. It happens when jilted lovers post intimate photos or videos of their exes without consent. The act is less about porn than revenge and the vindictive attempt to embarrass, humiliate and ruin lives. And when it takes place between co-workers, it becomes not only a significant workplace disruption but a potential source of liability to the organization.

## **5 Revenge Porn Liability Risks**

The practice of revenge porn has been in existence far longer than the laws intended to combat it. But the gap between practice and prohibition is closing fast. Acts of revenge porn in Canada can result in liability under at least 5 different laws:

### **1. Criminal Law**

In 2015, the *Protecting Canadians from Online Crime Act*, aka, Bill C-13, added a new crime to the Criminal Code: publication of an intimate image without consent. Specifically, Sec. 162.1 says that "everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person did not consent," faces a prison term of up to 5 years. While directed primarily against ex-partners, the law is drafted broadly enough to cover third parties like an employer.

### **2. Provincial Revenge Porn Legislation**

In addition to handcuffs, association with practitioners of revenge porn can drag you into a civil lawsuit for money damages. In January 2016, Manitoba became the first province to enact its own revenge porn legislation. The *Intimate Image Protection Act* gives victims the right to sue persons who publish or threaten to publish intimate photos or videos without their consent. Moreover, courts are

### 3. Court Cases

The power of courts to create new torts, i.e., civil wrongs, makes lawsuits a liability risk even in provinces without revenge porn legislation. Thus, for example, in January 2016, an Ontario Superior Court recognized the existence of a so-called privacy tort that the defendant violated when he non-published an ex-girlfriend's intimate video without her consent in an act of revenge porn and awarded the victim \$141,708 in damages [*Doe v. 464533 v. D.*, 2016 ONSC 514, Jan. 21, 2016]. Look for courts in other provinces to follow the same approach.

### 4. Infliction of Mental Distress

Revenge porn might also constitute what's known as intentional infliction of mental distress, a tort that requires the victim to prove 3 things: i. the conduct was "outrageous;" ii. the perpetrator deliberately tried to hurt the victim; and iii. the victim suffered visible illness as a result of the conduct. Thus, the victim in the *Doe* case above was able to show that her ex's act of revenge porn was *both* a privacy tort *and* intentional infliction of mental distress.

### 5. Constructive Dismissal

If, as is often the case, the act of revenge porn forces victims to leave their job, they may have a claim of constructive dismissal against the employer to the extent the act was committed by a co-worker and the employer failed to take adequate steps to prevent it. Allowing the non-consensual publication that it could and should have thwarted violated the employer's implied contractual obligation to treat employees with respect and dignity so they can do their job, the victim would argue.

### How To Protect Yourself

The key to managing liability risks is to recognize that they exist, i.e., the fact that employees are apt to commit acts of revenge porn against their co-workers, especially when they're involved in a romantic relationship. So make sure you add express language banning such behaviour to your key workplace conduct policies, including your:

- Anti-harassment policy;
- Anti-bullying policy;
- Social media use policy; and
- Workplace privacy policy; and
- General code of conduct.