Anne E. Posno
416-865-3095
aposno@litigate.com

February 19, 2019

Privacy includes freedom from unwanted scrutiny â€“ even in a public place

In *R v Jarvis*, the Supreme Court of Canada ("Court") convicted a high school teacher of voyeurism under section 162(1)(c) of the *Criminal Code*. Mr. Jarvis used a concealed camera, inside a pen, to secretly video record female teenage students in common areas of a school. The video focused on their faces, upper bodies and breasts.

The Court concluded there was no doubt from the circumstances of the recording that the students had a reasonable expectation that they would not be recorded in this manner. Importantly, the Court unanimously recognized that a person does not lose all expectations of privacy simply because she is in a public place where she knows she can be observed by others.

Under section 162(1)(c), the offence of voyeurism is made out when:

- there is a surreptitious observation or recording by technology;
- of a person "in circumstances that give rise to a reasonable expectation of privacy"; and
- if the observation/recording is done for a sexual purpose.

Given the scope and vigour of the Court's decision, it is puzzling that the case had different treatment below. At trial, the accused was acquitted because the judge was not satisfied that the recordings were for a sexual purpose. (This issue was admitted before the Supreme Court of Canada.) The Ontario Court of Appeal upheld the acquittal by ruling that the trial judge had erred in finding that the students were in circumstances that gave rise to a reasonable expectation of privacy. The appellate decision was unnecessarily influenced by the fact that the students were video recorded in common spaces, and were already subject to video surveillance at school.

Fortunately, on the final appeal, the Court had no difficulty recognizing that privacy is not an all-or-nothing concept. Privacy includes freedom from unwanted scrutiny – even in a public place where some types of visual recording are to be expected. Not all forms of video recording are equal. Close-up

videos of a student's face and intimate body parts are entirely distinct from surveillance videos of students as part of a situational landscape.

The Court's ruling was so strongly in favour of protecting the privacy rights of these female students, whose bodies, faces and breasts were the focus of Mr. Jarvis' videos that the Court indicated the same decision would likely have been made even if the accused was a stranger on a public street, rather than a teacher at the school.

Much of the Court's reasons engaged in the statutory interpretation of section 162(1)(c). Subsection (c) builds on the protection of privacy provided for in subsections (a) and (b) which focus on the surreptitious observation or recording of private voluntary/consensual exposure of one's body (including genital areas) or engagement in explicit sexual activity.

The voyeurism offence seeks to address two social harms: sexual exploitation and breach of privacy interests. The provision is intended to respond to the use of modern technology, and the ability to covertly create recordings, in public as well as in private, by effectively placing the voyeur in close proximity or at invasive angles of observation to the subject. Technology allows a viewer to observe from a position where they otherwise could not.

The Court opened the door to apply its reasoning to many other situations: a person lying on a blanket in a public park would not expect someone to use a telephoto lens to take a photo up her skirt, sunbathers at a public pool would not expect a drone to take high resolution photos of their genital areas, and a mother nursing her baby in the corner of a coffee shop would not expect to be video recorded.

The welcome broad scope of the Court's decision naturally raises the question of limitation: when is the non-consensual recording of another in a public venue a criminal offence? The offence of voyeurism, in a public space, requires consideration of the following: (a) the activity that the subject matter was engaged in, (b) the focus of any recording, including specific body parts, (c) the purpose of the recording/observation - was it sexual?, and (d) the subject matter's awareness of the recording.

A good example of a limit on the scope of criminal voyeurism was found in *R v Lebenfish*. In that case, the accused openly took photos of a nude sunbather at Hanlan's Point.

The judge acknowledged that the nude beachgoer did not abandon all privacy interests on disrobing in public. However, in the circumstances, there was no reasonable expectation that

nude sunbathers at Hanlan's Point would not be subject to visual recording of their nudity. These circumstances included that: nude beachgoers would appreciate that many people attending the beach will have cell phones with cameras; there was no prohibition against photographs; the photographs were taken of mature adults, with no more nudity in the photo than was exposed by observation by the naked eye. The judge also found that the accused's conduct was not surreptitious.

In *Jarvis*, while the courts below struggled with the proper application of section 162(1)(c), fortunately, on the final appeal, the Court fully recognized that a person does not lose all expectations of privacy simply because she is in a public place where she knows she can be observed or recorded by others.