

Combatting non-consensual intimate imagery in the Commonwealth Caribbean: Overcoming Legislative Gaps with Creative Approaches

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Abstract: *Non-consensual intimate imagery (“NCII”), the non-consensual sharing of sexually explicit images or videos of a person, has emerged as a pressing issue in the Commonwealth Caribbean, necessitating effective strategies to address this digital abuse. This paper explores the challenges faced by Commonwealth Caribbean nations in prosecuting perpetrators of NCII and highlights innovative approaches, taken by courts through old common law and civil law actions grounded in defamation and breach of confidence to fill the gaps left by inadequate legislative interventions.*

The paper begins by presenting an overview of NCII, its evolution in the Caribbean and its psychological, emotional and financial impact on victims. It explores existing domestic violence legislation as well as electronic crime legislation which is still in its infancy in the region, and it highlights the need for comprehensive legal frameworks that address the issue specifically and aid in its prevention.

Moreover, the paper acknowledges and interweaves the unique sociocultural context of the Caribbean islands, characterised by close-knit communities and conservative values. In such an environment, individuals, particularly women, may encounter difficulties in the recovery process. The social stigma associated with NCII, combined with cultural barriers and a lack of access to support services, can exacerbate and do little to alleviate the challenges faced by victims seeking justice.

In conclusion, the pressing issue of NCII in the Caribbean demands urgent action. While getting creative with existing laws has thus far provided some redress for victims of NCII, targeted and comprehensive legislation is required to protect those most vulnerable to the ripple effects caused by the distribution of NCII.

Keywords: *Non-consensual intimate imagery – Revenge porn – Commonwealth Caribbean – Remedies – Online abuse – Trust and safety*

Introduction

The decision to put the World Wide Web into the public domain over 25 years ago has proven to be one of the most transformative events in human history. Accessibility to the internet has facilitated technological and societal advancement, revolutionising communication and human

interaction and driving globalisation. While the internet has brought immeasurable benefits, creating a space for information sharing, and community building, it has also provided fertile ground for nefarious activities, and bad actors, who have created intricate underworlds of exploitation, usually directed at vulnerable groups.¹ One

¹ Katja Weckström, ‘Liability for Trademark Infringement for Internet Service Providers’ (2010) SSRN <

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633389 >
accessed 18 June 2024 .

such activity is the distribution of Non-Consensual Intimate Imagery (“NCII”). NCII distribution can be described as the act of distributing photos or videos depicting individuals in sexually suggestive or explicit circumstances without their consent.² It is a global issue with long-term effects, as these images can be stored and circulated in perpetuity by perpetrators.

This paper aims to explore the evolution of NCII in the Commonwealth Caribbean, shedding light on what it entails, its far-reaching implications and why it is particularly troubling in a Caribbean context. With a dearth of specialised legislation, inadequate law enforcement response, and insufficient community education, individuals, particularly women and girls, are left vulnerable to this form of cyber exploitation. This paper will examine the existing legislative schemes in Trinidad & Tobago, Saint Lucia, and Jamaica as well as the creative approaches the courts have employed to deal with cases of NCII while also exploring how these efforts, while commendable, may be insufficient to address the unique challenges posed by this phenomenon.

Finally, this paper aims to shed some light on the considerations to be borne in mind by legislators to ensure that a comprehensive statutory framework is put in place. It will also reflect on other solutions which may complement this legislative framework, while simultaneously considering Caribbean-specific cultural nuances and resource constraints, and the ever-evolving nature of this digital threat.

NCII and its Evolution in the Caribbean

The widespread adoption of smartphones and online social platforms has made it easy for individuals across the world to exchange messages containing sexual content, particularly explicit images and videos.³ This has

been no different in the Caribbean and the technological revolution has brought about an increase in this practice in the region, particularly among young people who are often more receptive to emerging technology.⁴ The unfortunate consequence of such a practice is the inevitable release of imagery which may have only been intended for a private audience. This phenomenon came to be known as, and is still commonly referred to as ‘revenge porn’. This term stemmed from the original understanding of the phenomenon, which was associated with and limited to romantic or sexual partnerships, where one partner sought to humiliate or embarrass the other. Scholars have however sought to move away from this term, acknowledging that there may be a whole host of motivations for releasing intimate imagery, including financial gain, notoriety, amusement, sexual gratification,⁵ sexual entitlement, aggrieved entitlement and the possession of dark personality traits.⁶ Furthermore, by focusing on the distribution of intimate imagery within the context of personal relationships, responsibility is confined only to the initial image distributor, rather than acknowledging the reality that widespread circulation of images can often be attributed to secondary distributors.⁷ Thus, terms such as NCII and ‘image-based sexual abuse’ have gained popularity in the academic community.

In the Caribbean context, the distribution of NCII is particularly concerning. Caribbean communities are notoriously close-knit and conservative. When a victim’s intimate images are released, these spread rapidly through the society reaching friends, family, coworkers, employers and members of the Caribbean diaspora. As smartphones and social media platforms have made sharing content remarkably effortless, the sharing of intimate imagery occurs with surprising ease among

2 Jolien Beyens and Eva Lievens, ‘A Legal Perspective on the Non-Consensual Dissemination of Sexual Images: Identifying Strengths and Weaknesses of Legislation in the US, UK and Belgium’ (2016) 47 *International Journal of Law, Crime and Justice* 31.

3 This practice is commonly known as sexting; Rafaela B.R. Silva and others, ‘Sexting: Adaptation of Sexual Behavior to Modern Technologies’ (2016) 64 *Computers in Human Behavior* 747.

4 *Ibid.*

5 Clare McGlynn and Erika Rackley, ‘Image-Based Sexual Abuse’ (2017) 37 *Oxford Journal of Legal Studies* 534.

6 V. Karasavva and A. Forth ‘Personality, Attitudinal, and Demographic Predictors of Non-Consensual Dissemination of Intimate Images’ (2021) 37 *Journal of Interpersonal Violence* NP19265.

7 *Ibid.*

friends or within group chats as if it were just another mundane topic of conversation. In the face of an obvious lacuna in information and statistics on this particular topic in the region, a small survey of just over 200 participants was conducted to establish a baseline understanding of the prevalence of NCII distribution in the various islands.⁸ A staggering 60% of these participants reported having received unsolicited NCII at some point or another, signalling just how quickly these images spread when they reach the public domain.

While the thoughtless distribution of persons’ intimate imagery is troubling enough, some persons have had their images posted on well-known pornography sites, some even under their full name, which can be revealed by a simple Google search. An even more disturbing trend has emerged in Trinidad and Tobago whereby websites dedicated to posting the intimate imagery of locals are popping up faster than they can be taken down. The Humanitarian Foundation for Positive Social Change (“the Humanitarian Foundation”),⁹ an organisation which actively assists victims of NCII in Trinidad & Tobago, has reported that upon the non-consensual distribution of a person’s intimate imagery, or its posting on one of the websites in question, a demand sometimes arises for more content from that particular person which has led to the creation of “deep fakes”. Deep fakes are algorithmically synthesised material wherein the face of a person is superimposed onto another body.¹⁰ This content is usually pornographic and victims of NCII are forced to relive their victimhood and face further embarrassment upon the circulation of deep fakes using their faces. The Humanitarian Foundation has also reported the exchange

of NCII becoming somewhat transactional, moving beyond our traditional understanding of NCII, as these images are traded and auctioned in designated Whatsapp and Telegram groups. It appears that once a victim’s images are released, they remain in cyberspace being shared, manipulated and replicated in perpetuity.

NCII is a phenomenon which disproportionately affects women and girls¹¹ and the effects are devastating and enduring. Approximately one quarter of survey participants reported being victims themselves and 66% of participants reported personally knowing someone who has been a victim. Female victims often face backlash upon the distribution of their intimate imagery and are blamed for taking and sharing the images in the first place.¹² This is particularly so in the Caribbean where conversations surrounding sexuality are still considered taboo to a certain extent and persons hold relatively conservative views. Thus, victims, particularly women, often struggle to reintegrate into society and rebuild their reputation.

Survey participants reported having experienced or personally knowing someone who experienced the following: 52% - ostracised by friends and family; 11% - lost or were not considered for a job; 46% - faced public ridicule; 20% - been broken up with; 25% - been expelled or suspended from school; 57% - had imagery redistributed or recirculated years later. These victims face serious repercussions in both their personal and professional lives.¹³ They may suffer from severe depression,¹⁴ psychological stress consistent with post-traumatic stress disorder¹⁵ and they face serious difficulty

8 The authors conducted an online survey shared virtually with participants in Trinidad and Tobago, Jamaica, Saint Lucia and St Vincent and the Grenadines in August 2023.

9 Interview with Ms. Shamira Sooklall the President and Director of the Humanitarian Foundation for Positive Social Change (a non-governmental organisation based in Trinidad and Tobago that actively combats the distribution of non-consensual intimate imagery) (via zoom, 21st June 2023).

10 Vasileia Karasavva and Aalia Noorbhai, ‘The Real Threat of Deepfake Pornography: A Review of Canadian Policy’ (2021) 24 *Cyberpsychology, Behavior, and Social Networking* 203.

11 Seth Fallik and others, ‘Revenge Porn: A Critical Content Analysis of the Nation’s Laws and Reflection upon Social Science Research’ (2022) 23 *Journal of Criminology, Criminal Justice, Law & Society* 1.

12 *Ibid.*

13 Jessica Magaldi, Jonathan Sales and John Paul, ‘Revenge Porn: The Name Doesn’t Do Nonconsensual Pornography Justice and the Remedies Don’t Offer the Victims Enough Justice’ (2020) 98 *Oregon Law Review*.

14 *Ibid.*

15 Samantha Bates, ‘Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors’ (2016) 12 *Feminist Criminology* 22.

finding future employment.¹⁶ However, evidence of the prevalence of NCII is largely anecdotal and comes from personal accounts, individual surveys, the research of NGOs and exposés done by news outlets.¹⁷ This is due to a lack of data collection on this particular issue, fuelled by low levels of reporting. Only 13% of survey participants claimed to have reported or known someone who has reported NCII to the police. This will be explored in greater detail below. Nonetheless, it is evident that the distribution of NCII is a serious problem plaguing the Caribbean community, particularly Caribbean women. Perpetrators very rarely face social or legal consequences and this underscores the urgent need to examine the existing legal framework and its effectiveness in addressing NCII in the region.

Existing Legislative Schemes and Creative Approaches to Addressing NCII

Trinidad and Tobago

In Trinidad and Tobago, there are several pieces of legislation which regulate technology and its use amongst its citizens. These include the **Computer Misuse Act**,¹⁸ the **Offences Against the Person Act**,¹⁹ the **Domestic Violence (Amendment) Act**²⁰ (“the DVA”), and the **Children Act**.²¹ However, none of these expressly penalise or criminalise the distribution of NCII.

The DVA is the only statute which makes reference to the dissemination of intimate images through electronic means. It does so through a recently expanded definition of ‘emotional or psychological abuse’ to include ‘disseminating intimate images of the applicant or a child of the applicant electronically or by any other means’. However, the only remedy or penalty available under the DVA for the dissemination of intimate images is the grant of a protection order. This is received upon application by the victim/applicant before the court. Under the DVA, the

perpetrator does not face any consequences for the initial dissemination of the applicant’s intimate imagery, and the act of disseminating an applicant’s intimate imagery without consent attracts no criminal penalty. A perpetrator only faces liability or consequences if they breach the protection order obtained by the applicant. Further, the DVA when read as a whole appears not to contemplate the distribution of NCII outside of the context of an intimate relationship. Relief is only open to the victim if they share one of the classes of relationships covered under the DVA, all of which are personal and immediate relationships. It therefore would not adequately cover the vast and ever-changing motivations behind the dissemination of NCII, which have expanded beyond intimate and personal relationships. As such the DVA would be inadequate to comprehensively treat with and provide redress in situations where intimate images are being circulated or distributed by third parties without the consent of victims.

In the case of *Therese Ho v Lendl Simmons*,²² Justice Frank Seepersad handed down a groundbreaking decision in which a victim of NCII, particularly ‘revenge porn’ was awarded compensatory damages against the person who released her intimate imagery and was granted an injunction to prohibit him from further disseminating that imagery. In that case, the parties were engaged in an affair during which time Therese sent several intimate images and videos to Lendl. When the relationship came to an end, Therese informed Lendl’s significant other about the affair and in retaliation, he sent the intimate images and videos to his friends, Therese’s friends and the father of Therese’s daughter. The judge noted at paragraphs 35 and 36 that:

35. It is unfortunate that as a society we have not been proactive and that we are burdened with so many archaic laws that predate our independence.

16 Elizabeth Ryan, ‘Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults’ (2010) 96 Iowa Law Review 357.

17 Khamarie Rogdriguez, ‘Revenge Porn Victims Powerless’ *Trinidad Express* (Trinidad, June 4 2023) < <https://trinidadexpress.com/news/local/revenge-porn-victims->

powerless/article_8707f124-027d-11ee-b3db-47ebfe0afc19.html. > accessed 18 June 2024.

18 Chap. 11:17 of the Laws of the Republic of Trinidad and Tobago.

19 Chap. 11:08 of the Laws of the Republic of Trinidad and Tobago. 20 Act No.18 of 2020.

21 Chap. 46:01 of the Laws of the Republic of Trinidad and Tobago. 22 CV2014-01949.

The impact of social media and its consequent effect on our individual and collective privacy has to be acknowledged and addressed. There is a tendency for persons to hide behind the perceived anonymity that comes from using a ‘username’ and/or a user profile while sitting behind a computer screen or when using a [hand held] device to engage in offensive, hurtful, divisive and destructive discourse. These persons may feel that they are empowered but their actions can infringe upon the rights of others with the aggrieved persons having no recourse.

36. Online conversations and the dissemination of information over the internet initiate an [open ended] forum. The internet is a comprehensive and cohesive database and there is really no anonymity in relation to the use of same. Photographs uploaded onto the internet can be retrieved forever. The impact upon an individual’s privacy is tremendous and the absence of clear and cohesive legislation to protect our citizens’ privacy and to punish those who violate the rights of others, can cause us to descend into a bottomless pit of anarchy...

The judge found that Lendl disseminated Therese’s imagery with the intent to inflict mental and emotional harm and he made the following comments at paragraphs 46 and 47 of the case:

46. The behaviour of the Defendant cannot be condoned and demonstrated a flagrant disregard for the feelings, emotion and dignity of the Claimant with whom he shared sexual relations. The Court was alarmed by the manner in which the Defendant viewed the Claimant as an object and his statement as contained in the messages that “she was just a ‘f-k’ ” is unacceptable. The treatment of women as mere objects of pleasure is offensive, derogatory, antiquated, has no place

in a civilised society and is indicative of the general lack of respect.

47. In this society women are often treated as second class citizens and as being inferior to their male counterparts but the reality is that they are excelling in all facets of national life and they are achieving greater academic success than many of their male counterparts. It is rather unfortunate that a young and talented cricketer like the Defendant behaved in such a manner. Upon the shoulders of those who hold positions of power, prestige and publicity there rests an onerous responsibility to adhere to the highest standards of moral and civilised conduct especially since the nation’s children look towards them to set the standard of acceptable conduct. As a society we have to undertake a critical review, reprioritise and refocus. The objectification of women continues to be viewed as being culturally acceptable as is evident in our soca and chutney music. We must ask ourselves the question, “how are we to build a developed nation when we encourage and celebrate disrespect?” Respect for individuals regardless of gender, ethnicity, sexual orientation, for the law and for authority, must define the way we live and interact with each other.

In considering what legal redress Therese could avail herself of, he noted that there were no local laws which would have been of much assistance, whether civil or criminal. He also noted, in quoting Kodilinye,²³ that there is no developed jurisdiction of the tort of misuse of private information in the Caribbean and therefore no action could be founded on the failure to respect the privacy of a person. Thus, he had to turn to the equitable doctrine of breach of confidence. In order to successfully make out a claim for breach of confidence, the claimant must show that: (i) the information must have the necessary quality of confidence i.e., it must not be public knowledge or property; (ii) there must have been an obligation of

23 Gilbert Kodilinye and others, *Commonwealth Caribbean Tort Law* (5th Edn, Routledge Taylor & Francis Group 2015) 453-454.

confidence in the circumstances under which the information was imparted; and (iii) there must have been an unauthorised use of that information by the party communicating it to the detriment of the confider.

It was easy to arrive at a finding of breach of confidence in this case as intimate imagery is inherently private and confidential. The parties were in a private sexual relationship and therefore there was an obligation of confidence. Finally, the distribution of the intimate imagery was unauthorised and was to Therese’s detriment. Accordingly, she was given a compensatory award of TTD\$150,000.00 (approx. US\$22,124.52) inclusive of aggravated damages. While this case marked a victory for victims of NCII and set a precedent for similar cases moving forward, it is limited in its application and is not sufficient in and of itself to provide relief for all victims.

First, this case was unique in that the perpetrator was a renowned cricketer and the case garnered significant public attention. The victim in this case was also very vocal about the incident and was willing to conduct interviews with news stations, all of which contributed to the case receiving due attention from the public and the judiciary alike. This is not the case for most victims as in most cases, the perpetrator is unlikely to be someone of public renown, nor is the victim likely to be willing to go public with such an incident. Although Therese was successful in court, it was at the cost of her name becoming a household name in Trinidad and Tobago at the time and at the cost of her images being further circulated. Now, a mere Google search of her name will reveal the entire ordeal, and that digital footprint will likely never be erased.

Furthermore, the doctrine of breach of confidence, though applicable in this case, is unlikely to have widespread impact to address other forms of NCII. A relationship of trust and confidence must have existed between the parties before one can allege that their confidence has been breached. While this may be utilised in the context of intimate relationships, when third parties become

involved and the relationship between them and the victim becomes too remote, this remedy is unlikely to provide redress. Thus, the absence of targeted legislation leaves many victims with no recompense, and no deterrents are in place to restrain potential perpetrators.

Jamaica

The legislative position regarding the distribution of NCII is certainly more advanced in Jamaica than in Trinidad & Tobago, though it possesses its own limitations. Section 9 (1) and (2) of the **Cybercrimes Act**²⁴ provides as follows:

- (1) A person commits an offence if that person —
 - (a) uses a computer to send to another person any data (whether in the form of a message or otherwise) that is obscene, constitutes a threat, or is menacing in nature; and
 - (b) intends to cause or is reckless as to whether the sending of the data causes annoyance, inconvenience, distress, or anxiety to that person or any other person.
- (2) An offence is committed under subsection (1) regardless of whether the actual recipient of the data is or is not the person to whom the offender intended the data to be sent.

This section provides an avenue whereby charges can be laid against a perpetrator of NCII and cases have been successfully prosecuted under it. The most famous of these cases was the one between Donovan Powell and Darieth Chisolm. Darieth Chisolm is an Emmy Award winning television personality and former NBC News anchor who was involved in an intimate relationship with a Jamaican man by the name of Donovan Powell. During their relationship, she was living with him in Jamaica and when she ended their relationship, he sent her threatening messages and created a website where he posted nude photos and videos of her which he took without her

²⁴ Act 31 of 2015.

knowledge.²⁵ Charges were laid under section 9 of the **Cybercrimes Act** and he pleaded guilty to three counts of malicious communication. He was sentenced to two terms of 12 months' imprisonment at hard labour on two of the counts, with the sentences to run concurrently and on the third he was ordered to pay a fine of JMD\$1,000,000.00 (approx. US\$6,474.65) or serve four months' imprisonment in default of payment. This term of imprisonment of four months was to run consecutively to the sentences of 12 months.²⁶ This sentence was eventually shortened on appeal and he was sentenced to two terms of 6 months' imprisonment on the first two counts and the fine of JMD\$1,000,000.00 on the third count was upheld.²⁷ This still represented a victory for the victim, Darieth Chisolm, who remained vocal on social media and in the news about her battle for justice. She has since gone on to found '50 Shades of Silence', a global movement aimed at advocating for victims of the non-consensual distribution of intimate imagery and which advocates for stricter laws and tougher enforcement for cyber sexual crimes.

Some parallels can be drawn between this case and the case of *Therese Ho*. Although these victims ultimately found justice through the legal system, their journey was marred by the painful necessity of going public, and they were often forced to relive their victimhood in the public eye. This additional burden of having to share such personal and intimate details serves as a reminder of the challenges faced by victims of NCII highlighting the need for greater empathy, support, and privacy protections for victims throughout the legal process.

Furthermore, while the **Cybercrimes Act** may be able to provide justice for some victims, as it did for Darieth

Chisolm, section 9 is still limited in its application. The Office of the Director of Public Prosecutions has called for a standalone section in the Act to deal specifically with NCII.²⁸ They noted that the requirement of an intention to cause harm has created a high threshold to ground a conviction. They believe that the specialised section should make it an offence to publish intimate imagery without consent, instead of requiring proof that they were released with the intention of causing harm. They further commented that the section makes it an offence to 'send' certain data but does not define the term. Persons often upload images to websites and it is unclear whether this situation is captured by the section. For these reasons, more all-encompassing legislation is required to ensure that all perpetrators can be prosecuted under the legislation.

Saint Lucia

Section 15 of the **Computer Misuse Act**²⁹ is written in similar terms to the Jamaican legislation and provides as follows:

(1) A person shall not use a computer to send a message, letter, electronic communication or article of any description that—

(a) is indecent or obscene;

(b) constitutes a threat; or

(c) is menacing in character,

with the intention to cause or being reckless as to whether he or she causes annoyance, inconvenience, distress or anxiety to the recipient

25 Hannah Lynn, 'Former WPXI Anchor Darieth Chisolm Wins Revenge Porn Case in Jamaican Court' *Pittsburgh City Paper* (23 July 2019) < <https://www.pghcitypaper.com/news/former-wpxi-anchor-darieth-chisolm-wins-revenge-porn-case-in-jamaican-court-15479072#:~:text=Two%20years%20after%20her%20revenge,Cyber%20crimes%20Act%2C%20according%20to%20Jamaican> > accessed 18 June 2024.

26 'J'can Man Receives 1-Year Sentence, \$1-Mil Fine for Revenge Porn Involving Former News Anchor' *Nationwide Newsnet*, (Jamaica, 25 November 2019) < <https://nationwideradiojm.com/jcan-man-receives-1-year-sentence-1-mil-fine-for-breach-of-cybercrimes-act/#>

> accessed 18 June 2024.

27 Alicia Dunkley-Willis, 'Revenge Porn Convict's Sentence Reduced' *Jamaica Observer*, (Jamaica, 26 March 2021 < <https://www.jamaicaobserver.com/2021/03/26/revenge-porn-convicts-sentence-reduced/> > accessed 18 June 2024.

28 Edmond Campbell 'Call for Revenge Porn to Be Standalone Offence' *The Gleaner* (Jamaica, 4 June 2021).

29 Cap. 8.14 of the Revised Laws of Saint Lucia.

or to any other person to whom he or she intends it or its contents to be communicated.

(2) A person who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding 3 months or both and in the case of a subsequent conviction, to a fine not exceeding \$20,000 or to imprisonment for a term not exceeding 6 months or both.

This section faces the same limitations as the Jamaican legislation in that there is a requirement of intent or recklessness to ground liability. However, police in Saint Lucia have warned³⁰ that NCII distribution is a crime and can be prosecuted under section 313 of the **Criminal Code**³¹ as libel. The section provides:

(1) A person commits the offence of libel who, by print, writing, painting, effigy, or by any means otherwise than solely by gestures, spoken words, or other sounds, unlawfully publishes any defamatory matter concerning another person, whether living or dead, either negligently or with intent to defame that other person.

This section provides an avenue whereby a conviction may be secured against someone who has distributed NCII. Though it contains a requirement for intent to defame or negligence as to whether the distribution would be defamatory, this may be a lower threshold than an intent to distress or cause harm. There is a presumption that when a victim’s intimate images are released into the society their reputation will be damaged,³² and by sharing them a perpetrator intends or is at least negligent as to whether the victim will be defamed. It is always open to a perpetrator to plead any of the defences to libel, the most

popular of which is likely to be ‘truth’ or ‘justification’. Images are, for all intents and purposes ‘true’ and may even have been taken by the victim themselves. However, a defence to criminal libel is more onerous than in proceedings for civil libel. The defendants have to prepare their defence and bear the brunt of the proceedings in pleading justification.³³ This is further compounded by section 326 of the **Criminal Code**, which requires a defendant to show not only that the defamatory matter published was true but that it was for the public benefit. This would be an almost insurmountable hurdle in a case of NCII distribution. Accordingly, this may be an avenue through which perpetrators of NCII may be prosecuted, even where there is no relationship with the victim and where there might not have been any clear motive to cause harm.

Proposed Approaches to Combat the Distribution of NCII in the Caribbean

While there have been commendable efforts by the courts as well as a demonstrated willingness by police to lay charges where legislation allows, many victims are still kept out of the doors of the courts if the circumstances of their case do not fall within the narrow confines of existing legislation or case law, highlighting the need for considerable legal reform.

Criminal Legislation

The implementation of comprehensive legislation is perhaps one of the biggest and most effective steps a country can make to combat the distribution of NCII. Such a legislative framework would serve to prosecute perpetrators, act as a deterrent to future perpetrators and to provide justice to victims. Broad-brush legislation or legislation which does not specifically contemplate NCII distribution and all of its nuances is often constrained in its application.³⁴ There are a number of considerations

30 ‘Saint Lucia Police Want To Go After Perpetrators Of Revenge Porn’ *Saint Lucia News Online* (Saint Lucia, 21 February 2019) < Saint Lucia police want to go after perpetrators of revenge porn (rssing.com) > accessed 20 June 2024.

31 Cap. 3:01 of the Revised Laws of Saint Lucia.

32 Suzie Dunn and Alessia Petricone-Westwood, ‘More Than ‘Revenge Porn’: Civil Remedies for the Non-Consensual Distribution

of Intimate Images’ (CCLA 38th Civil Litigation Conference, Fairmont Tremblant Canada, 16 November 2018 CanLIIDocs 10789, < <https://canlii.ca/t/sqt> > accessed 18 June 2024.

33 *Gleaves v Deakin* [1980] AC 477.

34 Clare McGlynn and Erika Rackley (n 5).

that need to be borne in mind by legislators to ensure that any legislation enacted is not too broad, too narrow or too burdensome, and that it effectively addresses the problem they are seeking to curtail.

In order to be comprehensive and cover all circumstances of NCII distribution, criminal legislators must bear in mind that: definition clauses should be included to clarify the meaning of certain terms such as “distribution” and “non-consensual”, or any other terms which, on interpretation, may limit the scope of the section; sections should clearly outline the elements of the offence i.e. knowingly distributing sexually explicit imagery of an identifiable person knowing that, that person has not consented to such distribution;³⁵ as scholars move away from the term ‘revenge porn’ and the motives behind NCII distribution have been found to have evolved beyond revenge, legislation ought not to include any requirement for proof of intent to embarrass or cause harm;³⁶ and legislation should not be so narrowly drafted as to preclude prosecution for the distribution of printed forms of intimate media³⁷ or prosecution for the creation of “deep fakes” or artificially generated intimate images of an identifiable person.

Grenada stands out within the region as having some of the most targeted criminal legislation for addressing NCII. Section 10 of the **Electronic Crimes Act, 2013** provides as follows:

(1) A person who, knowingly or without lawful excuse or justification, captures, publishes or transmits the image of a private area of a person without his or her consent, under circumstances violating the privacy of that person, commits an offence and is liable on summary conviction to a fine not exceeding two hundred thousand dollars or to a term of imprisonment not exceeding three years or to both.”

(2) For the purposes of this section—

(a) “transmit” means to electronically send a visual image with the intent that it be viewed by a person or persons;

(b) “capture” with respect to an image, means to videotape, photograph, film or record by any means;

(c) “private area” means the naked or undergarment clad genitals, pubic area, buttocks or female breast;

(d) “publishes” means reproduction in the printed or electronic form and making it available for the public;

(e) “under circumstances violating privacy” means circumstances in which a person can have a reasonable expectation that—

(i) he or she could disrobe in privacy, without being concerned that an image of his or her private area was being captured; or

(ii) any part of his or her private area would not be visible to the public, regardless of whether that person is in a public or private place.

This section does not suffer from the burdensome requirement for an intent to cause harm like those which exist in many of the other Caribbean countries. Moreover, it encompasses an extensive array of definitions that not only fortify and widen its scope but also enable the prosecution of a wide range of NCII cases, extending beyond ‘revenge porn.’ In doing so, it establishes a commendable precedent that could serve as a model for other nations in the region.

Civil Remedies

Although NCII distribution is an issue predominantly dealt with in the criminal courts, there has been an uptick

35 Mary Anne Franks, ‘Drafting an Effective “Revenge Porn” Law: A Guide for Legislators’ (2015) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2468823> accessed 18 June 2024.

36 Ibid.

37 Ibid.

in the number of victims seeking civil and compensatory redress in different parts of the world. This was seen in the *Therese Ho* case mentioned above. It has been suggested that such civil and compensatory relief may be more beneficial to a victim as it can provide them with the resources they need to rebuild their lives.³⁸ In *FGX v Gaunt*,³⁹ Thornton J noted that the case before her, which dealt with compensatory relief for what she termed ‘image-based abuse’ was thought to be the first of its kind to come before the civil courts in England and Wales. She found that the defendant had taken naked images of the claimant while in the shower and while she was sleeping, and that he uploaded these images onto pornographic websites accompanied by a photograph of her face. As a result, the claimant suffered from anxiety and depressive disorder and chronic post-traumatic stress disorder. She lost trust in people and became reclusive, to the extent of changing her job and refraining from personal relationships. She assessed the quantum of damages on the basis of separate and distinctive torts – the intentional infliction of injury and the misuse of private information. She awarded damages for pain, suffering and loss of amenities in the sum of £60,000, special damages in the sum of £37,041.61 to cover her medical expenses and £4,416.20 for future treatment.

In the civil claims for NCII a common cause of action appears to be that of breach of confidence. The issues and limitations surrounding claims for breach of confidence have been ventilated above, however the tort of misuse of private information may be an avenue whereby a victim can seek civil redress. Kodilinye⁴⁰ noted that there is no developed jurisprudence of the tort of misuse of private information in the Caribbean, however it may cover situations not covered by the doctrine of breach of confidence.

In the United Kingdom, courts have historically refused to recognise and develop the tort of invasion of privacy or misuse of private information. Courts have expressed in

cases such as *R v Khan (Sultan)*⁴¹ that it is not the role of the court to legislate in this area of law. In *Wainwright v Home Office*,⁴² a trial judge held that a strip search by prison officers of a young boy where his genitals and his foreskin were pulled back in search of drugs, was an invasion of privacy in accordance with the European Convention on Human Rights 1950. However, the UK Court of Appeal and the House of Lords disapproved of the position that humiliation and distress was tortious at common law. The House of Lords in *Wainwright v Home Office* held that there was no tort of invasion of privacy and that there was a difference between ‘identifying privacy as a value that underlay the existence of the rule of law... and privacy as a principle of law itself.’ However, the recent decision of *Google Inc v Vidal-Hall and others*,⁴³ may signal a relaxing of the UK Court’s strict approach on the tort of misuse of private information. In this case, the court stated that :

...[I]n the absence of any sound reasons of policy or principle to suggest otherwise, we have concluded in agreement with the judge that misuse of private information should now be recognised as a tort **for the purposes of service out the jurisdiction**. This does not create a new cause of action. In our view, it simply gives the correct legal label to one that already exists. We are conscious of the fact that there may be broader implications from our conclusions, for example as to remedies, limitation and vicarious liability, but these were not the subject of submissions, and such points will need to be considered as and when they arise.⁴⁴

While the court was willing to recognise the tort, it was only willing to do so for the purposes of service out of the jurisdiction. Whether or not the tort of misuse of private information can be extended without such proviso or even extended to NCII is left to be determined.

38 Clare McGlynn and Erika Rackley (n 5).

39 [2023] EWHC 419 (KB).

40 Kodilinye and others (n 23)

41 [1997] A.C. 558, [1996] UKHL 14.

42 [2003] UKHL 53.

43 [2015] EWCA Civ 311.

44 Ibid (emphasis added).

What is clear is that the reluctance to acknowledge this tort both in the UK and in the Caribbean context, as seen in *Therese Ho*, comes from the age-old belief and understanding that judges do not make law. As a consequence, there is only so far that judicial creativity can extend. Ultimately, this is where Parliament would have to specifically provide legislative alternatives so that actions can be maintained between private individuals for the dissemination of NCII.

Constitutional Remedies

In the absence of jurisprudence on the tort of misuse of private information in the Caribbean, Kodilinye⁴⁵ has proffered that horizontal creative arguments can be made that the interpretation of various fundamental rights provisions in Caribbean constitutions, can protect the misuse of citizens' private information. Further, there may be positive obligations on states to ensure that laws are in place for the protection of their citizens against the actions of other private citizens.

In Trinidad and Tobago, the Humanitarian Foundation together with an anonymised claimant, have made such an argument in their recent filing before the Supreme Court of Trinidad and Tobago⁴⁶ seeking *inter alia* a declaration that the State infringed their right to respect for private and family life for failing to put mechanisms in place and allocating sufficient resources to ensure their reports were investigated.

The right to privacy exists in Commonwealth Caribbean constitutions however, there may be nuances in how each is framed and worded. For example, in Trinidad and Tobago, the right to privacy is termed as 'the right of the individual to respect for his private and family life' while in Saint Lucia it is termed 'protection for his or her family life or his or her personal privacy, the privacy of his or her home and other property...'.⁴⁷ However, the right is

termed, it is only available against the state and its organs and actors. Further, these rights are interpreted negatively.

In the Eastern Caribbean case of *Jovil Williams et al v Attorney General of Christopher and Nevis et al*,⁴⁸ the High Court of St. Kitts and Nevis heard a case involving NCII and had to determine whether the victims' rights to privacy had been infringed by the state's actions in the dissemination of the NCII.

In *Jovil Williams*, the second claimant had been detained by the St. Kitts and Nevis police and had been assisting them with an investigation into an alleged robbery. While at the police station, the police officers confiscated and searched the second claimant's phone, finding a video of an intimate sexual encounter between the first and second claimant. In this video, the first claimant's entire nude body had been featured as well as their face, while only the second claimant's genitals were visible. The police officers on duty without the consent of either of the claimants edited and disseminated the said video into the public domain via the use of telecommunication devices and the internet. The claimants, aggrieved by the actions of the police officers, brought a claim against the State of St. Kitts and Nevis, contending that sections 3, 8 & 9 of the St. Kitts & Nevis Constitution expressly granted them protection for their personal privacy, the privacy of their property and from deprivation of property without compensation and that the actions of the police officers had infringed these rights. Williams J was of the view that alternative means of legal redress were not adequate in the circumstances and that the State infringed their constitutional rights to privacy and protection from arbitrary search. Williams J at paragraphs 59 and 67 of the judgment stated:

59. I am of the view that alternative means of legal redress are not adequate in the circumstances. The conduct of the Police officers

45 Kodilinye and others (n 23).

46 Khamarie Rodriguez, (n 17).

47 Section 1(c) of the Constitution of Saint Lucia, Cap. 1.01 of the Revised Laws of Saint Lucia.

48 In the matter of Sections 3, 8 and 9 of the Constitution of Saint Christopher and Nevis And In the matter of an application by the

Claimants Jovil Williams and Jason Campbell for Declarations, Damages and other relief alleging a breach of their rights under Section 3, 8 and 9 of the Constitution and for redress pursuant to Section 18 of the Constitution; Jovil Williams and another v Attorney General of St. Christopher and Nevis and another, [2016] ECSCJ No. 37.

was occasioned with the deliberate intent of causing embarrassment, distress, and humiliation to the Claimants, and it is therefore necessary to include in the award of compensation an appropriate quantum for Aggravated Damages for publication on the Internet a forum of unquantifiable users.

While the Police officers may have lawfully apprehended the 2nd Claimant they had no authority to search the 2nd Claimant's mobile phone without the appropriate warrant, and in so doing, **infringed his constitutional rights to privacy and protection from arbitrary search.** The Claimants are also entitled to Exemplary Damages for the unlawful and unconstitutional acts of the Police in seeking cheap thrills.

...67. This Court hereby declares that the claimants' fundamental rights to privacy and property as guaranteed by Sections 3, 8 and 9 of the Constitution have been infringed by the named Police officers attached to the Charlestown Police Station when they unlawfully searched, viewed, downloaded, disseminated or cause to be disseminated the claimants' sex tape, which was the claimants' private property.⁴⁹

Additionally, Williams J was satisfied on the evidence that it was appropriate to award both claimants compensation for 'significant embarrassment, anxiety, and distress' as a result of the dissemination of the video by the police. He as such awarded the first claimant EC\$350,094.00 (approx. US\$129,542.10) and awarded the second claimant EC\$150,000.00 (approx. US\$55,503.13).

While the judgment of Williams J may provide hope to victims of NCII that the right to privacy can be extended to protect against the dissemination of NCII by the State and its actors, it gives no indication as to whether this

right can be interpreted positively - whether the state has a duty to create laws and conduct investigations so as to protect victims of NCII. Of course Caribbean Constitutions have long been held to be living instruments, capable of growth and development which should over time meet new social, political and historical realities unimagined by its framers,⁵⁰ therefore a positive imagining of this right may be possible.⁵¹

Defamation

It is also open to victims to seek redress on the basis of defamation in the civil courts; however this is an approach that is still in its infancy across the world⁵² likely due to the challenges associated with successfully making out such a claim. A successful claim was however made out in the Dominican High Court case of *Marina Marshall v Lenisha Augustine et al.*⁵³ In that case, the claimant was an employee of Dominica Electricity Services Limited and a contestant in the Miss Dominica Carnival Pageant. As part of the publicity for the pageant, a number of photographs were taken of her and were spread widely through Dominica. An email then began to be circulated among her coworkers containing an image of a woman in a sexually explicit position, with the claimant's face superimposed on that image. The email contained a caption suggesting that she was a 'sallop'. This is a creole word which loosely translates to 'sexually degenerate or whore'.⁵⁴ This led to the claimant having to withdraw from the Carnival Pageant and to her being terminated by her employer. Her subsequent efforts to gain employment were unsuccessful for some time. The court found that the email and attachments were in fact and in law defamatory to the claimant and that she had been 'outrageously defamed', and she was accordingly awarded damages in the sum of EC\$525,000.00 (approx. US\$194,260.97) inclusive of general damages, aggravated damages and exemplary damages.

While this was quite a momentous victory for the claimant, particularly at the time it was decided in 2009,

49 Ibid (emphasis added).

50 Dickson J, in *Hunter v Southam Inc* [1984] 2 SCR 145, 155.

51 *Boyce and Another v AG Barbados* [2004] UKPC 32.

52 *Suzie Dunn and Alessia Petricone-Westwood* (n 32).

53 DOMHCV2001/0318 (delivered 23rd September 2009, unreported).

54 Ibid.

the circumstances were unique. As the claimant was a contestant in a national pageant, she had garnered some renown and had developed a reputation to be protected.⁵⁵ Such a response is not likely in a case where a victim is not of similar renown or does not have a good reputation within their community.⁵⁶ Furthermore, this case dealt with a situation where the imagery shared of the victim was not authentic and was digitally manipulated to display her in explicit positions. Therefore, it was not open to the defendants to mount a defence of truth or justification. The additional commentary in the email imputing sexual immorality further strengthened the claim for defamation and the contention that the email was defamatory. This may be an appropriate remedy in cases where deepfakes have been created. However, in cases where actual intimate imagery of victims is shared, particularly where no commentary is attached, it may be more challenging to make out a civil case for defamation, especially where the defendant relies on the defence of truth.⁵⁷

In the absence of criminal legislation, or even as a complement to criminal proceedings, victims may attempt to seek redress in the civil courts. Damages may prove to be a valuable remedy to assist in cases where victims have lost employment and are thrust into the employment market after their images have been circulated in our small societies. It may also provide welcome compensation for pain and suffering and emotional distress caused as a result of the ordeal. Furthermore, victims may seek out injunctive relief in the form of mandatory⁵⁸ or prohibitory injunctions which direct perpetrators to remove published intimate imagery and prevent them from further circulating said intimate imagery. These civil remedies are likely to go a long way

in compensating victims and in safeguarding them from further violations.

Technology and Specialised Cyber Crime Units

Results from the survey revealed that only 13% of participants either reported or knew someone who has reported instances of NCII. Regrettably, those who did report their experiences to law enforcement agencies often faced discouraging setbacks. They have lamented that their complaints were not treated seriously, with officers either taking their statements and subsequently shelving the matter or advising that attempting to pursue the case would be a ‘waste of time’. It is understood that Caribbean law enforcement agencies often grapple with resource constraints, both in terms of finances and manpower, causing them to direct their resources to the most pressing matters. It is also understood that in those countries where legislation is tenuous or non-existent, it may very well be futile to attempt to pursue cases of NCII when it is unlikely that a conviction could ever be made. However, this type of response to a victim seeking to report NCII does not appear to be unique to the Caribbean and there have been reports of victims being blamed by police for taking and sharing the intimate images in the first place,⁵⁹ pointing to the general perception of NCII and the women who report it. The lack of any robust criminal justice response has allowed this practice of NCII distribution to continue unchecked and with little to no repercussions for perpetrators.⁶⁰

However, upon the enactment of appropriate legislation, cyber crime units will be required to provide the technical expertise required to investigate and prosecute cases of NCII distribution effectively. Law enforcement, particularly those units designated to deal with cyber crimes, should have specialised and ongoing training to

55 Jason Haynes, ‘Judicial Approaches to Combating “Revenge Porn”’: A Multi-Jurisdictional Perspective’ (2018) 44 Commonwealth Law Bulletin 400.

56 Ibid.

57 Suzie Dunn and Alessia Petricone-Westwood (n 32).

58 Ibid.

59 Tegan S. Starr and Tiffany Lavis, ‘Perceptions of Revenge Pornography and Victim Blame’ (2018) 12 International Journal of Cyber Criminology <

<https://www.cybercrimejournal.com/pdf/Starr&Lewissvol11issue2IJC2018.pdf> > accessed 18 June 2024.

60 Michael Salter M, ‘Responding to Revenge Porn: Gender, Justice and Online Legal Impunity’ (Whose Justice? Conflicted Approaches to Crime and Conflict, University of Western Sydney, Sydney, September 27 2013) <
https://www.researchgate.net/publication/294787472_Responding_to_revenge_porn_Gender_justice_and_online_legal_impunity >
accessed 18 June 2024.

handle reports and cases of NCII distribution and to deal with the ever-evolving technology which facilitates this distribution. Specialised training should equip law enforcement professionals with the knowledge and soft skills needed to sympathise with victims, conduct thorough investigations, pinpoint perpetrators and gather the digital evidence required for legal action. The effective gathering of evidence will strengthen prosecutors’ cases and increase the likelihood of convictions in cases of NCII.

These units cannot operate without the necessary software and technological infrastructure. Data recovery software, decryption tools, advanced algorithms and reporting systems are just some of the systems that can be integrated to identify and remove explicit content, diminishing the risk of further victimisation. These units may also be uniquely placed to collaborate with social media platforms to streamline the process of removing NCII and preventing its re-upload. The Humanitarian Foundation, in consultations with Meta and other social media platforms, was informed that the algorithms put in place by those platforms can usually only identify and remove NCII when thousands of reports are made to them. This is not practical in the Caribbean where population sizes are small and the population is not particularly sympathetic to victims of NCII distribution. Furthermore, the intimate imagery would have to be viewed by thousands of people in order for them to make reports, thus further re-victimising and traumatising the victim. Law enforcement, particularly cyber-crime units, can establish point persons or help-desks to take reports from citizens, to then escalate said reports and liaise with the social media platforms directly to advocate for the removal of the intimate images.

Public Education & Awareness

The implementation of the aforementioned solutions will undoubtedly make a significant impact in both prosecuting and preventing cases of NCII distribution. However, they must be complemented by a shift in the traditional and conservative mindset surrounding NCII.

Public education and awareness campaigns can bring this topic to the forefront, dispelling misconceptions, and dispelling the culture of victim-blaming that often surrounds these incidents. Furthermore, this is a phenomenon particularly prevalent among young people and it is crucial that they be targeted in these efforts. The incorporation of sex education, digital literacy and consent education into school curricula will go a long way in teaching teenagers and young adults the importance of consent, respecting others’ boundaries online and the consequences of NCII distribution for both victims and perpetrators. In the fight against NCII distribution, it is imperative for members of the community to understand NCII and the life-changing impact it can have on victims. With heightened public awareness and understanding of the issue, society can shift its focus from blaming the victim to providing them with the necessary support to cope with their situation,⁶¹ all while fostering a culture that unequivocally condemns such actions. There should also be a focus on the establishment of support programs providing victims with the help that they need and informing them of and facilitating access to resources and relief. This cultural shift will be crucial in generating a collective demand for legislative and state intervention, paving the way for more stringent enforcement and comprehensive policies to combat NCII distribution in the region.

Conclusion

NCII in the Caribbean is a grave and prevalent issue which attracts an inadequate social response. The profound and enduring repercussions on the lives of victims underscore the urgency for comprehensive action. The proposed solutions hold promise for effecting substantial change in the lives of victims and future victims and being formidable deterrents against potential perpetrators. These solutions must work in tandem with each other in order to provide a more complete approach to address the distribution of NCII; an approach which marries both legal and social creativity.

61 Tegan S. Starr and Tiffany Lavis (n 59).