

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. O'Connor*, 2017 NSPC 68

Date: 2017-11-30

Docket: 8059877

Registry: Sydney

Between:

Her Majesty the Queen

v.

Joan O'Connor

Judge: The Honourable Judge A. Peter Ross

Heard: October 5 and November 7, 2017, in Sydney, Nova Scotia

Decision November 30, 2017

Charge: s.430(4) Criminal Code of Canada

Counsel: Mark Gouthro, for the Crown
Joan O'Connor in her own defence

Summary

The Defendant installed surveillance cameras at various locations on her property which captured views of the complainant's residence. The complainant feared that she was the object of the Defendant's interest. She became anxious about appearing at her doorstep and using her back yard, and worried that the cameras were capturing interior views through the windows of her house. She was also concerned about the recording of these images and dissemination on social media sites. Police charged the Defendant with committing mischief by interfering with the complainant's use and enjoyment of her property.

The defendant was found not guilty. There was no clear proof that the Defendant targeted the complainant's property with the cameras. There was no proof that the Defendant uploaded identifiable images of the complainant or her residence to the internet, nor that she ever intended to intimidate or embarrass the complainant in such fashion. The Defendant had legitimate security concerns of her own and was justified in monitoring her own premises with security cameras.

The offence of mischief, privacy as an aspect of the "enjoyment" of property, and expectations of privacy in a residential neighbourhood are discussed in general terms.

By the Court:

Introduction

[1] This case pits the legitimate interest of a homeowner to have reasonable use and enjoyment of that property against the interests of a neighbour who is legitimately concerned about the security of her own. It concerns expectations of privacy in a residential neighbourhood.

[2] The defendant is charged that between the 5th day of July, 2016 and the 30th day of November 2016 she did commit mischief by obstructing, interrupting or interfering with the lawful use, enjoyment or operation of property, 93 Centre St., Sydney, NS contrary to Section 430(1)(c) of the Criminal Code of Canada, thereby committing an offence pursuant to s.430(4)(b).

The Offence of Mischief; The Defence of Justification

[3] Section 430(1) of the Criminal Code reads as follows:

Every one commits mischief who wilfully

- (a) destroys or damages property;
- (b) renders property dangerous, useless, inoperative or ineffective;
- (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or
- (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

[4] Mischief charges appear in criminal courts with some frequency. Most often these are “damage to property” charges involving physical harm, alteration or destruction under subsections (a) or (b). Less common are charges of “interference” under subsections (c) or (d), (which are virtually identical).

[5] Charges of interference with real property - land and buildings - usually involve actual entry upon the premises by the accused person. Those that don't are typically noise complaints, although even there the accused's actions are projected on the property from elsewhere. In such instances the accused's actions are physically discernable. In the case at hand a different sort of interference is alleged. The complaint is that a home and back yard were being video-recorded by a neighbour. The Crown asserts that this activity impaired the ability of the occupier to enjoy her property. Neither functionality nor ‘peace and quiet’ are directly implicated. The interest in question is privacy. As such the charge is rather unusual; on a quick search I could not find a similar one in this province.

[6] “Enjoyment” of property under s.430 has acquired a more expansive meaning than was given to it by traditional property law. Cumberland, J.A., dissenting in *R. v. Drapeau* (1995) 96 C.C.C. (3d) 554 said at p. 568:

In my view ‘enjoyment’ here has a much more inclusive meaning than just the fact of being the holder of a right to possess the property; it includes the action of obtaining from property, which a person lawfully holds, the satisfaction that this property can provide to that person.

This interpretation gained favour in the Ontario Court of Appeal in *R. v. Maddeux* [1997] O.J. No. 1184 and the Manitoba Court of Appeal in *R. v. Nicol* 2002 MBCA 151.

[7] Even though the offence is broad in scope, the conduct must be sufficiently serious in risk or effect to rise to the level of criminal culpability. For instance, if someone returns to their car to find it blocked in by a person who has parked on the street, does this warrant a charge under s.430? If a girlfriend temporarily refuses to hand over her boyfriend's cellphone until he apologizes for an insult?

[8] S.429(1) states that a person can commit mischief if they intend the occurrence of the "event" which forms the subject matter of the charge or if they are reckless whether the event occurs or not. In the present case the "event" is an ongoing sense of unease which in turn discouraged the occupant from doing things around her premises that she would ordinarily do without a thought or a care. The law as drafted is not ideally suited to the type of harm complained about here.

[9] S.429(2) states "No person shall be convicted of an offence under sections 430 to 446 where he proves that he acted with legal justification or excuse or with colour of right." The following passages from *R. v. Robinson* 2014 BCSC 1463 are pertinent:

69 The word "and" in this section has been judicially edited to an "or" so that there need only be "legal justification" or "colour of right": *R. v. Creaghan* (1982), 1 C.C.C. (3d) 449 (Ont. CA), and *R. v. Pena* (1997), 148 D.L.R. (4th) 372 (B.C.S.C.)

70 Both parties agree that, despite the wording of this section, the Crown bears the burden of proving the legal justification or defence raised does not apply. Although I am aware of conflicting jurisprudence in this area, the rule of *stare decisis* as explained in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.), supports that I follow the considered decision of Mr. Justice Josephson in *R. v. Pena* (1997), 45 C.R.R. (2d) 134, declaring the reverse onus provision in s. 429(2) of the *Code* unconstitutional.

71 It is, therefore, for the Crown to prove the absence of justification or excuse where, as in this case, an accused provides some evidentiary basis to put these in issue. In other words, to use the words of Josephson J., "if the defence is available on the evidence, the accused is entitled to the benefit of any reasonable doubt that may arise":

[10] Examples of justification defences include s.27 of the Criminal Code, which permits the use of force to prevent commission of a criminal offence. The right of freedom of expression under s.2(b) of the Charter has been successfully pleaded as justification where the "interference" results from a protest staged by the accused, (see for example *R. v. Whatcott* [2014] S.J. No. 762 and the cases referred to therein).

[11] Ms. O'Connor pleads that her use of video surveillance to prevent illegal behavior on her own property justifies the incidental video recording of her neighbour's. She says that her actions were an extension of the legitimate security interest which she had in her own property. She claims that the video-recording of the complainant's premises was incidental to the video-taping of her own and, viewed reasonably, should not be considered criminal mischief.

[12] Colour of right is explained in the following passage from in *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369 (Ont. C.A.) at 372, cited with approval in *R. v. Dorosh* [2003] S.J. No. 871 (Sask.C.A.) and elsewhere:

The term "colour of right" generally, although not exclusively, refers to a situation where there is an assertion of a proprietary or possessory right to the thing which is the subject-matter of the alleged theft. One who is honestly asserting what he believes to be an honest claim cannot be said to act "without colour of right", even though it may be unfounded in law or in fact: see *R. v. Howson*, [1966] 3 C.C.C. 348. The term "colour of right" is also used to denote an honest belief in a state of facts which, if it actually existed would at law justify or excuse the act done: *R. v. Howson*. The term

when used in the latter sense is merely a particular application of the doctrine of mistake of fact.

[13] In Ms. O'Connor's case there is no suggestion that she was mistaken in any sense. She claims no proprietary interest in the Ayre home. Justification thus seems to be the more appropriate lens through which to view her defence.

The evidence

[14] There is little dispute about the facts. I have a reasonably clear picture of the actions of the defendant and the reactions of the complainant. What is in dispute is how to interpret these actions, what legal significance they have. I will summarize the testimony of the complainant and defendant, briefly note the evidence of the minor witnesses, and then discuss the photographic evidence.

The complainant

[15] At the material time Stephanie Ayre occupied a house on Centre Street, Sydney. The accused, Joan O'Connor lived on Rigby Road. Their properties abutted, separated by a fence. Both were adjacent an alleyway (perhaps a common right of way) sometimes traversed by members of the public.

[16] Ms. Ayre moved into her premises in June of 2016. In July the accused installed security cameras, some of which captured views of the Ayre property. Ms. Ayre noticed these in mid-August, after which, she claims, she lost some of the enjoyment and use of her property.

[17] Aside from the odd casual greeting, the parties did not know one another. One night as she went to the bathroom, Ms. Ayre happened to notice a red light on the defendant's house. She suspected it was a camera pointed at her window. She

called the police and expressed concern. It turned out to be a flood light, but with her suspicions raised she did then notice cameras in various places on the O'Connor property. One, in particular, concerned her. It was on the railing of the accused's back deck, pointed towards the rear of the Ayre house. Ms. Ayre was in the late stages of pregnancy. She began to worry about appearing at her own back door, about engaging in ordinary activities in and about her home. Her partner worked in the West, leaving her alone in the home for weeks at a time.

[18] Ms. Ayre and the accused spoke only once about the camera. The defendant asked Ms. Ayre if it bothered her. Ms. Ayre said that it did, because she didn't want to be filmed. The defendant replied "Google does it." She said she had the footage on a hard drive in her house. Ms. Ayre, not knowing her well, not trusting her, worried about how this footage might be used or distributed. She said she lost sleep, stopped using the back door, and worried what the camera might pick up through the windows of her house. She admitted to being anxious by nature, but claimed that this worsened her condition. She testified that floodlights installed on the neighbouring house "lit up her whole kitchen" when they come on. She moved her kitchen furniture so that it was not next to the windows, and covered the windows with plastic. She testified that she couldn't understand why the defendant would engage in such activity. She said these were all factors in her decision to separate from her partner and leave the property in July of 2017.

[19] When Ms. Ayre first called the police she asked them to investigate discreetly. The police may have tried to hide Ms. Ayre's complaint from the defendant when they first attended at her home. There may have been some existing tension between the defendant and police, unrelated to these charges, which caused the defendant some resentment at their involvement in the matter.

During the trial, alleged abuse of police power preoccupied the defendant as much as the charge itself. Ms. Ayre testified that after the police paid their visit to Ms. O'Connor's house, more cameras went up.

[20] Police involvement may indeed have caused the defendant to increase the surveillance. I have considered how this might affect determinations of purpose and justification. However even if the defendant redoubled her efforts, even if she was quite untroubled by any concerns voiced by Ms. Ayre, the issues remain essentially unchanged. I can accept Ms. Ayre's evidence on this point, but it does not affect the outcome of the case.

The defendant

[21] Joan O'Connor readily admitted to putting up security cameras, but stated her only purpose was to monitor her own premises for the presence of intruders. She lives alone. She once discovered that cinder blocks had been stacked against her house, near a bedroom window, suggesting that someone was trying to peer in. She spoke about an occasion when a mentally ill person tried to enter her house, which she found unnerving. She noted that young people tended to hang out and party at a nearby brook, and often used the back alleyway going and coming. Someone once smashed out the headlights and windshield of her car. She said "the security camera went up then." She also got a dog.

[22] She said she moved the deck camera further away after the complaint to police. She said it was incapable of "seeing" inside the Ayre home. She agrees that Ms. Ayre expressed concern about how "creepy" it was. She seems to have gotten upset when Ms. Barnes, a friend of Ms. Ayre, became more assertive, if not

outright hostile, about the presence of the cameras. This only cemented Ms. O'Connor's determination to continue with it.

[23] Ms. O'Connor said she had as many as four cameras actively recording, which she installed herself, and 2 digital video recorders. These held one terabit of data, and continuously recorded over older footage. She said she only reviewed the video if her security light was tripped, or if there was damage to her car. She said the cameras were low resolution with no zoom capability. She said she had no damage around her property after the cameras went up; she considers this proof of their deterrent effect.

[24] At least one of the cameras was pointed toward the front lawn. It too took in other homes in the neighbourhood, across the street. She agreed that the one on her back deck also captured one aspect of Ms. Ayre's house, but she did not see this as "a privacy issue", claiming to have no interest whatsoever in Ms. Ayre. She said it was positioned so that it would take a "head shot" of anyone around her car. She noted that she herself has blinds and drapes on her windows, that she cannot prevent others from watching her in her own backyard, that in a densely populated urban neighbourhood one cannot expect privacy on a back deck.

[25] Ms. O'Connor acknowledged posting some images on the internet, taken with her cameras. These are discussed in detail below.

Other witnesses

[26] Tara Barnes was a friend of Ms. Ayre and was with her when she approached the defendant about the cameras. She saw a video taken of the Ayre house on the internet; it did not show anything inside the house. Ms. Ayre had by

then covered her windows with plastic. Barnes testified to having seen floodlights on the front of the defendant's home in addition to the cameras in the back.

[27] Const. Keith Power took Ms. Ayre's complaint. He went to the defendant's home late in the evening of August 13, 2016. He said he was there about a noise complaint; he seemingly did not mention Ms. Ayre by name. At some point he noticed cameras, and later saw video on YouTube which he recognized as the Ayre residence. Cst. Bursey visited Ms. Ayre that October, and noticed several video cameras facing towards neighbouring properties.

Photographs / social media evidence

[28] This evidence was largely gathered by Ms. Ayre herself. She used her cellphone to take photos of the defendant's property and to take 'screen shots' of certain online material. A few still images, taken from video files, were introduced into evidence on a cd, played in court, and available to me to review after the trial. It was all treated rather casually in court. The witnesses testified about "YouTube channels" as though these were susceptible to judicial notice. I was left with the impression that the photos are only a portion of a larger collection of online postings, comments, etc. but I can only assess the case from the evidence led. I cannot embark on an investigation of my own nor speculate about what more might be "out there". The defendant didn't question the authenticity of the photographs; indeed she seemed to acknowledge that these exhibits were what they purported to be.

[29] There are photographs of the security camera on the deck and of the accused herself, taken from the Ayre property. In addition, there are screen shots taken by Ms. Ayre from publicly available videos and postings on the internet. Thus, I have

some photos of the cameras and their location relative to the Ayre property, and some which show what the cameras themselves were picking up. The resolution and clarity of these images may be somewhat better when viewed on the actual internet sites, but this is speculation and it likely does not matter. I refer to them by the numbers assigned on the cd.

[30] 2118 was taken by Ms. Ayre from inside her kitchen on a night she had lost power to her home. The power was on at the defendant's home. It shows Ms. O'Connor on her back step holding a camera in her hand. The defendant does not deny that she may have gone outside to take photos of the alleyway. She suggested in questioning of the complainant that she may have been using the camera for "night vision". There were widespread outages in this area of the city due to extreme flooding. Here and elsewhere the defendant points out that the photo is "blown up" and hence the actual distance between the subject of the photo and position from which it was taken is greater than appears. I assume that the defendant could not have seen into the darkened Ayre house. If anything, it would have been easier to take advantage if the roles were reversed.

[31] 3955 / 4011 seem to be the same image, from the defendant's YouTube channel. In it one sees windows of the Ayre home, lit from within. It is accompanied by text, described by Ms. Ayre as a "story". There may be more to the story than was tendered but I have not checked to find out. It seems to be comment about the defendant herself and her various interactions with police. There is some talk of neighbours, but Ms. Ayre is not mentioned by name. The defendant admits to posting this on the internet, and that the images were generated by her deck camera. She says it was a picture of her driveway which happened to show the Ayre house. I accept that Ms. Ayre recognized it as her house, as would

anyone familiar with the immediate neighbourhood. Otherwise it does appear to be identified with Ms. Ayre.

[32] 2710 shows the deck camera, and the dog's carpet.

[33] 1841 seem to be a cropped portion of another photo (4046). It depicts Ms. Ayre's kitchen door and window. Again it is from material uploaded to YouTube by the defendant, who said that the image does not show as much as she can detect with her naked eye.

[34] 6059 carries no weight. It was not spoken to by any Crown witness. When this exhibit was put to the defendant she did not admit to being the person shown and suggested someone may have cut and pasted her name into the accompanying text.

[35] 5607 and 5605 show a portable floodlight, put there by Ms. O'Connor because one of her security lights was out. Ms. Ayre claimed that it shone right into her kitchen.

[36] 7555 is a photo of the deck camera. One also sees the defendant's blue vehicle.

[37] 2718 is a photo of yet another camera. Ms. Ayre could not tell where it was pointed.

[38] None of photos of the Ayre residence actually show Ms. Ayre, or any other person. They show no human activity associated with the premises.

Caselaw

[39] In *R. v. Manoux* 2017 ONCJ 58 the accused was a tenant who entered into an arrangement with two young women whereby he gave them occupancy of his premises for four months. He left his furnishings and personal belongings there. He characterized it as a “sharing arrangement”. It was actually an attempt to sublet the unit, which was contrary to the express provisions of the lease. He said they had an understanding that it would be a quiet arrangement with be no noise and few guests, and that he might need to “crash” there occasionally.

[40] The offending conduct is described at para. 5:

What he did not disclose to the two women is that he had customised a Blu-ray player, to contain a web camera, and positioned it on a piece of furniture in the living area, so that it would record the images of people on the couch and coming and going from the apartment, by the hallway near the kitchen. As it was a web camera, he was able to access the device remotely, and the Ethernet cable attached to the Blu-ray player facilitated this. None of this was disclosed to the women who were paying to live there. Their upset on learning about it led to a report to police, and subsequently to the owner of the unit. Charges were laid against Mr. Manoux . . .

[41] Mr. Manoux was unable to obtain the insurance which Airbnb would have afforded him had he listed the apartment with them. And so, he claimed, he placed the camera for the sole purpose of protecting his property. He said he rented out only the bedrooms, maintaining some control of the entire apartment as a “third roommate”. He realized he would be in jeopardy with his landlord if the arrangement were discovered.

[42] One of the complainants testified that she was “freaked out” upon discovering the hidden device and for a long time afterward did not feel comfortable living there (even though it was immediately disabled). The other spoke about longer-term effects on her general sense of security.

[43] Shamai, J. had little time for the assertion that the two ladies had no reasonable expectation of privacy in the premises. He said that they were living there openly, paying rent, using the facilities and doing the ordinary things one does in one's home. Following *Maddeaux*, supra, he said at par.53:

The plain intent of Section 430(1)(c) (which differs in an immaterial way from Section 430(1)(d)) is to criminalize the 'dynamic aspect' of the enjoyment of property -- the employment, enjoyment or exploitation of property -- rather than its "static aspect" -- ownership, rental or possession. Mr. Manoux's argument must therefore fail, when he argues that because the complainants lived in the apartment in contravention of the condo rules and his own lease agreement, they had no claim of lawful use or enjoyment. Their actual use of the apartment was lawful . . .

He found that the complainants were fully "masters in their own home" and in lawful enjoyment of the entire unit.

[44] *Manoux* case poses the question "Does the lawful enjoyment of residential premises include a right to be free of surreptitious surveillance?" The judgement appears to answer "yes". At par. 60 it describes the private enjoyment of one's home as "a fundamental facet of having a home; indeed it is almost definitive of it." While acknowledging the differences, it takes instruction from cases involving state intrusion on privacy, noting that the Supreme Court has said that s.8 of the Charter protects people, not places. It notes at par. 56 that "the development of technology has complicated the protection of privacy in modern society . . . The ubiquity of the camera and the miniaturization of the related technology has made invasion of privacy increasingly contentious."

[45] Mr. Manoux had argued that the only criminal prohibition against hidden observation was the one described in s.162 of the Code – voyeurism, which

pertains only to places where people might be nude, and requires a sexual purpose. He claimed colour of right. The court gave this short shrift, saying at par.73: “It defies the limits of reasonableness to suggest that such a casual invasion of privacy . . . was reasonable . . . An invasion of privacy by technological and surreptitious means cannot be justified by a concern over property rights.”

[46] Distinctions between *Manoux* and the case at hand are notable. Firstly, Ms. O’Connor did not place a camera inside the complainant’s premises. Her cameras could only peer through open (in the sense of unshuttered) windows. While her cameras might have captured a vague image of goings-on inside the complainant’s house, there is no evidence that they could have captured an identifying image. Secondly, Ms. O’Connor made no attempt to hide the fact that she had cameras positioned and operating from her deck and elsewhere. Indeed, she wanted this to be obvious, believing that it had the effect of deterring intruders.

Discussion

[47] Typically, criminal courts consider an individual’s privacy interest in situations where a state actor has intruded upon it. In the case at hand the privacy and security interests of two individuals collide. Charter values may none the less be instructive. The Supreme Court has said that privacy has personal, territorial and informational aspects.

[48] Section 430(c) prohibits willful interference with the lawful use or enjoyment of property. As noted above, this includes “the action of obtaining from property, which a person lawfully holds, the satisfaction that this property can provide to that person.” What about a person who occupies premises for six months, during which s/he is videotaped without their knowledge? Later they

discover what was done, and the picture-taker is charged. During the time they used and enjoyed the property they were fully satisfied with their property - the surveillance had no impact on them. They have moved on to other premises where they know they have complete privacy. Do these circumstances give rise to a chargeable offence under s.430(c)?

[49] The favoured interpretation of s.430(c) speaks to a victim's subjective experience. Yet, in *Manoux* the court finds a violation of s.430(4) even though the complainants were unaware of the activity. During most of the four month interval over which the offence was committed the occupants were presumably enjoying the premises, blissfully unaware that they were being recorded. The device was disabled immediately upon discovery. The complainants described after-effects; however, the finding of guilt did not seem to depend upon any impact, emotional or otherwise, as of the time the offensive conduct occurred. Where the offence is predicated on the enjoyment of property, is the subjective experience of the complainant not engaged? Should the Crown have to prove an actual impact on "enjoyment" of the premises in order to secure a conviction?

[50] I am spared consideration of this point. Ms. Ayre was initially unaware of the recording, but the cameras kept operating well after she became aware of them. The recording spans a period during which the complainant did realize it was occurring and during which, she claims, her activities were actually curtailed and her enjoyment of the property correspondingly diminished.

[51] The functioning of a video camera differs from what a neighbour might see over the fence in the ordinary course. First, a camera is constantly watching. Second, the camera documents things in a way that memory cannot. Thirdly, such

images are now readily disseminated on social media and so placed in view of the entire on-line world.

[52] It is not surprising that the experience of being constantly surveilled and recorded could have psychological effects of the sort Ms. Ayre complained about. She said the cameras caused her such worry that she stopped doing things she would normally do. She felt it necessary to take steps to ensure that the cameras would not capture activities inside her house. She attributes the curtailment of her activities to a concern that she was being both seen and recorded.

[53] Hypothetically a camera may be so powerful, more acute than the human eye, as to be able to discern activities inside a dwelling through an open window. Conceivably this might involve an intrusion on a privacy inside a dwelling to the extent that the accused in *Manoux* experienced. One can imagine this being done surreptitiously. Hypothetically a person may record images, or audio for that matter, taken of a neighbour, and then upload and distribute the material in such a way as to create embarrassment, with the effect of limiting the neighbour's use of their yard. Few would wish to be unwilling and unwitting stars in an online "reality TV" show. However, neither of these hypotheticals pertains here.

[54] One remembers that an expectation of privacy must be reasonable, taking account the surrounding circumstances and nature of the living space. I assume that the Crown would not be prosecuting this case if the defendant had merely viewed Ms. Ayre across the fence as the opportunity allowed. Even if Ms. O'Connor had nothing more than a prurient curiosity about her neighbour's activities, it is not at all clear that viewing and/or recording on camera what is

apparent to the naked eye constitutes criminal interference with a neighbour's use and enjoyment of property.

[55] Lastly, perhaps it is not such a stretch to think that a person might have cameras pointed exclusively at a neighbour's back door out of security concerns. One might consider the situation of a person who lives next door to a drug dealer, or a case where there is specific reason to believe that an occupant of premises is committing serious offences against his or her neighbours.

The legal context

[56] Judges do not write law; they apply them. This case raises legitimate concerns, but if there is a gap in the law it is not the court's business to fill it. Neither are courts arbiters of good manners; incivility is not a crime. Courts cannot force homeowners to be considerate of their neighbours.

[57] Ms. Ayre testified that she felt intimidated by the defendant. This spoke to her own anxieties as much as to the behavior of Ms. O'Connor. Actual intimidation, in extreme cases, may be a criminal offence under s.423 of the Criminal Code. Someone who "besets or watches the place where a person resides", for the purpose of preventing her from doing something she has a lawful right to do, may commit such an offence.

[58] Ms. Barnes felt that Ms. Ayre was being harassed. Actual harassment, in extreme cases, may be an offence under s.264(2)(c). One manner of commission is by "watching or besetting the dwelling house" of a person in such a way as to cause, in that person, a reasonable fear for her safety.

[59] Criminal charges entail high degrees of culpability and involve high standards of proof. Short of criminalizing conduct, governments may choose to regulate certain activity in the public good. Completely aside from statutory offences, criminal or regulatory, people may have recourse to civil remedies - private actions between private entities – if another person has caused them harm. The Supreme Court has spoken of a continuum of culpability in the driving context. It begins with momentary lack of attention giving rise to civil liability, through to careless driving under a provincial highway traffic Act, culminating at dangerous driving under the Criminal Code.

[60] With respect to private property, there is a civil tort of nuisance whereby a landowner may seek damages for harm done to his or her property. I am not aware that municipalities or provinces have regulated the use of video surveillance equipment, although it is possible some have. Voyeurism (s.162) and dissemination of intimate images (s.162.1) are both criminal acts if the purpose or content is sexual, but there is no criminal offence of invasion of privacy by video camera *per se*.

[61] Large cities abound with closed circuit TV's, which surely must capture activity on private property, in addition to the public spaces they "police". Drones are another means by which cameras may intrude on private property, on people enjoying their own back yards. Many private businesses have cameras recording the actions of their customers, which makes it easier to detect theft, and most likely reduces it. Many schools are fitted with security cameras.

[62] It is not for a court to fill a gap in the law, if there is one. Perhaps diminishing expectations of privacy will render surveillance and observation of

personal activity a simple “fact of life”. Perhaps legislatures will see a need to protect the privacy of residential premises and enact civil bylaws, provincial regulations or even criminal laws to restrict or limit the use of video recording equipment in such spaces. The task at hand is to determine whether Ms. O’Connor’s actions violate the law as written.

Conclusion

[63] The Crown must prove the *actus reus* of the offence. Certainly there was video-recording, and certainly this did upset the complainant, diminishing her use and enjoyment of her property. Whether the complainant’s reaction is reasonable is less certain. The evidence does not show that the camera detected anything more than the defendant could have seen with her own eyes, lawfully, day or night. The possibility that widely recognizable and identifiable images would be disseminated via social media or otherwise would be worrisome to Ms. Ayre, but on the evidence it is not clear that this was done, or would have been.

[64] The Crown must prove *mens rea* – deliberate intent or wilful recklessness. On the evidence Ms. O’Connor was not especially interested in Ms. Ayre. While she was aware that her actions bothered Ms. Ayre, she did not set her cameras out with this purpose in mind. She did not possess an unhealthy curiosity about her neighbour’s personal affairs. The defendant may have been inconsiderate and uncaring about the effect the video-recording had on Ms. Ayre, but even if this is so, it does not give rise to criminal culpability.

[65] The Crown must dispel the possibility that Ms. O’Connor’s actions were justified. The facts show that Ms. O’Connor had legitimate security and privacy interests of her own. It is a reasonable possibility on the evidence that her purpose

in setting up the cameras was to protect her own premises by detecting and deterring would-be intruders.

[66] For these reasons the defendant is found not guilty.

Dated at Sydney, N.S. this 30 day of November, 2017

A. Peter Ross, JPC