The Supreme Court recently decided the case of Ryan Jarvis, a high school teacher charged with voyeurism contrary to s 162(1) of the *Criminal Code* for recording female students with a pen camera while at school. This is the first time that the Supreme Court has had the opportunity to engage with the elements of the voyeurism offence, as the issue before it was whether the subjects of Jarvis' videos were in circumstances giving rise to a reasonable expectation of privacy.[1] At both the trial and appeal levels, Jarvis was acquitted, though for differing reasons.[2] Here, the Supreme Court concludes that there was a reasonable expectation of privacy, and as such orders that a conviction be entered.

This decision provides a satisfying ending to what could reasonably be considered a saga of absurdity in the courts below. The reasoning of the majority represents a victory of common sense over excessive legal formalism. In the remainder of this blog I elaborate on these views, arguing in support of the majority's reasoning and highlighting the value of its approach over the approaches taken in the courts below, and by the dissent in the Supreme Court.

Before diving in, a review of the facts is necessary. Ryan Jarvis was a teacher at an Ontario high school. Other school staff became concerned that Jarvis was making video recordings of female students, after he was observed speaking to them while holding up a pen that emitted a red light. Further observation of this behaviour by the principal led to the confiscation of the pen, which was turned over to police. The pen turned out to also be a camera, capable of audio and visual recording. Its contents could be downloaded to a computer for viewing and editing. A total of 27 separate videos were recovered, of various lengths. They focused almost exclusively on female students, aged 14-18, and particularly on their faces and breasts. There seems to have been a few students that

[1] *R v Jarvis*, 2019 SCC 10 at para 4, 20 [*Jarvis*].
[2] *Ibid* at para 3.

Jarvis took a particular interest in. Of course, none of these young women were aware that they were being recorded by Jarvis while he conversed with them.[3]

As a result of these actions, Jarvis was ultimately charged with voyeurism contrary to s 162(1) of the *Criminal Code*. The section reads as follows:

> **162 (1)** Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if
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> (a) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;
>
> (b) the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or
>
> (c) the observation or recording is done for a sexual purpose.[4]

The trial judge found that the subjects of Jarvis' videos held a reasonable expectation of privacy, however he also found that there were other possible purposes beyond the sexual that Jarvis could have had in making the recordings. Thus, Jarvis was acquitted.[5] The Crown appealed, and the case came before the Ontario Court of Appeal. While the appellate court held that the trial judge had erred, as no other conclusion was available on the evidence other than that the recordings had been made for a sexual purpose, it also found that trial judge had erred in finding that the students were in circumstances giving rise to a reasonable expectation of privacy. This was because Jarvis had

[3] *Ibid* at para 7-12.
[4] *Criminal Code*, RSC 1985, c C-46, s 162(1).
[5] *Jarvis*, *supra* note 1 at para 15.

recorded them engaging in normal school activities in common areas where they knew that they could be observed by others and recorded by security cameras.[6]

It is perhaps clear now why I refer to these decisions as a "saga of absurdity". The finding of the trial judge that there were other possible purposes for Jarvis' recordings was, of course true. However, it ignores the difference between possibility and plausibility. Realistically, without some very compelling evidence on the record indicative of another purpose, there is no other sensible interpretation of Jarvis' actions. If the justice system engaged in such reasoning as a matter of course, every trial would end in acquittal. The appellate court rightly picked up on this when it found that there was no other inference available to the trial judge than that the recordings had been made for a sexual purpose. Jarvis advanced no alternate purpose before the court, and there is frankly no other way to interpret a series of close up videos of young women's chests, taken in the context that they were.[7]

Unfortunately, the appellate court then goes on to making an equally bizarre finding: that the students who Jarvis recorded were not in circumstances that gave rise to a reasonable expectation of privacy. On this view, a person's privacy expectations are primarily determined by location. One reasonably expects privacy when in a place where they are able to exclude others and be confident that they are not being observed. Since the students were in common areas of the school when they were recorded, and since they knew that they were being recorded by security cameras, they could not reasonably hold such an expectation.[8]

The issue that I take with this line of reasoning is that it is utterly divorced from the realities of everyday life. It is safe to say that the overwhelming majority of people do have an expectation

[6] *Ibid* at para 16-17.
[7] *R v Jarvis*, 2017 ONCA 778, at para 33, 53 [*Appeal*].
[8] *Jarvis*, *supra* note 1 at para 17.

that, when they are out in public, someone else will not be taking close up videos of sexualised parts of their bodies. In fact, I am quite certain that if I went to a mall, walked up to random women, and started taking videos of their chests with my phone, I would very probably be leaving that mall in police custody. At the very least, the subjects of those videos would be very angry. Yet, according to the Ontario Court of Appeal, it would be unreasonable of them to expect me not to do this. That is patently absurd. Of course, reasonableness at law does not necessarily coincide with what most people would do. However, when the law departs so far from the expectations of the individuals governed by it, then there is a problem.

This is to say nothing of the specific circumstances in the case at bar. If anything, the facts of *Jarvis* are more extreme than those of my above example, as they involve young, and in some cases under-age, women, in a school setting. I have serious difficulty seeing how anyone could consider it unreasonable for teenage girls at school to expect others not to make secret, close-up videos of their faces and breasts; especially a teacher.

That said, I do not wish to be too hard on the judges who ruled at both the trial and appeal levels. I am sure that there are plenty of commentators out there who have criticised the character of these individuals for the findings they made. However, I think that the absurd outcomes of these decisions can be attributed, to some extent, to an excessive reliance on legal formalism. I image that cases such as these are difficult for judges; Jarvis is a singularly unsympathetic character. What he was accused of is both deeply disgusting and offensive, and that he actually committed the acts in question was not in dispute. However, as triers of fact, judges have a duty to remain impartial and focused on the law and the facts before them. Perhaps, in trying to ensure that they gave Jarvis a fair hearing, these judges fell back on the mechanics of the relevant law. The way in which the appellate court framed the privacy issue is revealing in this regard. The Court of Appeal essentially asked "is it

reasonable for people in public places, who are aware that they are being recorded by security cameras, to expect not to be recorded". This is very different from the way I view the issue in the previous paragraph.

It is not so difficult to see how the judges in the courts below arrived at their conclusions when issues are framed narrowly and addressed in a formalistic way. It is easy to get caught in the weeds of a case, and I think judges are more likely to do so as a way to prevent their own biases or views on the conduct of the accused from creeping into their judgement inappropriately. However, especially where the concept of reasonability is invoked, context is crucial. The problem with the courts below is that they both failed to consider the situation as a whole, to step back and ask "what is really going on here?" The result was that certain particular details of the case were over emphasised in the analyses, and both courts reached conclusions that, from the outside, appear to be completely ridiculous.

In its decision, the majority of the Supreme Court recognises the importance of the full context of the situation. Location is not the main or only factor for the majority; in fact, they compile a non-exhaustive list of 9 factors that are relevant to determining whether there were circumstances giving rise to a reasonable expectation of privacy. These include: location, nature of the impugned conduct; awareness of or consent to observation or recording; manner of the conduct; subject matter or content of the observation or recording; rules, regulations or policies applicable to the conduct; relationship between the observer/recorder and the subject; purpose, and; personal attributes of the subject.[9] How each of these factors is to be considered, if at all in a given situation, is explained by the majority, with examples. What the majority is really saying, at its core, is that all of these details matter. As the majority notes at paragraph 68, referring to principles established in s

[9] *Ibid* at para 29.

8 *Charter* jurisprudence, "reasonable expectation of privacy" is a normative concept, and whether circumstances give rise to such an expectation is a question to be to be answered in light of norms of societal conduct.[10] What norms persist in a given situation is highly fact dependent and so normative questions ought to be construed broadly, not narrowly.

As I argued in my recent blog post concerning the *Vice Media* case, it is important that the law be structured so as to allow judges to engage with the full context of the scenario before them. There is an endless number of ways that situations can vary, and just when you think you have seen it all, someone will find a way to surprise you. For the law to be effective and just, it must remain applicable across the full range of these situations.

In this regard, the dissent at the Supreme Court raises a valid criticism of the majority: they shared a concern that it was inappropriate to import the reasonable expectation of privacy principles from the s 8 *Charter* context to inform our understanding of a *Criminal Code* provision, in part because this could undermine certainty and stability in the scope of criminal offences.[11] While I believe that there is a valid argument to be made that grounding criminal offences in a normative determination has the potential to create uncertainty about whether a specific act will draw criminal sanction, it is a weak one. Norms are inherently predictable, otherwise they are not norms. In this specific case, no one could realistically claim that they did not think making secret videos focused on young women's breasts at a high school would draw sanction. Only someone lacking the mental capacity for such judgements could seriously make such a claim, and there is an alternate avenue of defence for such accused.

The dissent also asserts that understanding the reasonable expectation of privacy in s 162(1) of the *Criminal Code* in the same way as it is understood in relation to s 8 of the *Charter* would put the

[10] *Ibid* at para 68.
[11] *Ibid* at para 97.

judiciary in the position of creating new common law offences.[12] Respectfully, this is not accurate. First, establishing that a reasonable expectation of privacy existed in the circumstances is not determinative in establishing an offence under s 162(1). It is merely one element of the wider offence. Second, if applied to other established and legitimate areas of criminal law, this logic becomes problematic. Do judges create common law offences every time that they make a novel determination under the significant contributing cause test? What about offences that engage objective standards of conduct or knowledge? Under this line of reasoning, any reasonableness element in a criminal offence is suspect, because ultimately these come down to normative judgements by triers of fact about what ought to have been.

Furthermore, the dissent is inconsistent in its interpretation of parliament's intentions. Significant portions of the dissenting reasons are given over to examining parliament's intentions and the actual mischief it sought to address. However, it never seems to occur to the dissent that there is significance to parliament's decision to import the exact words "reasonable expectation of privacy" that are used in the s 8 jurisprudence. Given that parliament is deemed to be fully aware of the law, this seems a significant oversight. It would appear to me that parliament would only use the exact same wording if it intended the concept to be informed by the same, or similar, principles. Furthermore, while the dissent is entirely right that "The Purpose and Function of Section 8 of the Charter and Section 162(1) of the Criminal Code are Fundamentally at Odds", this does not mean that an analytical tool used in one context cannot be used in another.[13] Just because a rifle and a defibrillator machine perform entirely opposite functions, it does not mean that some component parts of each cannot be the same.

[12] *Ibid* at para 98.
[13] *Ibid* at para 98.

In the end, I believe that the majority of the Supreme Court reached the right decision, and that the broad and normative approach to understanding reasonable expectation of privacy in the s 162(1) context is entirely appropriate. It allows for a flexible and contextual analysis, which can benefit both claimants and accused by permitting the judge to consider a wide range of potentially relevant facts. I do not believe that this makes the law in this regard unduly unpredictable, nor does this open the door to the creation of new common law offences by the judiciary. The dissent at the Supreme Court, like the judges of the courts below, made the mistake of being too formalistic and rigid in their understanding of the law. I think that they forgot to take a step back from the technical legal issues at play and put the entire situation in its proper context. Jarvis used his position as a high school teacher to secretly record close up videos focused on the breasts of young women in his charge. I know this for certain: even if I was entirely incorrect in my above analysis, I will not lose any sleep knowing that that man got a criminal conviction for what he did.