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Illuminating False Light: Assessing the Case for the False Light Tort in Canada

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The false light tort has been the most contentious of the four privacy torts recognized in many US states, receiving criticism for its uncertain connection to privacy interests, its overlap with defamation and its chilling effect on free speech. While the tort has not previously received much judicial or scholarly attention in Canada, the recent decision of the Ontario Superior Court of Justice in Yenovkian v Gulian *recognized false light as a cause of action in the province. This article cautions other Canadian common law courts against following suit through an analysis of the nature, history, and criticisms of the tort in the US. Although a narrow version of the tort could differentiate the action from defamation, the privacy interests protected may not be sufficiently widespread and significant enough to warrant extending the common law. Furthermore, the chilling effect on freedom of speech cannot be discounted.*

Le délit consistant à présenter une personne sous un faux jour a été considéré comme le plus controversé des quatre délits contre la vie privée reconnus dans de nombreux États américains, recevant des critiques pour son lien incertain avec le droit au respect de la vie privée, son chevauchement avec la diffamation et son effet paralysant sur la liberté d'expression. Bien que ce délit n'ait pas reçu beaucoup d'attention judiciaire ou académique au Canada, la récente décision de la Cour supérieure de justice de l'Ontario dans l'affaire Yenovkian c. Gulian *a reconnu que la présentation d'une personne sous un faux jour constitue une cause d'action dans la province. Dans le présent article, nous mettons en garde les autres tribunaux canadiens de common law contre la possibilité de donner suite à cette décision en analysant la nature, l'histoire et les critiques de ce type de délit aux États-Unis. Bien qu'une interprétation plus étroite du délit puisse le différencier de la diffamation, le droit au respect de la vie privée ainsi protégé peut ne pas être suffisamment étendu et important pour justifier l'extension de la common law. En outre, l'effet dissuasif sur la liberté d'expression ne peut être écarté.*

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Introduction

In a "world without privacy, or at least a world in which the meaning of privacy is radically transformed both as a legal idea and a lived reality,"[1] common law courts could play a vital role in providing greater protection for individuals' privacy rights. Other Commonwealth countries offer limited guidance about the potential merits of judicial innovation. English courts have rejected a general tort of invasion of privacy[2] and have instead relied on a modified breach of confidence action to protect

1. Austin Sarat, "Whither Privacy? An Introduction" in Austin Sarat, ed, *A World Without Privacy: What Law Can and Should Do?* (New York: Cambridge University Press, 2015) 1 at 1.
2. *Wainwright v Home Office*, [2003] UKHL 53, [2004] 2 AC 406 at para 35.

against unwanted disclosures.[3] The recent experience of New Zealand has more relevance,[4] but the privacy torts adopted there are "still in [their] infancy"[5] and the caselaw is limited.[6] Instead, the obvious example of a country that has developed novel privacy torts is the US where, in many states, four discrete privacy actions (intrusion upon seclusion, public disclosure of private facts, false light, appropriation) have been available for decades. Indeed, courts in the common law world have drawn heavily on US jurisprudence when considering novel privacy torts.[7]

The latest Canadian example of US influence on the development of privacy torts is *Yenovkian v Gulian*, decided in December 2019, in which the Ontario Superior Court of Justice recognized false light as a cause of action.[8] Until *Yenovkian*, the false light tort had neither received much attention from Canadian courts nor from Canadian legal scholars. The tort provides a cause of action when a plaintiff has been placed in a false light before the public if this representation was "highly offensive to a reasonable person" and if the defendant had "knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."[9] The false representation in question may defame the plaintiff but does not need to: the critical question is whether the representation amounts to a highly offensive one.[10] False light also differs from defamation by protecting privacy interests rather than reputation, although this point is contested. False light has been the most controversial of the four American privacy torts: the action's similarity to defamation has been a focal point of criticism in the US and offers a possible explanation for the limited Canadian discussion

3. *Campbell v MGN*, [2004] UKHL 22, [2004] 2 AC 457.
4. The New Zealand Court of Appeal recognized the tort of public disclosure of private facts in *Hosking v Runting*, [2004] NZCA 34, [2005] 1 NZLR 1 [*Hosking*] while the New Zealand High Court adopted intrusion upon seclusion in *C v Holland*, [2012] NZHC 2155 [*Holland*].
5. *Siemer v Spartan News Ltd*, [2014] NZHC 3175 at para 151 [*Siemer*].
6. This is particularly true of the intrusion upon seclusion tort as no other claim on this basis appears to have succeeded. The High Court of New Zealand held that a police search pursuant to a lawful warrant did not cause an intrusion upon seclusion in *Siemer*, *supra* note 5 at para 152 while it also dismissed an action in *Henderson v Slevin*, [2015] NZHC 366 at paras 69, 71 as the claim failed to demonstrate an area of seclusion and the defendants' actions were not highly offensive to a reasonable person. In *Duval v Clift*, [2014] NZHC 1950 at para 104, the claim for intrusion upon seclusion was judged to be of no merit with little discussion of the cause of action. In *Faesenkloet v Jenkin*, [2014] NZHC 1637 at paras 38, 53 Justice Asher questioned whether two distinct privacy torts were required, framing his analysis instead around the tort of invasion of privacy.
7. See eg *Hosking*, *supra* note 4; *Holland*, *supra* note 4; *Jones v Tsige*, 2012 ONCA 32 [*Jones*]; *Doe 464533 v ND*, 2016 ONSC 541 [*Doe*].
8. 2019 ONSC 7279 [*Yenovkian*].
9. *Restatement (Second) of the Law of Torts* § 652E (1977) [*Restatement*].
10. *Ibid* § 652D.

of the tort's utility. Nonetheless, the decision in *Yenovkian* confirms the recent Ontario trend of judicial openness to novel privacy torts following the earlier recognition of intrusion upon seclusion in *Jones*[11] and public disclosure of private facts in *Doe*.[12] Whether this trend extends beyond Ontario remains to be seen. There are, however, some hints that, post-*Jones*, other Canadian jurisdictions may follow the Ontario example.[13]

This article considers whether the false light tort should be imported into Canada, following the decision in *Yenovkian*, through an assessment of its value as a cause of action in the US. The first section outlines the different development of the protection of privacy in the common law in the US and Canada while the second section elaborates on the elements of the false light action. The third section explores the history of the tort in the US, highlighting its checkered history. This section also underscores the importance of the broader context of changes in US defamation law to the tort's growth. The following three sections explore the most substantive criticisms of the action: uncertainty as to the interests protected by the tort, its viability as an independent cause of action, and its alleged chilling effect on freedom of speech. Some of the problems with false light can be avoided by adopting a narrower version of the tort that only provides relief for non-defamatory statements about an individual that infringe on their privacy rights. However, questions remain about whether the privacy interests protected by this constrained version of false light are sufficiently widespread and significant enough to require protection under the common law. Moreover, despite significant differences between the Canadian and American approaches to free speech, the chilling argument cannot be ignored. For these reasons, it is not recommended that Canadian courts adopt the false light action.

I. *Common law protection of privacy in the US and Canada*

Invasion of privacy has long been recognized in the US as actionable in tort law. Following the famous call by Warren Brandeis and Louis Brandeis

11. *Jones*, *supra* note 7.

12. *Doe*, *supra* note 7.

13. See eg *VonMaltzahn v Koppernaes*, 2018 NSSC 192 at paras 48-51 (finding that the defendant had invaded the plaintiff's privacy); *Carbone v Burnett*, 2019 ABQB 98 at paras 46-47 (finding that the elements of intrusion upon seclusion had been not made out but not expressly rejecting the tort's availability in Alberta); *Grant v Winnipeg Regional Health Authority et al*, 2015 MBCA 44 at para 126 (acknowledging the hypothetical possibility of a claim for intrusion upon seclusion and/or false light in Manitoba); *Hynes v Western Regional Integrated Health Authority*, 2014 NLTD(G) 137 at para 25 (acknowledging that Newfoundland and Labrador privacy legislation does not exhaustively occupy the field and preclude common law privacy torts). *Contra Ari v Insurance Corporation of British Columbia*, 2013 BCSC 1308 at para 63 (confirming that there was no tort of invasion or breach or privacy in British Columbia).

in 1890 for the common law to protect the right to be let alone,[14] courts across the country began to recognize tortious invasions of privacy so that "[b]y 1960, a large number of cases had been decided under the auspices of the emerging privacy doctrine."[15] William Prosser's celebrated 1960 article attempted to provide greater structure to this doctrine.[16] His survey of the emerging case law in this area led him to identify four discrete tort actions protecting privacy: intrusion upon the plaintiff's seclusion, public disclosure of embarrassing facts about the plaintiff, publicity that places the plaintiff in a false light in the public eye, and appropriation of the plaintiff's name for the defendant's advantage. Prosser's classification, later adopted in the *Restatement*,[17] has "proved highly persuasive to states, lawmakers, and judges and has become the modern framework for the privacy tort in the United States."[18] Not all US jurisdictions recognize each of the four torts,[19] but Prosser's work continues to be the starting point for judicial consideration of the validity and extent of tort actions for privacy infringements.[20]

Unlike their counterparts in the US, Canadian courts have traditionally been resistant to attempts to extend the common law to provide a distinct tort action for invasions of privacy.[21] Other causes of action, such as trespass to land and defamation, potentially offer some protection against such intrusions,[22] but the prospect of a remedy hinges wholly on the specific facts in any given case.[23] Some protection, both in the common law and in statute, is available to prevent the misappropriation of personality.[24] Moreover, statutory torts of invasion of privacy exist in

14. "The Right to Privacy" (1890) 4:5 Harvard L Rev 193.
15. Gary T Schwartz, "Explaining and Justifying a Limited Tort of False Light Invasion of Privacy" (1991) 41:3 Case W Res L Rev 885 at 885.
16. William L Prosser, "Privacy" (1960) 48:3 Cal L Rev 383.
17. *Restatement*, *supra* note 9.
18. Paul M Schwartz & Karl-Nikolaus Peifer, "Prosser's 'Privacy' and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?" (2010) 98:6 Cal L Rev 1925 at 1938.
19. See Section III-3, *below*.
20. See eg the judgments in *Denver Pub Co v Bueno*, 54 P (3d) 893 (Colo Sup Ct 2002) [*Bueno*], *Jews For Jesus, Inc v Rapp*, 997 So (2d) 1098 at 1109 (Fla Sup Ct 2008) [*Rapp*] and *West v Media General Convergence, Inc*, 53 SW (3d) 640 at 645-646 (Tenn Sup Ct 2001) [*West*].
21. Chris DL Hunt, "Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada's Fledgling Privacy Tort" (2011) 37:1 Queen's LJ 167 at 168 [Hunt, "Conceptualizing"].
22. John DR Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997) 42:2 McGill LJ 355 at 366.
23. See eg the discussion in Chris DL Hunt, "The Common Law's Hodgepodge Protection of Privacy" (2015) 66 UNBLJ 161 at 164-179.
24. Amy M Conroy, "Protecting Your Personality Rights in Canada: A Matter of Property or Privacy?" (2012) 1 Western J Leg Studies 3.

some of the common law provinces (Saskatchewan,[25] British Columbia,[26] Manitoba,[27] and Newfoundland and Labrador[28]). However, there are strong grounds to doubt their effectiveness.[29] The general picture is of limited and inconsistent privacy protection in the common law in Canada. There is therefore a gap in privacy protection in Canadian law and common law privacy torts may offer one way to rectify this.

Recent decisions in Ontario that have explicitly borrowed from US jurisprudence suggest a possible change of direction. In *Jones*, the Ontario Court of Appeal recognized an action for intrusion upon seclusion,[30] while the Ontario Superior Court adopted the tort of public disclosure of embarrassing private facts in *Doe*.[31] Although the precedential value of the latter is questionable,[32] the two decisions together seem to indicate a greater judicial willingness, in one province at least, to reconsider whether tort law can play a role in defending individual privacy with some observers.

Until 2019, only three of Prosser's torts had been relevant in Canada. The false light tort, by contrast, had been largely ignored. Judicial consideration in Canada of the merits of the false light tort has been extremely limited.[33] A false light claim was rejected by the Court of Queen's Bench of Manitoba in *Parasuik v Canadian Newspapers Co*

25. *The Privacy Act*, RSS 1978, c P-24.
26. *Privacy Act*, RSBC 1996, c 373.
27. *The Privacy Act*, RSM 1987, c P125.
28. *Privacy Act*, RSNL 1990, c P-22.
29. A 2003 review of claims under the various provincial privacy statutes highlighted the limited success of plaintiffs and the modest damages awarded in successful claims: see Simon Chester, Jason Murphy & Eric Robb, "Zapping the Paparazzi: Is the Tort of Privacy Alive and Well?" (2003) 27:4 Adv Q 357 at 359. See also David H Flaherty, "Some Reflections on Privacy and Technology" (1998) 26:2 Man LJ 219 at 222. *The Privacy Act* in Saskatchewan, *supra* note 25, for example, reflects the prevalent concerns (eg wiretapping) at the time of its creation and is arguably unsuited to meet the challenges posed by contemporary information and communications technology. The hope of its drafters that its vague provisions would be developed and elaborated by the courts has not been borne out in practice. Indeed, from 1972, the year of its adoption, until 2012, there was only one reported decision under the Saskatchewan Privacy Act (Law Reform Commission of Saskatchewan, *Renewing the Privacy Act*, Final Report (2012) at 3, 22, online (pdf): <https://lawreformcommission.sk.ca/Renewing_the_Privacy_Act_Final_Report.pdf> [https://perma.cc/2UEJ-VUMU]).
30. *Jones*, *supra* note 7.
31. *Doe*, *supra* note 7.
32. It was a lower court decision with multiple causes of action that was subsequently reversed on procedural grounds in *Jane Doe 464533 v ND*, 2016 ONSC 4920.
33. A Quicklaw search for the Boolean term "false light" uncovered only thirty-nine Canadian cases (counting appeals of a lower court judgment separately), of which twelve were judgments that used the term in a more generic sense. Four cases, mentioned in the text, considered the false light claim in some detail, a further six involved preliminary decisions allowing or striking a claim without extensive consideration of the validity of the action, and one referred to a tort claim in the US. The remaining sixteen cases quoted Prosser's categorization without specifically commenting on the existence of a false light tort.

as having no foundation in either statute or the common law.[34] Both the Supreme Court of British Columbia[35] and the Ontario Superior Court of Justice[36] had rejected false light claims on the facts while not definitively ruling out the existence of the tort.

Similarly, there has been little academic discussion of the applicability of false light in the Canadian context. In a short footnote in a recent article, Chris DL Hunt rejects the adoption of the tort, arguing the interest protected is reputation, not privacy, and that there is too much overlap with defamation.[37] John DR Craig, too, dismisses the tort in the Canadian context because the element of falsity clouds the privacy interests at stake. He argues that such actions are more appropriately treated as defamation actions if the reputation of the plaintiff is damaged, or as public disclosure of embarrassing facts actions if the defendant's publicity impinges on the right to be let alone.[38] Beyond this, however, few Canadian scholars have assessed the utility of the tort.[39]

The false light tort has been the most contentious of Prosser's four torts[40] with many critics denying its relevance to the protection of privacy,[41] decrying its impact on free speech,[42] and attacking its application by courts.[43] The tort has been variously labelled "conceptually empty,"[44] "amorphous,"[45] and also "over-grown."[46] False light also seems intrinsically linked to the American context, specifically the stringent restrictions on defamation actions, as the action provides a potential means to circumvent these limitations.[47] Given the significance of this context and the repeated interrogations of the tort's legitimacy in its native jurisdictional habitat, false light may not be the most obvious candidate for importation.

34. [1988] 53 Man R (2d) 78 at 80, 2 WWR 737.
35. *Silber v British Columbia Television Broadcasting System Ltd* (1985), 25 DLR (4th) 345 at 354-355, 2 WWR 609.
36. *Chandra v Canadian Broadcasting Corp*, 2015 ONSC 5303 at para 44.
37. Hunt, "Conceptualizing," *supra* note 21 at 175, n 27.
38. Craig, *supra* note 22 at 382-383.
39. Other exceptions include a short positive assessment in HJ Glasbeek, "Outraged Dignity—Do We Need a New Tort?" (1968) 6:1 Alta L Rev 77 at 79 and a one-sentence rejection of the tort as overlapping with defamation in Russell Brown, "Rethinking Privacy: Exclusivity, Private Relation and Tort Law" (2006) 43:3 Alta L Rev 589 at 593.
40. *Lake v Wal-Mart Stores, Inc*, 582 NW (2d) 231 at 235 (Minn Sup Ct 1998) [*Wal-Mart*].
41. Bruce A McKenna, "False Light: Invasion of Privacy" 15 Tulsa LJ 113 at 126.
42. Diane Leenheer Zimmerman, "False Light Invasion of Privacy: The Light that Failed" (1989) 64:2 NYUL Rev 364 at 435-451.
43. J Clark Kelso, "False Light Privacy: A Requiem" (1992) 32:3 Santa Clara L Rev 783 at 819.
44. Zimmerman, *supra* note 42 at 369.
45. *Bueno*, *supra* note 20 at 904.
46. Schwartz, *supra* note 15 at 918.
47. See Sections IV–VI, *below.*

Nonetheless, the decision in *Yenovkian* has, at least for the time being, introduced the action into Ontario, confirming earlier speculation that all of Prosser's privacy torts would eventually be recognized in the province.[48]

Justice Kristjanson's judgment in *Yenovkian* provides a relatively short justification for recognizing false light.[49] The distinct interest the action protects is "a person's privacy right to control the way they present themselves to the world."[50] According to the *Restatement*, the misrepresentation may be defamatory but does not need to be.[51] Justice Kristjanson also acknowledges the overlap with the tort of public disclosure of private facts, both in the shared elements of each action[52] (ie publicity that is highly offensive to a reasonable person) and in practice.[53] However, false light should be recognized as:

> [i]t follows that one who subjects another to highly offensive publicity can be held responsible whether the publicity is true or false. This indeed, is precisely why the tort of publicity placing a person [in] a false light should be recognized. It would be absurd if a defendant could escape liability for invasion of privacy simply because the statements they have made about another person are false.[54]

There is no reference to the debate within US jurisprudence and American legal scholarship regarding the value of the tort. Admittedly, *Yenovkian* may not have been an ideal case for such a discussion given the range of orders and causes of action involved. The case arose from an exceptionally acrimonious family law dispute in which the applicant father was found to have engaged in "outrageous and egregious conduct at the extreme of reprehensibility."[55] The applicant father was subject to a permanent restraining order[56] and an order for child and spousal support, with sole custody awarded to the mother.[57] The father was, inter alia, also ordered to pay damages for intentional infliction of mental suffering, invasion of privacy (both false light and public disclosure of private facts), and punitive damages.[58] Nonetheless, judicial innovation in extending the

48. Stephen Aylward, "The Idea of Privacy Law: Jones v Tsige and the Limits of the Common Law" (2013) 71:1 UT Fac L Rev 61 at 71. Such speculation was based on the fact that Justice Sharpe had appeared in *Jones* to embrace the entire Prosser framework (*Jones*, *supra* note 7 at para 21).
49. *Yenovkian, supra* note 8 at paras 170-174.
50. *Ibid* at para 171.
51. *Ibid.*
52. *Ibid* at para 172.
53. *Ibid* at para 174.
54. *Ibid* at para 173.
55. *Ibid* at para 197.
56. *Ibid* at para 48.
57. *Ibid* at para 206.
58. *Ibid.*

common law should be careful and considered. Before other Canadian courts choose to follow the decision in *Yenovkian*, it is vital to scrutinize the nature, history, and criticisms of the tort in the US.

II. *An analysis of the false light tort*

1. *The elements of a false light action*

a. *Publicity*

While the elements of false light bear some similarities with defamation, one difference is the degree to which the defendant must have disseminated the falsehood. Defamation under US tort law requires publication; "widespread publicity" (but not necessarily publication) has been held to be "an essential ingredient to any false light invasion of privacy claim."[59] The difference between publication and publicity has been described in the following way:

> 'Publication,'…includes any communication by the defendant to a third person. 'Publicity,' on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication…It is one of a communication that reaches, or is sure to reach, the public.[60]

As acknowledged by the Supreme Court of Alabama in *Gary v Crouch*, publicity is clearly a higher threshold than publication.[61] Information communicated to a single individual or a small group of people will not suffice. For example, publicity has been held not to have occurred when an investigative report has been handed over to a person who initiated the investigation with an instruction to keep it confidential,[62] nor when information alleging the plaintiff had misappropriated company property is passed on to a small number of individuals at a corporation and a government agency.[63] The publicity requirement, by contrast, will be satisfied by publication of the alleged falsehood in a newspaper or magazine and by broadcast on television or radio.[64] Publicity might also mean dissemination of material not to the public at large but to a

59. *Crump v Beckley Newspapers, Inc*, 320 SE (2d) 70 at 88 (W Va Supp Ct App 1984) [*Crump*].
60. *Restatement*, *supra* note 9 at § 652D.
61. 867 So (2d) 310 at 318, n 6 (Ala Sup Ct 2003).
62. *Johnston v Fuller*, 706 So (2d) 700 at 5 (Ala Sup Ct 1997).
63. *Freeman v Unisys Corp*, 870 F Supp 169 at 12 (ED Mich 1994).
64. Richard E Kaye, *Causes of Action*, vol 33, 2nd ed (Toronto: Thomson Reuters, 2007) (WL).

sufficiently large number of people, such as a letter sent to over 3,500 households as in *Parnigoni v St. Columbia's Nursery School*.[65]

In some jurisdictions, an exception has been made to the "widespread" condition for publicity where the communication is to an individual with whom the plaintiff has a special relationship.[66] However, despite being cited elsewhere,[67] the continuing validity of this exception is uncertain and another, more recent Illinois district court chose to follow Seventh Circuit precedent in adopting the much more demanding publicity standard applied elsewhere.[68]

b. *Falsehood*

False light is set apart from the other privacy torts as it requires the communication of a falsehood about the plaintiff. The plaintiff has to prove the false nature of the statement.[69] The falsehood can be defamatory but need not be.[70] The falsehood may take the form of a false description of the plaintiff, a statement falsely attributed to the plaintiff, an incorrect identification of the plaintiff as the subject of a photograph or a false implication about the plaintiff's character, proclivities or endorsement.[71] Linked to the requirement that the falsity publicized be highly offensive to the reasonable person, minor inaccuracies will not incur liability.[72] For instance, the Court of Appeals of Georgia rejected an exotic dancer's false light claim against a magazine publisher and a private club for an advertisement featuring a picture of her on the basis that the only inaccuracies contained within it were the dancer's stage name and the false implication that the dancer worked at the club being advertised.[73] A plaintiff will also not be allowed to recover when the claim centres on information they argue should have been included along with the original material communicated so long as the information publicized is "substantially true."[74] Where, however, the defendant creates "a false impression by knowingly or recklessly publicizing selective pieces of true information,"[75] the plaintiff can prove falsity. Finally, due to the constitutional protection

65. 681 F Supp (2d) 1 at 19 (DDC 2010).
66. *Poulos v Lutheran Social Services of Illinois, Inc*, 728 NE (2d) 547 at 555 (Ill App 1 Dist 2000).
67. *Duncan v Peterson*, 835 NE (2d) 411 at 423-424 (Ill App 2 Dist 2005).
68. *Davis v Jewish Vocational Service,* 2010 WL 1172537 (ND Ill).
69. Kaye, *supra* note 64.
70. David A Elder, *The Law of Privacy* (Deerfield, IL: Clark Boardman Callaghan, 1991) at 262.
71. Kaye, *supra* note 64.
72. *Rinsley v Brandt*, 700 F 2d 1304 at 1308 (10th Cir 2003).
73. *Cabaniss v Hipsley*, 151 SE 2d 496 at 503 (Ga App Ct 1966).
74. *Goodrich v Waterbury Republican-American, Inc*, 448 A (2d) 1317 at 1331 (Conn Sup Ct 1982).
75. *Santillo v Reedel*, 634 A 2d 264 at 267 (Pa Sup Ct 1993).

of opinions,[76] a false light action will not succeed where the defendant's representation is deemed by the court to qualify as an opinion.[77]

c. *Identification of the plaintiff*

The information publicized must be "concerning the other that places the other in a false light."[78] Thus, the plaintiff must be clearly identifiable in the defendant's representation. The plaintiff need not be named by the defendant,[79] and defendants may still attract liability despite a disclaimer that a piece of work is fiction.[80] If the plaintiff is a member of a group that is being placed in a false light, then a false light claim, following the precedent set in defamation actions, will only succeed if the group is "so small that the publicity can reasonably be understood as referring to that individual"[81] or if "the plaintiff can show that the circumstances of the publication reasonably give rise to the conclusion that there is a particular reference to the plaintiff."[82] While courts have generally borrowed the framework for identification from defamation actions, Elder points to one clear exception.[83] Due to the difference between publication and publicity, false light claims require that the plaintiff be identifiable to a wider group of people beyond the plaintiff's "small group of intimates."[84]

d. *Highly offensive to the reasonable person*

False light, like public disclosure of private facts, requires that the infringement of privacy be highly offensive to the reasonable person. The highly offensive requirement sets a threshold for the imposition of liability so that a false light action will not be successful "for the publication of information [is] so innocuous that notice of potential harm would not be present."[85] This is an objective standard: unusually sensitive plaintiffs will not be granted relief.[86] Kaye provides a series of illustrative categories based on cases in which the highly offensive standard was satisfied. These include where the plaintiff is described in crude and vulgar terms, where

76. *Gertz v Robert Welch, Inc*, 418 US 323 (1974) at 339-340 [*Gertz*].
77. *Cibenko v Worth Publishers, Inc*, 510 F Supp 761 at 766 (D NJ 1981).
78. *Restatement*, *supra* note 9 at § 652E.
79. In *MG v Time Warner, Inc*, 89 Cal App 4th 623 (2001), a Sports Illustrated story about sexual abuse by coaches in youth sport used a team photograph of a Little League team to illustrate the story. None of the plaintiffs were named, but the California Court of Appeal, affirming a lower court's denial of the defendant's motion to strike the complaint, found the plaintiffs had a viable claim.
80. *Muzikowski v Paramount Pictures Corp*, 322 F 3d 918 at 927 (7th Cir 2003).
81. *Michigan United Conservation Clubs v CBS News*, 485 F Supp. 893 at 904 (WD Mich 1980)
82. *Diaz v NBC Universal, Inc*, 337 F App'x 94 at 96 (2d Cir 2009).
83. Elder, *supra* note 70 at 280.
84. *Brauer v Globe Newspaper Co*, 217 NE (2d) 736 at 740 (Mass Sup Jud Ct 1966).
85. *Crump*, *supra* note 59 at 90.
86. *Godbehere v Phoenix Newspapers, Inc*, 783 P2d 781 at 786 (Ariz Sup Ct 1989).

the plaintiff's professional reputation has been impugned by a falsehood, where the plaintiff's photo or name has been published in a sexually explicit magazine, or where the defendant's representation implies that the plaintiff is a liar, has been unfaithful to their sexual partner, or has committed criminal offences.[87]

e. *Knowledge or reckless disregard as to falsity*

The requirement of knowledge or reckless disregard as to falsity in the *Restatement*'s definition reflects the extension to false light of the constitutional protection provided to free speech in defamation actions.[88] In the wake of *Gertz*,[89] it is likely that that this constitutionally required standard of fault, the "actual malice" standard, does not apply when the plaintiff is a private individual and not a public figure. *Gertz* established that states could set a lower level of fault (ie negligence) for defamation claims by private individuals provided there was no strict liability.[90] The *Restatement* takes a cautious approach as to whether a false light action can be based on the defendant's negligent falsehood.[91] However, a number of states have adopted this lower fault requirement.[92]

2. *Defences*

The defences for false light actions effectively mirror those available in defamation suits. The *Restatement* makes clear that absolute privilege defences available in defamation actions also apply fully to the privacy torts.[93] Thus, an untruthful statement made during the middle of a judicial proceeding could not be the basis for a false light claim. Consent is included in the absolute privilege defences: as long as the disputed publicity does not exceed the scope of the prior consent, it provides a full defence.[94] Similarly, conditional privilege defences are wholly imported from defamation actions.[95] A defendant is therefore able to take reasonable steps in the protection of his or her own interests, to communicate matters of common interest, and to give information to public authorities regarding a crime committed or potentially to be committed.[96] A defence of conditional privilege may be defeated if the information was communicated outside

87. Kaye, *supra* note 64.
88. See Section III-2, *below*.
89. *Supra*, note 76.
90. *Ibid* at 347.
91. *Supra* note 9 at § 652E.
92. Kaye, *supra* note 64; Zimmerman, *supra* note 42 at 392, n 173.
93. *Restatement*, *supra* note 9 at § 652F.
94. *Ibid*.
95. *Ibid* at § 652G.
96. Elder, *supra* note 70 at 313-315.

the privilege[97] or if the plaintiff can show malice or bad faith on the part of the defendant.[98] Conditional privilege in the context of defamation has been less important since the decision in *New York Times v Sullivan*[99] relocated some of its traditional functions to the constitutional protections afforded by the First Amendment.[100]

III. *The history of the false light tort in the US*

1. *An inauspicious beginning?*

Prosser's influence in the origins of the false light tort cannot be questioned: the term "false light" had not been connected to "privacy" in any reported American judgments prior to Prosser's article, but this changed in the following years.[101] However, his pioneering work in "finding" the tort has been the focal point for criticism.

Prosser's identification of false light as one of four privacy torts was based on his survey of a number of American cases in which the false light concept had, he claimed, gradually crystallised. The first false light case, though, according to Prosser was an English one: in *Lord Byron v Johnston*,[102] a publisher was prevented from selling a poetry manuscript he had falsely claimed had been authored by Lord Byron. Kelso pointedly highlights that subsequent cases have treated this as a standard passing off action in which Lord Byron sought to prevent the deceptive marketing of a good which affected his business interests.[103] Prosser's misreading of this case may not have undermined his underlying argument if the remaining American case law withstood further scrutiny. Kelso, however, critically re-examines each of the cases relied on by Prosser to substantiate his claim of increasing "independent recognition" for the false light tort.[104] Kelso argues that Prosser's survey involved substantial mischaracterization. Regardless of whether the cases are centred on fictitious testimonials in advertising, false attribution of books, articles, and ideas to the plaintiff, or unauthorized use of the plaintiff's name or picture (including in a rogue's gallery), Kelso argues that the cases were decided on various combinations of libel, commercial misappropriation, and unfair competition.[105] The emergence of a new tort through these decisions was simply "wishful

97. *Restatement*, *supra* note 9 at § 604.
98. Elder, *supra* note 70 at 315.
99. 376 US 254 (1964) [*Sullivan*].
100. Rodney A Smolla, *Law of Defamation* (Toronto: Thomson Reuters, 2018) (WL).
101. Kelso, *supra* note 43 at 783.
102. (1816), 2 Mer 28, 35 ER 851 (Ch).
103. Kelso, *supra* note 43 at 792.
104. Prosser, *supra* note 16 at 398.
105. Kelso, *supra* note 43 at 814.

thinking"[106] and "[f]alse light existed only in Prosser's mind."[107] Other critics have been less acerbic while still acknowledging Prosser's central role in identifying the tort.[108]

Kelso's forceful critique attacks the very foundation of the false light tort and is difficult to reject without replicating his re-examination of cases. The problematic beginning of the false light tort need not, however, fatally damage the case for it. Prosser may have misrepresented, intentionally or otherwise, the evidence for the prior existence of the tort, but this problematic justification does not automatically damage other forms of justification. In other words, it may be possible to legitimize the tort's existence by other means, for example by reference to a pressing need brought about by a gap in the legal protection of privacy. Related to this, the initial impetus to recognize an action may be of little significance if courts, in practice, find valid, well-considered reasons for its adoption.

2. *The spread and limits of the false light tort*

False light quickly found relatively widespread acceptance following the publication of Prosser's article and the tort's subsequent inclusion in the *Restatement* in 1967.[109] However, the spread of the tort has to be viewed in the context of the increasing restrictions being placed on defamation actions in this period.

In 1964, the US Supreme Court's decision in *Sullivan* constitutionalized the law of libel,[110] placing stringent restrictions on the ability of public official plaintiffs to recover.[111] In such cases, "actual malice," that is proof of either knowledge of the falsehood or reckless disregard in relation to it, was required. This requirement was in subsequent decisions then extended to defamation suits involving plaintiffs who were public figures.[112] For a short time, the "actual malice" requirement was extended even further to apply in all matters of "public interest" before "[t]he law then retreated to a dichotomy between defamation on matters of public concern in which the plaintiff is a public official or public figure, and defamation on

106. *Ibid* at 790.
107. *Ibid* at 787.
108. For Zimmerman, *supra* note 42 at 382, Prosser's "efforts at creative taxonomy…in a real sense 'invented' the false light tort by singling out previously unacknowledged features common to most of the nonadvertising [*sic*] appropriation cases."
109. James B Lake, "Restraining False Light: Constitutional and Common Law Limits on a Troublesome Tort" (2009) 61:3 Fed Comm LJ 625 at 637.
110. *Sullivan*, *supra* note 99.
111. Smolla, *supra* note 100.
112. *Curtis Publishing Co v Butts*, 388 US 130 (1967); *Associated Press v Walker*, 389 US 889 (1967).

matters of public concern in which the plaintiff is a private figure."[113] For plaintiffs falling into the latter category, the required level of fault must be at least negligence but varies depending on the state in which the action was initiated.[114] The decision in *Gertz* in 1974 also limited the recovery of presumed or punitive damages to claims that had satisfied the "actual malice" fault requirement.[115] On top of these restrictions, the Supreme Court established a further line of constitutional limitations impeding the ability of plaintiffs to recover.[116]

The cumulative impact of these changes was to significantly narrow the opportunities for plaintiffs seeking damages for defamation. False light was therefore often used as an alternative or supplementary means of legal redress for plaintiffs suffering reputational damage from defamatory expression.[117] Nonetheless, the limits of the tort were quickly established through two important decisions by the US Supreme Court.

In *Time, Inc v Hill*,[118] the Supreme Court considered an action for invasion of privacy based on New York's privacy statute. The reliance on the statute meant that the action was technically for commercial appropriation.[119] Nonetheless, the facts of the case were a close fit for a false light action as at the root of the action was a claim based on a non-defamatory falsehood. In September 1952, the Hill family had been held hostage for nineteen hours by three convicts on the run.[120] The story later inspired a novel loosely based on the events in which the hostage-takers behave menacingly and at times violently toward their hostages, contrary to their actual behaviour.[121] The novel was itself turned into a Broadway play the following year, and *Life* magazine published a photo essay on

113. Smolla, *supra* note 100.
114. *Gertz*, *supra* note 76 at 345-346.
115. *Ibid* at 349.
116. Amongst other factors, actual malice must be demonstrated with "convincing clarity" while appellate courts have been entitled to engage in "independent review" in relation to First Amendment cases. There has been increased use of summary review limiting severely the number of libel cases which go to a jury and the characterization of plaintiffs as public officials and public figures has been very liberally applied. See David A Anderson, "Is Libel Law Worth Reforming?" (1991) 140:2 U Pa L Rev 487 at 494-501.
117. See Section V, *below*.
118. 385 US 374 (1967) [*Time*].
119. Zimmerman, *supra* note 42 at 384.
120. Alex Alben, "Privacy and the Press—An Examination of how the Supreme Court Confused Press Freedom and False Light Privacy in Critical Cases" (2017) 28 Stan L & Pol'y Rev 13 at 3.
121. According to the Hills, the hostage-takers behaved civilly throughout, and the detention ended without further incident when the convicts left the home, although two of the hostage-takers subsequently were killed in the police's attempt to apprehend them. See Don R Pember & Dwight L Teeter, Jr., "Privacy and the Press Since Time, Inc. v. Hill" (1974) 50:1 Wash L Rev 57 at 63.

it.[122] Unlike the novel and the play,[123] *Life*'s article named the family as the subject, falsely attributed the more sensationalist elements of the novel and play to the Hills' actual experience, and printed photographs of the actors recreating scenes from the play at the Hills' former home.

Mr. Hill had originally won damages of $30,000, but the Supreme Court found narrowly in favour of Time, Inc, remanding the case for a new trial. The majority of the Court held that the constitutional protections for speech and press meant that false reports were protected from liability unless the plaintiff could prove either that the defendant knew the report was false or was reckless in his or her disregard of the truth.[124] Although the Supreme Court judgment never mentioned "false light" and instead referred to the "doctrine of fictionalization,"[125] the *Time* decision made clear that the constitutional protections established against defamation actions in *Sullivan* were applicable in privacy actions.[126]

The only other time the US Supreme Court has considered false light was in *Cantrell v Forest City Publishing Co* in 1974.[127] The action was brought by Mrs. Cantrell and her children following two stories about her in a Cleveland newspaper. Mrs. Cantrell's husband had been among the forty-four victims killed when a bridge collapsed.[128] After publishing a first story on the consequences of the tragedy on the Cantrell family, the journalist returned to the family for a follow-up without the knowledge or consent of Mrs. Cantrell.[129] The second article implied that the widow had been present during the interview and portrayed the family as living in poverty within a "dirty and dilapidated" home.[130] The Cantrells had won at trial although their claim for punitive damages was rejected by the district judge on the basis that there had been no evidence of the common law standard of malice.[131] The verdict was overturned by US Court of Appeals for the Sixth Circuit, which appeared to have considered that the required standard of fault from *Time* (ie knowledge of falsity or recklessness in disregard for the truth) had not been met and that there was no evidence of knowledge on the part of the defendant.[132] When the Supreme Court

122. *Ibid*.
123. Bryan R Lasswell, "In Defense of False Light: Why False Light Must Remain a Viable Cause of Action" (1993) 34:1 S Tex L Rev 149 at 155-156.
124. *Time*, *supra* note 118 at 387-388.
125. *Ibid* at 385, n 9.
126. McKenna, *supra* note 41 at 132.
127. 419 US 245 (1974) [*Cantrell*].
128. Zimmerman, *supra* note 42 at 388.
129. Lasswell, *supra* note 123 at 156.
130. *Cantrell*, *supra* note 127 at 248.
131. *Ibid* at 251-252.
132. *Ibid*.

considered the appeal, it found that the district judge's instructions to the jury adequately communicated that knowledge or recklessness on the part of the defendant was necessary for a verdict for the plaintiff.[133] In addition, the majority held that there was ample evidence at trial to suggest the journalist knew of the falsehoods contained within the publication and that the defendant was liable as his employer.[134] The Court, however, was unwilling to comment on whether a lower standard of fault would be constitutional.

Together, the decisions in *Time* and *Cantrell* appeared to have simultaneously confirmed the valid existence of the false light tort and established some limitations on it. For Zimmerman, however, the Supreme Court had given the false light action "a generous reception."[135] The tort indeed appeared to have been readily accommodated across different jurisdictions in the US. Reported false light actions began to multiply with Kelso recording in 1992 that there had been over 350 cases at the state level and more than 250 federal cases since Prosser's article in 1960.[136] In a number of states (New York, Virginia, Wisconsin, Nebraska, Rhode Island), privacy statutes occupied the field and prevented the recognition of additional privacy torts,[137] but where this was not the case, the false light tort appeared to gain general recognition. Whether this was due to courts recognizing a compelling case for the tort or due instead to Prosser's unique position of influence to mould American tort law according to his design is a moot point.[138] As critics of the action have shown, in many US jurisdictions, courts simply grounded the existence of the tort in its inclusion in the *Restatement* without extensive analysis of its advantages and disadvantages.[139] Moreover, it was apparent that false light's rise was

133. *Ibid* at 252.
134. *Ibid* at 253-254.
135. Zimmerman, *supra* note 42 at 392. Zimmerman is critical of the Supreme Court's judgment for not subjecting the false light action to a more extensive and rigorous examination of the state's interest in limiting free speech (*ibid* at 385).
136. Kelso, *supra* note 43 at 783.
137. Privacy actions in New York have to be based on Section 51 of the NY Civil Rights Law. See *Howell v New York Post Co, Inc*, 612 NE (2d) 699 at 703 (NY Ap Ct 1993). Similarly, Virginian courts have rejected the availability of remedy for invasion of privacy outside the available statutory protection in the state: see *WJLA-TV v Levin*, 564 SE (2d) 383 at 395, n 5 (Va Sup Ct 2002). For Wisconsin, see *Zinda v Louisiana Pacific Corp*, 440 NW 2d 548 at 555 (Wis Sup Ct 1989). The privacy statutes of Nebraska (*Nebraska Revised Statute* § 20-204 (1979)) and Rhode Island (Rhode Island General Laws § 9-1-28.1(a)(4) (2009)) explicitly recognize false light as a cause of action.
138. Neil M Richards and Daniel J Solove point out that Prosser's position as "a well-regarded torts scholar…[,] the leading treatise writer and casebook author…[and] chief reporter for the Second Restatement of Torts" allowed unique influence over subsequent privacy jurisprudence" ("Prosser's Privacy Law: A Mixed Legacy" (2010) Cal L Rev 1887 at 1890).
139. See Harvey L Zuckman, "Invasion of Privacy—Some Communicative Torts Whose Time Has

also connected to the broader context of changes in American defamation law.

3. *Turning off the false light? The growing backlash against a "nebulous"*[140] *tort*

David A Elder claimed that by 1991 "[t]he great majority of jurisdictions have found no difficulty with the false light tort under state law."[141] However, resistance to the tort had already been evident for some time. Legal scholars increasingly called for a reformulation or abolition of the tort while there were also indications of judicial reconsideration of the tort's value.

In addition to scrutiny of the origins of false light, criticisms from legal scholars have focused on a number of problems: the indistinct interests protected by the tort,[142] the overlap with other forms of action and the associated argument that false light has been used to evade defamation's procedural restrictions,[143] the chilling effect it has on free speech,[144] the vagueness of the highly offensive standard,[145] and even the difficulty in distinguishing between truth and falsehoods.[146] Later sections of this paper will explore further the first three of these critiques, but for now, it is sufficient to note that the academic re-assessment of the tort found an echo in some state courts.

In 1984, the Supreme Court of North Carolina rejected the false light tort on both practical and constitutional grounds.[147] In *Renwick*, a college dean previously involved in student admissions of African-American students sued for false light and libel following the publication of an article which, he alleged, attributed false statements to him, depicting him as "an extremist, a liar and…irresponsible in his position."[148] The Court, however, refused to recognize the false light tort due to its overlap with defamation and its negative impact on constitutionally protected free speech. Moreover, the Court speculatively asserted that the problems of a

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Gone" (1990) 47:1 Wash & Lee L Rev 253 at 255; Kelso, *supra* note 43 at 825.

140. Prosser, *supra* note 16 at 398.

141. Elder, *supra* note 70 at 264.

142. McKenna, *supra* note 41 at 116-119; Zimmerman, *supra* note 42 at 371, 432.

143. McKenna, *supra* note 41 at 130; Zimmerman, *supra* note 42 at 394; Kelso, *supra* note 43 at 846; Zuckman, *supra* note 139 at 258.

144. Zimmerman, *supra* note 42 at 435; Zuckman, *supra* note 139 at 257.

145. Zimmerman, *supra* note 42 at 374, 434.

146. *Ibid* at 406.

147. *Renwick v News and Observer Publishing Co*, 312 SE (2d) 405 at 412 (NC Sup Ct 1984) [*Renwick*].

148. *Ibid* at 409.

prying, intrusive media identified by Warren and Brandeis were in the past due to higher standards of journalistic training.[149]

The *Renwick* judgment seemed to inspire courts elsewhere to look more critically at the false light tort. Some courts, like the Supreme Judicial Court of Massachusetts in *Elm Medical Laboratory, Inc v RKO General, Inc*, swiftly dispensed with implausible claims without definitively ruling out recognition in due course.[150] Of more significance, however, were the decisions of the Supreme Courts of Texas and Minnesota in *Cain v Hearst*[151] and *Wal-Mart*[152] respectively. Each court weighed the advantages and disadvantages of false light and rejected its adoption within their respective states. In both cases, the majority agreed with the *Renwick* judgment that the action largely duplicated existing torts, notably defamation, and infringed on constitutionally protected free speech.[153] Duplication and free speech concerns were woven together to provide a catch-all justification for rejection of the tort. If false light failed to add any additional protection, then there was little reason for its existence. If, however, false light did add significantly to the protection against publicized falsehoods afforded to individuals, then it constituted an unacceptable threat to free speech.[154]

The backlash against false light in the courts has not, however, been ineluctable. Since the turn of the century, the Supreme Courts of Colorado[155] and Florida[156] have rejected the tort, but false light has also been expressly approved by courts in Tennessee,[157] Ohio,[158] Missouri,[159] and Nevada.[160] Where earlier adoption of the tort by state courts was often accomplished by rote reference to the Restatement, it is notable that the last four decisions engaged with the issues raised by other courts and academic commentary and have still found sufficient grounds to adopt the action. Nonetheless, the history of the tort in the US highlights its mixed judicial reception and its problematic relationship to the specific development of American defamation law. To assess the case for the tort's importation into Canada, the following sections address the three most potent criticisms

149. *Ibid* at 413.
150. In the words of Justice Nolan, "[t]his court has not recognized that tort and does not choose to do so now." See 532 NE (2d) 675 at 681 (1989).
151. 878 SW 2d 577 (Tex Sup Ct 1994) [*Cain*].
152. *Wal-Mart*, *supra* note 40.
153. *Ibid* at 235-236; *Cain*, *supra* note 151 at 580-583.
154. *Cain*, *supra* note 151 at 583.
155. *Bueno, supra* note 20.
156. *Rapp, supra* note 20.
157. *West*, *supra* note 20 at 645-646.
158. *Welling v Weinfeld*, 866 NE (2d) 1051 at 1057 (Ohio Sup Ct 2007) [*Welling*].
159. *Meyerkord v Zipatoni Co*, 276 SW (3d) 319 at 324 (Mo App ED 2008) [*Meyerkord*].
160. *Franchise Tax Bd. of California v Hyatt*, 335 P (3d) 125 at 141 (Nev Sup Ct 2014) [*Franchise*].

of the tort: the uncertain interests protected by the tort, its independent viability as a cause of action, and its relationship to freedom of speech.

IV. *False light as privacy tort? The interests protected*

Part of the confusion surrounding false light lies in Prosser's problematic original formulation, which identified the interest protected as being "clearly that of reputation, with the same overtones of mental distress as in defamation."[161] Prosser also suggested it often operated as a functional equivalent to defamation "affording a needed remedy in a good many instances not covered by the other tort"[162] and contemplated the prospect of false light "swallowing up and engulfing the whole law of public defamation."[163] From the outset, then, the tort's independence was in question due to the failure to locate its purpose in protecting a distinct privacy interest.[164] According to Nathan E Ray, the Supreme Court's analysis in *Time* reinforced the conflation of false light and defamation.[165] The Court grafted the constitutional restrictions for defamation onto false light without exploring whether the same interest was protected by both actions. Prosser's focus on reputation has provided ammunition for critics who contend that false light is unnecessary due to its considerable overlap with defamation. Moreover, the identification of reputation as the key interest protected has led some to question whether the tort is properly grouped with the other privacy actions.[166]

US courts have been divided, sometimes internally, about whether false light protects reputation or the right to be let alone. The majority judgments in *Renwick*[167] and in *Cain*[168] did not explicitly state that the interest protected by false light was reputation, but the action's overlap with defamation was a dominant theme of both decisions. By contrast, the dissents in both cases characterized the interest protected as a privacy interest.[169] Disagreement on this point has continued to characterize

161. Prosser, *supra* note 16 at 400. It is a curious feature of Prosser's conceptualization of the four privacy torts that he only identifies one, intrusion upon seclusion, with the protection of mental tranquility. Arguably, this interest inheres in all four actions and provides a clear rationale for grouping them together.
162. *Ibid* at 401.
163. *Ibid*.
164. See Suzanne Reynolds Greenwood, "Privacy: The Search for a Standard" (1975) 11:4 Wake Forest L Rev 659 at 668-670 for a similar critique.
165. Nathan E Ray, "Let There Be False Light: Resisting the Growing Trend Against an Important Tort" (2000) 84:3 Minn L Rev 713 at 727.
166. Ellen Alderman & Caroline Kennedy, *The Right to Privacy* (New York: Alfred A. Knopf, 1995) at 156, 195.
167. *Renwick*, *supra* note 147.
168. *Cain*, *supra* note 151.
169. *Renwick*, *supra* note 147 at 415; *Cain*, *supra* note 151 at 586.

the subsequent case law. Courts in Tennessee,[170] Ohio,[171] Missouri,[172] Nevada,[173] and Hawai'i[174] have all recognized that false light safeguards a privacy interest whereas courts in Colorado[175] and Florida[176] have found that such judgments depend on "parsing a too subtle distinction between an individual's personal sensibilities and his or her reputation in the community."[177]

Aside from its perceived proximity to defamation, Bruce A McKenna suggests a further, more philosophical, reason to doubt false light's status as a privacy action. He argues that by its very nature a false statement about an individual cannot be something he or she wanted to keep private:

> [T]he person referred to in the statement cannot intend to keep private a matter which, in her own mind, does not exist. If the statement is false, then the person about whom it is made would have no reason to be aware of its subject matter. It must be questioned, therefore, how that individual can desire to keep the subject matter of the publication a private matter.[178]

In a similar vein, Jonathan Schonsheck argues that false light is a sui generis tort, rather than a privacy one, as it does not necessarily involve an invasion of privacy and is more damaging to the victim's "social persona."[179] For Schonsheck, attempts to find logical similarity between false light and the three other privacy torts become "contorted, strained, even paradoxical."[180] These arguments are not especially convincing. An individual may desire to keep their private affairs hidden from public view: any publicity given to these affairs, even if false, is still an affront to the individual's dignity. In addition, the person affected by a false representation of their private affairs may think it necessary to correct the public record, thus requiring him or her to make an unwanted public statement. In this way, it could be argued that the individual's interest in privacy has been compromised twice.

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170. *West*, *supra* note 20 at 645-646.
171. *Welling*, *supra* note 158 at 1057.
172. *Meyerkord*, *supra* note 159 at 324.
173. *Franchise*, *supra* note 160 at 141.
174. *Chung v McCabe Hamilton & Renny Co, Ltd*, 128 P (3d) 833 at 848 (Hawai'i Sup Ct 2006).
175. *Bueno*, *supra* note 20 at 902.
176. *Rapp*, *supra* note 20 at 1109.
177. *Bueno*, *supra* note 20 at 902.
178. McKenna, *supra* note 41 at 126.
179. "The Unrelenting Darkness of False Light: A Sui Generis Tort" in Ann E Cudd & Mark C Navin, eds, *Core Concepts and Contemporary Issues in Privacy*, AMINTAPHIL: The Philosophical Foundations of Law and Justice, vol 8 (Cham: Springer, 2018) at 97.
180. *Ibid* at 103.

Rather than define false light by its protection of reputation, it seems more appropriate to ground false light in the protection it accords individual privacy.[181] While defamation concerns an objective, external reputational interest, "[i]n privacy cases the interest affected is the subjective one of injury to [the] inner person."[182] How this is more precisely delineated, however, has been the subject of considerable academic contention. Ken Gormley suggests four definitional clusters emerging from the literature: (1) privacy as "an expression of one's personality or personhood, focussing upon the right of the individual to define his or her essence as a human being"; (2) privacy as an issue of autonomy, "the moral freedom of the individual to engage in his or her own thoughts, actions and decisions"; (3) privacy as the control of information about oneself; and (4) "mix and match" definitions that conceptualize privacy as in terms of multiple key elements.[183] Gormley's catholic approach, finding value in each of these competing definitions, is adopted here as it provides a broad analytical framework capturing the key conceptual dimensions of privacy.[184]

The four definitional clusters outlined by Gormley suggest a clear basis for justifying the false light action by its protection of privacy interests. While the third approach—the right to determine whether, how much, when and with whom personal information is shared with others—is most obviously engaged by false light claims, the first two definitions also have some relevance. An individual's right to express their personality is arguably infringed by widely disseminated falsehoods. The disjuncture between their self-expression and others' characterization of them will likely diminish their reputation externally, but the publicly known falsehoods may also cause an internal injury if it limits or distorts their capacity for self-expression. The right to autonomy is also circumscribed by publicized false claims as it constrains the freedom to think, act and make decisions: the subject of a publicized falsity is forced into a decision about whether and how to respond.[185]

Determining the interest protected by false light as the right to privacy provides the tort with a stronger foundation. Not only does this help dispel concerns that the action overlaps too extensively with defamation, it also provides a stronger justification for recovery in non-defamatory false

181. Lasswell, *supra* note 123 at 170; McKenna, *supra* note 41 at 127.
182. Thomas I Emerson, "The Right of Privacy and Freedom of the Press" (1979) 14:2 Harv CR-CLL Rev 329 at 333.
183. Ken Gormley, "One Hundred Years of Privacy" [1992] Wis L Rev 1335 at 1337-1338.
184. *Ibid* at 1339.
185. Greenwood, *supra* note 164 at 688.

light cases based on incorrect laudatory statements about a plaintiff.[186] If false light protects reputation, then recovery for reputational damage in such cases could only be rationalized when the falseness of the laudatory statement was already known. Where the falsity of the representation of the plaintiff was not widely known, then it is impossible to claim reputational damage. Obviously, the false light claim would itself expose incorrect positive statements about the plaintiff, but basing a claim for reputational damage on the damage incurred by the claim being made hardly seems like sound logic. A more coherent approach recognizes that the injuries sustained are first and foremost internal, as violations of privacy rights.

V. *False light as a viable independent cause of action?*

According to its critics, a major problem with the false light tort is that it adds little to existing common law remedies. Its superfluous nature, it is alleged, can be seen in the significant amount of overlap with other causes of action, evident in the fact that false light rarely stands as an independent cause of action and that recovery for false light alone is even rarer. This section examines these arguments and, by outlining contrasting categories of false light cases, highlights the differences between a broad conception of false light, featuring significant intersection with other tort actions, and a narrower conception emphasizing false light's discrete nature. The latter, it will be argued, is most suitable if the tort were to be imported into Canada.

Section II highlighted that false light shares important elements and defences with defamation while the interests protected by the tort have sometimes been identified as reputational as shown in section III. Given this fundamental similarity, it is not surprising that in practice false light and defamation actions have often been combined where allowed.[187] Such overlap can be criticized for judicial inefficiency, but perhaps more problematic is the use of false light, a tort "relatively unencumbered by common law restrictions,"[188] to circumvent the strict limitations placed on defamation actions. Where a defamation action is barred by the statute of limitations, false light may provide an alternative means of relief.[189]

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186. See *West*, *supra* note 20 at 646.

187. Courts have often adopted a critical attitude towards plaintiffs' attempts to initiate defamation and false light claims together. For instance, in California, the plaintiff, if initiating actions for both defamation and false light, must include a claim for a non-defamatory statement; if it does not, the false light claim is subsumed into the defamation action. See *Dworkin v Hustler Magazine Inc*, 867 F (2d) 1188 at 1193 (9th Cir 1989).

188. Zimmerman, *supra* note 42 at 394; See also Lake, *supra* note 109 at 638.

189. For instance, the Court in *Rinsley v Brandt*, 446 F Supp 850 at 858 (D Kan 1977) rejected adopting the one year limit on defamation actions due to the separate nature of the false light tort.

Defamation defences have also not always been consistently applied to false light actions by courts.[190] For some authors, this is particularly concerning given the potential chilling effect of any action imposing liability for expression.[191] Both Elder and Wade make the case that the use of false light to evade the stringent restrictions on defamation is a positive feature of the tort,[192] but proponents of this view are in the minority and their opinion is not shared by most courts.[193]

Kelso's exhaustive review of false light case law since Prosser's article (ie 1960–1992) indicates that the category of false light claims where defamation was also pleaded is the single largest class of false light cases.[194] The relatively small subset of such cases in which the plaintiff was awarded damages or where an appellate court allowed the case to advance to trial do not prove false light's independent existence as "the false light claim in each case added absolutely nothing to the plaintiff's recovery."[195] False light was also judged to not augment plaintiffs' claims when paired with appropriation and/or intentional infliction of emotional distress.[196] The final stage of Kelso's study examines cases in which a false light claim standing alone was the basis for recovery or for the trial proceeding. Cases within this very small subset of false light claims are more accurately characterized, according to Kelso, as defamation or intentional infliction of emotional distress claims or a combination of both. Kelso's study, therefore, raises strong doubts about the independent viability and value of false light.

An alternative way to explore this issue is to look at different attempts to group together false light claims. Based on a thorough examination of existing US case law, Elder identifies nine types of false light actions. False light claims have been made based on publicity containing alleged falsehoods which:

1. implicitly or explicitly portray the plaintiff as implicated in, suspected of, and/or linked to criminal conduct[197];

190. Lake, *supra* note 109 at 626.
191. See Section V, *below*.
192. Elder, *supra* note 70 at 263; John W Wade, "Defamation and the Right of Privacy" (1962) 15:4 Vand L Rev 1093 at 1120-1122.
193. For instance, most courts have imposed the defamation limitations period on false light claims. See Kelso, *supra* note 43 at 858.
194. *Ibid* at 835.
195. *Ibid* at 838-839.
196. *Ibid* at 851, 855.
197. Elder, *supra* note 70 at 285.

2. portray the plaintiff as taking part in sexually promiscuous conduct or conduct otherwise perceived as immoral[198];
3. include a picture of, or story about, the plaintiff in a pornographic or other scurrilous publication[199];
4. impute or imply behaviour which, though "unethical, dishonest, disreputable or exceptionally unseemly," falls short of criminal [200;]
5. create a negative impression about the plaintiff with respect to his or her profession, office or business[201];
6. inaccurately represent the plaintiff's financial condition, regardless of whether the plaintiff was a business-person or merchant[202];
7. depict the plaintiff, who has been the victim of a crime or is in some other way worthy of sympathy, as pathetic or ridiculous[203];
8. misuse the plaintiff's name in a non-commercial context, imputing to him or her false beliefs, legal or political affiliation or involvement, or status as a litigant, critic or candidate[204]; or
9. use the plaintiff's name or picture in some form of advertising for the defendant's business or product.[205]

These nine illustrative categories covering the "spectrum of exposures of the public self"[206] give a strong indication of both the breadth of previous false light claims and the substantial overlap with other tort actions. Many of these categories (for instance, 1, 2, 4 and 5) could potentially give rise to a defamation action in addition to, or in place of, a false light claim, while the final two types of action seem closer to the appropriation privacy tort. In addition, a plaintiff in one of these nine scenarios may also be able to make a claim for intentional infliction of emotional distress depending on the gravity of the distress suffered, the defendant's behaviour amounting to "extreme and outrageous conduct,"[207] and the jurisdiction.

In contrast to Elder's categorization, Schwartz's classification is not so much an attempt to gather previous false light claims into coherent groups

198. *Ibid* at 286.
199. *Ibid* at 287.
200. *Ibid* at 291.
201. *Ibid* at 292.
202. *Ibid* at 293.
203. *Ibid* at 294.
204. *Ibid* at 295.
205. *Ibid* at 296.
206. Tom Gerety, "Redefining Privacy" (1977) 12:2 Harv CR-CLL Rev 233 at 256.
207. *Restatement*, *supra* note 9 at § 46.

as to locate the discrete essence of false light. He argues that false light should be limited to publicizing non-disparaging falsehoods about the plaintiff[208] and suggests four non-exhaustive categories in which false light properly applies: (1) where the defendant publicizes false non-defamatory claims about the plaintiff's private life[209]; (2) where the defendant makes false claims about the "deeply personal thoughts or emotions of the plaintiff"[210]; (3) where the defendant depicts the plaintiff as "severely victimized by a variety of circumstances"[211]; and (4) where the defendant makes false laudatory claims about the plaintiff.[212] Both the *Cantrell* and *Time* decisions fall within the third category and *Cantrell* can also be situated in the second group. A case such as *Eastwood v Superior Court*,[213] in which Clint Eastwood sued for false light based on publicized false accounts of his romantic entanglements, provides an example of the first. As the alleged relationship depicted did not involve infidelity by either party, it would be difficult to establish reputational damage, but clearly there is an invasion of privacy. An example of the final category would be an unauthorized biography that makes false laudatory claims of its subject such as in *Spahn v Julian Messner, Inc*.[214]

Canadian courts considering adopting the false light tort would face the choice between the broad version of the tort with hazy definitional boundaries and substantial overlap with other claims and a minimal version that provides a cause of action for scenarios not covered by defamation. As a novel cause of action, it is easier to justify the latter. To adopt the *Restatement's* definition of false light would mean accepting a more vaguely defined tort characterized by considerable overlap with existing causes of action. A clear risk entailed in this option would be duplication resulting in judicial inefficiency. The evidence from Kelso's study indicates that the vast bulk of false light actions, at least until 1992, could have been framed as another cause of action. A narrower false light tort avoids this replication while still providing recovery for situations where the publicity given to a non-disparaging falsehood constitutes a significant invasion of the plaintiff's privacy. Undoubtedly, a major reason for the proliferation of false light claims in the US context has been the tightening of defamation rules.[215] As defamation remains a viable option for plaintiffs

208. Schwartz, *supra* note 15 at 892.
209. *Ibid* at 893.
210. *Ibid* at 894.
211. *Ibid* at 895.
212. *Ibid*.
213. 149 Cal App (3d) 409 (Cal Ct App 1983).
214. 233 NE (2d) 840 (NY Ct App 1967).
215. Lake, *supra* note 109 at 638.

in Canada, there is less functional need to provide an alternative method of legal recourse. For these reasons, then, a narrow version of the false light tort is preferable.

It remains to be seen, however, whether this narrow version of false light services an actual need in society and whether the privacy interests violated are sufficiently serious to warrant extension of the common law. The narrow definition of false light grounded in the right to privacy suggested here helps minimize the overlap with other causes of action and as such, establishes a stronger claim for its distinctiveness. What it does not establish is that the privacy interests involved are suitably widespread to warrant legal recognition. The limited evidence of distinct false light cases identified in Kelso's study does not substantiate a need for this novel cause of action. Furthermore, the nature of the privacy interest infringed may itself not be worthy of protection. A recurrent concern even mentioned by Prosser is that the tort may encourage the initiation of trivial claims.[216] The "highly offensive to a reasonable person" standard may help to limit frivolous claims succeeding, but if applied strictly would work to shrink further the number of viable false light actions.

VI. *False light and free speech: A chilling effect?*

This section assesses the extent to which false light potentially impinges on free speech through an exploration of the contrasting approaches to free speech in the American and Canadian contexts and the specific mechanism by which false light could have a chilling effect. Although the adoption of false light in Canada would probably not give rise to the same level of concern, the chilling argument cannot be entirely disregarded, particularly for media organizations.

As shown earlier, changes in American defamation law in the 1960s and 1970s significantly restricted the ability of plaintiffs to recover. Despite this, David A Anderson argues that the "remnants of American libel law" still have a chilling effect due to the interaction of a constitutionally permissive regime encouraging publishers to libel, the small but extant possibility of a large jury award incentivising plaintiffs, and costly and protracted litigation.[217] However, from a comparative perspective, US legal protection of free speech is extremely strong.[218] At least some of the free speech anxiety expressed in academic and judicial commentary about false light seems attributable to this very particular framework. For instance, Zimmerman's contention that false light has "a severe chilling

216. Prosser, *supra* note 16 at 401.
217. Anderson, *supra* note 116 at 487, 550.
218. See eg *Grant v Torstar Corp*, 2009 SCC 61 at para 85 [*Grant*].

effect on the communication of accurate information"[219] is perhaps only comprehensible in the US context.

The purported chilling effect of false light would likely be less of a concern if the tort was imported into Canadian jurisdictions. A repeated theme of Canadian jurisprudence has been that individual rights are not absolute and this is equally true of freedom of speech.[220] Freedom of expression is protected in Canada by section 2(b) of the *Canadian Charter of Rights and Freedoms*, but this right is qualified by section 1 of the *Charter*, which allows that *Charter* rights can be subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[221] While the *Charter* does not apply directly to the common law when the dispute is between two non-governmental actors,[222] the Supreme Court of Canada has made clear that the common law has to be interpreted in a manner consistent with *Charter* principles.[223] Accordingly, in recent years the common law of defamation has been modified to allow greater protection for freedom of expression on public interest issues. The Supreme Court, in *Grant*, recognized a new defence of "responsible communication on matters of public interest" in defamation actions[224] while in *WIC Radio Ltd v Simpson*, the Court expanded the availability of the fair comment defence by clarifying that the defence was to be assessed according to an objective standard, that is whether on the proven facts anyone could honestly have expressed the defamatory comment.[225] However, despite the expanded defences available to defendants, the law of defamation is still much more plaintiff-friendly in Canada than in the US.[226]

The difference between the approaches to free speech in the American and Canadian contexts can be seen in the contrasting attitudes towards balancing freedom of expression against other concerns. In the Canadian context, this is a recurrent feature of Supreme Court of Canada judgments which have "recognized that the values of individual reputation, emotional security and privacy protected by civil responsibility for libel should be

219. Zimmerman, *supra* note 42 at 370.
220. See eg *Grant*, *supra* note 218 at para 2.
221. Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
222. *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174.
223. *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 91, 126 DLR (4th) 129 [*Hill*].
224. *Grant*, *supra* note 218 at para 7.
225. 2008 SCC 40 at paras 49-51 [*WIC Radio*].
226. Mitchell Drucker, "Canadian v. American Defamation Law: What Can We Learn from Hyperlinks" (2013) 38 Can-USLJ 141 at 142, 150; Adrienne Stone, "Defamation of Public Figures: North American Contrasts" (2005) 50:1 NYL Sch L Rev 9.

given equal weight with the values of democratic self-governance and truth finding that are protected by freedom of expression."[227] By contrast, similar balancing exercises undertaken in the past by the US Supreme Court have been much more controversial for, among other things, not giving meaningful content to the First Amendment.[228]

The different approach to free speech issues in the two countries suggests that, were the false light tort to be adopted in Canada, anxiety about its chilling effect would likely be less pronounced. Where such concerns were raised by defendants, courts could fall back on a balancing exercise weighing the quasi-constitutional privacy interest[229] of the plaintiff with the defendant's right to free expression. In other words, the tension between the two rights at stake in a false light case would not in itself be a reason to reject the tort's adoption.

The chilling effect argument, though, cannot be rejected entirely. One objection against false light is that it would encourage much greater conservatism on the part of media organizations as from an editorial standpoint, false non-defamatory statements are difficult to identify.[230] News stories that injure the reputation of the plaintiff can be easily recognized prior to publication and their claims subjected to close scrutiny. Reporting that presents its subjects in a neutral or positive manner does not raise such concerns and so liability for false light claims can be avoided only by "laboriously checking the accuracy of *all* statements of fact about individuals presented by the reporters and researchers."[231] Such a development would strain the capacity of many media organizations, particularly at a point when journalism is acknowledged by many to be in crisis.[232] Recent Supreme Court of Canada decisions have pointed

227. Peter A Downard, *The Law of Libel in Canada*, 4th ed (Toronto: LexisNexis, 2018) at 26-27. For examples of this, see *Hill*, *supra* note 223 at para 107; *WIC Radio*, *supra* note 225 at para 2; *Grant*, *supra* note 218 at para 46.

228. Thomas I Emerson, "Toward a General Theory of the First Amendment" (1962) 72:5 Yale LJ 877 at 913-914; Laurent B Frantz, "The First Amendment in the Balance" (1962) 71:8 Yale LJ 1424 at 1443.

229. *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at paras 24-25 [*Lavigne*].

230. Zuckman, *supra* note 139 at 257.

231. *Ibid* [emphasis in original].

232. Victor Pickard, "Can Government Support the Press? Historicizing and Internationalizing a Policy Approach to the Journalism Crisis" (2011) 14:2 Communication Rev 73.

to the fundamental role of freedom of expression[233] and the integral role played by the communications media in Canadian democracy.[234] While this freedom must be balanced against the quasi-constitutional right to privacy recognized in *Lavigne*,[235] the chilling risk posed by false light may be too great, particularly given the concerns identified earlier that the specific privacy interest being protected is neither sufficiently widespread nor serious enough to warrant legal protection.

Conclusion

The false light tort has not been extinguished in the US despite a growing movement against it in the 1980s and 1990s. Since the turn of the century, state courts have continued to adopt the tort and Prosser's privacy tort framework remains the primary point of reference for American discussion of privacy protection under the common law. The decisions in *Jones* and *Doe* signalled a new openness to Prosser's privacy torts on the part of Ontario courts with the recognition of false light in *Yenovkian* a further step in this direction. However, before other Canadian common law courts embrace false light, they should consider whether the tort is truly necessary in the Canadian context. The history and development of the tort in the US highlight uncertainty over the interests false light protects and concern about its impact on free speech. The action's substantial overlap with defamation is also important: the growth of false light claims is clearly connected to the specific American context, that is the increasingly restrictive parameters of defamation law in the US. These criticisms can be blunted by reframing the tort to protect privacy interests, not reputation, and by permitting relief only where the publicly communicated information about the plaintiff is non-defamatory. The regular use of false light in conjunction with, or in place of, defamation and appropriation actions can be avoided by establishing a more coherent version of the tort that provides protection only in scenarios unlikely to be covered by other causes of action.

Yet, it remains uncertain, even in a world of routine privacy infringements, whether there is a sufficient need for such an action. Genuine false light cases are relatively rare, and it is questionable whether the violation of privacy involved in such fact patterns rises to a level requiring legal remedy. Furthermore, recognizing potential liability for

233. *Grant*, *supra* note 218 at paras 1, 42.
234. *Ibid* at para 52.
235. *Lavigne, supra* note 229 at paras 24-25.

non-defamatory expression, though less likely to cause consternation in the Canadian context, may still unduly hamper the work of the media. Together, these factors strongly favour judicial conservatism and courts facing false light claims should reject. Novel torts should not be recognized too hastily as "[d]octrinal limbs too swiftly shaped, experience teaches, may prove unstable."[236]

236. Ruth Bader Ginsburg, "Speaking In A Judicial Voice" (1992) 67:6 NYU L Rev 1185 at 1198.