

When 'Big Brother' turns out to be your neighbor

By: Alex G. Philipson January 30, 2014



Living in the 21st century can be a pain in the neck. The more we look down at our smartphones, the more we have to look over our shoulders. All this stooping and twisting is taking a toll.

Who's to blame? To read the news of late, the powers that be. Hardly a week goes by without some revelation about the National Security Agency's snooping on American citizens. And more locally, the police use people's cell-site

location information to track them without probable cause.

When the authorities invade our privacy, it's creepy. But it isn't personal. What, then, if the offender is not an anonymous government agent but someone closer to home? What if the prying eyes are those of your neighbor? Civilian spying may not offend the Constitution, but it can offend our sensibilities in ways even more disturbing than those of the NSA.

Long before video cameras became widely commercially available, and homeowners began using them to monitor their property, the home-security tools of choice were burglar alarms, dogs and floodlights. Though less invasive than a camera, each had the potential to disturb the neighbors. For instance, a poorly positioned floodlight could give the impression of a whole-house interrogation. As a kid, I knew this firsthand.

In the Chicago neighborhood where I grew up, our backyard abutted another directly behind ours. For years, our families coexisted peacefully. But in 1976, our neighbor moved. The new neighbor installed a floodlight that lit up more than just his backyard; it sent a blinding light into our kitchen. The brightness was irritating, but the fix was easy: He just lowered the floodlight's aim.

But what if the neighbor had installed a video camera instead of a floodlight? And what if he had aimed the camera at our house to intimidate us? Might that have constituted an invasion of our privacy? What does it take to transform a modern-day inconvenience into an actionable tort?

Shortly, the Supreme Judicial Court will take up those questions in the case of *Polay, et al. v. McMahon* (SJC-11460).

The backdrop of the case is familiar enough. The parties resided across the street from each other in a typical neighborhood of single-family homes. But unlike the ordinary frictions that can accompany living in close proximity, their familiarity bred more than just contempt — it spawned all-out litigation.

The defendant allegedly colluded with other neighbors to drive the plaintiffs out of the neighborhood. Baseless criminal complaints and harassment-prevention orders were filed against the plaintiffs. The defendant installed multiple video-surveillance cameras on his house and pointed them at the plaintiffs' property. The cameras, it was asserted, recorded the plaintiffs' house, yard and street 24 hours a day.

In the lawsuit, the plaintiffs claimed an invasion of their privacy, under G.L.c. 214, §1B. But a judge in the Superior Court dismissed the claim. Because anyone walking down the street could have seen what the defendant's cameras captured, he reasoned, no invasion of privacy occurred. That the surveillance was part of a campaign of intimidation did not enter into the court's analysis.

The case is now before the SJC. The court has never before addressed whether inter-neighbor surveillance can violate G.L.c. 214, §1B.

Had the story unfolded in my hometown of Chicago, the result would have been clear at the appellate level. The plaintiffs would have lost.

In the Illinois case of *Schiller v. Mitchell*, 828 N.E.2d 323, 325-329 (Ill. App. Ct. 2005), the defendant (as in *Polay*) conducted 24-hour video surveillance of the plaintiff's property and filed frivolous criminal charges and civil grievances. But because the plaintiff did not allege that the surveillance caught any private activity that a passerby could not have seen, the court held that no tortious invasion of privacy occurred. *Id.* at 327-329.

The court thought it irrelevant that the defendant's surveillance was meant to harass the plaintiff. All that mattered was that the cameras recorded only areas visible to the public. *Id.* The same rationale governed a case from Indiana with similar facts. See *Curry v. Whitaker*, 943 N.E.2d 354, 356-359 (Ind. Ct. App. 2011).

Thus, when it comes to privacy rights, Illinois and Indiana share more than just a border.

Should the result be different in Massachusetts? If our privacy jurisprudence is to be followed, then yes. The reason is that here, unlike in the Midwest, why a defendant invades a plaintiff's privacy — not simply where the invasion takes place — is important.

Even if a defendant does not intrude on an area that a plaintiff reasonably intends to keep private, the defendant can still violate G.L.c. 214, §1B, if the purpose of the intrusion is to harass or intimidate the plaintiff. See *Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 409 Mass. 514, 519, 521 (1991); *Ellis v. Safety Ins. Co.*, 41 Mass. App. Ct. 630, 637-638 (1996); *DiGirolamo v. D.P. Anderson & Assocs., Inc.*, 1999 WL 345592, at *2-5 & n.3 (Mass. Super. Ct. May 26, 1999); *Cook v. WHDH-TV, Inc.*, 1999 WL 1327222, at *5 (Mass. Super. Ct. March 4, 1999).

Massachusetts is not alone in this view. In Vermont and Rhode Island, too, the motivation for a defendant's intrusion on a plaintiff's seclusion is germane. See *Pion v. Bean*, 833 A.2d 1248, 1251-1259 (Vt. 2003) (inter-neighbor surveillance tortiously invaded plaintiff's privacy despite lack of intrusion into plaintiff's house where purpose of surveillance was to intimidate); *Swerdlick v. Koch*, 721 A.2d 849, 856-858 (R.I. 1998) (no tortious invasion of privacy where inter-neighbor surveillance was motivated by defendant's legitimate concern that plaintiff illegally operated a business from home, and where plaintiff did not claim personal harassment). New Englanders, it seems, prize their privacy more highly than do Midwesterners.

Still, no matter what part of the country one calls home, the line separating the public and private spheres is blurrier than ever before. Surveillance cameras dot practically every urban street corner; cellphones come standard with photographic capabilities; and almost no building or road has escaped worldwide public display, thanks to Google's "Street View" feature of Google Maps.

With all of these eyes on us, have our reasonable expectations of privacy changed? Is this heightened scrutiny the price we pay of living in a technologically advanced age?

The judge who dismissed the privacy claim in *Polay* thought so. For him, today's surveillance society has pushed privacy rights firmly behind closed doors; if it isn't hidden from view, it isn't private. And there is some support for that idea. At least one court has held that Google's photographing of private homes for publication on the Web does not tortiously invade a homeowner's privacy. See *Boring v. Google, Inc.*, 362 Fed. Appx. 273, 279-280 (3d Cir. 2010).

But that case involved only a single photograph of a plaintiff's home taken for purposes of an online map application. That's far different from what allegedly happened in *Polay*. There, a neighbor living directly across the street from the plaintiffs videotaped the plaintiffs' property on a continuous basis, 24 hours a day, as part of a pattern of harassment.

Neighbor-on-neighbor surveillance turns community living on its head. Support is what we want from the folks living on our block, not suspicion. At our best, we trust the family next door with a spare key to our house in case of an emergency; we help each other dig out from heavy snowfalls; and we band together over issues of communal safety and welfare. How unsettling, then, when the neighbor you hope will look out for you instead only looks at you.

Sure, we must demand that the government respect our privacy. But we also must show that respect for each other.

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