Privacy Tort, Where Art Thou?

Gayle Hill compares the recent UK rejection of a tort of privacy with Australian developments in the area.

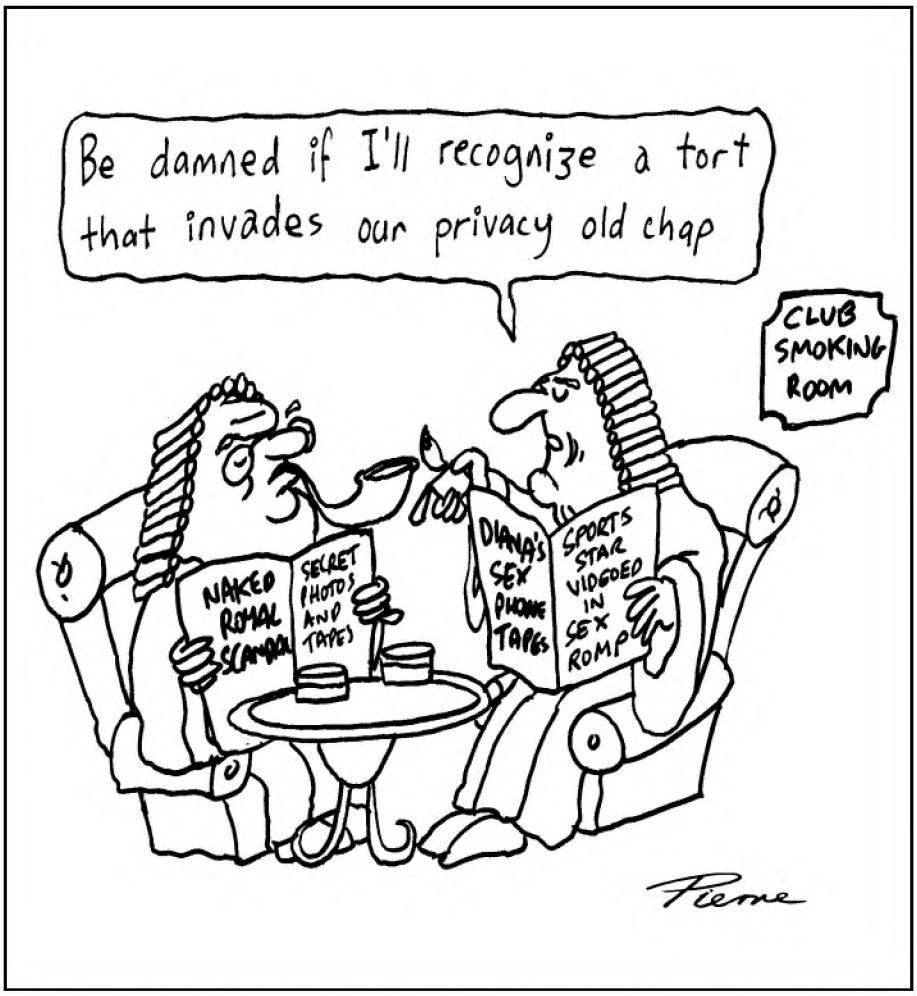
In a development that may be contrasted with the Queensland District Court case of *Grosse v Purvis*[1], the House of Lords in the United Kingdom has refused to recognise a specific tort of invasion of privacy.

Unlike the Australian case which involved a factual scenario in which the defendant's conduct was likened to stalking, the UK case of *Wainwright and another v Home Office*[2] which was decided on 16 October 2003 was brought by relatives of a person being held in custody pending trial. On a visit to the prison, the mother and brother of the accused were strip searched. The searches were not conducted in accordance with the prison's rules:

- both were asked to uncover all of their bodies at once (not expose the upper half then the lower);
- consent forms were not given until after the strip search had been performed;
- the room used to search Mrs Wainwright had an uncurtained window through which she was able to be seen from the street; and
- Alan Wainwright's armpits and genitals were examined by prison officers contrary to the prison rules for strip searches.

Mrs Wainwright suffered emotional distress but no recognised psychiatric illness. Alan, who had physical and learning difficulties, was so severely affected that he suffered post-traumatic stress disorder. Counsel for the defendant conceded that touching Alan's genitals, namely pulling the foreskin of his penis back ostensibly to search for drugs, was a battery.

The Judge at first instance held that the searches could not be justified as a proper exercise of statutory power because the searches were an invasion of privacy in excess of what was necessary and proportionate and because the prison authorities had failed to abide by their own rules. Although agreeing with the second but not the first reason, the Court of Appeal confirmed that the searches were not protected by statutory authority. However, in order to be successful in their claim, the Wainwrights needed to establish a cause of action.



The Judge held there were two such causes of action based on trespass. His Honour reasoned in part that the law of tort should provide a remedy for distress caused by an infringement of the right of privacy protected by Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (the ***Convention***), even though the UK *Human Rights Act 1998* had not come into force at the time of the strip searches. The Court of Appeal did not agree and set aside the decision except in relation to the battery against Alan Wainwright.

In considering the proposition that there is a tort of invasion of privacy, the House of Lords reviewed the development of the jurisprudence of privacy in the United States of America into four loosely linked privacy torts and, on that basis, questioned its value because it is such a high level generalisation.

The invitation to declare that since 1950, at the latest, there has been a previously unknown tort of invasion of privacy was rejected. Lord Hoffmann differentiated between identifying privacy as a value underpinning the law and privacy as a legal principle in itself. Freedom of speech was given as another example of a value, rather than a legal principle, which is not capable of 'sufficient definition to enable one to deduce specific rules to be applied in concrete cases'.[3]

The House of Lords considered a number of previous cases in which individuals' privacy was alleged to have been violated. According to Lord Hoffmann, the difficulty was not so much in formulating general propositions prohibiting, for example, telephone interception, surveillance, taking and publication of photographs, use of film from CCTV cameras, publication of private marital and medical information, but in articulating the circumstances in which such intrusions ought to be permissible. Because this weighing of competing public interests required detailed rules and not broad common law principles, the legislature and not the courts should provide the remedy – just as the legislature had done following a number of other cases in which the law had provided no remedy.

The House of Lords refused to interpret the comments of Sedley LJ in the recent case involving the unauthorised publication of wedding photographs of Catherine Zeta-Jones and Michael Douglas (*Douglas v Hello! Ltd)* as advocating the creation of a high level principle of invasion of privacy. Nor was the adoption of a high level principle of privacy necessary to comply with article 8 of the Convention. Furthermore, the coming into force of the *Human Rights Act* was regarded as weakening the argument in support of such a principle because of the statutory remedies subsequently provided by that Act.

Lord Scott of Foscote, who delivered a separate judgement, agreed fully with Lord Hoffman but also indicated that he would have been receptive to an argument that the Judge's original award of damages to Alan Wainwright should not have been reduced and that the aggravated damages was 'distinctly on the low side'[4]. Clearly, Lord Scott was disturbed by the nature of the search endured by Alan Wainwright which he said 'constituted as gross an indignity as can be imagined'[5] and the absence of any possible justification 'allows the inference to be drawn that it was a form of bullying, done with the intention to humiliate'[6].

Regardless, the Lords held as a matter of principle that the unjustified infliction of humiliation and distress does not, without more, constitute a tort at common law.

The Lords noted that prior to the enactment of the *Protection from Harassment Act 1997*, there was no tort of intentional harassment giving a remedy for anything less than physical or psychiatric injury.

Although various remedies may have been developed for situations in which claimants are allegedly aggrieved by an invasion of what they regard as their privacy (for example, misuse of confidential information, certain types of trespass and nuisance), the House of Lords was unanimous that the common law in the UK has not developed an overall remedy for the invasion of privacy. Lord Scott left open the question whether the conduct inflicted on Mrs Wainwright, which did not involve a battery, should be regarded as tortious had it occurred now that the UK Human Rights Act is in operation. That question will have to be decided if, or when, such a case arises.

It seems curious that the House of Lords would have found it too difficult to frame broad common law principles for a tort of privacy. Senior Judge Tony Skoien of the Queensland District Court managed quite comfortably to do so in *Grosse v Purvis*. Had the appeal in *Grosse v Purvis* proceeded rather than being discontinued, there is much in the House of Lords decision that could have provided bases for further legal argument.

Judge Skoien held that an individual can recover damages for mental, psychological or emotional harm, including embarrassment, hurt, distress and post traumatic stress disorder where 'a willed act of another intrudes on their privacy or seclusion in a manner which would be considered highly offensive to a reasonable person'[7]. He also held that damages could be awarded for any enforced changes of lifestyle caused by such an intrusion upon a person's privacy or seclusion. His Honour was quite comfortable in holding that a defence of public interest should be available but, as no such concept arose from the facts of *Grosse v Purvis*, the articulation of that defence was left to be developed in subsequent cases.

Judge Skoien also stated that, separate and distinct from the tort of invasion of privacy, an action for 'harassment' is a possible developing tort in Australia.

Lord Hoffmann, on the other hand, took the view that:

> 'In institutions and workplaces all over the country, people constantly do and say things with the intention of causing distress and humiliation to others. This shows lack of consideration and appalling manners but I am not sure that the right way to deal with it is always by litigation.'[8]

As a result of the House of Lords decision in *The Wainwrights' case*, the public in the UK have been left without much prospect of a tort of privacy being recognised by the courts. That position is in stark contrast to the developments occurring in other Commonwealth countries such as Australia, New Zealand and Canada. Hopes of further developments in the law of privacy were dealt a double blow by the release on the day preceding the decision in *Wainwright* of the UK Government's response to the *Fifth Report of the Culture, Media and Sport Select Committee on Privacy and Media Intrusion*.[9]

In its response, the UK Government declined to accept many of that report's recommendations, instead taking the view that current legislation is adequate to protect the privacy of individuals and that self regulation is the preferred approach. Rather than the report providing an impetus for some action on its behalf, the UK Government's response is to view the report as opening the debate on how the regulatory system could be improved. The UK Government believes that 'such debate is healthy and constructive, and that it should lead to a positive outcome'.[10] Privacy advocates, practitioners and the hapless public are left to wonder how endless debate without resolution can remain 'healthy and constructive'.

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1 [2003] QDC 151.
2 [2003] UKHL 53.
3 [2003] UKHL 53 at paragraph 31.
4 [2003] UKHL 53 at paragraph 61.
5 [2003] UKHL 53 at paragraph 59.
6 [2003] UKHL 53 at paragraph 61.
7 [2003] QDC 151 at para 444.
8 [2003] UKHL 53 at para 46.
9 TSO Ref HC 458-1.
10 Government's response at paragraph 5.1.