Issue 18: June 2007

The Uncertain Tort of Privacy Invasion

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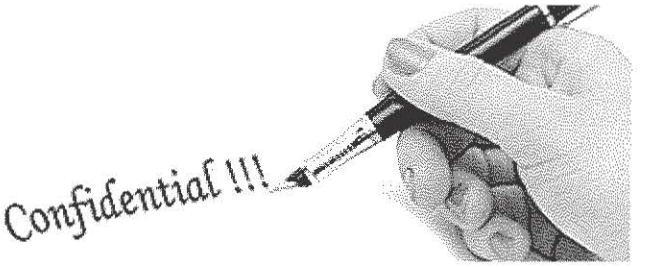

In this article, ***Peter Applegarth SC*** *discusses a recent judgment of the Victorian County Court in which it was held that a tort of invasion of privacy exists in Australian law:* Jane Doe v Australian Broadcasting Corporation *[2007] VCC 281. In doing so, he examines a number of interesting decisions that touch upon the privacy of the individual, both in Australia and abroad.*

I
t was a simple, but bold, step for a Victorian County Court Judge to recently hold that a tort of invasion of privacy exists in Australian law[1]. The facts of the case were simple. ABC Radio broadcast the identity of a rape victim in breach of a statutory prohibition. It could not justify the publication of that sensitive, personal information.

But finding a tort for breach of the plaintiff's privacy was not necessary in order to fill a gap in the protection the law provided to the plaintiff. The judge already had held that the plaintiff should be awarded damages for breach of statutory duty, more controversially, for breach of a duty of care that the ABC was found to owe the plaintiff and also for breach of confidence.

In 2001 the High Court, in the *Lenah Game Meats* case[2] , cleared the path for a tort of invasion to privacy to emerge. But Chief Justice Gleeson warned that "the lack of precision of the concept of privacy" was a reason for caution in declaring a new tort. Caution also was required because privacy interests could be protected by the development of recognised causes of action like breach of confidence.

In developing the law it is important to recognize that the "right to privacy" embraces a range of different interests. In the United States, Professor Prosser and the *Restatement of Torts* categorised them into four categories. They include:

• intentional intrusion upon the plaintiff's seclusion or solitude or his private affairs;

• publicity to a matter concerning the private life of another if the matter publicised is of a kind that:

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

The first case to recognize a tort of privacy in Australia was *Grosse v Purvis*[3]. It was a case that fell into the category of intrusion upon

seclusion. Senior Judge Skoien concluded[4] that the essential elements of the tort would be:

(a) a willed act by the defendant;

(b) which intrudes upon the privacy or seclusion of the plaintiff;

(c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities; and

(d) which causes the plaintiff detriment in the form of mental psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.

The Victorian case of *Doe v ABC* did not concern intrusion upon seclusion. It involved the public disclosure of sensitive, private information in the media. Judge Hampel did not explain why it was necessary in that case to declare a tort of privacy when other laws, including the law of breach of confidence as developed by English courts in recent years, adequately protected the plaintiff's privacy interests against the public disclosure of personal information. Her Honour did not consider it appropriate to define the elements of the new tort since, in the case in hand, the plaintiff had a reasonable expectation that the information would remain private and there was no competing public interest in it being published.

Defining the elements of the new privacy tort will be left to other cases and, in the meantime, uncertainty will prevail. Is it enough for a plaintiff to simply prove facts in relation to which there is a reasonable expectation of privacy? Should they have to prove also that publicity would be highly offensive to a reasonable person? How should the new privacy tort accommodate competing interests like freedom of communication? Should the plaintiff have to prove that the information is not of legitimate concern to the public? Or should it be for a defendant to prove some public interest justification?

The answers to these questions cannot necessarily be found in cases from other countries, where legal analysis turns on "rights" to freedom of communication found in constitutions like the US Bill of Rights or in human right statutes like the UK's *Human Rights Act*, 1988. In Australia, the only constitutional guarantee on freedom of a communication is a limited right to communicate about government and political matters, and only Victoria and the ACT have Human Rights Acts.

This leaves celebrities, sporting stars and other public figures to guess whether the new tort of privacy will protect them from unwanted disclosure of personal information. In the UK, the sexual indiscretions of star footballers and other supposed "role models" are not necessarily protected by the law of confidence, partly because the other participants in the star's sexual exploits are said to have a right to disclose information relating to the relationship[5]. Can Australian sporting stars expect their one night stands in hotel rooms whilst on tour to be better protected by Australia's new privacy tort?

In the UK, supermodel Naomi Campbell, who falsely claimed that she had "never had a drug problem", was able to recover damages against a newspaper that reported that she was attending meetings of Narcotics Anonymous and published photographs taken of her in the street as she left a meeting of NA[6]. This was despite the fact that she conceded that it was legitimate for the media to set the record straight and report that she was attempting to deal with her drug problem. English law may not protect celebrities like Ms Campbell from being photographed when they pop down to the shop to buy a pint of milk, but it did protect her from the publication of photos of her leaving the Narcotics Anonymous meeting. This result was reached by a 3:2 majority of the House of Lords, which overruled a Court of Appeal bench of three that took the opposite view. So much for certainty.

Uncertainties in this area will abound and, if recent English experience is any guide, the uncertainty will last for years. The lengthy legal saga of *Douglas v Hello!* has drawn towards a close. It began in 2000 when unauthorised photographs of the wedding of actors Michael Douglas and Catherine Zeta-Jones were published by the magazine *Hello!* and spoiled another magazine's exclusive to publish authorised photographs of the event. The celebrity couple succeeded in an action for breach of confidence, with English courts recognising the underlying value that the law protects is human autonomy – the right to control the dissemination of information about one's private life.

The fundamental value of personal autonomy lies at the heart of privacy law. But some commentators wonder whether cases like *Douglas v Hello!* are really about the right to publicity rather than the right to privacy. Is the real complaint that a spoiler has deprived the celebrity of the commercial opportunity to exploit a commodity called celebrity by misappropriating a right to market images? Nearly seven years after the celebrity wedding, the House of Lords recently divided 3:2 in a battle between the rival magazines[7]. It restored a judgment for one million pounds in favour of the magazine *OK!* against the magazine *Hello!*. That final stage of the litigation in the House of Lords resolved itself into a case about commercially valuable confidential information, rather than personal privacy. The celebrity couple were not parties in the final appeal.

The privacy or publicity interests at stake in celebrity cases like *Douglas v Hello!* are far removed from the privacy interests of the victims of sexual offences, such as the deserving plaintiff in the recent Victorian case of *Doe v ABC*. But her interests were adequately protected by existing laws. The unnecessary recognition of a tort of invasion of privacy in that case sets the scene for uncertainty about the elements of this new judge-made tort.

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Endnotes

- *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281. The ABC has announced that it will appeal on various grounds including against the finding that the tort of invasion of privacy existed in Australia.
- *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63
- [2003] QDC 151; (2003) Aust Torts Reports 81-706
- at [444]
- *A v B plc* [2003] QB 195

- *Campbell v MGN Ltd* [2004] 2 AC 457.
- [2007] UKHL 21 (2 May 2007); some of the earlier rounds of the litigation are reported in [2001] QB 967; [2003] 3 All E R 996; [2005] QB 125