PLAYING AWAY FROM HOME: SPORTSPEOPLE, PRIVACY AND THE LAW

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The private lives of sportspeople can often be the subject of intense media scrutiny, yet Australian law may not offer sportspeople adequate protection against invasions of privacy. This article analyses the problems confronted by sportspeople in light of the media's interest in their private lives, canvassing the existing direct and indirect legal protections of personal privacy, developments in overseas jurisdictions, principally the United Kingdom, and current law reform proposals for a statutory tort of invasion of privacy.

Introduction

It is difficult to gauge whether the media is becoming more invasive of sportspeople's privacy. The media and their reading, listening and viewing publics (or at least, sections of them) have long been interested in the private lives of sport stars. What is clear is that prominent sportspeople are increasingly relying on law to protect their privacy from the public gaze. For instance, last year began with footballer John Terry unsuccessfully seeking to prevent the publication of details of his alleged affair with model, Vanessa Perroncel.[1] It concluded with the St Kilda Football Club taking action in the Federal Court of Australia, trying to stop the posting on social networking sites of naked photographs of two of its players.[2] In the intervening period there was such a flurry of legal activity in the United Kingdom aimed at protecting the privacy of sportspeople that *The Guardian* newspaper dubbed 2010, 'The Year of the Injunction'.[3] In the month of August alone, the same newspaper reported that four sportspeople had obtained injunctions restraining the publication of stories about their private lives. Golfer Colin Montgomerie was granted an injunction

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[1] As to the legal proceedings relating to John Terry and Vanessa Perroncel, see below 'Recent developments and future directions'.

[2] As to the legal proceedings relating to the St Kilda Football Club and Nick Riewoldt, see below 'Recent developments and future directions'.

[3] Martin Kelner, 'Raise a cocktail glass to the Year of the Injunction', *The Guardian* (online), 20 December 2010 <http://www.guardian.co.uk/sport/2010/dec/20/screen-break-martin-kelner-sheepig>.

to prevent the publication of details of his extra-marital relationships.[4] Three other Premier League footballers obtained 'super-injunctions'[5] preventing the publication of stories about their private lives.[6] It seems that sportspeople are no longer willing to accept that public scrutiny of their private lives is part of the price of fame.

The private lives of sportspeople are not only of interest in the United Kingdom. The disclosure of Tiger Woods' extramarital liaisons garnered worldwide attention. In Australia, the private lives of sportspeople also attract media attention, sometimes with the willing involvement of the sportspeople themselves,[7] sometimes without their consent or even without regard to their objection. Sometimes, a sportsperson's private life can have an impact upon his or her professional sporting life. It is sometimes difficult to disentangle the public and the private aspects of a sportsperson's life. Sport is intrinsically interesting to the media and their audiences, so it is unsurprising, if not always defensible, that all aspects of sportspeople's lives including their private lives, might find their way into newspapers and magazines or onto radio, television or the internet.

This article analyses what rights to privacy sportspeople have and how they might most effectively protect their private lives from the media and the wider public. With a particular focus on sportspeople, it examines the current state of privacy protection as it is developing in Australia and the United Kingdom. It also examines recent proposals for reform to privacy law in Australia by the Australian Law Reform Commission ('ALRC'), the New South Wales Law Reform Commission ('NSWLRC') and the Victorian Law Reform Commission ('VLRC'), and assesses how effectively they might protect sportspeople's private lives from unwanted media attention.

Privacy Protection under Australian Law

It is perhaps apposite that the leading Australian authority on whether the common law recognises an enforceable right to privacy was concerned with

[4] The fact of the super-injunction was revealed in Caroline Gammell and Mark Reason, 'Montgomerie wins gagging order over tabloid story', *The Daily Telegraph* (London), 12 August 2010, 3. The identity of the woman seeking to make disclosures about her encounters with Montgomerie was revealed in Andrew Parker, 'Monty's sex case blonde; Golfer's ex-lover gagged', *The Sun* (London), 13 August 2010, 1, 13.

[5] 'The term "super injunction" refers to an order restraining a person from doing something and, additionally, restraining that person from publishing, or informing others of the content of the order and of the fact that the order was made': Adrian Zuckerman, 'Super Injunctions – Curiosity-Suppressant Orders Undermine the Rule of Law' (2010) 29 *Civil Justice Quarterly* 131, 131.

[6] See also Matthew Moore, 'Second footballer wins court gagging order', *The Daily Telegraph* (London), 20 August 2010, 2; Victoria Ward, 'Another star wins gagging order; High Court judge grants injunction hiding sportsman's identity and the allegations made against him', *The Daily Telegraph* (London), 13 November 2010, 13.

[7] See, for example, Ben Cousins, *Ben Cousins: My Life* (Pan MacMillan, 2010) and the accompanying, high-rating documentary, which was screened on the Seven Network.

sport – specifically, radio broadcasting of horse racing. For decades, the High Court of Australia's decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[8] was taken as authority for the proposition that there was no such right under Australian law.[9] In this case, Victoria Park Racing sought injunctions against George Taylor, Cyril Angles and the Commonwealth Broadcasting Corporation.[10] Taylor permitted a viewing platform to be constructed on his property, giving a view over the racecourse. For a fee, Angles could sit on the viewing platform to call the races via telephone. Angles was an announcer with Sydney radio station, 2UW, operated by the Commonwealth Broadcasting Corporation. Victoria Park Racing was concerned that 2UW's broadcasts would deter potential spectators from attending the races, thereby reducing its takings. Importantly, it based its claim to an injunction principally on private nuisance and, to a lesser extent, copyright infringement.[11] At first instance, Nicholas J in the Supreme Court of New South Wales refused to grant the injunction.[12]

On appeal, the High Court by majority (Latham CJ, Dixon and McTiernan JJ, Rich and Evatt JJ dissenting) dismissed the appeal. The majority found that the defendants' conduct did not constitute a substantial and unreasonable interference with the racecourse's use and enjoyment of its land.[13] The defendants did not interfere with any right or incident of the possession of land protected by the tort of private nuisance because, as Latham CJ baldly stated:

> [a]ny person is entitled to look over the plaintiff's fences and to see what goes on in the plaintiff's land. If the plaintiff desires to prevent this, the plaintiff can erect a higher fence … [T]he law cannot by an injunction in effect erect fences which the law is not prepared to provide.[14]

His Honour went further, opining that a defendant does no wrong by looking, describing and broadcasting what he or she sees on another person's property so long as the defendant did not breach a contract or a confidence or use defamatory or offensive language.[15] Latham CJ also held that there was no general right to

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[8] (1937) 58 CLR 479 ('*Victoria Park*').

[9] See, for example, *Australian Consolidated Press Ltd v Ettingshausen* (Unreported, NSW Court of Appeal, Gleeson CJ, Kirby P and Clarke JA, 13 October 1993), 9 (Kirby P). See also *Cruise v Southdown Press Pty Ltd* (1993) 26 IPR 125, 125 (Gray J); *GS v News Ltd* (1998) Aust Torts Reports ¶81–466, 64, 913–64, 915 (Levine J).

[10] As to the facts of the case, see *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 492 (Latham CJ), 498–99 (Rich J), 512–13 (Evatt J).

[11] *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 492, 497 (Latham CJ), 506, 510 (Dixon J), 513, 515 (Evatt J).

[12] *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1936) 37 SR(NSW) 322; (1936) 54 WN(NSW) 141.

[13] *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 493 (Latham CJ).

[14] Ibid 494.

[15] Ibid (Latham CJ).

privacy.[16] Dixon J found that freedom from view or inspection was not a right or incident of the possession of land protected by the tort of private nuisance.[17] McTiernan J agreed that the racecourse had not identified a legal right protected by the tort of private nuisance.[18]

In dissent, Rich J found that the tort of private nuisance was sufficiently flexible to encompass interferences with the possession of land generated by new broadcasting technologies.[19] Indeed, his Honour presciently noted the invasive potential of television, a medium then unavailable in Australia and in its infancy in the United Kingdom.[20] Also in dissent, Evatt J accepted that there was no general right to privacy at common law. However, his Honour found that the instant case was not concerned with a mere interference with privacy. In any event, Evatt J observed that the fact that there was no general right to privacy did not necessarily mean that all interferences with privacy are lawful. His Honour also accepted that, as a general principle, an individual committed no wrong by looking into another person's property but noted that this was not absolute, suggesting that the systematic watching of another person's property could be actionable.[21] For his Honour, the fact that the racecourse had suffered actual pecuniary loss was an important factor pointing to a finding of private nuisance.[22]

Victoria Park has remained an obstacle for the development of privacy protection in Australian law for a number of reasons. First, the principal cause of action relied upon was the tort of private nuisance but there were also dicta seemingly directed to the non-existence of a general right to privacy, indicating an ambiguity as to how broad or narrow the true *ratio decidendi* of this case actually is.[23] The case also confirms the nexus between privacy and private property in the common law's thinking.[24] Given that privacy can be enjoyed and invaded in non-proprietary ways, this nexus needs to be broken in order to protect privacy meaningfully. Secondly, the case concerned the protection of commercial interests but was subsequently assumed to apply equally to personal privacy.

This apparent lack of direct protection of personal privacy in Australian law compelled sporting plaintiffs to rely upon other causes of action to protect

[16] Ibid 496.
[17] Ibid 507–08.
[18] Ibid 524–25.
[19] Ibid 501.
[20] Ibid 505. See also, 519 (Evatt J).
[21] Ibid 517, 521.
[22] Ibid 520.
[23] As to which, see further *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; discussed below at 'Towards direct protection of privacy at common law'.
[24] See Sir Stephen Sedley, 'Sex, libels and video-surveillance' in Stephen Sedley (ed), *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, 2011) 311, 311; David Rolph, 'The Mechanical Eye: Looking, Seeing, Photographing, Publishing' in Geoffrey Sykes (ed.), *Courting the Media: Contemporary Perspectives on Media and Law* (Nova Publishers, 2010) 75, 78–79.

their privacy indirectly. As the case law demonstrates, sportspeople could use other causes of action, such as defamation and breach of confidence, for this purpose.[25]

Indirect Privacy Protection under Australian Law

Defamation

Whilst historically the common law has not directly protected privacy, its protection of another interest centred on the plaintiff's persona, reputation, is well established and has been extensive through the tort of defamation.[26] Reputation is broadly defined as what others think of a person and is contrasted with character, which is who a person truly is.[27] Reputation, then, is the public self of the plaintiff.[28] Whilst concerned with the sanctioning of false and derogatory public statements, defamation law has been used in Australia to provide a measure of indirect protection of personal privacy. This could occur because, in four out of the eight defamation jurisdictions, an element of public interest or public benefit was a long-standing requirement of a justifiable publication. At common law, proof of substantial truth was a complete defence to defamation.[29] Until recently, in the Australian Capital Territory, New South Wales, Queensland and Tasmania, proof of substantial truth was insufficient. A publisher had to demonstrate that the substantially true publication was also in the public interest or for the public benefit.[30] Consequently, a publication which was substantially true but invasive of a person's privacy was not defensible. This particular form of the defence of justification arguably acted as a *de facto* privacy protection, preventing the publication of true but intrusive stories.[31]

Sportspeople were able to use defamation law to protect their privacy. They could do this by seeking an injunction to restrain the publication of matter which was invasive of their privacy or suing for damages if that matter was

[25] Defamation and breach of confidence are not the only causes of action which can indirectly protect privacy. However, they are the two causes of action relied upon by sportspeople in the decided cases. Other potential causes of action include trespass to the person, trespass to land, intentional infliction of harm, copyright, passing off, misleading or deceptive conduct and, to a lesser extent, private nuisance.

[26] The common law's disproportionate and anomalous treatment of reputation and privacy has been the subject of criticism. See, for example, Sir Stephen Sedley, 'Sex, libels and video-surveillance' in Stephen Sedley (ed), *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, 2011) 311.

[27] See *Plato Films Ltd v Speidel* [1961] AC 1090, 1138 (Lord Denning).

[28] See David Rolph, *Reputation, Celebrity and Defamation Law* (Ashgate, 2008) 5.

[29] See, for example, *Rofe v Smith's Newspapers Ltd* (1924) 25 SR(NSW) 4, 21–22 (Street ACJ).

[30] As for the requirement of public interest as part of the defence of justification, see *Defamation Act 1974* (NSW) s 15(2)(a) (repealed). As for the requirement of public benefit as part of the defence of justification, see *Civil Law (Wrongs) Act 2002* (ACT) s 59 (repealed); *Defamation Act 1889* (Qld) s 15 (repealed); *Defamation Act 1957* (Tas) s 15 (repealed).

[31] David Rolph, 'Preparing for a Full-Scale Invasion? Truth, Privacy and Defamation' (2007) 25(3/4) *Communications Law Bulletin* 5, 6–7; David Rolph, 'A critique of the national, uniform defamation laws' (2008) 16 *Torts Law Journal* 207, 228.

published. This is illustrated by *Chappell v TCN Channel Nine Pty Ltd*.[32] In that case, prominent cricketer Greg Chappell sought an injunction to restrain *A Current Affair* from broadcasting allegations about an extra-marital affair with a woman named Samantha Hickey, including details about Chappell's engagement in unspecified 'sexual activities of an unusual nature'[33]. The story originated from a Melbourne tabloid newspaper, *The Truth*. Indeed, *A Current Affair*'s report was ostensibly a critique of *The Truth*'s approach to journalism but entailed a rehearsal of the details of Hickey's affair with Chappell, including an interview with Hickey herself. In reviewing and applying the relevant principles for the issue of an interlocutory injunction to restrain the publication of allegedly defamatory matter, Hunt J (as his Honour then was) noted that such relief was rarely granted where it would interfere with the discussion of a matter of public interest. His Honour also recorded that Channel Nine intended to rely upon a defence of justification under the *Defamation Act* 1974 (NSW) s 15 (repealed),[34] with its additional requirement of public interest.[35] Thus, there were two distinct grounds which required a consideration of the public interest. Justice Hunt rejected the view that, as a public figure, there was a public interest in how Chappell behaved in private, emphasising that public figures are entitled to a private life and that private matters only became a matter of public interest if the public figure elects to make them public or if they affect the public figure's capacity to perform public duties. He had no difficulty finding that Chappell's alleged adultery and sexual proclivities had no bearing upon his capacity to be a sports administrator and businessman. His Honour found that Chappell's position as the Australian Cricket Board's Commissioner responsible for hearing appeals against breaches of the players' code of behaviour did not strengthen the case for a public interest in the broadcast, as the code related to the public conduct of cricketers.[36] Justice Hunt also rejected the view that Chappell's sexual conduct became a matter of public interest because the cricketer generally had a high moral reputation. In order for Chappell's sexual conduct to be a matter of public interest in this way, Chappell would have to have had a high moral reputation in the relevant sector, on matters of sexual morality, which he did not have. Justice Hunt posited the following test for how a public figure's private life becomes a matter of public interest:

> either because it affects the performance of his public duties … or because he makes it such a matter himself. If the plaintiff had in fact deliberately put himself forward *to the public* as subscribing to such high standards in his private behaviour, so that he could be taken as having appealed to the public for its judgment on that private

[32] (1988) 14 NSWLR 153.
[33] *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153, 156.
[34] *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153, 163–64.
[35] Alternatively, the matter could relate to an occasion of qualified privilege. See *Defamation Act* 1974 (NSW) s 15(2)(b) (repealed). This was not satisfied in this case. See *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153, 170–71 (Hunt J).
[36] *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153, 165–66 (Hunt J).

> behaviour, he cannot then be heard to say the public does not have the right to pronounce the judgment which he asked of it.[37]

Given that there was no public interest in publishing the imputations against Chappell, the defence of justification was bound to fail, providing a compelling ground to grant the injunction.[38] There was equally no overriding public interest, outside the defence of justification supporting publication.[39] Justice Hunt concluded his judgment by opining that:

> [t]he Australian media is, in general, reasonably responsive to the need to permit public figures some degree of privacy in relation to their private behaviour. Such a need arises because, if every public figure is to become "fair game" in relation to his private behaviour which is unrelated to his capacity to perform his public duties, the community will suffer grievously from the unwillingness of suitable people to enter public life.[40]

Chappell v TCN Channel Nine is significant because it demonstrates the capacity for defamation law to restrain what are effectively invasions of privacy and affirms more generally the common law's approach to a public figure's right to a private life. As public figures, sportspeople are entitled to assert a right to a private life, unless they by choice or by conduct, make private conduct a matter of public interest.

In addition to using defamation law to obtain an injunction to restrain what is essentially an invasion of privacy, a sportsperson can sue for damages. Indeed, given the restraint courts exercise in granting injunctive relief for defamation,[41] a sportsperson is more likely to succeed in suing for damages for defamation. The ability to use defamation law to claim damages for what was, in substance, an invasion of privacy is demonstrated by *Ettingshausen v Australian Consolidated Press Ltd*.[42] In that case, prominent and photogenic rugby league player, Andrew Ettingshausen, brought defamation proceedings against ACP in respect of a photograph published in *HQ* magazine. The photograph was one of a series taken on the 1990 Kangaroos tour of Great Britain, commissioned for use in a commemorative book, *Twenty Eight Heroes:*

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[37] Ibid 167.
[38] Ibid 169–70 (Hunt J).
[39] Ibid 171 (Hunt J).
[40] Ibid 172.
[41] This was confirmed by the High Court of Australia in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57. See also Benedict Bartl and Dianne Nicol, 'The Grant of Interlocutory Injunctions in Defamation Cases in Australia following the Decision in *Australian Broadcasting Corporation v O'Neill*' (2006) 25 *University of Tasmania Law Review* 156, 169; David Rolph, 'Showing Restraint: Interlocutory Injunctions in Defamation Cases' (2009) 14 *Media and Arts Law Review* 255, 290–91.
[42] For a detailed treatment of this case, see David Rolph, *Reputation, Celebrity and Defamation Law* (Ashgate, 2008) ch 7.

Inside the 1990 Kangaroo Tour. To promote the book, an article in *HQ* magazine was published. The photograph used on the first page of the article was not used in the book. It was a grainy black-and-white photograph of Laurie Daley, Ben Elias and Andrew Ettingshausen in the shower. In the bottom right hand corner, beneath some text, the shaft of Ettingshausen's penis was visible.[43]

The imputations based on the natural and ordinary meaning of the matter ultimately considered by the jury in this case were that Ettingshausen deliberately permitted the photograph to be taken and published or that he was simply 'a person whose genitals have been exposed to the readers of the defendant's magazine *HQ'*. In addition, there was a true innuendo pleaded as to Ettingshausen's unfitness to be a schools and junior development officer for the New South Wales Rugby League on the basis of the publication of the photograph.[44]

ACP pleaded a number of defences, including consent, common law and statutory qualified privilege and unlikelihood of harm, however, given the state of the evidence, most were not allowed to be placed before the jury.[45] The jury had no difficulty in finding that the first imputation on the natural and ordinary meaning of the matter and the true innuendo were defamatory, that there was no defence and that Ettingshausen should be awarded $350,000 damages. On appeal, the award of damages was set aside as manifestly excessive and a retrial limited to the issue of damages was ordered.[46] At the retrial, the jury awarded Ettingshausen $100,000 damages.[47]

What is notable about ACP's pleaded defences was that there was no defence of justification. That is understandable given that, at the time in New South Wales, this defence required the publication to relate to a matter of public interest. Whilst it might be true that Ettingshausen's genitals had been exposed to the readers of *HQ* magazine, it would be difficult to argue that it was in the public interest to do so.

The *Ettingshausen* litigation led to a number of defamation claims in which plaintiffs sued for defamation arising out of the publication of photographs showing exposed private parts of their bodies.[48] Sportspeople, amateur and professional, were amongst the claimants. In *McDonald v North Queensland Newspaper Co Ltd*,[49] the plaintiff rugby league player sued in respect of a local

[43] James Kerr and Brett Cochrane, 'Hunks', *HQ*, April 1991, 94–95.
[44] *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443, 445.
[45] *Australian Consolidated Press Ltd v Ettingshausen* (Unreported, NSW Court of Appeal, Gleeson CJ, Kirby P and Clarke JA, 13 October 1993), 12–14, 20 (Kirby P).
[46] Ibid 4 (Gleeson CJ), 24 (Kirby P), 33 (Clarke JA).
[47] Anabel Dean, 'ET happy after $100,000 damages for nude photo', *The Sydney Morning Herald* (Sydney), 2 February 1995, 2.
[48] As to the influence of the *Ettingshausen* litigation in a non-sporting context, see David Rolph, above n 28, 165.
[49] [1997] 1 Qd R 62.

newspaper's publication of a photograph of him in which part of his penis was protruding from his shorts; in *Obermann v ACP Publishing Pty Ltd*,[50] a representative water polo player sued soft pornographic magazine, *Picture*, over the publication of a photograph in which her breasts were accidentally exposed during the course of a game. More recently, Fremantle Dockers footballer, Paul Hasleby, threatened legal proceedings against *The West Australian* newspaper and the now defunct Network Ten programme, *The Panel*, over the publication and republication of a photograph in which the tip of Hasleby's penis was exposed.[51]

As Kirby P (as his Honour then was) emphasised on appeal, the common law had not at that time, recognised an enforceable right to privacy. Rather, privacy was an underlying value which could inform the development of the common law. His Honour stressed that the award of damages in this case should vindicate Ettingshausen's reputation, rather than compensate him for an invasion of privacy.[52] Yet in substance, if not in law, the real interest violated here on Ettingshausen's part was surely his privacy, not his reputation. Ettingshausen's recourse to defamation law was compelled by the common law's failure to develop an enforceable right to privacy.

The possibility of using defamation law as an indirect means of protecting privacy has been diminished by the introduction of the national, uniform defamation laws.[53] Now across Australia, the proof of substantial truth alone is a complete defence to defamation.[54] There is no longer an additional requirement of public interest or benefit. Whether or not this is a desirable development has been the subject of debate.[55] Nevertheless, the consequence of this reform is clear: defamation law no longer provides the same level of indirect protection of privacy that it has in the past. This might have the desirable effect of providing the impetus for the recognition of direct protection of personal privacy but in the interim, plaintiffs are left with diminished legal protection of their interests.[56]

However, there is still some limited scope for defamation law to provide incidental protection of personal privacy. Other doctrines and principles of defamation law retain a requirement of public interest. Properly understood, the public interest

[50] [2001] NSWSC 1022.

[51] See David Rolph, above n 28, 166–67. See also Chris Davies, 'A Storm Drifting By? Defamation Law and Sport in Australia and New Zealand' (2009) 40 *Victoria University of Wellington Law Review* 669, 687.

[52] *Australian Consolidated Press Ltd v Ettingshausen* (Unreported, NSW Court of Appeal, Gleeson CJ, Kirby P and Clarke JA, 13 October 1993), 9–10 (Kirby P).

[53] See David Rolph, 'A critique of the national, uniform defamation laws', above n 31, 228–29.

[54] *Civil Law (Wrongs) Act* 2002 (ACT) s 135; *Defamation Act* 2006 (NT) s 22; *Defamation Act* 2005 (NSW) s 25; *Defamation Act* 2005 (Qld) s 25; *Defamation Act* 2005 (SA) s 23; *Defamation Act* 2005 (Tas) s 25; *Defamation Act* 2005 (Vic) s 25; *Defamation Act* 2005 (WA) s 25.

[55] See generally David Rolph, 'Preparing for a Full-Scale Invasion? Truth, Privacy and Defamation', above n 31, 5.

[56] As to recent Australian reform proposals on personal privacy protection, see below 'Towards direct protection of privacy under statute'.

is a free-standing element of the test to be applied when determining whether or not to grant an interlocutory injunction to restrain the publication of allegedly defamatory matter.[57] However, even if the injunction could be obtained, the changes to the substantive defences brought about by the national, uniform defamation laws will make the underlying claim in defamation unviable, thereby rendering the injunction futile.[58] The common law defence of fair comment still requires that the comment relate to a matter of public interest,[59] whilst the statutory analogues require 'proper material for comment'.[60] Although 'proper material for comment' is more broadly defined than the common law's test for public interest, purely private matters seem likely to be outside the ambit of either of these elements of the respective defences.

Breach of confidence

Another existing means by which sportspeople can protect their privacy from media intrusion is the equitable cause of action for breach of confidence. Although the ability of the equitable jurisdiction to bind a confidant's conscience to keep a confidence is long-standing,[61] the elements of the cause of action for breach of confidence only coalesced comparatively recently.[62] The primary application of breach of confidence has been to commercially sensitive information[63] but it also extends to personal information about private individuals.[64]

A recent Australian case in which breach of confidence was used to protect sportspeople's privacy was *Australian Football League v The Age Co Ltd*.[65] The AFL's Illicit Drugs Policy permitted the identities of players who tested positive to the use of illegal drugs once or twice to remain confidential. However, a

[57] See *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [31] (Gleeson CJ and Crennan J), [79]–[89] (Gummow and Hayne JJ). See further David Rolph, 'Showing Restraint: Interlocutory Injunctions in Defamation Cases' (2009) 14 *Media and Arts Law Review* 255, 275–76.

[58] As to futility and its impact on the grant of injunctive relief, see Normann Witzleb, '"Equity does not act in vain": An analysis of futility arguments in claims for injunctions' (2010) 32 *Sydney Law Review* 503.

[59] *Goldsbrough v John Fairfax & Sons Ltd* (1934) 34 SR(NSW) 524, 532 (Jordan CJ); *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR(NSW) 171, 173 (Jordan CJ); *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183, 215–19 (Dawson, McHugh and Gummow JJ).

[60] *Civil Law (Wrongs) Act* 2002 (ACT) s 139B(5), 139B(6); *Defamation Act* 2006 (NT) s 28(5), 28(6); *Defamation Act* 2005 (NSW) s 31(5), 31(6); *Defamation Act* 2005 (Qld) s 31(5), 31(6); *Defamation Act* 2005 (SA) s 30(5), 30(6); *Defamation Act* 2005 (Tas) s 31(5), 31(6); *Defamation Act* 2005 (Vic) s 31(5), 31(6); *Defamation Act* 2005 (WA) s 31(5), 31(6).

[61] As to the historical development of breach of confidence, see R G Toulson and C M Phipps, *Confidentiality* (Sweet & Maxwell, 2nd ed, 2006) [1–001]–[1–018].

[62] The *locus classicus* is generally considered to be Megarry J's judgment in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

[63] See, for example, *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41; *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203; *Faccenda Chicken Ltd v Fowler* [1987] Ch 117.

[64] See, for example, *Argyll v Argyll* [1967] Ch 302; *Stephens v Avery* [1988] Ch 449; *Hitchcock v TCN Channel Nine Pty Ltd* (2000) Aust Torts Reports ¶81–550; (2000) Aust Contracts R ¶90–108.

[65] (2006) 15 VR 419.

third positive result would lead to a player's identity being publicly disclosed.[66] Several media companies learned of the identities of three players who had tested positive once or twice and wanted to publish a story naming them. They submitted that the identities of the players were no longer confidential because of discussions in internet *fora* already naming them; their naming in an online *Sydney Morning Herald* article, subsequently removed but already reproduced by Media Monitors and disseminated to its client base; the naming of one of the players in a talkback segment on a pay television football programme; and discussions amongst journalists and the AFL.[67] They argued that the cumulative effect of this disclosure was that the information was ineluctably in the public domain and was thereby deprived of its confidential nature.[68] Justice Kellam found that publication in the latter three ways was to such a limited audience that it did not constitute release of the information into the public domain. In relation to the information disseminated through online discussion boards and in chatrooms, his Honour found that the anonymous and speculative nature of the 'information' was not sufficient to deprive the players' identities of their confidential quality.[69] Justice Kellam further found that the disclosure of the players' identities would not amount to the disclosure of an 'iniquity of a serious criminal nature'.[70] In any event, the audience for such disclosure was not the proper authority to investigate any such iniquity, but rather the readership of the defendants' newspapers.[71] Justice Kellam found that the preponderance of authority supported the view that a broader defence of public interest was not part of Australian law, in contrast to the position in the United Kingdom, but that, even if it were, the balancing of the public interests between maintaining and disclosing the confidential information favoured non-disclosure.[72] His Honour characterised the public interest in maintaining the confidentiality of the players' identities in the following way:

> Taking into account the pressures of professional sport, the public scrutiny of players engaged in professional sport, the so-called "celebrity status" of players, their age range and the background of many players in the AFL competition, it is not surprising that some players in the competition are either manipulated by others, or on occasions fall into temptation to use drugs of the nature of those used by many others in the community. On this basis, it appears to me that it can be well argued that the IDP has a sound basis. It can be well argued that a process which is designed to identify players

[66] *Australian Football League v The Age Co Ltd* (2006) 15 VR 419, 422–23 (Kellam J).
[67] Ibid 425–27 (Kellam J).
[68] Ibid 427–28 (Kellam J).
[69] Ibid 431–33 (Kellam J).
[70] Ibid 436.
[71] Ibid 437 (Kellam J).
[72] Ibid 440, citing *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, *Smith Kline & French Laboratories (Aust.) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 and *Sullivan v Sclanders* (2000) 77 SASR 419.

> who might use illicit drugs and to endeavour to rehabilitate and educate them before exposing them to public scrutiny is a sensible approach. The emotional and financial damage that might be done to a young player who is detected to be in breach of the IDP, if his first or second breach for that matter were to become public, needs no further explanation.[73]

Whilst it was open to the newspapers here to discuss the efficacy of the AFL's Illicit Drugs Policy, a clear matter of public interest, naming players, could not be said to be in the public interest, but would merely satisfy public curiosity and sell newspapers. Consequently, Kellam J granted permanent injunctions against the media outlets restraining them from identifying the players in question.[74] *AFL v The Age* demonstrates the capacity of an orthodox application of the equitable cause of action for breach of confidence to protect an aspect of a sportsperson's privacy, in this instance highly personal medical information.

In the United Kingdom, breach of confidence has been the means by which direct privacy protection has been achieved. In order to comply with its obligations under the *European Convention on Human Rights*, which was incorporated into domestic law by the *Human Rights Act* 1998 (UK), English courts have adapted breach of confidence to give effect to the right to a private life under Article 8 of the Convention,[75] thereby creating what has been described as essentially a 'tort of misuse of private information'.[76] The development of breach of confidence in this way has occurred through a series of cases brought largely by celebrities, sportspeople figuring prominently amongst them.

One of the significant, early cases was *A v B plc*.[77] A was a Premier League footballer who was married with children. He had extra-marital relationships with two women, C and D. C contacted a newspaper published by B plc, seeking to sell her story, as well as providing information about D's relationship with A. B proposed to publish two stories about A's extra-marital affairs. A became aware of B's intention to publish when D contacted A, seeking money not to talk to the newspaper. A was particularly concerned to prevent publication because his wife did not know about his affairs and that his children may be harmed by the publicity. At first instance, Jack J granted an interim injunction. B plc appealed against the decision. Giving the judgment of the

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[73] Ibid 442–43.
[74] Ibid 443. As to the form of the injunctions, see 419, 444–45 (Kellam J).
[75] See, for example, *Campbell v MGN Ltd* [2004] 2 AC 457, 464–66 (Lord Nicholls of Birkenhead), 472–73 (Lord Hoffmann), 480 (Lord Hope of Craighead), 494–97 (Baroness Hale of Richmond); *Douglas v Hello! Ltd (No 3)* [2006] QB 125, 150 *per curiam*; *McKennitt v Ash* [2008] QB 73, 80 (Buxton LJ).
[76] *Campbell v MGN Ltd* [2004] 2 AC 457, 465 (Lord Nicholls of Birkenhead).
[77] [2003] QB 195.

Court of Appeal, Lord Woolf CJ provided guidelines for the grant of interim injunctions in cases such as the present one.[78] One of the important guidelines was as follows:

> Where an individual is a public figure he is entitled to have his privacy respected in the appropriate circumstances. A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure. The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position. Whether you have courted publicity or not you may be a legitimate subject of public attention. If you have courted public attention then you have less ground to object to the intrusion which follows. In many of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information. If this is the situation then it can be appropriately taken into account by a court when deciding on which side of the line a case falls. The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest.[79]

This passage marks a telling shift in the way in which 'the public interest' is defined, with a consequent impact on the balance of competing interests between the sportsperson and the newspaper. It starts in an orthodox way, accepting that public figures have a right to a private life but that this may be diminished by virtue of their public life. This is consistent with Hunt J's analysis in *Chappell v TCN Channel Nine*. However, the analysis diverges when it suggests that a public figure's entitlement to a private life is lessened simply because he or she is a role model or a trendsetter. Positing a somewhat crude, inverse relationship between a public figure's profile and his or her expectation of privacy is novel.

[78] *A v B plc* [2003] QB 195, 204–10.
[79] Ibid 208.

Equally, Lord Woolf CJ effectively conflates 'the public interest' with that which the public is interested in – concepts ordinarily kept distinct. With respect, his Lordship's reasoning here is circular – a free press is in the public interest; a free press will only survive if it prints what it perceives audiences want; therefore, it is in the public interest to publish that in which the public is interested. Adopting this view of the public interest, the Court of Appeal found that the trial judge had given too much weight to A's privacy at the expense of the freedom of expression of C and D and the newspaper which wanted to publish the story.[80] Setting aside the injunction allowed the readers of *The Sunday People* to learn that Garry Flitcroft, the captain of the Blackburn Rovers, was the sportsman with a secret.[81]

The approach of the Court of Appeal in *A v B* is the most favourable to the media in any of the decided cases from the United Kingdom. The balance has been recalibrated in subsequent cases.[82] As a consequence, sportspeople have had mixed success in trying to protect their privacy. In late May 2004, Fulford J refused to restrain *The Sunday Mirror* and *The Mail on Sunday* from publishing allegations about long-distance runner, former politician and chairman of London's successful 2012 Olympics bid, Sebastian Coe, his ten-year affair with Vanessa Lander and her termination of the child they conceived together whilst Coe's wife was pregnant with his third child, apparently applying reasoning similar to that in *A v B*.[83] In February 2006, a high-profile member of the Chelsea and the English national soccer teams, Ashley Cole, brought proceedings against *News of the World* and *The Sun* newspapers over stories suggesting that he, another Premier League footballer and a prominent music industry figure had a 'gay orgy' in which a mobile telephone was used as a sex toy. Cole sued for defamation and invasion of privacy, ultimately settling his claims for an undisclosed sum. The case was notable for the fact that these media outlets did not name any of the participants but the *News of the World* published a photograph of one of the footballers with the music industry figure. A gay website, www.pinknews.co.uk, published what it claimed was the original photograph, showing Ashley Cole and Ian Thompson, also known as

[80] Ibid 216–18.

[81] Rachel Bletchly and Frank Thorne, 'Garry Flitcroft: Hooked on Danger Sex: The Full Story of the Soccer Rat Exposed by Mistress No 1: Dancer Pamela James Nov 1999–Jan 2001', *The Sunday People* (London), 31 March 2002, 1; Chris Tate, 'Garry Flitcroft – He was a fantastic lover and asked me to marry him. Then I found out about his wife …', *The Sunday People* (London), 31 March 2002, 22.

[82] *McKennitt v Ash* [2008] QB 73, 96–97 (Buxton LJ). See also *Jameel v Wall Street Journal Europe SprL* [2007] 1 AC 359, 408 (Baroness Hale of Richmond).

[83] See Helen Padley, 'Lord Coe left standing as princess has fairytale ending in the European court' (2005) 16(1) *Entertainment Law Review* 17–19. See also Suzanne Kerins, 'Seb was a gold medallist in bed … he adored me in sexy outfits', *The Sunday Mirror* (London), 30 May 2004, 4; 'Sex between us was dynamite but Seb was devastated when I aborted our baby', *The Mail on Sunday* (London), 30 May 2004.

DJ Masterstepz.[84] More recently, prominent footballer, John Terry, was unable to persuade Tugendhat J to grant him an injunction to prevent the publication of a story about his affair with Vanessa Perroncel, the girlfriend of team-mate, Wayne Bridge. Although Manchester United footballer, Ryan Giggs, had the benefit of an injunction suppressing the reporting of his extra-marital affair with former Miss Wales and *Big Brother* contestant, Imogen Thomas, the combination of Twitter, a Scottish Sunday newspaper and a Liberal Democrat parliamentarian speaking with the protection of parliamentary privilege, subverted the effect of the order.[85] Other sportspeople have been more successful in maintaining their privacy through court orders.[86]

Towards Direct Protection of Privacy at Common Law

The common law's historical failure to protect privacy has been recognised by courts, law reform bodies and academics as a significant gap in the legal protections afforded to individuals.[87] Privacy has been recognised as an important value underlying the common law.[88] It is a human right under international law and in those Australian jurisdictions in which statutory charters of rights have been enacted.[89] However, there has, as yet, been no recognition of a fully developed, enforceable right to privacy.

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[84] See Frances Gibb, 'England star sues over reports on "bisexual" players', *The Times* (London), 3 March 2006, 21; Owen Gibson, 'England star sues for libel after gay sex story starts online rumour mill', *The Guardian* (London), 3 March 2006, 3; Dominic Ponsford, 'Cole sues over tabloid "gay orgy" stories', *Press Gazette* (London), 3 March 2006, 1; Hugh Muir, 'Ashley Cole wins apology for sex slur', *The Guardian* (London), 26 June 2006, 6. As to the articles which formed the basis of Cole's claim, see Rav Singh, 'Number's Up! Exclusive: Exposed – Truth behind story that vibrated the nation', *News of the World* (London), 19 February 2006, 6. See also Catherine Bond, 'Can I sue Google if it says I'm gay? The tales of Internet defamation in the UK' (2006) 64 *Computers and Law* 1, 3.

[85] These two cases are discussed below, 'Recent developments and future directions'.

[86] See, for example, *JIH v News Group Newspapers Ltd* [2011] 1 WLR 153; [2010] EMLR 26; [2010] EWCA Civ 804; *TSE v News Group Newspapers Ltd* [2011] EWHC 1308 (QB); *MJN v News Group Newspapers Ltd* [2011] EWHC 1192 (QB).

[87] As to judicial views, see, for example, *Kaye v Robertson* [1991] FSR 62, 66 (Glidewell LJ), 70 (Bingham LJ), 71 (Leggatt LJ); *Cruise v Southdown Press Pty Ltd* (1993) 26 IPR 125, 125 (Gray J). As to academic views, see, for example, Kaaren Koomen, 'Under Surveillance: Fergie, Photographers and Infringements on Freedom' (1993) 17 *University of Queensland Law Journal* 234, 234; Raymond Wacks, 'Why there will never be an English common law privacy tort' in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press, 2006) 154–83, 154. As to the views of law reform bodies, see below 'Towards direct protection of privacy under statute'.

[88] *Wainwright v Home Office* [2004] 2 AC 406, 423 (Lord Hoffmann).

[89] As to the protection of privacy under international human rights documents, see *International Covenant on Civil and Political Rights* Art 17; *Universal Declaration of Human Rights* Art 12. As to the protection of privacy under domestic charters of rights, see *Human Rights Act* 2004 (ACT) s 12; *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 13.

There are two principal reasons. The first obstacle is definitional.[90] Privacy can be experienced, expected and invaded, in so many different ways that it is difficult to reduce it to a stable, coherent interest.[91] It is difficult to fashion legal principles to protect an interest in the absence of any agreement as to how that interest should be defined.

The second reason is the debate as to whether legal protection of privacy should properly be developed by courts or legislatures. In *Kaye v Robertson*,[92] the English Court of Appeal acknowledged the common law's shortcoming in protecting personal privacy but found that the common law's view was so entrenched that only the legislature could remedy it.[93] The enactment of the *Human Rights Act* 1998 (UK) has compelled the courts in that jurisdiction to engage in the development of effective protections of personal privacy.[94] The issue of whether courts or legislatures should develop privacy protection has also arisen in Australia. There have been some tentative steps by courts towards the recognition of a common law right to privacy, as well as recommendations by three law reform bodies in favour of a statutory cause of action.

In terms of common law developments, the leading case is the High Court of Australia's decision in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.[95] In this case, a possum abattoir sought an injunction to restrain the national broadcaster from showing footage of its slaughtering and processing operations. The footage had been obtained by unidentified trespassers, who handed it to an animal liberation organisation, who in turn gave it to the ABC. At first instance, Underwood J refused the injunction but an appeal to the Full Court of the Supreme Court of Tasmania was successful.[96] On appeal to the High Court, a live issue was what cause of action could support an injunction in favour of Lenah Game Meats. Lenah Game Meats did not rely on defamation and did not assert any copyright in the footage, ultimately falling back upon a speculative claim of a tort of invasion of privacy. The various judgments addressed this submission in different ways. Chief Justice Gleeson stated that '[t]he law should be more astute than in the past to identify and protect interests of a

[90] See, for example, *Kaye v Robertson* [1991] FSR 62, 70 (Bingham LJ); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 225–26 (Gleeson CJ); *Giller v Procopets* (2008) 24 VR 1, 35 (Ashley JA); Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) [1.41].

[91] See David Rolph, 'The Mechanical Eye: Looking, Seeing, Photographing, Publishing' in Geoffrey Sykes (ed), *Courting the Media: Contemporary Perspectives on Media and Law* (Nova Publishers, 2010) 75, 78; Raymond Wacks, 'Why there will never be an English common law privacy tort' in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press, 2006) 154, 175–77.

[92] [1991] FSR 62.

[93] *Kaye v Robertson* [1991] FSR 62, 66 (Glidewell LJ), 70 (Bingham LJ), 71 (Leggatt LJ). See also *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 372 (Sir Robert Megarry VC).

[94] See above 'Breach of confidence'.

[95] (2001) 208 CLR 199.

[96] As to the facts and the procedural history, see *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 233–36 (Gummow and Hayne JJ), 260–61 (Kirby J).

kind which fall within the concept of privacy.'[97] His Honour appeared to express a preference for developing breach of confidence rather than recognising a new tort of invasion of privacy as the means of achieving this.[98] The difficulty Lenah Game Meats confronted was that, in Gleeson CJ's view, what was sought to be protected was not private or confidential.[99] Gummow and Hayne JJ (with whom Gaudron J agreed)[100] approached this issue by observing that '*Victoria Park* does not stand in the path of the development of such a cause of action'. Properly construed, *Victoria Park* was authority for the proposition that private nuisance, paradoxically, did not protect privacy, but that did not foreclose the common law otherwise protecting privacy.[101] As to the legal method of achieving this, Gummow and Hayne JJ seemed to express a preference for the 'development and adaptation of recognised forms of actions to meet new situations and circumstances … [r]ather than a search to identify the ingredients of a generally expressed wrong.'[102] However, their Honours reasoned that, even if a cause of action were to develop and be recognised by Australian law, it would not be for the benefit of corporations, such as Lenah Game Meats Pty Ltd, as privacy was a dignitary interest which corporations did not possess.[103] As Lenah Game Meats was unable to point to a cause of action supporting its injunction, the ABC was entitled to broadcast the footage.[104] In his judgment, Kirby J held that it was not essential for a plaintiff to identify a precise cause of action in order to obtain an interlocutory injunction.[105] Although his Honour found that the lower courts had the power to grant the injunction, he held that their exercise of the discretion miscarried because they failed to give adequate weight to the implied freedom of political communication on government and political matters,[106] namely animal welfare.[107] Although it was strictly unnecessary to decide the issue, Kirby J expressed some views about a tort of invasion of privacy. His Honour broadly agreed with the remarks of Gummow and Hayne JJ about the status of *Victoria Park,* observing that '[i]t may be that more was read into the decision in *Victoria Park* than the actual holding required.'[108] Ultimately, Kirby J deferred determining whether the common law should recognise an enforceable right to privacy,[109] although, in doing so, he intimated that corporations should not benefit from any such development.[110] In his dissenting judgment, Callinan J held that the relationship between Lenah Game Meats and the ABC was one 'of a fiduciary kind and of confidence', such that it was

[97] Ibid 225.
[98] Ibid 223–27 (Gleeson CJ).
[99] Ibid 227.
[100] Ibid 231 (Gaudron J).
[101] Ibid 248–49 (Gummow and Hayne JJ).
[102] Ibid 250.
[103] Ibid 256–58 (Gummow and Hayne JJ).
[104] Ibid 228 (Gleeson CJ), 232 (Gaudron J), 259 (Gummow and Hayne JJ).
[105] Ibid 268.
[106] Ibid 286 (Kirby J).
[107] Ibid 287–88 (Kirby J).
[108] Ibid 277 (Kirby J).
[109] Ibid 278.
[110] Ibid 279.

unconscionable to allow the ABC to retain and broadcast the footage.[111] Again, although it was strictly unnecessary to do so, Callinan J expressed some views about whether a tort of invasion of privacy should be recognised in Australian law.[112] Like Gummow and Hayne JJ, he questioned whether *Victoria Park* was an obstacle to the recognition of such a right, pointing out that the case was decided by a narrow majority and was determined at a time when sports broadcasting had not assumed the significant commercial proportions it later would.[113] His Honour thought that *Victoria Park* was distinguishable from the instant facts, particularly because there had been an interference with Lenah Game Meats' property.[114] Accepting that 'the time is ripe for consideration whether a tort of invasion of privacy should be recognised in this country',[115] Callinan J suggested that there was no reason not to extend such a right to corporations and government agencies.[116] Justice Callinan would have continued the injunction.[117]

Given the range of issues and the diversity of approaches in *ABC v Lenah Game Meats*, it is unsurprising that courts have applied this authority inconsistently. Only inferior courts thus far have relied upon it to support a tort of invasion of privacy.[118] Superior courts have consistently rejected the view that *ABC v Lenah Game Meats* unequivocally endorses a tort of invasion of privacy as part of the common law of Australia.[119] There is some suggestion that the High Court has sanctioned the adaptation of breach of confidence to protect privacy, following similar developments in the United Kingdom.[120] A decade after *ABC v Lenah Game Meats* was decided, it is unclear how the common law's treatment of privacy will develop, if at all. A notable difference between the Australian and the United Kingdom jurisprudence is that celebrities have been the main impetus for developing privacy law in the United Kingdom, whereas there have been no celebrity plaintiffs in Australia thus far. The High Court has indicated that it is receptive to claims for invasion of privacy, so long as they are brought by natural persons. A sportsperson who experiences an intrusion upon his or her privacy might wish to bring a test case to prompt the development of the common law in Australia.

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[111] Ibid 316–17.
[112] Ibid 320.
[113] Ibid 320–21.
[114] Ibid 323.
[115] Ibid 328
[116] Ibid 326–27.
[117] Ibid 341.
[118] *Grosse v Purvis* (2003) Aust Torts Reports ¶81-706, 64,187 (Skoien DCJ); [2003] QDC 151; *Doe v Australian Broadcasting Corporation* [2007] VCC 281, [148] –[150], [157] –[164] (Judge Hampel).
[119] *Kalaba v Commonwealth of Australia* [2004] FCAFC 326 *per curiam*; *Giller v Procopets* (2008) 24 VR 1, 35 (Ashley JA), 106–07 (Neave JA). *See* also *Gee v Burger* [2009] NSWSC 149, [53] –[55] (McLaughlin AsJ); *Chan v Sellwood* [2009] NSWSC 1335, [37] (Davies J); *Dye v Commonwealth Securities Ltd* [2010] FCA 72, [288] –[290] (Katzmann J).
[120] *Giller v Procopets* (2008) 24 VR 1, 35–36 (Ashley JA), 106 (Neave JA).

Towards Direct Protection of Privacy Under Statute

It is not only the courts in Australia which have examined the need for an enforceable right to privacy. The ALRC, the NSWLRC and the VLRC have all recently recommended the introduction of some form of statutory cause of action for invasion of privacy in reports on privacy or private-related issues.[121]

In its report, *For Your Information: Australian Privacy Law and Practice*, the ALRC emphasised the desirability of a national, uniform legislative approach to the protection of privacy. Allowing the courts to develop privacy protection would lead, according to the ALRC, to an undesirable diversity of approaches across jurisdictions. Even if such a cause of action were developed by the courts, the resulting cause of action would be constrained by its tortious or equitable origins.[122] A statutory cause of action could address privacy protection more holistically and more flexibly.[123] It would foreclose the common law's development of a cause of action for invasion of privacy, thereby avoiding protracted and difficult issues about the distinction between tort and equity.[124]

The ALRC recommended that a non-exhaustive list of examples of acts or conduct constituting an invasion of privacy should be included in the legislation. The list included circumstances where there has been a serious interference with an individual's home or family life; where the individual has been subject to unauthorised surveillance; where the individual's correspondence or communications have been interfered with, misused or disclosed; or where sensitive facts of the individual's life have been disclosed.[125] Notwithstanding the support of the AFL Players' Association in their submission,[126] the ALRC recommended against the inclusion of the use of a person's identity or likeness without consent.[127] It suggested that such conduct interfered with something akin to an intellectual property right.[128] Similarly, it suggested that portraying an individual in a false light was more akin to defamation than an invasion of privacy.[129] The threshold test recommended for whether there had been an invasion of privacy was that a plaintiff had a reasonable expectation of privacy and that the defendant's conduct would have been highly offensive to a reasonable person of ordinary sensibilities.[130] Both elements needed to be assessed in all of the circumstances. The ALRC recommended that the plaintiff's interest in his

[121] Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008); New South Wales Law Reform Commission, *Invasion of Privacy*, Report 120 (2009).
[122] Australian Law Reform Commission, above n 120, [74.113].
[123] Ibid [74.116].
[124] Ibid [74.117].
[125] Ibid [74.119].
[126] Ibid [74.102].
[127] Ibid [74.120].
[128] Ibid [74.122] –[74.123].
[129] Ibid [74.120].
[130] Ibid [74.133], [74.135].

or her privacy be balanced against the public interest in freedom of expression and the right to be informed at the level of liability, rather than having the defendant's countervailing interests operate as free-standing defences.[131] The ALRC suggested a similar approach to the plaintiff's express or implied consent to an alleged invasion of privacy.[132] The rationale behind requiring public interest and consent as elements of the cause of action, rather than acting as defences, is to ensure that privacy does not overwhelm legitimate, countervailing interests.[133] The ALRC recommended that only natural persons should be entitled to sue.[134] It also recommended that liability should only be imposed for intentional or reckless, not negligent, conduct.[135] It further recommended that the cause of action should not require proof of damage.[136] It proposed a number of defences, including conduct incidental to the defence of person or property; conduct authorised or required by law; fair comment on a matter of public interest; or privilege for the purposes of defamation law.[137] It outlined a range of potential remedies, including compensatory and aggravated, but not exemplary, damages; an account of profits; an injunction; a court-ordered apology or correction; an order for the delivery up and destruction of material; and a declaration.[138] It recommended that the statutory cause of action for invasion of privacy be enacted in federal legislation,[139] although it acknowledged the possibility of co-operative state and territory legislation.[140]

Given that the ALRC and the NSWLRC shared consultation notes and submissions, it is unsurprising that there is a substantial amount common to their respective recommendations. There are, however, significant divergences on some issues. For instance, unlike the ALRC, the NSWLRC recommended that the test for an invasion of privacy should be whether the plaintiff had a reasonable expectation of privacy, unqualified by any requirement that the invasion of privacy be highly offensive to a reasonable person of ordinary sensibilities. The offensiveness of the defendant's conduct would be a factor relevant to whether an invasion of privacy had been established. The NSWLRC's rationale for this approach was to ensure that privacy was adequately protected. It claimed that its proposal would provide 'a level playing field' for the balancing of privacy against countervailing interests, such as freedom of expression.[141] However, like the ALRC, the NSWLRC recommended that the balancing of interests occur at the level of liability. Indeed, the NSWLRC placed the onus squarely

[131] Ibid [74.147], [74.157].
[132] Ibid [74.159].
[133] Ibid [74.147].
[134] Ibid [74.160].
[135] Ibid [74.164]. *Contra Doe v Australian Broadcasting Corporation* [2007] VCC 281, [163] (Hampel J).
[136] Ibid [74.167] –[74.168].
[137] Ibid, [74.169], [74.171].
[138] Ibid, [74.177].
[139] Ibid [74.189].
[140] Ibid [74.191].
[141] New South Wales Law Reform Commission, above n 120, [5.9]–[5.13].

on the plaintiff to demonstrate that his or her interest in personal privacy was not outweighed by a countervailing public interest.[142] The NSWLRC proposed a non-exhaustive list of factors to be considered when determining whether an invasion of privacy had occurred, including the nature of the subject-matter; the nature and offensiveness of the defendant's conduct; the relationship between the plaintiff and the defendant; the plaintiff's public profile; the plaintiff's vulnerability; the conduct of the plaintiff and the defendant before and after the invasion of privacy, including any apology or offer of amends made by the defendant; the impact of the conduct on the plaintiff's health, welfare and emotional well-being; and whether the defendant's conduct contravened any statutory provision.[143] The NSWLRC stressed that it was recommending the introduction of a statutory cause of action, not a statutory tort. It emphasised that this cause of action was not to be 'constrained by rules or principles generally applicable in the law of torts'.[144] The defences and remedies recommended by the NSWLRC were broadly similar to those proposed by the ALRC.[145] Importantly, the NSWLRC proposed a statutory cap on compensatory damages for non-economic loss for invasion of privacy, including a mechanism for the indexation of the cap.[146] This is analogous to caps on this head of damages for personal injuries and defamation.[147] In terms of 'prohibitory orders', the NSWLRC suggested that an injunction to restrain an apprehended invasion of privacy should be easier to obtain than an injunction to restrain the publication of allegedly defamatory matter.[148] Thus, if this reform is implemented, sportspeople will find it even easier than Chappell did to secure an injunction and will not need to be concerned with the effect of recent defamation law reforms.[149] The NSWLRC recommended that the common law tort of invasion of privacy, to the extent that it exists, should be expressly abolished by statute.[150] It also expressed the view that enacting a statutory cause of action for invasion of privacy might obviate the need for the development and distortion of the equitable cause of action for breach of confidence.[151] It recognised that existing causes of action could continue to provide incidental protection of personal privacy.[152] However, the NSWLRC's principal concern in this regard was that statute, not common law or equity, should be the vehicle by which privacy was directly protected.[153] The NSWLRC also recommended a one-year limitation period for privacy claims.[154] It recommended against allowing claims to survive the plaintiff's

[142] Ibid [5.17]–[5.18].
[143] Ibid [5.21]. See also [5.23]–[5.45].
[144] Ibid [5.55].
[145] Ibid [6.1]–[6.12], [7.1]–[7.5].
[146] Ibid [7.11].
[147] *Civil Liability Act* 2002 (NSW) s 17; *Defamation Act* 2005 (NSW) s 35.
[148] New South Wales Law Reform Commission, above n 120, [7.18].
[149] See above 'Defamation'.
[150] New South Wales Law Reform Commission, above n 120, [8.1].
[151] Ibid [8.2].
[152] Ibid [8.2] –[8.3].
[153] Ibid [8.1].
[154] Ibid [9.1].

death.[155] It shared the ALRC's concern for a national, uniform approach[156] but recommended co-ordinate legislation by the states and territories as the best means of achieving this.[157]

The VLRC, as part of its report, *Surveillance in Public Places*, took a different approach from the ALRC and the NSWLRC. It stated that Victoria could still demonstrate 'leadership in relation to the protection of personal privacy'[158] and that a national, uniform approach might need to be 'a long-term goal'.[159] It recommended two separate, statutory causes of action – one for the misuse of private information, the other for intrusion upon seclusion.[160] It did this in order to address the difficulty of defining privacy.[161] It recommended against allowing the common law to continue to develop, as this would be time-consuming and costly.[162] The VLRC recommended the incorporation of a requirement that the conduct be 'highly offensive' in order to exclude trivial cases.[163] It refused to exclude negligent conduct as a basis of liability.[164] It proposed an exhaustive list of defences, similar to those proposed by the ALRC and the NSWLRC, with the addition of a free-standing public interest defence.[165] It suggested a narrower list of remedies, limited to compensatory damages, injunctions and declarations.[166] Drawing upon the experiences from the United Kingdom and New Zealand, the VLRC did not accept that enacting these causes of action would create 'a flood of litigation'.[167] Concerned that these causes of action should be available to all people, not merely the province of celebrity plaintiffs, the VLRC supported conferring jurisdiction on the Victorian Civil and Administrative Tribunal.[168] In the VLRC's view, the causes of action should only be available to natural persons and specifically not to deceased estates and corporations.[169]

Thus, the issue of privacy has been of considerable interest to law reformers in recent years, if not yet legislatures. The Commonwealth government will respond to the ALRC's recommendations about a statutory cause of action for invasion of privacy in its Second Stage Response to the ALRC's report on privacy. However, at the time of writing, it had not released its response.[170] There

[155] Ibid [10.1].
[156] Ibid [11.1].
[157] Ibid [11.3].
[158] Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report 18 (2010) [7.2].
[159] Ibid [7.3].
[160] Ibid [7.5], recommendations 22–24.
[161] Ibid [7.123].
[162] Ibid [7.117].
[163] Ibid [7.142].
[164] Ibid [7.148].
[165] Ibid [7.178]–[7.179], [7.182], [7.187]–[7.189], recommendations 28 and 29.
[166] Ibid, recommendation 29.
[167] Ibid [7.121].
[168] Ibid [7.122], [7.226]–[7.228], recommendation 31.
[169] Ibid [7.240], recommendation 32.
[170] See <http://www.dpmc.gov.au/privacy/reforms.cfm>.

are no present plans in either New South Wales or Victoria to implement the recommended statutory causes of action. If these causes of action are enacted, they will provide a direct means for sportspeople to protect their privacy. The protection will not be absolute; it will necessarily be subject to enumerated defences, embodying countervailing interests. Nevertheless, direct protection is preferable to the piecemeal and indirect protection currently available. For sportspeople concerned about their privacy, a legislated solution has a distinct benefit over allowing the common law to continue to develop, providing more immediate and more certain protection. Given the challenges to personal privacy that continue to arise and are unlikely to abate, sportspeople and their representatives have a real interest in supporting the introduction of privacy rights in Australia in some form.

Recent Developments and Future Directions

As privacy law in Australia develops in whatever form it takes, sportspeople will confront ongoing difficulties protecting their privacy against media intrusion. For sportspeople who have long been prominent in their sporting careers and therefore of interest to the media, often in relation to non-sporting aspects of their lives, the prolonged media exposure may act to deprive them of expectations of privacy they might otherwise have enjoyed. For instance, in 2010, an escort, Jenny Thompson, gave an interview to the tabloid newspaper, *The News of the World*, about having sex with Premier League footballer, Wayne Rooney, while Rooney's wife, Coleen, was pregnant.[171] Rooney reportedly considered seeking an injunction to restrain the interview being published but decided against it. The fact that, in 2004, Rooney had voluntarily discussed his use of prostitutes when he was 'very young and immature', and, to a lesser extent, the fact that he and his wife sold the rights to their wedding photographs to a women's magazine for an estimated £2.5 million, would have weighed against the success of any application, as this prior media coverage, particularly the former, could be used as the basis of a defence of public interest by a media outlet.[172] In order for sportspeople to maximise the possibility of protecting their privacy against media intrusion, they need not only to be vigilant but also consistent in their dealings with the media.

Interaction with the media can also present another difficulty. In *Terry v Persons Unknown*, the active 'reputation management' engaged in on behalf of John Terry, the captain of the Chelsea and the English national soccer teams and 2009 Father of the Year, deprived him of his ability to protect his privacy. In

[171] Keith Gladdis and Dominic Herbert, 'Let's Score at Home; Cheat Roo and Hooker: Star's Sordid Betrayal of his Family', *The News of the World* (London), 5 September 2010, 1.
[172] Matthew Moore, 'Rooney is powerless to stop latest sex allegations', *The Daily Telegraph* (London), 6 September 2010, 7. As to the defence of public interest and prior media coverage of a sportsperson's private life, see *Terry v Persons Unknown (Rev 1)* [2010] EWHC 119 (QB), [40]–[43] (Tugendhat J).

late January 2010, Terry sought an injunction to restrain the publication of the fact of his extra-marital relationship with French model, Vanessa Perroncel; details of their relationship, including its consequences; material leading to the identification of Terry and Perroncel; and photographs evidencing or detailing these matters.[173] Justice Tugendhat accepted that the information, if published and found to be false, was arguably defamatory.[174] The evidence before the court indicated that Terry's solicitors and business partners met to discuss media interest in Terry's private life. The business partners arranged for Perroncel to sign a confidentiality agreement. Justice Tugendhat was concerned about this, as, unlike the solicitors, the business partners owed no duties to the court. His Lordship inferred that the business partners had a clear, commercial interest in protecting and enhancing Terry's reputation, particularly for the purposes of sponsorship.[175] He also had reservations about whether the confidentiality agreement accurately reflected Perroncel's wishes, suggesting a power imbalance between Terry and Perroncel based on their relative public profiles, questioning whether the stated consideration of £1 was the only consideration provided and querying how Terry's business partners came to be talking to Perroncel in the first place.[176] Justice Tugendhat was also concerned that Terry did not put on any evidence himself. This lack of evidence was apparently because Terry was busy.[177] In his Lordship's words, '[r]espect for the dignity and autonomy of the individuals concerned requires that, if practicable they should speak for themselves'.[178] Given that the interest sought to be protected in the proceedings was Terry's personal privacy, this gap in the evidence was telling. It fortified Tugendhat J in his ultimate conclusion that Terry was principally concerned with his reputation, not his privacy. In his Lordship's view, Terry treated the legal proceedings in response to the allegations as 'a business matter'.[179] Consequently, the restrictive approach to the grant of injunctions to restrain the publication of defamatory matter applied.[180] The newspapers were at liberty to publish the allegations.[181] *Terry v Persons Unknown* indicates that successful sportspeople, who rely upon professional services to create, maintain and protect their public profiles, need to take a different approach when engaging in litigation to protect their privacy. Given the highly personal nature of the interest involved, courts

[173] Ibid [6] (Tugendhat J).
[174] Ibid [9].
[175] Ibid [28]–[33] (Tugendhat J).
[176] Ibid [34]–[35] (Tugendhat J).
[177] Ibid [36] (Tugendhat J).
[178] Ibid [66] (Tugendhat J).
[179] Ibid [95] (Tugendhat J).
[180] Ibid [123] (Tugendhat J).
[181] See, for example, Cyril Dixon, 'England Captain's Secret Affair', *The Daily Express* (London), 30 January 2010, 1; Rebecca Evans, 'John Terry cheats on wife', *The Daily Mirror* (London), 30 January 2010, 1; Sam Greenhill, Christian Gysin and Steve Doughty, 'England Captain's Affair with Team Mate's Girlfriend', *The Daily Mail* (London), 30 January 2010, 1; Gordon Rayner and Martin Evans, 'England captain loses privacy battle', *The Daily Telegraph* (London), 30 January 2010, 1.

require sportspeople to demonstrate an active concern for their privacy, rather than devolving that responsibility to others.[182]

When seeking to protect their personal privacy, sportspeople also confront real challenges from technology. This capacity and the inadequacy of current Australian laws to protect personal privacy were amply demonstrated by the experience of several prominent St Kilda footballers in late 2010. A seventeen year old girl uploaded naked photographs of Nick Riewoldt and Nick dal Santo to her Facebook page. She claimed that she had come to know the footballers when they visited her school, that a sexual relationship developed with one player, Sam Gilbert, and that she fell pregnant with his child, although the baby was stillborn. She claimed that she took the photographs herself in Melbourne but it was later revealed that they were taken by Gilbert on a team trip to Miami and that she had copied them from his laptop computer. Riewoldt had asked Gilbert to delete them immediately but Gilbert had not done so.[183] The girl threatened to release further compromising photographs of other players from the Carlton and Sydney AFL clubs but this never transpired.[184] The St Kilda Football Club and Gilbert commenced proceedings in the Federal Court of Australia against the girl. Justice Marshall ordered the girl to take down the photographs and not to post any further ones. However, by then, the photographs were widely circulating on the internet.[185] The girl continued to make allegations via Twitter and Youtube.[186] As a result of the publication of the photographs, Riewoldt was harassed when he went out in public.[187] In January 2011, a settlement was reached whereby the girl agreed to comply with a court order that she delete the photographs and not repost them again in return for accommodation being provided for her for several months.[188] The resolution of the Federal Court proceedings was not the end of the matter. The girl in question attended the St Kilda AFL team's training session, distributing

[182] See generally Craig Callery, 'John Terry: Reflections on Public Image, Sponsorship, and Employment' (2010) 2 *International Sports Law Review* 48.
[183] Rohan Connolly, 'Gilbert sorry as Riewoldt fumes', *The Age* (Melbourne), 22 December 2010, 2; Mike Sheahan, 'What are the bare facts?', *The Herald-Sun* (Melbourne), 22 December 2010, 2.
[184] Anthony Dowsley, 'I want my revenge: Teenager says there is more to come', *The Herald-Sun* (Melbourne), 21 December 2010, 7; Anthony Dowsley and Amelia Harris, 'Teen vows Blues and Swans will be her next targets', *The Herald-Sun* (Melbourne), 22 December 2010, 3.
[185] Anthony Dowsley, 'Saints Naked Fury: St Kilda wins court order to protect its champions; Defiant teenage girl vows to publish more photos', *The Herald-Sun* (Melbourne), 21 December 2010, 1; Paul Millar and Reid Sexton, 'Pictures of naked Saints go viral, despite court order', *The Age* (Melbourne), 21 December 2010, 1.
[186] Reid Sexton and Paul Millar, 'Teen adds tech touch to wrath of a woman scorned', *The Age* (Melbourne), 21 December 2010, 6.
[187] Martin Blake and Maris Beck, 'Riewoldt harassed: Saints', *The Age* (Melbourne), 21 January 2011, 3; Anthony Dowsley, 'Riewoldt dust-up over nude photos', *The Herald-Sun* (Melbourne), 21 January 2011, 3.
[188] Anthony Dowsley, 'Girl gets "free" apartment: Saints seal photo deal', *The Herald-Sun* (Melbourne), 22 January 2011, 3; Jon Pierik and Genevieve Gannon, 'Nude-pic teenager strikes deal with Saints', *The Age* (Melbourne), 22 January 2011, 3.

leaflets and heckling players.[189] In February 2011, she also claimed that a sexual relationship developed between her and player agent, Ricky Nixon, during which he supplied her with cocaine.[190] Following an investigation, Nixon was banned by the AFL Players' Association's Agents Accreditation Board from acting as a player agent for two years.[191] In March 2011, the girl gave an interview to *60 Minutes*, as a result of which her identity became widely discussed in the traditional media (although it had been readily accessible on the internet from the outset). In the interview, Kim Duthie admitted that she had lied about her pregnancy.[192] Duthie subsequently admitted that she lied about her involvement with Nixon[193] but she may have been lying about her lying.[194] At the time of writing, neither Riewoldt nor dal Santo has taken legal action in relation to the invasion of privacy.[195] As a result of this affair, the AFL Players' Association called for the introduction of effective privacy laws, not only for players but for all individuals.[196] The AFL also conducted a session for rookie players on how to use social media appropriately.[197] This incident clearly demonstrates how vulnerable high-profile sportspeople are to having their privacy invaded and how inadequate existing legal protections are to provide them with a remedy.

Even if sportspeople have the benefit of court orders protecting their privacy, they may nevertheless find their private lives exposed by virtue of internet technologies. The recent experience of Manchester United footballer, Ryan Giggs, underscores this. Initially known by the pseudonym, 'CTB', Giggs obtained an interim injunction, preventing former Miss Wales and *Big Brother* contestant, Imogen Thomas, from giving an interview with *The Sun* newspaper about their relationship. Giggs suggested, and Eady J accepted as arguable,

[189] Carolyn Webb and Megan Levy, 'Photo-scandal teen tackles Saints at new HQ's debut', *The Age* (Melbourne), 11 January 2011, 5.
[190] Anthony Dowsley, 'Sex, Lies & Video Tapes: Police Quiz Teen Girl Over Drugs, Spy Cam; Manager Denies Affair As Probe Decides Future', *The Herald-Sun* (Melbourne), 22 February 2011, 1; Caroline Wilson, 'Girl at centre of St Kilda photo scandal alleges affair with Nixon: Sex claims', *The Age* (Melbourne), 19 February 2011, 3.
[191] Scott Spits and Jake Niall, 'On the ropes: Board suspends Nixon's licence', *The Age* (Melbourne), 18 March 2011, 24; Michael Warner and Anthony Dowsley, 'Guilty', *The Herald-Sun* (Melbourne), 18 March 2011, 1.
[192] Maris Beck and Ahmer Khohar, 'St Kilda teen lied she was pregnant', *The Age* (Melbourne), 7 March 2011, 3; Anthony Dowsley, 'I wasn't pregnant, teen admits', *The Herald-Sun* (Melbourne), 7 March 2011, 5.
[193] Anthony Dowsley and Mark Robinson, 'Now Kim retracts sex and drugs claims against Ricky Nixon: I made it all up', *The Herald-Sun* (Melbourne), 9 June 2011, 3.
[194] Anthony Dowsley, 'No end to her lies: St Kilda schoolgirl back tracks again on Nixon sex and drugs claims', *The Herald-Sun* (Melbourne), 10 June 2011, 3.
[195] Selma Milovanovic, 'Several legal options for Riewoldt over photos: Confusion over who took pictures', *The Age* (Melbourne), 22 December 2010, 6; Anthony Dowsley, 'St Kilda vows to sue 17-year-old girl over nude photos row: We'll make you pay', *The Herald-Sun* (Melbourne), 24 December 2010, 3.
[196] Sam Edmund, 'Improve privacy laws, players' union urges', *The Herald-Sun* (Melbourne), 22 December 2010, 2; Jon Pierik, 'Nude picture harms skipper's image: Saints', *The Age* (Melbourne), 21 December 2010, 3. For a critical view, see Susie O'Brien, 'Protecting privacy a real priority', *The Herald-Sun* (Melbourne), 22 December 2010, 39.
[197] Jon Pierik, 'Rookies drilled on social media', *The Age* (Melbourne), 11 January 2011, 7.

that Thomas was attempting to blackmail Giggs – an allegation rejected by those representing Thomas.[198] Even though the court orders extended beyond traditional media, the social media platform, Twitter, allowed individuals to speculate as to the identity of 'CTB'. A large number of names were suggested, although Giggs' name predominated. So concerned was Giggs that he commenced proceedings against Twitter for breaching the injunction.[199] Justice Eady refused to vary the injunction to allow Giggs to be identified on the basis that his identity had become public via Twitter.[200] This was not the end of the matter. The Scottish newspaper, *The Sunday Herald*, acting on advice that an injunction issued by an English court was not binding in Scotland, published a front page photograph of Giggs with the word, 'CENSORED', written in a black bar across his eyes. Although it did not name Giggs, he was clearly identifiable. The newspaper contained substantial coverage of the case and explained why it had decided to disclose Giggs' identity: it was concerned with the pernicious effect of injunctions and superinjunctions on freedom of the press and open justice.[201] As a result of its conduct, *The Sunday Herald* was threatened with contempt proceedings.[202] Giggs' injunction was further subverted by John Hemming, a Liberal Democrat parliamentarian, who named Giggs as 'CTB' under parliamentary privilege in the House of Commons.[203] Justice Tugendhat refused to vary the injunction to allow Giggs to be named on the basis that he had been named in parliamentary proceedings.[204] However, the combined effect of these three forms of disclosure was that Giggs became widely known and reported in traditional media as 'CTB'. Newspapers speculated whether Giggs was 'the new Tiger Woods' and whether his sponsorship deals were in jeopardy.[205] The United Kingdom Attorney-General, Dominic Grieve QC warned that tweeters who breached injunctions in privacy cases were exposing themselves to punishment for contempt of court.[206] Revelations about Giggs' private life continue to emerge, with the most recent, at the time of writing,

[198] *CTB v News Group Newspapers Ltd* [2011] EWHC 1232 (QB), [7]–[16]. See also Jenna Sloan, 'Giggs is coward for slur on my Imogen: Dad fury over "blackmail" claim', *The Sun* (London), 4 June 2011, 30–31.

[199] Martin Evans and Steven Swinford, 'Footballer to sue Twitter for "breach of injunction"', *The Daily Telegraph* (London), 21 May 2011, 4.

[200] *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB), [23]–[25].

[201] Editorial, 'Privacy laws go far enough', *The Sunday Herald* (London), 22 May 2011, 34.

[202] Frances Gibb, Anushka Asthana and Alexi Mostrous, 'Paper faces legal threat over picture of footballer', *The Times* (London), 23 May 2011, 1.

[203] Jane Croft and Salamander Davoudi, 'Commons breaches gag order', *The Financial Times* (London), 24 May 2011, 2; Frances Gibb, Roland Watson and Michael Savage, 'Worst-kept secret is broken as MP names player in privacy row', *The Times* (London), 24 May 2011; Patrick Wintour and Dan Sabbagh, 'Privacy laws in chaos as MP names Giggs over injunction', *The Guardian* (London), 24 May 2011, 1.

[204] *CTB v News Group Newspapers Ltd* [2011] EWHC 1334 (QB).

[205] James Tozer, 'Is Giggs the New Tiger? He Could Be the New Woods as Sponsors Desert Him Over Scandal', *The Daily Mail* (London), 7 June 2011, 9.

[206] Martin Evans, 'Rebel Twitter users will be prosecuted, says law chief', *The Daily Telegraph* (London), 8 June 2011; Frances Gibb, 'Tweeters face legal action over privacy', *The Times* (London), 8 June 2011, 8. See also James Chapman, 'Twitter gossips warned: You're in for a rude shock', *The Daily Mail* (London), 24 May 2011, 5.

being the allegation that Giggs had an eight year affair with his sister-in-law, as well as liaisons with his mistress' mother and a third, undisclosed lover.[207] Paradoxically, privacy protections are developing at the same time that internet technologies with the potential to subvert these protections are burgeoning.[208] It may not be possible to protect privacy through absolute secrecy and prior restraint. For lawmakers and legal advisors, the experience of Ryan Giggs provides a salutary lesson. Whilst plaintiffs might prefer to avoid an invasion of privacy in the first place, the balance of competing interests might favour allowing media outlets to publish and then allow plaintiffs to sue for damages, mirroring defamation cases.

Conclusion

The media's interest in the private lives of sportspeople is unlikely to wane. In particular, the development of internet technologies, such as Facebook and Twitter, not only increase the opportunities for sportspeople to share aspects of their private lives with the media and their fans but also increase the opportunities for unwanted intrusion upon sportspeople's privacy.[209] Currently, it is widely recognised that Australian law does not adequately protect privacy. It is possible that Australian law will develop to recognise a cause of action for invasion of privacy in some form. For sportspeople concerned about protecting their privacy, there are two obvious courses of action: they can lobby governments to act upon the recommendations of various law reform bodies or, if appropriate circumstances present themselves, they can bring test cases to stimulate the development of common law or equitable protections of personal privacy. Any changes they secure will close a gap in the law for the benefit of all individuals.

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[207] Keith Gladdis and Carole Aye Maung, 'Giggs 8yr affair with Bro's Wife: Cheating Prem star betrays his family', *The News of the World* (London), 5 June 2011, 1; Martin Fricker, 'Giggs and Girl No 3', *The Daily Mirror* (London), 7 June 2011, 1; Martin Fricker, 'Giggs Tried to Seduce Lover's Mother', *The Daily Mirror* (London), 8 June 2011, 1. *The Sun* also covered other, less important but equally invasive aspects of Giggs' private life, such as his treatment for baldness and his alleged feud with his brother, Rhodri: John Coles, 'Sex Cheat Giggs Fights to Preserve Follicles', *The Sun* (London), 8 June 2011, 1; 'Mum tells her lads to finish feud', *The Sun* (London), 8 June 2011, 5.

[208] 'Keeping secrets in the age of tweets', *The Economist* (London), 28 May 2011, 34; Katy Hayes, 'Privacy is dead: get used to prying eyes', *The Sunday Times* (London), 29 May 2011, 15. However, see Tim Bradshaw, 'Word of mouth identified footballer behind gag order', *The Financial Times* (London), 30 May 2011, 3.

[209] As Canberra Raider rugby league footballer, Joel Monaghan, discovered when a photograph taken of him simulating oral sex with a dog at a 'Mad Monday' function was circulated via Twitter. The police and the RSPCA launched investigations into Monaghan's conduct. Monaghan was forced to resign and eventually to leave the country, signing to play with the Warrington Wolves. See Chris Dutton and John-Paul Moloney, 'Disgraced Monaghan's career on line as prank goes viral', *The Canberra Times* (Canberra), 5 November 2010, 1; Adrian Proszenko, 'Shamed Raider looks to UK: I don't want to lose my livelihood over a stupid prank, Monaghan says', *The Canberra Times* (Canberra), 7 November 2010, 3; John-Paul Moloney, 'A father's steadying hands helps a son say sorry', *The Canberra Times* (Canberra), 10 November 2010, 1. Significantly, *The Canberra Times* editorialised in the aftermath of this incident that Twitter and other social media sites needed to be subject to more stringent privacy standards: 'Monaghan result shows damage caused by breach of privacy', *The Canberra Times* (Canberra), 14 November 2010, 30.