IS NOTHING PRIVATE ?: PRIVACY AND THE NEED FOR LEGISLATIVE INTERVENTION

by P D T Applegarth SC[1]

In 1980, when I was a law student, I read a provocative article in the *Law Quarterly Review* titled "The Poverty of 'Privacy'". In it Raymond Wacks concluded:

> "'Privacy' has grown into a large and unwieldy concept. Synonymous with autonomy, it has colonised traditional liberties, become entangled with confidentiality, secrecy, defamation, property, and the storage of information. It would be unreasonable to expect a notion so complex as 'privacy' not to spill into regions with which it is closely related, but this process has resulted in the dilution of 'privacy' itself, diminishing the prospect of its own protection as well as the protection of the related interests.
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> In this attenuated, confused and overworked condition, 'privacy' seems beyond redemption. Any attempt to restore it to what it quintessentially is – an interest of the personality – seems doomed to fail for it comes too late. 'Privacy' has become as nebulous a concept as 'happiness' or 'security'. Except as a general abstraction of an underlying value, it should not be used as a means to describe a legal right or cause of action.
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> It is submitted that a more honest, effective and rational course is to approach the subject from the standpoint of the protection of 'personal information'."[2]

As overworked as the concept of "privacy" was in 1980 and still is today, it wields a huge influence. It has been recognised as a human right. For instance, article 17 of the *International Covenant on Civil and Political Rights* provides:

> "1. No one shall be subjected to arbitrary or unlawful interference with his **privacy**, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
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> 2. Everyone has the right to the protection of the law against such interference or attacks."[3]

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1 An address to the Australian Legal Philosophy Students' Association on 18 March 2008.

2 (1980) 96 LQR 73 at 88.

3 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] *Australian Treaty Series* 23, art 17 (generally entered into force for Australia 13 November 1980) ("ICCPR") (emphasis added)

The United Nations Human Rights Committee has stated that privacy includes a "sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone".[4]

But in what form should our legal system confer a legal right or cause of action for what can loosely be called an invasion of privacy?

In 2001 the High Court, in the *Lenah Game Meats* case[5], 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.

There is a need for caution because simply harnessing a concept such as "privacy" in declaring a new tort is a recipe for analytic confusion and uncertainty in the law. Philosophers can debate whether "privacy" is a value and whether it can be equated with personal autonomy. Lawmakers, including judicial lawmakers in writing the 21st Century chapter of the common law and in moulding equitable doctrines and remedies, should proceed cautiously by recognising certain specific "privacy interests" that deserve protection and defining the extent of their protection, rather than giving legal protection to an amorphous "right to privacy".

The US experience in tort law is instructive. Building upon Professor Prosser's work[6] the "Restatement on Torts"[7] says that the right to privacy may be invaded in four ways. The first is "Intrusion upon Seclusion". The second is "Appropriation of Name or Likeness". The

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4 *Coeriel and Aurik v The Netherlands* United Nations Human Rights Committee, 52nd sess, UN Doc CCPR/C/52/D/453/1991, [10.2] (1991).

5 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63.

6 W L Prosser "Privacy" (1960) 48 California Law Rev 383.

7 Restatement of the Law, Second, Torts, 652 (1977) American Law Institute.

third is "Publicity given to Private Life" and the fourth is identified as "Publicity Placing Person in False Light". This analysis demonstrates how amorphous the concept of privacy is. Many of us regard cases on appropriation of name or likeness as having more to do with the right to publicity than the right to privacy. If anything, it is about a right of property, and preventing unjust enrichment by the misuse of someone else's goodwill, or a commodity called celebrity.

The development of a tort of privacy in Australia, by either a statutory cause of action or a judge-made tort is likely to focus upon two of these categories: The first is intrusion upon seclusion or solitude. The second is public disclosure of private facts.

Senior Judge Skoien recognised the existence of a tort based upon intrusion upon privacy or seclusion in *Grosse v Purvis*.[8] The tort requires a willed act which intrudes upon privacy and seclusion in a manner which is "highly offensive to a reasonable person of ordinary sensibilities" and 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 he or she is lawfully entitled to do.

Tonight I wish to address a different emerging tort which is concerned with the public disclosure of private facts. The need for protection is all too apparent. The public's thirst for gossip and scandal is insatiable, but it has always been so.[9] In 1891 Oscar Wilde in The *Soul of Man under Socialism* observed:

> "The public have an insatiable curiosity to know everything, except what is worth knowing. Journalism, conscious of this, and having tradesman-like habits, supplies their demands."

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8 [2003] QDC 151 ; (2003) Aust Torts Reports 81-706

9 Warren and Brandeis "The Right to Privacy" (1890) 4 Harv Law Rev 193 were concerned with press excesses and the right to privacy was formulated as a protection against gossip.

What is different today, and what makes the need for protection more pressing, is modern technology. Not just the telephoto lens which can capture images from a distance without committing a trespass. Modern mobile phones make everyone who owns one an amateur photographer, and easy access to the internet makes each of these amateur photographers a potential global publisher. They have a potential readership beyond the imagination of William Randoph Hearst or Lord Beaverbrook.

An example of the potential of modern technology to invade privacy occurred last April when rugby league superstar, Sonny Bill Williams, was captured on a mobile phone image during a friendly encounter with an equally fit sportswoman in a men's toilet cubicle at a Sydney hotel. The photos found their way onto the internet, and then into the pages of the Murdoch press.

How should the law restrict the public disclosure of sensitive private facts? English courts have done so without declaring a tort of privacy invasion. Instead, they have adapted the action for breach of confidence to provide a remedy where private information is disclosed in circumstances where a person disclosing information knew or ought to have known that there was a reasonable expectation that the information would be kept confidential or private. Some would say it is akin to a tort of privacy invasion except in name only. Still, the House of Lords in *Wainwright*[10] declared that there was no tort of invasion of privacy. Professor Wacks in a recent essay titled "Why there will never be an English common law privacy tort" gives seven reasons for this conclusion, and the first is the advance of the equitable remedy for breach of confidence.[11]

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10 *Wainwright v Home Office* (2004) 2 AC 406.

11 Wacks "Why there will never be an English common law privacy tort" in Kenyon and Richardson (eds) *New Dimesnions of Privacy Law: International and Comparative Perspectives* (2006). In summary, the seven factors are:

1. The advance of the equitable remedy for breach of confidence;
2. The impact of the *Human Rights Act* 1998;
3. The dominance of freedom of expression;
4. The impact of the Data Protection Act 1998;
5. Media self-regulation;
6. Incoherence of the concept of privacy;
7. Judicial preference for legislation.

Things have come a long way since *Kaye v Robertson*.[12] In that 1991case, the actor, Gordon Kaye, was recovering from serious head injuries in a private room of a hospital from which most visitors were explicitly barred. He was in no condition to consent to a press interview. A reporter and photographer from the *Sunday Sport* shamefully invaded the hospital room. In that case the English Court of Appeal adopted the assumption of counsel that English law recognised no right of privacy.[13]

In the last decade English courts have adapted the action for breach of confidence to protect privacy interests, and we have the UK *Human Rights Act,* 1998 and actors Michael Douglas and Catherine Zeta Jones largely to thank for that. The case arose out of their wedding at the Plaza Hotel in New York. In the same vein as John Howard's slogan in the 2001 Tampa election the actors declared:

> "We decide who will come to our wedding and the terms upon which they will come to it."

But an enterprising photographer captured some unauthorised shots and a magazine that bought them threatened to spoil the exclusive rights to publish authorised that had been sold by the actors to a rival magazine. Perhaps it is only millionaires like the happily married couple who can afford litigators to make new law. 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.

Sedley LJ declared:

> "What a concept of privacy does.. is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship

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12 [1991] FCR 62.

13 Glidewell LJ said as much when giving the leading judgment.

> of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy."[14]

The course of adapting the law of confidence comes with it's problems, and one of my colleagues at the Bar, Mark Johnson, has published an article questioning whether the "square peg of privacy" should be forced into the "round hole of confidence", or whether we should look to a new tort.[15]

If Australian courts look to a new tort, then they can look to formulations of a tort against disclosure of private information, as established by judges in New Zealand.[16] But judicial lawmaking comes with its problems.

It was a simple, but bold, step last year for a Victorian County Court Judge to hold that a tort of invasion of privacy exists in Australian law.[17] 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.

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

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14 *Douglas v Hello! Ltd* [2001] QB 967 at 1001 [126].

15 Johnson "Should Australia force the square peg of privacy into the round hole of confidence or look to a new tort?" (2007) 12 MALR 441.

16 *Hosking v Runting* [2005] NZLR 1.

17 *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281. The ABC appealed on various grounds including against the finding that the tort of invasion of privacy existed in Australia. The appeal was settled in March 2008.

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. For instance, in *Lenah Game Meats* Gleeson CJ asked whether the disclosure would be "highly offensive to a reasonable person". In the *Naomi Campbell* case some members of the House of Lords regarded that test as too strict. What test is a trial judge in Australia to choose from the judicial smorgasbord?

There are big issues to be resolved about defining the cause of action for public disclosure of private facts, and when the privacy interest trumps other interests.

Is it enough for a plaintiff to simply prove circumstances where 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?

What are "private facts"? What are public and private places?

What reasonable expectation of privacy does a public figure have?

What defences should be available?

Is it a defence, as in a breach of confidence action, that the information in the public domain? Does information on a public record cease to be "private"? [18]

Should there be a defence akin to a *Lange* defence where the matter involves the discussion of government or political matters?

Without human rights instruments like a *Human Rights Act* as exists in the UK, how does the court balance competing interests? Do privacy interests have a priority over other interests such as freedom of speech?

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.

The hazards of judicial law making in this area make us look to a statutory cause of action in the interests of greater certainty. The New South Wales Law Reform Commission suggests such an enactment in its comprehensive Consultation Paper. But its tentative proposal of having a cause of action for invasion of a generally worded right of privacy, coupled with a non-exhaustive list of examples of invasion, deploys an imprecise concept or value as a cause of action and thereby creates unnecessary uncertainty.

I must declare an interest. Even with a more precise statutory cause of action, there will be uncertainty, and therefore the potential for plenty of litigation.

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[18] For example, The United States Court of Appeals has held that the fact that information is on public record about applicant's HIV status did not become a matter of public record so as to bar an action for privacy.

Celebrities, sporting stars and other public figures will be left 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.[19] 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.[20] 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.

But potential uncertainty is not a *sufficient* reason to not enact a law to control the public disclosure of sensitive private facts. If uncertainty was a sufficient reason to do nothing, then Parliaments would not have enacted statutory causes of action for breach of vaguely worded statutory duties, and courts would not have developed the modern law of negligence. But we have to limit the scope for uncertainty, lest the law fall into disrepute and any cause of action become the exclusive plaything of the rich and famous.

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19 *A v B plc* [2003] QB 195.

20 *Campbell v MGN Ltd* [2004] 2 AC 457.

To be realistic, and if English experience is a guide, any new cause of action is likely to be used, and misused, by the rich and famous, more than the ordinary citizen. This is because the public's thirst for gossip about, and unguarded images of, celebrities is enormous. Readers demand to see what film stars look like without their makeup, dressed in tracky dacks as they pop down to the shop to buy a pack of fags. Readers of *New Idea* like to look at images of aging supermodels emerging from the surf, and to see signs of cellulite. Perhaps it's the search for the authenticity. Maybe, as Wilde said, it is insatiable curiosity to know everything, except what is worth knowing.

Some of us would like to have the freedom to be protected *from* too much information about celebrity marriages and images of cellulite. But we can exercise that freedom by reading the *Law Quarterly Review* rather than *New Idea.*

Celebrities and corporations like to control images and stories, lest it diminish the value of a commodity called celebrity. Under the guise of protecting the value of personal autonomy or "a right to privacy" in the form of the right to control disclosure of private information, the law inadvertently may create an image right or a right to publicity. The risk is very real, since in applying the traditional action for breach of confidence to information that was already in the public domain, Lord Hoffmann and the majority in *Douglas v Hello (No 3)*[21] effectively created an image right, or a right to publicity.

In conclusion, Oscar Wilde famously wrote:

> "We are all in the gutter, but some of us are looking at the stars"[22]

The English barrister, Christine Michalos, in discussing *Image Rights and Privacy after Douglas v Hello* cleverly observed:

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21 [2008] 1 AC 1; [2007] UKHL 21; [2007] 2 WLR 920

22 *Lady Windemere's Fan*

"…as the market shows, we may not all read the gutter press, but we all want to look at the stars"