Under Surveillance: Fergie, Photographers and Infringements on Freedom

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The recent world-wide publication of photographs of the Duchess of York frolicking topless by the poolside with her 'financial adviser' has made sensational headlines, not to mention having improved the lot of many newspapers and magazines who are eager to boost sales with glimpses of a royal breast. However, besides adding a further chapter to the Royal family's marital sagas and delighting the public by enabling them to moralise about whether Fergie, officially separated from her husband, should or should not have been swimming topless around a poolside and canoodling with a companion, lies the far more significant issue of the right of all individuals to some degree of privacy and the inability of the law to protect individuals *in a private place* from being the subject of surveillance and exposure by the telescopic lenses of the media.

It has been clear since the 1937 High Court decision in *Victoria Park Racing and Recreation Grounds Co Limited* v. *Taylor*[1] that there is no common law right to privacy in Australia. Any civil remedies which an individual may have in respect of the publication of photographs taken while they are on private property is a coincidental result of the operation of branches of law which have the purpose of protecting rights other than privacy.[2] These branches consist of the law of trespass, nuisance and defamation.[3] However, as this paper will show, these remedies are inadequate and inappropriate to protect individuals against invasions of privacy such as the *Fergie Photographs*. Moreover, unless the law develops a right of individuals to be protected from the publication of photographs taken in private places there will be an erosion of the fundamental human right[4] to be free from photographic surveillance where there is no public interest in such surveillance.[5]

Why protect individuals from surveillance?

Provided that a person's activities are within the perimeters of the law and there is no genuine 'public interest' in respect of that person's private activities, the right of that person to be free from interference from the state and others is one of the very foundations

1 (1937) 58 CLR 479 (affirmed in *Moorgate Tobacco Co Limited* v. *Phillip Morris Limited (No.2)* (1984) 156 CLR 414).

2 Note that most criminal codes in Australia have some 'peeping tom' provision making the peeping or prying upon a person an offence. Section 547C of the *Crimes Act* 1900 (NSW) makes it an offence for 'any person to be in, on or near a building without reasonable cause with intent to peep or pry upon another person.' The maximum penalty is three months imprisionment or a fine of $200.

3 Rights to restrain the publication of personal information may also be available under the equitable doctrine of breach of confidence. However, as this does not apply in respect of the *Fergie Photographs* it is not discussed in this article.

4 See Article 12 of the *Universal Declaration of Human Rights* and Article 17 of the *Covenant of Civil and Political Rights*.

5 This article does not discuss surveillance where it is for purposes other than publication in the media and in respect of which there may be some other public interest e.g. surveillance for the purposes of exposing fraud in insurance or personal injury claims.

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of a democratic society and the rights of individuals to liberty, freedom of speech and freedom of expression. The recognition of a right to privacy is vital to preserve a meaningful sense of these rights in our society. Little would remain of the concept of liberty, free speech and expression if every conversation and activity in one's life was subject to surveillance and monitoring. Sir Zelman Cowen said:

> [A] man without privacy is a man without dignity: the fear that Big Brother is watching and listening threatens the freedom of the individual no less than the prison bars.[6]

In *Emcorp Pty Limited* v. *Australian Broadcasting Corporation*[7] Williams J. expressed his concern at the risk that fundamental human rights were being undermined by the media:

> [T]he judges jealously protect the rights of citizens against oppressive conduct by the State ... It would be unthinkable that under the guise of freedom of speech the media (particularly in a situation where competition for ratings was a motivating factor) could trample on the rights of citizens which were inviolable as against the State.[8]

The right of individuals to maintain some degree of privacy and be free from undue surveillance is also embodied in various international human rights conventions to which Australia is a signatory. For example, Article 12 of the *Universal Declaration of Human Rights* states that:

> No one shall be subject to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation ... Everybody has the right to the protection of law against such interference or attacks.[9]

Trespass and Surveillance

The *Fergie Photographs* were taken by a photographer who allegedly trespassed onto private property with a long-distance photographic lens.[10] It is clear that in Australia an action for trespass to land will be available where there has been a direct, unlawful and intentional interference with land or premises in respect of which the plaintiff is entitled to exclusive possession.[11] However, the real issue in such cases is usually whether the plaintiff can protect his or her privacy by preventing the *publication* of the booty of the trespass, such as the photographs or film taken of the plaintiff in the course of the trespass. This issue has been considered in two recent Australian decisions: *Lincoln Hunt Australia Pty Limited* v. *Willesee*[12] and *Emcorp Pty Limited* v. *Australian Broadcasting Corporation.*[13]

In *Lincoln Hunt Australia Pty Limited* v. *Willesee*[14] a television reporter and a camera crew entered the plaintiff's business premises for the purpose of asking questions about its business operations. The reporter allegedly wandered around the premises opening doors to rooms which the camera crew duly filmed. The plaintiff sought an injunction to

6 Cowen, Z., *The Private Man, The Boyer Lectures 1969*, 9.
7 [1988] 2 Qd. R. 169.
8 *Id.* 173.
9 See also Article 17 of the *Covenant of Civil and Political Rights.*
10 *The Sydney Morning Herald*, August 29, 1992, 37.
11 Where the defendant has entered the airspace above the land of the plaintiff an action in trespass to land will only be available where the act amounts to an interference with the plaintiff's use and enjoyment of the land and the structures upon it. See *Bernstein of Leigh (Baron)* v. *Skyviews & General Ltd* [1978] Q.B. 479, 485-488, referred to with approval by Hodgson J. in *L.J.P. Investments Pty Limited & Anor* v. *Howard Chia Investments Pty Limited* (1989) Aust.Torts R. 80-269.
12 (1986) 4 N.S.W.L.R. 457.
13 [1988] 2 Qd.R.169.
14 (1986) 4 N.S.W. L.R. 457.

restrain the televising on the ground that the film had been obtained through the defendant's unlawful act of trespassing.

In the Supreme Court of New South Wales Young J. found that the tort of trespass had been made out.[15] However, referring to the established principle that 'one does not commit a tort merely by looking', his Honour found that the filming of the plaintiffs without their consent did not, of its own, constitute a tort.[16]

Where photographs or film were obtained as a result of a trespass Young J. agreed that an interlocutory injunction may be granted in some cases:

> [I] am of the view that the Court has power to grant an injunction in the appropriate case to prevent publication of a videotape or a photograph taken by a trespasser ... However, the Court will only intervene if the circumstances are such to make the publication unconscionable.[17]

His Honour then went on to explain that a publication will be 'unconscionable' only where the plaintiff can prove that he or she will suffer 'irreparable damage' if the injunction is not granted, and that the balance of convenience favours the granting of an injunction.[18] Young J. said that irreparable damage may occur when 'the damages are virtually impossible of quantification'.[19] Presumably by this his Honour meant that the damages must be *so substantial* that they could not be calculated, so that mere embarrassment or humiliation would not suffice, irrespective of the difficulties in quantifying damages in such cases.

Young J. recognised that there would be substantial support in the community for the granting of an injunction to prevent the publication of photographs or film taken upon private premises where there is some evidence that such publication would affect goodwill. However, irrespective of this community support, his Honour said that 'there is a long way to go from that point to the point where the court actually grants an injunction'.[20]

In the case before him, Young J. held that the plaintiffs failed on the first count as they were unable to prove that they would suffer 'irreparable damage' if the broadcast proceeded. Therefore, the injunction was refused.

His Honour went on to comment that if trespass was later proved at the full trial then the plaintiff would, of course, be entitled to damages as a result of the trespass. Young J. stressed that, in some cases, it would be appropriate to award exemplary damages against a defendant.[21]

In respect of privacy, Young J. made brief reference to the decision of the American Federal Court in *Ann-Margret* v. *High Society Magazine Inc.*[22] in which the defendant was restrained from publishing copies of semi-nude photographs of the plaintiff. The original photographs had apparently been stolen from the plaintiff and then returned to her. His Honour said that he was 'quite sure that the *Ann-Margret* case would be decided the same way in New South Wales as it was in the USA'.[23]

15 *Lincoln Hunt Australia Pty Limited* v. *Willesee* (1986) 4 N.S.W.L.R. 457, 460.

16 *Id.* 461. This approach was recently applied in the New Zealand decision, *Bradley* v. *Wingnut Films Ltd.* [1993] 1 N.Z.L.R. 415, in which Gallen J., 429, said that the filming of a trepass would not render the film a trepass itself.

17 *Id.* 463.

18 *Ibid.*

19 *Id.* 464.

20 *Ibid.*

21 *Ibid.*

22 498 F. Supp. 401 (1980).

23 *Lincoln Hunt Australia Pty Limited* v. *Willesee* (1986) 4 N.S.W.L.R. 457, 463. However, it should be noted that there is a tort of privacy in the United States of America. See Prosser, W.L.; *Privacy*, (1960) 48 *California L. Rev.* 383.

In the second Australian decision of *Emcorp Pty Limited* v. *Australian Broadcasting Corporation*[24] Williams J., in the Supreme Court of Queensland, granted an injunction to restrain the publication of film footage obtained as the defendant unlawfully trespassed onto the plaintiff's property.

This case also involved a reporter and a camera crew entering the plaintiff's premises for the purpose of conducting an impromptu interview concerning the plaintiff's business practices. A director of the plaintiff company had made repeated although unheeded requests for the reporter to leave before the camera crew joined the reporter inside the premises and began filming and recording. The plaintiff brought an action against the defendants for trespass to land and injurious falsehood and sought an interlocutory injunction restraining the broadcasting of the film and sound recordings which were made as a result of the trespass.

In deciding whether to grant an injunction Williams J. approved of the 'unconscionability' test set down by Young J. in *Lincoln Hunt*. Williams J. also stressed that the question of whether an injunction should be granted must be considered in the light of the *prima facie* case of trespass against the defendants.[25]

However, in contrast to *Lincoln Hunt*, Williams J. found that in this case the balance of convenience did favour the granting of an injunction as damages, including punitive damages, may not have been an adequate remedy:

> [T]he effect on the business of the plaintiffs of the dissemination of the audio-visual material in question throughout Australia could be devastating. In the circumstances it is clearly arguable that damages, including punitive damages, would not be an adequate remedy'[26].

His Honour went on to state that the fact that the audio-visual material was obtained in breach of the legal rights of the plaintiff outweighed the considerations of freedom of speech which might otherwise operate in favour of the defendants.

The judgments in both *Lincoln Hunt* and *Emcorp* acknowledge that, in some circumstances, the publication or broadcasting of information may be rendered 'unconscionable' as a result of the unlawful means by which the material is collected. However, in both cases the factor determining whether an injunction would be granted was the degree of *economic harm* which would be suffered by the plaintiff and whether damages would be an adequate form of compensation, rather than the extent of the infringement of the plaintiff's privacy.

If the extent of economic or financial harm is the measure by which the court will determine 'irreparable damage' then it is difficult to imagine a situation in which an individual, whose privacy has been invaded by a media crew trespassing into his or her home, would be able to show sufficient economic harm to weigh the balance of convenience test in favour of granting an injunction.

In fact, neither of these decisions referred to the extent to which the plaintiff's privacy was infringed or suggested that this is a relevant factor in determining whether an injunction should be granted to restrain the publication of the material obtained by a trespasser. In the context of the *Fergie Photographs* it would be necessary for an Australian court to determine whether the Duchess would suffer 'irreparable damage' as a result of the publication before deciding to grant an injunction. Given that the photographs did not expose the Duchess as being involved in any illegal activity and they appear after a barrage of negative publicity about the Duchess, it would be open to a court to find that damages,

24 [1988] 2 Qd.R.169.

25 *Id.* 174.

26 *Id.* 178. See also *Morris* v. *TV3 Network Ltd.* (High Court of New Zealand, Neizor J., 14 October, 1991, unreported).

perhaps including punitive damages, may suffice as compensation and thus refuse to grant an injunction.

From a privacy perspective, the application of the 'irreparable damage' test to the question of whether an injunction should be granted is entirely inappropriate as damage in any economic sense is not the issue. The effect of an infringement of an individual's privacy, as with infringements on a person's liberty and freedom, do not readily fit within notions of reparable or irreparable loss or economic damage.

A plaintiff who, through an act of trespass, has been subject to media surveillance and public exposure may, of course, pursue an action for damages in trespass. However, the courts may be reluctant to use trespass as a 'back-door' to compensating privacy interests. Where there has been no damage to the property and, perhaps more importantly, where the individual whose privacy is invaded by a film crew has not been shown in a particularly unfavourable light, the courts may be reluctant to make awards of substantial damages. The result may be that, unlike the deterrent created by awards of high damages in successful defamation actions, media organisations may consider the damages awarded against them for trespass to land a small price to pay for scoop photographs and film footage of famous persons on private properties or within private homes.

The courts' reluctance to grant injunctions in respect of film or photographic booty of a trespass seems to disregard the fact that, at least in respect of occupiers of land, the tort of trespass to land has traditionally protected the occupier's privacy, dignity and the right to be free from undue surveillance. Whilst on private property occupiers of the land have a lawful right to exclude all others. The tort of trespass to land has thus historically protected occupiers from being subject to the curious and salacious gaze of those who may otherwise stroll across their land and perhaps peek through windows to observe them at work or play. The tort is actionable without proof of damage.[27] Accordingly, in the days before zoom lenses and other sophisticated optical equipment, trespass to a very large extent *did* protect the privacy of occupiers against unwarranted intrusion or surveillance and provided compensation in the event of a breach.

The advances in technology which now enable private behaviour to be *recorded* in the course of a trespass by way of photographs and film, combined with the evolution of a sophisticated and internationally linked media, have substantially changed the nature of privacy invasions and affronts to dignity involving trespass to land. The reluctance of the judiciary to prevent the publication of recorded material obtained in the course of a trespass indicates the failure of the tort to adapt to the realities of our technological age. As a result of this failure an individual's right to a degree of privacy when on private property, which the tort of trespass has traditionally protected, seems to have been lost to a bygone era.

Furthermore, the limited protection which the law of trespass to land does offer is only available to those who are in occupation of the land and are entitled to exclusive possession of the property, reflecting the values of a time which linked individual rights to legal interests in property. Thus, even if a licensee of premises were to prove that he or she *would* suffer 'irreparable damage' from the publication of photographs or film taken as a result of a trespass, the person photographed or filmed would not have *locus standi* to bring the action in trespass and apply for an injunction to prevent the publication of the material and/or damages.

This issue was graphically illustrated in the recent English case involving the actor

27 Likewise battery, a form of trespass to the person, is actionable *per se*, entitling individuals to damages in circumstances in which they have been subjected to conduct which is 'offensive to a reasonable sense of honour and dignity'. Such affronts to one's honour and dignity include being spat upon or kissed without consent. See J.G. Fleming, *The Law of Torts*, (7th ed., Sydney: Law Book Co., 1987), 2 and 23.

Gordon Kaye.[28] In that case the plaintiff had undergone extensive surgery to his head and brain following an accident. Whilst in a hospital room recovering from his injuries journalists from the first defendant's newspaper gained access to the hospital room and took a number of photographs of the plaintiff whilst purportedly 'interviewing' him. The plaintiff, by his next friend, sought an injunction to prevent the publication of the material, claiming that it was obtained without the plaintiff's consent.[29]

Notwithstanding that the plaintiff was occupying a 'private' hospital room which exhibited a notice prohibiting entry to the general public, no action in trespass to land was available to the plaintiff as he was only a licensee of the room.

People falling within the category of mere licensees would also include holiday-makers, who like Fergie may have paid substantial sums of money to attend resorts which offer seclusion, the house guests of an occupier, lodgers in a boarding house, university students in a house of residence and occupiers of mobile homes located in caravan and recreation parks.[30]

In these cases the party who has the right to exclusive possession of the property, such as the owner or lessee, would, of course, have standing to bring an action in trespass, but for many reasons may be unwilling to do so. In any event, that party would be unlikely to have suffered the requisite damage to weigh the balance of convenience in favour of an injunction to restrain the publication of the photographs or film of the licensee taken during the trespass.

In the course of providing a remedy against unlawful intrusions onto private property it is clear that the law of trespass provides an occupier of land with only very limited protection against the publication of material obtained as a result of the trespass. Moreover, in many cases, the person whose privacy has been invaded will not be entitled to exclusive possession of the property and thus will be left wholly without a right in trespass to prevent the publication of photographs or to claim compensation, even when the material was obtained whilst in the course of the photographer trespassing and causing 'irreparable damage'.[31]

It is worth noting that in *Gordon Kaye* the plaintiff argued, *inter alia*,[32] that the taking of flashlight photographs of him without consent was a trespass to the person. Despite the fact that the Court expressed the view that Mr Kaye had been subject to a 'monstrous invasion of his privacy' this claim failed. Bingham L.J. stated that, however desirable it would be to provide the plaintiff with some remedy, battery and assault were causes of action which were 'never developed to cover acts such as these'.[33] However, more importantly, the Court held that, even if battery and assault were proved, an injunction would be an inappropriate remedy as the plaintiff's aim was not to prevent a further battery, but to prevent the defendants from profiting from their own trespass.

Nuisance and surveillance

The tort of private nuisance may offer an occupier of land a remedy where, as a result of an activity occurring outside of the plaintiff's property, there has been an infringement of his or her right to the beneficial use and enjoyment of the land. The interference can be

28 *Kaye* v. *Robertson and Another* [1991] F.S.R. 62.

29 The plaintiff argued that the plaintiff's injuries rendered him unable to give informed consent and unfit to be interviewed: *Kaye* v. *Robertson and Another* [1991] F.S.R. 62, 62.

30 It is presumed for these purposes that Fergie was a mere licensee of the property which was the subject of the trespass.

31 R.P. Handley, 'Trespass to Land as a Remedy for Unlawful Intrusion on Privacy', (1988) 62 *Australian Law Journal* 216, 222.

32 The plaintiff also alleged libel, passing off and malicious falsehood, succeeding only on the latter.

33 *Kaye* v. *Robertson and Another* [1991] F.S.R. 62, 69-70 per Bingham L.J.

caused by something tangible or intangible. The annoyance or discomfort to the occupier of the land must be substantial and unreasonable, and actual harm must also be proved. For the purposes of this tort, actual harm has been held to include disturbance to the plaintiff's comfort, health or convenience,[34] as well as physical damage to the plaintiff's property.

Whether the taking of photographs of a plaintiff from outside of his or her property constituted a nuisance was specifically considered in *Lord Bernstein of Leigh* v. *Skyviews & General Ltd.*[35] In this case the plaintiff brought an action against the defendant after the defendant took a photograph of his property from an aeroplane passing through the airspace above the plaintiff's land. Griffiths J. made the following comments in respect to nuisance:

> The present action is not founded in nuisance for no court would regard the taking of a single photograph as an actionable nuisance. But if the circumstances were such that a plaintiff was subjected to the harrassment of *constant* surveillance of his house from the air, accompanied by the photographing of his *every* activity, I am far from saying that the court would not regard such a monstrous invasion of his privacy as an actionable nuisance for which they would give relief. [emphasis added][36]

It thus appears that the law of nuisance may offer some protection to occupiers against privacy invasions in the form of carrying out photographing, filming, or surveillance where the activity constitutes a *substantial and continuous* interference with the plaintiff's right to enjoy land in his or her possession. There is no need to prove that the offending conduct produced any palpable effect on the property.

However, the Court in *Bernstein* expressly stated that where the photographing or filming is a 'one-off' event this will not constitute a *substantial* interference with the rights of the occupier. Thus, were a photographer, being outside of the land, to photograph or film a person on his or her private property as a 'one-off' event or over a short period of time, it is unlikely that this would constitute a *substantial* interference with the person's right to *use and enjoy his or her land* so as to entitle him or her to an action in nuisance.

The almost invariable use of long distance camera or video equipment by the media in these situations is even more likely to render the interference *with the land* miniscule, further reducing the plaintiff's likelihood of success.

Professor Fleming has stated that where conduct is devoid of any social utility, such as systematic telephoning and 'watching and besetting', and is directed solely at causing annoyance, it may constitute an unreasonable interference with the plaintiff's property so as to constitute a nuisance. However, Professor Fleming has also stated that 'no liability is warranted unless the intrusion is substantial and of a kind that a reasonable person of normal sensitivity would regard as offensive and intolerable' and that an infringement on one or two occasions is not actionable, even if designed to cause annoyance.[37]

It is likely that the *Fergie Photographs* were taken over one or two days in circumstances which could not be described as constant surveillance. If so then no action would be available in nuisance in respect of this isolated photographic frenzy, irrespective of the invasion of privacy which it entailed.

Further, as an action in nuisance is adjunct to the occupier's proprietary rights, it is only available to the party who is entitled to exclusive possession of the land affected.

34 Fleming, *supra* note 27, 385-386.

35 [1977] 2 All E.R. 902.

36 *Id.* 909.

37 Fleming, *supra* note 27, 575. In *Animal Liberation (Victoria) Inc. & Anor* v. *Gasser & Anor* (1990) Aust. Torts. R. 81-027, 67890, the Full Court of Victoria described besetting as including 'a surrounding with hostile demeanour so as to put in fear of safety'.

Thus, as with trespass, licensees, patients in hospitals or nursing homes, occupiers of boarding houses and many holiday-makers will be without a remedy in nuisance, even where they have been the subject of *constant surveillance* by a photographer in pursuit of good copy.

Defamation and surveillance

The law of defamation will provide a cause of action to a plaintiff in respect of whom a defamatory imputation has been published. Matter will be defamatory if it gives rise to an imputation which:

(a) is likely to injure the reputation of the plaintiff by exposing him or her to 'hatred, contempt or ridicule',[38]

(b) tends to lower the plaintiff in the estimation of others,[39] or

(c) is likely or tends to make people shun or avoid the plaintiff.[40]

If, in the opinion of the trial judge, the matter is capable of bearing a defamatory meaning then it must be put before a jury to determine whether the matter is, in fact, defamatory, as understood by ordinary members of the community. The standards to be applied are those of:

> '[H]ypothetical referees ... ordinary men not avid for scandal ... Whether the alleged libel is established depends upon the understanding of the hypothetical referees who are taken to have a uniform view of the meaning of the language used, and upon the standards, moral or social, by which they evaluate the imputation they understand to have been made.[41]

Where there has been a publication of matter concerning the plaintiff which is personal or embarrassing, but not *defamatory*, then the law of defamation provides no protection. Of note is the case of *Cairns* v. *John Fairfax & Sons Ltd*,[42] in which a media organisation was found to be entitled to publish material which contained imputations that a Commonwealth Minister was having an adulterous relationship with his married secretary, as these imputations were not considered by the jury to be defamatory. In the Court of Appeal Mahoney J.A. said:

> At one time, a sexual relationship between unmarried persons was, I think, necessarily seen as discreditable. At the present time, at least a substantial part of the community would not see it as discreditable.[43]

The finding by the jury in this case and Mahoney J.A.'s statement above, illustrates the inappropriateness of attempting to apply the law of defamation to protect the private affairs of individuals from undue media exposure. Further, they illustrate the need for the legal system to recognise that one's reputation and one's privacy are separate issues. It is no answer to a plaintiff who has had photographs of herself swimming topless and frolicking with a companion as front page news around the world to say that the public may not think less of her or, even that the public's view of her may have been raised.

Given the high rates of marital separation, public exhibitions of affection between partners and topless swimming in our society, it would be quite open to the jury to find that photographs showing a woman who is separated from her husband sunbathing top-

38 *Parmiter* v. *Coupland* (1840) 6 M.& W. 105, 108; 151 E.R. 340, 342.
39 *Slatyer* v. *The Daily Telegraph Co Ltd* (1908) 6 C.L.R. 1, 7. See also *Boyd* v. *Mirror Newspapers Ltd* [1980] 2 N.S.W.L.R. 449, 452.
40 *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 T.L.R. 581.
41 *Reader's Digest Services Pty Ltd.* v. *Lamb* (1982) 150 C.L.R. 500, 506 per Brennan J.
42 *Cairns* v. *John Fairfax & Sons Ltd* [1983] 2 N.S.W.L.R. 708.
43 *Id.* 721.

less and smooching with a companion are perhaps embarrassing and personal, but not defamatory. Accordingly, if the scenario of the *Fergie Photographs* had occurred in Australia, then Fergie may not have had a remedy under our defamation law.

However, Fergie may be able to show that the topless photographs gave rise to imputations which were defamatory of her. In the recent case of *Ettingshausen* v. *Australian Consolidated Press Ltd*[44] Hunt J. held that the imputation that the plaintiff was 'a person whose genitals have been exposed to the readers of... a publication with widespread readership' was capable of being defamatory. But merely proving that the photographs were defamatory will not necessarily mean that Fergie will be protected from publication as a defence to the action may be available.[45] The most important defence in the context of photographs or film would be the defence of justification. In South Australia, Victoria, Western Australia and the Northern Territory it is a complete defence to an action in defamation that the defamatory imputation is true. In the context of photographs the defence of truth would not normally be difficult to establish and the Duchess would thus have no remedy in defamation in respect of the publication.

In Queensland, Tasmania and the A.C.T. the imputation must not only be true but be for the public benefit. In New South Wales the publication must be true, or substantially true and relate to a 'matter of public interest'. It is clear that a matter will not be one of 'public interest' merely because the public are interested or curious to know about it. In *Chappell* v. *TCN Channel Nine Pty Ltd*,[46] Hunt J. considered the meaning of a 'matter of public interest' under the New South Wales *Defamation Act* 1975, in the following terms:

> A public figure's private behaviour or character can become a matter of public interest in one of two ways — either because it affects the performance of his public duties ... or because he makes it such a matter himself. If the plaintiff had 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 behaviour, he cannot then be heard to say that the public does not have the right to pronounce the judgment which he asked of it.[47]

If Fergie were to bring an action for defamation in New South Wales then the public interest defence may be raised on the ground that, as a public figure, her poolside frolics and lack of swimming apparel relate to a matter of public interest.

It is certainly arguable that the publication of the *Fergie Photographs* was motivated by an indignant press concerned about Fergie's 'morality' and her ability to carry out her public functions as the Duchess of York. However, one may be forgiven for thinking that the inevitable increase in sales which would flow from offering the public a peek of a royal breast and a few toe-sucking antics may also have been a motivating factor in the publication.

It must also be borne in mind that this case involved not merely *informing* the public of the fact that Fergie and her children were holidaying with her financial advisor and that she was sunbathing topless, but the publication of *explicit photographs* of the Duchess engaging in these lawful activities whilst in a private place. If it were to be argued that Fergie's public position means that she is not entitled to protection from publication of photographs of her and her associates in these circumstances then the law of defamation may effectively be denying Fergie and others in the public spotlight *any right to privacy*.[48] Photographers would be at liberty to focus zoom lenses on the homes and perhaps even the bedroom and bathroom windows of the rich and famous and merely plead that

44 (1991) 23 N.S.W.L.R. 443.

45 This area is presently the subject of reform proposals in New South Wales, Victoria and Queensland. See the New South Wales Legislative Committee's *Report on the Defamation Bill 1992*.

46 (1988) Aust.Torts R. 80-187.

47 *Id.* 67, 775-67, 776.

48 The same result would occur where truth alone forms a complete defence to an action in defamation.

all of what was recorded is true or, if required, is in the 'public interest' or 'for the public benefit', as it *may* reflect the ability of the person to perform his or her public functions.

To follow this argument to its logical conclusion, it would seem that photographs of Fergie and her companion in the act of consummating the alleged affair, as opposed to merely informing the public of the fact of their relationship, may also be published as being true and in the 'public interest'.

Further, if photographs of Fergie's lawful and intimate activities in a private place are considered to be matters of genuine public interest then the question arises of whether it should be left to a matter of luck that a photographer is able to locate her and capture the scenes through an act of trespass, or whether *all* of Fergie's activites should be photographed or filmed in case a matter of public interest arises.

Whilst it is acknowledged that certain behaviour of 'public figures' should be scrutinised by the media, the issue which arises in the case of the *Fergie Photographs* is the right of all individuals to have some private sphere, albeit small, in which he or she can relax in the company of family and friends, without being subjected to photographic surveillance and subsequent publication in the world's media where the activities are lawful and where there is no *genuine* public interest in such surveillance other than prurient or morbid curiosity. To deny any individual the right to be free from undue surveillance whilst on private property is to subject that individual, to a situation reminiscent of George Orwell's 'telescreen' in *Nineteen Eighty-Four*:

> There was of course no way of knowing whether you were being watched at any given moment ... You had to live — did live, from habit that became instinct — in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinised.[49]

The only option available to a person who does not wish to be the subject of photography via long distance lenses whilst in the bedroom, bathroom or around the poolside of private premises is for that person to lock himself or herself within a building which has no windows, a situation which is intolerable in a society which purports to value freedom.

It must be noted that even where the law of defamation provides a remedy to the plaintiff in these circumstances the courts have clearly stated that interlocutory injunctions will not normally be granted to restrain the publication of defamatory material, leaving the plaintiff to sue for damages.[50]

In *Chappell*, Hunt J. took the rare step of granting an interlocutory injunction to protect the plaintiff from the publication of defamatory material of a sexual nature. In making this decision, Hunt J. referred to his earlier decision in *Church of Scientology of California Inc.* v. *Reader's Digest Services Pty Ltd.*[51] in which he stated that before an interlocutory injunction will be granted in a defamation case, the following test must be satisfied:

> A plaintiff must establish that a subsequent finding by a jury that the matter complained of was not defamatory of him would be set aside as unreasonable, that there is no real ground for supposing that the defendant may succeed upon any defence of justification, privilege or comment, and that he, the plaintiff, is likely to recover more than nominal damages only.

And later:

> I accept as the settled law that the power to grant interlocutory injunctions in defamation cases must be exercised with great caution and only in very clear cases ...[52]

49 Orwell, G., *Nineteen Eighty Four* (Penguin Books, 1954), 6.
50 *Chappell* v. *TCN Channel Nine Pty Ltd* (1988) Aust. Torts R. 80-187.
51 (1980) 1 N.S.W.L.R. 344.
52 *Id.* 349-350 per Hunt J.

The basis of this approach is the court's recognition of the role which freedom of speech plays in a democratic society and the view that in most cases damages are an adequate form of compensation for individuals whose reputation is or is likely to be damaged.

The court's reluctance to grant interlocutory injunctions in defamation cases again illustrates the inappropriateness of using the law of defamation as a mechanism to protect personal privacy. In most cases involving defamatory imputations, the issues will not be as clear as in *Chappell*; there will be some uncertainty as to whether the imputation is defamatory or if the public interest test will be satisfied.[53] The courts are therefore unlikely to grant an injunction restraining the publication even where it involves the wide publication of photographs or film taken of a plaintiff on private property. Except in those rare cases where the issues are easily determined, media organisations are thus effectively encouraged to publish material and wait and see if the plaintiff responds with litigation. Of course, where the defendant's actions are blatant and unjustified the courts may make an order for aggravated damages but in making such an award the emphasis is on the conduct of the defendant rather than the degree to which the plaintiff's privacy has been invaded.[54]

In order to prevent publication, an individual who is the subject of defamatory photographs or film must first be *aware* of the proposed publication and second, be successful in obtaining an interlocutory injunction to restrain its publication. In commencing defamation proceedings the plaintiff faces the prospect of exacerbating the invasion of privacy by drawing further public attention to the photographs or filmed material, particularly where the material is proved to be 'true' or 'genuine', even though not in the public interest. However, in the case of the *Fergie Photographs* it is difficult to imagine how anything could bring further attention to the matter.

The factors outlined above, combined with the delay, expense and frustration experienced even by successful defamation litigants, may leave many victims of unjustified surveillance by the media without an effective and practical remedy.

Photographing and filming individuals from outside of premises — the 'offensive exception'

For over fifty years the High Court's decision in *Victoria Park Racing and Recreation Grounds Co Limited* v. *Taylor*[55] has stood as authority for the principle that there is no common law right to privacy in Australia. The facts of the *Victoria Park* case involved commercial interests rather than those of personal privacy and the appropriateness of applying the majority judgments in that case to the issue of personal privacy has been the subject of some debate.[56]

Nevertheless, in respect of occupiers of land and their rights to privacy, the statement of Dixon J. stands as clear authority for the proposition that:

> [T]he natural rights of an occupier do not include freedom from the view and inspection of neighbouring occupiers or of other persons who enable themselves to overlook the premises.[57]

53 In *Kaye* v. *Robertson and Another* [1991] F.S.R. 62, 67, Glidewell L.J. said that whilst in his view it was certainly arguable that the article in question would be libellous of the plaintiff, he could not say that such a conclusion is inevitable and thus an injunction should not be granted.

54 *Praed* v. *Graham* (1890) 24 Q.B.D. 53, 55.

55 (1937) 58 C.L.R. 479.

56 The Australian Law Reform Commission has commented that in one sense the case was not a privacy case at all but instead concerned the right to benefit from the publicity value of a public spectacle. See the Australian Law Reform Commission Report No. 11, *Unfair Publication: Defamation and Privacy*, (Canberra: A.G.P.S., 1979), 133.

57 *Victoria Park Racing and Recreation Grounds Co Limited* v. *Taylor* (1937) 58 C.L.R. 479, 507.

Latham C.J. also said:

> Any 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.[58]

This decision concerned the defendant's construction of an artificial structure from which he could observe the commercial activities taking place on the plaintiff's property. However, the days in which a higher fence will ensure privacy have been replaced with the era of long distance cameras, zoom lenses, low-flying aircraft and a media industry which seems avid for a hint of a famous breast in the quest to increase sales.

As the *Fergie Photographs* illustrate, a right to privacy can no longer be meaningfully considered in the restricted context of whether a neighbour should be able to look harmlessly over a back fence. Moreover, in our technologically sophisticated society, infringements of privacy by way of surveillance equipment may occur in a context in which individuals are virtually powerless to protect themselves.

Subject to the law of defamation, the principles enunciated in *Victoria Park* also extend to denying individuals a right to prevent others from taking and publishing photographs or film of them on their property where no trespass has been committed. The High Court referred, with approval, to the case of *Sports and General Press Agency Ltd* v. *'Our Dogs' Publishing Co. Ltd.*[59] in which Horridge J. said:

> In my judgment no one possesses a right of preventing another person photographing him any more than he has a right of preventing another person giving a description of him, provided the description is not libellous or otherwise wrongful. Those rights do not exist.[60]

This was followed in the more recent case of *Bathurst City Council* v. *Saban.*[61] However, in accepting this principle Young J. acknowledged that there was a limited number of exceptions which applied to the taking and publishing of photographs of a plaintiff against his or her will. These exceptions are: where the photograph is taken in breach of contract, where it is libellous, where there would be a breach of confidence, or where they were taken for a criminal purpose.[62] To these His Honour suggested two further exceptions to the right of publication. The first was where the photographs were of a ward of the court, and the second was where the photographs in question were 'offensive'.[63]

In explaining the meaning of 'offensive' Young J. pondered on whether an Australian court should rely on the American case law in this area.[64] After issuing a warning about doing so, his Honour stated that the 'offensive exception' may be limited to cases where a photograph of a person in an 'embarrassing pose' had been 'surreptitiously taken and published'.[65]

If accepted, the offensive exception could effectively create a new tort which would give a plaintiff an action against a defendant where photographs or film are published in the circumstances of the *Fergie Photographs*. Significantly, Young J. did not refer to any right of the plaintiff to *prevent* publication but merely to bring an action in respect of the publication.

58 *Id.* 494.
59 [1916] 2 K.B. 880.
60 *Id.* 884.
61 (1985) 2 N.S.W.L.R. 704.
62 *Id.* 707.
63 *Id.* 708.
64 His Honour made obiter comments that it would be open to the Supreme Court of New South Wales to give relief to a plaintiff where a plaintiff has been photographed in a shockingly wounded condition after a road accident or where a plaintiff is photographed with her skirt blown up when standing innocently over an air vent at a fun park, referring to the American cases of *Leverton* v. *Curtis Pub Co* 97 F.Supp.181 (1951) and *Daily Times Democrat* v. *Graham* 162 So. (2d) 474 (1964).
65 *Bathurst City Council* v. *Saban* (1985) 2 N.S.W.L.R. 704, 708.

However, his Honour provided no clear guide as to what would constitute an 'offensive' photograph. Young J.'s reference to the word 'embarrassing' would give an extremely wide, and perhaps an unacceptable, breadth to the action. It is more likely that the action would be limited to photographs and film taken of an individual, where the material recorded offends current social standards. In the context of the *Fergie Photographs*, a court would then have to determine whether the sight of Fergie sunbathing topless and smooching with her companion offends these current social standards. Given that this may be seen on thousands of beaches world-wide every summer, it may be difficult to prove that it is offensive.

Precisely what the term 'surreptitiously taken' means is also difficult to determine from Young J.'s comments. Does it mean that the photographs are merely taken without the knowledge of the plaintiff? Or does it mean that the photographs must be taken in circumstances which are somewhat underhand or unlawful? If the former were adopted then all photographs taken without the subject being aware at the time may be caught by this action. If the latter approach were adopted then it would seem that only photographs or film which were taken pursuant to some illegal or tortious act or were perhaps motivated by ill-will would come within the defence.

However, until the courts are given the opportunity to further consider the '*offensive exception*', its application and scope to protect persons who have been subject to privacy invasions such as the *Fergie Photographs* remains unclear and uncertain to provide relief.

Conclusion

In the absence of specific legislation to protect against unfair publications[66] and unless and until the courts develop the 'offensive exception' referred to by Young J. in *Saban's Case*, the law in Australia has left individuals without an adequate remedy to ensure protection against surveillance and subsequent publication in circumstances such as the *Fergie Photographs* This is notwithstanding that the material may have been obtained through an unlawful act of trespass, that the conduct photographed or filmed is lawful, and that there may be no genuine public interest in the publication.

If the legal system fails to respond to scenarios such as the *Fergie Photographs* much more can be said about the lack of importance which our society gives to the right of the individual to be free from undue surveillance than it does about the alleged failings of one woman's morality.

Postscript

Following the publication of the *Fergie Photographs* the Duchess of York and her companion successfully brought proceedings in France for breach of privacy under the French *Civil Code* and were awarded $139,000 and $58,000 respectively for breach of privacy.[67] Unlike the common law jurisdictions, French law has afforded individuals a right to privacy for over a century. Article 9(i) of the French *Civil Code* states: 'Everyone has the right to respect for his private life.'

66 There have been several unsuccessful attempts to introduce legislative protection against unjustified publications. See the Australian Law Reform Commission *Discussion Paper No. 2, Privacy and Publication-Proposals for Protection* and *Report No. 11, Unfair Publications; Defamation and Privacy* (Canberra: A.G.P.S., 1979). See also the *Defamation Bill (NSW)* 1991, ss. 20-23.

67 *Telegraph Mirror*, December 10, 1992.