Technology driving the law

The law is not always known for keeping pace with technological or social change but in some areas lawyers as well as the judiciary need to be alert to what is new and different. Privacy is a classic example.

In Australia key privacy obligations for government, business and other organisations are contained within state and federal privacy laws. However, Australian law knows no tort of invasion of privacy which would allow one private citizen to take action against another.[1] But the equitable action of breach of confidence has been extended by the courts to include the unauthorised dissemination of confidential information, including private photos and videos. The leading case has been the 2008 Victorian Supreme Court decision in *Giller v Procopets*,[2] which was followed in January by the Supreme Court of Western Australia in *Wilson v Ferguson*.[3]

The facts in both cases are similar – after an acrimonious break-up, a man released sexually explicit photos and videos of his former girlfriend to their mutual friends. But, as the events in *Giller* happened in 1996 and those in *Wilson* happened in 2013, they have some striking differences.

In *Giller* the defendant took a VCR tape and a VCR player to the houses of several people who knew both him and the plaintiff, and then tried to compel them to watch it. Unsurprisingly, they all refused and asked him to leave. He then went out in public with nude photographs of the plaintiff and tried to show them to the plaintiff's mother, who also refused to look at them. All in all, very few people actually saw the explicit material.

In *Wilson*, by contrast, the defendant quickly and easily posted 16 photos and two videos to Facebook, accompanied by offensive comments about the plaintiff. He removed them a few hours later, but not before they had been seen by his 300 Facebook friends. The Court noted that this was exacerbated by the fact that the plaintiff and defendant both worked as fly-in fly-out workers at a mine and had many of their co-workers as Facebook friends. It was also a male-heavy workplace where the conversation, particularly concerning women, was often risqué.

In addition to awarding the plaintiff an injunction against further publication of the photos and videos, the Court also awarded her $35,000 in damages for emotional distress and a further $13,404 for economic loss to compensate her for the time that she took off work. This establishes that equitable compensation for breach of confidence can now take into account pain and suffering in the same way as damages for the tort of negligence for physical injury.

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What is most significant about the judgment is that the Court specifically recognised that development of the law was appropriate given technological change. As Justice Mitchell wrote:

"The process of capturing and disseminating an image to a broad audience can now take place over a matter of seconds and be achieved with a few finger swipes of a mobile phone . . . In many cases, such as the present, there will be no opportunity for any injunctive relief to be sought or obtained between the time when a defendant forms the intention to distribute the images of a plaintiff and the time when he or she achieves that purpose."[4]

It seems certain that privacy law will remain an interesting and dynamic field for this reason. In 10 years who knows what will be possible? ▮

TWO PRIVACY CASES SHOW HOW THINGS HAVE CHANGED.

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1 Refer to a 2014 ALRC Report on this topic: www.alrc.gov.au/news-media/alrc-releases-report-serious-invasions-privacy-digital-era.
2 [2008] VSCA 236.
3 [2015] WASC 15.
4 At [80].