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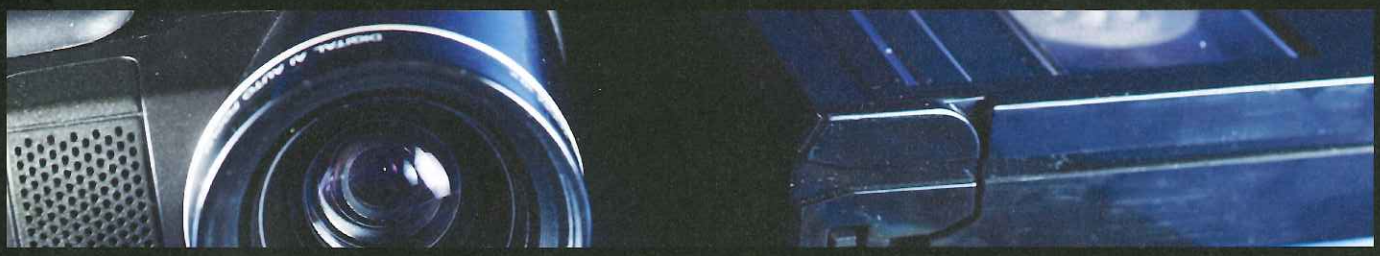

BREACH OF CONFIDENCE BECOMES BREACH OF PRIVACY?

While the specific tort of invasion of privacy is yet to be upheld, compensation for mental distress and embarrassment is available using the doctrine of breach of confidence.

By Dr Robert Dean

A front page article in a metropolitan newspaper headlined "Damages award for sex tape"[1] called the recent decision of the Victorian Court of Appeal in *Giller v Procopets*[2] (*Giller*) an Australian first. While a remedy for the dissemination of videos taken in breach of privacy is not a first in Australia,[3] the decision confirmed at the highest level that the action for breach of confidence has become, in Victoria if not Australia, a de facto equitable right to privacy.

Leaving aside Part IX of the *Property Law Act* (Adjustment Claims), the relevant facts in *Giller* are that the respondent had videotaped sexual activities between himself and the appellant in the privacy of their bedroom, sometimes with her consent, but sometimes without it. Following the breakdown of that relationship, the respondent attempted to and succeeded in distributing this tape to the applicant's family and others. At least two recipients viewed the tape.

The case is notable for two reasons. The first is that it comes to grips with the little known, and less understood, action for the tort of intentional infliction of harm causing nervous shock, but secondly and more importantly, because it revisits the existence of a tort of privacy in Australia in light of the High Court ruling in *ABC v Lenah Game Meats*[4] (*Lenah Game Meats*) and continues the transformation of the equitable obligation of confidence known as the doctrine of breach of confidence as a de facto equitable right to privacy.

Since Prince Albert and Queen Victoria's private etchings found their way by means unknown into the hands of a Mr Strange[5] and the court found their Highnesses entitled to an injunction for "breach of trust or confidence", it was clear equity would not tolerate such a breach of privacy. In 1967 the English aristocracy once again dispelled any doubts concerning modern equity's willingness in this regard when the English Court of Chancery stepped in to prevent the intimate pillow talk between the Duke and Duchess of Argyle being published against Her Grace's wishes because "an injunction may be granted to restrain the publication of confidential information not only by the person who was a party to the confidence but by other persons into whose possession that information has improperly come".[6]

But what has not been clear is, if it is too late to prevent a breach of privacy, can equity compensate the victims for the hurt and embarrassment they have suffered by the publication of private material? Any law of privacy must be able to either prevent a breach of privacy or, when it is too late to prevent the breach, compensate the injured party. In *Giller*, privacy having been breached, what compensation would the Court grant Ms Giller?

To make matters more interesting, the trial judge held that Ms Giller was a robust woman not given to fainting away in the face of the vicissitudes of life. His Honour held she suffered no physical harm or a recognised psychiatric illness – merely embarrassment and mental distress.

Intentional infliction of harm

Ms Giller argued that the tort of intentional infliction of harm would provide her with a remedy. The tort of intentional infliction of harm causing nervous shock, first enunciated in 1897 by Lord Wright in *Wilkinson v Downton*,[7] has since been severely limited by the courts. Unlike unintentional but negligent conduct, the conduct must have been calculated to cause harm; the conduct must have been likely to frighten and "reasonably capable" of causing nervous shock (our courts attribute Australians with "a high degree of robustness" (at [454])) and finally, the distress it causes must be physical harm or a recognised psychological illness. Mental distress will not do.

Maxwell P accepted Kirby J's invitation to Australia's Courts of Appeal to share the responsibility of developing the law and used the past development of this tort as a guide to its future frontiers. His Honour noted the artificiality of requiring that a defendant should be able to have foreseen that their conduct would cause a recognised psychiatric injury, when even professional psychiatrists cannot define the difference between a quantifiable psychiatric injury and mental distress. In his Honour's view the tort should extend to causing mental distress.

However, this development of the law, already recognised by the House of Lords,[8] was not to be, as his Honour's colleagues (Neave and Ashley JJA) took a more cautious approach. Their Honours concentrated on the *actus rea*, agreeing that an appropriate restriction, unless and until the legislature decided otherwise, was to limit such claims to instances where the victim suffered a recognised psychiatric injury rather than mere mental distress.

This raises the interesting scenario that a person held to have intended severe psychiatric injury but due to intervening circumstances caused merely emotional distress will avoid liability, while a defendant who only intended to frighten but not to psychologically damage the defendant, but in fact caused a diagnosable nervous illness, would be held to account.

Birth of a tort of privacy premature?

With the tort of intention to cause harm unavailable to compensate Ms Giller's mental distress, it was left to Ashley and Neave JJA (with whom Maxwell P agreed) to decide if either a tort of privacy or the equitable doctrine of breach of confidence could perform this task or whether Australian law offered no remedy for such an unequivocal and somewhat shocking breach of privacy.

Like the High Court in *Lenah Game Meats* (at [225–226]), Ashley JA found it unnecessary to definitively rule in or out a tort of privacy given the availability of alternative remedies. Neave JA also adopted that approach, referring to Gummow and Hayne JJ's belief in *Lenah Game Meats* that it was better "to

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strengthen the protection afforded to privacy interests by existing causes of action" than declare a tort of privacy (at [429] and [430]).

Consequently, in view of this judgment, the Australian Law Reform Commission's recent proposal for the legislature to create such a tort and the present federal government's willingness to comply with that recommendation, it is submitted that the attempt in judgments such as *Grosse v Purvis* and *Doe v ABC*[9] to breathe life into a tort of privacy in Australia has, for all practical purposes, failed.

Enter breach of confidence

As noted above, Australian courts have found no difficulty in finding a remedy to prevent the wrongful disclosure of videos of private acts and the Court of Appeal proved no exception in promoting breach of confidence to fill the invasion of privacy gap in Australian law. Neave JA, having found it unnecessary to decide whether a tort of privacy existed, said (at [430]) (quoting the High Court in *Lenah Game Meats*): "... the better course ... is to look to the development and adaptation of recognised forms of action to meet new situations ... there would be an obligation of confidence upon the persons who obtained [images and sounds of private activities] and upon those into whose possession they came ...".

Ashley JA also looked to breach of confidence for an adequate remedy (at [39], [131] and [168]).

If the equitable doctrine of breach of confidence provided Ms Giller with a cause of action, the question then became: could such an equitable doctrine provide appropriate damages to compensate her for her distress and embarrassment? Breach of confidence is an equitable, not a common law, cause of action, the remedies for which are generally an injunction or other equitable relief. What relief could it provide? The two possibilities were either damages pursuant to *Lord Cairns' Act* (which provides common law remedies for equitable causes of action) or equitable compensation. But would either of these alternatives extend to mere mental distress and embarrassment?

Lord Cairns' Act

Neave JA noted that the trial judge had held s38 of the *Supreme Court Act* 1986 (Vic) (the Victorian equivalent of *Lord Cairns' Act*) did not apply because Ms Giller had not sought an injunction and s38 only gave remedies in damages in addition to or in substitution for an injunction.

The energy expended by commentators in this area of redundant debate puts paid to the old belief that where there is smoke there is fire.[10] To the extent that it is of any practical relevance, the overwhelming judicial authority gives *Lord Cairns' Act* and its equivalent statutes the widest possible interpretation in giving courts of equity access to common law remedies.[11]

Nevertheless, Neave and Ashley JJA both gave detailed reasons on this issue and, to the extent that it was ever in any doubt, reasserted that:

1. unlike the position in New Zealand (*Aquaculture Corporation v New Zealand Green Mussel Co Limited*),[12] equity and common law are not merged in Australia, but rather administratively equity has access to common law remedies;
2. common law damages are available under *Lord Cairns' Act* in the aid of a purely equitable right; and
3. the argument that *Lord Cairns' Act* would not support damages if an injection was not sought should be dismissed. Neave JA (with whom Ashley JA agreed at [137]) said (at [404]): "... the fact that Ms Giller had not sought an injunction ... did not deprive the Court of its power to award damages. That power exists so long as a court has jurisdiction to award an injunction".

Ashley and Neave JJA agreed that the trial judge was wrong in disregarding *Lord Cairns' Act* but their Honours disagreed (Ashley JA at [141] and Neave JA at [428–431]) as to whether *Lord Cairns' Act* would stretch to damages for mere mental distress and embarrassment.

Equitable compensation

Having considered *Lord Cairns' Act*, both their Honours then rendered these *Lord Cairns' Act* arguments nugatory because both accepted equity's capacity to award compensation in its own right entirely independently of *Lord Cairns' Act*. They agreed (at [149–153]) that both principle and the preponderance of authority supported such a conclusion.

(It regularly comes as a surprise to this author that courts re-tread the much travelled arguments surrounding the now undeniable conclusion that equity can, quite independently from common law, of its own volition grant damages in the form of compensation (restitution) which are entirely appropriate in both character and quantum, for the breach of an equitable obligation and that consequently *Lord Cairns' Act* is, in this regard, rendered redundant.)

Equitable damages for breach of a commercial confidence (trade secrets) have long been accepted as available. But if the breach of confidence is to extend to the disclosure of private facts, then if it is too late to obtain an injunction, the damage suffered may have no commercial value but may be limited to the victim's embarrassment and distress. Is equitable compensation available for such loss?

Neave JA noted (at [142]) that there was no Australian decision which has considered the point and "the position appears to be at large on this issue". Both Neave JA (with whom Maxwell P agreed) and Ashley JA were of the view that for breach of confidence to truly provide a remedy for a breach of privacy it must provide not only the means of preventing it (injunction), but if it was too late to prevent it then it should provide an appropriate means of compensating the victim lest equity proved impotent (Ashley JA at [145], [146] and [150] and Neave JA at [423]).

Neave JA noted that damages for equivalent common law wrongs sometimes did extend to mental distress (defamation and deceit), sometimes only extended to mental distress in limited circumstances (contract where pleasure and enjoyment is a term) and sometimes did not extend to damages for mental distress at all (negligence). Her Honour noted that it is the character of the wrong that should determine whether such damages are available and that given that breach of confidence is closest in character to defamation, damages for mental distress should be available for access by equity for breach of confidence.

Similarly, having held (at [141]) that *Lord Cairns' Act* remedies would not stretch to mental distress because "with few exceptions the common law has turned its face against such awards", Ashley JA also held (at [148–159]) equity could compensate for mental distress and embarrassment arising from a breach of confidence.

But were aggravated and extemporary damages available to Ms Giller? Again their Honours looked at *Lord Cairns' Act* and again no conclusive answer was found. Again their Honours rendered the *Lord Cairns' Act*

alternative nugatory by concluding that equity had the capacity to award aggravated damages because such damages are compensatory, compensating the victim because of the way the breach of privacy was carried out, and held on the facts before it exemplary damages were not appropriate.

Conclusions

This judgment should, but probably will not, mean that the intellectual merry-go-round of *Lord Cairns' Act* versus equitable compensation is finally consigned to history.

More importantly, it clarifies the law in Victoria by deciding that:

1. The birth of a specific tort of invasion of privacy in Australia was premature and is now better left to the legislature as recently recommended by the Australian Law Reform Commission;
2. In the meantime, the law of breach of confidence has so developed and expanded as to be unrecognisable as that simple doctrine enunciated 50 years ago in the seminal case of *Coco v AN Clark*.[13] It has, in both form and in substance, now broadened beyond its modern role in the protection of trade secrets to include what looks very like a de facto equitable doctrine of breach of privacy;
3. All necessary remedies from injunction through to compensation damages are available as equitable remedies, including compensation for mere mental distress and embarrassment, aggravated damages and perhaps, should the right set of facts arise, exemplary damages.

This judgment should, but probably will not, mean that the intellectual merry-go-round of *Lord Cairns' Act* versus equitable compensation is finally consigned to history.

It would seem that the fledging common law tort of privacy in Victoria has been pronounced dead – long live the equitable right of privacy. The common law may be past childbearing, but it would seem equity is still as fertile as ever. ●

DR ROBERT DEAN is a Victorian barrister and a mediator in intellectual property, commercial law and planning law.

The numbers in square brackets in the text refer to the paragraph numbers in the judgment.

1. *The Age*, 11 December 2008, p1.
2. [2008] VSCA 236 (10 December 2008).
3. *Lincoln Hunt Aust Pty Ltd v Willesee* (1986) 4 NSWLR 457; *Church of Scientology Inc. v Transmedia Productions Pty Ltd* (1987) Aust Tort Reports 80-101; *Emcorp Pty Ltd v ABC* (1988) 2 QR 169; *Rinsale Pty Ltd v ABC* [1993] Aust Tort Reports 18-231; *Donnelly v Amalgamated Television Services Pty Ltd* (1998) 45 NSWLR 570.
4. [2001] 208 CLR 199.
5. *Prince Albert v Strange* (1849) 2 De G & Sm 652; 64 ER 293.
6. [1967] Chancery 302, 333.
7. [1897] 2 QB 57.
8. *Wainwright v Home Office* [2004] 2 AC 406 at [44].
9. [2003] QDC 151; [2007] VCC 281.
10. For a detailed analysis of the arguments and the conclusion that they are now sterile see Robert Dean, *The Law of Trade Secrets and Personal Secrets* (2nd edn), 2002, Lawbook Co Pty Ltd, paras 278–284 and see also, Robert Dean, *The Law of Trade Secrets*, 1999, Lawbook Co Pty Ltd, p78, para (e) and generally, Chapter 1.
11. See the many cases referred to at note 286 at p324 of Robert Dean, *The Law of Trade Secrets and Personal Secrets* (2nd edn), 2002, Lawbook Co Pty Ltd.
12. [1990] 3 NZLR 299, 301.
13. [1969] RPC 41.