The tort of privacy invasion in Australia after *Jane Doe*

The ABC’s appeal in *Jane Doe v ABC* has settled. This leaves us to guess whether a tort of invasion of privacy for public disclosure of private facts exists under Australian law.

A few months ago, the departing General Counsel at the ABC, Stephen Collins, told *GLJ* readers that the ABC’s appeal in the *Jane Doe* case would enable the High Court ultimately to determine whether a tort of privacy should exist (*GLJ* 7 December 2007). He predicted that the High Court was unlikely to create a new tort, but would develop the equitable action for breach of confidence. He warned of the dangers of letting a County Court decision affect how the Australian media goes about its daily activities. He also argued that it was wrong to treat the *Jane Doe* decision as an aberration, and that the facts of the case made it a suitable vehicle to appeal.

Now we will never know what the Victorian Court of Appeal or the High Court would have made of the invasion of privacy finding in *Jane Doe*, or the equally controversial finding in that case that the ABC owed the plaintiff a common law duty of care.

**A bold but unnecessary step**

It was a simple, but bold, step last year for a Victorian County Court Judge Felicity Hampel SC to hold that a tort of invasion of privacy exists in Australian law: *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281. 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 SC 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 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.

The elements of the tort and defences to it

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 posed the test of asking if 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?

Big issues need to be resolved in defining the cause of action for public disclosure of private facts, and when privacy interests trump 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 figures 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”? 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 some 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 2007 Consultation Paper. But its tentative proposal of having a cause of action for a generally worded right of privacy, coupled with examples, deploys an imprecise concept or value as a cause of action and thereby creates unnecessary uncertainty.

**“The Poverty of Privacy”**

In 1980 Raymond Wacks wrote a provocative article in the *Law Quarterly Review* titled *The Poverty of ‘Privacy’*. He 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.

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.

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’.”

As overworked as the concept of “privacy” has become, 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.

2. Everyone has the right to the protection of the law against such interference or attacks.”

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”.

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 *Lenah Game Meats* ((2001) 208 CLR 199; [2001] HCA 63) 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. Is “privacy” a value akin to 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 the *Restatement on Torts* 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 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.

**Intrusion Upon Seclusion or Solitude**

Senior Judge Skoien recognised the existence of a tort based upon intrusion upon privacy or seclusion in *Grosse v Purvis* (2003) Aust Rorts Reports 81-706, [2003] QDC 151. 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. If put to the test, this category of privacy intrusion tort seems likely to be confirmed by Australian appellate courts in future cases.

**Public Disclosure of Private Facts**

How should the Australian 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* ([2004] 2 AC 406) 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. The first is the advance of the equitable remedy for breach of confidence.

In remodelling the action for breach of confidence to protect privacy interests in the long-running *Douglas v Hello!* litigation English courts were influenced by the privacy right contained in the *Human Rights Act 1998* and emphasised that the underlying value that the law protects is human autonomy– the right to control the dissemination of information about one’s private life.
But some commentators question whether the “square peg of privacy” should be forced into the “round hole of confidence”, or whether we should look to a new tort.

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. *(Hosking v Runting [2005] 1 NZLR 1)* But judicial lawmaking comes with its problems, and the main one is uncertainty, as exemplified by the uncertainty left in the wake of *Jane Doe v ABC*. Should the media conclude on the strength of that decision that a tort of privacy invasion exists for disclosure of “private facts” (even ones disclosed, as in that case, in open court)? If it does, what are the elements of the tort and the defences to it?

**Judicial preference for legislative intervention**

Appellate judges in future cases may fear to tread in the direction where Judge Hampel SC chose to go in *Jane Doe v ABC* by declaring a tort of privacy invasion for public disclosure of private facts. Passages from *Lenah Game Meats* sound a cautionary note about a general tort of privacy invasion. Professor Wacks’ final reason for concluding that there would never be a common law tort of privacy invasion in England was judicial preference for legislative intervention.

This was on display at a privacy seminar last week, when Justice Patrick Keane of the Queensland Court of Appeal stated that legislative intervention is essential to any satisfactory outcome because judges “should not be relied upon to achieve it”.

**Over to the legislature ?**

Faced with uncertainty about the content of the common law, and proposals for a privacy tort from law reform commissions, one might expect the legislature to bite the bullet. But the Murdoch press’ campaign against the NSWLRC’s tentative proposals makes me doubt whether politicians will have the ‘ticker’ to take on the media and enact a statutory cause of action for privacy invasion.

Even with a more precise statutory cause of action than that proposed by the NSWLRC there will be uncertainty. Celebrities, sporting stars and other public figures may be left to guess whether any 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 (A v B plc [2003] QB 195). 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 (Campbell v MGN Ltd [2004] 2 AC 45). 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.

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 lawmakers 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.

**The right to privacy and the right to control publicity**

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.

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 may create a right to publicity or an image right.
The risk is very real, since in applying the traditional action for breach of confidence to information that was already in the public domain, the majority in *Douglas v Hello (No 3) [2008] 1 AC 1 [2007] UKHL 21* effectively created an image right or a right to publicity.

The facts of *Jane Doe v ABC* were a million miles away from a celebrity “privacy” case in which a public figure seeks to cash in by selling their story, or to control images of themselves so as to not dilute the value of their celebrity. But by taking the bold and unnecessary step of declaring a privacy tort, the Victorian County Court in *Jane Doe* has injected uncertainty into Australian law which will not be resolved by an appeal in that case.

In the age of uncertainty that lies ahead, less deserving plaintiffs than Jane Doe can be expected to exploit the situation by asserting that their common law privacy rights have been infringed. Under the guise of protecting their privacy rights, celebrities will be able to control publicity to their commercial advantage.

- Peter Applegarth SC