

PRIVACY — BOLDLY GOING WHERE DEFAMATION HASN'T GONE BEFORE

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ABSTRACT

[295] Until recently, Australian law did not recognise an invasion of privacy tort, and there was no general right of privacy. In considering privacy issues, however, Australian courts have begun departing from principles of English law and looking favourably to the United States, where a long history of privacy jurisprudence sometimes gives plaintiffs a cause of action in circumstances where defamation cannot be established. New Zealand courts, meanwhile, have recognised an invasion of privacy tort, but have distinguished it in some important respects from the principles in American privacy jurisprudence. Privacy law's potential breadth could make it an increasingly popular cause of action in Australia, especially given the convoluted state of defamation legislation.

Defamation in Transition

Defamation actions have long been fashionable amongst Australia's rich and famous, amongst wealthy businessmen and prominent politicians. Government ministers are not averse to pursuing their critics through the courts, as Australian Labor Party groupie Bob Ellis found after writing that Tony Abbott and Peter Costello were both in the Labor Party until they each slept with a woman who married Costello and persuaded them to join the Young Liberals. On the losing side of a costly court battle, Ellis bemoaned Australian Capital Territory Chief Justice Terry Higgins' apparent view that 'politicians were delicate flowers the price of whose bruised feelings was above rubies'.²

Similarly, Pauline Hanson sued the Australian Broadcasting Corporation (ABC) for playing Pauline Pantsdown's song *Backdoor Man* because, inter alia, it suggested she was a potato, and Joh Bjelke-Petersen sued the ABC over allegations of corruption in his government. There are delicate flowers in tabloid journalism, too; Richard Carleton of *60 Minutes* sued when *Media Watch* accused him of plagiarism. Businessmen and companies, meanwhile, account for one-quarter of defamation

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² Bob Ellis, *Goodbye Babylon* (2002) 351.

actions.³ Paul [296] Anderson, the CEO of BHP, sued *The Australian* for a column suggesting the main reason for the BHP-Billiton merger was that Anderson's wife detested Australians.⁴

And the damages can be formidable. Former New South Wales Law Society President John Marsden was awarded \$525,000 last year over allegations of sexual conduct with underage boys. With the inclusion of legal costs, Channel Seven is reputed to have settled for around \$6 million to \$9 million.⁵ This year, a partner of the law firm Clayton Utz sued a disgruntled art dealer who sent four emails to 'people prominent in public life' accusing her of professional misconduct and dishonesty. Justice David Levine awarded the plaintiff \$220,000, plus costs and interest, despite there being 'no evidence of actual damage to reputation'.⁶ Rather, the damages were to compensate injury to her feelings and enable her to point to the sum awarded as demonstrating the falsity of the allegations.⁷ In March, the same sum was awarded to Pat O'Shane after *The Sydney Morning Herald* published twin opinion pieces, one criticising her performance as a magistrate, the other supporting her.⁸

For the hoi polloi, however, defamation law provides only limited protection for human dignity and freedom from harassment. To begin with, anyone who is desperately ordinary, and without prominent acquaintances, may have difficulty demonstrating harm: one must have a reputation before one's reputation can be damaged.⁹ Also, the expense of litigation takes defamation actions beyond the means

³ Malcolm Knox, 'Reputation rescue: smart money is on NSW', *The Sydney Morning Herald* (Sydney), 21 June 2003.

⁴ See also Stephen Mayne, *The Crikey defamation list* (26 February 2004) <<http://www.crikey.com.au/media/2002/12/26-defolist.html>>.

⁵ Richard Ackland, 'Fibs, yes, but not enough for it to count', *The Sydney Morning Herald* (Sydney), 10 October 2003.

⁶ *Markovic v White* [2004] NSWSC 37, [15], [24].

⁷ *Ibid* [20], [24].

⁸ See also Gregory Hywood, 'An affront to our democracy', *The Age* (Melbourne), 25 March 2004; Richard Ackland, 'Matter-of-fact approach to expressing our opinions', *The Sydney Morning Herald* (Sydney), 19 March 2004. By comparison, a Queensland Supreme Court Judge calculated the injuries to O'Shane's six year old nephew Tjandamurra O'Shane, when a stranger doused him in petrol and set him alight in a schoolyard in 1996, as \$132,500 (he was awarded the maximum allowable payout under Queensland's criminal compensation scheme of \$75,000): Law Institute of Victoria, *Burnt boy would have received nothing in Victoria* (16 June 1999) <http://www.liv.asn.au/news/media/19990616_burntboy.html>.

⁹ Also, at common law, defendants can lead general evidence of the plaintiff's bad reputation as a mitigating factor in any award of damages. However, they are not usually entitled to lead evidence of specific misconduct: *Scott v Sampson* (1882) 8 QB 491. For a discussion of how the defence's attacks

of most people. That is in part due to the technical complexity of defamation laws, including provisions intended to curtail exuberant damages awards.

In New South Wales, where approximately half of all Australian defamation verdicts are delivered,¹⁰ such provisions include:

- the abolition of exemplary damages;¹¹
- a determination by the judge whether the matter complained of is reasonably capable of carrying the imputation pleaded, and whether the imputation is reasonably capable of bearing a defamatory meaning, before a case can proceed to jury trial;¹²
- determination of damages by the judge rather than the jury;¹³
- a provision that there must be an appropriate and rational relationship between the harm and the [297] damages, taking into consideration the general range of damages for non-economic loss in personal injury awards;¹⁴
- a provision that corporations cannot sue for defamation;¹⁵
- a defence to defamation if the plaintiff rejected a reasonable offer to make amends;¹⁶
- consideration, when awarding costs, of any misuse by a party's superior financial position to hinder the early resolution of the proceedings, and of whether the costs may exceed the quantum of damages.¹⁷

on the plaintiff's reputation are controlled by law, see Michael Gillooly, *The Law of Defamation in Australian and New Zealand* (1998) 102.

¹⁰ Malcolm Knox, 'Reputation rescue: smart money is on NSW', *The Sydney Morning Herald* (Sydney), 21 June 2003.

¹¹ *Defamation Act 1974* (NSW) s 46, commenced 1974.

¹² *Defamation Act 1974* (NSW) s 7A, commenced 1995.

¹³ *Defamation Act 1974* (NSW) s 7A, commenced 1995.

¹⁴ *Defamation Act 1974* (NSW) s 46A, commenced 1995. This provision mirrors the common law doctrine set out in *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44. Taking into account the statutory provisions, the award of damages in a defamation action still operates as a vindication of the plaintiff to the public and as consolation for the wrong done to the plaintiff (including injury to feelings and damages to reputation): at 60. For a discussion of the doctrine used to assess the quantum of compensatory damages, see Andrew Kenyon, 'Problems with defamation damages?' (1998) 24 *Monash University Law Review* 70.

¹⁵ *Defamation Act 1974* (NSW) s 8A, commenced 2003.

¹⁶ *Defamation Act 1974* (NSW) s 9G, commenced 2003.

¹⁷ *Defamation Act 1974* (NSW) s 48A, commenced 2003.

Despite these provisions, deep-pocketed defendants, typically media organisations, frequently adopt the tactic of wearing down plaintiffs through the lengthy and convoluted litigation process. There is a broad range of exceptions and defences specific to defamation law — such as justification, fair comment and innocent dissemination¹⁸ — but these vary between jurisdictions, and defamatory material is often published in multiple jurisdictions.

The States' failure to date to pass uniform defamation laws necessarily adds to the complexity and expense,¹⁹ further limiting the reach of defamation law for most plaintiffs. Even though the litigation may occur in a single forum, the substantive law of each place of publication must normally be considered and applied. For example, exemplary damages may be available in defamation actions in New South Wales for publications outside New South Wales, notwithstanding the abolition of exemplary damages in that State.²⁰ Multi-jurisdictional publication is particularly problematic on the Internet,²¹ especially since the High Court confirmed in *Dow Jones v Gutnick*²² that publication occurs in the jurisdiction from which material is accessed, rather than where it is uploaded.²³

The need for uniformity in Australian defamation laws 'has been more or less constantly on the Standing Committee of Attorneys-General (SCAG) agenda since 1980'.²⁴ Philip Ruddock began agitating for reform after being appointed Commonwealth Attorney-General last year. The State and Territory Attorneys-General have greeted his reform proposals with suspicion, and on 30 July 2004 they

¹⁸ For a discussion of defamation defences generally, see Michael Gillooly, *The Third Man: Reform of the Australasian Defamation Defences* (2004). Gillooly argues that existing defamation law gives insufficient consideration to the interests of the recipients of defamatory communications, and that simplification of defences would reduce the costs of litigation. For a discussion of how the innocent dissemination defence applies in cyberspace, see Greg Heaton, 'ISP liability for defamation in cyberspace' (2000) 6 *International Internet Law Bulletin* 33.

¹⁹ See, eg, Gillooly, above n 9, 342.

²⁰ See Matt Collins, 'Choice of Law in Defamation after *John Pfeiffer Pty Ltd*' (2001) 6 *Media & Arts Law Review* 171, 177–8.

²¹ For a discussion of Internet users' liabilities in foreign jurisdictions, see Greg Heaton, 'Nazis on the net: Free speech versus the world police' (2000) 39(4) *Law Society Journal (New South Wales)* 64.

²² (2002) 194 ALR 433.

²³ But see Richard Potter, '*Dow Jones v Gutnick* — what happened after all the hype?' (2004) 7 *Internet Law Bulletin* 33. Potter contends that *Gutnick* 'really had little or no effect on what is published on the net': at 33.

²⁴ Australian Government Attorney-General's Department, *Outline of Possible National Defamation Laws* (17 March 2004) 1 <<http://www.ag.gov.au/defamation>>.

released their [298] own discussion paper.²⁵ Unfortunately, the paper fails to resolve a number of issues that have long been a matter of contention between the States, most significantly whether truth should be a complete defence to defamation.

At common law, it is a complete defence to publication if the matter complained of is true. The rationale is that ‘as the object of civil proceedings is to clear the character of the plaintiff, no wrong is done to him by telling the truth about him. ... [B]y telling the truth about a man, his reputation is not lowered beyond its proper level, but is merely brought down to it.’²⁶ In New South Wales, Queensland, Tasmania, and the Australian Capital Territory, however, truth alone is not a defence to defamation. In those jurisdictions, the defence of justification also requires that defendants establish an element of public benefit, or that publication of truthful information was in the public interest.²⁷ This confers a limited measure of privacy protection into defamation law.

‘In the public interest’ means ‘of serious concern to the public’, rather than simply ‘interesting to the public’.²⁸ The defence arose in England, in relation to the tort of breach of confidence, from the principle that one should not be liable for a breach of confidence that exposes a crime or misdeed. It developed into a balancing test between the public interest in maintaining confidences and the public interest in knowing the truth.²⁹ Australian courts are likely to hold that publication of confidential material will be permitted where there is some impropriety which is of such a nature that, in the public interest, it ought to be exposed.³⁰ The public interest element was imported into the defamation truth defence in New South Wales in 1847 following an English parliamentary report.³¹

²⁵ Standing Committee of Attorneys-General, *Proposal for Uniform Defamation Laws* (30 July 2004) <http://www.lawpress.com.au/States_Defamation_July04.pdf>.

²⁶ *Rofe v Smith's Newspapers* (1924) 25 SR (NSW) 4, 21–2.

²⁷ For a discussion of defamation law in various Australian jurisdictions, see Gillooly, above n 9; Des Butler and Sharon Rodrick, *Australian Media Law* (2nd ed, 2004) 25.

²⁸ For the defence of public interest to override an express obligation of confidence, as a rule, the information must go beyond being interesting to the public and private matters which are of no real concern to them. There must be a pressing public need to know: see, eg, *Lion Laboratories v Evans* [1985] QB 526, 537. See also Sally Walker, *Media Law: Commentary and Materials* (2000) 961–2.

²⁹ See, eg, *Woodward v Hutchins* [1977] 1 WLR 760, 764 (Lord Denning).

³⁰ See, eg, *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 74 ALR 428, 445–50.

The private affairs of a person who exercises public power or is responsible to an electorate — such as a politician, a judge or a union official — can be relevant to their fitness for office. Such a person's private affairs are more likely to be a matter of public interest than the private affairs of a person who is in the public eye for other reasons, such as a film star or a sportsperson.³² A person's private behaviour can also become a matter of public interest if they deliberately put themselves forward to the public as having high moral standards.³³ Therefore, in Australian jurisdictions where truth alone is not a defence to defamation, the public interest requirement prevents the gratuitous destruction of a person's reputation, including a person in public life, by the publication of purely private facts.

By contrast, over 20 years ago the Australian Law Reform Commission commented that a truth as a complete defence to defamation

is capable of giving rise to grave injustice. It enables a person, from vindictiveness or sensation mongering, to resurrect old stories, lowering a person's reputation and causing him great embarrassment by exposing to the [299] world some misdeed long forgotten or some matter of purely private concern such as his relationships with members of his family.³⁴

The Commission also recognised the conceptual difficulties of stretching existing causes of action to protect private facts that are neither confidential nor defamatory. Instead of relying on incremental developments of the common law, the Commission recommended a statutory cause of action for publication of 'sensitive private facts' where publication is likely to cause distress, annoyance or embarrassment. Defences would include the matter being on the public record and the topic being of public interest.³⁵ No such statute was ever enacted.

³¹ See John Fleming, *The Law of Torts* (9th ed, 1998) 614; Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979) [123].

³² *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

³³ *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153, 165.

³⁴ Australian Law Reform Commission, above n 31, [123].

³⁵ *Ibid* [236]–[237].

Asserting that ‘the states and territories have squandered the best opportunity in decades to achieve national uniformity’,³⁶ Phillip Ruddock indicated he might introduce national defamation legislation in the spring 2004 session of Parliament.³⁷ His revised discussion paper, released on 29 July 2004, noted:

Various submissions have recognised that privacy concerns are important but have suggested they should be dealt with in separate privacy legislation. It is noteworthy, however, that since the [Australian Law Reform Commission] recommended privacy legislation in 1979, no jurisdiction has enacted it. In addition, the future of an action for invasion of privacy at common law is unclear. Absent legislative or common law rights, the case for conferring a limited right of privacy in the defamation context is compelling.³⁸

Accordingly, the paper proposes ‘a defence to a defamatory charge or allegation if it is true and relates to a matter of public interest.’³⁹ The paper proposes a curious definition of public interest, that is, any matter that does not involve an unwarranted disclosure of specified private affairs. This would be broader than a rule that something will not be a matter of public interest unless it is of serious concern to the public.

Under the Commonwealth proposals, defamation could also be easier to establish, as ‘it would be sufficient if the plaintiff’s reputation was adversely affected in the estimation of a substantial and reputable section of the community’.⁴⁰ Such a definition would require jurors to consider not what ordinary reasonable people *generally* would think (to determine which a juror might consult his or her own feelings), but what *some* people might think. As a study by the Communications Law Centre of the University of New South Wales has revealed, people tend to think of

³⁶ Philip Ruddock, ‘Repute in ill dispute’, *The Australian* (Sydney), 4 August 2004.

³⁷ Marcus Priest, ‘State split on defamation law’, *The Australian Financial Review* (Sydney), 19 March 2004. See also Stephen Mayne, *Ruddock’s crazy defamation plan* (23 March 2004) <<http://www.crikey.com.au/media/2004/03/23-0009.html>>.

³⁸ Australian Government Attorney-General’s Department, *Revised Outline of Possible National Defamation Laws* (29 July 2004) 1 <<http://www.ag.gov.au/defamation>>.

³⁹ *Ibid.*

⁴⁰ *Ibid.* 11.

themselves as being more tolerant than the average person.⁴¹ Thus a juror might have a misperception that an imputation that someone smokes marijuana, for example, is defamatory, even if the juror would not personally think less of someone who smokes marijuana.

The Commonwealth Parliament would have constitutional power to legislate for most defamation proceedings aside from defamatory publications made by one individual against another. A reference of power from the States to the Commonwealth under s 51(xxxvii) of the *Australian Constitution* would remove even this limitation. Such cooperation appears unlikely, however. Aside [300] from the States' being loath to relinquish control to the Commonwealth, disagreements remain over the appropriate balance between free speech and the protection of reputations. The States, for example, propose statutory mechanisms to limit damages, and a prohibition on defamation proceedings by corporations and representatives of dead people. The Commonwealth proposals are generally more plaintiff-friendly (and thus more restrictive of free speech).

On 5 November 2004, SCAG released a Model Defamation Bill, to be considered by State and Territory cabinets over the next year.⁴² The Model Bill would preserve the common law defence of truth (without any public interest requirement), and provide an additional defence of contextual truth (where a defamatory imputation does not further harm a person's reputation because of the substantial truth of another imputation). Ruddock noted the outstanding differences between the States and Territories would enact it. He said, '[i]n this area, good intentions have frequently come to nothing.'⁴³

Privacy Law in Australia

As the Commonwealth discussion paper on defamation law reform points out, the future of privacy law in Australia is unclear.⁴⁴ But the same could be said of

⁴¹ Roy Baker, University of New South Wales, 'Defamation — are the courts getting it wrong?' (media release, 15 October 2004) <http://www.unsw.edu.au/news/adv/articles/2004/oct/Defamation_MNE.html>.

⁴² Standing Committee of Attorneys-General, *Model Defamation Provisions* (5 November 2004) <http://www.lawpress.com.au/Model_Defamation_Provisions.pdf>.

⁴³ Australian Government Attorney-General Department, above n 38, 15.

⁴⁴ *Ibid* 15.

defamation law. There have been rapid developments in both areas of law in the past year, and plaintiffs seeking to protect their reputations might now consider bringing an action in either. An invasion of privacy tort could have broader application than the various privacy statutes around Australia, which simply concern data handling by organisations, and contain exemptions for small businesses, employee records and the media. It could have broader application, also, than statutory developments such as the New South Wales Workplace Surveillance Bill 2004, which would prohibit employers from conducting camera, computer or tracking surveillance of workers, unless the employee knows or a magistrate has authorised covert surveillance.⁴⁵ An invasion of privacy tort could encapsulate a range of rights, some of which would offer more protection than defamation laws and statutory privacy laws, provided the privacy rights are not defeated by free speech or public interest arguments.

Grosse v Purvis — the mayor, her stalker, her daughter and their lover

The District Court of Queensland announced the arrival in Australia of an invasion of privacy tort in the case of *Grosse v Purvis*.⁴⁶ Alison Grosse, a former mayor of Maroochy Shire, had a sexual relationship with Robert Purvis in 1994. He subsequently took exception to her contacts with other men, alleging amongst other things that she performed sexual acts with the clients of her Swedish massage business. He spied on her private life, loitered outside her bedroom window, made repetitious offensive phone calls to her, and behaved offensively to her friends and relatives.

In 2000, when Grosse married her daughter's former boyfriend, Purvis accused him of being a drug addict and a drug dealer. Purvis' harassment of Grosse continued, and in 2002 she sued him for invasion of privacy. Queensland's *Courier Mail* and other newspapers carried sordid details for weeks, as the case unfolded in the District Court. Eventually, in June 2003, Senior Judge Skoien awarded Grosse \$178,000 in damages.

The judge held that there are four elements to the tort of invasion of privacy: (1) a willed act by the defendant; (2) which intrudes upon the privacy or seclusion of the

⁴⁵ See New South Wales Attorney General's Department, *Exposure Draft Bill: Workplace Surveillance Bill 2004* (June 2004) <<http://www.pco.nsw.gov.au/pdf/exposure/b04-027-20-d10.pdf>>.

⁴⁶ [2003] QDC 151.

plaintiff; (3) in a manner which would [301] be considered highly offensive to a reasonable person of ordinary sensibilities; and (4) 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.⁴⁷

He said, '[i]n this case the cause of action in invasion of privacy has been presented as a case of stalking, with which I regard harassment as synonymous'.⁴⁸ He considered harassment to be 'merely an aggravated form of invasion of privacy' characterised by 'protracted and persistent conduct on the part of the defendant'.⁴⁹

In calculating damages, the judge said the case was 'a very similar type of action'⁵⁰ to an action in defamation, and that aggravated compensatory damages were appropriate. He said the defendant's 'acts were persistent, frequent, regular and often carried out in the presence of others. It has involved allegations of the most hurtful kind which have no doubt spread rumours or at least helped to maintain their currency.'⁵¹

The judge also remarked upon the defendant's conduct during the litigation. He said:

Of particular note is the fact that the defendant's pleadings maintained, and still maintain, allegations that the plaintiff was immoral in relation to sexual acts she is said to have committed as early as 1994 and in her maintenance of a series of wanton sexual liaisons since. Although his counsel did not pursue that latter aspect other than very cursorily, that did not prevent the defendant himself, in the witness box, from doing so. ... At another point he gratuitously introduced an allegation of a scandalous sexual act between the plaintiff and a well-known politician. All of that was done in the presence of large numbers of the public and the press and received wide publicity. The plaintiff must surely have been deeply offended by it and of course some of the mud will stick. This aspect of the defence raises by analogy, in actions for defamation, the aggravating

⁴⁷ Ibid [444].

⁴⁸ Ibid [451].

⁴⁹ Ibid.

⁵⁰ Ibid [471].

⁵¹ Ibid [477].

nature of the maintenance of an unestablished plea of justification or unsuccessful attacks on the character or credit of the plaintiff.⁵²

Paradoxically, although the defendant's conduct in spreading rumours during the case aggravated the damages, Grosse herself revisited the stories and disseminated them to a wider, nationwide audience after the judgment, by participating in an *Australian Story* program that aired on ABC Television.⁵³

Alluding to the defence of public interest, Senior Judge Skoien said, 'The matter is complicated by the fact that the plaintiff is a political figure and political figures must expect their private lives to be the subject of interest, even scrutiny (provided that scrutiny is reasonable).'⁵⁴ The public interest defence does not give carte blanche to repeat all gossip and rumour.

The judge acknowledged counsel's submission that 'there has been no case in Australia which has expressly given recognition to a right of action for invasion of privacy.'⁵⁵ However, he decided that following the 2002 High Court case of *Lenah Game Meats*,⁵⁶ it was 'a logical and desirable step' to hold 'that there can be a civil action for damages based on the actionable right of an individual person to privacy.'⁵⁷

[302] A more cautious view is that *Lenah Game Meats* did not determine whether privacy interests would be best protected by the recognition of a distinct privacy tort or by an extension of existing causes of action, and that only a further decision by the High Court could resolve this uncertainty. There has been some muttering amongst lawyers that liability in *Grosse v Purvis* could easily have been established under another tort such as trespass, so it was quite unnecessary for a District Court judge to start pontificating about privacy. Nonetheless, there are substantial High Court obiter dicta about the possible development of an invasion of privacy tort.

⁵² Ibid [478].

⁵³ ABC Television, 'Madam Mayor', *Australian Story*, 15 September 2003 <<http://www.abc.net.au/austory/content/2003/s944465.htm>>.

⁵⁴ *Grosse v Purvis* [2003] QDC 151, [59].

⁵⁵ Ibid [421].

⁵⁶ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2002) 208 CLR 199.

⁵⁷ Ibid [442].

Lenah Game Meats — privacy, free speech and an abattoir

In Australia, courts usually will not permit injunctive relief to prevent media publication of matter capable of causing injury to reputation, other than in the most exceptional circumstances. A plaintiff must show that he or she has a prima facie case (which in practice often amounts to trying to convince the judge that there is no possible defence permitting the publication), that he will suffer irreparable injury for which damages will not be an adequate remedy, and that the balance of convenience favours granting an injunction.⁵⁸

The difficulties of obtaining injunctive relief were confirmed in *Lenah Game Meats*, where the High Court held that a 'brush tail possum processing facility' could not restrain the broadcasting of a film of its slaughtering operations, even though the film was obtained unlawfully by an unknown trespasser. The plaintiff respondent conceded that it did not have a maintainable action for defamation, breach of confidence or injurious falsehood, but invited the court to declare that Australian law now recognises a tort of invasion of privacy.⁵⁹

A majority of the judges concluded that even if there were a common law right to sue for invasion of privacy, the activities filmed in this case were not private. Moreover, the judges were doubtful whether any common law right of privacy would extend to corporations. Gleeson CJ suggested that the foundation of privacy rights is the protection of human dignity, while Gummow and Hayne JJ cited a New Jersey case:

The tort of invasion of privacy focuses on the humiliation and intimate personal distress suffered by an individual as a result of intrusive behavior. While a corporation may have its reputation or business damaged as a result of intrusive activity, it is not capable of emotional suffering.⁶⁰

⁵⁸ *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, 153. For a discussion of the law on injunctions in defamation, see Gillooly, above n 9, 319.

⁵⁹ For further discussion of *Lenah Game Meats*, see David Lindsay, 'Playing Possum? Privacy, Freedom of Speech and the Media Following *ABC v Lenah Game Meats Pty Ltd* (Pt I)' (2002) 7(1) *Media & Arts Law Review* 1; David Lindsay, 'Playing Possum? Privacy, Freedom of Speech and the Media Following *ABC v Lenah Game Meats Pty Ltd* (Pt II)' (2002) 7(3) *Media & Arts Law Review* 161.

⁶⁰ *Lenah Game Meats* (2002) 208 CLR 199, [127], citing *NOC Inc v Schaefer*, 484 A 2d 729 (NJ Super Ct Law Div, 1984).

They added, ‘However else it may develop, the common law in Australia upon corporate privacy should not depart from the course which has been worked out over a century in the United States.’⁶¹

Gummow and Hayne JJ observed that the United States ‘has been treated as the fount of privacy jurisprudence’, even though ‘[p]rivacy law in the United States delivers far less than it promises, because it resolves virtually all these conflicts in favour of information, candour, and free speech.’⁶² Although Australia’s privacy law is relatively undeveloped, the judges observed that some of the types of invasion of privacy recognised in the United States would in many instances be actionable in Australia under [303] other causes of action such as defamation, particularly in those jurisdictions where truth alone is not a complete defence.⁶³

American law generally recognises four distinct types of invasion of privacy:

(1) appropriation — the unauthorised use of a person’s name or likeness to obtain some benefit; (2) intrusion — physically or electronically intruding into one’s private quarters; (3) public disclosure of private facts — the dissemination of truthful private information which a reasonable person would find objectionable; (4) false light in the public eye — publication of facts which place a person in a false light even though the facts themselves may not be defamatory.⁶⁴

All six judges in *Lenah Game Meats* were generally sympathetic to the American principles of privacy law, but noted that they were developed in the context of the constitutional right to free speech under the First Amendment,⁶⁵ for which there is no Australian equivalent. Consequently, in comparison to the United States, courts in Australia might strike a balance more in favour of privacy than free speech.

⁶¹ *Ibid* [129].

⁶² *Ibid* [119], citing David Anderson, ‘The Failure of American Privacy Law’ in Basil Markesinis (ed), *Protecting Privacy* (1999) 139, 140.

⁶³ See, eg, *Lenah Game Meats* (2002) 208 CLR 199, [123] (Gummow and Hayne JJ).

⁶⁴ *Agency For Health Care Admin v Associated Industries of Fla*, 678 So 2d 1239 (Fla, 1996). The four categories are also outlined in *Restatement of the Law Second, Torts* (1977) and have been accepted by the Supreme Court: see, eg, *Cox Broadcasting Corporation v Cohn*, 420 US 469, 488 (1975).

⁶⁵ The First Amendment of the *United States Constitution* reads in part: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press...’.

However, it remains uncertain whether privacy will remain simply a value underlying the existence of other torts, such as defamation or breach of confidence, or become a new tort of itself. Gleeson CJ cited difficulties with developing an adequate definition of 'privacy' as a reason for caution in declaring a tort of invasion of privacy.⁶⁶ He surmised that the requirement in the United States for the plaintiff to prove that the disclosure is highly offensive helps to delineate what is 'private', given the imprecision of the concept of privacy.⁶⁷

An alternative to declaring a tort of invasion of privacy is to recognise the protection of privacy interests in existing causes of action such as breach of confidence. Gleeson CJ suggested that an obligation of confidentiality could arise even where a defendant did not *receive information in confidence*, as is conventionally required and as is implied in the sense of information being *confided* from one person to another. He suggested that the obligation could arise from the nature of the information, rather than the circumstances in which it is imparted.⁶⁸

The next logical step would be for courts to acknowledge protection not only of the confidential communication of private information, but also of the private information itself. Gummow and Hayne JJ considered a possible trend in common law countries towards recognising an actionable right of privacy, and discussed English precedents supportive of such a development.⁶⁹ Subsequent judicial pronouncements in England, however, have shown that a unified approach to privacy law is not emerging across common law countries.

England

In *A v B & C*,⁷⁰ the Court of Appeal overturned an injunction preventing publication of a footballer's extra-marital affairs. The Court decided that transient sexual relationships attracted less right to [304] confidentiality than permanent ones, especially where one of the parties decided that they did not want the relationship to

⁶⁶ *Lenah Game Meats* (2002) 208 CLR 199, [41].

⁶⁷ Gleeson CJ said: "The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.": *ibid* [42].

⁶⁸ *Ibid* [29], [55].

⁶⁹ *Ibid* [113]–[116].

⁷⁰ [2002] EWCA Civ 33770.

remain confidential. The tenuous protection of private information is arguably a result of courts' refusal to recognise any invasion of privacy tort.

The absence of any actionable right of privacy was acknowledged by the Court of Appeal in the 1991 case of *Kaye v Robertson*,⁷¹ in which a newspaper reporter and photographer invaded the plaintiff's hospital bedroom as he lay recovering from brain surgery, purported to interview him and took photographs. But ten years later, in the Court of Appeal case of *Douglas v Hello! Ltd*,⁷² Keene LJ commented that English law had evolved to the point where *Kaye v Robertson* might today be decided in favour of the plaintiff. Similarly, Sedley LJ acknowledged that in the case before them the plaintiffs (Michael Douglas and Catherine Zeta-Jones) had a right to privacy. One might conclude from such statements that English law now implicitly recognises a general invasion of privacy tort. However, any such thoughts were put to rest with two recent decisions by the House of Lords.

Wainwright v Home Office — a strip search gone awry

In *Wainwright v Home Office*,⁷³ five law lords unanimously held that there is no general tort of invasion of privacy in English law. The Wainwrights sought compensation after they were strip searched, in a manner contrary to prison guidelines, while visiting a relative in prison. As Lord Hoffman said, 'Strip searching is controversial because having to take off your clothes in front of a couple of prison officers is not to everyone's taste.'⁷⁴

Lord Hoffman dismissed arguments that the decision in *Douglas* supported the emergence of a general actionable tort of privacy. He referred to Sedley LJ's remarks in *Douglas* that '[t]he law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.'⁷⁵ Lord Hoffman said:

⁷¹ [1991] FSR 62.

⁷² [2001] 2 WLR 992.

⁷³ [2003] UKHL 53.

⁷⁴ *Ibid* [3].

⁷⁵ *Ibid* [28], citing *Douglas* [2001] 2 WLR 992, [126].

I read these remarks as suggesting that ... the common law of breach of confidence has reached the point at which a confidential relationship has become unnecessary. ... His observations are in my opinion no more (although certainly no less) than a plea for the extension and possibly renaming of the old action for breach of confidence.⁷⁶

In other words, an obligation of confidence could arise from the nature of the information, rather than the circumstances in which it is imparted, but that did not mean there is any general tort of invasion of privacy. Such a tort, Lord Hoffman inferred, would give rise to an unacceptable degree of uncertainty. Referring to the fact that American law recognises four different types of invasion of privacy, Lord Hoffman said:

The need in the United States to break down the concept of 'invasion of privacy' into a number of loosely-linked torts must cast doubt upon the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case. English law has so far been unwilling, perhaps unable, to formulate any such high-level principle. There are a number of common law and statutory remedies of which it may be said that one at least of the underlying values they protect is a right of privacy. ... But there are [305] gaps; cases in which the courts have considered that an invasion of privacy deserves a remedy which the existing law does not offer. Sometimes the perceived gap can be filled by judicious development of an existing principle.⁷⁷

Lord Hoffman said furthermore 'the coming into force of the *Human Rights Act 1998* weakens the argument for saying that a general tort of invasion of privacy is needed to fill gaps in the existing remedies.'⁷⁸ That statute conferred into English law several of the rights set out in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, including a right to respect for private and family life, and a right to freedom of expression.⁷⁹ The United Kingdom's integration into Europe,

⁷⁶ *Wainright* [2003] UKHL 53, [29]–[30].

⁷⁷ *Ibid* [18].

⁷⁸ *Ibid* [34].

⁷⁹ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222 (entered into force 3 September 1953), as amended by Protocols 3, 5, and 8 (which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively). Article 8 reads:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the

therefore, may be encouraging a divergence of the paths taken by England and Australia in relation to privacy law.

Campbell v MGN Limited — Narcotics Anonymous and the supermodel

On 6 May 2004, just six months after the *Wainwright* decision, the House of Lords revisited privacy protections in the common law, noting that it is a fast developing area in several common law jurisdictions.⁸⁰ *Campbell v MGN Limited*⁸¹ arose when British supermodel Naomi Campbell sued Mirror Group Newspapers for publishing photographs and stories about her treatment for drug addiction at Narcotics Anonymous. Campbell conceded that publication of the fact that she was a drug addict was a matter of legitimate public comment because she had lied publicly that she did not take drugs.⁸² Lord Nicholls of Birkenhead observed:

[306] When talking to the media Miss Campbell went out of her way to say that, unlike many fashion models, she did not take drugs. By repeatedly making these assertions in public Miss Campbell could no longer have a reasonable expectation that this aspect of her life should be private. ... [W]here a public figure chooses to present a false image

interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10 reads:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

⁸⁰ *Campbell v MGN Limited* [2004] UKHL 22, [11] (Lord Nicholls of Birkenhead).

⁸¹ *Ibid.*

⁸² The same principle was pivotal to a Court of Appeal decision that Campbell was not entitled to summary judgment against a former employee, Vanessa Frisbee, who sold a story about a sexual relationship between Campbell and the actor Joseph Fiennes, when Campbell was engaged to be married to millionaire businessman Flavio Briatore. Frisbee claimed that Campbell repudiated the confidentiality clause in her employment contract when Campbell assaulted her. Exposing the falsity of Campbell's public image might be permissible considering that 'Miss Campbell had voluntarily stimulated public interest in her private life. She had painted a false picture of herself to the public': *Campbell v Frisbee* [2002] EWCA Civ No 1374, [26]. Lord Phillips cited an earlier Court of Appeal decision: 'It seems to me that those who seek and welcome publicity of every kind bearing upon their private lives so long as it shows them in a favourable light are in no position to complain of an invasion of their privacy by publicity which shows them in an unfavourable light': at [30], citing *Woodward v Hutchins* [1977] 1 WLR 760, 765 (Lord Bridge).

and make untrue pronouncements about his or her life, the press will normally be entitled to put the record straight.⁸³

All five judges agreed on that point, but differed over whether the *Mirror* should have confined itself to the bare fact of Campbell's drug dependency and the fact that she was seeking treatment, or whether it was entitled to reveal more of the circumstantial detail and print the photographs.⁸⁴

The majority decided that there was no compelling need for the public to know details such as the name of the organisation that she was attending for therapy. This was private information that imported a duty of confidence.⁸⁵ Lord Hope of Craighead said one might conclude that 'a reasonable person of ordinary sensibilities would not regard the publication of the further details of her therapy as particularly significant.'⁸⁶ But that was the incorrect test. 'The question is what a reasonable person of ordinary sensibilities would feel *if she was placed in the same position as the claimant*.'⁸⁷

Moreover, the publication of a photograph may be an infringement of privacy, even if taken in a public place. Lord Hope of Craighead said:

In *Peck v United Kingdom* [2003] 36 EHRR 719, para 62 the court held that the release and publication of CCTV footage which showed the applicant in the process of attempting to commit suicide resulted in the moment being viewed to an extent that far exceeded any exposure to a passer-by or to security observation that he could have foreseen when he was in that street.⁸⁸

In dissent, Lord Nicholls of Birkenhead appeared to accept the *Mirror's* view that it was permissible to include the photographs and some details of Campbell's treatment

⁸³ *Campbell* [2004] UKHL 22, [24].

⁸⁴ *Ibid* [59].

⁸⁵ *Ibid* [95].

⁸⁶ *Ibid* [97].

⁸⁷ *Ibid* [99] (emphasis added).

⁸⁸ *Ibid* [122].

by way of verification.⁸⁹ The additional information was of ‘an unremarkable and consequential nature’.⁹⁰

Lord Nicholls of Birkenhead also commented that the term ‘breach of confidence’ is misleading⁹¹ and the ‘essence of the tort is better encapsulated now as misuse of private information.’⁹² However, none of the judges expressly reopened the question of whether English law recognises a distinct invasion of privacy tort. Indeed, the Baroness Hale of Richmond said *Wainwright* ‘indicates that our law cannot, even if it wanted to, develop a general tort of invasion of privacy’,⁹³ and Lord Hoffman said:

This House decided in *Wainwright v Home Office* [2003] 3 WLR 1137 that there is no general tort of invasion of privacy. But the right to privacy is in a general sense one of the values, and sometimes the most important value, which underlies a number of more specific causes of action.⁹⁴

[307] New Zealand

Although England’s highest court has categorically rejected a distinct tort of invasion of privacy, on 1 April 2004 the New Zealand Court of Appeal hinted that England’s breach of confidence tort now extends to situations that are simply invasion of privacy under another name.⁹⁵

Hosking v Runtig* — *souring of a media tart

Mr and Mrs Hosking became a ‘celebrity couple’ in New Zealand thanks to Mr Hosking’s career in broadcasting. The couple willingly participated in media coverage of their lives, including stories about Mrs Hosking’s pregnancy. However, following the birth of their twin daughters, Ruby and Bella, the couple declined to give further interviews. The couple later separated, and *New Idea!* magazine decided to publish a story about Mr Hosking spending Christmas without his family. Mr and Mrs Hosking sued to prevent publication of photographs of their 18-month-old daughters. The

⁸⁹ *Ibid* [63].

⁹⁰ *Ibid* [26].

⁹¹ *Ibid* [13].

⁹² *Ibid* [14].

⁹³ *Ibid* [134].

⁹⁴ *Ibid* [43].

⁹⁵ *Hosking v Runtig* [2004] NZCA 34.

photographs were taken by Mr Runting in a public street and 'there was nothing in the least personally embarrassing or distressing about the material'.⁹⁶

All five judges dismissed the plaintiffs' claim, and discussed the emerging tort of invasion of privacy. Gault P and Blanchard J said:

[I]n substance the law in New Zealand developed at the High Court level is very close to the position now reached (or approached) by the English courts, though different terminology is used. The position in the United Kingdom is that there is not a general law of invasion of privacy. But the law will protect against the publication of private information where that is harmful and is not outweighed by public interest or freedom of expression values. In England that is done within the scope of the tort of wrongful disclosure of confidential information. In New Zealand we prefer to categorise it as a separate head of liability.⁹⁷

Several of the judges appeared to be conscious of avoiding accusations of judicial activism.⁹⁸ They mentioned the judiciary's traditional role in developing law and emphasised 'we are not to be taken as establishing a general cause of action encompassing all conduct that may be described as invasion of privacy.'⁹⁹ Rather, they were 'at this point' concerned only with one of the four types of invasion of privacy recognised in American law: the dissemination of truthful private information where the publicity would be highly offensive to a reasonable person.¹⁰⁰ In the Hoskings' case the judges agreed that publication of the photographs 'would not publicise any fact in respect of which there could be a reasonable expectation of privacy.'¹⁰¹

Gault P and Blanchard J referred to a Canadian case, *Aubry v Editions Vice-Versa Inc*,¹⁰² where a plaintiff was awarded damages after a magazine published a photograph of her taken in a public place. In that case the Supreme Court confirmed a

⁹⁶ Ibid [271].

⁹⁷ Ibid [7].

⁹⁸ See, eg, *ibid* [4], [108], [253]. Gault P and Blanchard J said: 'It is because the legislative process is inapt to anticipate or respond to every different circumstance that some developments in the law result from such case by case decisions. That is the traditional process of the common law': at [4].

⁹⁹ *Ibid* [45].

¹⁰⁰ *Ibid* [68], [118], [125]–[128].

¹⁰¹ *Ibid* [164].

decision of the Quebec Court of Appeal that '[t]he right to respect for private life is infringed as soon as an image is published without consent, provided the person is identified. It is irrelevant to the question of breach whether the image is in any way reprehensible, or has injured the person's reputation.'¹⁰³ However, expectations of privacy could be less in certain [308] circumstances, such as where the plaintiff appeared only incidentally in a photograph of a public place, or as part of a group of persons.¹⁰⁴

By contrast, Gault P and Blanchard J said, 'we do not consider there is a cause of action in our law directed to unauthorized representation of one's image.'¹⁰⁵ Although the judges did not expressly say so, this would also appear to mean they were rejecting one of the four types of invasion of privacy recognised in American law: the unauthorised use of a person's name or likeness to obtain some benefit. The American tort protects a person's *commercial* right to use of their own image, as opposed to their human right to prevent use of their image even where publication is not for a commercial purpose. As Mr Runting sold photographs of the Hosking twins to *New Idea!* for use in a commercial publication, this was, *prima facie*, a case of unauthorised use a person's likeness to obtain some benefit.

However, the judges did favourably cite the American public figure test, which is not recognised in Australian defamation law and is most unlikely to be recognised in any Australian invasion of privacy tort. They said, 'The right to privacy is not automatically lost when a person is a public figure, but his or her reasonable expectation of privacy in relation to many areas of life will be correspondingly reduced as public status increases.'¹⁰⁶

¹⁰² [1998] 1 SCR 591.

¹⁰³ *Hosking* [2004] NZCA 34, [62], referring to *Aubry* [1998] 1 SCR 591.

¹⁰⁴ *Hosking* [2004] NZCA 34, [63], referring to *Aubry* [1998] 1 SCR 591. Gault P and Blanchard J noted: 'Quebec is a civil law jurisdiction with close ties to the law of France (where a right to privacy has long been included in the civil code). Supreme Court decisions on appeal from Quebec have no binding effect on the common law provinces': *Hosking* [2004] NZCA 34, [64].

¹⁰⁵ *Hosking* [2004] NZCA 34, [171]. In *Campbell* [2004] UKHL 22, the Baroness Hale of Richmond reached the same conclusion in relation to English law. She said: 'Unlike France and Quebec, in this country we do not recognise a right to one's own image: cf *Aubry v Editions Vice-Versa Inc* [1998] 1 SCR 591. We have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential': at [154].

¹⁰⁶ *Hosking* [2004] NZCA 34, [121].

Unfortunately, the judges did not clarify whether determining the 'reasonable expectation' is a policy question of the level of privacy that a public figure *ought* be entitled to, or a factual question of the level of privacy that a public figure can *realistically* expect. If it is the latter, the privacy protection that public figures can legitimately expect would be undermined by repeated media intrusion. That is, the level of media intrusion would determine what level of media intrusion is legally acceptable.

The judgment also does little to clarify the ambit of 'public interest', and indeed appears to confuse this term of art with the more colloquial idea of a matter being 'interesting to the public'. Gault P and Blanchard J cited the 'natural curiosity and interest' that the public has in the personal lives of celebrities, and their families, as a reason for reducing their right to privacy, without giving any moral justification for such a principle.¹⁰⁷

Gault P and Blanchard J noted that in defamation cases, 'exceptional, clear and compelling reasons are required before injunctive relief will be made available.'¹⁰⁸ They said:

It was argued before us that if the New Zealand courts develop a tort of interference with privacy, cases that would previously have been pleaded in defamation will be pleaded in the privacy tort instead. If a less stringent approach to interim restraint pending determination of claims is adopted it would enable plaintiffs to avoid the principle of prior restraint.¹⁰⁹

Without clearly adjudicating on the issue, the judges noted the respondents' submission that '[w]here the underlying interest is reputational, the prior restraint rules should be consistent between defamation and any privacy tort.'¹¹⁰ They concluded, however:

¹⁰⁷ Ibid [120], citing Randerson J's first instance judgment in *Hosking v Runting* [2003] 3 NZLR 285, [141].

¹⁰⁸ *Hosking* [2004] NZCA 34, [152].

¹⁰⁹ Ibid [155].

¹¹⁰ Ibid [156].

[309] The general position, then, is that usually an injunction to restrain publication in the face of an alleged interference with privacy will only be available where there is compelling evidence of most highly offensive intended publicising of private information and there is little legitimate public concern in the information.¹¹¹

Nonetheless, privacy rights appear to obtain greater protection at common law in New Zealand than in the United States. Gault P and Blanchard J said the ‘compromise’ between privacy and free speech ‘seems to have made the right to privacy in the United States a somewhat hollow one, due to the weight that is given to free speech. Freedom of expression is essentially seen as a trump card, even in cases where protection of privacy interests is clearly warranted.’¹¹² Moreover:

It would be pointless to formulate a cause of action with one hand and take it away from potential claimants with the other. If this Court is to rely on the United States jurisprudence to inform our developments in this area, we must remain alive to the outcome for the tort of privacy that that country has witnessed.¹¹³

United States

While in Australia only the District Court of Queensland has to date unambiguously recognised a tort of invasion of privacy, in the United States it is clearly established that plaintiffs may claim invasion of privacy to seek redress for the publication of embarrassing personal information. This is important because of the difficulty in the United States of winning defamation actions, particularly for public figures. Especially since the 1960s, the United States Supreme Court has shown very little sympathy for defamation plaintiffs, which presumably explains why fewer defamation actions are commenced in the entire United States than in Australia.¹¹⁴ Nonetheless, actions for invasion of privacy — like actions for defamation — are apt to be defeated by the right to free speech.

¹¹¹ Ibid [158].

¹¹² Ibid [73].

¹¹³ Ibid [76].

¹¹⁴ Roy Baker, ‘Third Person Singular? Instructing the Defamation Jury’, (paper for the Jury Research Conference, University of New South Wales, Sydney, 17 October 2003) 2, <<http://www.comslaw.org.au/publications/pub54.pdf>>.

Bartnicki v Vopper — Privacy, Free Speech and a Union

In *Bartnicki v Vopper*,¹¹⁵ the United States Supreme Court ruled that a radio commentator could not be punished for broadcasting a tape of an illegally intercepted conversation. The conversation, between officials of a teachers' union engaged in collective bargaining negotiations, was embarrassing for its appearance of thuggery: 'If they're not gonna move for three percent, we're gonna have to go to their, their homes. To blow off their front porches, we'll have to do some work on some of those guys.'¹¹⁶

The commentator who broadcast the tape played no part in the illegal interception, obtained the tape lawfully, and the conversation was a matter of public concern. Stephens J, delivering the majority opinion, said 'it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.'¹¹⁷

He said, '[i]n this case, privacy concerns give way when balanced against the interest in publishing matters of public importance. ... One of the costs associated with participation in public affairs is an attendant loss of privacy.'¹¹⁸ Public figures are held to lose, at least to some extent, their right to privacy on the grounds that they had sought publicity and consented to it, and their affairs had become [310] legitimate matters of public interest. This public figure test blurs the distinction between public figures who exercise public power and those who are merely famous.¹¹⁹

The High Court of Australia has not expressly considered the American approach to public figures in relation to privacy. However, the Court has examined the public figure test that has developed in the United States in relation to defamation following *New York Times Co v Sullivan*,¹²⁰ and decided it is inappropriate for Australia. Instead

¹¹⁵ 532 US 514 (2001).

¹¹⁶ Quoted in *Bartnicki v Vopper*, 532 US 514 (2001) at Part I (Stevens J).

¹¹⁷ *Ibid* at Part VI.

¹¹⁸ *Ibid*.

¹¹⁹ See, eg, *Curtis Publishing Co v Butts*, 388 US 130 (1967).

¹²⁰ 376 US 254 (1964).

the Court established a new defence to defamation based on an implied constitutional freedom of political communication.¹²¹

The stronger emphasis on free speech in the United States derives from what the Supreme Court has called America's 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.'¹²² Because of this principle, neither factual error nor defamatory content suffice to remove the First Amendment shield from criticism of public officials.¹²³ A public figure plaintiff in defamation actions must prove 'actual malice' on the part of the defendant, that is, that the defendant was aware the material published was false, or was recklessly indifferent to its truth or falsity.¹²⁴ Even a 'private figure', where the defamation does not relate to a matter of public concern, must prove that the defendant was at least negligent in failing to discover the truth.¹²⁵

Moreover, as Stephens J acknowledged, the Supreme Court has repeatedly refused to answer categorically whether the publication of *truthful* information may ever be punished consistent with the First Amendment.¹²⁶ The dogmatism of this approach has led to some startling decisions, such as *The Florida Star v BJJ*,¹²⁷ in which the Supreme Court held that imposing damages on a newspaper for publishing the name a rape victim violated the First Amendment. In dissent, White J said, 'The Court's concern for a free press is appropriate, but such concerns should be balanced against rival interests in a civilized and humane society. An absolutist view of the former leads to insensitivity as to the latter.'¹²⁸ He warned that the majority's 'harsh' decision would inevitably lead to the 'obliteration' of 'one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts.'¹²⁹

¹²¹ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104. The freedom was subsequently narrowed in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

¹²² *New York Times Co v Sullivan*, 376 US 254, 270 (1964) (Brennan J).

¹²³ *Ibid.*

¹²⁴ The 'actual malice' test was pronounced in relation to 'public officials' in *New York Times Co v Sullivan*, 376 US 254 (1964) 279–83. Subsequent cases extended the test to 'public figures': see *Curtis Publishing Co v Butts*, 388 US 130 (1967) 162–5.

¹²⁵ *Gertz v Robert Welch Inc*, 418 US 323 (1974).

¹²⁶ *Bartnicki v Vopper*, 532 US 514 (2001) at Part VI.

¹²⁷ 491 US 524 (1989).

¹²⁸ *Ibid* 547.

¹²⁹ *Ibid* 550.

The reluctance of courts to prevent publication of any truthful information gives rise to privacy issues that affect everybody, not just those involved in public affairs. It potentially exposes to publicity anyone who comes to public attention through any 'newsworthy' event, such as through being a victim of crime or a natural disaster. It also means that a person can publish details, for example, of his or her sex life on the Internet, even supposing other individuals are involved.

In the latter example, it is clear that in some Australian jurisdictions such publication could be defamatory, even if truthful. Even in those Australian states where truth is a complete defence to defamation, it is possible that there could be an action for breach of confidence or invasion of privacy. In England, the High Court has held that a plaintiff could prevent his former wife from publishing information about their intimate relationship. Adultery and divorce did not release the 'innocent' [311] spouse from the obligation to preserve 'marital confidence'.¹³⁰ In New Zealand, the District Court has awarded damages to a prostitute whose client took sexually explicit photographs of her and had one published in an adult magazine without her consent. The Court ruled that her 'personal shield of privacy' had been destroyed, despite the fact that she could not be identified from the photograph.¹³¹

In the United States, however, a plaintiff would have difficulty even establishing a cause of action. The case of *Johnson v Max*,¹³² which was eventually abandoned by the plaintiff despite initial success in obtaining interlocutory injunctive relief, demonstrates the hurdles that must be overcome despite a clearly established tort of invasion of privacy. As the New Zealand Court of Appeal commented in *Hosking*, 'the right to privacy in [the United States] has been limited to such a degree that most courts do not even allow a complaint for invasion of privacy to get past the initial stage of litigation.'¹³³

¹³⁰ *Duchess of Argyll v Duke of Argyll* [1967] Ch 302.

¹³¹ *L v G* [2002] DCR 234.

¹³² (Circuit Court, Palm Beach County, Florida, 6 May 2003, 2003-CA004867AF). For the judgment and court documents, see <<http://www.tuckermax.com/missvermont.html>>.

¹³³ *Hosking* [2004] NZCA 34, [75].

Johnson v Max — the cad and the beauty queen

Tucker Max is a graduate of Duke Law School, who was fired from a US\$2,400 a week internship at a California law firm for drunken behaviour. He is now living on his status as an 'Internet celebrity', having gained notoriety by publishing stories denigrating ex-girlfriends on his website.¹³⁴

Katy Johnson is a winner of Miss Vermont beauty contests who promotes abstinence from sex until marriage and has parlayed her beauty pageant experience into a career of acting and writing newspaper columns. She also publishes 'character education comic strips' intended to 'promote, and teach young girls, values such as self-esteem, confidence, respect, integrity, responsibility and beauty.'¹³⁵ Johnson has a website which 'is directed to and created primarily for pre-teen girls and their families in search of wholesome family values.'¹³⁶ It advertises Johnson's books and t-shirts,¹³⁷ and offers advice about beauty pageants.¹³⁸

Johnson filed suit against Max in a Florida Circuit Court when he published a story on his website revealing lurid details of their purported sexual relationship, including how he and Johnson had sex on their first date in the back seat of her car. Rather than an action in defamation, Johnson sought monetary damages on three counts: unauthorised use of name and likeness, invasion of privacy, and battery. She sought emergency injunctive relief, swearing in her affidavit, 'I fear that more will continue

¹³⁴ See <<http://www.tuckermax.com/dateapplication.html>>.

¹³⁵ Affidavit of plaintiff Katy Johnson, *Johnson v Max* (Circuit Court, Palm Beach County, Florida, 1 May 2003, 2003-CA004867AF). See <<http://www.katyjohnson.com/charact.html>>: 'Obscene things being said in the name of the flag ... Should make most people want to GAG!'; 'Stay away from boys who treat you like toys.'

¹³⁶ Affidavit of plaintiff Katy Johnson, *Johnson v Max* (Circuit Court, Palm Beach County, Florida, 1 May 2003, 2003-CA004867AF).

¹³⁷ See <<http://www.katyjohnson.com/formtemp.html>>: 'Cute T-shirts send a message of virtue. Tell Mom to buy one for nurture!'; 'Cute T-shirts are worn by PC girls ... So get as many as mom allows.'

¹³⁸ See, eg, <<http://www.katyjohnson.com/askkat7.html>>: 'Dear Katy: I was wondering where I could buy spray adhesive to keep the swimsuit from riding up.' 'Katy: Stickem or Firm Grip can be bought at sports stores like Champs or Sports Authority. Two-sided tape or Photo Mount tape or putty, which can be bought at your local drug store, are also effective.'; or <<http://www.katyjohnson.com/askkat3.html>>: 'Dear Katy: I am not very pretty in the face but want to enter beauty pageants. Should I? Plain Jane' 'Katy: Yes! A beauty pageant is an image scrimmage. A cute attitude, great competition skills and a 'grin from within' can make the judges forget about your face.'

to read these stories, including my father, and associate me with Tucker Max and his adult audience.'¹³⁹

[312] Judge Diana Lewis granted a temporary injunction in May 2003, without holding a hearing and without Max having been notified of the suit. The order prohibited Max from disclosing 'any stories, facts or information, notwithstanding its truth, about any intimate or sexual act engaged in by' Johnson. It prohibited Max from using the words 'Katy', 'Johnson', or 'Miss Vermont' on his website, and from having a link on his website to hers.¹⁴⁰

Max filed a motion to dissolve the injunction, and the American Civil Liberties Union filed leave to appear as amicus curiae, calling the injunction 'an egregious violation of the First Amendment'.¹⁴¹ Generally in the United States in order to obtain an interlocutory injunction, a plaintiff must demonstrate that: (1) there is a substantial likelihood of success on the merits; (2) the plaintiff is likely to suffer immediate and irreparable injury if the defendant's conduct is not enjoined; (3) the threatened injury to the plaintiff outweighs any potential damage the injunction might cause to the defendant; and (4) the injunction would not be adverse to the public interest.¹⁴² The test is similar to that in Australia.

Max argued that the only harm complained of by Johnson was her 'great embarrassment', which could not constitute irreparable injury as an award of damages would be adequate remedy. In fact, the irreparable injury was being inflicted on the defendant, and the public, by the injunction.¹⁴³ Indeed, the Supreme Court has said, 'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'¹⁴⁴ For this reason it is exceedingly rare in the United States for claims for invasion of privacy to be considered sufficient to

¹³⁹ Affidavit of plaintiff Katy Johnson, *Johnson v Max* (Circuit Court, Palm Beach County, Florida, 1 May 2003, 2003-CA004867AF).

¹⁴⁰ *Johnson v Max* (Circuit Court, Palm Beach County, Florida, 6 May 2003, 2003-CA004867AF).

¹⁴¹ *Memorandum of amicus curiae American Civil Liberties Union of Florida in support of defendant's emergency motion to dissolve temporary injunction* (17 June 2003) *Johnson v Max* (United States District Court, Southern District of Florida, 03-80515-CIV-HURLEY).

¹⁴² See, eg, *Harris County, Texas v Carmax Auto Superstores Inc*, 177 F 3d 306, 312 (5th Cir, 1999).

¹⁴³ *Defendant's emergency motion to dissolve ex parte temporary injunction* (17 June 2003) *Johnson v Max* (United States District Court, Southern District of Florida, 03-80515-CIV-HURLEY).

¹⁴⁴ *Elrod v Burns*, 427 US 347, 372 (1976) (Brennan, White and Marshall JJ).

prohibit future publication. Any such injunction, or ‘prior restraint on expression’, is ‘the most serious and the least tolerable infringement of First Amendment rights’,¹⁴⁵ and comes ‘with a “heavy presumption” against its constitutional validity.’¹⁴⁶

Max also sought dismissal of Johnson’s invasion of privacy claims, on the grounds that she had failed to state a claim upon which relief could be granted. Johnson’s claims appeared to be based on two of the four types of invasion of privacy recognised in American law: appropriation and the dissemination of truthful private information.

Regarding appropriation, Johnson argued that Max had without consent used her name and photograph for commercial purposes — that is, attracting visitors to his website, on which he advertises books he has published. Under Florida legislation, defences to unauthorised use include where the name or likeness is used as part of any bona fide news report or presentation having a current and legitimate public interest, provided the name or likeness is not used for advertising purposes.¹⁴⁷ Max responded that mere use in a publication of a person’s name or likeness does not constitute a commercial purpose, even if the publication itself is a commercial product. The reason for this seemingly counter-intuitive principle appears to be that most media such as magazines have some underlying commercial purpose, and to prohibit any use of a person’s likeness in such media would be unduly restrictive and unreasonable.¹⁴⁸

[313] Regarding public disclosure of private facts, an invasion of privacy occurs where the disclosure would be highly offensive and objectionable to a reasonable person of ordinary sensibilities, and the matter is not of legitimate concern to the public.¹⁴⁹ The plaintiff need not demonstrate ‘actual malice’,¹⁵⁰ and truth is not a

¹⁴⁵ *Nebraska Press Association v Stuart*, 427 US 539, 559 (1976) (Burger CJ).

¹⁴⁶ *Organization for a Better Austin v Keefe*, 402 US 415, 419 (1971) (Burger CJ, Black, Douglas, Brennan, Stewart, White, Marshall, and Blackmun JJ).

¹⁴⁷ § 540.08(3), Fla Stat.

¹⁴⁸ See, eg, *Loft v Fuller*, 408 So 2d 619 (Fla App, 1981).

¹⁴⁹ See, eg, *Heath v Playboy Enterprises Inc*, 732 F Supp 1145 (SD Fla 1990). In *Lenah Game Meats* (2002) 208 CLR 199, Gleeson CJ surmised that the requirement in the United States for the plaintiff to prove that the disclosure is highly offensive helps to delineate what is ‘private’, given the imprecision of the concept of privacy.

¹⁵⁰ That is, the requirement that public official plaintiffs in defamation actions demonstrate that the defendant was aware the material published was false, or was recklessly indifferent to its truth or falsity: *New York Times Co v Sullivan*, 376 US 254 (1964) 279–83.

defence. Indeed, if the story is not factual, there can be no claim for publication of private facts. It is incongruous, then, that Johnson based her claim on Max's public dissemination of 'private facts of and concerning the Plaintiff', but subsequently her counsel issued a press release saying she 'vehemently denies the story about her on the website.'¹⁵¹

Given Johnson's earlier unsuccessful motion for a court order preventing public comment or dissemination of facts or information concerning the case, it is perhaps also ironic that she used the press release to promote her public profile. The press release said: 'Her biggest concern was that little girls trying to visit her web site to see the *Starrlettes* or Miss Vermont web site for pageant information were being diverted by search engines to Max's depraved site.' It continued: 'She will be appearing on the MTV documentary 'MADE' on June 28, as a coach who has one month to turn a tomboy into a beauty queen.'¹⁵²

Any plaintiff in a case such as this, as in defamation actions, faces the dilemma that litigation will cause further dissemination of the embarrassing material. Johnson helped catapult to global notoriety a scurrilous website that would otherwise have remained in relative obscurity. Indeed Max asserted, 'As disingenuous as it is to file a lawsuit and then to seek damages based on the publicity generated by the lawsuit, that is precisely what Plaintiff is claiming here.'¹⁵³

Max inferred that his motive in publishing an autobiographical account of his alleged relationship with Johnson was to expose her hypocrisy. His lawyer said,

Katy Johnson holds herself out publicly, for her own commercial gain, as a champion of abstinence and a woman of virtue. The public has a legitimate interest in knowing

¹⁵¹ Katy Johnson, 'Former Miss Vermont, Katy Johnson, Breaks Silence On Injunction Against "Depraved Web Site"' (Press Release, 5 June 2003) <<http://www.transmediagroup.com/newsroom/2003/605FormerMissVermont.htm>>.

¹⁵² Ibid.

¹⁵³ *Defendant's Notice of removal to Federal Court* (6 June 2003) *Johnson v Max* (United States District Court, Southern District of Florida, 03-80515-CIV-HURLEY).

whether or not her own behavior is consistent with the virtuous image that she publicly seeks to promote.¹⁵⁴

Certainly under Australian law, Johnson's public proclamation of high moral standards would give members of the public the right to question her adherence to those standards.¹⁵⁵

As for Johnson's complaint that Max's website 'repeatedly characterises the Plaintiff as unintelligent, naïve and/or promiscuous',¹⁵⁶ it is arguable that if a person exploits her image to promote values to children, determining whether she is unintelligent, naïve and promiscuous is a matter of legitimate public interest.

[314] In the United States, court precedent falls heavily in favour of free speech at the expense of privacy protection, and allows broad interpretation of what is a matter of legitimate public interest. The Florida Supreme Court has held that 'the requirement of lack of public concern is a formidable one.'¹⁵⁷ In a somewhat circular fashion, the Court has equated 'legitimate public interest' with whether the publication was subject to First Amendment protection.¹⁵⁸ Arguably this means that the public interest requirement can never defeat the constitutional right to free speech. In any event, Johnson appeared to succumb to the weight of such precedent when she withdrew her suit, filing a notice of voluntary dismissal in July 2003.

Lawrence v Texas — Being Gay in Texas

Despite the difficulties that the First Amendment right to free speech poses for plaintiffs, privacy rights continue to evolve. In some situations the First Amendment now bestows a *right* to privacy, rather than a way to defeat it. In *Stanley v Georgia*, the Supreme Court held that the First Amendment prevents conviction for possessing and reading obscene material in the privacy of one's home: 'If the First Amendment

¹⁵⁴ Quoted in Adam Liptak, 'Internet battle raises questions about the first amendment', *New York Times* (New York), 2 June 2003.

¹⁵⁵ *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153, 165.

¹⁵⁶ *Complaint for injunctive relief and damages* (2 May 2003) *Johnson v Max* (Circuit Court, Palm Beach County, Florida, 2003-CA004867AF).

¹⁵⁷ *Cape Publications, Inc v Hitchner*, 549 So 2d 1374 (Fla, 1989).

¹⁵⁸ *Tyne v Time Warner Entertainment Co*, 204 F Supp 2d 1338 (MD Fla, 2002).

means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch.'¹⁵⁹

Subsequently, litigants have argued that this principle should apply to other activities conducted in private. In the 1986 case of *Bowers v Hardwick*,¹⁶⁰ however, the Supreme Court rejected the argument that laws banning homosexual sex contravened privacy rights arising from the First Amendment. Delivering the opinion of the Court, White J said, 'Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home.'¹⁶¹

The Court overruled its *Bowers* decision seventeen years later in *Lawrence v Texas*.¹⁶² The case arose when Texas police, responding to a neighbour's deliberately false report of an armed intruder in the apartment of John Lawrence, entered his unlocked apartment. Upon discovering Lawrence and another man having sex, the police charged them under the Texas Homosexual Conduct Law.

When the Court ruled in June 2003 that laws banning homosexual sex were unconstitutional, it found a right to liberty and privacy arising not from the First Amendment, but from the Due Process Clause of the Fourteenth Amendment.¹⁶³ Whereas the majority in *Bowers* had held that the Due Process Clause [315] does not confer 'a fundamental right to homosexuals to engage in acts of consensual

¹⁵⁹ *Stanley v Georgia*, 394 US 557 (1969) (Marshall J).

¹⁶⁰ 478 US 186 (1986).

¹⁶¹ *Bowers*, 478 US 186 (1986) (Burger CJ, White, Powell, Rehnquist, O'Connor JJ).

¹⁶² 539 US - (2003). (Circuit Court, Palm Beach County, Florida, 6 May 2003, 2003-CA004867AF).

¹⁶³ The Fourteenth Amendment reads in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Thus the Fourteenth Amendment contains both the 'Due Process Clause' and the 'Equal Protection Clause'. Kennedy J said in *Lawrence* of the Texas Homosexual Conduct Law: 'Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants': 539 US - (2003) at Part II. The Fourteenth Amendment also serves to extend the Bill of Rights (the first ten amendments to the United States Constitution) to the States as well as to the federal government.

sodomy',¹⁶⁴ the majority in *Lawrence* said this decision revealed a 'failure to appreciate the extent of the liberty at stake.'¹⁶⁵

Delivering the opinion of the Court, Kennedy J said:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.¹⁶⁶

Kennedy J concluded:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. ... The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.¹⁶⁷

The Massachusetts Supreme Court extended the principles in *Lawrence* when, in November 2003, it declared that bans on same-sex marriage are unconstitutional.¹⁶⁸ In Australia, too, laws limiting personal liberties have been overturned on privacy grounds. In 1994 the United Nations Human Rights Committee upheld a claim by a Tasmanian resident that provisions of the Tasmanian Criminal Code proscribing homosexual sex violated his right to privacy under the *International Covenant on*

¹⁶⁴ *Bowers*, 478 US 186 (1986) (White J).

¹⁶⁵ *Lawrence*, 539 US - (2003) (Kennedy, Stevens, Souter, Ginsburg, and Breyer JJ) at Part II.

¹⁶⁶ *Ibid.* Kennedy J also said the *Bowers* Court incorrectly relied on the 'ancient roots' of sodomy laws. He said there is 'no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. ... Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit non-procreative sexual activity more generally. ... It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so': at Part II.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Goodridge v Department of Public Health*, 440 Mass 309 (2003).

Civil and Political Rights.¹⁶⁹ When Tasmania failed to respond, the Commonwealth Parliament overruled the Tasmanian provisions by enacting the *Human Rights (Sexual Conduct) Act 1994*.

Conclusion

In the United States, where privacy and free speech jurisprudence is considerably more developed than in Australia, the precise boundaries between free speech and privacy rights are still a matter of contention. This was demonstrated by Johnson's injunction against Max, which would have significantly restrained free speech on the Internet. Free speech tends to trump privacy in these contests. Nonetheless, privacy provides greater protection of human dignity and freedom from harassment than that provided by defamation law. An invasion of privacy law in Australia would be unlikely to have such [316] broad exceptions or defences as defamation law, and without the technical complexity of defamation law might be less costly to litigate.

To date an invasion of privacy tort is not widely recognised in Australia, though *Grosse v Purvis* and recent judicial pronouncements in England and New Zealand will be influential should similar cases arise in other Australian jurisdictions. An invasion of privacy tort could prohibit any harmful intrusion into a person's privacy that is highly offensive to a reasonable person. Such intrusions might include the more vexatious activities of call centre advertisers, private investigators, debt collectors or journalists. Privacy law's potential breadth could make it an increasingly popular cause of action, including for interlocutory injunctive relief, which is almost impossible to obtain under defamation law. Just as beige, apparently, became for awhile the new black, privacy may well become the new defamation.

¹⁶⁹ *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976). Article 17 reads in part: '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.' Note that this clause alludes both to privacy and defamation, suggesting some commonality.