

## PROTECTING PRIVACY POST *LENAH*: SHOULD THE COURTS ESTABLISH A NEW TORT OR DEVELOP BREACH OF CONFIDENCE?

JILLIAN CALDWELL\*

### INTRODUCTION

It may be that development [in protecting privacy through the courts] is best achieved by looking across the range of already established legal and equitable wrongs. On the other hand, in some respects these may be seen as representing species of a genus, being a principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life ... Nothing in these reasons should be understood as foreclosing any such debate or as indicating any particular outcome. Nor, as already has been pointed out, should the decision in *Victoria Park*.<sup>1</sup>

It has long been accepted that the case of *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*<sup>2</sup> ('*Victoria Park*'), decided by the High Court in 1937, is authority for the proposition that no 'right to privacy' is recognised by the Australian common law.<sup>3</sup> According to one commentator, '[a]cademic advocacy of a judge-made law of privacy in Australia ... is virtually non-existent; the cause appears, owing to *Victoria Park*, to be regarded as lost'.<sup>4</sup> However, in the recent case of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*<sup>5</sup> ('*Lenah*'), a majority of the High Court held that although no right to privacy exists in relation to corporations, *Victoria Park* does not stand in the way of establishing a privacy right with respect to natural persons. The decision invites,

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\* BA/LLB (Hons), Australian National University. This paper is an amended version of my Honours thesis.

1 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 258 (Gummow and Hayne JJ).

2 (1937) 58 CLR 479.

3 See, eg, Greg Taylor, 'Why is there No Common Law Right of Privacy?' (2000) 26 *Monash University Law Review* 235, 237; Megan Richardson, 'Breach of Confidence, Surreptitiously or Accidentally Obtained Information and Privacy: Theory Versus Law' (1994) 19 *Melbourne University Law Review* 673, 675; Gerald Dworkin, 'The Common Law Protection of Privacy' (1967) 2 *University of Tasmania Law Review* 418.

4 Taylor, above n 3, 268.

5 (2001) 208 CLR 199.

in fact necessitates, an assessment of the means through which individual privacy may be most appropriately protected by the Australian courts.<sup>6</sup>

Privacy is an interest that deserves protection. In Gavison's words, privacy promotes 'a healthy, liberal democratic and pluralistic society; individual autonomy; mental health; creativity; and the capacity to form and maintain meaningful relations with others'.<sup>7</sup> The value placed on privacy by the international community is evidenced by its enshrinement as a basic human right in various international instruments, such as the *International Covenant on Civil and Political Rights*<sup>8</sup> ('ICCPR'), art 17 of which provides that '[n]o 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'. Privacy is also accorded substantial recognition in the domestic law of various states, with constitutional or civil remedies available for invasions of privacy in Germany,<sup>9</sup> France,<sup>10</sup> Canada,<sup>11</sup> the United States,<sup>12</sup> New Zealand<sup>13</sup> and the United Kingdom.<sup>14</sup>

In contrast, the Australian common law only protects privacy interests where they are incidental to interests protected by other causes of action, such as defamation,<sup>15</sup> trespass,<sup>16</sup> nuisance and the intentional infliction of emotional

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6 For other analyses of *Lenah*, see Megan Richardson, 'Whither Breach of Confidence: A Right of Privacy for Australia?' (2002) 26 *Melbourne University Law Review* 381; William Heath, 'Possum Processing, Picture Pilfering, Publication and Privacy: *Australian Broadcasting Corporation and Lenah Game Meats Pty Ltd*' (2002) 28 *Monash University Law Review* 162; Daniel Stewart, 'Protecting Privacy, Property, and Possums: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2002) 30 *Federal Law Review* 1; David Lindsay, 'Protection of Privacy Under the General Law Following *ABC v Lenah Game Meats*: Where to Now?' (2002) 9(6) *Privacy Law and Policy Reporter* 101; Jonathan Morton, 'Common Law Right to Privacy Moves Closer in Australia' (2001) 8(7) *Privacy Law and Policy Reporter* 144.

7 Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89 *The Yale Law Journal* 421, 442.

8 Opened for signature 16 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976). It entered into force in Australia 13 November 1980. See also *Universal Declaration of Human Rights*, GA Res 217A (III), 3 UN GAOR, 183<sup>rd</sup> plen mtg, UN Doc A/Res/217A (III) (1948), art 12; *Convention on the Rights of the Child*, opened for signature 26 January 1990, 28 ILM 1448, art 16 (entered into force 2 September 1990); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221, art 8 (entered into force 3 June 1952); *American Convention on Human Rights*, signed 22 November 1969, 9 ILM 673, art 11 (entered into force 18 July 1978).

9 See Hans Stoll, 'The General Right to Personality in German Law: An Outline of its Development and Present Significance' in Basil Markesinis (ed), *Protecting Privacy* (1999) 29; John Craig and Nico Nolte, 'Privacy and Free Speech in Germany and Canada: Lessons for an English Privacy Tort' (1998) 2 *European Human Rights Law Review* 162; Basil Markesinis, 'Privacy, Freedom of Expression and the Horizontal Effect of the Human Rights Bill: Lessons from Germany' (1999) 115 *The Law Quarterly Review* 47; Taylor, above n 3, 247–56.

10 See Étienne Picard, 'The Right to Privacy in French Law' in Basil Markesinis (ed), *Protecting Privacy* (1999) 49.

11 See John Craig, 'Invasion of Privacy and Charter Values: The Common-Law Tort Awakens' (1997) 42 *McGill Law Journal* 355; Craig and Nolte, above n 9.

12 See below Part I(A).

13 Ibid.

14 See below Part II(A).

15 *Australian Consolidated Press Ltd v Ettingshausen* (Unreported, New South Wales Court of Appeal, Gleeson CJ, Kirby P and Clarke JA, 13 October 1993) [14].

16 *Northern Territory v Mengel* (1995) 185 CLR 307, 354.

distress.<sup>17</sup> The tort of defamation, for example, protects an individual's reputation *in* society, rather than his or her privacy *from* society.<sup>18</sup> In some jurisdictions, it is a complete defence to defamation that the information published is true.<sup>19</sup>

The statutory protection of privacy in Australia is also limited. Whilst amendments to the *Privacy Act 1988* (Cth)<sup>20</sup> apply the National Privacy Principles regarding personal information to the private sector, individuals,<sup>21</sup> small businesses<sup>22</sup> and employers<sup>23</sup> are largely exempt, as are media organisations.<sup>24</sup> Further, the *Privacy Act 1988* (Cth) provides no remedy for other privacy invasions, such as intrusions upon the seclusion of individuals.

When compared with international law and privacy laws in other jurisdictions, it is clear that Australian privacy protection requires development. A threshold question is whether it is appropriate for such developments to take place through judicial, rather than legislative, means. Common arguments for judicial restraint are that courts do not have the resources to undertake the broad inquiries that often inform government decisions, or the democratic legitimacy to effect significant changes in the law.<sup>25</sup> Nevertheless, it is widely acknowledged today that courts do create law.<sup>26</sup> The courts have justified changes to the law on the basis that they accord with the 'expectations of the international community' and the 'contemporary values of the Australian people'.<sup>27</sup> Common law rules have also been overturned where the social circumstances and expectations on which they are based have radically altered.<sup>28</sup> Individual privacy in Australia is increasingly at risk due to rapidly developing information, communication and surveillance technologies and a more investigative media industry. A recent study suggests that the vast majority of Australians wish to have greater control

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17 For analysis of the incidental protection of privacy in Australia, see Taylor, above n 3, 240–7; John Fleming, *The Law of Torts* (9<sup>th</sup> ed, 1998) 664–8; Stephen Todd, 'Protection of Privacy' in Nicholas Mullany (ed), *Torts in the Nineties* (1997) 174, 196–204; Peter Bailey, *Human Rights: Australia in an International Context* (1990) 272–3; William Morison, Parliament of New South Wales, *Report on the Law of Privacy*, Parl Paper No 170 (1973) 15–20; Haddon Storey, 'Infringement of Privacy and its Remedies' (1973) 47 *The Australian Law Journal* 498, 503–5; Dworkin, above n 3, 437–45.

18 Taylor, above n 3, 242–3; Edward Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *New York University Law Review* 962, 978–81.

19 Truth alone is a defence in the NT, SA, WA and Vic. In other jurisdictions, publication must also be in the 'public benefit': *Defamation Act 1901* (ACT) s 6; *Defamation Act 1889* (Qld) s 15; *Defamation Act 1957* (Tas) s 15, or in the 'public interest': *Defamation Act 1974* (NSW) s 15(2). See Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (1998) 104–23.

20 *Privacy Amendment (Private Sector) Act 2000* (Cth).

21 *Privacy Act 1988* (Cth) s 7B(1).

22 *Privacy Act 1988* (Cth) s 7B(4).

23 *Privacy Act 1988* (Cth) s 7B(3).

24 *Privacy Act 1988* (Cth) ss 6C(1), 7(1)(ee).

25 Justice Michael Kirby, 'Courts and Policy: The Exciting Australian Scene' (1993) 10 *Commonwealth Law Bulletin* 1794, 1798.

26 See, eg, Justice Ronald Sackville, 'Continuity and Judicial Creativity – Some Observations' (1997) 20(1) *University of New South Wales Law Journal* 145; Justice Michael McHugh, 'The Judicial Method' (1999) 73 *The Australian Law Journal* 37; Kirby, above n 25.

27 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J, with whom Mason CJ and McHugh J concurred).

28 See, eg, *R v L* (1991) 174 CLR 379, in which the High Court overturned the presumption that there was irrevocable consent to sexual intercourse within marriage.

over the ways in which their private information is utilised.<sup>29</sup> In light of these circumstances, the grounds for judicial intervention are strong.

It must be noted, however, that protecting privacy directly through judicial means is unlikely to be a straightforward task, given the difficulty in formulating a definition which is both precise and comprehensive.<sup>30</sup> Privacy has been variously conceptualised as a right, an interest, an area of life, a psychological state and a form of control.<sup>31</sup> Definitions include the 'right to be let alone',<sup>32</sup> a concern for 'limited accessibility',<sup>33</sup> the condition of not having private facts known about oneself<sup>34</sup> and a right to an 'inviolable personality'.<sup>35</sup> Although some commentators argue that the concept is not acceptably coherent to underpin legal protection,<sup>36</sup> this paper is premised on the view that the definitional uncertainties may be largely avoided if the essential *interests* giving rise to privacy claims are identified.<sup>37</sup>

The interest in protecting against non-consensual disclosures of personal information is widely accepted as being at the core of the concept of privacy,<sup>38</sup> clearly contemplated by art 17 of the *ICCPR*. In rejecting the claim that the plaintiff in *Lenah*, a corporation, could prevent the publication of 'private' facts, the High Court undertook a detailed analysis of the means through which non-consensual disclosures of information may be remedied in relation to natural persons.<sup>39</sup> It is this interest in maintaining the privacy of personal information, which Wacks defines as 'those facts, communications or opinions which relate to the individual and which it would be reasonable to expect him [or her] to regard as intimate or sensitive',<sup>40</sup> that will be considered in this paper.

Two different causes of action that may protect against non-consensual disclosures of personal information were considered in *Lenah*: the tort of invasion of privacy by the publication of private facts, available in the United States and New Zealand, and the existing equitable action for breach of

29 Office of the Federal Privacy Commissioner, *Privacy and the Community* (2001) [1].

30 See, eg, Raymond Wacks, 'Introduction' in Raymond Wacks (ed), *Privacy* (1993) vol 1, x; Judith Jarvis Thomson, 'The Right to Privacy' (1975) 4 *Philosophy and Public Affairs* 295; Raymond Wacks, 'The Poverty of "Privacy"' (1980) 96 *The Law Quarterly Review* 73; Stanley Benn, 'The Protection and Limitation of Privacy' (1978) 52 *The Australian Law Journal* 601.

31 Gavison, above n 7, 424–7; Benn, above n 30, 601–3; Wacks, 'Introduction', above n 30, xii–xiii.

32 Thomas Cooley, *A Treatise on the Law of Torts* (2<sup>nd</sup> ed, 1888) cited in David Leebron, 'The Right to Privacy's Place in the Intellectual History of Tort Law' (1991) 41 *Case Western Reserve Law Review* 769, 781.

33 Gavison, above n 7.

34 William Parent, 'A New Definition of Privacy for the Law' (1983) 2 *Law and Philosophy* 305.

35 Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193, 205.

36 See, eg, Richard Posner, 'The Right of Privacy' (1978) 12 *Georgia Law Review* 398.

37 See Raymond Wacks, *Personal Information* (1989) 19; Wacks, 'Introduction', above n 30, xv.

38 See, eg, Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979); Australian Law Reform Commission, *Privacy*, Report No 22 (1983); Todd, above n 17, 178; Wacks, *Personal Information*, above n 37, 19–28; Gavin Phillipson and Helen Fenwick, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (2000) 63 *The Modern Law Review* 660, 662–3; Jane Wright, *Tort Law and Human Rights* (2001) 163.

39 A discussion of whether corporations should be entitled to privacy rights is beyond the scope of this paper.

40 Wacks, *Personal Information*, above n 37, 26; Wacks, 'Introduction', above n 30, xvi.

confidence, which protects privacy in the United Kingdom. Having regard to the High Court's discussion, this paper provides a comparative analysis of the judicial protection of privacy in the United States, New Zealand and the United Kingdom, with a view to assessing whether Australian courts should establish a tort or else expand the action for breach of confidence to protect this interest. Whilst the capacity of both actions to protect privacy has been recognised in Australia,<sup>41</sup> their comparative merits have received little judicial or academic attention.<sup>42</sup> Analyses that have been undertaken<sup>43</sup> are based largely on outdated premises, due to recent developments in breach of confidence law.

In Part I, I will outline the way in which the tort of public disclosure of private facts has been formulated in the United States and New Zealand. The varying dicta in *Lenah* regarding the introduction of a tort into the Australian common law will then be considered. In Part II, I will examine the equitable action for breach of confidence in the United Kingdom and argue that three approaches to the action can be identified: the traditional, improper means and privacy approaches. The scope of the Australian action and the relevant analyses by the justices in *Lenah* will also be assessed. In Part III, I will compare the merits of establishing a tort against expanding breach of confidence to encompass the privacy approach. It will be argued that, in order to avoid conceptual distortion and inconsistency and to afford greater privacy protection to individuals, the preferable option is to establish a new privacy tort in Australia.

## I PROTECTING PRIVACY THROUGH A TORT OF PUBLIC DISCLOSURE OF PRIVATE FACTS

It seems to me that, having regard to current conditions in this country, and developments of the law in other common law jurisdictions, the time is ripe for consideration whether a tort of invasion of privacy should be recognised.<sup>44</sup>

A tort of invasion of privacy by the publication of private facts is recognised in the overwhelming majority of American states.<sup>45</sup> In a series of cases over the last two decades, the New Zealand High Court has also accepted the existence of

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41 See, eg, Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, above n 38, [231]–[247]; Australian Law Reform Commission, *Privacy*, above n 38, [930]–[931].

42 But see Wright, above n 38, 181–2; Raymond Wacks, *Privacy and Press Freedom* (1995) 56–9.

43 Daniel Laster, 'Breaches of Confidence and of Privacy by Misuse of Confidential Information' (1989) 7 *Otago Law Review* 31; Daniel Laster, 'Commonalities between Breach of Confidence and Privacy' (1990) 14 *New Zealand Universities Law Review* 144; Wacks, *Personal Information*, above n 37, 125–34.

44 *Lenah* (2001) 208 CLR 199, 328 (Callinan J).

45 Diane Zimmerman, "'Requiem for a Heavyweight': A Farewell to Warren and Brandeis's Privacy Tort" (1983) 68 *Cornell Law Review* 291, 292, 365–6; Taylor, above n 3, 259.

such a tort.<sup>46</sup> In contrast, the Australian law of torts only incidentally protects privacy.<sup>47</sup> In Section A of this Part, I shall outline the background of the tort of public disclosure of private facts and the way it has been formulated in the United States and New Zealand. Particular emphasis will be placed on developments in the latter jurisdiction, due to the similarities between the Australian and New Zealand social and cultural contexts. In Section B, I shall summarise the background to and facts in *Lenah*. The significance of the reinterpretation of *Victoria Park* and the divergent dicta in *Lenah* regarding the reception of such a tort into the Australian common law will then be analysed.

## A The Tort of Public Disclosure of Private Facts in the United States and New Zealand

### 1 Background

In a seminal article in 1890, American lawyers Warren and Brandeis argued that an independent ‘right to privacy’ could be drawn from existing breach of confidence,<sup>48</sup> property and defamation cases.<sup>49</sup> Their contention that the ‘right to be let alone’ required independent protection created a ‘minor revolution’ in the law of torts,<sup>50</sup> with American courts applying the right to an expansive range of circumstances. Seventy years later, the influential jurist, Prosser, surveyed the cases in which the right had been considered. He contended that a ‘complex of four’ torts could be identified:<sup>51</sup> publicity which places the plaintiff in a false light;<sup>52</sup> appropriation of the plaintiff’s name or likeness;<sup>53</sup> intrusion upon the

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46 *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *Bradley v Wingnut Films* [1993] 1 NZLR 415; *P v D* [2000] 2 NZLR 591. For judicial expressions of support for the tort, see *Hobson v Harding* (1994) 1 HRNZ 342; *T v Attorney-General* (1988) 5 NZFLR 357, 378; *Sharma v ANZ Banking Group* (1992) 3 NZBORR 183, 189. See also Rosemary Tobin, ‘Invasion of Privacy’ (2000) *New Zealand Law Journal* 216; John Burrows, ‘Privacy’ in Stephen Todd (ed), *The Law of Torts in New Zealand* (2<sup>nd</sup> ed, 1997) 951; John Katz, ‘Sex, Lies, Videotapes and Telephone Conversations: The Common Law of Privacy from a New Zealand Perspective’ (1995) 17 *European Intellectual Property Review* 6.

47 See above Introduction.

48 *Abernethy v Hutchinson* (1824) 3 LJ Ch 209; *Prince Albert v Strange* (1849) 18 LJ Ch 120; *Morison v Moat* (1851) 20 LJ Ch 513. See Part II.

49 Warren and Brandeis, above n 35, 193.

50 Zimmerman, above n 45, 292.

51 William Prosser, ‘Privacy’ (1960) 48 *California Law Review* 383, 389.

52 This tort largely protects reputation and financial interests, rather than privacy. In Australia, the tort of defamation will usually cover intrusive conduct actionable under this category, particularly in those jurisdictions in which truth is not a complete defence. See Harry Kalven, ‘Privacy in Tort Law – Were Warren and Brandeis Wrong?’ (1966) 31 *Law and Contemporary Problems* 326, 332; Todd, above n 17, 178; Dworkin, above n 3, 420.

53 This is more accurately characterised as a ‘right of publicity’ than a privacy right, for the conduct it proscribes usually amounts to depriving the plaintiff of the opportunity to commercially exploit his or her own name or likeness. Such conduct is generally actionable in Australia under the tort of passing off. See Melville Nimmer, ‘The Right of Publicity’ (1954) 19 *Law and Contemporary Problems* 203; David Bedingfield, ‘Privacy or Publicity? The Enduring Confusion Surrounding the American Tort of Invasion of Privacy’ (1992) 55 *The Modern Law Review* 111, 114.

plaintiff's seclusion or solitude;<sup>54</sup> and public disclosure of private facts about the plaintiff.<sup>55</sup> It is the fourth tort, subsequently referred to as the 'privacy tort', that directly protects against non-consensual disclosures of personal information. Prosser's summary of its elements and defences has been adopted by the *Restatement (Second) of Torts*,<sup>56</sup> and widely accepted by American courts.<sup>57</sup> Prosser's formulation of the fourth privacy tort has also been explicitly relied upon in two of the three most important New Zealand cases in which the privacy tort has been established.<sup>58</sup> The other three torts identified by Prosser have not yet been recognised in New Zealand.

## 2 Elements of Liability

Liability will only be established for the privacy tort if three elements are satisfied:

- (1) there is a public disclosure of facts about the plaintiff;
- (2) the facts disclosed are private; and
- (3) the matter made public is one that would be offensive and objectionable to a reasonable person of ordinary sensibilities.<sup>59</sup>

It has been suggested that a fourth element also exists, requiring the plaintiff to establish that there is no public interest in the publication.<sup>60</sup> However, most judges and commentators assume that, as with defamation, the public interest in publication is a defence to the tort, placing the onus of proof on the defendant.<sup>61</sup> Although the underlying basis of liability has received little attention from courts or scholars, an intentional or negligent disclosure may additionally have to be shown.<sup>62</sup>

<sup>54</sup> The tort protects what is often described as the archetypal privacy interest of being 'let alone', receiving some protection under the common law of trespass and nuisance. This interest also receives some protection under statutes imposing criminal liability for the interception of telecommunications and postal communications: *Telecommunications (Interception) Act 1979* (Cth); *Crimes Act 1914* (Cth) Pt VIIA, and for stalking and harassment: *Crimes Act 1900* (NSW) s 562AE; *Criminal Code* (Qld) s 359A; *Criminal Law Consolidation Act 1935* (SA) s 19AA; *Criminal Code* (Tas) s 192; *Crimes Act 1958* (Vic) s 21A; *Criminal Code* (WA) ss 338D, 338E. However, as gaps in the law remain, Australian courts should consider whether this tort should be received into the common law.

<sup>55</sup> For critiques of Prosser's classification, see Bloustein, above n 18, 962; Hyman Gross, 'The Concept of Privacy' (1967) 42 *New York University Law Review* 34, 46–53; Laster, 'Breaches of Confidence and of Privacy by Misuse of Confidential Information', above n 43, 61.

<sup>56</sup> §§ 652A–E (1977).

<sup>57</sup> Zimmerman, above n 45, 299; Dworkin, above n 3, 422. See, eg, *Time Inc v Hill*, 385 US 374, 383 (1967); *Cox Broadcasting Co v Cohn*, 420 US 469, 488 (1975); *Zacchini v Scripps-Howard Broadcasting Co*, 433 US 562, 571–3 (1977).

<sup>58</sup> *Bradley v Wingnut Films* [1993] 1 NZLR 415, 423–4; *P v D* [2000] 2 NZLR 591, 601–2.

<sup>59</sup> Prosser, above n 51, 392–8.

<sup>60</sup> Werdner Keeton et al, *Prosser and Keeton on the Law of Torts* (5<sup>th</sup> ed, 1984) 857; Burrows, above n, 46, 967; *P v D* [2000] 2 NZLR 591, 601–2.

<sup>61</sup> See, eg, Todd, above n 17, 184–6; Zimmerman, above n 45, 350–62 and cases cited therein; Kalven, above n 52, 335–7 and cases cited therein; Bedingfield, above n 53, 113–14.

<sup>62</sup> Roderick Bagshaw, 'Obstacles on the Path to Privacy Torts' in Peter Birks (ed), *Privacy and Loyalty* (1997) 133, 141; Kalven, above n 52, 334–5.

(a) *Public Disclosure*

A 'public disclosure' or publication of facts about the plaintiff consists of any matter that is communicated to the general public, or to so many persons that it is substantially certain to become public knowledge. Disclosing facts to an individual or small group will not be actionable.<sup>63</sup> A practical rationale for this limitation is that the privacy tort would create an 'impossible legal tangle' if mere gossip was subjected to liability.<sup>64</sup> Bloustein also explains the rule in terms of the interest protected by the privacy tort. For him, the gravamen of the complaint is not that friends or acquaintances learn details about the plaintiff, but that the plaintiff has been publicly scrutinised, 'as if 100,000 people were suddenly peering in, as through a window, on one's private life'.<sup>65</sup> It is usually only media organisations that satisfy the widespread publicity requirement – individuals have rarely attracted liability.<sup>66</sup>

It is unclear whether the defendant must have intended to disclose the facts about the plaintiff.<sup>67</sup> Todd assumes that an intentional or negligent disclosure must be shown,<sup>68</sup> an approach that is consistent with liability under Australian defamation law.<sup>69</sup> However, in contrast to defamation law, which does not require widespread publicity, the defendant's mental state will rarely be considered under the privacy tort, as the cases usually involve clearly intentional disclosures.<sup>70</sup>

(b) *Private Facts*

In general, information only receives protection under the privacy tort if it is not publicly available and has not received prior publicity<sup>71</sup> on the basis that '[what] belongs to the public domain cannot without glaring paradox be called private'.<sup>72</sup> Thus, there is usually no liability for publicising details contained in public records.<sup>73</sup> The American courts have taken a strict approach to this negative requirement, largely due to the constitutional protection of freedom of speech and the press under the First Amendment.<sup>74</sup> In *Cox Broadcasting Co v*

63 *Restatement (Second) of Torts* § 652D(a) (1977).

64 Zimmerman, above n 45, 337.

65 Bloustein, above n 18, 979. For a critique of this approach, see Zimmerman, above n 45, 338–41.

66 Cases in which individuals have been liable include: *Brents v Morgan*, 221 Ky 765 (Ky App, 1927) (shop owner placed poster announcing the plaintiff's debt in main street window); *Biederman's of Springfield Inc v Wright*, 322 SW 2d 892 (Mo, 1959) (debt collector vocally demanded payment at plaintiff's workplace on repeated occasions); *Lambert v Dow Chemical Company*, 215 So 2d 673 (La App, 1968) (company showed photographs of injured employee to other employees) cited in Zimmerman, above n 45, 300.

67 Bagshaw, above n 62, 133, 141; Todd, above n 17, 181; Kalven, above n 52, 334–5.

68 Todd, above n 17, 181.

69 In this context, negligence denotes a failure to take reasonable steps to prevent publication, where publication was a reasonably foreseeable consequence of the defendant's actions: Gillooly, above n 19, 76–7.

70 Todd, above n 17, 181.

71 *Restatement (Second) of Torts* § 652D(b) (1977); Prosser, above n 51, 395–6.

72 Parent, above n 34, 307.

73 *Restatement (Second) of Torts* §§ 652D, 652D(b); Prosser, above n 51, 395–6.

74 David Anderson, 'The Failure of American Privacy Law' in Basil Markesinis (ed), *Protecting Privacy* (1999) 139, 157–9.

*Cohn*,<sup>75</sup> for example, the Supreme Court held that a newspaper was not liable for widely publishing the name of a rape victim obtained from trial records, as there was a First Amendment privilege to publish accurate reports about matters on the public record.<sup>76</sup> In limited circumstances, however, information contained on the public record may become private through lapse of time.<sup>77</sup>

In the first New Zealand case that concerned the privacy tort, *Tucker v News Media Ownership*<sup>78</sup> ('*Tucker*'), the courts adopted a more flexible approach to public records. In that case, a heart transplant candidate, the subject of a public fundraising campaign, sought to enjoin a newspaper from publishing details of his criminal convictions many years earlier. Justice Jeffries granted an interim injunction at the interlocutory stage on the basis of the privacy tort, presumably accepting that facts on the public record could become private over time.<sup>79</sup> In considering the plaintiff's subsequent application for a permanent injunction at trial, McGechan J expressed support for the introduction of the tort into the common law, stating that freedom of speech was important but not decisive in that case, particularly since it concerned the right to life.<sup>80</sup> However, he discharged the injunction on the ground of futility, as several other media organisations had publicised the information.<sup>81</sup> Significantly, the public record of the plaintiff's convictions was at no stage considered to be a bar to relief.

In the United States, a fact may also fail to be 'private' if it is observed or acquired when the plaintiff is in a public place. Plaintiffs have been denied a right to privacy in relation to conduct in restaurants,<sup>82</sup> shops,<sup>83</sup> airports<sup>84</sup> and school buildings.<sup>85</sup> However, the revisers of Prosser's classic torts textbook have suggested that widely publicising a fact that occurred in a public place may be actionable if the matter is not of public concern.<sup>86</sup> This more nuanced approach received support in the New Zealand case of *Bradley v Wingnut Films*<sup>87</sup>

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75 420 US 469 (1975).

76 See also *Florida Star v BJJ*, 105 L Ed 2d 443 (US Fla, 1989).

77 Prosser, above n 51, 396; *Restatement (Second) of Torts* § 652D(k) (1977). See *Melvin v Reid*, 112 Cal App 285, 297 (Cal App 4 Dist, 1931) (a former prostitute who had been acquitted for murder was granted relief after a film publicised her name and whereabouts several years later). This approach may now be unconstitutional following *Cox Broadcasting Co v Cohn*, 420 US 469 (1975).

78 (Unreported, High Court of New Zealand, Jeffries J, 20 October 1968) (interlocutory judgment); (Unreported, Court of Appeal of New Zealand, 23 October 1986) (interlocutory appeal judgment); [1986] 2 NZLR 716 (trial judgment).

79 *Tucker* (Unreported, High Court of New Zealand, Jeffries J, 20 October 1986) quoted in *Tucker* [1986] 2 NZLR 716, 732. The Court of Appeal upheld this decision: *Tucker* (Unreported, Court of Appeal of New Zealand, 23 October 1986) quoted in *Tucker* [1986] 2 NZLR 716, 732.

80 *Tucker* [1986] 2 NZLR 716, 735.

81 *Ibid* 735–6.

82 *Wilkins v National Broadcasting Company*, 71 Cal App 4<sup>th</sup> 1066 (Cal App 4 Dist, 1999); *Dempsey v National Enquirer*, 702 F Supp 927 (D Me, 1988) cited in Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305, 310.

83 *Mark v Seattle Times*, 635 P 2d 1081 (Wash, 1981); *Jacova v Southern Radio and Television Company*, 83 So 2d 34 (Fla, 1955) cited in Paton-Simpson, above n 82, 310.

84 *Fogel v Forbes Inc*, 500 F Supp 1081 (DC Pa, 1980) cited in Paton-Simpson, above n 82, 310.

85 *Jarrett v Butts*, 379 SE 2d 583 (Ga App, 1989) cited in Paton-Simpson, above n 82, 310.

86 Keeton et al, above n 60, 859. See below Part I(A)(3)(a) for a discussion of the 'public interest' defence.

87 [1993] 1 NZLR 415.

(*Bradley*). In that case, the plaintiff sought to prevent the publication of a 'splatter film' that fleetingly depicted his family's tombstone. Justice Gallen was prepared to accept that the privacy tort formed part of New Zealand law<sup>88</sup> and applied the three Prosser requirements. Although finding that 'there could scarcely be anything less private than a tombstone in a public cemetery',<sup>89</sup> Gallen J thought it conceivable that information available in a public place should not receive widespread publicity if it was not of public concern. Had the tombstone been directly involved in the film's depiction of violence, his decision to deny relief may have been different.<sup>90</sup> Under this analysis, the existence or availability of information in a public place is relevant but not conclusive in determining whether the facts are private.

(c) *Offensive and Objectionable to a Reasonable Person*

The objective requirement that the public disclosure be offensive and objectionable to a reasonable person is often described as a 'mores' test, with the available protection based on the 'customs and ordinary views' of the community in which the disclosure took place.<sup>91</sup> In the American case of *Sidis v F-R Publishing Co*,<sup>92</sup> for example, there was no liability for publishing a sympathetic article about the reclusive and undistinguished adult life of a child prodigy. Although the article was a 'merciless' dissection of his life, the disclosure of details about his appearance, habits and personality was held not to 'outrage the community's notion of decency'.<sup>93</sup> The film depicting the tombstone in *Bradley* also failed to satisfy this element.<sup>94</sup>

Conversely, in the New Zealand case of *P v D*,<sup>95</sup> Nicholson J found that the publication of an article disclosing that the plaintiff, a public figure, had received psychiatric treatment, would be highly offensive. His Honour argued that whilst enlightened attitudes to mental illness should prevail, denying relief for that reason would be to ignore the value individuals place on the privacy of their medical details. His Honour noted that the test was objective, but considered the plaintiff's stated feelings, as the test was based on what a reasonable person would feel in the particular circumstances.<sup>96</sup> Although this test potentially protects majority interests,<sup>97</sup> Justice Nicholson's approach of drawing on the plaintiff's feelings in assessing reasonableness encourages a greater appreciation

88 *Bradley* [1993] 1 NZLR 415, 423, cited with approval in *Morgan v TVNZ* (Unreported, High Court of New Zealand, Holland J, 1 March 1990) and *C v Wilson and Horton Ltd* (Unreported, High Court of New Zealand, Williams J, 27 May 1992) cited in Burrows, above n 46, 965. Justice Gallen noted, however, that the extent of the tort should be regarded with caution due to the importance of freedom of expression: *Bradley* [1993] 1 NZLR 415, 423.

89 *Bradley* [1993] 1 NZLR 415, 424.

90 *Ibid.*

91 Prosser, above n 51, 396; *Restatement (Second) of Torts* § 652D(c) (1977).

92 113 F 2d 806 (CA 2, 1940).

93 *Sidis v F-R Publishing Co*, 113 F 2d 806, 807, 809 (CA 2, 1940).

94 *Bradley* [1993] 1 NZLR 415, 424.

95 [2000] 2 NZLR 591.

96 *P v D* [2000] 2 NZLR 591, 601.

97 Elizabeth Paton-Simpson, 'Private Circles and Public Squares: Invasion of Privacy by the Publication of "Private Facts"' (1998) 61 *The Modern Law Review* 318, 322–3; Bagshaw, above n 62, 139.

of difference. His Honour's judgment also highlights that the test is whether a reasonable person *in those circumstances* would find publication offensive – too often, the courts appear to approach the test from the perspective of the information's recipients.

### 3 Defences

#### (a) 'Public Interest' in Disclosure

The most important defence to the privacy tort is that there is a 'public interest' in disclosure. American courts have taken an absolutist approach to this defence: if the plaintiff is a 'public figure' or the information is 'newsworthy', there is usually no liability for a privacy invasion.<sup>98</sup> A 'public figure' includes 'any one who has arrived at a position where public attention is focused upon him [or her]', although a defendant cannot create a public figure by publicising details about that person.<sup>99</sup> Nevertheless, there may be some subject matters, such as sexual relations, which are not of legitimate public interest under the mores test.<sup>100</sup>

American courts have also been willing to accept the judgment of publishers and broadcasters as to what is 'newsworthy'.<sup>101</sup> In *Bartnicki v Vopper*,<sup>102</sup> for example, the Supreme Court held that a radio station was not liable for broadcasting a telephone conversation illegally intercepted and recorded by a third party. As the conversation concerned employment negotiations between teachers and a school board, a matter of public interest, there was a First Amendment privilege to broadcast the material.<sup>103</sup> The newsworthiness defence has, in Zimmerman's words, 'practically destroyed the private facts tort as a realistic source of a legal remedy' in the United States.<sup>104</sup>

In contrast, the New Zealand courts have been sensitive to privacy interests in considering this defence. Justice McGechan noted in *Tucker* that the plaintiff invited some examination of his character by appealing publicly for heart transplant funding. Regardless, his Honour refused to place undue weight on this factor, noting that the plaintiff was a 'reluctant debutante' in relation to public exposure.<sup>105</sup> Similarly, in *P v D*, Nicholson J restrained publication of details about the plaintiff's psychiatric treatment, despite that person's status as a public figure.<sup>106</sup> Taking a narrow approach to this defence, he concluded that the 'legitimate public interest' in publication was minimal, as there was no evidence

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98 *Restatement (Second) of Torts* § 652D(d)–(i) (1977); Prosser, above n 51, 410–11.

99 Prosser, above n 51, 411.

100 *Restatement (Second) of Torts* § 652D(h) (1977).

101 Zimmerman, above n 45, 353; *Restatement (Second) of Torts* § 652D(g) (1977).

102 69 USLW 4323 (2001).

103 See also *Florida Star v BJJ*, 491 US 524 (1989); *New York Times Co v United States*, 403 US 713 (1964).

104 Zimmerman, above n 45, 351. See also Wacks, *Privacy and Press Freedom*, above n 42, 113; Kalven, above n 52, 336; Bedingfield, above n 53, 114; Taylor, above n 3, 262.

105 *Tucker* [1986] 2 NZLR 716, 735.

106 *P v D* [2000] 2 NZLR 591, 603.

that the plaintiff's mental health affected the character or occupational competence of the plaintiff.<sup>107</sup>

*(b) Other Defences*

There will be no liability if a plaintiff has consented to a disclosure of private facts, although he or she can revoke consent at any time before the disclosure occurs. If a privacy invasion exceeds the plaintiff's consent, then the conduct may still be tortious.<sup>108</sup> A privacy action is also subject to the privileges applicable to defamation, on the basis that if there is a privilege to publish false and defamatory material, there must be the same privilege to publish details that are true.<sup>109</sup> In the Australian context, disclosures made in parliament or court would be absolutely privileged.<sup>110</sup> A defence of qualified privilege, as expounded in *Lange v Australian Broadcasting Corporation*,<sup>111</sup> would also be available.<sup>112</sup> However, truth is clearly not a defence to the disclosure of true private facts.<sup>113</sup>

#### 4 Remedies

An invasion of privacy is actionable per se, so that further harm to the plaintiff need not be established.<sup>114</sup> A plaintiff may recover damages for the deprivation of his or her privacy, for reasonable emotional distress or humiliation suffered, and for special damage caused by the invasion.<sup>115</sup> In cases where disclosure is apprehended, the most important remedy will usually be an injunction. As injunctions in relation to tortious conduct are awarded in equity's auxiliary jurisdiction, the inadequacy of damages must usually be shown.<sup>116</sup> However, this requirement has rarely prevented the courts from awarding injunctions; in contrast to defamation cases, where reputation can be restored by a public determination that the publication was false, a privacy invasion cannot be cured.<sup>117</sup>

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<sup>107</sup> Ibid 602.

<sup>108</sup> Prosser, above n 51, 419–20; *Restatement (Second) of Torts* § 652F(b) (1977). See, eg, *McCabe v Village Voice Inc*, 550 F Supp 525 (DC Pa, 1982).

<sup>109</sup> Warren and Brandeis, above n 35, 216; *Restatement (Second) of Torts* §§ 652F, 652G (1977); Prosser, above n 51, 421.

<sup>110</sup> For absolute privileges available under defamation law, see Gillooly, above n 19, 149–68.

<sup>111</sup> (1997) 189 CLR 520.

<sup>112</sup> Gillooly, above n 19, 169–220.

<sup>113</sup> Prosser, above n 51, 419; *P v D* [2000] 2 NZLR 591, 602; *Tucker* (Unreported, High Court of New Zealand, Jeffries J, 20 October 1986) quoted in *Tucker* [1986] 2 NZLR 716, 732; *Tucker* [1986] 2 NZLR 716, 735. Cf the Court of Appeal's suggestion that the defence of justification may require consideration: *Tucker* (Unreported, Court of Appeal of New Zealand, 23 October 1986) quoted in *Tucker* [1986] 2 NZLR 716, 732.

<sup>114</sup> Prosser, above n 51, 409.

<sup>115</sup> *Restatement (Second) of Torts* § 652H (1977); Prosser, above n 51, 409.

<sup>116</sup> Gino Dal Pont, Don Chalmers and Julie Maxton, *Equity and Trusts: Commentary and Materials* (2<sup>nd</sup> ed, 2000) 902–3.

<sup>117</sup> Phillipson and Fenwick, 'Breach of Confidence as a Privacy Remedy', above n 38, 691.

## B A Tort of Public Disclosure of Private Facts in Australia?

For over 60 years, *Victoria Park*<sup>118</sup> has been cited as authority for the proposition that the Australian common law does not recognise a 'right to privacy'.<sup>119</sup> In that case, the High Court held that a racecourse owner had no cause of action to prevent the defendants, who had erected an observation platform on adjoining land, from conducting radio broadcasts about horse races. In considering the plaintiff's claim that a tort of nuisance had been committed, supported by a recognised right to privacy, Latham CJ commented that '[however] desirable some limitation upon invasions of privacy might be, no authority ... shows that any general right of privacy exists'.<sup>120</sup> The traditional interpretation of this 'unnecessarily categorical dicta'<sup>121</sup> was rejected in the *Lenah* case.

The High Court appeared receptive to the possibility of establishing a privacy tort for the first time in *Lenah*, the facts of which are as follows. The plaintiff, Lenah Game Meats ('Lenah'), slaughters brush tail possums in licensed abattoirs in Tasmania, exporting the meat to foreign markets. At some time prior to March 1998, unknown persons unlawfully installed hidden cameras on the corporation's premises and filmed the stunning and killing of possums. The film was supplied to Animal Liberation, who provided it to the Australian Broadcasting Corporation ('ABC').<sup>122</sup> After the ABC broadcast an excerpt of the film,<sup>123</sup> Lenah instituted proceedings to prevent further broadcasts. A single judge in the Tasmanian Supreme Court dismissed the application, primarily on the basis that Lenah's statement of claim disclosed no cause of action against the ABC.<sup>124</sup> A majority of the Full Court upheld an appeal, concluding that an injunction could be awarded where publication was unconscionable, regardless of whether a cause of action could be identified.<sup>125</sup>

The ABC appealed to the High Court. Lenah contended that the Full Court's reasoning was correct and that further publications would constitute actionable invasions of its privacy rights. The High Court rejected the claims that unconscionability could sustain injunctive relief and that a tort of invasion of privacy could be invoked by corporations. The injunction was, therefore, set aside. However, a majority indicated that *Victoria Park* did not preclude the establishment of such a tort with respect to natural persons.

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118 (1937) 58 CLR 479.

119 The last case in which the High Court considered *Victoria Park* prior to *Lenah* was *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414, 444–6. Although that case did not involve privacy, the Court's acceptance of the reasoning underpinning *Victoria Park* had been interpreted as upholding the principle that no privacy right exists in Australia: *Bathurst City Council v Saban* (1985) 2 NSWLR 704, 706–7.

120 *Victoria Park* (1937) 58 CLR 479, 495–6.

121 John Fleming, *The Law of Torts* (9<sup>th</sup> ed, 1998) 664–8.

122 *Lenah* (2001) 208 CLR 199, 220–1, 236–7, 291–3.

123 *Lenah* (2001) 208 CLR 199, 293.

124 *Ibid* 214, 234–5, 293–4.

125 *Lenah Game Meats Pty Ltd v Australian Broadcasting Corporation* [1999] TASSC 114.

Of the six justices who heard *Lenah*,<sup>126</sup> Gummow and Hayne JJ, with whom Gaudron J agreed, considered *Victoria Park* and the protection of privacy in other jurisdictions in the greatest depth. In a joint judgment, their Honours found that although Latham CJ rejected the proposition that the law recognised a right to privacy under the head of nuisance, *Victoria Park* did not stand for any proposition respecting the existence of an independent privacy tort.<sup>127</sup> They accepted that the plaintiff in that case was really seeking to protect its commercial interests in publicising a spectacle, rather than its privacy.<sup>128</sup> Quoting a British case and the *Restatement*, Gummow and Hayne JJ indicated that, for them, a privacy tort would be based on 'the fundamental value of personal autonomy'<sup>129</sup> and the 'interest of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears and publications of others'.<sup>130</sup> Consequently, they held that a privacy tort was not available to corporations, as they 'lack[ed] the sensibilities, offence and injury to which provide a staple value for any developing law of privacy'.<sup>131</sup>

Nevertheless, it appears that Gummow and Hayne JJ have reservations about the establishment of such a tort in Australia, even in relation to natural persons. They argued that the significance of *Victoria Park* was the legal method employed by Dixon J, who refused to follow the United States Supreme Court in formulating a tort of unfair competition<sup>132</sup> as it amounted to the introduction of new generalised doctrine into the law.<sup>133</sup> This approach was followed by Deane J in delivering the High Court's judgment in *Moorgate Tobacco Co Ltd v Philip Morris [No 2]*<sup>134</sup> ('*Moorgate*'). Justice Deane's scepticism about predicated liability on broad, indeterminate concepts was cited with approval by Gummow and Hayne JJ. They referred to the difficulties in defining privacy<sup>135</sup> and asserted that 'the better course, as Deane J recognised, is to look to the development and adaptation of recognised forms of action to meet new situations and circumstances'.<sup>136</sup> Although this statement indicates a distinct preference for developing existing actions over the establishment of a privacy tort, their Honours made it clear that nothing in their judgment should be interpreted as indicating any particular outcome.<sup>137</sup>

Chief Justice Gleeson only briefly considered *Lenah*'s claim regarding a privacy tort, as he held that breach of confidence would have adequately covered

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126 Justice McHugh did not sit.

127 *Lenah* (2001) 208 CLR 199, 248–9.

128 Ibid 249 citing Morison, above n 17, [12]. See also S Skala, 'Is There a Legal Right to Privacy?' (1977) 10 *University of Queensland Law Journal* 127, 136; Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, above n 38, [216].

129 *Douglas v Hello! Ltd* [2001] QB 967, 1001 quoted in *Lenah* (2001) 208 CLR 199, 256. See below Part II(A)(2)(b) for a discussion of this case.

130 *Restatement (Second) of Torts* § 652A(b) (1977) quoted in *Lenah* (2001) 208 CLR 199, 258.

131 *Lenah* (2001) 208 CLR 199, 256.

132 See *International News Service v The Associated Press*, 248 US 215 (1918).

133 *Victoria Park* (1937) 58 CLR 479, 509–10.

134 (1984) 156 CLR 414.

135 *Lenah* (2001) 208 CLR 199, 252.

136 Ibid 250.

137 Ibid 258. See the quote commencing the above Introduction.

the case had the activities filmed been private.<sup>138</sup> Significantly, he argued that ‘the law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy’.<sup>139</sup> The basis of privacy rights was human dignity, so that such rights might be inapplicable to corporations.<sup>140</sup> However, he concluded that due to the lack of precision of the concept of privacy and the conflict between privacy and free speech, courts should be cautious in accepting a new tort in Australia.<sup>141</sup>

Justice Kirby thought it unnecessary to decide whether a privacy tort should be declared, as he accepted two other bases for granting an injunction to Lenah.<sup>142</sup> He noted that more may have been read into *Victoria Park* than the decision required<sup>143</sup> and that universal principles of human rights, as elucidated in art 17 of the *ICCPR*, were applicable in this context.<sup>144</sup> However, Kirby J stipulated in argument that the Court’s failure to declare a privacy right in *Victoria Park* and the fact that a privacy tort had been introduced by legislatures in a number of other jurisdictions, rather than by courts,<sup>145</sup> were arguments against judicial intervention. The impact that a tort may have on free speech<sup>146</sup> and the ambit of the implied freedom of political communication were further reasons for restraint.<sup>147</sup>

Justice Callinan appeared most enthusiastic about the reception of a privacy tort into the Australian common law. He clearly considers privacy to be an important value, quoting American writer, Rosen, to the effect that privacy is

indispensable to freedom ... necessary for the formation of intimate relationships, allowing us to reveal parts of ourselves to friends, family members, and lovers that we withhold from the rest of the world. It is, therefore, a precondition for friendship, individuality, and even love.<sup>148</sup>

However, it is unclear what values Callinan J views as forming the basis of a privacy tort, as he did not rule out the possibility that corporations and

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138 *Lenah* (2001) 208 CLR 199, 225. See below Part II(B) for an analysis of Chief Justice Gleeson’s approach.

139 *Lenah* (2001) 208 CLR 199, 225.

140 *Ibid* 226. See also Justice Gaudron’s comment in argument that the right to privacy is aimed at protecting individual dignity. She assumes that there are ‘essentially private’ matters that can be identified: Transcript of Proceedings, *Lenah* (High Court of Australia, Gaudron J, 3 April 2001) 101, 78.

141 *Lenah* (2001) 208 CLR 199, 225–6.

142 *Ibid* 277.

143 *Ibid*.

144 *Ibid* 279. For discussions of the relationship between art 17 and Australian law, see *GS v News Limited* (1998) Aust Torts Reports ¶81-466, 64,897, 64,913–64,915 and Terry Gygax, ‘At Last – Enforceable Privacy Rights in Australia? The Potential for Treaties to Give Protection Against Uninvited Media Attention’ (2000) 12 *Bond Law Review* 192.

145 Transcript of Proceedings, *Lenah* (High Court of Australia, Kirby J, 3 April 2001) 106. See, eg, *Privacy Act* RSBC 1979, c 336 (British Columbia, Canada); *Privacy Act* RSM 1987, c P125 (Manitoba, Canada); *Privacy Act* RSN 1990, c P-22 (Newfoundland, Canada) and *Privacy Act* RSS 1978, c P-24 (Saskatchewan, Canada). See Craig, above n 11; Craig and Nolte, above n 9, 166.

146 Transcript of Proceedings, *Lenah* (High Court of Australia, Kirby J, 3 April 2001) 109.

147 *Ibid* 62–3, 106.

148 Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (2000) 11 quoted in *Lenah* (2001) 208 CLR 199, 324.

governments may enjoy the same or similar rights.<sup>149</sup> He asserted that the majority views in *Victoria Park* appeared anachronistic<sup>150</sup> and that the case was distinguishable from *Lenah*.<sup>151</sup> Given the privacy threats posed by the media industry and modern technology<sup>152</sup> and developments in other jurisdictions,<sup>153</sup> he concluded that the 'time is ripe' to consider whether a privacy tort should be recognised in Australia.<sup>154</sup> Although his Honour suggested that the separation of the roles of the judiciary and legislature should be considered in this regard, he noted that there had been many recent judge-made changes to the law.<sup>155</sup>

Justice Callinan also indicated what the tort might look like if accepted into Australian law. He adopted Prosser's classification and contended that, on the facts in *Lenah*, the tort of intrusion upon seclusion had been committed.<sup>156</sup> It is unclear why he characterised this as an intrusion upon seclusion, rather than an impending publication of private facts; the essence of *Lenah*'s complaint was not that its 'private' operations had been filmed, but that the ABC intended to broadcast information about those operations. His Honour expressed reservations about applying American decisions influenced by the First Amendment, and asserted that any principles for an Australian tort must be incrementally established, having regard to the Australian context.<sup>157</sup> He referred to the public interest defence available in New Zealand and argued that '[u]ltimately the questions involved are ones of proportion and balance', an exercise familiar to Australian courts.<sup>158</sup>

## C Conclusion

In the United States and New Zealand, the tort of public disclosure of private facts enables individuals to pursue a remedy for non-consensual publications of personal information. However, due to the primacy accorded to free speech under the First Amendment, the American tort has largely been emptied of its content. In contrast, the New Zealand courts have adopted a more balanced approach to the competing interests of privacy and freedom of expression in formulating the privacy tort. The High Court of Australia now appears willing to consider establishing a tort of invasion of privacy in relation to natural persons, albeit with caution.

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149 *Lenah* (2001) 208 CLR 199, 326–7.

150 *Ibid* 322.

151 *Ibid* 323.

152 *Ibid* 299–309.

153 *Ibid* 324–6.

154 *Ibid* 328. See the quote commencing above Part I.

155 *Lenah* (2001) 208 CLR 199, 328–30.

156 *Ibid* 327.

157 *Ibid* 328.

158 *Ibid*. Note that on the basis of the above dicta of the Justices in *Lenah*, a judge of the District Court of Queensland, Skoien SJ, recently held that a tort of invasion of privacy exists in Australia. He saw the privacy tort as a 'logical and desirable step' towards meeting changing circumstances in Australia and awarded the plaintiff, the Mayor of Maroochy Shire, \$178 000 in damages for invasions of her privacy by a former lover: *Grosse v Purvis* (Unreported, District Court of Queensland, Skoien SJ, 16 June 2003) [415]–[447], [471]–[484]. It remains to be seen whether this decision will be endorsed by higher courts.

## II PROTECTING PRIVACY THROUGH THE EQUITABLE ACTION FOR BREACH OF CONFIDENCE

If the activities filmed were private, then the law of breach of confidence is adequate to cover the case.<sup>159</sup>

The equitable action for breach of confidence is well established in the United Kingdom and Australia,<sup>160</sup> although it is ‘little more than a truism’ that its scope is difficult to delineate.<sup>161</sup> In Section A of this Part, I will analyse the background of the British action and the way in which it has been formulated in relation to personal information. I will argue that three different approaches to the action may be identified in the case law. In Section B, I will summarise the scope of breach of confidence in Australia and assess the varying approaches to the action taken by the High Court justices in *Lenah* and their potential significance for equity’s protection of privacy in relation to non-consensual disclosures of personal information.

### A Breach of Confidence as a Privacy Remedy in the United Kingdom

#### 1 Background

The action for breach of confidence was first recognised in the United Kingdom in the 19<sup>th</sup> century.<sup>162</sup> Its jurisdictional basis has since been a ‘source of lingering uncertainty’:<sup>163</sup> at various times, the courts have grounded the action in contract,<sup>164</sup> property,<sup>165</sup> tort<sup>166</sup> and equity, leading some commentators to conclude that the action is *sui generis*.<sup>167</sup> Today, it is generally accepted that

159 Ibid 225 (Gleeson CJ).

160 Francis Gurry, *Breach of Confidence* (1984); Roger Toulson and Charles Phipps, *Confidentiality* (1996); James Kearney, *The Action for Breach of Confidence in Australia* (1985); Roderick Meagher, Dyson Heydon and Mark Leeming, *Equity Doctrines and Remedies* (4<sup>th</sup> ed, 2002) 1109–42.

161 Wacks, *Privacy and Press Freedom*, above n 42, 49.

162 *Abernethy v Hutchinson* (1824) 3 LJ Ch 209; *Prince Albert v Strange* (1849) 18 LJ Ch 120; *Morison v Moat* (1851) 20 LJ Ch 513. See Kearney, above n 160, 5.

163 Gurry, above n 160, 25. See also Toulson and Phipps, above n 160, 19; Peter Radan, Cameron Stewart and Andrew Lynch, *Equity and Trusts* (2001) 237–41; Gareth Jones, ‘Restitution of Benefits Obtained in Breach of Another’s Confidence’ (1970) 86 *The Law Quarterly Review* 463; United Kingdom Law Commission, *Breach of Confidence*, Cmnd 8388 (1981) [3.1].

164 *Litholite Ltd v Travis and Insulators Ltd* (1913) 30 RPC 266, 532; *Lamb v Evans* (1893) 1 Ch 218; *Seager v Copydex* [1967] 2 All ER 415. See also Gurry, above n 160, 28–36; Kearney, above n 160, 22–5; Radan, Stewart and Lynch, above n 163, 238–9.

165 See, eg, *Prince Albert v Strange* (1849) 18 LJ Ch 120 (although equity was also cited as a basis for relief); *Exchange Telegraph Co (Ltd) v Howard* (1906) 22 TLR 375 cited in Gurry, above n 160, 50–1.

166 Two senior judges have recently referred to the action as both a tort and equitable cause of action: *Venables v News Group Newspapers Ltd* [2001] Fam 430, 447–8, 462 (Butler-Sloss P); *Douglas v Hello! Ltd* [2001] QB 967, 998–1001 (Sedley LJ). See also United Kingdom Law Commission, above n 163, [6.5] (proposed the enactment of a statutory tort of breach of confidence); Peter North ‘Breach of Confidence: Is There a New Tort?’ (1972) 12 *Journal of the Society of Public Teachers of Law* 149; Gurry, above n 160, 56–7.

167 Gurry, above n 160, 58–61; Kearney, above n 160, 21. See also *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4<sup>th</sup>) 14, 74.

breach of confidence is grounded in equity's exclusive jurisdiction.<sup>168</sup> There is some support for characterising the obligation as fiduciary in nature.<sup>169</sup> However, the equitable duty is generally regarded as constituting a field of its own, based on the concepts of conscience and good faith.<sup>170</sup>

There are three types of confidential information protected by the action: commercial or technical, governmental and personal.<sup>171</sup> Most breach of confidence cases concern commercial or technical information.<sup>172</sup> Its confidentiality is assessed by reference to the originality or exclusivity of the information, on the basis that 'a confidant has a right to the fruits of his [or her mental] labours'.<sup>173</sup> Governmental information is protected if its confidentiality is in the public interest.<sup>174</sup> It is equity's protection of personal information, discussed below, that may provide a remedy for privacy invasions.

## 2 Elements of Liability

Three elements must be satisfied to found an action for breach of confidence:

- (1) the information must have the necessary quality of confidence;
- (2) the information must have been imparted in circumstances importing an obligation of confidence; and
- (3) there must be an unauthorised use of that information to the detriment of the party communicating it.<sup>175</sup>

### (a) Information with the Necessary Quality of Confidence

Personal information will only have the necessary quality of confidence if it is not 'public property and public knowledge'.<sup>176</sup> A statement read in an open court<sup>177</sup> and information that has received prior publicity,<sup>178</sup> for example, have

168 See, eg, *A v B* [2003] QB 195, 202; Dal Pont, Chalmers and Maxton, above n 116; Meagher, Heydon and Leeming, above n 160, 1112; Wacks, *Privacy and Press Freedom*, above n 42, 48.

169 *Schering Chemicals v Falkman* [1981] 2 WLR 848, 869.

170 See, eg, *R v Department of Health; Ex parte Source Informatics Ltd* [2001] QB 424, 439; *Fraser v Evans* [1969] 1 QB 439, 361; Laster, 'Breaches of Confidence and of Privacy by Misuse of Confidential Information', above n 43, 35; George Wei, 'Surreptitious Takings of Confidential Information' (1992) 12 *Legal Studies* 302, 304; Radan, Stewart and Lynch, above n 163, 240; Meagher, Heydon and Leeming, above n 160, 1117.

171 Dal Pont, Chalmers and Maxton, above n 116, 173–90; Radan, Stewart and Lynch, above n 163, 242–7. Artistic and literary information has also received some protection: Gurry, above n 160, 101–2.

172 Phillipson and Fenwick, 'Breach of Confidence as a Privacy Remedy', above n 38, 674.

173 William Wilson, 'Privacy, Confidence and Press Freedom: A Study in Judicial Activism' (1990) 53 *The Modern Law Review* 43, 45. See, eg, *Saltman Engineering Co Ltd v Campbell* (1948) 65 RPC 203, 215.

174 *Attorney-General v Jonathan Cape Ltd* [1976] QB 752, 770–1; *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 51; Meagher, Heydon and Leeming, above n 160, 1135–6; Gurry, above n 160, 103–8.

175 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47 approved by the House of Lords in *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109.

176 *Saltman Engineering Co Ltd v Campbell* (1948) 65 RPC 203, 215. See also *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 282; *Woodward v Hutchins* [1977] 1 WLR 760, 764.

177 *Bunn v British Broadcasting Corporation* [1998] 3 All ER 552.

178 *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 260, 276, 290, 293.

been found to be in the public domain. Facts that are relatively secret may still satisfy this element.<sup>179</sup>

The courts have not developed a clear test for determining what subject matters are sufficiently confidential,<sup>180</sup> although ‘confidentiality’ and ‘privacy’ are often used interchangeably.<sup>181</sup> The traditional rule applied by the courts is that ‘trivial tittle-tattle’ will not be protected,<sup>182</sup> a negative requirement that has rarely precluded plaintiffs from obtaining relief.<sup>183</sup> In the recent case of *A v B*,<sup>184</sup> in which privacy was found to be directly protected by the action,<sup>185</sup> the Court of Appeal held that ‘usually the answer to the question whether there is a private interest worthy of protection will be obvious’.<sup>186</sup> This emphasis on judicial intuition provides little assistance in determining whether information has the necessary quality of confidence. In the subsequent Court of Appeal decision of *Campbell v Mirror Group Newspapers Ltd*<sup>187</sup> (*‘Campbell’*), Chief Justice Gleeson’s judgment in *Lenah* was cited as establishing that this element will be satisfied if disclosure of the information would be highly offensive to a reasonable person.<sup>188</sup>

*(b) Imparted in Circumstances Importing an Obligation of Confidence*

The most contentious element of the equitable action is that the information be imparted in circumstances importing an obligation of confidence.<sup>189</sup> Three approaches to the element may be identified in the case law. Under what I term the ‘traditional approach’ to this element, it is necessary to show that there was a confidential relationship or communication between the parties.<sup>190</sup> There will be an implied relationship if a reasonable person would have realised that the information was imparted in confidence.<sup>191</sup> Third parties who receive confidential information will also be subject to an obligation if they had notice of the confidant’s impropriety.<sup>192</sup> As recently as 2001, the traditional approach received

179 Ibid 260. See also *Schering Chemicals v Falkman* [1981] 2 WLR 848, 870; *Stephens v Avery* [1988] Ch 449, 454; *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444, 456.

180 Phillipson and Fenwick, ‘Breach of Confidence as a Privacy Remedy’, above n 38, 674.

181 See, eg, *British Steel Corporation v Granada Television Ltd* [1981] 2 WLR 310, 319; *Home Office v Harman* [1981] 2 WLR 310, 319, 328, 330; *Riddick v Thomas Board Mills Ltd* [1977] 3 All ER 677, 689 cited in Gurry, above n 160, 13.

182 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 48.

183 See, eg, *Stephens v Avery* [1988] Ch 449, 454 (details of a sexual relationship not trivial tittle-tattle), applied in *Michael Barrymore v News Group Newspapers Ltd* [1997] FSR 600.

184 [2003] QB 195, 206.

185 See below Part II(A)(2)(b).

186 *A v B* [2003] QB 195, 206.

187 [2003] 2 WLR 80.

188 *Campbell* [2003] 2 WLR 80, 95–6.

189 Phillipson and Fenwick, ‘Breach of Confidence as a Privacy Remedy’, above n 38, 670.

190 *Saltman Engineering Co Ltd v Campbell* (1948) 65 RPC 203, 213 (Lord Greene MR). See Phillipson and Fenwick, ‘Breach of Confidence as a Privacy Remedy’, above n 38, 670; Wacks, *Privacy and Press Freedom*, above n 42, 53.

191 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 48. For critiques of the reasonableness standard in this context, see Meagher, Heydon and Leeming, above n 160, 1112–13; *Deta Nominees Pty v Viscount Plastic Products Pty Ltd* [1979] VR 167, 191.

192 *Malone v Commissioner of Police for the Metropolis (No 2)* [1979] 1 Ch 344, 361.

support from two Lord Justices at the interlocutory stage of *Douglas v Hello! Ltd*<sup>193</sup> ('*Douglas*'). In that case, two actors sought an interlocutory injunction to restrain the publication of photographs taken surreptitiously at their wedding. In assessing the balance of convenience, Brooke and Sedley LJ noted that the claimants might not succeed in establishing breach of confidence at trial, as the photographer may have been an intruder, with whom they had no relationship.<sup>194</sup> Under this analysis, the basis for intervention is to protect confidential communications and 'society's revered institutions', such as marriage,<sup>195</sup> from disintegration.<sup>196</sup> Trust reposed in and accepted by the confidant underlies the imposition of the equitable duty.<sup>197</sup>

However, numerous cases suggest that an obligation may be imposed even where no prior relationship existed.<sup>198</sup> In *Stephens v Avery*,<sup>199</sup> Browne-Wilkinson V-C stated that 'the relationship between the parties is not the determining factor' in breach of confidence cases;<sup>200</sup> the basis of intervention is that it is unconscionable for a person to disclose information which he or she received knowing that it was confidential.<sup>201</sup> This analysis was adopted by Lord Goff in *Attorney-General v Guardian Newspapers (No 2)*<sup>202</sup> ('*Guardian Newspapers*'). In his words:

a duty of confidence arises when confidential information comes to the knowledge of a person ... in circumstances where he [or she] has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he [or she] should be precluded from disclosing the information to others.<sup>203</sup>

In *Venables v News Group Newspapers Ltd*<sup>204</sup> ('*Venables*'), it was also held that a duty of confidence may arise in equity independently of a relationship or communication between parties.<sup>205</sup>

The demise of the need for a prior relationship has greatly enhanced the action's capability to protect privacy *incidentally*. Under this analysis, subsequently referred to as the 'improper means approach', a defendant may be restrained from disclosing information if the circumstances through which it was obtained are sufficient to put an individual on notice that the information is

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193 [2001] QB 967.

194 *Douglas* [2001] QB 967, 984, 998. See also *Spencer v United Kingdom* (1998) 25 EHRR CD 172. Cf *Douglas* [2001] QB 967, 1012.

195 See, eg, *Duchess of Argyll v Duke of Argyll* [1967] 1 Ch 302, 330.

196 Wilson, above n 173, 50.

197 Laster, 'Breaches of Confidence and of Privacy by Misuse of Confidential Information', above n 43, 39.

198 Wright, above n 38, 179–81; Wacks, *Privacy and Press Freedom*, above n 42, 59–71; Helen Fenwick and Gavin Phillipson, 'Confidence and Privacy: A Re-examination' (1996) 55 *Cambridge Law Journal* 447, 450–2; Phillipson and Fenwick, 'Breach of Confidence as a Privacy Remedy', above n 38, 670–2; Meagher, Heydon and Leeming, above n 160, 1117–19.

199 [1988] Ch 449.

200 *Stephens v Avery* [1988] Ch 449, 482.

201 *Ibid.*

202 [1990] 1 AC 109.

203 *Ibid* 281.

204 [2001] Fam 430.

205 *Ibid* 462.

confidential.<sup>206</sup> In the early case of *Lord Ashburton v Pape*,<sup>207</sup> for example, the Court of Appeal held that equity would restrain the publication of confidential information ‘improperly or surreptitiously obtained’.<sup>208</sup> More recently, it was held at trial in *Douglas* that the individual who had taken the surreptitious photographs of the claimants’ wedding had breached an obligation of confidence he owed to the claimants, despite having no prior relationship with them.<sup>209</sup> In these cases, the courts impose a constructive relationship of confidence on the parties.

In conjunction with these developments, numerous contemporary cases also suggest that the basis of intervention in personal information cases is to protect the plaintiff’s privacy *directly*, an approach which I term the ‘privacy approach’.<sup>210</sup> In *Hellewell v Chief Constable of Derbyshire*<sup>211</sup> (‘*Hellewell*’) Laws J stated that

[i]f someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his [or her] subsequent disclosure of the photograph would ... surely amount to a breach of confidence ... In such a case, the law would protect what might reasonably be called a right of privacy.<sup>212</sup>

The Court of Appeal unanimously held in *R v Department of Health; Ex parte Source Informatics Ltd*,<sup>213</sup> that ‘the concern of the law [regarding personal confidences] is to protect the confider’s personal privacy’.<sup>214</sup> All three Court of Appeal judges who heard the interlocutory application in *Douglas* referred to the action’s potential to protect privacy,<sup>215</sup> as did the High Court judge who heard the case at trial.<sup>216</sup>

Due to the unanimous decision of the Court of Appeal in *A v B*,<sup>217</sup> it is now undisputed that the privacy approach has been adopted in the United Kingdom.

206 See Phillipson and Fenwick, ‘Breach of Confidence as a Privacy Remedy’, above n 38, 671; Wright, above n 38, 179–180; Wacks, *Privacy and Press Freedom*, above n 42, 66–71.

207 [1913] 2 Ch 469.

208 *Lord Ashburton v Pape* [1913] 2 Ch 469, 475. For other early cases adopting this approach, see *Exchange Telegraph v Howard* (1906) 22 TLR 375; *Abernethy v Hutchinson* (1825) 2 LJ Ch 219.

209 *Douglas* [2003] EWHC 786 Ch (Unreported, Lindsay J, 11 April 2003) [227]–[228]. Note, however, that Lindsay J characterised the *Douglas* wedding as a valuable trade secret and analysed breach of confidence law accordingly. For other cases in which the improper means approach has been endorsed, see *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444, 453 and *Shelley Films v Rex Features Ltd* [1994] EMLR 134 (surreptitious photographs taken of film shoots).

210 Gurry, above n 160, 13–15; Megan Richardson, ‘Breach of Confidence, Surreptitiously or Accidentally Obtained Information and Privacy: Theory Versus Law’ (1994) 19 *Melbourne University Law Review* 673; Fenwick and Phillipson, ‘Confidence and Privacy’, above n 198; Ng-Loy Wee Loon, ‘Emergence of a Right to Privacy from within the Law of Confidence’ (1996) 18 *European Intellectual Property Review* 307; Radan, Stewart and Lynch, above n 163, 257–60.

211 [1995] 1 WLR 804.

212 *Ibid* 807. For a detailed analysis of this case, see Ng-Loy Wee Loon, above n 210.

213 [2001] QB 424.

214 *R v Department of Health; Ex parte Source Informatics Ltd* [2001] QB 424, 440. See also *Guardian Newspapers* [1990] 1 AC 109, 255.

215 *Douglas* [2001] QB 967, 984–5, 1001, 1011–12.

216 *Douglas* [2003] EWHC 786 Ch (Unreported, Lindsay J, 11 April 2003) [186] (provides a summary of the cases in which the privacy approach has been adopted).

217 [2003] QB 195.

In that case, the Court of Appeal considered its privacy obligations under the *Human Rights Act 1998* (UK) ('HRA'), which provides that 'public authorities', including courts, must not act incompatibly with the *European Convention of Human Rights* ('ECHR').<sup>218</sup> In delivering the Court's judgment, Lord Woolf CJ asserted that arts 8 and 10 of the *ECHR*, which confer rights to privacy and freedom of expression respectively, provided new parameters within which courts should decide whether an individual's privacy should be protected.<sup>219</sup> He argued that it was 'not necessary to tackle the vexed question of whether there is a separate cause of action based upon a new tort', for 'breach of confidence now will, where this is appropriate, provide the necessary protection'.<sup>220</sup> Citing Lord Goff, he held that a duty of confidence may arise whenever the defendant 'either knows or ought to know that the other person can reasonably expect his [or her] privacy to be protected'.<sup>221</sup> Despite referring to a 'necessary relationship',<sup>222</sup> Lord Woolf CJ endorsed the decision in *Venables*, asserting that an obligation may be imposed in an extensive range of circumstances, as where surveillance techniques invaded an individual's privacy.<sup>223</sup>

*A v B* clearly enhances the protection of privacy through breach of confidence. However, limitations may be discerned. Whilst not an essential condition of liability, the existence of a relationship and its nature were presented as important factors in determining whether the defendant had notice of the information's confidentiality.<sup>224</sup> The Court also appeared to prioritise freedom of expression over privacy, holding that because it was required to have 'particular regard' to art 10<sup>225</sup> and that the existence of a free press was desirable, any interference with publication had to be justified.<sup>226</sup> In *A v B* itself, the plaintiff, a renowned footballer, sought to restrain the publication of articles in which two women recounted their adulterous relationships with him. He was denied relief on the basis that the relationships were impermanent and that the confidence was a

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218 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 June 1952). See *Human Rights Act 1998* (UK) ch 42 ss 6(1), 6(3)(a). These provisions have a 'horizontal effect' on litigation between private parties: Phillipson and Fenwick, 'Breach of Confidence as a Privacy Remedy', above n 38, 677; Murray Hunt, 'The Horizontal Effect of the Human Rights Act' (1998) *Public Law* 423, 442; Lord Justice Richard Buxton, 'The Human Rights Act and Private Law' (2000) 116 *The Law Quarterly Review* 48; Basil Markesinis, 'Privacy, Freedom of Expression and the Horizontal Effect of the Human Rights Bill: Lessons from Germany' (1999) 115 *The Law Quarterly Review* 47, 72–3; Ian Leigh, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?' (1999) 48 *International Comparative Law Quarterly* 57.

219 *A v B* [2003] QB 195, 202.

220 *Ibid* 206, 207. Although the existence of a privacy tort was rejected in *Kaye v Robertson* [1991] FSR 62, the issue was re-examined in *Douglas* [2001] QB 967 and *Wainwright v Home Office* [2002] QB 1334.

221 *A v B* [2003] QB 195, 207.

222 *Ibid*.

223 *Ibid*.

224 For a general discussion of this approach, see Wacks, *Privacy and Press Freedom*, above n 42, 64.

225 *Human Rights Act 1998* (UK) ch 42, s 12(4).

226 *A v B* [2003] QB 195, 205. For a critique of the prioritisation of freedom of speech under the *HRA*, see Phillipson and Fenwick, 'Breach of Confidence as a Privacy Remedy', above n 38, 685–7.

shared confidence, which the women, who had a right to freedom of expression, did not want to preserve.<sup>227</sup>

(c) *Unauthorised Use to the Detriment of the Plaintiff*

Based on Australian authority,<sup>228</sup> the Court of Appeal has recently held that there must be both an unauthorised and unconscionable use of the relevant information.<sup>229</sup> The disclosure of impersonalised medical prescription details did not constitute unconscionable use, even though patients had disclosed the information to pharmacists for a limited purpose.<sup>230</sup> There is conflicting authority as to whether it must be shown that the plaintiff has suffered or will suffer detriment.<sup>231</sup> In *X v Y*,<sup>232</sup> the disclosure of confidential information was found to constitute detriment per se.<sup>233</sup> Although detriment was assumed to be necessary at trial in *Douglas*, the distress the claimants suffered due to the publication of the unauthorised wedding photographs was held to be sufficient.<sup>234</sup> Thus, if detriment is a necessary element, the standard of proof appears to be low.

### 3 Defences

(a) *'Public Interest' in Disclosure*

The only significant defence to breach of confidence is that disclosure of the information is in the 'public interest', an extension of the principle that 'there is no confidence as to the disclosure of iniquity'.<sup>235</sup> In *W v Edgell*,<sup>236</sup> a psychiatrist who examined a murderer seeking parole from a psychiatric institution was permitted to disclose his report to authorities on the basis that protecting public safety outweighed the interest in maintaining personal confidences.<sup>237</sup> In contrast, an injunction was granted in *X v Y* to prevent the publication of the names of two doctors who had contracted AIDS, on the grounds that preserving the confidentiality of medical records and not deterring sufferers from obtaining treatment outweighed the public interest in the information.<sup>238</sup> Despite the conclusion in *A v B* that it should be 'obvious' when a public interest exists,<sup>239</sup> it

227 *A v B* [2003] QB 195, 207, 216–17.

228 *Smith Kline and French Laboratories (Aust) Ltd v Secretary, Dept of Community Services & Health* (1991) 28 FCR 291.

229 *R v Department of Health; Ex parte Source Informatics Ltd* [2001] QB 424.

230 *Ibid* 440.

231 See, eg, *Guardian Newspapers* [1990] 1 AC 109, 270 (Lord Griffiths) (detriment necessary), 256 (Lord Keith) (disclosure constitutes detriment), 282 (Lord Goff) (left question open).

232 [1988] 2 All ER 648.

233 *Ibid* 657.

234 [2003] EWHC 786 Ch (Unreported, Lindsay J, 11 April 2003) [199].

235 *Gartside v Outram* (1986) 26 LJ Ch 113, 114. See also *Initial Services Ltd v Putterill* [1968] 1 QB 396; *Fraser v Evans* [1969] 1 QB 349; *Schering Chemicals v Falkman* [1981] 2 WLR 848; *Attorney-General v Jonathan Cape* [1976] 1 QB 752.

236 [1990] Ch 359.

237 *Ibid* 415–16, 424. See also *Lion Laboratories v Evans* [1985] 1 QB 526; *Hubbard v Vosper* [1972] 2 QB 84.

238 *X v Y* [1988] 2 All ER 650, 660–1.

239 *A v B* [2003] QB 195, 206.

appears that the courts will usually undertake a balancing exercise in assessing the competing claims to confidentiality and freedom of expression.

British courts also accept that although a 'public figure is entitled to a private life ... he [or she] must expect and accept that his [or her] actions will be more closely scrutinised by the media'.<sup>240</sup> If the individual holds a particularly prominent position or has courted public attention, then he or she will have even less ground to object to a breach of confidence.<sup>241</sup> In *Lennon v News Group Newspapers Ltd*,<sup>242</sup> for example, John Lennon was denied an injunction to prevent the publication of articles in which his former wife disclosed intimate details regarding their marriage. As they had both previously sought publicity about their relationship, it had 'ceased to be their own private affair'.<sup>243</sup> The Court similarly held in *Campbell* that the public had an interest in knowing that a high profile model, who had previously lied about her drug addiction, was attending Narcotics Anonymous meetings. However, the Court took a more restrictive approach to the defence, holding that had the claimant not made public assertions that she did not take drugs, she would have been entitled to keep the details of her therapy confidential.<sup>244</sup>

#### 4 Remedies

A variety of equitable remedies are available for breaches of confidence in relation to personal information. For apprehended or continuing breaches, an injunction is usually the most important remedy, awarded in equity's exclusive jurisdiction. A court may order the delivery up of items containing confidential information.<sup>245</sup> Equitable compensation may also be awarded for emotional harm or distress suffered where the defendant has not profited from a breach, with the objective of placing the plaintiff in the same position as if the breach of confidence had not occurred.<sup>246</sup> Where the defendant has profited, damages may be awarded in lieu of or in addition to an injunction.<sup>247</sup> Alternatively, a plaintiff may seek an account of profits where the defendant has made pecuniary gain.<sup>248</sup>

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240 Ibid 208.

241 Ibid.

242 [1978] FSR 573.

243 *Lennon v News Group Newspapers Ltd* [1978] FSR 573, 574. Cf *Duchess of Argyll v Duke of Argyll* [1967] 1 Ch 302. See also *Woodward v Hutchins* [1977] 1 WLR 760.

244 *Campbell* [2003] 2 WLR 80, 93.

245 Gurry, above n 160, 411–16; Wacks, *Privacy and Press Freedom*, above n 42, 165–6; Kearney, above n 160, 49–50.

246 Meagher, Heydon and Leeming, above n 160, 1140.

247 Dal Pont, Chalmers and Maxton, above n 116, 215; Gurry, above n 160, 428–51; Kearney, above n 160, 50–6; Wacks, *Privacy and Press Freedom*, above n 42, 148–54. For a critique of this view, see Meagher, Heydon and Leeming, above n 160, 1140–1.

248 Gurry, above n 160, 417–24; Wacks, *Privacy and Press Freedom*, above n 42, 154–5; Kearney, above n 160, 47–9; Dal Pont, Chalmers and Maxton, above n 116, 214–15.

## B Breach of Confidence as a Privacy Remedy in Australia?

Prior to the development of the privacy approach in the United Kingdom, the Australian action for breach of confidence was largely comparable. As few Australian decisions concern personal information, British jurisprudence often continues to be relied upon in this context. The Australian courts have broadly interpreted the definition of confidential information, finding that the identity of witnesses and informants<sup>249</sup> and sensitive cultural and religious information<sup>250</sup> have the necessary quality of confidence.

Both the traditional and improper means approaches have been adopted in Australia. In *Franklin v Giddins*,<sup>251</sup> which concerned nectarine cuttings that had been stolen by a competitor of the plaintiff, the unconscionability of the defendant's actions was cited as the basis of an obligation of confidence. Justice Dunn stated that he could not accept that a thief who knowingly steals a trade secret is less unconscionable than a traitorous employee.<sup>252</sup> This case has been interpreted as the beginning of the demise of the need for a prior relationship of confidence.<sup>253</sup> In *Commonwealth v John Fairfax & Sons Ltd*<sup>254</sup> ('Fairfax'), which concerned government information, Mason J cited *Lord Ashburton v Pape*<sup>255</sup> as establishing that a duty may be imposed where the information was 'improperly or surreptitiously obtained'.<sup>256</sup> Similarly, the High Court held in *Moorgate*<sup>257</sup> that equitable intervention is founded on 'an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained'.<sup>258</sup>

Detriment was assumed to be necessary in *Fairfax*, but Mason J suggested that there may be sufficient detriment if disclosure of information exposed an individual to public discussion and criticism.<sup>259</sup> Some authorities suggest that detriment need not always be shown.<sup>260</sup> Further, the public interest defence has been interpreted narrowly in commercial cases, held to extend only to information regarding threatened breaches of the law or misdeeds of similar gravity, such as threats to public health.<sup>261</sup> Justice Gummow has even stated that

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249 *G v Day* [1982] 1 NSWLR 24; *Falconer v Australian Broadcasting Corporation* [1992] 1 VR 662; *Gilbert v Star Newspaper Co* (1984) 11 TLR 4.

250 *Foster v Mountford and Rigby Ltd* (1976) 14 ALR 71. Cf *Church of Scientology of California v Kaufman* [1973] RPC 685.

251 [1978] Qd R 72.

252 *Ibid* 79–80.

253 W Braithwaite, 'The Secret of Life – A Fruity Trade Secret' (1979) 95 *The Law Quarterly Review* 323, 323–4.

254 (1980) 147 CLR 39.

255 [1913] 2 Ch 469. See above Part II(A)(2)(b).

256 [1913] 2 Ch 469, 475 cited in *Fairfax* (1980) 147 CLR 39, 50.

257 (1984) 156 CLR 414. See above Part I(B).

258 *Moorgate* (1984) 156 CLR 414, 438.

259 *Fairfax* (1980) 147 CLR 39, 51.

260 *Smith Kline & French Laboratories (Aust) Ltd v Department of Community Services & Health* (1990) 22 FCR 73, 112; *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 190.

261 *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1980) 33 ALR 31; *Bacich v Australian Broadcasting Corporation* (1992) 29 NSWLR 1.

the test is not truly a defence, but an expression of the equitable concept of clean hands.<sup>262</sup> However, it is generally accepted that there is an independent public interest defence to the action.<sup>263</sup>

The *Lenah* case, decided just prior to *A v B*, concerned commercial, rather than personal, information. Further, *Lenah* did not argue breach of confidence on the facts. It accepted that the abattoir's slaughtering process, whilst 'hidden from public view', did not constitute confidential information, because the abattoir was visited by inspectors and the public, upon whom confidentiality requirements had not been imposed.<sup>264</sup> Justices Gummow and Hayne did not consider the action, presumably for this reason. However, three justices examined breach of confidence jurisprudence in considering the case.

The most significant analysis regarding the protection of privacy through breach of confidence was that of Gleeson CJ. On the basis of *Lord Ashburton v Pape*, *Fairfax* and *Guardian Newspapers*, he found that equity could be invoked to restrain the publication of confidential information improperly or surreptitiously obtained, even where there was no confidential relationship or communication.<sup>265</sup> Citing the dicta in *Hellewell*, in which Laws J stated that the action could protect 'what might reasonably be called a right of privacy',<sup>266</sup> Gleeson CJ also accepted that privacy interests could be protected under the action in Australia, subject to the constitutional freedom of political communication.<sup>267</sup> It appears that, for him, equitable intervention may be based not only on the traditional and improper means approaches, but also on the privacy approach.

Chief Justice Gleeson assumed that 'confidential' and 'private' information were comparable, using the terms interchangeably. He referred to the definitional difficulties regarding privacy, stipulating that '[t]here is no bright line which can be drawn between what is private and what is not'.<sup>268</sup> However, he argued that the requirement that disclosure of information would be highly offensive to a reasonable person was in many circumstances a 'useful practical test' of what is private.<sup>269</sup> Although an act would not be private simply because it occurred on private property, the nature of the information, the disposition of the owner and the characteristics of the property from which it was obtained, were relevant factors to consider.<sup>270</sup> Chief Justice Gleeson concluded that had the activities filmed been private, then the breach of confidence would have covered the case.

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262 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 445–52 followed in *Sullivan v Sclanders* [2000] SASC 273. Cf *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 171.

263 See, eg, *A v Hayden* (1984) 146 CLR 532, 545, 571–3; *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86; Dal Pont, Chalmers and Maxton, above n 116, 200–12; Radan, Stewart and Lynch, above n 163, 253–5; Meagher, Heydon and Leeming, above n 160, 1132–4.

264 *Lenah* (2001) 208 CLR 199, 221.

265 *Ibid* 224–5.

266 [1995] 1 WLR 804, 807. See above Part II(A)(2)(b).

267 *Lenah* (2001) 208 CLR 199, 224.

268 *Ibid* 226.

269 *Ibid*.

270 *Ibid*.

An obligation would have been placed on the persons who obtained the film and third parties who knew, or ought to have known, the manner in which it was obtained.<sup>271</sup>

Justice Kirby also accepted the improper means approach.<sup>272</sup> However, he was willing to extend equity's protection to information that was *not* confidential or private. Noting that “‘cheque-book journalism’, intrusive telephoto lenses, surreptitious surveillance, gross invasions of personal privacy, deliberately deceptive “stings” and trespass onto land “with cameras rolling” are mainly phenomena of recent times’,<sup>273</sup> he argued that the ‘cry of distress is the summons to relief’.<sup>274</sup> His Honour found that equity may enjoin the use of *any* information obtained by ‘illegal, tortious, surreptitious or improper means where the use of such information would be unconscionable’.<sup>275</sup> In assessing unconscionability, the integrity of private property, privacy and freedom of expression should be considered.<sup>276</sup> Justices Gummow and Hayne, with whom Gaudron J agreed, rejected this analysis, holding that it was unsupported by authority and turned upon an indeterminate notion of unconscionability.<sup>277</sup> Chief Justice Gleeson also held that the ‘consequences of such a proposition are too large’.<sup>278</sup> Therefore, it seems unlikely that Justice Kirby’s reasoning will be followed.

Justice Kirby additionally considered the impact of the implied freedom of political communication on the case. He stated that in considering injunction applications, the courts should balance the implied freedom with competing interests. In his words, the

public interest in free speech would not always ‘trump’ individual interests. Instead, this approach would require that proper attention be given to the value of free speech ... [and] the rights of individuals to protection of the law against arbitrary or unlawful attacks on their reputation and privacy, to the extent that the law upholds those values.<sup>279</sup>

Given that animal welfare was a matter of federal concern, that the ABC had national functions extending to facilitating political discourse and that Lenah was engaged in an export business, he concluded that the Tasmanian Supreme Court should have considered the constitutional principle.<sup>280</sup> Had this case involved ‘serious personal denigration, humiliation and invasion of the privacy of a given individual’, an injunction might properly have been awarded.<sup>281</sup> His Honour concluded that adequate weight had not been given to the implied freedom and that the appeal should be allowed.<sup>282</sup>

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271 Ibid 225.

272 Ibid 271–2 citing *Moorgate* (1984) 156 CLR 414, 438; *Lord Ashburton v Pape* [1913] 2 Ch 469, 475; and *Fairfax* (1980) 147 CLR 39, 50.

273 *Lenah* (2001) 208 CLR 199, 272 (footnotes omitted).

274 Ibid quoting *Wagner v International Ry Co* (1921) 133 NE 437.

275 *Lenah* (2001) 208 CLR 199, 276.

276 Ibid 275–6.

277 Ibid 258–9.

278 Ibid 231.

279 Ibid 285.

280 Ibid 281–2, 288.

281 Ibid 287.

282 Ibid 288.

Justice Callinan took a different approach, contending that the film was an item of property.<sup>283</sup> He referred to *Franklin v Giddins* as the beginning of the demise of the requirement for a prior relationship<sup>284</sup> and viewed the violation of *Lenah's* proprietary rights as constituting a confidential relationship between the parties.<sup>285</sup> Indeed, for Callinan J, the ABC's possession of the film, obtained in violation of *Lenah's* right to exclusive possession of its abattoir, and the subsequent exploitation of the film, which would be to *Lenah's* detriment and the ABC's financial advantage, created a 'relationship of a fiduciary kind and of confidence'.<sup>286</sup> As the ABC knew or ought to have known that the film was obtained in violation of proprietary rights, its use would be unconscionable. A constructive trust should be attached to the property and delivered up to *Lenah*.<sup>287</sup>

Despite *Lenah's* concession that the relevant information was not confidential, Callinan J argued that its activities were 'private, albeit in a qualified sense'.<sup>288</sup> It appears that, for him, the information was confidential and of proprietary value on the basis that moving images are of greater value than a spoken or written recitation of facts.<sup>289</sup> Although some commentators have argued that confidential information is property,<sup>290</sup> it is 'settled doctrine' that this approach has been rejected in Australia.<sup>291</sup> However, his Honour also predicated his analysis on privacy, stipulating that his approach did not involve an extension of principle, as the law already recognised a right to privacy as a category of breach of confidence.<sup>292</sup> Despite the ambiguities in Justice Callinan's judgment, he seems to accept that equitable intervention may be based on the traditional, improper means and privacy approaches, which he combines with a proprietary analysis.

## C Conclusion

The action for breach of confidence law regarding personal information is a rapidly developing area of the law. *Lenah* has confirmed that the improper means approach is accepted in Australia, greatly enhancing the action's potential to protect individual privacy *incidentally*. In the United Kingdom, breach of confidence now *directly* protects privacy, partly due to the impact of the *HRA*. There are signs that the Australian High Court may adopt the privacy approach even without the *HRA*, a development openly supported by the Chief Justice. Although Kirby and Callinan JJ place primary emphasis on the improper method

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283 Ibid 315.

284 Ibid 317 citing Braithwaite, above n 253, 323–4.

285 *Lenah* (2001) 208 CLR 199, 315.

286 Ibid.

287 Ibid 315–16.

288 Ibid 297.

289 Ibid 297, 315.

290 See Staniforth Ricketson, 'Confidential Information – A New Proprietary Interest' (1978) 11 *Melbourne University Law Review* 223; Jennifer Stuckey, 'The Equitable Action for Breach of Confidence: Is Information Ever Property?' (1981) 9 *Sydney Law Review* 402; Norman Palmer, 'Information as Property' in Linda Clarke (ed), *Confidentiality and the Law* (1990) 83; S Wheeldon, 'Reflections on the Concept of "Property" with Particular Reference to Breach of Confidence' (1997) 8 *Auckland University Law Review* 353.

291 Meagher, Heydon and Leeming, above n 160, 1126–8. See, eg, *Moorgate* (1984) 156 CLR 414, 437.

292 *Lenah* (2001) 208 CLR 199, 320 citing *Douglas* [2001] QB 967, 998–1001, 1011.

of obtaining information as a basis for relief, they too consider privacy interests in formulating the equitable duty. It is probable that in a case involving a natural person, the privacy approach would receive even greater support.

### III PROTECTING PRIVACY THROUGH TORT OR EQUITY?

In the past, the law has come at [privacy protection] at oblique angles, and various torts or equitable remedies have provided a measure of protection. But the suggestion is that ... we should reconceptualise.<sup>293</sup>

*Lenah* has necessitated an examination of how the privacy of personal information may be most appropriately protected by Australian courts. In Section A of this Part, I will undertake a comparison of the privacy tort and breach of confidence. In Section B, I will assess whether breach of confidence should be developed to encompass the privacy approach or whether a privacy tort should be established in Australia. I will argue that the latter course is preferable, avoiding conceptual distortion and inconsistency and affording individuals with more comprehensive privacy protection in relation to their personal information.

#### A Comparing the Tort with Breach of Confidence

In comparing the privacy tort with breach of confidence, it is important to note that the extent to which each action may protect privacy is dependent on the context in which the law is applied. In formulating the tort, for example, the New Zealand courts have demonstrated a greater sensitivity to privacy interests than American courts, which have interpreted the First Amendment broadly. Similarly, if breach of confidence is developed to protect privacy in Australia, it will differ from the British action, as Australian courts will not be influenced by the *HRA*. As such, the essential characteristics of each cause of action are difficult to compare. It is more accurate to assess their different emphases in protecting against non-consensual disclosures of personal information.

To determine what information is capable of protection, descriptive and normative tests are applied under both actions. The descriptive requirement under the tort that there be 'private facts' is similar to the descriptive requirement under the equitable action that the information have the 'necessary quality of confidence'. However, a significant difference between the actions is that the gravamen of the privacy tort is a *publication* of personal information, whereas breach of confidence focuses on the initial unauthorised use or *disclosure*. Therefore, the tort is better equipped to protect information that is in the public domain or has been disclosed to a limited audience, but has not been widely publicised.<sup>294</sup> In practice, the American tort has afforded no greater protection to information in the public domain than has breach of confidence in the United Kingdom and Australia. However, New Zealand courts, not constrained by the

<sup>293</sup> Transcript of Proceedings, *Lenah* (High Court of Australia, Kirby J, 2 April 2001) 38.

<sup>294</sup> Wacks, *Privacy and Press Freedom*, above n 42, 56; Wright, above n 38, 182. See also Keeton et al, above n 60, 859; *Bradley* [1993] 1 NZLR 415, 423, discussed in above Part I(A)(2)(b).

First Amendment, have found that whilst the public accessibility of personal information is relevant in determining whether the facts are 'private', its accessibility is not in itself a bar to relief.

The normative requirement that must be satisfied for information to receive protection under the privacy tort is that the facts are so intimate or sensitive that it would be highly offensive to a reasonable person for them to be disclosed. This requirement demonstrates that the tort concentrates on the subject matter of the personal information. In contrast, the equitable action has traditionally concerned any information that is not trivial tittle-tattle, potentially protecting a far broader range of information. This may be attributed to the fact that the action was developed to preserve confidential relationships. Under the traditional approach to breach of confidence, a relationship of trust, rather than the private subject matter of the information, is central to the imposition of a duty.

Similarly, an individual who obtains information through means that would have put a reasonable person on notice that it was confidential would be subject to a constructive relationship of confidence under the improper means approach to the equitable action. A duty may also be imposed on third parties who have notice of the impropriety. In *Lenah*, for example, both the individuals who filmed the slaughtering process and the ABC would have been potentially liable for disclosing the information had it not been publicly accessible. Under this approach, any information that is obtained by improper means and is not trivial tittle-tattle may be protected, presumably if it can be shown that the plaintiff would have imposed confidentiality requirements on the defendant had he or she requested access to the information. This ensures that those who avoid entering express relationships of confidence do not escape liability.

However, under the privacy approach to the equitable action, the basis of liability has changed. As suggested in *Hellewell*, for example, a photograph may potentially amount to a breach of confidence if it was taken of another engaged in 'some private act'.<sup>295</sup> In approving this statement in *Lenah*, Gleeson CJ stipulated that a useful test of what is private is that the disclosure would be highly offensive to a reasonable person,<sup>296</sup> similar to the requirement in *A v B* that the privacy interest be 'obvious'.<sup>297</sup> The significance of these developments cannot be underestimated. Under the privacy approach to breach of confidence, the courts are applying the same or a similar test to that used under the tort to determine whether information is capable of protection. It is the subject matter of the information, rather than the existence of a relationship, that will result in the imposition of an obligation of confidence.

To summarise, a broad range of information that would not satisfy the 'highly offensive' tort test may be protected under the traditional approach to breach of confidence if a relationship existed or the plaintiff conveyed that the information was confidential, based on his or her subjective notions of confidentiality, when communicating with the defendant. If the improper means through which the

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295 [1995] 1 WLR 804, 807 (Laws J). See above Part II(A)(2)(b).

296 *Lenah* (2001) 208 CLR 199, 226, followed in *Campbell* [2003] 2 WLR 80, 95–6. See above Part II(B) and II(A)(2).

297 [2003] QB 195, 206. See above Part II(A)(2)(a).

information was obtained put the defendant on notice that the plaintiff considered it confidential, so that a constructive relationship of confidence exists, the same principle applies. Under the privacy approach to breach of confidence, however, the highly offensive objective test applies, as it does under the privacy tort. As liability is based on the subject matter of the information, a duty may potentially be imposed where no relationship of any kind exists, but only if the information is descriptively confidential and would be highly offensive to disclose.

In more general terms, some similarities between the two causes of action can be discerned. The public interest in disclosure is the most important defence under both actions, protecting freedom of expression. Although its scope varies widely between jurisdictions, this may be primarily attributed to the contexts in which the defence is applied, rather than to inherent differences between the actions. If the privacy approach under breach of confidence is accepted in Australia, the application of the defence in such cases is likely to parallel any defence established under a tort. The implied freedom of political communication is also likely to have an equivalent impact on the two actions.

Further, the damage that must be shown is comparable. An invasion of privacy under the tort is actionable per se, with relief available for emotional distress or humiliation suffered. If disclosure of information in breach of the plaintiff's confidence does not in itself constitute sufficient detriment, evidence of emotional distress is similarly adequate to sustain relief. The most important remedy in privacy cases is usually an injunction, available under both actions. However, a greater diversity of remedies is available under breach of confidence, including delivery up and an account of profits. Damages may be obtained under the privacy tort where a disclosure has already occurred, although equitable compensation may afford plaintiffs with greater relief, as it is not limited in the same way by principles of remoteness of damage and foreseeability.<sup>298</sup>

## **B Reconceptualising the Judicial Protection of Privacy in Australia**

A common argument for developing breach of confidence over establishing a new tort is that it would involve less disruption to established law. A preference for legalism is discernible in some of the judgments in *Lenah*. Justices Gummow and Hayne indicated their preference for incrementally developing existing actions, such as breach of confidence, to protect privacy rather than introducing new generalised doctrine into the law.<sup>299</sup> Chief Justice Gleeson cited the lack of precision of the concept of privacy as a reason for caution in establishing a tort,<sup>300</sup> although he was prepared to ground the equitable action on privacy, using the tort test to determine whether information was 'private'.<sup>301</sup> These legalistic arguments in favour of developing breach of confidence law ignore the 'dramatic doctrinal change[s]'<sup>302</sup> required to protect privacy under this action.

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298 Dal Pont, Chalmers and Maxton, above n 116, 975.

299 *Lenah* (2001) 208 CLR 199, 250. See above Part I(B).

300 *Lenah* (2001) 208 CLR 199, 225–6.

301 Ibid 226.

302 Wilson, above n 173, 43.

The privacy approach transforms the basis of intervention under the equitable action. As discussed above, if breach of confidence were expanded to encompass the privacy approach in Australia, a relationship of confidence would not necessarily be required in personal information cases. The courts should avoid masking the judicial creativity that is required to develop the law in this way through the 'mechanical neutrality of precedent'.<sup>303</sup> If personal information is to be protected in Australia on the basis that the subject matter of the information is private, the more candid and intellectually honest course is to establish an action created for this purpose: the tort of public disclosure of private facts.

Appropriating breach of confidence for a purpose vastly different from its original object would involve conceptual artificiality and distortion. The notion of 'confidence' assumes that an express or constructed relationship existed between the parties, consistent with the traditional and improper means approaches to the action. However, the privacy approach, which does not require a relationship of any kind, 'makes a mockery of the notion of "confidence"'.<sup>304</sup> In Sir Thomas Bingham's words, protecting privacy through the equitable action does 'impermissible violence to the principles upon which that cause of action is founded'.<sup>305</sup> Conversely, the privacy tort was formulated specifically to protect against non-consensual disclosures of private information, regardless of whether a relationship of confidence existed between the parties. Establishing a tort would create a coherent, rather than conceptually artificial, action for invasion of privacy in Australia.

Adopting the privacy approach in Australia would also result in a fundamental inconsistency within the equitable action, with greater protection afforded to personal information than to commercial and government information. Indeed, given that the privacy approach is only applicable in the context of personal information, express or constructed relationships would still be required to protect commercial and government information under breach of confidence law. Chief Justice Gleeson failed to recognise the inapplicability of the privacy approach to commercial information in *Lenah*, suggesting that the 'offensive or objectionable' subject matter test was a useful standard in determining whether *Lenah*'s commercial information could be protected under the equitable action. This test is clearly inapplicable to commercial and government information, the subject matter of which would rarely, if ever, render it highly offensive to a reasonable person of ordinary sensibilities to disclose.

Further, protecting privacy through the equitable action is likely to result in inconsistency in the application of breach of confidence law. In personal information cases, the basis of intervention and scope of protection would be dependent on whether the traditional, improper means or privacy approach was applied. Given that, in many instances, the courts could apply more than one of these approaches on the facts of the case, the law may well develop in an unpredictable manner. The uncertainties surrounding the action are illustrated by

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303 Ibid.

304 Laster, 'Breaches of Confidence and of Privacy by Misuse of Confidential Information', above n 43, 56.

305 Sir Thomas Bingham, 'Should There be a Law to Protect Rights of Personal Privacy?' (1996) 5 *European Human Rights Law Review* 450, 457.

its vastly different interpretations by Gleeson CJ and Kirby and Callinan JJ in *Lenah*, and the Chief Justice's suggestion that the 'offensive or objectionable' test could be applied to all categories of information covered by breach of confidence law. In contrast, the tort simply protects against non-consensual disclosures of personal information. A reconceptualisation of the judicial protection of privacy would ensure that attention was directed to the relevant issues: the publication of private information about an individual and the harm suffered by the plaintiff as a consequence.

Significantly, the tort is also capable of providing more comprehensive privacy protection than the privacy approach under breach of confidence. As previously noted, if personal information in the public domain is so sensitive or intimate that it would be highly offensive for it to be widely published, the tort is better equipped to provide protection, as the tort focuses on publication, rather than the initial unauthorised use or disclosure of information. The widespread publicity requirement allows for recognition of the critical difference between 'the disclosure of a personal fact in a dusty public record ... and a similar disclosure disseminated through the mass technology of the modern press'.<sup>306</sup> The tort is less rigid in its demarcation of what is and what is not 'private', allowing details of past criminal convictions on the public record, for example, to be protected, as in *Tucker*. The tort is the preferable action for protecting privacy, not only on conceptual grounds, but also on substantive grounds.

The substantive benefits of protecting privacy through the tort rather than breach of confidence may be illustrated by examining the recent European Court of Human Rights case of *Peck v United Kingdom*,<sup>307</sup> the facts of which are as follows. The applicant was filmed by a closed circuit television ('CCTV') camera walking along a street at night holding a kitchen knife, with a view to committing suicide. The operator of the system notified the police, who arrived at the scene and took him to a police station. Several weeks later, the local council who operated the CCTV system released two photographs taken from the footage, accompanied by an article on the benefits of CCTV. Two local newspapers also published the photographs. Extracts from the footage were subsequently screened on two television programs and viewed by approximately 10 million people, including friends, family and colleagues of the applicant. After his leave to apply for judicial review was rejected by the High Court of England and Wales, the applicant applied to the European Court, claiming that his privacy had been invaded and that he had no effective domestic remedy under domestic law, so that arts 8 and 13 of the *ECHR* had been breached.

The Court found that the publication of the footage constituted a serious interference with the applicant's privacy,<sup>308</sup> on the basis that the relevant incident was 'viewed to an extent which far exceeded any exposure to a passer-by ... and to a degree surpassing that which the applicant could possibly have foreseen'.<sup>309</sup>

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306 Stanley Ingber, 'Rethinking Intangible Injuries: A Focus on Remedy' (1985) 73 *California Law Review* 772, 848–9 cited in Paton-Simpson, 'Private Circles and Public Squares', above n 97, 327.

307 (2003) 36 Eur Court HR 41, 719.

308 Ibid 719, 739.

309 Ibid.

It also held that breach of confidence would not have provided the applicant with an effective domestic remedy.<sup>310</sup> The Court reasoned that domestic courts would have been unlikely to accept that the images had the necessary quality of confidence or were imparted in circumstances importing an obligation of confidence and that once the material was in the public domain, its republication would not have been actionable.<sup>311</sup>

If the privacy tort existed in the United Kingdom, it is likely that the Court's conclusion as to whether the applicant had an effective domestic remedy would have been different. The fact that the events occurred in a public place would be a relevant but not conclusive factor in determining whether the information was capable of protection. Similarly, the local council's disclosure of two photographs to a limited audience would not prevent subsequent publications from being actionable, given that the tort focuses on widespread publication rather than the initial unauthorised use of the information. If Australian courts do not establish a privacy tort, Australian individuals will have no remedy for privacy invasions of this magnitude.

### C Conclusion

In personal information cases, the Australian action for breach of confidence should be limited to the traditional and improper means approaches. The privacy tort provides a more candid and coherent means through which to protect against privacy invasions through non-consensual disclosures of personal information than does the privacy approach under the equitable action. Attention will be directed to the relevant issues, and the protection afforded to individuals will be more comprehensive, if the courts establish a privacy tort, rather than developing an action ill-suited to protecting privacy. It is time for the judicial protection of privacy to be reconceptualised.

## CONCLUSION

The protection of individual privacy in Australia is currently inadequate. As a consequence of the High Court's decision in *Lenah*, the courts have reached a crossroads in determining the means through which non-consensual disclosures of personal information should be most appropriately regulated. The preferable course is for the courts to establish a new tort of invasion of privacy by the public disclosure of private facts. Due to the similarities between the Australian and New Zealand legal and social contexts and the relatively balanced approach New Zealand courts have taken to the competing interests of privacy and freedom of expression, developments in that jurisdiction would provide a useful guide to Australian courts establishing a tort. However, the principles of an Australian tort

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310 Ibid 719, 752.

311 Ibid 719, 751. Note that the facts of the case preceded the entry into force of the *HRA* and the development of the privacy approach. However, given that the events occurred in the public domain, the European Court would probably have come to the same conclusion in relation to facts occurring today.

must be developed having regard to the Australian context, including the impact of the implied freedom of political communication on privacy protection.

Various justices in *Lenah* suggested that an Australian privacy tort would be based on personal autonomy and human dignity. This analysis is supported by art 17 of the *ICCPR*, to which Australia is a signatory. Establishing a privacy tort predicated on these fundamental human values would recognise the significance of individual privacy, particularly in view of the privacy threats posed by rapidly developing information, communication and surveillance technologies and an increasingly invasive media industry. It would encourage the protection of other privacy interests founded on personal autonomy and dignity, such as the interest in protecting against intrusions upon seclusion. *Lenah* provides an important opportunity to reconceptualise the judicial protection of privacy in Australia. It is an opportunity not to be missed.