

Doe v ABC – A new version of a privacy tort?

Graham Greenleaf, 23 April 2007

[Unpublished case-note]

Media disclosure of the identity of a rape victim in Australia has resulted in a District Court judgment on 3 April 2007 finding (among other things) that Australia has a 'privacy tort' of disclosure of private facts. Damages of \$234,190 (over £100,000) were awarded. Not surprisingly, the case is now on appeal to the Victoria's Court of Appeal. The only previous Australian decision finding a common law right of privacy, *Grosse v Purvis* [2003] QDC 151 in the Queensland District Court, did not result in an appeal. If this case is contested all the way to Australia's High Court, the decision may be a major one for the common law world.

Doe v Australian Broadcasting Corporation & Ors [2007] VCC 281 involved the sentencing hearing of YZ for rapes within marriage of Jane Doe. ABC radio broadcast, in its news bulletins, details including the name of YZ, that the offence was rape, the suburb in which the rapes took place, and in one broadcast the real name of Jane Doe. Many listeners subsequently attempted to contact her and her family. Evidence was given of the substantial and long-lasting psychological damage that this caused to Jane Doe and its consequences. Two ABC journalists subsequently pleaded guilty to breaches of s4(1A) of the *Judicial Proceedings Reports Act 1958* (Vic) which prohibits identification of rape victims. Ms Doe subsequently sued both the journalists and their employer, the broadcaster.

Judge Hempel found four separate heads of liability entitling Ms Doe to compensation: breach of statutory duty; breach of a duty of care to avoid inflicting psychiatric injury through negligent publication; breach of confidence; and negligent unlawful disclosure of private information.

Breach of statutory duty

The breach of the statutory duty imposed on the three defendants by s4(1A) was held by Hempel J to give rise to a private right of action by Ms Doe. The presumption in favour of a statutory duty giving rise to a private right to sue for damages (*Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397) was not displaced by the criminal sanctions imposed by the section because, in Hempel J's view, Doe's injuries were 'of a kind against which the statute was designed to afford protection' (*Byrne v Australian Airlines* (1995) 185 CLR 410).

The 'nervous shock' duty

Hempel J held that the Australian law on the duty of care to avoid psychiatric harm requires 'simply a relationship between the parties of such a nature that it is reasonable to require a defendant to have in contemplation the kind of injury to a plaintiff that he or she in fact suffered, if the defendant acts without reasonable care'. The court held the relationship here was not merely that between a broadcaster and the listening public but instead 'one between persons under an obligation not to publish information identifying a victim of a sexual assault, and a victim entitled to the protection from publication of identifying information' provided by s4(1A). It held that 'it is reasonable ... to contemplate that ... psychiatric injury, could result from publication of information identifying a victim published in breach of s4(1A) in ABC news bulletins'.

Breach of confidence

Australian law has not yet adopted the extended version of the breach of confidence action established by such UK decisions as *Campbell v MGN Ltd* [2004] 2 AC 457. Hempel J took the view that many of the statements in the UK cases are 'as apposite to the development of the law here as they are in the UK', and that in *ABC v Lenah Game Meats* (2001) 208 CLR 199 Gleeson CJ signalled that Australian courts might take a similar approach when referring to 'circumstances reflecting an obligation of confidence' rather than pre-existing relationships of confidence. Hempel J considers that she is applying Gleeson CJ's approach in finding a breach of an obligation of confidence to Ms Doe by the ABC's disclosure of 'information capable of being characterised as information which the person to whom it relates has a reasonable expectation would remain private.' Alternatively she considers that 'this information in any event fits into the category of 'easy to identify as private', to use the first part of Gleeson CJ's formulation in *Lenah Game Meats*'.

These applications of Gleeson CJ's *obiter dicta* in *ABC v Lenah* may be upheld on appeal, but at this stage they constitute a new departure in Australian law unsupported by decisions of any higher courts.

The 'privacy tort'

Finally, and probably of greatest interest, Hempel J accepts the plaintiff's argument that in *ABC v Lenah* 'the High Court left open the development, in appropriate cases, of a tort of privacy, rejecting the long held view that *Victoria Park Racing and Recreation Ground Co Ltd v Taylor* (1937) 58 CLR 479 stood in the path of [its] development'. In 'respond[ing], although cautiously, to the invitation held out by the High Court in *Lenah Game Meats*' she says:

'I do not consider it is appropriate for me to attempt to formulate an exhaustive definition of privacy. It has rightly been described as an imprecise concept. In accepting the invitation, I am doing no more than taking the next, incremental step in the development of the recognition of the right to protection against, or provide remedy for, breach of privacy by seeking to identify the principle applicable to the facts of this case.'

The 'incremental step' toward a privacy tort is Hempel J's decision that:

'The wrong that was done here was the publication of personal information, in circumstances where there was no public interest in publishing it, and where there was a prohibition on its publication. In publishing the information the defendants failed to exercise the care which could be reasonably required of them to protect the plaintiff's privacy and comply with the prohibition on publication imposed by s4(1A).'

Her Honour elaborated on the type of conduct required for this fourth breach: 'This, coupled with the absence of public interest, the clearly private nature of the information, and the prohibition on publication, all point to the publication being unjustified. In my view, a formulation of unjustified, rather than wilful, in these circumstances provides a fair balance between freedom of speech and the protection of privacy.'

She elaborated further on the nature of the 'personal information' required: 'For the reasons I have already canvassed when considering breach of confidence, the information is personal or confidential information which the plaintiff had a reasonable expectation

would remain private, and clearly private. Its disclosure was plainly something which an individual was entitled to decide for herself.’

This is a very narrowly defined tort of unjustified disclosure of private facts. It can be summed up as the negligent disclosure of personal information the publication of which is prohibited, subject to a public interest defence.

But wait, there’s more...

Few first instance decisions cover as broad a range of principles as *Doe v ABC*. This note only covers aspects of the four heads of liability found by the Court. But there is a lot more, including on the important question of the relationship between defamation actions and other actions concerning communication of information, where it was held that defamations actions do not monopolise that field, and much on the measure(s) of damages that are appropriate.

The decision is available from <<http://www.countycourt.vic.gov.au/>>.