THE LAW SOCIETY OF NEW SOUTH WALES
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Communications, Entertainment & Technology Law Committee

Inquiry into remedies for the serious invasion of privacy in New South Wales

Questions on Notice taken during the hearing on 30 October 2015

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Mr CHOW: We do make a reference to C v Holland, a recent New Zealand case that actually addresses some of those issues. I am not specifically familiar with those but I am aware that the submission talks to those particular elements, one of them being infringing a reasonable expectation of privacy. If we were to look closely at the way in which it was addressed in the New Zealand case it would give some background to that particular element.

The Hon. LYNDA VOLTZ: How does that cover the example of someone who has given consent for a photo at some point and then years later someone reproduces it?

Consent and 'reasonable expectation of privacy'

While the Committee has expanded on the findings in *C v Holland* [2012] NZHC 2155, that is not a case in which the plaintiff had given consent to the defendant watching her in the shower or taking video clips ([1] and [99]), and consent was not discussed, nor was the *"example of someone who has given consent for a photo at some point and then years later someone reproduces it"*.

In DP80, the ALRC recommended that the question of whether the plaintiff consented to the conduct of the defendant should be one of a number of factors that the court considers in determining whether a person in the position of the plaintiff would have had a reasonable expectation of privacy in all the circumstances, and this consideration should be provided for in an Act (Proposal 6-2).

In the example proposed by Ms Voltz and Mr Shoebridge, whether or not the plaintiff consented to photos being taken in a private / intimate setting is a matter of fact. Consent may be express or implied, and may be revoked expressly or impliedly. A critical factor is the extent or degree of the consent given in all the circumstances. For instance, a person may consent to photos being taken and kept by his or her partner, but not anybody else.

The Committee agrees that 'consent' (and the extent of such consent) should merely be one factor the court should consider in determining whether there was a 'reasonable expectation of privacy'. The means used to intrude upon seclusion may also be relevant to whether or not there is a reasonable expectation of privacy.

The Committee also agrees with the ALRC's concerns with attempting to specify particular examples of invasion of privacy in an Act (as set out in DP80). The ALRC express their concerns as follows:

> *"5.51 Some stakeholders suggested that more specific examples of invasion of privacy might be included in the Act. For example, Electronic Frontiers Australia submitted that there should be examples for data breaches, aggregated collections of data, and 'posting of photographs, audio-recordings, and video-recordings of personal spaces, activities, and bodies for which consent to post has not been expressly provided by the participant'. [Electronic Frontiers Australia, Submission 44]*
>
> *5.52 However, the ALRC considers that the application of the tort to more specific and particular circumstances is best left to the courts to consider on a case by case basis, but within the confines of the two categories specified [intrusion upon seclusion and misuse or disclosure of private information]. Specific examples may provide additional guidance, but they also carry a greater risk of distracting the court from the consideration of the distinct facts and circumstances of a particular case."*

The Committee agrees with the ALRC's proposal that 'a reasonable expectation of privacy' should be an objective test and the court should consider whether it would be reasonable for a person in the position of the plaintiff to have expected privacy. The subjective expectation of the plaintiff may be relevant, but it is not the focus of the test, nor an essential element that must be satisfied ([6.10] of DP80).

C v Holland and 'reasonable expectation to privacy'

A tort of intrusion upon seclusion was recognised in *C v Holland*,[1] a New Zealand case that concerned a man who surreptitiously installed a recording device in a bathroom, which recorded his female flatmate showering. Whata J held that this invasion of privacy was actionable as a tort even though the defendant had not publicised the recording (*Holland* at [93]). He drew guidance from the decision of the Ontario Court of Appeal in *Jones v Tsige*,[2] which also recognised the tort of intrusion upon seclusion. In that case the defendant, who was in a relationship with the claimant's former husband, used her workplace computer to gain access to the claimant's banking records. Similarly, there was no publication.

Ultimately, Whata J found Mr Holland had intruded into C's intimate personal space and activity; the intrusion infringed a reasonable expectation of privacy and was highly offensive to the reasonable person ([99]). He found that it was appropriate for the common law to establish a tort consistent with the American tort of intrusion upon seclusion and existing authorities. Whata J stated at [94]:

> *"[I]n order to establish a claim based on the tort of intrusion upon seclusion a plaintiff must show:*
>
> *(a) An intentional and unauthorised intrusion;*
>
> *(b) Into seclusion (namely intimate personal activity, space or affairs);*
>
> *(c) Involving infringement of a reasonable expectation of privacy;*
>
> *(d) That is highly offensive to a reasonable person."*

At [96], Whata J explained that the last two elements replicate the Hosking requirements[3] and that the boundaries of the privacy tort of wrongful publication of private facts articulated in Hosking[4] apply where relevant.

In *Hosking*, the NZ Court of Appeal reasoned that the fundamental ingredient of the tort was that a plaintiff must show a reasonable expectation of privacy in respect of information or material which the defendant has published or wishes to publish (*Holland* at [41]). The reasonable expectation of privacy arises when publication of private material would cause substantial offence to a reasonable person (*Hosking* at [256]).

Whata J reviewed the American tort of intrusion upon seclusion (see for example *Holland* at [17]):

> *"A plaintiff must establish a reasonable expectation of privacy in the matter. This has involved a two-prong test. There must be a subjective expectation of solitude or seclusion, and for this expectation to be objectively reasonable.[5] As stated in Shulman v Group W Productions, Inc:*[6]
>
> > *The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source."*

The Committee endorses this approach.

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[1] *C v Holland* [2012] 3 NZLR 672 (24 August 2012).
[2] *Jones v Tsige* (2012) 108 OR (3rd) 241.
[3] *Hosking v Runting* [2005] 1 NZLR 1 (Court of Appeal).
[4] Ibid.
[5] *Jones v Tsige* (2012) 108 OR (3rd) 241 at [59]; *Katz v United States* 389 US 347 (1967) at 361.
[6] *Shulman v Group W Productions, Inc* 955 P 2d 469 (Cal 1998) at 490.

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Mr DAVID SHOEBRIDGE: If you were being humiliated in that way, through somebody abusing an image of your spouse or child, you would have your own independent cause of action in those circumstances, arguably.

Ms CURRY: Arguably.

The Hon. LYNDA VOLTZ: Wouldn't consent then become an issue? Fundamental to the offence would be that you did not have consent.

Mr DAVID SHOEBRIDGE: What about the circumstance where you are being humiliated and the intent is to cause harm to person A by distributing humiliating images of their partner. Should the cause of action extent to that?

The Hon. LYNDA VOLTZ: You could take that question on notice; you do not have to answer it here and now.

Ms CURRY: That would be best taken on notice. It is an interesting area.

In light of our position that a statutory cause of action should be confined to breaches of privacy of natural and living persons, which endorses the recommendation of the 2014 ALRC Inquiry, we submit that the action should not extend to being actionable by a third party. Privacy is personal; an individual's right to privacy should not be able to be claimed by another. For example, a plaintiff's partner should not have a separate cause of action for damages for emotional harm they have suffered as a result of a serious invasion of the plaintiff's privacy. Of course, if the serious invasion of a person's partner's privacy also results in a serious invasion of that person's privacy, he or she would have a separate cause of action against the defendant.

This is consistent with a cause of action for defamation, where the action can only be brought by the person who has had their reputation defamed. Similarly, the action for serious invasion of privacy should be brought only by the person who has had their privacy invaded.

This is a separate issue from representative actions. The Committee submits that the statutory cause of action should not prevent an action to be brought on behalf of a plaintiff who is unable to commence proceedings on their own behalf.

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CHAIR: Another issue, which has come up in other submissions, is in relation to surveillance cameras and accidental recording, in particular with security cameras on a person's home. They could be motion sensor activated and could accidentally film neighbours. Another issue is the use of drones. Do you have any comments to make in relation to those issues and the privacy laws surrounding that?

Indeed, advances in technology, and a reduction in the price of these new surveillance technologies, have allowed these issues to become part of everyday life. Drones are becoming cheaper and the cameras and sensors available for purchase are continually improving their quality and sensitivity. It can be common for our neighbours to have security or surveillance cameras on their homes, or for a small drone to be seen in our local park. The Standing Committee on Social Policy and Legal Affairs tabled a useful report to the Australian Parliament on 14 July 2014 titled 'The Eyes in the Sky'.

Chapter 4 is headed 'Drones and privacy' and makes useful recommendations that the Legislative Council may like to consider. The Standing Committee on Social Policy and Legal Affairs are also concerned that, *"The capacity of RPAs [drones] to enter private property, to travel unnoticed, and to record images and sounds which can be streamed live create significant opportunities for privacy breaches."*[7]

In any privacy reform such as this, the Committee suggests that it is critical to address the issue of privacy without focussing on specific technologies. Again, this is reflected in the Committee's submission that 'a reasonable expectation of privacy' should be an objective test and the court should consider whether it would be reasonable for a person to have expected privacy in all the circumstances.

The Committee submits that state and federal laws covering this area should be harmonised in respect of listening devices, optical surveillance devices, data surveillance devises and tracing devices. Amendments to already existing legislation can then support the operation of any new tort.

Another interesting point to consider is whether there needs to be more education provided at the point of sale for these surveillance technologies. The 'Eyes in the Sky' report recommends that the Australian Government, through the Civil Aviation Safety Authority, include information on Australia's privacy laws with the safety pamphlet that is currently distributed to vendors of remotely piloted aircraft. It suggests that the pamphlet should highlight users' responsibility not to monitor, record or disclose an individual's private activities without their consent. Further, any regulatory body responsible for overseeing the activities of this industry may wish to adopt a tactic taken by the entertainment industry in their fight against copyright infringement and include 'privacy notices' every time an individual powers on their device (in circumstances where a screen is used). This would mirror the 'copyright notices' that appear at the start of a DVD or digital download of a movie. The effect of such a requirement would be that privacy considerations would be at the forefront of a user's mind every time they operate their device.

The 'Eyes in the Sky' report also adopts the position that the government should implement the ALRC's proposal for the introduction of a tort of serious invasion of privacy. This sits comfortably within the Committee's own submission to the Legislative Council and aligns with many of the statements already given by witnesses in this inquiry.

[7] 'Report: Eyes in the sky' *Inquiry into drones and the regulation of air safety and* privacy House of Representatives Standing Committee on Social Policy and Legal Affairs (14 July 2014); p 34

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Mr DAVID SHOEBRIDGE: One of the primary concerns that I personally have, and I think it is shared by a number of people, is that we do not come up with a remedy that becomes the exclusive domain of the wealthy—we do not want to only come up with rights that can only be vindicated by wealthy and powerful individuals. Your submission pretty much adopts the Australian Law reform commission submission which talks about courts being the primary place where these rights are vindicated. We all know from experience that that is often a hideously expensive process and it excludes most ordinary Australians. What about a non-court remedy—either in a statutory tribunal or by giving the Privacy Commissioner certain remedies and powers. How do you feel about that?

…

Mr DAVID SHOEBRIDGE: What are the views of the NSW Young Lawyers about having a tribunal apart from a court, increasing the powers of the Privacy Commissioner and, finally, of the women's legal service solution of giving additional powers to the local court when domestic violence orders are being sought?

As the Legislative Council is aware, the Committee is made up of members from a cross-section of NSW Young Lawyers who generally practice or have interests within the areas of communications, entertainment and technology law. The Committee members have differing views on alternatives to courts being the primary place where serious invasions of privacy rights are vindicated.

The one theme that appears consistent throughout the majority of the Committee's members is that the introduction of laws protecting against serious invasions of privacy is overdue, and the Committee is of the view that the implementation of the Bill put forward by the ALRC should be a priority. The reasons for this position are documented on pages 41 and 42 of the transcript of the Committee's evidence hearing at 10:15am on 30 October 2015, together with our earlier written submission. Accordingly, the Committee's position is that any delays in implementing such laws reflecting our position previously submitted to the Legislative Council should be avoided.

The only other comment we can add on behalf of the Committee in response to this question is that the introduction of a tribunal and/or delegation of certain powers relating to enforcement of such laws could be of significant benefit moving forward, if the correct balance of delegation of power and duties is achieved and the law reflects well-defined parameters for decision making. However, the Committee anticipates that finding that balance, at this stage, could cause delays.

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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Supplementary Questions on Notice - hearing on 30 October 2015

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Question for all witnesses:

If the committee were to recommend a statutory cause of action for serious invasions of privacy, one option might be to recommend that a fault element encompassing negligence (as well as intent and recklessness) apply to corporations; while recommending a more limited fault element (intent and recklessness only) that would apply to natural persons.

Do you have any concerns or comments in regards to this?

The Committee is of the view that a wider fault element in a statutory cause of action for serious invasions of privacy against corporations may be appropriate. A major factor in considering such a wider fault element would be that corporations are more likely to have the resources to access more sophisticated equipment and technology to collect and maintain private material, and a breach could therefore have broader consequences, so implementing additional safeguards and/or processes to avoid a negligent invasion of privacy would be relatively less burdensome on the corporation (compared with an individual). With that increased capacity to implement safeguards and/or processes, should potentially come a higher level of responsibility.

It is also arguable that the consequences of a negligent breach of privacy by a corporation could be more serious and/or widespread than that of an individual: compare, for example, a negligent breach by a news corporation, with circulation to millions, to that of an individual on Facebook with 300 friends.

While the Committee generally remains of the view that the element of negligence should not extend to natural persons, if the Legislative Committee is inclined to recommend that a fault element encompassing negligence should apply, then the Committee sees merit in the argument that such a fault element encompassing negligence apply to breaches of privacy by persons 'in trade or commerce', rather than merely corporations.

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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