Litigating privacy cases in the wake of *Giller v Procopets*

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Recently the Victorian Supreme Court of Appeal in ***Giller v Procopets****, in lowering the damages threshold for breach of confidence, paved the way for this equitable cause of action to respond to invasions of privacy arising from the non-consensual disclosure of personal information. This paper explores the right of privacy in Australian law, demonstrating that breach of confidence can now be used to protect privacy interests, and provides a foundation that is arguably far greater than the protection offered in privacy tort countries, such as New Zealand. The Court of Appeal's decision in* ***Giller*** *represents solid groundwork for the protection of individual privacy. Australian courts, in the absence of a statutory cause of action, now face the challenge of balancing the competing interests of individual privacy against the public interest in allowing freedom of expression.*

Thousands of column inches and hours of air time have recently been devoted to the story of Lara Bingle and *that* photo — a private moment, seemingly captured without her consent and distributed, ultimately, into the mainstream media. Legal opinion has been sought, expressed and published on the issue of whether Lara Bingle has a cause of action to seek damages for a breach of privacy. Much of the legal commentary has been in the negative — that Lara is out of luck — as there is no right of privacy or tort of privacy in Australia.

Although correct, insofar as no right of privacy exists in the Australian jurisdiction, this narrow opinion overlooks the recent Victorian Supreme Court of Appeal decision in *Giller v Procopets*,[1] which gave breach of confidence the teeth to respond to invasions of privacy arising from the non-consensual disclosure of personal information. As a result, I suggest that Lara is not out of luck at all. On the contrary, Australian law is on her side, and is now more closely aligned with the body of privacy jurisprudence from the United Kingdom.

The equitable cause of action, breach of confidence, is now a powerful weapon in the protection of privacy. In lowering the damages threshold for breach of confidence, *Giller* paved the way for proceedings to be confidently commenced, not only to restrain publication of private information, but also to seek damages when such information is published. Tabloid media — be alert! Be alarmed!

On 23 September 2009, the High Court of Australia dismissed a special leave application brought by Boris Procopets in the matter of *Procopets v*

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1 (2008) 40 Fam LR 378; 79 IPR 489; [2008] VSCA 236; BC200810874 (*Giller*).

Giller,[2] refusing to review the decision in *Giller*[3] and bringing an end to a long, and at times torturous, case that dealt with events occurring in 1996.[4]

The facts in *Giller*

Ms Giller had lived in a de facto relationship with Mr Procopets, in a home which he owned. The couple had twin sons. Giller had a daughter from a previous marriage. The trial judge found that Procopets assaulted Giller five times, on one occasion in front of her daughter. The couple eventually separated, but their sexual relationship continued. Procopets surreptitiously videotaped their sexual activities on a hidden camera. For a time, Giller was unaware of this, but, as their relationship deteriorated, Procopets threatened to show the video to Giller's family and friends. He took a videotape to her parents' house and left it with her brother, though her family refused to look at it. He showed Giller's mother photographs, taken from the videotape, of Giller engaged in sexually intimate activity. He attempted to show the video to a couple who were Giller's friends, and took a VCR to the home of the elderly mother of another friend in order to show the videotape to her. He told Giller's employer that he had a video of her engaged in sexual activity with a client.

The trial before Gillard J

In 1999, Giller commenced proceedings in the Supreme Court of Victoria, pleading three alternative causes of action arising from the distribution of the videotape:[5] breach of confidence; invasion of privacy; and intentional infliction of emotional distress.

After a trial that lasted 26 days, Gillard J ruled that: Giller did not suffer a clinically significant anxiety disorder, but suffered from merely annoyance and distress;[6] although satisfied that there had been a clear breach of confidence,[7] the law did not permit a plaintiff to recover general damages for distress type injuries for breach of confidence;[8] Giller was not entitled to damages for breach of confidence, as s 38 of the Supreme Court Act 1986 does

2 The author appeared for *Procopets v Giller* [2009] HCASL 187. The application for special leave was dismissed on the ground that it raised no question of law on which an appeal could enjoy any real prospect of success.

3 Dismissed on the ground that the application for special leave raised no question of law on which, if special leave were granted, an appeal could enjoy any real prospect of success.

4 On 10 December 2008, the Victorian Court of Appeal gave judgment in the case of *Giller*. It had taken 16 months for the court to reach its decision, the appeal having been heard on 27 and 28 August 2007. It had taken 3 years and 4 months for the case to reach the Court of Appeal, the appeal being from the decision of Gillard J, which was handed down on 7 April 2004, after a 26-day trial. The case arose from events that had occurred at the end of 1996; it had taken 7½ years to come to trial.

5 Claiming compensatory, aggravated and exemplary damages. She also sought an adjustment of their property interests and damages for assault. I will not deal with this aspect of the case in this article.

6 *Giller v Procopets* [2004] VSC 113; BC200402552 at [280].

7 Ibid, at [276]. Gillard J found that the plaintiff established that the relationship was a confidential one and that she did not authorise the defendant to distribute the video or show it, and that the defendant's unauthorised distribution was a breach of that confidence.

8 Ibid, at [275].

not apply because she had failed to claim an injunction;[9] the law in Australia has not developed to the point where it recognises an action for breach of privacy;[10] and, although the plaintiff 'established the elements of the tort of intentionally inflicting mental harm', the harm was annoyance and distress only,[11] and the law does not permit recovery of damages for distress in a claim for intentionally causing mental harm.[12]

In summary, although the trial judge found that there had been a breach of confidence and that the conduct of Procopets had been reprehensible in the extreme, Alla Giller had slipped through the cracks.

The appeal

The privacy issues raised by the appeal were:

(a) Whether Australian law recognised a tort of invasion of privacy. The Court of Appeal did not take the opportunity to consider the development of a tort of unjustified invasion of privacy, instead finding that it was unnecessary for the purposes of the appeal before it to consider whether a generalised tort of invasion of privacy should be recognised.[13]

(b) Whether Giller had suffered only distress or a recognised psychiatric illness. The Court of Appeal unanimously refused to overturn the trial judge's finding that Giller had suffered only emotional distress. This resulted in the court needing to decide the damages issues relating to breach of confidence and intentional infliction of harm.

(c) Whether intentional infliction of harm would sound in damages for distress only.[14] The court was split on whether the tort of intentional infliction of harm would respond in damages for emotional distress, with Maxwell P deciding it would,[15] Ashley JA deciding it would not, and Neave JA deciding that it was unnecessary to decide the issue.[16]

(d) The breach of confidence issues:

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9 Ibid, at [163]–[166].

10 Ibid, at [188]. See also [265], where Gillard J said: 'A cause of action based on privacy is not available in Australian law at present.'

11 Ibid, at [275].

12 Ibid, at [277].

13 *Giller*, above n 1, at [167]–[168] and [447] per Ashley JA, with which Maxwell P agreed at [1]. In doing so, they took the same approach taken by the High Court in *Lenah Game Meats*, below n 29.

14 Intentional infliction of harm was only argued in this case due to the calculated manner in which Procopets undertook what the court found was his intention to cause Giller harm and distress. Given that *intention* to cause harm is an essential element, it would only be in such extreme cases as *Giller* that intentional infliction of harm could be seen as a cause of action to protect privacy. For the most part, intentional infliction of harm is rarely an applicable cause of action in privacy cases, particularly those involving the media.

15 *Giller*, above n 1, at [2], accepting what Lord Hoffman said in his speech in *Wainright v Home Office* [2004] 2 AC 406; [2003] 4 All ER 969; [2003] 3 WLR 1137; [2003] UKHL 53 (see *Giller* at [24] and [31]–[38] per Maxwell P).

16 *Giller*, above n 1, at [471].

(i) whether Giller was entitled to compensation under s 38 of the Supreme Court Act although she had not sought an injunction; the court unanimously finding that she was so entitled;[17] and
(ii) whether equitable compensation/damages was available for a breach of confidence that caused distress only.

Breach of confidence — compensation for distress?

It was argued before the Court of Appeal that since the case of *Cornelius v De Taranto* in 2001,[18] UK courts had routinely accepted that they were entitled to award damages for injury to feelings or distress caused by breach of confidence. Further, that the Court of Appeal decision in *Douglas v Hello! Ltd (No 2)*[19] and the House of Lords decision in *Campbell v Mirror Group Newspapers Ltd*[20] had confirmed this entitlement to damages for breach of confidence. It was also argued that it did not matter that the UK cases dealt with the European Convention or the UK Data Protection Act 1998.

The significance of *Giller* is that the Court of Appeal accepted these arguments, holding that Giller was entitled to compensation for the mental distress and embarrassment caused by the publication of the videotapes. This aspect of the case was critical to the development of privacy law in Australia. Most breaches of privacy do not result in the victim suffering 'recognised psychological disorders', and it was only through the lowering of the damages threshold that breach of confidence has become the action capable of protecting an individual's privacy. Neave JA wrote the leading judgment in *Giller* on this aspect of the case.

It is important to note that the *Giller* appeal was argued before the recent UK decisions dealing with breach of confidence in a privacy setting, including *Murray v Big Picture (UK) Ltd*[21] and *Mosley v News Group Newspapers Ltd*,[22] so these recent cases did not form part of the argument or the judgment.[23]

In the judgment, Neave JA said:

> It must be acknowledged that in *Campbell v Mirror Group Newspapers Ltd*, and again in *Douglas v Hello! Ltd*, the Court of Appeal and the House of Lords were

17 Ibid, at [403]–[405] per Neave AJ, at [134] per Ashley JA; at [1] per Maxwell P. In doing so, the court adopted the approach in *Talbot v General Television Corporation Pty Ltd* [1980] VR 224; [1981] RPC 1.

18 [2001] All ER (D) 227 (Oct); (2001) 68 BMLR 62; [2002] EMLR 112; [2001] EWCA Civ 1511 (*Cornelius*). See [66], [67] and [69]: 'In the present case, in my judgment, recovery of damages for mental distress caused by breach of confidence, where no other substantial remedy is available, would not **[Q: be?]** inimical to "considerations of policy" but indeed to refuse such recovery would illustrate that something was wrong with the law.'

19 [2006] QB 125; (2005) 65 IPR 449; [2005] 4 All ER 128; [2005] 3 WLR 881 (*Douglas*).

20 [2004] 2 AC 457; [2004] 2 All ER 995; [2004] 2 WLR 1232; [2004] UKHL 22 (*Campbell*).

21 (2008) EWCA Civ 446.

22 [2008] All ER (D) 322 (Jul); [2008] EWHC 1777 (B); [2008] NLJR 1112; [2008] EMLR 679 (QB).

23 Although these recent UK cases talk in terms of a 'reasonable expectation of privacy', moving away from the Gleeson CJ test in *Lenah Game Meats*, below n 29, that 'a person of ordinary sensibilities would find publication highly offensive or objectionable', the actions are still in breach of confidence and follow the *Cornelius* line by awarding damages for distress.

> primarily concerned with the balance to be struck between the competing human rights recognised by the European Convention — the right to privacy under Article 10 and the right to freedom of expression under Article 8. In my view, however, that circumstance in no way weakens the force of these decisions of high authority in endorsing the proposition that, if a breach of confidence is shown to have occurred, damages (or more correctly an order for equitable compensation or damages in lieu of an injunction) can be awarded for distress falling short of psychiatric injury caused by that breach of confidence. I point out that in *Campbell v Mirror Group Newspapers Ltd* the damages award affirmed by the House of Lords was based solely on the plaintiff's claim for breach of confidence.[24]

Ashley AJ said that although common law has, by and large, set its face against awards of damages for mental distress, that does not mean that equity must do so. The judge expressed five reasons why equitable damages ought not be available for mental distress in a case like the one before the court:

> First, equity is here dealing not with some careless act, but with intentional conduct in defiance of a good faith obligation of confidence.
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> Second, an anticipated breach would surely have attracted injunctive relief. On any balance of convenience test, the appellant must have succeeded. It would have been readily within contemplation that breach would lead to the appellant suffering at least distress and embarrassment. The breach having occurred, I think it would be anomalous if — predictable distress and embarrassment having occurred — it was now held that no compensation for the same was available.
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> Third, it is a variant of the second consideration, it would be odd if breach of an equitable obligation could attract no remedy when anticipated breach would do so.
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> Fourth, for historic reasons — associated with 'floodgates' arguments, perceived difficulties of proof, and concern (sensible or otherwise) about the ability of civil juries to separate the real from the fictitious — the common law, as I said a little earlier, has generally shied away from permitting damages for distress. But equity, starting with a clean slate, has no reason to do so.
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> Fifth, one area of actions at law in which damages for distress are available is in proceedings for defamation. Defamation impacts upon the victim's reputation, and so may understandably give rise to distress. It seems to me that there is a considerable similarity between such a case and a case like the present — in which the victim's reputation is damaged, and distress ensues, by reason of material disclosed in breach of confidence — such material being prima facie defamatory. Those circumstances suggests to me that, following its own course, equity would recognise predictable mental distress as proper for an award of equitable damages.[25]

Although the court refused to award exemplary damages, citing *Harris v Digital Pulse Pty Ltd*,[26] and ultimately noting that Procopets had already been punished by the criminal law,[27] the court did award aggravated damages, being satisfied that Procopets had breached his duty of confidence with the deliberate purpose of humiliating, embarrassing and distressing Giller.

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24 *Giller*, above n 1, at [418]. Baroness Hale said that it was agreed that the Data Protection Act 1998 added nothing to the action for breach of confidence: see *Campbell*, above n 20, at [130]. See also [86] and [125] per Lord Hope; and [162] per Lord Carswell.

25 *Giller*, above n 1, at [149]–[153].

26 (2003) 56 NSWLR 298; 197 ALR 626; [2003] NSWCA 10; BC200300149.

27 *Giller*, above n 1, at [435]–[437] per Neave JA; at [157] per Ashley JA (following *Harris*).

The court (by majority) awarded Giller damages of $40,000 for breach of confidence, including $10,000 aggravated damages as compensation for her humiliation and distress.[28] The court (also by majority) dismissed Giller's separate claim for the intentional infliction of mental harm by Procopets, and because the award of damages in this case was based on breach of the confidential relationship between sexual partners, the court did not have to decide whether Australian law recognises a stand-alone right to recover damages for breach of privacy.

Why breach of confidence is now enough to protect privacy interests

To appreciate where *Giller* fits in the privacy puzzle, and why I said earlier that the tabloid press needs to be cautious, one must view *Giller* in conjunction with dicta from Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.[29]

In *Lenah Game Meats*, Gleeson CJ proposed a test to determine what information can be regarded as confidential even in situations where it has not been obtained in circumstances of trust and confidence; that is to say, obtained improperly or surreptitiously. The judge said: 'The nature of the information must be such that it is capable of being regarded as confidential. A photographic image, illegally or improperly or surreptitiously obtained, where what is depicted is private, may constitute confidential information.'[30] The duty of confidence, he continued, would extend not only to persons who obtained or took them but also upon those into whose possession they came, *if they knew, or ought to have known, the manner in which they were obtained*.[31] Critically, Gleeson CJ proposed the test for what may be considered private information; a test that was adopted in the early UK cases of *Campbell* and *Douglas*.[32] The judge said:

> There is no bright line which can be drawn between what is private and what is not. Use of the term 'public' is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary

28 Ashley JA would have awarded $20,000 for the breach of confidence and $7500 for aggravated damages.

29 (2001) 208 CLR 199; 185 ALR 1; [2001] HCA 63; BC200107043 (*Lenah Game Meats*).

30 Ibid, at [34].

31 Ibid, at [39].

32 The Gleeson test has been rejected in subsequent cases, including *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446 at [52] per Clarke MR, Laws and Thomas LJ, and a new test of 'reasonable expectation of privacy' has been introduced, which is to be balanced against the Art 10 right of Freedom of Expression: see *Mosley v News Group Ltd* [2008] All ER (D) 322 (Jul); [2008] EWHC 1777 (B); [2008] NLJR 1112; [2008] EMLR 679 per Eadie J.

standards of morals and behaviour, would understand to be meant to be unobserved. *The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.*[33]

Therefore, it can be seen that on the current state of Australian law, even if a relationship of trust does not exist, there may be an actionable breach of confidence if:

(a) a photographic image (or other information) has been illegally or improperly or surreptitiously obtained and where what is depicted (or contained) is private;
(b) information may be considered private if its disclosure would be highly offensive to a reasonable person of ordinary sensibilities;
(c) a duty of confidence would extend not only to persons who took the images (or obtained the information) but also to persons into whose possession they came, if they knew, or ought to have known, the manner in which they were obtained; and
(d) as a result of *Giller*, the dissemination of those images (or information) causes distress to the claimant.

Conclusion

In an environment where the protection of privacy is on the political and legislative agenda,[34] an action for breach of confidence can now be commenced, not only to restrain publication of personal information, but also to seek damages when such information is published and causes distress.

Advocates of a tort of privacy may have been disappointed with the Court of Appeal's refusal to explore what had been described as the 'emerging tort of privacy', especially given that the High Court's refusal to grant special leave may well have sounded the death knell for a privacy tort. However, the Court of Appeal's decision in *Giller* has, in my opinion, provided a foundation for the protection of an individual's privacy that is arguably far greater than that offered in privacy tort countries like New Zealand, which would not have afforded Naomi Campbell a remedy given that the photograph of her leaving Narcotics Anonymous was taken on a public street.[35]

What remains for the courts to decide is, in the absence of a statutory cause of action, how equity will balance the competing interests of maintaining an individual's privacy against interests of the public to be informed about matters of public concern and the public interest in allowing freedom of expression.

Watch this space!

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33 *Lenah Game Meats*, above n 29, at [42] (emphasis added).

34 See NSWLRC recommendations for a statutory cause of action for invasion of privacy: NSW Law Reform Commission, *Invasion of Privacy*, Report No 120, 2009.

35 Critical to that case was that the photograph could be seen as information on Campbell's health and medical condition.