Privacy Law
Bulletin

The ultimate balancing test — privacy v freedom of expression

Michael Rivette CHANCERY CHAMBERS MELBOURNE[1]

Takeaways

- Privacy and Freedom of expression are competing public interests.
- Neither public interest has precedence over the other.
- Not all expression is equal, just as not all privacy interests are worthy of the same protection.
- Although English law has developed under the spectre of the obligations imposed under the *European Convention of Human Rights* much can be gained from understanding how the UK courts have approached the development of what has been described as the "ultimate balancing test".
- In predicting how Australian courts will approach the balancing exercise, privacy professionals should be aware of the foundation set by the House of Lords in *Campbell v MGN Ltd.*

Background

At the time of writing, the Commonwealth Attorney General has made no comment on the Australian Law Reform Commission's final report on *Serious Invasions of Privacy in the Digital Era (ALRC Report)*. It therefore seems unlikely that the federal government will, at least in the short term, enact a statutory civil cause of action for serious invasions of privacy.

If this is correct, then the law relating to privacy will continue to be developed incrementally through the superior courts of Australia. Although the balance between privacy interests and freedom of speech has yet to be argued in any superior court where the matter has proceeded to judgment,[2] it is inevitable that it will be, with the resulting case law providing an important piece in the development of privacy law in this country.

To predict the process Australian courts will adopt requires an understanding of the following three matters:

- the nature of the competing public interests;
- Australia's international obligations; and
- the UK jurisprudence on the nature of the balancing exercise between the two interests.

The competing public interests

The interests in privacy and the interest in freedom of expression are both public interests, even though claims in privacy are necessarily made by the individual, and claims supporting publication through freedom of expression are often made by media corporations.

Although a personal right of human autonomy, at its core, privacy is also of crucial public interest. This is true of many personal rights, as was highlighted by Gaudron and McHugh JJ in *Plenty v Dillon*,[3] when their Honours said:

> If the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a personal right.

The public interest in matters of confidence, or what we now describe as privacy interests, was discussed in *Attorney General v Guardian Newspaper Ltd (No 2)*[4] *(Spycatcher)* where Lord Goff noted that "there is a public interest that confidences should be preserved and protected at law."

Although of high public importance, privacy is not an absolute value or right that necessarily takes precedence over other values of public interest.[5] One of the enduring values of public interest is freedom of speech. As recently as 2013, French CJ in *Attorney General (SA) v Corporation of the City of Adelaide*[6] said:

> Freedom of speech is a long-established common law freedom.[7] It has been linked to the proper functioning of representative democracies and on that basis has informed the application of public interest considerations to claimed restraints upon publication of information.[8]

Freedom of speech has been described as an "essential element in the constitution of an ordered society or a society organised under and controlled by law".[9] However freedom of speech is also not absolute. The guarantee of freedom of communication, speech or expression "does not postulate that the freedom must always and necessarily prevail over competing interests of the public".[10]

Lord Goff in *Spycatcher* observed that when the two competing public interests are present the court will be required to carry out a balancing operation, weighing the two competing interests:[11]

> [A]lthough the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply ... to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.

The relevance of the UK law

Although English law has, since 1998, developed under the spectre of the obligations imposed under the European Convention of Human Rights (European Convention),[12] which includes a requirement for the UK courts to have regard to the "Strasbourg jurisprudence",[13] much can be gained from understanding how the UK courts have approached the development of what has been described as the "ultimate balancing test".[14]

The early development of the balancing exercise, which still forms the basis of the UK approach, finds its genesis in the House of Lords opinion in *Campbell v MGN Ltd (Campbell)*,[15] which was decided without reliance on Strasbourg jurisprudence, and with reasoning firmly entrenched in the traditional equitable cause of action, breach of confidence.

The Victoria Court of Appeal in the landmark decision of *Giller v Procopets*[16] had no difficulty in following the decisions in *Campbell* and *Douglas v Hello! Ltd (Douglas)*[17] even though the cases were primarily concerned with the balance to be struck between the competing human rights recognised by the European Convention — the right to privacy under Art 8 and the right to freedom of expression under Art 10.

In discussing the relevance of *Campbell* and *Douglas*, given that they were decided by reference to Art 8 and 10 of the European Convention, Neave JA observed that in her view "that circumstance in no way weakens the force of these decisions of high authority".[18] Her Honour also noted that in *Campbell* the damages award affirmed by the House of Lords was based solely on the plaintiff's claim for breach of confidence.

Finally, a compelling reason why UK privacy jurisprudence should not be discounted is that the obligations imposed on the UK by the European Charter are similar to obligations imposed on the Commonwealth of Australia by the International Convention on Civil and Political Rights (1966) (International Covenant), which the Commonwealth of Australia signed on 13 November 1980.[19]

Article 17 of the International Covenant provides:

- No-one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- Everyone has the right to the protection of the law against such interference or attacks.

The obligation is prescribed, however the method is not.[20]

In the same way that the UK courts developed breach of confidence to comply with the obligations imposed under Art 8 of the European Convention,[21] Australian courts have also incrementally expanded the application of breach of confidence in a way that allows this equitable cause to respond to privacy issues[22] and, although perhaps not consciously doing so, comply with the obligations under Art 17 of the International Covenant.[23]

The competing obligation relating to freedom of expression, being the equivalent of Art 10 of the European Convention, is found in Art 19 of the International Covenant, which provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Although not as detailed as the obligation imposed under Art 10 of the European Convention,[24] the International Covenant clearly contemplates a balancing between the competing interests found in Art 17 and 19.

In much the same way that Australian courts have adopted the identical approach to that of the UK in responding to privacy issues through the development of breach of confidence, it should be anticipated that Australian courts will also look to the UK authorities when asked to balance the competing public interests of privacy and freedom of expression.

The UK approach to the "ultimate balancing test"

When considering whether there has, or will be, an invasion of privacy through publication, the UK courts

routinely balance the rights of privacy and freedom of expression embodied in Arts 8 and 10 of the European Convention.[25] Neither right is given priority, as the rights are considered of equal value in a democratic society.[26]

The UK courts first consider the value or weight to be attributed to the specific rights at play in each particular case.[27] As Baroness Hale in *Campbell*[28] observed:

> [The basic] approach involves looking first at the comparative importance of the actual rights being claimed in the individual case; then at the justification for interfering with or restricting each of those rights; and applying the proportionality test to each.

In the 10 years since the House of Lords handed down its opinion in *Campbell*, the foundation of the approach adopted by UK courts, even in the face of a large volume of Strasbourg jurisprudence, is still fundamentally rooted in this initial formulation. This was highlighted in the judgment of Tugendhat J in *AVB v TDD*,[29] in which his Honour summarised the approach presently taken by the UK courts as follows:

> If Article 8 is engaged then the second stage of the inquiry is to conduct "the ultimate balancing test" which has the four features identified by Lord Steyn in *In Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 A.C. 593 at [17]:
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> > First, neither article [8 or 10] has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.

In determining the comparative importance of the competing interests of privacy and freedom of expression, it is important to appreciate that not all expression is equal, just as not all privacy interests are worthy of the same protection.[30] On a practical level there is a clear hierarchy of both privacy interests and of expression interests.

On the privacy side of the scales, the more intrinsically personal or intimate the nature of the information, the greater the weight a court should give to the information when conducting the balancing exercise.

Top of the privacy list, are the classic types of information which Gleeson CJ identified in *Lenah Game Meats*[31] as easily identifiable as "private", when he observed: "Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private".

However, even within these more classic categories of confidential or private information, not all information will be equal. Again, this was illustrated by Baroness Hale in *Campbell* when observing how even certain health information, although private, may not outweigh the freedom of expression interests when dealing with a public figure, saying:

> The weight to be attached to these various considerations is a matter of fact and degree ... The privacy interest in the fact that a public figure has a cold or a broken leg is unlikely to be strong enough to justify restricting the press's freedom to report it.

On the freedom of expression side of the scales, in what Baroness Hale described as "top of the list", is political speech. The Baroness observing that "[t]he free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy."[32]

This is the same in Australia, where in *Lange v Australian Broadcasting Corporation*,[33] the High Court of Australia found that freedom of communication on matters of government and politics was of such fundamental public importance as to be an implied right in our Constitution. Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ observed:

> Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation.

Another interest high on the spectrum is the public interest in disclosing iniquity[34] or misdeeds. As was noted by Lord Denning MR in *Initial Services v Putteril*:[35]

> [N]o private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare.

In the final analysis, the weight to be attached to these various considerations is a matter of fact and degree. As stated earlier, what this simply means is that the more intimate or personal the information to be published, the greater the likelihood that it will be found to outweigh any interests in publication. Conversely, the greater the need for the public to be informed, such as in the case of political speech, or the disclosure of iniquity or misdeed, then the more likely it will be that the public interest in freedom of expression will prevail over any personal privacy interests.

What is clear is that once it is established by a plaintiff that the information is private or confidential, then the onus will shift to the defendant claiming freedom of expression, who will be required to show specific justification as to why it ought to be published.[36]

In attempting to show justification, there will need to be a recognition that there is a key distinction between what is interesting to the public and what is in the public

interest to be known. Sections of the public may be interested in what Kim Kardashian had for breakfast and with whom she ate, but this does not mean that the publication of this information is in the public interest. It may sell papers or glossy magazines, and it may satisfy the commercial interests of the media organisation, but it will not meet the public interest threshold. As Sir John Donaldson MR observed in *Francome v Mirror Group Newspapers Ltd*:[37]

> The media, to use a term which comprises not only the newspapers but also television and radio, are an essential foundation of any democracy. In exposing crime, anti-social behaviour and hypocrisy and in campaigning for reform and propagating the views of minorities, they perform an invaluable function. However, they are peculiarly vulnerable to the error of confusing the public interest with their own interest.

Conclusion

In much the same way as the decisions in *Campbell* and *Douglas* helped shape the incremental development of breach of confidence to protect privacy interests, so too that same body of UK authority can offer guidance to Australian courts on the balance that must be struck between the competing public interests of privacy and freedom of expression.

The ALRC recommended the adoption of a similar approach taken in *Campbell* should a statutory civil cause of action be enacted.[38] Therefore whether or not a statutory civil cause of action for serious invasions of privacy is eventually enacted, privacy professionals must now familiarise themselves with how the UK courts have approached the development of the "ultimate balancing test".

Michael Rivette
Barrister
Chancery Chambers
Melbourne

Footnotes

1. Michael Rivette is at the forefront in the developing areas of privacy law, breach of confidence and data protection, having successfully argued the privacy issues in the landmark decision of *Giller v Procopets* (2008) 24 VR 1; (2008) 79 IPR 489; [2008] VSCA 236; BC200810874. He is the co-author of the Australian sections of the leading UK text Tugendhat and Christie The Law of Privacy and the Media, and has written on the area of privacy in a number of legal publications. He sits on the advisory board of the Centre for Media and Communications Law, and is an Editorial Board Member of the Privacy Law Bulletin (LexisNexis).
2. The balance was referred to by Hampell J in the County Court decision of *Jane Doe v ABC* [2007] VCC 281 at [163] not in the context of balancing the competing interests, but in dealing with a prohibition of publication as a result of a sexual assault.
3. *Plenty v Dillon* (1991) 171 CLR 635, 655; 98 ALR 353; 65 ALJR 231; BC9102635.
4. *Attorney-General v Observer Ltd; Times Newspapers Ltd; Guardian Newspapers Ltd (No 2)*; sub nom *Attorney-General v Guardian Newspapers Ltd (No 2) (All ER; WLR)* [1990] 1 AC 109 at 256; [1988] 3 All ER 545; [1990] 3 WLR 776; [1988] 2 WLR 805.
5. Australian Government, Australian Law Reform Commission Serious Invasions of Privacy in the Digital Era — FINAL REPORT (2014)(ALRC Report) p 33 at [2.22].
6. *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; 192 LGERA 185; [2013] HCA 3; BC201300754 at [43]
7. W Blackstone *Commentaries on the Laws of England* 1769, bk 4, pp 151–2; *Bonnard v Perryman* [1891] 2 Ch 269 at 284; [1891] All ER Rep 965 per Lord Coleridge CJ; *R v Metropolitan Police Cmr; Ex parte Blackburn (No 2)* [1968] 2 QB 150 at 155; [1968] 2 All ER 319 at 320; [1968] 2 WLR 1204 per Lord Denning MR; *Wheeler v Leicester City Council* [1985] AC 1054; [1985] 2 All ER 1106; ; [1985] 3 WLR 335; *Attorney-General v Observer Ltd; Times Newspapers Ltd; Guardian Newspapers Ltd (No 2); sub nom Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 203; [1988] 3 All ER 545 at 614; [1990] 3 WLR 776; [1988] 2 WLR 805 per Dillon LJ.
8. *Commonwealth v John Fairfax & Sons Ltd (Defence Papers case)* (1980) 147 CLR 39 at 52; (1980) 32 ALR 485; 55 ALJR 45; BC8000113 per Mason J; *Attorney-General v Times Newspapers Ltd (Sunday Times Thalidomide case)* [1974] AC 273 at 315; [1973] 3 All ER 54 at 77; [1973] 3 WLR 298 per Lord Simon of Glaisdale; *Hector v Attorney-General of Antigua* [1990] 2 AC 312 at 318; [1990] 2 All ER 103 at 106; [1990] 2 WLR 606.
9. *Australian Capital Television Pty Ltd v Commonwealth (No 2) (Election/Electoral Advertising Bans/Free Speech)* (1992) 177 CLR 106 at [45]; 108 ALR 577; 66 ALJR 695; BC9202654 per Mason CJ.
10. Above, n 9.
11. Above, n 4, at 282.
12. As incorporated into English law by the Human Rights Act 1998.
13. Section 2(1) of the UK Human Rights Act 1998 does not mean that Strasbourg decisions will prevail over domestic UK decisions. The obligation to take Strasbourg jurisprudence into account is always subject to compliance with English precedent: *Kay v Lambeth London Borough Council; Leeds City Council v Price* [2006] All ER (D) 120 (Mar); [2006] 2 AC 465; [2006] 4 All ER 128; [2006] 2 WLR 570; *R (Purdy) v Director of Public Prosecutions* [2009] All ER (D) 335 (Jul); [2009] NLJR 1175; [2009] 4 All ER 1147; [2009] 3 WLR 403.

14. Albeit under the obligations imposed under the European Convention of Human Rights as incorporated into English law by the Human Rights Act 1998.
15. *Campbell v MGN Ltd* [2004] All ER (D) 67 (May); [2004] NLJR 733; [2004] 2 All ER 995; [2004] 2 WLR 1232.
16. *Giller v Procopets* (2008) 24 VR 1; 79 IPR 489; [2008] VSCA 236; BC200810874.
17. Above, n 15; *Douglas v Hello! Ltd* [2003] All ER (D) 110 (Nov); [2004] IP & T 710; [2004] EMLR 13; [2003] EWHC 2629 (Ch).
18. Above, n 15, at [418].
19. In accordance with Article 49, Resolution 2200A (XXI) of 16 December 1966.
20. In recent times state governments have embodied these principles in legislation dealing with the manner in which "public authorities" must act. For example Victoria has the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Victorian Charter), which is substantially based on the International Covenant, (although in gender neutral terms) and which embodies the principles contained in Art 17. Section 13 of the Victorian Charter provides "A person has the right — (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and (b) not to have his or her reputation unlawfully attacked".
21. See House of Lords decision in *Campbell*, above, n 15, 465, [18]; see also Lord Nicholls of Birkenhead in *Campbell* at [17]; European Court of Human Rights decision in *Von Hannover v Germany* (2004) 40 EHRR 1, [57] (Ress, Caflisch, Türmen, Hedigan and Traja JJ, Cabral P and Zupancic J concurring), which was cited with approval by the Master of the Rolls in *Douglas v Hello!* [2004] All ER (D) 280 (May); [2005] 3 WLR 881, 899; [2005] EWCA Civ 595, [47] (Lord Phillips of Worth Matravers MR).
22. To appreciate why breach of confidence is the main cause of action in privacy litigation in Australia, one must look at the interaction between *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (Lenah Game Meats)* (2001) 208 CLR 199; 185 ALR 1; [2001] HCA 63; BC200107043 and *Giller v Procopets (No 2) (Giller)* (2009) 24 VR 1; [2009] VSCA 72; BC200902384. In the author's view these decisions have sounded the death knell to the development of a common law tort of privacy.
23. In so doing our courts have followed the long standing approach proposed by Deanne J in *Moorgate Tobacco Co Ltd v Phillip Morris Ltd (Moorgate Tobacco)* (1984) 156 CLR 414, 445; BC8400490 (Deanne J) (Gibbs CJ, Mason, Wilson and Dawson JJ concurring), where his Honour (at p 445) advocated the "desirability of adopting a flexible approach to traditional forms of action when such an approach is necessary to adapt them to meet new situations".
24. Which provides that the exercise of the freedom of expression carries with it duties and responsibilities, that may be subject to restrictions, inter alia, preventing the disclosure of information received in confidence.
25. As incorporated into English law by the Human Rights Act 1998.
26. *Campbell*, above, n 15, at [111], [113] per Lord Hope. At [113] citing Sedley LJ in *Douglas v Hello! Ltd* [2000] All ER (D) 2435; (2000) 9 BHRC 543; [2001] QB 967; [2001] 1 Fam Law R 982, CA, [137]. See also *S (A Child) (Identification: Restrictions on Publication), Re* [2004] NLJR 1654; [2004] UKHL 47; [2005] 1 AC 593; [2004] 3 WLR 1129 at [17] per Lord Steyn.
27. *S (A Child) (Identification: Restrictions on Publication), Re, above*, at [17] per Lord Steyn.
28. Above, n 15, at, [141].
29. *AVB v TDD* [2014] EWHC 1442 (QB).
30. *Campbell*, above, n 15, at [148] per Baroness Hale.
31. *Lenah Game Meats*, above, n 22.
32. *Campbell*, above, n 15, at [148].
33. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; 145 ALR 96; 71 ALJR 818; BC9702860 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.
34. See *Gartside v Oughtram* (1857) 26 LJ Ch 9 NS 113, 114 per Page-Wood V-C.
35. *Initial Services Ltd v Putterill* [1968] 1 QB 396, 410; [1967] 3 All ER 145; [1967] 3 WLR 1032.
36. *Campbell*, above, n 15, at [147] per Baroness Hale.
37. *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892, 898; [1984] 1 WLR 892.
38. ALRC Report at [9.14] p 145, with the difference in the ALRC proposal being that privacy needs to"'outweigh" free speech (Recommendation 9-1 p 144) whereas in *Campbell* once Art 8 is engaged and there's a privacy interest established the question is whether free speech prevails over privacy, *Campbell*, above, n 15, at [141] per Baroness Hale, see also *McKennitt v Ash* [2006] All ER (D) 200 (Dec); [2008] QB 73 at [11]; [2007] EMLR 113; [2006] EWCA Civ 1714.