



The INTERACTION of REMEDIES for DEFAMATION and PRIVACY

By David Rolph

The protection of personal privacy under Australian law is a matter of considerable topical interest. Three law reform commissions have variously recommended the introduction of some form of statutory cause of action for invasion of privacy.¹ The Commonwealth attorney-general currently has a consultation about this issue.²

In terms of the development of the common law, the tenth anniversary of the High Court of Australia's landmark decision in *ABC v Lenah Game Meats Pty Ltd* has recently passed.³ The common law development of a direct, comprehensive protection of personal privacy appears to have stalled, with only two inferior court

decisions supporting the recognition of a tort of invasion of privacy and the preponderance of superior court authorities opposing it.⁴ However, the *Gazette of Law and Journalism* has recently reported that the Supreme Court of NSW may hear an important test case on whether the common law of Australia now recognises an enforceable right to privacy.⁵

Both legislative reform and, to a lesser extent, case law, point towards a renewed interest in privacy protection.

A neglected aspect of the move towards direct privacy protection in Australian law is the interaction between privacy and defamation. This article argues that the failure to consider the potential impact on defamation brought about by the introduction of an enforceable law on privacy, in whatever form the latter might take, will distort the balance of competing interests struck in defamation law. In particular, it will focus on issues relating to damages and injunctions for defamation and privacy and the problems posed by recent legislative proposals.

REPUTATION AND PRIVACY

Privacy is a dignitary interest. It is a human right recognised under a wide range of international, national and local instruments.⁶ The High Court of Australia in *ABC v Lenah Game Meats* recognised that if an enforceable right to privacy were to be recognised in Australia, it would be for the benefit of natural persons, not corporations.⁷ The explicit rationale for this view was that privacy is part of the innate dignity of the individual.⁸

Privacy is not the only dignitary interest recognised by the common law. Indeed, one dignitary aspect of personality has been well protected by the common law for centuries. This is the right to reputation, which is protected by defamation law.

In developing direct privacy protection, whether legislatively or at common law, it is useful to bear in mind Australian law's current treatment of dignitary interests. The proposed protection of privacy does not occur in a legal vacuum. What is being proposed is the filling of a gap in the legal protection of dignitary interests. The way the common law has developed is to treat reputation and privacy as distinct legal interests and to protect the former but not the latter.

This differential treatment of reputation and privacy reflects the different conceptions of what these legal interests entail. Recent defamation scholarship has critically evaluated the concept of reputation.⁹ Broadly defined, 'reputation' is what other people think of the plaintiff; it is his or her public self.¹⁰ Consequently, there is a public interest in freely discussing the reputation of others. Thus, it is axiomatic that defamation law strikes a balance between the protection of reputation and freedom of expression.¹¹ By contrast, privacy is the private self of the plaintiff. Almost by definition, there is no presumptive public interest in the plaintiff's private self. Given the historical development of legal protections of dignitary interests, a somewhat anomalous position has arisen under Anglo-Australian law, whereby reputation has been highly protected and privacy not at all. If one were devising legal protections of dignitary interests from first principles, privacy would be more worthy than reputation of stronger protection.

DAMAGES

The recent proposals by the Australian Law Reform Commission (the ALRC), the New South Wales Law Reform

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Commission (the NSWLRC) and the Victorian Law Reform Commission (the VLRC) all propose a range of remedies for invasions of privacy. Central to these remedies is an award of compensatory damages.¹² This reflects the nature of these proposed causes of action as analogous to tort. However, none of these reform proposals suggest that exemplary damages should be available for invasion of privacy.¹³

One way in which the differential treatment of reputation and privacy has manifested itself in recent reform proposals is in relation to the capping of damages for defamation and privacy. In the early 2000s, tort law reform introduced statutory caps on damages for non-economic loss in personal injury cases. In a number of jurisdictions where those caps were introduced, the initial cap was set at \$350,000 and was coupled with a statutory indexation mechanism.¹⁴ The introduction of national, uniform defamation laws, which came into effect in early 2006, legislated for a statutory cap on damages at \$250,000; again, supported by a statutory indexation mechanism.¹⁵ The differences in the caps between personal injury and defamation claims signal the legislature's attribution of relative importance to the underlying legal interests.

The NSW Law Reform Commission has proposed a statutory cap on damages for invasion of privacy at \$150,000. This is also supported by a statutory indexation mechanism in terms similar to those governing personal injury and defamation claims.¹⁶ Although a statutory cause of action is a novel development, setting the statutory cap at this level, below that of defamation, is undesirable, failing to reflect the relative importance Australia should now ascribe to the respective interests. The amounts of the caps matter; they signal the importance the legislature ascribes to the underlying interests. If a statutory cause of action for invasion of privacy is to be introduced with a cap on damages, that cap should be higher than that imposed for defamation.

Injunctions

The other important remedy proposed by the ALRC, the NSWLRC and the VLRC for invasion of privacy is an injunction.¹⁷ Injunctive relief poses more significant challenges to the interaction of privacy and defamation than damages. This is because historically it has been very difficult to obtain an interlocutory injunction to restrain the publication of defamatory matter.

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For over a century, following the English Court of Appeals' decision in *Bonnard v Perryman*, it was widely considered to be virtually impossible to obtain an interlocutory injunction in a defamation claim.¹⁸ Recently, the High Court of Australia, in *Australian Broadcasting Corporation v O'Neill*,¹⁹ held that general equitable principles governing the grant of injunctive relief applied to defamation claims,²⁰ but their application was informed by particular considerations, which meant that in practice an injunction was rarely awarded. These considerations were the common law's historical aversion to prior restraint and freedom of expression;²¹ the balance of interests was struck so that the defendant was able to speak freely without having his or her right to speak interfered with before it was exercised; but if the defendant defamed the plaintiff, the defendant was liable to the plaintiff in damages. This situation might not be ideal from the plaintiff's perspective, but there are the defendant's interests also to be considered. It effects a fair compromise of the parties' respective interests.

If plaintiffs are given the right to sue for invasion of privacy, which is properly understood as a dignitary interest, additional to the plaintiff's interest in his or her reputation, there arises the issue of what approach should be taken for the plaintiff to be able to obtain an interlocutory injunction for invasion of privacy. The issue of whether a plaintiff should be able to obtain an interlocutory injunction for invasion of privacy should not be considered in isolation; the impact on defamation law needs to be considered. If a plaintiff is able to obtain an interlocutory injunction for invasion of privacy, this may have a distorting effect on defamation law; it would provide an incentive for plaintiffs to recast claims previously brought as defamation claims as invasion of privacy claims, thereby subverting the restrictive approach to injunctive relief in defamation.

This raises difficult issues of principle. On the one hand, an argument can be made that defamation turns upon a dichotomy of truth and falsity, whereas invasion of privacy is concerned not with these matters but merely with whether something is private or not. On this analysis, it might be

argued that the plaintiff should be able to elect whether to frame his or her claim in defamation or invasion of privacy, or both. On the other hand, historically the common law has treated defamation as the proper cause of action for false and derogatory statements. The concept of false privacy is a vexed one. The common law would have developed differently if the equitable cause of action for breach of confidence – the equitable cause of action which has been adapted to provide direct privacy protection in the United Kingdom – had extended to false information. United Kingdom courts are currently struggling with the concept of 'false privacy' and its implications for the interaction of remedies for defamation and invasion of privacy.²²

Yet none of the law reform proposals consider the interaction between defamation and privacy. In particular, this important, practical issue is given no consideration. If a plaintiff was now able to elect to claim either defamation or invasion of privacy, he or she would have a real incentive to plead invasion of privacy in order to obtain an injunction that would not ordinarily be available in defamation. This would be a change to a long-standing practice. Its implications need to be considered before any reform is undertaken. One solution might be to have an award of damages as the principal remedy for invasion of privacy, just as it is for defamation, with an interlocutory injunction as possible but exceptional. If a new cause of action for invasion of privacy mirrored the position in relation to injunctive relief for defamation, there would be no incentive for plaintiffs to frame claims as invasions of privacy which would previously have been pleaded as defamation.

It might be argued that once a plaintiff's privacy has been invaded, it can never be restored. This is equally true of defamation. Although, in principle, a favourable defamation verdict acts to vindicate the plaintiff's reputation, the reality is, in many cases, very different. An award of damages for defamation is usually granted many years after the publication of defamatory matter – if a plaintiff does not settle first or if a plaintiff elects not to sue in the first place. The fact of the defamation trial, with its repetition of the defamatory allegations, becomes part of the plaintiff's reputation, so that the sting of the defamation never completely dissipates. There is a disparity between the rhetoric and the reality of defamation law.²³ Thus, reputation and privacy should not be treated so differently for the purposes of injunctive relief. If a plaintiff were aware that his or her privacy was to be invaded, he or she would probably want to obtain an injunction to restrain it. If a plaintiff were aware that his or her reputation was to be damaged, he or she would probably also want an injunction but the common law, as a matter of principle, has consistently refused to grant it. The common law has taken the view that the appropriate balance of interests between plaintiffs and defendants is that defendants may exercise freedom of expression but that if, in their exercise, they defame, they are liable for the consequences. If a cause of action for invasion of privacy is to be developed, it should not be allowed to disturb the balance of interests the law has struck in relation to defamation, at least not without proper consideration.

CONCLUSION

There is a momentum building towards the development of an enforceable right to privacy in Australian law. In order to be effective, this development needs to take into account the potential consequences for existing defamation laws. The remedies available and the principles and provisions governing them are important. Damages for defamation and privacy should reflect the relative importance of the respective dignitary interests underpinning these causes of action. Injunctions ought not perversely to encourage plaintiffs to frame claims as invasions of privacy where previously they would have been pleaded as defamation. To this end, further consideration of the interaction between defamation and privacy is warranted, to ensure that the balance of interests currently struck in defamation law is not distorted by the introduction of a law of privacy. ■

Notes: **1** Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No. 108, 2008; New South Wales Law Reform Commission, *Invasion of Privacy*, Report No. 120, 2009; Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report 18, 2010. **2** Department of Prime Minister and Cabinet, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy: Issues Paper*, September 2011. **3** 2001] 208 CLR 199; [2001] HCA 63. The High Court of Australia handed down its decision in this case on 15 November 2001. **4** *Grosse v Purvis* (2003) Aust Torts Reports ¶181-706; [2003] QDC 151; *Doe v Australian Broadcasting Corporation* [2007] VCC 281. **5** The case is *Saad v Chubb Security Australia*: <http://www.glj.com.au/1703-article> (accessed 18 November 2011) (password required). **6** See, for example, *International Covenant on Civil and Political Rights* Art 17; *Universal Declaration of Human Rights* Art 12; *European Convention on Human Rights* Art 8. See also *Human Rights Act 2004* (ACT) s12; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s13. **7** *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63 at [43] per Gleeson CJ, at [126] per Gummow and Hayne JJ. **8** *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63 at [43] per Gleeson CJ, at [126] per Gummow and Hayne JJ. **9** See, for example, David Rolph, 'Dirty Pictures' (2006) 10 *Law Text Culture* 101; Lawrence McNamara, *Reputation and Defamation*, Oxford University Press, Oxford, 2007; David Rolph, *Reputation, Celebrity and Defamation*, Ashgate, Aldershot, 2008; Kenneth H Craik, *Reputation: A Network Interpretation*, Oxford University Press, Oxford, 2008; David S Ardia, 'Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law' (2010) *Harvard Civil Rights-Civil Liberties Law Review* 261; Bob Tarantino, 'Chasing reputation: The argument for differential treatment of "public figures" in Canadian defamation law' (2010) 48 *Osgoode Hall Law Journal* 595; Laura A Heymann, 'The law of reputation and the interest of the audience' (2011) 52 *Boston College Law Review* 1341. **10** *Plato Films Ltd v Speidel* [1961] AC 1090 at 1138 per Lord Denning. See also David Rolph, *Reputation, Celebrity and Defamation Law*, Ashgate, Aldershot, 2008, pp4-6. **11** *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568 per *curiam*; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 599 per Gleeson CJ, McHugh, Gummow and Hayne JJ; [2002] HCA 56. **12** Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No. 108, 2008, Recommendation 74-5; New South Wales Law Reform Commission, *Invasion of Privacy*, Report No. 12, 2009, cl 76(1)(a); Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report 18, Recommendation 29(a). **13** Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No. 108, 2008, Recommendation 74-5; New South Wales Law Reform Commission, *Invasion of Privacy*, Report No. 12, 2009, cl 78; Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report 18, Recommendation 29(a). **14** *Personal*

Injuries (Liabilities and Damages) Act 2003 (NT) ss27, 28; *Civil Liability Act 2002* (NSW) ss16, 17. See also *Civil Liability Act 2003* (Qld) ss61, 62; *Civil Liability Act 1936* (SA) s52; *Civil Liability Act 2002* (Tas) s27; *Wrongs Act 1958* (Vic) ss28G, 28H; *Civil Liability Act 2002* (WA) ss9, 10. **15** *Civil Law (Wrongs) Act 2002* (ACT) s139F; *Defamation Act 2006* (NT) s32; *Defamation Act 2005* (NSW) s35; *Defamation Act 2005* (Qld) s35; *Defamation Act 2005* (SA) s33; *Defamation Act 2005* (Tas) s35; *Defamation Act 2005* (Vic) s35; *Defamation Act 2005* (WA) s35. **16** New South Wales Law Reform Commission, *Invasion of Privacy*, Report No. 12, 2009, Appendix A: *Civil Liability Amendment (Privacy) Bill* cl 77. **17** Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No. 108, 2008, Recommendation 74-5; New South Wales Law Reform Commission, *Invasion of Privacy*, Report No. 12, 2009, Appendix A: *Civil Liability Amendment (Privacy) Bill* cl 76(1)(b); Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report 18, Recommendation 29(b). **18** [1891] 2 Ch 269. **19** (2006) 227 CLR 57; [2006] HCA 46. **20** *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 67-8 per Gleeson CJ and Crennan J, at 86 per Gummow and Hayne JJ; [2006] HCA 46. **21** *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 72-3 per Gleeson CJ and Crennan J, at 86-7 per Gummow and Hayne JJ; [2006] HCA 46. **22** See, for example, *Terry v Persons Unknown* [2010] EMLR 16; [2010] EWHC 119 (QB). **23** See, for example, David Rolph, *Reputation, Celebrity and Defamation Law*, Ashgate, Aldershot, 2008, 167 in relation to the *Etingshausen* litigation.

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