

## What if you had sex in the city?

### Private Acts / Public Places

Storytelling is intensely personal.

In 2005 Kylie Minogue was diagnosed with breast cancer. A disease that has sadly probably affected the lives of a third of the people here today An intensely private thing. But sometimes revelations of a deeply personal nature might serve a greater purpose. When Kylie Minogue revealed she had breast cancer women seeking screening doubled.

Photo journalism tells a story and galvanizes a community into action faster than words. We have seen this time and time again. In images that are usually graphic and personal.

The Victorian fires dramatically brought the pain and suffering of those involved to the public at large. They were images of personal grief, who can forget Gary Hughes story in the OZ. But were they images that shouldn't have been shared? Or will those images save lives next time.

#### Slide 1

Photojournalism is important. It can debunk a government's stupidity faster than 1000 s of words.

Like the UK government's view of what is secret.

#### Slide 2

I am going to talk about Facebook, walking in the street with your children and photographs.

Where the law is and where it might go. More importantly I will try to demonstrate why we should not be quick to create a statutory privacy monolith.

Private – we all know what this is.

We all know the boundaries its hard to imagine that we need to be told where they are.

### **Slide 3**

For example we know as Justice Gillard stated in the important case of Giller v Procopets:

*"Persons indulging in a sexual activity in the privacy of their own home create a confidential relationship ..which is shared between those persons but is not to be divulged to others"*

Or do we as a community really accept this boundary?

### **Slide 4**

#### **(Sex and the city clip)**

So who is in touch with reality His Honour or millions of women (and Men) who will go out tonight and tell their stories in bars or on the internet?

It's that intersection that I want to touch on as well because its important in considering what the law should be because the law is not just for the media especially these days where we share information between individuals on a more extensive basis.

Who here:

1. is on Facebook? (hold hand up)
2. has posted photos to Facebook? (hold hand up)
3. has other photos of kids other than your own? (hold hand up)
4. has conducted a Nazi Orgy with prostitutes (hold hand up)

Well it was worth a try!

All of these have recently been the subject of attention in the courts.

So what is the law and where is it going?

We need to be careful with our rules to ensure that they are congruent with the world we are creating. So what exactly does the law in its emerging incarnations seek to protect beyond the protections available to date? What boundaries are being set? The law of privacy is developing in several unique ways.

In Australia it's an extensive series of laws, and there is no overarching principle which of course offends those with neat minds but the world is not neat.

## Slide 5

The privacy and related acts cover our right to keep things like health records private. Defamation protects our reputations. Breach of Confidence keeps our sex life and other confidences secret. What else do we need to protect? Photos taken of us in the street?

How does the law define what is private? We have already seen one judicial view of that issue.

In Australia one of the main pronouncements on this was by the Chief Justice Gleeson derived from US jurisprudence. He said:

**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.**

At the moment there is no tort of privacy and the superior decisions rely on breach of confidence.

The ALRC has tried to create an overarching principle and its one that reflects that definition of private:

To establish the cause of action for a "serious invasion of privacy", a claimant must show:

- there is a reasonable expectation of privacy;
- the act or conduct complained of is highly offensive to a reasonable person of ordinary sensibilities;
- the public interest in maintaining the claimant's privacy outweighs other matters of public interest (including the interest of the public to be informed about matters of public concern and the public interest in allowing freedom of expression); and

A number of judges usually in lower courts have tried to establish a tort of privacy. These moves are justified under either the banner of bringing some coherency or overarching principle to the law or to rectify a specific situation. But at what cost?

Fortunately, superior court judges to date have shown a marked reluctance to move in that direction acknowledging that the law already provides a range of remedies in diverse circumstances. They have exercised some care no doubt cognisant of the implications of such a move.

Such an example is Gillard and Prospects.

### **Giller - Procopets**

Giller (the Applicant) and Procopets (the Respondent) were engaged in a sexual relationship with each other. On a number of occasions, the Respondent filmed

their sexual activities. At first, the Applicant was unaware of this filming. After a time, she became aware of the filming but did not seek to discontinue it. After the couple's relationship had ceased, the Respondent began threatening to show the video to the Applicant's friends and family.

- breach of confidence
- intentional infliction of emotional distress; and
- invasion of privacy

There was no outcome regarding the tort of privacy:

- Maxwell P did not address the issue.
- Neave JA held that it was not necessary to determine its existence (since damages could be awarded on the basis of a breach of confidence), although her Honour made some obiter comments regarding the possibility of a tort of privacy.
- Ashley JA similarly did not find it necessary to determine this issue.

In contrast in the UK where we have seen there is a remarkable expansion of actions for breach of privacy. Whilst the law there is different and will remain different as long as we do not have a Bill of Rights there have been some remarkable results. Issue the shape of our internet community actions will mainly be between individuals.

### **Facebook:**

There is a decision in the UK on Facebook.

Describe.

Why is Facebook important it represents the way most people now get information, from interconnected groups often unconstrained by national borders, it demonstrates a desire for community.

## **Mosely:**

(explain decision) Judges comments:

*I decided that the Claimant had a reasonable expectation of privacy in relation to sexual activities (albeit unconventional) carried on between consenting adults on private property. I found ... (no) ..Nazi behaviour or adoption of any of its attitudes.*

*There was bondage, beating and domination which seem to be typical of S and M behaviour.*

*But there was no public interest or other justification for the clandestine recording, for the publication ....on the News of the World website.*

*I accept that such behaviour is viewed by some people with distaste and moral disapproval, but in the light of modern rights-based jurisprudence that does not provide any justification of the intrusion on the personal privacy of the Claimant.*

*Nor can it seriously be suggested that the case is likely to inhibit serious investigative journalism into crime or wrongdoing, where the public interest is more genuinely engaged.*

## **J K Rowling:**

A photo of J K Rowling's daughter in a pram on a the street, well that's private isn't it.

A court at first instance thought not.

### **Justice Patten:**

**"If the law is such as to give every adult or child a legitimate expectation of not being photographed without consent on any occasion on which they are not, so to speak, on public business, then it will have created a right for most people to the protection of their image..... if a simple walk down the street qualifies for protection, then it is difficult to see what would not."**

The court of Appeal begged to differ. It was a child. The child had its own right to privacy and because it couldn't control where it was that privacy had been breached.

**Court of Appeal:**

**We do not share the predisposition identified by the judge in that routine acts such as a visit to a shop or a ride on a bus should not attract any reasonable expectation of privacy. All depends upon the circumstances.....**

**In this appeal we are concerned only with the question whether David, as a small child, had a reasonable expectation of privacy, not with the question whether his parents would have had such an expectation.**

**It seems to us that, subject to the facts of the particular case, the law should indeed protect children from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication .....**

Mind you some celebrities take a more open attitude to the photographs of themselves and their children.

**Slide 6**

Clearly Hugh Jackman and J K Rowling's minds differ on this issue.

Here Hugh Jackman is the very model of the Aussie dad out with his kid to see Nicole Kidman's newborn clearly completely unperturbed by the photographers.

So what of photos like the top one? (beach shot)

Is this a serious invasion of privacy and highly offensive to a person of ordinary sensibilities. I think not but the Rowling decision gives me pause for concern.

Will we be able to take photos of children at the beach?

Some surf clubs have already banned taking of photos at junior surf events. Self regulation is often much more powerful than law because it is initiated by those it most affects.

Of course, there are those who point to the Australian Law Reform Commission's qualification namely "a serious invasion of privacy" and the qualification on public interest and defences attached to the action as providing an appropriate balance. These are good points but the robustness of those qualifications is a matter to be tested in Courts. Often much is made of the overseas experience but we have no constitutional or covenant protection of free speech unlike most of those jurisdictions.

The law already places children in a very special position and here in NSW we have the very controversial laws that protect the photos of children and often their accused parents identity even if the child is dead. So this is not beyond the bounds of judicial creativity that the English approach may be followed.

The difficulty of course is knowing where the balance between private and public lies and what is in the public interest.

As we see these are matters in which fair and reasonable minds may differ.

We live in a community and that for a community to flourish we need to live in a state of connected curiosity and community.

Privacy zealots might prefer we live in a state of silence as small unconnected islands. Living in a bubble of isolation.

But that is not reality. The challenge for not only us here today but also the law is to develop so that we can live in a state of connected curiosity. A state where we find connections and intellectual challenges.

An undue focus on privacy works against that and only serves the powerful in the community.

My question for you all here today, which of these images more closely represents reality.

## Slide 7

The boy in the bubble? Or the boy in the crowd (**Slide 8**)?

But the ALRC and Judicial statements all sound pretty reasonable, don't they?

But are they?

Private – we all know what this is and its boundaries, or do we?

Who here, for example would publish a photo of a naked 12 year old girl.

Of course not, but an artist may. There is no public interest in it and it can be easily stated to be a serious invasion of a child's privacy. It would be highly offensive to a reasonable person of ordinary sensibilities. Would the public interest in maintaining the child's privacy outweighs the public interest in allowing freedom of expression for example? Minds are bound to differ on that.

## Slide 9

This photo matters. It changed a nations view of an entire war, her permission was not sought and by any standard of the laws described above, her privacy was breached. Was it in the public interest such that it outweighed her privacy? The US government would have not subscribed to that view. Her family might not have thought that at the time.

What if it was taken during the Victorian fires? Would it not be acceptable then. Or at the world trade Centre?

And who here would show a photograph of a child in dire social circumstances (or of a mother with her dead child)? This photo was one of series that brought the crisis in Ethiopia to the worlds attention in the 1980's. Only a few weeks ago many argued that photos of personal anguish relating to the fires in Victoria were not justified and presumably not in the public interest.

## Slide 10

Or a man falling to his death at the World Trade Centre or (**Slide 11**) bodies washed up after the tsunami in Thailand. One can only imagine the grief of families exposed to these images but should they have been shown?

Only a few weeks ago the American Government lifted a ban on photographs of caskets of dead American soldiers in Iraq their cry was to protect the privacy of the families and the soldiers concerned, but one can't help wonder if there real concern was to protect dissent about the war in Iraq. Political leaders were telling us mission accomplished this banned photo was telling another story.

These photos invaded someone's privacy and grief. We know there is a voyeurism in all things but there is sometimes more.....

And when they were published we probably didn't know what their effect would be.

## **Slide 12**

But these photos have defined our time.

They recorded the world around us and often changed the course of history.

They exposed political inaction.

They put a human face on issues which otherwise might appear distant and irrelevant.

They part of our collective consciousness and created a shared sense of conscious.

The ability to take and share photos like this on Facebook or flicker gives ordinary members of the community a voice, creates the conditions for democratic debate and prevents politicians, the rich powerful and dare I say even the media from dominating the agenda.

Our society is the richer for these photos. What would a precedent preventing publication of those images do to our press freedom? It could also, without exaggeration, change the course of history.

Public interest is an illusive and delicate thing.

Best we protect it.