10. D Butler

Full name: Professor Des Butler

Question 1:

Question 2:

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Question 6:

Statutory causes of action should exist where there is:

(a)          (i)            An intentional intrusion upon another person’s solitude;

(ii)           in circumstances where there is a reasonable expectation of privacy;

(iii)          which results in the plaintiff suffering emotional distress, embarrassment or humiliation.

and where there is:

(b)          (i)            An intentional disclosure of information about a person

                (ii)           in relation to which information there is a reasonable expectation of privacy

(iii)          which results in the plaintiff suffering emotional distress, embarrassment or humiliation.

In determining whether there was a reasonable expectation of privacy, the Act should give effect to the comments by Gleeson CJ in Australian Broadcasting Corporation v Lenah Game Meat Pty Ltd (2001) 208 CLR 199 at [42]:

“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 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 (emphasis added).”

For these purposes, these observations may be translated into workable definitions as follows.

In relation to (a) the intentional intrusion upon a person’s solitude:

* there will be a “reasonable expectation of privacy” where there are activities which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved and the observation of which would be highly offensive to a reasonable person of ordinary sensibilities.

In relation to (b) the intentional disclosure of facts about a person:

* there will be a “reasonable expectation of privacy” where there is information which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be undisclosed and the disclosure of which would be highly offensive to a reasonable person of ordinary sensibilities.

The Act should provide a non-exhaustive list of factors that may be taken into account when determining whether on balance there is a “reasonable expectation of privacy”.  As I argue in Australian Media Law 4th edition (2012), [8.800], these may include:

* Whether the plaintiff is a public figure who courts publicity. Rather than developing special rules for public figures, the fact that the plaintiff is one who routinely courts publicity should merely indicate that he or she normally has a low expectation of privacy. In this way it is possible to accommodate recognition that even celebrities and other public figures are entitled to privacy on occasions (Lee v News Group Newspapers Ltd [2010] NIQB 106 at [33]) especially when balanced with other factors such as a public figure attending family in a hospital or a funeral, or a public figure who seeks to escape fame at every available opportunity when not working (see, eg, Von Hannover v Germany (2005) 40 EHRR 1; McKennitt v Ash [2005] EWHC 3003 at [76] (QB)). By contrast, it has been suggested that a well known person who courts publicity does not have a reasonable expectation of privacy when involved in casual circumstances, such as “popping out for a pint of milk” (John v Associated Newspapers Ltd [2006] EWHC 1611 at [14]-[15]).
* Whether the plaintiff courted publicity on the relevant occasion. While a person who courts publicity may have difficulty arguing an expectation of privacy in relation to publicity in respect of that matter (see, eg, Hickey v Sunday Newspapers Ltd [2010] IEHC 349), such a person  would still normally have a greater expectation of privacy on other occasions. This may mean, for example, that such a plaintiff may expect to be in the media spotlight for a shorter time than a public figure who courts publicity generally.
* Whether the plaintiff is associated with an event of public interest. Generally speaking, there may be no reasonable expectation of privacy in the fact of a road accident or other accident in a public place and the circumstances surrounding it. However, there may be exceptional circumstances in which a person involved in such an incident may be able to argue a right to privacy, even though the relevant circumstances arose in public and were observable by those in the immediate vicinity, such as where there are intimate and highly personal communications at the scene (Andrews v Television New Zealand Ltd [2009] 1 NZLR 220).
* The intimacy of the facts or circumstances involved. The Australia Law Reform Commission has previously defined “private facts” as those concerning details of an individual’s health, private behaviour, home life or personal or family relationships (Unfair Publication: Defamation and Privacy Report No 11 (1979)). People are entitled to expect privacy for anything non-criminal taking place in the home environment, including any conversations or disagreements occurring therein, as well as descriptions of the building or its contents (McKennitt v Ash [2005] EWHC 3003 at [137] (QB); Lee v News Group Newspapers Ltd [2010] NIQB 106at [43]) and the home address (Green Corns Ltd v Claverley Group Ltd [2005] EWHC 958 at [53]; Lee v News Group Newspapers Ltd [2010] NIQB 106 at [32]). This would also include communications to friends and others in the aftermath of bereavement or other trauma (McKennitt v Ash [2005] EWHC 3003 at [80] (QB)) and confidential business dealings such as payments for performances or royalties (McKennitt v Ash [2005] EWHC 3003 (QB)). Such facts might be regarded as carrying with them a high expectation of privacy.
* If a sexual liaison is involved, the intimacy of the sexual relationship. Sexual relationships may be seen as involving a range of expectations when it comes to privacy. At one end of the spectrum sexual relations within marriage or long-time partnership at home would be protected from most disclosures whereas a one night stand with a stranger in a hotel or transitory engagement in a brothel may carry with it a low expectation of privacy (Theakston v MGN Ltd [2002] EMLR 398 at 418; A v B plc [2003[ QB 195 at 217; ETK v News Group Newspapers Ltd [2011] EWCA Civ 439 at [17]-[18]).
* Whether the plaintiff's family is involved. Even where the plaintiff has courted publicity, it would normally be expected that his or her family would nevertheless be entitled to their privacy, especially when there are children of a vulnerable age who are involved. However, this consideration must be considered in light of other factors and is not conclusive (Hoskings v Runting [2005] 1 NZLR 1).
* The plaintiff's age. Where the plaintiff is a child of vulnerable age there would normally be a high expectation that he or she is entitled to a measure of privacy (Murray v Express Newspapers [2009] Ch 481; Hosking v Runting [2005] 1 NZLR 1 at [147]; Lee v News Group Newspapers Ltd [2010] NIQB 106 at [44]). Even where the child plaintiff is a public figure who courts publicity he or she should be entitled to a greater expectation of privacy than an adult public figure although naturally less of an expectation that a child who does not court publicity.
* How public the occasion is. Activities conducted open to plain sight would normally have a lesser expectation of privacy than those conducted behind closed doors. However, much depends upon the circumstances: it is not possible to draw a rigid line between what is private and that which is capable of being witnessed in a public place by other persons (Andrews v Television New Zealand Ltd [2009] 1 NZLR 220). For example, a plaintiff may have a reasonable expectation of privacy for a hushed conversation conducted in a restaurant or busy hallway. Naturally in such cases the fact that the conversation takes place may be public but the content of the conversation may be private. Similar considerations apply to semi-public places such as hospitals (Cf Kaye v Robertson (1991) 19 IPR 147).
* The means used to obtain the information. The fact that the information could only be obtained through surreptitious means should normally be an indication that in the circumstances there was a high expectation of privacy (Shelley Films v R Features [1994] EMLR 134; Creation Records Ltd v News Group Newspapers Ltd (1997) 39 IPR 1). There may also be a reasonable expectation of privacy in relation to behaviour in a public place which may be a transient occurrence for those who witnessed it, but which by virtue of CCTV images that have been recorded that may be repeatedly replayed (Peck v United Kingdom (2003) EHRR 41).
* Whether there is a risk of serious injury to the plaintiff if there is disclosure. The risk of serious injury if there is disclosure should normally indicate a high expectation of privacy (Venables v News Group News Papers Ltd [2001] 1 All ER 908).
* Whether the information is already in the public domain. In the case of disclosure, if the information is already in the public domain there can be no reasonable expectation of privacy (Mosley v News Group Newspapers Ltd [2008] EWHC 1117). However, this is a question of degree: the mere fact that the information has been shared with one or more of a number of other people or that they have otherwise become aware of the information does not necessarily mean that the information has entered the public domain (see, eg, Prince of Wales v Associated Newspapers Ltd [2006] EWHC 522 (Ch) at [99]-[116]; McKennitt v Ash [2005] EWHC 3003 (QB); ETK v News Group Newspapers Ltd [2011] EWCA Civ 439). Unlike commercial secrets, in the context of personal information courts should be loath to deny the protection of the law unless and until there is no longer anything left be protected (WB v H Bauer Publishing Ltd [2002] EMLR 145). It has been suggested, for example, that it does not necessarily follow that because personal information has been revealed to one set of newspaper readers that there can be no further invasion of privacy. Fresh revelations to different groups may still cause distress and damage (McKennitt v Ash [2005] EWHC 3003 at [81] (QB)).
* Whether the information is contained in a public record which is part of the public consciousness. Normally information which may be freely accessed by any member of the public would have little expectation of privacy (see, eg, Rogers v Television New Zealand Ltd [2008] 2 NZLR 277 at [48] per Blanchard J, [63] per Tipping J and [104]-[105] per McGrath J). However, information in a public record which has long passed out of the public consciousness is not necessarily in the public domain. A person who has a distant “skeleton in the closet” should have a greater expectation of privacy, especially where the skeleton has no relationship to current activities than, for example, a notorious paedophile recently released from jail.
* Any other circumstances. There may be other factors pertaining to the particular case which increase or decrease the expectation to privacy.

Question 7:

Public interest should be a defence to the statutory cause of action rather than a factor to be taken into account when determining whether there has been an invasion of privacy. That would place the onus of proving public interest on the defendant rather than the plaintiff. That would accord with other causes of action that may in some senses be closely related to an action for invasion of privacy such as defamation. It would also make the action more accessible by persons with limited resources, such as members of the general public, whilst casting a burden on the defendant who may be more likely to be an institution such as a media organisation.

Question 8:

Question 9:

Question 10:

I have argued elsewhere ( D Butler, “A Tort of Invasion of Privacy in Australia?” (2004) 29 University of Melbourne Law Review 339; D Butler and P Meek, “Camera Trapping and Invasions of Privacy: an Australian Legal Perspective” (2013) 20 TLJ 234) that the formulation of an unreasonable intrusion tort by Skoien SJDC in Grosse v Purvis as including an element requiring proof of damage was contrary to current understandings in an Australian tort law of the distinction between trespass actions (to which an action for unreasonable intrusion would be akin) and actions on the case. However, a statutory cause of action need not be subject to such distinctions. For the purposes of consistency, if an action were provided for both cases of unreasonable intrusion and disclosure of information then the same approach to the question of damage ought to be adopted for both actions – both should be actionable per se or require proof of a measure of damage. It is submitted that a distinction should be drawn between the damage to reputation that is presumed to follow from defamatory publication and the affront to dignity or challenge to personal autonomy constituted by an invasion of privacy. The consequences that attend the latter may be in such varying degrees it should be a requirement that the plaintiff show proof of damage in his or her individual case.

Question 11:

Proof of recognised psychiatric illness in the case of negligence provides an important limitation that avoids defendants being burdened by indeterminate liability. By contrast, invasions of privacy tend to be intentional acts that are focused upon an individual. The same policy considerations therefore are not present. Accordingly it should be sufficient if the plaintiff is able to prove damage in the nature of embarrassment, humiliation or emotional distress.

Question 12:

Question 13:

Question 14:

In the United States, the four forms of invasion are subject to a number of common defences.  These might translate into an Australian common law context as follows:

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| --- | --- |
| United States | Australia |
| Absolute privilege defences as apply to defamation | * Parliamentary privilege * Judicial privilege |
| Consent | * Consent |
| Conditional privilege: reports of public proceedings | * Qualified privilege: fair and accurate reports (parliament, courts) |
| Conditional privilege: executive officers performing official duties | * Qualified privilege: duty and interest (official notices concerning community affairs) |
| Conditional privilege: protection of defendant’s interests | * Qualified privilege: duty and interest (retort) |
| Conditional privilege: report to government authorities concerning mental health | * Qualified privilege: duty and interest (limited audience with interest in truth) |
| Conditional privilege: reasonable investigation of claim against defendant | * Qualified privilege: duty and interest (limited audience with interest in truth) |

See D Butler, “A Tort of Invasion of Privacy in Australia?” (2004) 29 University of Melbourne Law Review 339

There is therefore a clear analogy in this respect between the breach of privacy torts and the tort of defamation.

In addition, some guidance regarding appropriate defences might also be gleaned from existing legislation which provides a degree of protection against invasions of personal privacy. Unfortunately there is no uniformity in the defences provided under the various Listening Devices Acts and Surveillance Devices Acts. See Listening Devices Act 1992 (ACT), s 5(2); Surveillance Devices Act 2007 (NSW), s 11(2); Invasion of Privacy Act 1971 (Qld), s 45(2); Listening and Surveillance Devices Act 1972 (SA), s 7(2); Listening Devices Act 1991 (Tas), s 10(2); Surveillance Devices Act 1998 (WA), s 9(2); Surveillance Devices Act 1999 (Vic), s 11(2); Surveillance Devices Act (NT), s 40(2). However, exceptions which form common ground between the different regimes broadly relate to:

* Communication or publication with express or implied consent;
* Communication or publication which is no more than is reasonably necessary:
  + In the public interest
  + For the protection of the interests of the defendant
  + In the course of legal proceedings

The analogy to defamation is further served in Queensland, Tasmania and the ACT where an additional exception is where the communication or publication is to a person reasonably believed to have an interest in the conversation so as to make the communication or publication reasonable in the circumstances, a defence similar to the statutory qualified privilege provided under s 30 of the uniform Defamation Acts.

Mosley v News Group Newspapers Ltd [2008] EWHC 1117 demonstrates that there are circumstances attending publication purportedly in the public interest where further constraint may be warranted. In that case Eady J (at [140-141]) thought that there would be value in applying a test of “responsible journalism” when determining whether the publication breached privacy in the public interest (cf Lord Phillips MR in Campbell [2003] QB 633 at [61] ). In this connection Eady J made reference to the guidelines developed by Lord Nicholls in Reynolds v Times Newspapers Ltd [2001] 2 AC 127 at 205. Those guidelines are also reflected in s 30(3) of the uniform Defamation Acts.

In addition, in order to be constitutionally valid any statutory cause of action for serious invasion of privacy would require freedom of communication concerning government or political matters, as stated in Lange v Australian Broadcasting Corporation (1997) 189 CLR 520. As recognised in Lange that requirement may be sufficiently accommodated by a defence similar to the statutory qualified privilege provided under s 30 of the uniform Defamation Acts.

It is submitted, therefore, that the appropriate defences to a statutory cause of action for serious invasion of privacy should be:

* express or implied consent
* absolute privilege for Parliamentary and judicial proceedings
* qualified privilege in terms similar to the statutory qualified privilege provided under s 30 of the uniform Defamation Acts
* fair and accurate reports of proceedings
* publications that are no more than necessary for the protection of the interests of the defendant

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A potential imbalance exists between members of the general public who may find that their privacy has been invaded and the defendant, who may be a well resourced media organisation. Apart from obstacles including the fact that taking action may involve a repeat invasion of the individual’s privacy, that individual may lack the resources to institute proceedings and seek redress. In the same way that a system facilitating an offer to make a means was designed to ensure that defamation was available to not only rich litigants, a similar system should be available to an individual who has had his or her privacy invaded. That may enable a speedier means to address the affront to dignity and involve alternative means of resolution of complaints including apologies and corrections.

Question 25:

Question 26:

Question 27:

All Australian jurisdictions have existing legislation that provides a measure of protection of personal privacy against unreasonable intrusion and disclosure of information in the form of legislation regulating the installation, use or maintenance of listening devices (Queensland, South Australia, Tasmania and the ACT) or optical surveillance devices and listening devices (New South Wales, Victoria, Western Australia and the Northern Territory).

Surveillance Devices Acts, which cover both video and audio devices, are more adapted to modern technology than Listening Devices Acts, which only apply to audio devices. For example, Listening Devices Legislation do not prohibit behaviours such as “walk ins” or hidden camera intrusions and disclosures practised by some media organisations, provided the audio is not recorded or shared whereas such conduct is contrary to the prohibitions contained in the Surveillance Devices. However there is no uniformity in either the Listening Devices Acts nor the Surveillance Devices Acts (Butler and Rodrick, Australian Media Law 4th ed 2012, [8.160]-[8.130]).  The differences in the legislation may prove significant in particular cases.

For example, the Surveillance Devices Acts in both Northern Territory and Western Australia define “private activity” to mean an activity carried on in circumstances that may reasonably be taken to indicate the parties to the activity desire it to be observed only by themselves, but does not include an activity carried on in circumstances in which the parties to the activity ought reasonably to expect the activity may be observed by someone else (NT s 4; WA s 30).  By contrast, “private activity” is defined in Victoria as an activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves, but does not include: (a) an activity carried on outside a building; or (b) an activity carried on in any circumstances in which the parties to it ought reasonably to expect that it may be observed by someone else. Accordingly, the use of modern technology (such as a camera mounted on an unmanned aerial vehicle) to film private activities conducted in a backyard or rooftop (such as sunbathing) may infringe the laws in the Northern Territory and Western Australia but not Victoria. In New South Wales the prohibition is against the knowing installation, use or maintenance of an optical surveillance device on or within premises or a vehicle or other object to record visually or observe the carrying on of an activity where that involves:

(a)          entry onto or into the premises or vehicle without the express or implied consent of the owner or occupier, or

(b)          interference with the vehicle or other object without the express or implied consent of the person having lawful possession or control of the vehicle or object.

Similarly, the use of modern technology such as an unmanned aerial vehicle to capture images of activities occurring in a neighbouring backyard or, for that matter, inside a building will not breach the prohibition if that intrusion does not involve entry into the neighbouring premises.

Protection against unreasonable intrusion in an age of advanced technology (including the use of unmanned aerial vehicles and devices such as Google Glass) becoming more accessible in terms of cost and ease of use may be significantly improved by SCAG facilitating the States and Territories adopting uniform legislation that prohibits the installation, use or maintenance of an optical surveillance devices and listening devices to knowingly record “private activities”, defined in terms similar to the legislation in either the Northern Territory or Western Australia. This prohibition should be supported by laws against misuse of information in the form of a prohibition of the communication or publication of any such recording.  Such a prohibition already exists in both Listening Devices Acts and Surveillance Devices Acts.

Any such uniform Surveillance Devices legislation should in addition make provision for recovery of compensation or other remedies such as injunction by any aggrieved person.

Question 28:

Other comments: