Common law privacy torts - paper tiger or new limit on corporate behaviour?

Eugene Oscapella examines whether the use of privacy torts to seek legal redress poses a threat to the business community.

A recent Court of Appeal decision from New Zealand has confirmed the emergence of a common law (judge-made) tort of invasion of privacy in that country. The existence of such a tort gives individuals a right to take civil action in the ordinary courts against companies, individuals and sometimes governments, for damages or injunctions.

At first glance, the Hosking decision, released March 25th 2004, may appear to be only of local interest. Decisions of New Zealand courts do not bind courts of other countries. However, even if not binding on other common law countries, the decision may encourage judges abroad to be more inventive in addressing privacy issues, with consequences for corporate behaviour in those countries. At the same time, some question the practical impact of a privacy tort on corporate behaviour. Even if a full-fledged privacy tort emerges, is it largely a legal right in theory only — a paper tiger?

The Hosking decision involved a photographer who, without the consent of two "celebrity" parents, took pictures of the couple's children in a public street. The couple sought to prevent publication of the photographs in a magazine.

The majority of the Court of Appeal concluded that it was actionable as a tort to publish information or material in respect of which the plaintiff has a reasonable expectation of privacy, unless that information or material constitutes a matter of legitimate public concern justifying publication in the public interest. However, the majority also found that neither the parents nor the children had a reasonable expectation of privacy in the circumstances of the case.

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The Court found that New Zealand's Privacy Act was no impediment to the creation of a common law privacy tort. Justice Tipping stated that, "In the absence of any express statement that the Privacy Act was designed to cover the whole field, Parliament can hardly have meant to stifle the ordinary function of the common law, which is to respond to issues presented to the Court in what is considered to be the most appropriate way and by developing or modifying the law if and to the extent necessary."

The Court also rejected the notion that the absence from the Bill of Rights Act of a broad right of privacy inferred against incremental development of the law to protect particular aspects of privacy that may evolve case by case. Said Justice Tipping, "Society has developed rapidly in the period of nearly 15 years since the enactment of the [New Zealand] Bill of Rights in 1990. Issues and problems which have arisen, or come into sharper focus, as a result of this development should, as always, be addressed by the traditional common law method in the absence of any precluding legislation."

EXTENSION OF THE TORT

The judgment is quite clear that it was not intended to extend the scope of the tort of invasion of privacy beyond the circumstances of the case — unwanted publication of photographs by a magazine. However, the reasoning behind the creation of the tort could well serve as a springboard for lawsuits by those with other privacy concerns that are not addressed by current laws. As Justice Gault noted, "The law governing liability for causing harm to others necessarily must move to accommodate developments in technology and changes in attitudes, practices and values in society." Furthermore, he noted, "from time to time . . . there arise in the courts particular fact situations calling for determination in circumstances in which the current law does not point clearly to an answer. Then the courts attempt to do justice between the parties in the particular case. In doing so the law may be developed to a degree."

Applying Justice Gault's reasoning, video surveillance of employees and customers, use of RFID (radio frequency identification) tags and employee drug testing are among the many situations where privacy torts could fill a gap in the law. Consumers might also rely on the tort to challenge data collection and handling practices, even if the practices comply with data protection legislation. Thus, companies might not only have to comply with data protection laws, they might also have to ensure other aspects of their operations respect the somewhat amorphous notion of a right to privacy.

PRIVACY TORTS ELSEWHERE

The Hosking decision also contains a very useful comparative survey of the current state of the law on privacy torts in several other common law jurisdictions — Australia, England, the United States and Canada.

Australia - The Court in Hosking noted that there were some early indications that a privacy tort might be introduced in Australia in media cases. However, later courts have declined to recognise a stand-alone common law right to privacy in Australian law. Justice Gault concluded that, "essentially . . . the High Court of Australia has not ruled out the possibility of a common law tort of privacy, nor has it embraced it with open arms. Nor did current Australian legislation such as the Privacy Act 1988 (Cth) create a statutory tort of privacy (a statutory tort of privacy creates a right of civil action for violations of privacy through legislation rather than through common law)."

United Kingdom - The Court remarked that there was no common law tort of privacy in English law at present. However, the tort of breach of confidence provided a right of action to both companies and individuals in

respect of use or disclosure where information has been communicated in confidence. As well, the tort of breach of confidence gave a cause of action in respect of the publication of personal information about which the subject has a reasonable expectation of privacy.

Justice Gault observed that the Human Rights Act 1998 incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 into domestic law. Article 8 of the Convention provides that everyone has the right to respect for his private and family life, his home and his correspondence. The result, he suggested, has been the continued evolution of the existing breach of confidence action in the UK to address privacy concerns.

United States - The Court in Hosking also reviews the US jurisprudence and literature on privacy torts. It refers to the Restatement of Torts, which sets out the broad parameters of the tort of privacy in the US:

1. One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.

2. The right to privacy is invaded by:

a. unreasonable intrusion upon the seclusion of another . . .
b. appropriation of the other's name or likeness . . .
c. unreasonable publicity given to the other's private life . . .; or
d. publicity that unreasonably places the other in a false light before the public . . .

Canada - The Court in Hosking noted that Quebec enacted a "quasi-constitutional" statement of rights that guarantees every person "a right to respect for his private life." This right, found in the Quebec Charter of Human Rights and Freedoms, can be exercised in relations between individuals, between individuals and government, or between individuals and corporations. Thus, companies subject to Quebec law must not only respect data protection legislation, but also the broader privacy protections encapsulated in the Quebec Charter.

The Court in Hosking also noted that several Canadian provinces have enacted statutory privacy torts. (By way of example, British Columbia has a broad statutory tort, making it "actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.")

The New Zealand judgment notes the continuing uncertainty about the existence of a common law tort of privacy in Canada, but hints that the development of such a tort may be close, since "privacy concerns are increasingly receiving protection in Canada."

IMPACT ON CORPORATE BEHAVIOUR

As noted above, the evolution of a common law privacy tort has significant potential implications for relationships between a company and its customers and employees, and even with individuals who have no dealings with the company. The tort introduces a new element of privacy protection for individuals that may extend far beyond the protections afforded by data protection law. However, the scope of this protection will remain unclear until successive judgments flesh out the tort. This creates some uncertainty for companies. The uncertainty about the scope of the tort may also make individuals who feel their privacy has been violated reluctant to rely on the tort to sue a company. For example, will future judges in New Zealand extend the scope of the common law right to privacy enunciated in the Hosking case? Or will they limit the right to the limited circumstances of the case – the publication of photographs of individuals taken without consent in a public place?

> RFID technology and employee drug testing are among the many situations where privacy torts could fill a gap in the law

Justice Tipping acknowledged the lack of certainty about the scope of the privacy tort in the case before the Court in Hosking. Still, he argued, there was not much force in the criticism that the new tort is so uncertain that it should never be born. "The parameters of any general duty are constantly being worked out and refined by the Courts," he said. An underpinning jurisprudence could be allowed to develop for privacy. "What expectations of privacy are reasonable will be a reflection of contemporary societal values and the content of the law will in this respect be capable of accommodating changes in those values."

The second factor militating against companies being pursued through common law or statutory privacy torts is the burden of litigation for the complainants. Complaints made under data protection legislation are investigated by data protection authorities at no expense to the complainant. However, an individual who relies on a privacy tort to challenge a company's actions must launch a civil action against the company and incur the expense of litigation against an entity that may have much greater resources. (The Hoskings not only lost their case, but paid their own lawyer's fees and were ordered to pay NZ$18,000 in costs). Thus, only the wealthy (as in the Hosking case) or organisations (including unions and public interest groups) may realistically be in a position to rely on these torts to obtain legal redress.

In fact, Justice Keith, one of two justices in Hosking who argued against the creation of a tort of privacy, stressed the lack of utility of such a tort in practice. He noted that in both Canada and the United States, the tort of privacy has only rarely been invoked. He cited one 1983 study that found fewer than 18 cases in the United States – or about two each decade – in which a plaintiff was either awarded damages or found to have stated a cause of action sufficient to withstand a motion for summary judgment or a motion to dismiss.

Perhaps, as Justice Keith suggested, a privacy tort will cause barely a ripple in the world of privacy protection. However, as individuals become increasingly sensitive to privacy intrusions, and with legislatures often slow to respond to those concerns, companies should not entirely discount the impact of this emerging tort on their activities.

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FURTHER INFORMATION: For the full judgment of the Hosking case: www.law.auckland.ac.nz/learn/medialaw/docs/Hosking.pdf