Some wrong turns for ‘personal data’

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Interpreting Privacy Principles: Chaos or Consistency?

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Overview

- Information privacy legislation is interpreted only rarely by higher courts to any significant extent
  - Aust Federal (1 case); HK (2 or 3 cases); UK
  - Most cases are heard by judges who have not before been required to interpret these laws
  - Because these cases are so few they may have a disproportionate effect on interpretations until more cases arise
- … and the result is often highly contentious
  - Katrine Evans has given NZ examples
  - *Eastweek* (HK)
  - *Durant* (UK)
  - *FM v Macquarie* (NSW)

Eastweek [2000] HKCA 137

- Facts
  - Eastweek photographer took zoom photo of woman in public place because of her bad dress sense
  - Photo published, captioned as ‘Japanese mushroom head’
  - Caused her considerable embarrassment with clients
- History
  - HK PCO held this was unfair collection of personal data
  - CA Majority held no ‘personal data collection’, which required an ‘intention to identify’
  - Wong JA (dissent) stressed ‘identifiability’, as required by (b) of definition of ‘personal data’ was sufficient.

Eastweek (3)

- Majority (per Ribiero JA) took a very restrictive view
  - 'it is … of the essence of … personal data collection that the data user must thereby be compiling information about an identified person or about a person whom the data user intends or seeks to identify'.
  - Here, Eastweek 'remained completely indifferent to and ignorant of her identity …'
- Consequences
  - Any publication of data from which ***others*** may easily identify a person will not thereby be 'personal data'
  - If the collector could take steps ('seeks') to identify the person but does not, it will not be 'personal data'
  - Unresolved: if the collector already has in its possession information to identify the person ('an identified person'?)
  - Result is that collection of a great deal of easily identifiable data is excluded from protection

Eastweek (3) - criticisms

- Majority's 3 arguments may all be criticised:
  1. Why is 'identifi*able*' not sufficient? - plain words of definition - satisfies example of attempt to retrieve by her name a year later
  2. Inhibiting press? - why not just hold it is 'fair' in the news context? - consent is not required, notice may be
  3. Support from other Ordinance provisions? - aren't all 5 examples satisfied by 'retriev*able*'?
- Argument of Wong JA (dissent) also unsatisfactory:
  - Example implies 'identifi*able*'is correct criterion - but he does not answer whether she was identifiable by Eastweek - if she was not, no personal data
- **Conclusion**: CA would have been better to find it *was* personal data but still find for Eastweek because collection was (I) fair or (ii) not identifiable. No damage to the law.

Durant v Financial Services Authority [2003] EWCA Civ 1746

- History
  - UK Court of Appeal in [2003] EWCA Civ 1746 (Auld, Mummery & Buxton JJ) - restrictive approach by the highest UK Court to yet consider 'personal data'
  - House of Lords refused leave to appeal (2005)
  - May go to European Court of Human Rights as a breach of A8 of the European Convention on Human Rights
  - EU may pursue UK for breach of EU privacy Directive
- Facts
  - Could D access files of Barclays and FSA that referred to him and the complaint he made (s7 of Act)?
    - No exclusion in UK Act for documents used in litigation

Durant (2) - reasoning

- CA starts its interpretation of 'related to' in definition of 'personal data' from its view of the purpose of s7: 'to enable him to check whether … processing … infringes his privacy'; 'It is not an automatic key to any information … in which he may be named …'
- 'Mere mention' does not amount to personal data; it 'depends on where it falls in a continuum of relevance or proximity to the data subject…'; 2 factors said to assist:
  - (I) 'whether the information is **biographical** in'… 'going beyond' events which have 'no personal connotations' or his privacy is not compromised.
  - (ii) 'the information should have the putative data subject **as its focus** rather than some other person'
- 'In short it is information that affects his privacy whether in his personal or family life, business or professional capacity.' - allows 'business or professional privacy'

Durant (3) - criticisms

- Problems with Durant approach
  - Unnecessary: detailed exemptions play the same role
  - Inoperable: subjective decisions on what is ‘private’ or a ‘focus’ - like FOIA problems in applying ‘personal affairs’
- Support Lindsay’s criticisms [2004] PLPR 13 of *Durant:*
  - Role of definition of ‘personal data’ is to distinguish anonymous information, not to differentiate between kinds of information based on the extent they affect privacy
  - Will create great uncertainty
  - Ignores rights-based approach of Data Protection Directive - access is essential to autonomy and dignity
  - Other interests are protected by exceptions to the IPPs, not by artificial limits on ‘personal information’

Durant (4) - Apply or avoid?

- Should *Durant* be applied in Australia?
  - For: ‘about’ is similar to ‘related to’
  - Against: Previous criticisms of reasoning apply
  - On *Durant* facts, NPP 6 exception already protects existing or anticipated litigation / negotiations, against access (Lindsay)
- Should Durant be applied in HK?
  - ‘related to’ is used in HK Ordinance
  - Do PD(P)O exceptions from access apply? - see s58(1) and (3) - is this the correct way to deal with the issue?
  - In *Eastweek* Ribiero JA refers to ‘important’ personal data (once) - is this significant? - I have heard HK PCO staff refer to this
  - Long title: ‘to protect the privacy of individuals in relation to personal data’ - does this dictate any particular approach?
- **Conclusion**: *Durant* can, and should, be avoided

Macquarie University v FM [2005] NSWCA 192

- Facts
  - FM's doctoral studies at Macquarie were terminated for disciplinary reasons; he later applied to UNSW
  - A Macq staffer disclosed observations about FM (never written down) to a UNSW staffer - was this a disclosure in breach of s18?
- History
  - NSW ADT Appeal Panel held the NSW Act did not require information to be held in some recorded form by an agency before s18 disclosure applied
  - NSW Court of Appeal overturned this: a NSW agency does not 'hold personal information' if it is only 'held in the mind of an employee'

Macquarie University v FM (2)

- CA held ‘A person is neither “in possession”, nor in “control” of the contents of his or her mind.’ [34]
  - The ordinary meaning of ‘possession or control’ does not extend to what we hold in our minds [34]
  - A bold proposition, necessary for the Court to decide that the information in question was not “held” within s4
- CA considered all provisions in the Act which referred to “holds personal information” - decided ‘almost all’ would **not** make sense if they applied to information held *only* in people’s minds.
  - Then concluded it was unlikely that ‘holds personal information’ in s18 had a different meaning

Macquarie University v FM (2) - right turn or wrong turn?

- My view is that in this case a higher Court took the right turn on a crucial issue
  - The NSW CA decision is not a decision about 'personal information' per se - only about the requirement that it be 'held' by an agency before *some* IPPs apply;
  - So once it is held it can still be disclosed *from* the mind of a person, not only directly from a record
  - The ADT Appeal Panels approach would have been a radical departure for regional privacy laws; in different ways, all others require information be held in a 'record' before IPPs (except collection) apply
  - This decision is a landmark in obtaining consistency in regional privacy laws and their interpretation