Some wrong turns for ‘personal data’

Graham Greenleaf, UNSW

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 ‘identifiable’ 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 ‘retrievable’?

- Argument of Wong JA (dissent) also unsatisfactory:
  - Example implies ‘identifiable’ 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