

Harassment, Privacy and Alison Mau

Notes for RNZ slot from Ursula Cheer (Associate Professor) Canterbury University, 31 March 2010.

1. Privacy has been in the news again. Alison Mau made complaints on the tele that she was being stalked by media. (this was denied). This story involves aspects of spying, or surveillance, and so it is timely to discuss some recommendations made by the Law Commission in its on-going investigation into our laws of privacy (Invasion of Privacy: Penalties and Remedies (Report 113, January 2010).
2. The issues around the Alison Mau complaint were much blogged about, such as:
 - a. Do celebrities who live by the media have a right to complain when they object to what is being published? (yes, I think even celebrities are entitled to a private life, at least in relation to any area they have kept out of the public eye);
 - b. Is there public interest in the sexual orientation of celebrity newsreaders? (It's highly unlikely, though lots of people may be prepared to buy the *Herald* to read about it);
 - c. Should Mau have complained on breakfast television about the situation and used the opportunity to ask viewers to contact an editor of a womens' magazine to complain? (it does seem rather incongruous that she did this on the segment of the programme which happily delves into womens' magazines every week), and I do have some concern about use of the broadcast opportunity to solicit

negative responses and direct them to an actual email address - however, this does not apparently breach the BSA privacy principle 4 which provides:

The protection of privacy includes the protection against the disclosure by the broadcaster, without consent, of the name and/or address and/or telephone number of an identifiable individual, in circumstances where the disclosure is highly offensive to an objective reasonable person.

The BSA has held in *TV Works Ltd and Kirk* [2007] that the disclosure of an e-mail address did not result in the type of mischief that Principle 4 is designed to address. It is aimed at preventing 'potential harassment or physical threats at a place of residence'. Nicole Moreham has suggested this is right because unwanted e-mails can be easily deleted and e-mail addresses can easily be changed. However, I wonder about that. Business email addresses are less easy to change and the possibility of an invited spamming campaign might be a form of harassment which should be prevented. Moreham has suggested that disclosure of an e-mail address could still be a breach of BSA Principle 1, which provides:

1. It is inconsistent with an individual's privacy to allow the public disclosure of private facts, where the disclosure is highly offensive to an objective reasonable person.

and I agree with her.

- d. Should TVNZ have weighed into the mix with coverage on Closeup? (State broadcaster, etc, but since it is expected to operate on commercial principles along with private media, it is entitled to call this stuff news, whatever ulterior motive there might be.)

3. However, the main issue for Mau was the fact that she felt she and her family were being stalked. So what can anybody, including celebrities, do about persistent media methods that border on stalking? The answer is maybe:

- i. The tort of privacy is of little use unless the stalking produces information which is then published. In New Zealand, you need to show you had a reasonable expectation of privacy in the information published, and publication is highly offensive to an objective reasonable person. The defendant has a defence if they can show there is public interest in the information. So the tort only covers what we call informational privacy at present. It does not apply, currently, to the **manner** in which information is obtained, although it might be argued that the tort should be extended in this way. The problem with stalking is that much of it occurs in public, and the presumption in the tort is that you do not have an expectation of privacy in relation to events which occur in public. However, there are indications in overseas cases that activities occurring in public can be the subject of the tort - the *Murray* case involving the author JK Rowling and her family walking on a public street, and the *Von Hannover* case, involving a successful claim by Princess Caroline of Monaco for photographs of family activities carried on in public.

The fact remains, however, that really, you would have to argue for a separate tort covering interferences with aspects of your physical autonomy - effectively a right to be let alone. Here it might be useful to look to the BSA.

- ii. What about the BSA? The BSA has a privacy principle which states:

3. (a) It is inconsistent with an individual's privacy to allow the public disclosure of material obtained by intentionally interfering, in the nature of prying, with that individual's interest in solitude or seclusion. The intrusion must be highly offensive to an objective reasonable person.

How does this work? 'Solitude' has been defined as 'the state of being alone' and in fact has not been satisfied in any of the complaints so far. But seclusion can cover more possibilities. You have an interest in 'seclusion' if you are in a 'state of screening or shutting off from outside access or public view', because you have created 'a zone of sensory or physical privacy'. And you can do this even if you are not absolutely on your own. Once you have established an interest in solitude or seclusion you have to show it has been interfered with. It will almost always be an interference with solitude or seclusion to broadcast footage obtained with a hidden camera or even when you are filmed quite overtly.

There are still difficulties applying Principle 3 to intrusions in a publicly accessible place. In all the cases where Principle 3 has been breached, the footage was obtained either by filming a person on private property or by filming the property itself. For example, seclusion can exist when you are opening your front door or when inside your own house or car, or on your farm property, and this can apply even if you are not present on the land in question. However, seclusion does not cover activities on a public waterway, or to someone conducting his work in a public place with unrestricted access.

Moreham argues it is too simplistic to use this approach. Being in public may mean you can be seen only by a handful of people who happen also to be in the vicinity. Furthermore, to interpret the Principle in this way means there is almost no protection to those without access to private property, such as 'homeless men living under a bridge in central Auckland, even against broadcast of footage obtained by continual unwanted surveillance by an overzealous reporter'. And some workers spend the bulk of their working lives in public. Therefore, Moreham has suggested that the Principle could be extended to cover your interest in solitude or seclusion *or your private affairs or concerns*, as in one form of the tort in the US. This might then cover forms of media stalking,

remembering that intrusion still has to be highly offensive to a reasonable person.

Of course, such a principle could only apply to broadcast, not print media, at present, since the BSA has no jurisdiction over magazines or print media. However, the tort could be extended to these situations too.

iii. What about the criminal law? We have a Harassment Act and criminal offences which cover some spying activities. But there are gaps.

i. Obviously if media commit an illegal act while persistently following someone, or hang around watching them, they can be criminally liable. The most obvious offences are trespass, and wilful damage. If you secretly film someone engaged in intimate activities, you may be guilty of intimate covert filming offences. If you are peeping or peering into a dwellinghouse at night without reasonable excuse, you can be fined \$500. The Law Commission has recommended that this offence be broadened to cover voyeuristic behaviour, and should not be limited to night time.

ii. However, it is no offence to use a device for visual surveillance. The Law Commission has recommended a new offence of intentionally installing a visual surveillance device or interception device on private land or premises, where trespass is used. Law enforcement agencies exercising valid powers would be exempt. The Commission has also recommended an offence of using a visual surveillance device to observe or record the activities in a dwelling, without consent. This is not limited to surveillance of intimate acts. For this, defences would be available to others as well as law enforcement agencies. This would be based on reasonable belief that the dwelling or that part filmed was being used for work or business, or that the accused reasonably believed that the surveillance was necessary to protect

individual or public health or safety, or to provide evidence of a crime, - and the extent of surveillance was necessary for those purposes. The Commission is of the view that such defences will protect the media.

- iii. The Harassment Act 1997 was passed to deal with gangs and domestic and other stalking behaviour. Harassment can only be criminal if there is an intention to create fear for the victim's safety or for that of the victim's family. However, civil restraining orders can be obtained more easily, where there is distress caused by specified behaviours, such as watching and loitering near the home or work of the victim, or following or accosting them. Such acts have to be part of a pattern of behaviour which includes the act on at least two separate occasions within a 12 month period. There is a defence of lawful purpose.
- iv. The Law Commission has recommended that the Act be amended to make clear that filming people, tracking their movements and tapping telephone calls can amount to harassment ie: keeping people under surveillance. Further a single protracted act of surveillance could trigger the Act, rather than two separate incidences.

The Commission had quite a bit to say about the defence of lawful purpose. They suggest it would clearly cover media using a hidden camera to obtain information of real public concern where there is no other effective method of obtaining it. However, they point out that the defence does not cover extreme forms of harassment, by surveillance or otherwise. The activity must be proportionate to the purpose. Acts lawful in themselves may invite a restraining order where the manner of performance creates actual harassment. So just having a lawful purpose is not enough.

The United Kingdom Harassment Act has been applied to paparazzi activities, but the defence there requires that the

conduct be reasonable, not just proportionate, in the circumstances.

The Law Commission has indicated that the defence in New Zealand could be made clearer to indicate the requirement of proportionality, but that the Bill of Rights would still have to be taken into account in that process.

So, Alison Mau has a number of choices, all really depending on the context of the 'stalking' she says she has been experiencing. Meanwhile, the government is to consider the Law Commission's recommendations when it completes its review of the law, later in the year.

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