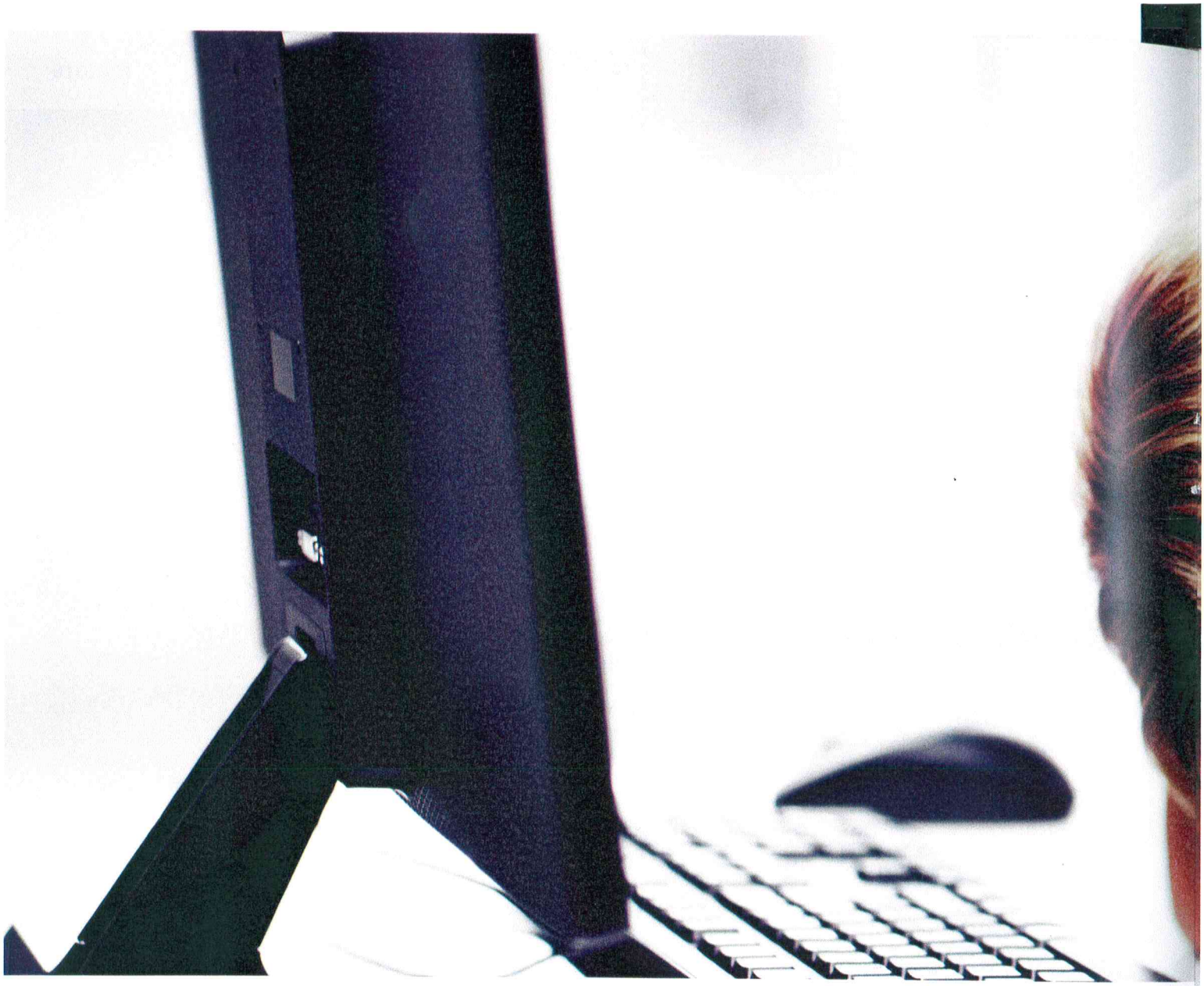

The Law of Equity, the Information Age and Revenge Porn

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INTRODUCTION

Revenge porn is a modern problem that is presenting challenges for legal systems worldwide. Facilitated by modern information technology it is a new way of causing harm, usually by a man against a woman. In a recent Western Australian case, the Supreme Court met the challenge by finding remedies in the law of equity.

THE INFORMATION AGE AND REVENGE PORN

Advances in communications and information technology over the past 20 years have led to widespread changes in modes of capturing and transferring data and images, in inter-personal communication and in behaviour. The advances include the internet, World Wide Web, websites, internet based social media applications, digital and wireless data transfer, and smartphones.

These are components of what has been given the label the Information Age among other descriptors. New phenomena have emerged and words and terms have been created to describe them. 'Revenge porn' is an example.

The Information Age has witnessed the phenomenon of some individuals in a sexual relationship using readily available information technology to produce and exchange, consensually and for their intimate private viewing, sexually explicit

images of themselves. This behaviour has created a new and associated risk.

A proportion of these relationships break down. Current information technology has provided a new way for a jilted lover to cause harm to a former sexual partner by distributing intimate images beyond the private walls of the relationship. The term 'revenge porn' has been coined to describe this pernicious, and possibly increasing, form of behaviour. The label applies to sexually explicit still or moving images of an individual that have been shown or made available for viewing on a smartphone, computer or tablet, by means of the internet or other data services, without the consent of and for the purpose of harming the pictured individual. It might be viewed as an Information Age analogue of a sexual assault.

REVENGE PORN CASE IN THE SUPREME COURT

In *Wilson v Ferguson*[1] a victim of revenge porn obtained equitable remedies, including injunction and an order for payment of what was held to be equitable compensation.

The case is of interest to lawyers for at least four reasons. First, it exemplifies the problem of revenge porn that has emerged in the Information Age and the difficulties faced by the courts and the law in finding a remedy for harm caused to a victim. Secondly, it provides a precedent for a remedy for a new problem by applying the rules of confidence of the law of equity. Thirdly, the case spotlights the remedy of equitable compensation and its availability for mental distress falling short of psychiatric injury - an outcome that is outside the traditional boundaries of the remedy and is beyond the boundaries of the common law. Finally and unusually, although perhaps not so unusual given the nature of the subject matter and allegations against the defendant, the trial of the action proceeded in the absence of the defendant.

The plaintiff and the defendant were fly-in/fly-out workers at the Cloudbreak mine site in the Pilbara. In November 2012 they commenced a romantic relationship. The plaintiff moved in with the defendant at his home in a Perth suburb. In less than 12 months the relationship had ended in acrimony.

During the months of their relationship, by smartphones, they took and exchanged photographs of a sexual nature that depicted each other naked or partly naked. In addition, the plaintiff took videos of herself nude and, on one occasion, nude and masturbating. Without the plaintiff's consent the defendant used the plaintiff's phone to email the videos to himself.

The relationship between the parties deteriorated. Catalysing events occurred in the space of about 7 hours on a single day, 5 August 2013. Shortly before midday the plaintiff sent the defendant a text message saying that she knew he was cheating on her and she wanted nothing to do with him. Subsequently that day the defendant uploaded to his Facebook page, with boorish comments, sixteen explicit photographs and two

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explicit videos of the plaintiff. The photographs and videos were then available for viewing by the defendant's approximately 300 'Facebook friends' many of whom worked at Cloudbreak.

The plaintiff did not have a Facebook account, but she discovered the general nature of what the defendant had done when, at about 5.20pm, she began to receive telephone calls and text messages from friends. She then exchanged text messages with the defendant and at about 7.00pm the photographs and videos were removed from Facebook.

A witness who gave evidence for the plaintiff at trial first saw the photographs at about 5.30pm when he saw two co-workers looking at, and talking about, pictures on the screen of a mobile phone. The phone was handed to the witness. The trial judge concluded that a significant number of workers at Cloudbreak accessed the images of the plaintiff and a greater number were aware of their existence.

By means of a friend's Facebook account the plaintiff saw the photographs and videos. She was horrified, disgusted and upset by what she saw. She felt humiliated, distressed and anxious because she and defendant worked at the same worksite. She could not sleep for about three nights and to the time of trial more than 12 months later (2 December 2014) she had slept badly. She felt unable to work from 6 August to 30 October 2013. At the time of trial she still felt humiliated and anxious. She was taking sleeping tablets nearly every night to help her sleep. However (perhaps surprisingly, given her evidence) there was no evidence that she suffered from a recognised psychiatric illness.

The plaintiff did not seek damages for intentionally or negligently inflicted psychiatric injury, or for damage to her reputation from defamation. She called in aid the law of equity to provide remedies for improper disclosure of confidential information. She sought an injunction restraining further publication of the photographs and 'damages'.

The trial judge held that the essential elements of an action in equity for breach of confidence were that the information was of a confidential nature, that it was communicated or obtained in circumstances importing an obligation of confidence, and that there was an unauthorised use of the information. He held that those elements were satisfied on the facts of the case. In his view there should be an injunction prohibiting the defendant from publishing photographs or videos of the plaintiff engaging in sexual activities or in which the plaintiff appeared naked or partially naked. In addition he awarded the plaintiff $35,000 as "equitable compensation for the damage which she has sustained in the form of significant embarrassment, anxiety and distress as a result of the dissemination of intimate images of her in her work place and among her social group". In addition, he awarded "economic loss of $13,404" for lost wages for period when the plaintiff did not work in 2013.

GILLER V PROCOPETS

The trial judge followed and applied, as he was bound to do unless convinced that it was clearly wrong, an earlier decision of the Victorian Court of Appeal in *Giller v Procopets*[2]. The High Court has directed that intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation, or non-statutory law, unless they are convinced that the interpretation is plainly wrong[3].

Giller v Procopets was a case about revenge porn in the era of videotapes. The defendant, who won at trial but did not appear at the hearing of the appeal, attempted to distribute to members of the plaintiff's family copies of a videotape that recorded he and the plaintiff engaging in a variety of sexual activities in the privacy of a bedroom on ten occasions. The Court of Appeal held that the plaintiff was entitled to recover equitable 'damages' for her mental distress that fell short of psychiatric injury.

On 23 September 2009 the High Court (Heydon and Bell JJ) refused special leave to appeal.[4] It is unclear from the short note of the decision whether there was a proposed ground of appeal to the effect that equitable compensation for mental distress was not available as a matter of law.

Giller and *Wilson v Ferguson* raise the issue of the ambit of the remedy of equitable compensation. The notion that equitable 'damages' should be awarded for mental distress (or indeed for something other than loss of property, money, or other valuable right) is problematic for a number of reasons (and some were identified in the reasons for decision of the Judges of Appeal in *Giller* and by the trial judge in *Wilson v Ferguson):*

1. Relief by way of equitable compensation developed in the context of cases of breach of trust and breach of fiduciary duty impacting upon property or proprietary rights;[5]
2. There was no Australian authority that supported the decision in *Giller;*
3. The decision in *Giller* relied on a small number of English decisions that appear to have assumed the availability of the remedy;[6]
4. Awarding a money sum as compensation for personal harm might be seen to be more appropriately the province of the common law;[7]
5. With limited exceptions damages are not recoverable as a common law remedy for mental distress, stress or anxiety falling short of psychiatric injury;[8]
6. According to the authors of *Meagher Gummow & Lehane's Equity, Doctrines and Remedies* (5th Edition)[9], awards of equitable compensation are concerned with property and economic interests and the remedy is not available for personal injury or trespass to the person: see also *Paramasivam v Flynn*. The trial judge in *Wilson v Ferguson* referred to [23-605] of *Meagher Gummow & Lehane* but only as a reference for a statement that it did not follow from his conclusion (that he agreed with the decision in *Giller* and that a remedy of monetary compensation was available) that "compensation for non-economic loss will be available for breach of other equitable obligations which may be more concerned with the protection of economic interests";
7. *Giller* has been criticised by the authors of *Meagher Gummow*

& Lehane[10] who concluded "it is submitted that the reasoning in *Giller v Procopets* nevertheless does not convincingly sustain the conclusions there reached as regards Lord Cairns' Act or equitable compensation". The trial judge in *Wilson v Ferguson* did not refer to this criticism;

8 In *Wilson v Ferguson* the trial judge spoke about "determining how the equitable doctrine of breach of confidence *should* be developed", that the remedy "*should* ... accommodate contemporary circumstances and technological advances", that *Giller* was "an *appropriate* incremental adaptation of established equitable principle", and that "the equitable doctrine of breach of confidence *should* be developed by extending the relief available for unlawful disclosure of confidential information" (my emphasis);

9 It might be reasonable to contend that the decision in *Giller* represents more than an incremental development of the law of equity based on judicial precedents, and that a development of this kind and magnitude should only be effected by a change to statutory law or a decision of the High Court.

CONCLUSION

Unless and until the decisions in *Giller v Procopets* and *Wilson v Ferguson* are overruled they stand as precedents that enable a victim of revenge porn to recover a money sum for mental distress that is not a psychiatric illness. They will become elements in the arsenal of case law available to lawyers who represent victims of breach of a duty of confidence, including cases of revenge porn. In theory the remedy will be available in other cases of breach of equitable duty.

However, it might be argued that it is not the role of the law of equity to provide a remedy of compensation in this area. It might be reasonable to anticipate that in the future the High Court will be asked to decide whether *Giller v Procopets* and *Wilson v Ferguson* correctly state the law in Australia. The prospect that the High Court will decide that compensation for mental distress is not a remedy provided by the law of equity should not be ruled out. The stage will be set if another Australian intermediate appellate court declines to follow them. In a case of revenge porn, if the evidence permits, it would be prudent for a plaintiff's lawyer to frame the claim in tort as one for damages for psychiatric injury, in addition to or as an alternative to a claim for equitable compensation.

ABOUT THE AUTHOR

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NOTES

1. [2015] WASC 15 (delivered 16 January 2015).
2. [2008] VSCA 236; (2008) 24 VR 1.
3. *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89 [135]; *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492.
4. [2009] HCASL 187.
5. *Giller* [146] per Ashley JA.
6. *Giller* [412], [416] per Neaves JA.
7. cf *Paramasivam v Flynn* (1998) 90 FCR 489.
8. *Baltic Shipping v Dillon* [1993] HCA 4, (1993) 176 CLR 344.
9. See [23-605].
10. at [24-080] and [24-085].