Gazette of Law and Journalism Interview: Tom Blackburn SC

*As one of Australia's leading defamation silks, **Tom Blackburn SC** has acted for a range of mass media clients, and the occasional plaintiff … He's leaving the jurisdiction for the big libel smoke of London, and agreed to share his thoughts on privacy, defamation, section 18C and more*

GLJ: At last count four Australian inquiries recommended a statutory tort of privacy. Do we need one and what form should it take?

TB: It's not so much a question of whether I think we need one, I think we are going to get one eventually.

I think it would be desirable too, for the courts to develop it.

The difficulty with legislation is that it so often has unintended consequences, particularly in areas which affect protection of privacy or reputation on the one hand, and freedom of expression on the other.

I think that on the whole judges are better placed to develop the law incrementally in an area like this than parliamentarians.

GLJ: Do you think that's because we don't have a Bill of Rights in this country so there's no counter-veiling protection for freedom of expression?

TB: That's an interesting question because when you look at the way that the so-called tort of privacy has been developed in the UK, it's very much based on Articles 8 and 10 of the European Convention on Human Rights, which has been enacted into domestic law by the *Human Rights Act*.

And of course the convention establishes a number of rights upon which the tort is based.

On the one hand you've got Article 8 – headed right to respect for family and private life – and on the other hand there's Article 10, which is headed freedom of expression.

On top of that you've got section 12 of the *Human Rights Act* which requires particular regard to be paid to freedom of expression in any application for relief and in the case of journalism, the extent to which the material is either public or in the public interest.

The legal protections in the United Kingdom are very much based upon what you might call established or fundamental rights. We just don't have them here.

GLJ: Do you think we need them?

TB: I don't think at the moment that we need them, but I do think that if the courts develop a right of privacy, then the law that the courts create must incorporate similar matters, as matters of law, into the tort.

In other words, the kinds of matters that are in Articles 8 and 10 and section 12 of the*Human Rights Act* are matters that are essential to be worked into any personally enforceable tort of privacy in Australia.

I'm undecided as to whether we actually need what you might call constitutional protections in regard to those matters.

GLJ: The courts haven't been very pro-active in this area however, have they?

TB: No, they haven't and we've had, as you say, four inquiries and recommendations that there should be a personally enforceable tort of privacy.

GLJ: I suppose there are some claims that are brought in breach of confidence that amount to a kind of privacy claim.

TB: Certainly – you've got *Giller* and *Procopets* and so on, but I think that the action for privacy, based on breach of confidence does not go far enough.

The reason I say that is this: the action for breach of confidence as applied to a claim for privacy is capable of protecting information that is private, or information that is partially private.

But then you run up against the principle that the courts won't normally make an order that has no work to do; that is pointless.

Particularly in the breach of confidence sphere, as soon as you get information which is at least, to some extent, out in the public domain, there is a real question of whether there would be any effectiveness.

The action for privacy goes, or should go, further than that and it should also protect harassment or intrusion, which is something that I just don't think that an adapted action for breach of confidence is capable of protecting.

This is a distinction which has been made most recently by the UK Supreme Court in PJS against Newsgroup Newspapers, where the court, drawing on things that had been said at first instance and on appeal earlier, particularly emphasised this distinction between the reluctance of equity to protect information which is really out in the public domain, or partially out in the public domain.

The distinction is between that position and the protection that a tort of privacy gives, or ought to give, to intrusion upon seclusion or harassment, even if the information is already publicly available.

So I don't think that an adapted action for breach of confidence would go far enough.

GLJ: There are some who argue that we have enough protection in our current harassment laws to cover what you're talking about. What do you say to that?

TB: Well, I don't think that apprehended violence orders and the like cover the kind of situation that is often dealt with by the courts here and in the UK.

GLJ: You've recently argued an interesting version of a privacy claim. The case was settled. It was Gina Rinehart against Channel Nine and the production company which made a TV series based on her life. Rinehart's claim was what is known as a "false light" privacy claim. Can you explain your submissions?

TB: We argued the claim on two limbs; one, upon the four limbs of the United States tort of privacy, and there was an alternative claim that was based on a variation of the UK law, but without explicitly bringing in the European Convention, which of course we can't have any reliance on.

In so far as her claim was based on the law of the United States, we alleged four things – that she had a right not to have her private affairs or those of her private affairs that the public had no concern with to be kept from public view, to be free of unreasonable intrusion upon her seclusion, to be free of exploitation of her

name and likeness and personality, and significantly in this case, to live her life without being subject to unwarranted publicity that placed her in a false light.

The alternative aspect of it was more conventionally that she had a right not to have exposed information which is obviously private or which a reasonable person in the position of the plaintiff would have an expectation of privacy.

GLJ: What kind of information were you referring to?

TB: A good example in her case was the depiction of her and Frank Rinehart having this kind of garish wedding in Las Vegas with an Elvis Presley impersonator standing behind them. It's a very good example because it's both tawdry and untrue.

That was just completely made up and it seems to me that that is a very good example of the "false light" element of the claim.

It was particularly fictitious in the sense that the program portrayed this garish wedding occurring at a time when the plaintiff's mother was dying in Australia, with the inference being that she couldn't be bothered going home.

That seems to me to be a very good example of a situation in which a reasonable person in the position of the plaintiff would have an expectation of privacy – and it wasn't even true.

GLJ: If you get a "false light" privacy claim up in the way that you wanted to with Gina Rinehart, where does that leave the producers of drama series that are based on people who are still alive?

TB: Well, I suppose it leaves them in much more of a difficult position than they are in at the moment.

It frequently happens that persons who make docudramas or historical dramas get releases from the people they are proposing to portray and I know from my own experience – not the Rinehart case – that if you don't do that it can cause a vast amount of difficulty and threaten the existence of the entire project.