

Examples: Confidential?

- ✓ Cultural and religious secrets known by some in Aboriginal community (*Foster*);
- ✓ Information published online to a small number of Govt organisations, mention on Fox Footy by a caller, knowledge by some within the AFL (no evidence), and internet chat forums (*AFL v Age*);
- ✓ Photographs of a celebrity wedding (*Douglas v Hello!* – there were elaborate security procedures to thwart paparazzi);
- ✓ Video footage of sexual activities (*Giller* – Gillard J held that, while it was common knowledge that G and P were having sexual relations, the images in the video footage were not);
- × Killing of possums, where the operations licensed by a public authority, abattoir is visited by inspectors and other visitors and no special precautions were taken to avoid its operations being seen by strangers (*Lenah*);
- × Legal principles (*O'Brien*).

Stage 2: Value

- The secret information **must be valuable**.
- 2 different types of value:
 - A. **Commercial value** (human ingenuity required)
 - Commercial information will be valuable → **not a high threshold**
 - i) if it was brought into being by the application of **skill and ingenuity of the human brain** (*Saltman*; Megarry J in *Coco*); **or**
 - ii) if someone is **willing to pay money for it** (*Douglas v Hello!*; in this case, the exclusive photographs had commercial value because OK! Magazine paid more than £1m for the rights to them);
 - **However, monetary value is not sufficient.**
 - An obligation of confidence **may exist where there is no contractual relationship** (*Talbot*)
 - Examples:
 - ✓ **A concept for a TV show** (*Talbot* – A mere idea cannot be protected. But Harris J said, an idea can be developed to a stage where it's capable of being protected. Here, T's concept had a **unique format** and 'a commercial twist');
 - ✓ **Technical drawings** (*Saltman*); and
 - ✓ **Genetic information** contained in budwood (*Franklin*).
 - ✓ **Operation manuals** of accommodation provider (*Link 2*).

Franklin – nectarine budwood

- Info: genetic material of a novel breed of nectarine, which was surreptitiously taken (3rd element).
- Held per Dunn J: Commercially valuable.
- The parent tree may be likened to a safe where there are locked up copies of a formula for making a nectarine tree with special characteristics which make it especially valuable.

Link 2

- Info: operation manuals of accommodation provider
- Issues: Whether skill and ingenuity were employed into compiling this manual. Expenditure of time/cost in gathering info. Restriction of access to the manuals.

Held:

- Compilation of info as to D's business processes and operational procedures involved a **sufficient degree of skill and ingenuity**.
- D as employee/director must have been aware the manual belonged to the company, and was not free to use or disclose other than for purposes of the business.

B. Personal value

- Examples of personal information recognised as valuable:
 - ✓ Information with “**deep religious and cultural significance**” (*Foster* – Aboriginal religious ceremonies secret and capable of protection);
 - ✓ Information about **parties indulging in a sexual activity in the privacy of their own home** (*Giller*).
 - ✓ Disclosure on **Facebook of private photos and videos of sexual relations** inherently confidential and protected (*Wilson*)
- **Can have personal value if “private”**
- Not applicable to corporations (*Lenah* per Gleeson CJ: Much of what is protected by privacy is human dignity. This may be incongruous when applied to a corporation)
- Is the info trivial or banal?

Test for “private” (Gleeson CJ in *Lenah*):

Q: Would disclosure or observation of information or conduct be **highly offensive to a reasonable person of ordinary sensibilities?**

Better test: **Human dignity and personal autonomy?** (*Jane Doe; Giller*)

- Not about humiliation, offensiveness or embarrassment.
- Personal autonomy i.e. control over how to present oneself to the world, especially intimate aspects of one's personality
- This area is still developing..

Lenah

- Lenah ran a factory that canned possum meat for export. Trespasser secretly went onto site and filmed this. Trespasser then gave the tape to animal rights group and passed this onto ABC.
- Lenah was not trying to prevent the video from being shown for commercial reasons, but concerned about their reputation.

Held: Activities were not ‘private’ despite trespass and surreptitious filming

- Not BOC because this info did not have the requisite value because it was info that was standard for a meat canning factory. Nothing special; expected in this context.

Right to privacy?

- UK: no tort of privacy, but BOC extended
- NZ: tort of privacy
- AU: no tort of invasion on privacy

Douglas v Hello! (UK case) – hybrid info [both personal and commercial]

- All guests were prohibited from taking photos. All rights to publish photos were sold to OK magazine.
 - A photographer who was not invited sold these photos to Hello Mag.
- UK court Held: breach of privacy
- **Only dissent applies in Australia** (as cited by many Aus courts)
 - Information was about wedding – personal matter but was going to sell photos anyway, therefore could not argue it was going to be completely secret → commercial undertones.
 - Monetary value itself is not sufficient – need human ingenuity.
 - There was no human ingenuity in the wedding photos. Nothing so special about it to merit commercial value.
 - Since they were going to sell photos anyway, there was not a requisite personal or cultural value.
 - In Australia, this would **fail in both personal and commercial value**.

Giller

Held: BOC found.

- Court avoided finding a new tort of privacy because BOC sufficient to provide remedy.
 - Right to compensation on other grounds, thus unnecessary to decide whether tort of invasion of privacy should be recognised.

3. Knowledge of restrictions placed on confidential information

- **Test:** Defendant knows, or ought to know, that information was imparted in confidence.
 - ❖ **P intended** the information to be confidential
 - Not enough *per se* (*Smith Kline*).
 - ❖ **“D knows”**
 - Eg *Foster* (Dr M recognised the confidence as evidenced by the caveat in his book, saying it should only be read after consultation with local male religious leaders. Muirhead J also said “it is inevitable that they took Dr M into their confidence” – ie ‘ought to know’ category).
 - ❖ **“or ought to know”**
 - **Test is objective:** Would a reasonable man in the shoes of the recipient have realised on reasonable grounds that the information was given in confidence?
 - Thus it is *not* necessary to say information is confidential if it is clear from the circumstances in which the information was received.
 - Megarry J in *Coco* said “where information of commercial or industrial value is given on a businesslike basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of conf”.
 - For example, *Saltman*, *Talbot* and *Coco*¹;

¹ In *Coco*, P showed his design for a moped engine to D – it was implicit that D was only looking at the design for the limited purpose of deciding whether or not they wanted to build the engine for P.

- Where D is a public entity, you cannot hold that D ought to have known of the limitation on use if that limitation might clash with the performance of their functions under legislation (Gummow J in *Smith Kline*). Here, the defendant, the Dept of Community Services, has a function concerned with public health and safety. In exercising this function, D may properly have regard to B1 data for a drug held by them when assessing a generic version of that drug. Thus Court will not impute to D an obligation whereby discharge of his functions is restricted.

- **Situations**

- a. **Relationship of confidence (confided under circumstances requiring continued confidentiality)**

- If the information is revealed within a confidential relationship, an obligation of confidence is created;
- E.g. marital, contractual, client, patient
- **Confidential relationships** include:
 - ✓ **Relationship of marriage** – continues even after divorce; and
 - ✓ Persons indulging in a **sexual activity** in the privacy of their own home create a confidential relationship during such activity (Gillard J in *Giller v Procopets*). This is implied by the intimate nature of the activity, and the relationship of mutual trust and confidence which is shared between the persons.

If no pre-existing relationship:

- b. **Improperly or surreptitiously acquired information**

- Where information is not imparted but taken;
- Equity will **restrain publication of confidential** info improperly or surreptitiously obtained (*Smith Kline*)
- The **act of theft creates an obligation of confidence**; notwithstanding that there was no communication of the information by P (*Franklin* – per Dunn J, “I find myself quite unable to accept that a thief who steals a trade secret, knowing it to be a trade secret, with the intention of using it in commercial competition with its owner, to the detriment of the latter, and so uses it, is less unconscionable than a **traitorous servant**”);
- ALSO, **surreptitious, illegal or improperly obtained images of a private act** are protected (Gleeson CJ in *Lenah*).

- c. **Accidentally obtained by chance**

- ‘Where **obviously confidential** document is ‘**wafted**’ by an electric fan...’ (*AG v Guardian*)
 - Even though D did not steal it, there is an obligation if it is obviously confidential.
- ‘**Blurting**’ was found to have **no obligation** of confidence in *Coco*.

- d. **Third party acquirers (obtained by another)**

- What if the information is released or about to be released by a 3rd party?
- Even if the chain of transmission is unclear, P may proceed against 3rd party recipient if all elements can be established.
- The **same test is applied to the 3rd party/indirect recipients**;
- Examples: