The Right to erasure: Its application & limits in New Zealand

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OUTLINE

- From old to new – Tort law origins of RTBF
- Not novel in Data Privacy logic and rationale
- Brief look at General Data Protection Regulation (GDPR)
- Some notable cases in NZ
- The digital dimension: defamation comparison; extraterritoriality
- Potential solutions

TORT LAW BACKDROP

- *Melvin v Reid* 297 P 91 (Cal 1931)
  - An early example of principle of contextual integrity?
- *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 (HC)
  - Interim injunction granted but later discharged when facts publicised by third party
  - Plaintiff was "reluctant debutante" as a public figure and courts sympathetic
- *Hosking v Runting* [2005] 1 NZLR 1 (CA)
  - Established privacy tort in NZ
  - Criteria:
    1. Private facts
    2. Publicity that is highly offensive to objective reasonable person
    3. Defence of "legitimate public concern" vs. "public interest"
  - Analogy with legitimacy principle in data privacy?

HOSKING V RUNTING

Gault P and Blanchard J at 36:

"The importance of the value of freedom of expression therefore will be related to the extent of legitimate public concern in the information publicised. Phillipson refers to proportionality which captures the interrelationship between the competing values. That this may draw the courts into determinations of what should or should not be published must be accepted. Such judgments are made with reference to indecent publications and suppression orders and are part of the judicial function. It is not a matter of judges being arbiters of taste, but of requiring the exercise of judgment in balancing the rights of litigants"

DATA PRIVACY

- Privacy principles (IPPs in NZ; APPs in Australia)
  - Correction principle
  - Accuracy principle
  - Retention principle
- Underlying logic of data privacy laws
  - Kafka's *The Trial*
  - powerlessness and vulnerability linked to lack of information and transparency

THE INFORMATION LIFE CYCLE

Collection

Storage/
Use

Disclosure/
Disposal

- Principles cover entire spectrum
- Common thread: contextual integrity and purpose

PRINCIPLES IN DETAIL

- IPP 7 (2) duty – on request or own initiative – to take "such steps (if any) to correct…as are in the circumstances reasonable to ensure…accurate, up-to-date, complete and not misleading"
  - "having regard to the purposes for which information may lawfully be used"
  - IPP 7(3) right to attach statement of request for correction
  - IPP 7(4) where "reasonably practicable" inform third parties where (2) or (3) occur
  - S 2 defines correct/correction – "alter by way of correction, **deletion** or addition"
  - IPP 8 shall not use info. without taking such steps etc to ensure it is "accurate, up to date, complete, **relevant** and not misleading"
    - "having regard to the purpose for which the information is **proposed** to be used"
  - IPP 9 shall not keep info. for longer than is required
    - "For the purpose for which the information may lawfully be used"

HONG KONG ORDINANCE COMPARISON

- S 2 Interpretation: "correction in relation to personal data, means rectification, erasure or completion"
- S 23 duty to make correction: "where data user satisfied that personal data to which a data correction request relates is inaccurate"
- S 26 "all practicable steps to erase … where no longer required for the purpose (including any directly related purpose) for which the data was used
  - Exceptions apply including public interest
- Principle 2 – accuracy and duration of retention
  - "having regard to the purpose including any directly related purpose for which the personal data is or is to be used"

GDPR

- Art. 17 Right to erasure including where:
  - Where no longer necessary in relation to purposes for which collected/processed
  - Where processing is based on consent and consent withdrawn
  - Where right to object exists – note this is tied to concepts such as
    - Overriding legitimate grounds/ compelling legitimate grounds/ interests of controller
    - Involves balancing against interests, rights and freedoms of the data subject
    - Article 29 Working Party Guidance e.g. employer/building owner's need to comply with health & safety obligations vs. profiling for marketing purposes
  - When erasure of publicized data must take "reasonable steps" to inform others that request for erasure of links, copies etc

LITIGATION IN NEW ZEALAND

- Privacy Commissioner Case Notes
- Human Rights Review Tribunal Cases (HRRT)
  - Substantial number and significant damages awards
- Privacy Bill 2018 retains right to access HRRT
- Bill strengthens Commissioner's powers to make access determinations & compliance orders

LITIGATION EXAMPLES

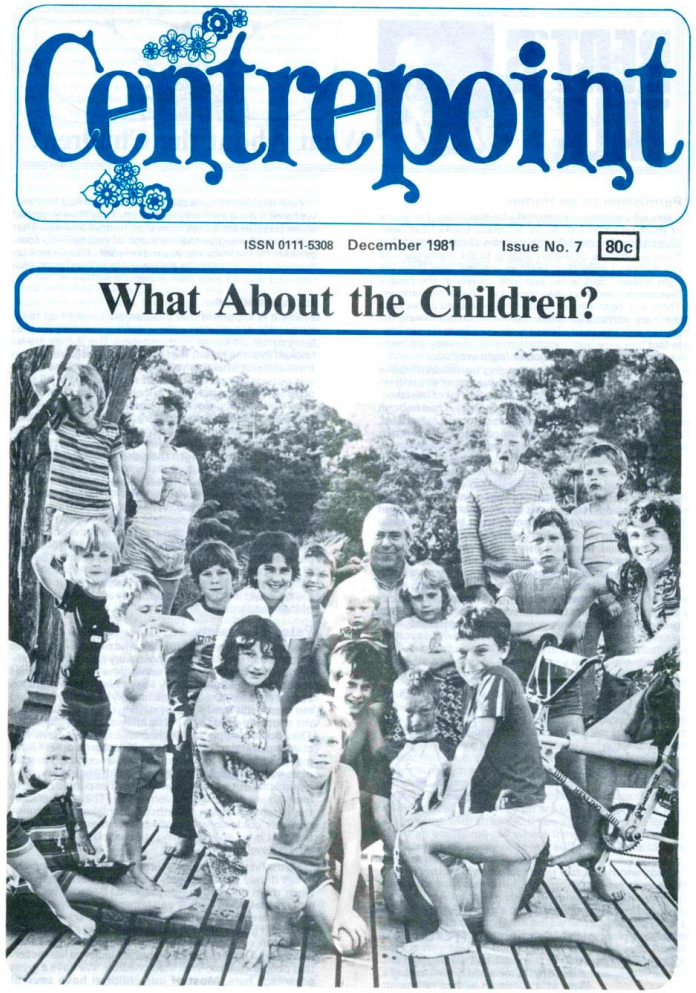
- *Plumtree v A-G* [2002] NZHRRT 10
  - Complete file found only after litigation commenced
  - Correction of Vietnam veteran's vaccination records ordered
  - Note – actual correction versus request for correction sought
  - Significance of case?

CASE NOTES

- *Case Note 5532* [1996] NZ Priv Cmr 3
  - Info retained by employer re employee dismissal
  - Practice to retain for 5 years
  - Further legal actions possible
  - Found retention lawful
- *Case Note 218236* [2011] NZ Priv Cmr 4
  - Govt. department hired company to "pre-screen" job applicants
  - Form stated company retained indefinitely for future applications
  - Found indefinite retention incompatible with IPP 9
  - Dept. ordered company to destroy

HRRT CASE

- *EFG v Commissioner of Police* [2006] NZHRRT 48
  - Concerned disclosure from Police vetting service (National Intelligence Application or NIA)
    - Only .001% of requests released notes from NIA; usually just "red-stamped"
  - Plaintiff member of Hippie commune 1970s and left in 1981
  - Charged with indecent assault on girls under 12 in 1990
  - Prosecution case so weak received s 347 discharge
  - Order suppressing plaintiff's name
  - Plaintiff subsequently had successful career as counsellor



EFG CONT'D

- From 2002 onwards Police decided to release all "notings" on NIA
  - Contained highly prejudicial but unsubstantiated allegations by girls
  - File on which notings based unable to be located
  - Referred to s 347 discharge without explanation and failed to record suppression
- Adverse consequences for plaintiff
- Sought access to his file – ONLY THEN was file on which noting based found
- Held: IPP 8 breached; order restraining disclosure & damages
  - Had not ensured info accurate, up-to-date, complete, relevant and not misleading
- Held: no breach of IPP 9
- *Obiter* that authorisation for disclosure (IPP 11) not informed

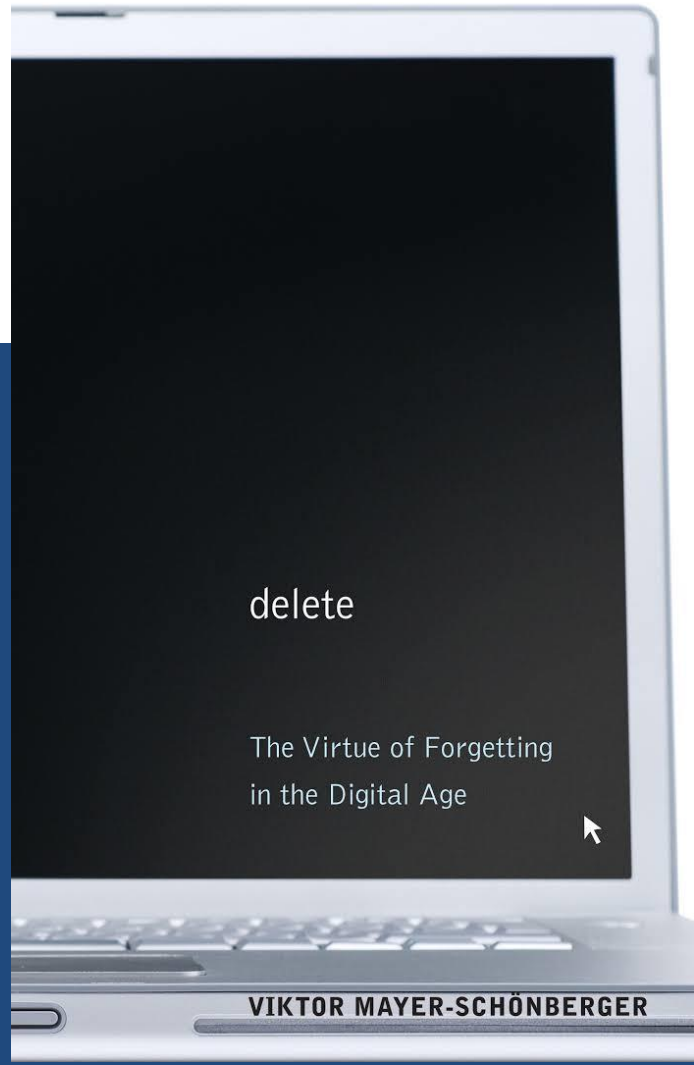
EFG QUOTES

"a purpose of the [suppression] order was to give effect to the principle that not having been found guilty the plaintiff was innocent of the charges brought against him and ought not to have his life blighted by later reference to what had occurred" – at [71.e]

"we think it would be wrong and potentially dangerous for this Tribunal to purport to fix a time limit of some kind beyond which information on the NIA database must be removed" –at [78]

DIGITAL MEMORY

- Erasure more about retrievability / accessability
- Those who control access have power
- Viktor Mayer-Schönberger 's *Delete* argues that forgetting serves function
  - Human characteristic of contextualizing past against present experience
  - Digital memory can lose sight of context
  - Digital memory can be manipulated



ISSUES

- Compared to defamation key issue is “use” and “purpose”
- Scraping and re-publishing?
  - E.g. “Insolvency Watch NZ”
- Hyperlinking with/ without “snippets”/ shallow vs. deep hyperlinks?

  https://www.privacyfoundation.nz/

  https://www.privacyfoundation.nz/wp-content/uploads/2018/03/Media-Release-on-New-Privacy-Bill.pdf
- Search engines and self-regulating “rating” applications
  - E.g. Airbnb; Uber

DEFAMATION COMPARISON?

- *A v Google New Zealand Ltd* [2012] NZHC 2352
  - Summary judgment against plaintiff as wrong defendant (**Google NZ** had little/no influence on **Google Inc**.)
  - Refused to strike out defendant's claim it had not "published" statement
  - Left open possibility of defendant using "innocent dissemination" defence
- *Crookes v Newton* [2011] SCC 47
  - Application of wide pre-Internet publication rules problematic
  - Architecture of Internet relies on hyperlinking; "chilling effect" of liability
  - Held hyperlink without more (e.g. repetition) not publication
  - Footnote analogy
  - USA Communications Decency Act 1996 – **creation** or **development** vs. passive dissemination

BACK TO DATA PRIVACY

- In terms of accuracy & correction principles focus on "use"
- *Henderson v Commissioner of Inland Revenue* [2004] NZHRRT 27
  - Focused on correction / accuracy of IRD's statement to Inquiry
  - Statement that plaintiff had "refused to agree" to release of report
  - Statement made to select committee
  - IRD posted link/memo to statement on its intranet
- Held:
  - Applied *R v Brown* [1996] 1 ALL ER 545 – to pass info. to another = "use"
  - Left open whether memo = "use"
  - Refused to order correction of historical report

HENDERSON QUOTES

"our conclusion might have been different if we had been persuaded that there was some use to which the information might be put in the future, and which might affect Mr Henderson in some real way" – at [64]

"But we do not consider that an individual's desire to achieve a correction simply for the sake of correction will ever be sufficient in and of itself to justify the conclusion that, as a result, the agency in question must take steps under Principle 7(2) to correct its records." – at [65]

CONCLUSIONS

- Right to erasure a conditional right
- Contingent on purposes for which info. used/ legitimacy
- Key question when data indexed/linked online is its purpose
- Canadian Privacy Commissioner approach:
  - Most accessible version of individual's history = most accurate, up-to-date etc
  - *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014]
- Carve-outs needed from "publicly available publication" for indexing

Thank you

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