

Facebook sex tape case has implications for privacy law in Australia

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Not since 2008 has a superior Australian court awarded compensation for emotional distress in a breach of confidence case.

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A West Australian woman has won almost \$50,000 in compensation from an ex-boyfriend who posted sexually explicit videos and photos of her on Facebook, in a significant ruling on personal privacy law.

Caroline Wilson, a fly-in, fly-out worker at Fortescue Metals Group's Cloudbreak mine in the Pilbara, took her ex-boyfriend and former colleague Neil Ferguson to court after he posted 16 photos and two videos of her on his Facebook page.

The court heard Mr Ferguson posted the sexually explicit material after Ms Wilson ended their relationship via text message.

"By posting the photographs and videos on his Facebook page, the defendant made them available to his approximately 300 'Facebook friends', many of whom worked at Cloudbreak," West Australian Supreme Court Justice Robert Mitchell said.

In expletive-laden text messages to Ms Wilson, Mr Ferguson said the photos were "out for everyone to see ... Can't wait to watch you fold as a human being".

Ms Wilson, who was 31 at the time of the trial, was alerted to the posts by friends at about 5.20pm on August 5, 2013. They were deleted at about 7pm after she begged Mr Ferguson to remove them.

Ms Wilson's lawyer, Barrie Goldsmith, argued his client was entitled to an injunction under the law of breach of confidence to restrain Mr Ferguson from re-posting the material, along with compensation for loss of wages, embarrassment and distress.

There are very few Australian cases on whether plaintiffs in breach of confidence cases can get compensation for emotional distress, as opposed to economic loss.

The Australian Law Reform Commission (ALRC) [released a report in June](#) setting out elements of a potential civil action for serious invasions of privacy that would allow damages for emotional distress. The Abbott government does not support the new law.

The ALRC also said it was "desirable" for Parliament to "clarify the courts' powers to award compensation for emotional distress" in breach of confidence cases.

Justice Mitchell referred to a 2008 Victorian Court of Appeal decision, *Giller v Procopets*, in which a woman won compensation for emotional distress after her former partner distributed copies of sexually explicit videotapes of the pair.

Justice Mitchell said this was the only case he would find in which a superior court in Australia grappled with the same issues. Since the events in *Giller*, which took place in 1996, technological advancements had "dramatically increased the ease and speed" of disseminating images and other material.

He ruled that Ms Wilson was entitled to an injunction and \$48,404 in compensation, including \$35,000 for emotional distress and \$13,404 for loss of wages while on leave. Mr Ferguson was sacked over the incident.

Associate professor David Rolph, a media law expert at the University of Sydney Law School, said the case "indicates that breach of confidence might provide a remedy for addressing a lot of personal privacy concerns".

But he noted that applying existing causes of action to new situations they do not "neatly fit" may distort the law and have unintended consequences.

"My own view is that if privacy is a value that's worth protecting it's worth protecting directly and we should think about that in a broader, more

comprehensive way," he said.

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