

## UNSOCIAL MEDIA AND THE LAW – “SEXTING”

Our Articles have previously expressed the observation that the community has a generally heightened interest in social media and the law, or more particularly, what remedies are available for unsocial media conduct. Generally, the laws that have applied to communications still apply to today’s social media and digital age, but there remains considerable interest in how these rules will be applied and enforced.

The case discussed below shows the development of equitable principles of compensation for a breach of confidence causing humiliation, anxiety and distress.

### **Breach of confidence – “Sexting”**

In the Supreme Court of Western Australia in [Wilson v Ferguson \[2015\] WASC 15](#) the Court awarded equitable compensation for the damage which Ms Wilson sustained in the form of significant humiliation, anxiety and distress as the result of dissemination of intimate images of her to her workplace and social group.

Ms Wilson and Mr Ferguson were workmates that entered into a relationship. Both were “fly-in-fly-out” workers, at the same mine, in Western Australia. Ms Wilson moved in with Mr Ferguson at his Perth home but they lived in separate quarters when at the mine.

Mr Ferguson had, at one point, sent a text of an explicit photo of himself. Subsequently, Ms Wilson reciprocated with an explicit photo of herself. Ms Wilson then took a sexually explicit video and showed Mr Ferguson for their mutual pleasure. Unknown to Ms Wilson, Mr Ferguson had transferred the video to his phone.

The Court diplomatically observed:-

*“Not uncommonly for a young couple in a sexual relationship, they shared intimate images with each other using their mobile phones during their relationship. This practice has introduced a relatively new verb – Sexting – to the English language”*

The relationship ended at the instigation of Ms Wilson with Mr Ferguson subsequently retaliating by publishing the images on Facebook for viewing by his 300 Facebook friends. In the words of the Court:-

*“...the publication by a jilted ex-lover to a broad audience via the internet, of explicit images of a former partner which had been confidentially shared between the sexual partners during the course of their relationship.”*

The Court found that:-

*“The publication occurred in breach of an equitable obligation of confidence owed by the defendant [Ferguson] to the plaintiff [Wilson]. The appropriate relief for the breach of that obligation in the present circumstances is a grant of an injunction prohibiting further publication of the images and an award of equitable compensation. The equitable compensation should include an award to compensate the plaintiff [Wilson], so far as money can, for the humiliation, anxiety and distress which has resulted from the defendant’s [Ferguson] publication of the images in breach of the obligation of confidence he owed to her.”*

The Court found that the taking and exchange of images by Ms Wilson was private between herself and Mr Ferguson and that Mr Ferguson understood this. Further, Mr Ferguson’s publication was motivated to cause Ms Wilson humiliation as many of his 300 Facebook friends were common friends, acquaintances or workmates.

The Court has assessed as appropriate the payment of compensation in circumstances causing humiliation, anxiety and distress even though the Plaintiff has not sustained a psychiatric injury. The damages for the breach of confidence were \$35,000 plus an additional \$13,404 for economic loss.

In this case the Court followed the Victorian Supreme Court, Court of Appeal decision in [Alla Giller v Boris Procopets \[2008\] VSCA 236](#) (“Gillers Case”) which, amongst other things, concerned the publication of a video tape of sexual activity between Ms Giller and Mr Procopets. The publication was the distribution of the video tape by Mr Procopets.

## **Lessons**

Accordingly, the Courts have shown a willingness to apply old rules of law for communication to the digital social media age and a willingness to consider compensation where that is the appropriate form of remedy. Perhaps the adage an ounce of prevention is worth a pound of cure applies as equally to the digital age as it has in the past.

**Date Published: 16 February 2015**

**Victor Hamit**  
**Wentworth Lawyers Pty Ltd**  
Level 40  
140 William Street  
MELBOURNE VIC 3000

Tel: (03) 9607 8380  
Mobile: 0408 590 706

Email: [vhamit@wentworthlawyers.com.au](mailto:vhamit@wentworthlawyers.com.au)  
Website: [www.wentworthlawyers.com.au](http://www.wentworthlawyers.com.au)

*Disclaimer:*

*These materials are provided as a general guide on the subject only, not as specific advice on any particular matter or to any particular person. Please seek specific advice on your own particular circumstances as situations and facts vary.*

*Liability limited by a scheme approved under the Professional Standards Legislation*