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1. [Lew Cher Phow @ Lew Cha Paw & Ors v Pua Yong Yong & Anor \[2011\] MLJU 1195](#)

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Lew Cher Phow @ Lew Cha Paw & Ors v Pua Yong Yong & Anor [2011]
MLJU 1195

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HIGH COURT (JOHOR BAHRU)
VERNON ONG J
CIVIL SUIT NO (MT-1) 22–510 OF 2007
24 June 2011

*Ong Kow Meng (KM Ong, Lee & Co) for the plaintiffs.
Wu Tern Yue (Wu & Co) for the defendants.*

Vernon Ong J:

The plaintiffs and the defendants are immediate neighbours. The plaintiffs' claim is based on the tort of private nuisance and breach of right to privacy committed by the defendants.

Brief account of the facts

The plaintiffs are residing at No. 3, Jalan Haruan, Batu 10 81300 Skudai, Johor. The defendants reside at house No. 4 located immediately next to the plaintiffs residence. A chain-link fence coupled with zinc sheets separates the two houses.

Some misunderstandings arose between the plaintiffs and the defendants around February and March 2006. Subsequently the relationship between the plaintiffs and the defendants deteriorated to the extent that the 7th plaintiff was charged and convicted for criminal intimidation against the defendants.

On 13.5.2006, the defendants installed five closed-circuit television (CCTV) cameras in their house. Four of the cameras are installed at the front porch whilst one is installed at the rear of the house. Of these five CCTV cameras, only one CCTV camera (identified as camera no. 3) located at the front porch is pointing directly at the plaintiffs' house. Camera no. 3 is attached to a 9 feet pole which is about 16 feet from the chain-link fence.

Plaintiffs' case

The plaintiffs' principal complaint is that (i) camera no. 3 is directed and focused at and monitoring and capturing images of the plaintiffs' front courtyard, and (ii) the camera at the rear of defendants' house is directed and focused at and monitoring and capturing images of the rear portion of the plaintiffs' house. As a result, the plaintiffs feel that they are being spied on and therefore their right to privacy have been infringed.

Due to the defendants' action, the plaintiffs were forced to put up zinc sheets along the chain-link fence to avert the defendants' spying activities. The plaintiffs have been suffering emotional stress, strain and medical complications. The defendants' action is a private nuisance as it amounts to unlawful interference with the plaintiffs' use, comfort, enjoyment and interest over their house.

Consequently, the plaintiffs are claiming for (i) RM500,000.00 in damages, (ii) exemplary and or punitive damages to be assessed, (iii) an injunction prohibiting the defendants from installing a CCTV camera directed the plaintiffs' house, (iv) an order that the defendants remove, dismantle or destroy the cameras pointed at the plaintiffs' house, and (v) costs.

Defendants' defence

As a preliminary issue, it is contended that the plaintiffs who are mere occupiers of the house do not have locus standi to bring the action of private nuisance as they are not the owners of the house {*Hunter v Canary Wharf Limited* [1997] AC 655}.

In answer to the plaintiffs assertions, the defendants contend that the CCTV cameras do not focus on or monitor the plaintiffs' property, their courtyard and or interior of their house. The defendants also contend that the CCTV cameras do not, at any time, survey or monitor the plaintiffs' movements and does not have a view into the plaintiffs' property or rooms. The installation of the CCTV cameras was precipitated by a number of factors. They include (i) threats made against the defendants and their family members, (ii) an incident on 8.2.1006 where fire crackers were fired at about 2:00 am in front of the defendants' house, (iii) an incident on 11.5.2006 where a large plastic bag containing chicken parts and entrails was thrown into the defendants' compound, and (iv) several robberies in the area.

It is also contended that the plaintiffs are guilty of prolonged, inordinate and inexcusable delay of about 15 months in bringing this action. Therefore, the plaintiffs have by their conduct acquiesced in the matters complained of, and are estopped in law from pursuing their claim.

Issues to be tried

At the outset, the Court will deal with the issue of locus standi. In this case the plaintiffs have been residing in the house for more than 13 years and they continue to reside therein. As residents and occupants they have been and continue to be in possession and occupation of the house. Consequently, this Court holds the plaintiffs have an interest in the land. Accordingly the plaintiffs have the locus standi to bring an action for private nuisance (*Inchbold v Robinson* (1869) L. R. 4 CH. 388; *Jones v Chappeli* (1875) L.R. 20 Eq. 539). The Court will now address the 2 issues relating to (i) private nuisance and (ii) infringement of rights to privacy.

Whether the case for private nuisance has been made out?

Private nuisance occurs when there is an act or omission which interferes with, disturbs or annoys a person in the exercise or enjoyment of his ownership or occupation of land or some other right or interest used or enjoyed in connection with the land. Public nuisance occurs when there is an act or omission which interferes with or disturbs or annoys a person in the exercise or enjoyment of his right as a member of the public (Clark & Lindsell on Torts, 18th Edn p 973;). Thus, the distinction between private and public nuisance is that in public nuisance rights which are common to all persons are infringed; whereas, in private nuisance, the rights of private individuals related to their possession or title to immoveable property are affected.

Whether the interference complained of amounts to a nuisance is a question of degree. It is necessary to bear in mind that in organised society, one is expected to put up with a certain amount of discomfort and annoyance caused by the legitimate activities of one's neighbours. Therefore, whether an action constitutes a nuisance must be determined by reference to all the surrounding circumstances of the case. The surrounding circumstances would include the time and place of its commission, the seriousness of the harm, the manner of committing it, whether it is done maliciously or in the exercise of rights and the effect of its commission (see *Winfield and Jolowiz on Tort*, 15th Edition, at p. 497; *Stone v. Bolton* [1949] 1 All ER 237).

Findings of the Court

The plaintiffs' principal ground is that they have been suffering emotional stress, strain and medical complications. Learned counsel for the plaintiffs submitted that the plaintiffs have been suffering emotional stress and strain throughout. As such, the defendants' actions amount to unlawful interference with the plaintiffs use, comfort, enjoyment and interest in the house. The plaintiffs called 3 witnesses - the 7th plaintiff Liow Joo Swee (PW1) a businessman, the 4th plaintiff Lee Chin Yee (PW2) a lorry driver and the 8th plaintiff Lew Pau Lit (PW3) a sales supervisor. The evidence in chief of PW1, PW2 and PW3 are in essence similar. Their accounts of the events which took place prior to the installation of the CCTV cameras are irrelevant for the purposes of determining whether there was any undue interference with the plaintiffs' enjoyment of the house.

It is the pleaded case that the plaintiffs lodged 2 police reports on 22.5.2006 and 13.10.2006. In both reports they complained that the defendants' CCTV cameras infringed on their fundamental human rights. They also said that they dismantled and rebuilt their kitchen located at the back of their house in order to prevent the defendants from monitoring their activities. They said that their daily activities were being monitored and under surveillance 24 hours a day. Consequently, they had to keep their windows and door shut. They were unable to live well, eat well, sleep well and at times suffered from various medical complaints like vomiting, asthma, headaches and fever. Their children were also affected in their studies. As they could not tolerate this intrusion any longer, they ventilated their

anger and frustration at a press conference which was featured in a Chinese news daily on 10.12.2006. They also said that the 1st plaintiff an elderly gentleman suffered similarly.

It is settled law that the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s 101(1) Evidence Act 1950). The burden of proof is on that party is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this case the burden of proof is on the plaintiffs to establish their case. If they fail to do so, it will not do for the plaintiffs to say that the defendants have not established their defence (*Selvaduray v Chinniah* [1939] MLJ 253 CA; *Abrath v North Eastern Railway Co* [1883] 11 QBD 440; [s 102](#) Evidence Act 1950).

In order for the plaintiffs to discharge the burden and standard of proof, it is necessary for their oral testimony to be corroborated. Apart from their oral evidence, the plaintiffs produced 2 police reports. These police reports allude to the defendant's CCTV cameras; but they do not shed light on the plaintiffs' allegation of undue interference with their enjoyment of their house. The plaintiffs' complaints relating to their children's health and studies being adversely affected were not corroborated in any material particular. Neither were the alleged sufferings of the 1st plaintiff proven as the 1st plaintiff could have testified on his own behalf but he did not. No reason was given as why he did not testify. PW1, PW2 and PW3 appear to be in good health. There is no evidence to show that PW1's business has been adversely affected or that he suffered from any mental anxiety or stress. The same can be said of PW2 who is still working as a lorry driver; he did not give any instance of suffering from any adverse consequences. PW3's sales career improved over the years as she was promoted from sales promoter to sales supervisor in 2007. In fact, all of the plaintiffs' witnesses said that their daily life and routine was quite normal. Their children are growing up normally; they are doing well and do not have any unusual health or other problems. There was no independent corroborative evidence such as medical reports to substantiate their complaints of poor mental and physical health. The plaintiffs lived in relative comfort and security as the front main door to the house was kept open from time to time. Under cross-examination, PW3 agreed that the kitchen was dismantled as it was encroaching on the defendants' land and not as averred by PW1, PW2 and PW3 in their evidence in chief.

On the totality of the evidence as disclosed by the plaintiffs, there is nothing to preclude the Court from holding that the plaintiffs were and are going about their daily lives in the usual and ordinary manner unaffected by any undue interference from the defendants' CCTV cameras. The plaintiffs allegation of suffering from undue interference in the exercise and enjoyment of their house is unsubstantiated. As the plaintiffs have failed to satisfy the burden of adducing evidence in support of their case the question must be answered in favour of the defendants.

Whether the plaintiffs' right to privacy have been infringed by the defendants?

In the light of the above findings, it now falls to be determined whether it is lawful for the defendants to place camera no. 3 which is targeted at the plaintiffs' front courtyard and porch. It is not denied by the defendants that camera no. 3 was installed to monitor and place the plaintiffs front courtyard and porch under continuous surveillance. Therefore, the plaintiffs' daily ins and outs and activities in the front courtyard and porch would come under continuous video surveillance of camera no. 3 twenty-four hours a day seven days a week.

Learned counsel for the plaintiffs argued that by reason of the defendant's acts, the human rights of the plaintiffs have been infringed. There is no express provision on a person's right to privacy in the Federal Constitution. However, the right to privacy has been described as the right of a person to the seclusion of himself, his family or his property. This phrase 'right to privacy' is used in the Indian case law to refer to the right which an owner of a house may have under local custom to seclusion of his inner apartments from the view of his neighbour. It has been used in England and in the United States in a very different sense and refers to the right to freedom from emotional disturbance like annoyance, mental pain or distress caused by certain forms of misconduct which do not fall within one of the torts recognised by the law (Ramaswamy Iyer's *The Law Of Torts*, 9th Edition 625 para. 15.5).

In this case the defendants' CCTV cameras were installed for the purposes of security. Camera no. 3 is pointing directly into the plaintiffs' front courtyard and porch area. Notwithstanding the zinc sheet put up along the chain-link fence, a portion of the plaintiffs' front courtyard and porch falls under camera no. 3's continuous video surveillance.

Findings of the Court

CCTV surveillance

Over the past decade, the use of CCTV cameras have become common feature in many countries. In Malaysia, it is quite common to see CCTV cameras in shopping malls, car parks, banks, offices, hotels, airports, train and bus stations. It is anticipated that the use of CCTV cameras in Malaysia will be extended to cover urban landscapes in our major cities. CCTV surveillance is undertaken for various purposes. These include directed covert surveillance, intrusive covert surveillance, other covert surveillance such as employees by employers and non-covert surveillance as in public areas such as banks, shops, train stations, airports, shopping malls (Remedies for unlawful CCTV surveillance Part 1, John Wadham, 150 New Law Journal 1173). Directed covert surveillance is undertaken in relation to a specific investigation or a specific operation which is likely to result in the obtaining of private information about a person and which is not done as an immediate response to events or circumstances that would make it impracticable to seek an authorisation. Intrusive covert surveillance is carried out in relation to anything taking place on residential premises or in any private vehicle. Directed covert surveillance, intrusive covert surveillance and non-covert surveillance in areas in which the public have access are usually carried out by the police and or public or private security agencies.

CCTV are also installed in office premises, factories warehouses and plants for the prevention and detection of crime or other misconduct. CCTV surveillance may be also carried out by private individuals for the purposes of personal, family or household affairs and for security purposes. In fact, it has been reported that video recordings of CCTV cameras installed inside homes have been adduced as evidence of misconduct by maids. CCTV surveillance is also commonly found in apartments and condominiums; the common areas such as lifts, walkways, corridors and swimming pools are under continuous CCTV surveillance. In the above cited instances, the overt surveillance of the premises are carried out by the owner, management or occupier of the premises in question with the express or implicit consent of the occupiers and visitors therein.

This is a case of overt surveillance as camera no. 3 is not hidden and it can be clearly seen from the plaintiffs' house,. In a semi-private setting such as a shopping mall, a member of the public gives up his claim not to be surveilled in return for increased security whilst in that location. In that sense, there is, at least an element of individual choice. In the present case, however, there does not seem to be an element of choice. Notwithstanding the plaintiffs protests against being under video surveillance by the defendants, the defendants have refused to remove camera no. 3.

Arising from this case are two competing values: safety and privacy. Do the defendants' fear for their safety and security override the right to privacy of the plaintiffs? Does the CCTV surveillance constitute an intrusion or interference with plaintiffs' right to respect for their private and family life and their home? Is the CCTV surveillance an unreasonable intrusion upon the privacy of the plaintiffs? Ultimately this is a question of balance between the rights of the owner of the CCTV camera (the defendants) and the CCTV camera's target (the plaintiff

Right to privacy

According to Dr Nehaluddin Ahmad in "The Right To Privacy And Challenges: A Critical Review" ([2008] 5 MLJ cxxi) privacy is said to be very difficult to define and circumscribe. Privacy has roots deep in history. The Bible has numerous references to privacy. Islam too recognises the right of every citizen in its state to privacy without undue interference or encroachment. There was also substantive protection of privacy in early Hebrew culture, classical Greek culture and among the people of ancient China. These protections mostly focused on the right to solitude. However, privacy can be divided into separate but related concepts one of which is territorial privacy. Territorial privacy concerns the setting of limits on intrusion into the domestic and other environments; this includes searches and video surveillance. He also alluded to a trend in India which subscribes to the view that the Indian Constitution contains rights other than those expressly mentioned in its content; these rights he described as unenumerated rights. To determine whether such unenumerated right exists, it must be shown that the right in question is an integral part of the enumerated right upon which its existence depends. If the unenumerated right is a definite and integral part of the enumerated right, then it has as much force as the enumerated right itself and is subject to the same conditions and restrictions as the enumerated right itself. Otherwise, the enumerated right would be meaningless without providing for certain other rights by implication (*Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295; *Munn v Illinois* 94 US 113; *Wolfe v Colorado* 338 US 25; *Semayne's case* (1604) 5 Co Rep 91).

There is no specific provision in the Federal Constitution guaranteeing the right to privacy. However, several related rights including freedom of assembly, speech and movement are expressly provided for. The fact that the right to privacy has not been specifically provided for does not preclude a Court of law from holding that such a right exists. Privacy is recognised a fundamental human right internationally. It is given recognition by international covenants, and treaties and regional human rights treaties (art. 14 Universal Declaration of Human Rights 1948; art. 17

International Covenant on Civil and Political Rights; art. 8 European Convention for the Protection of Human Rights and Fundamental Freedoms 1950).

Privacy is difficult to define with precision. It means different things to different people. It encompasses the law on tort, constitutional law, criminal procedure, civil procedure, family law and contract. In the present case, the privacy in question relates to a person's right to respect for his private and family life and his home.

Findings of the Court

In this case, the defendants' declared intention is that the plaintiffs are the primary targets of camera no. 3. This act of carrying out overt surveillance on the plaintiffs carries with it an implied threat that the fruits of the surveillance may be used for purposes adverse to the interests of the plaintiffs. In effect, this is clearly calculated to undermine the plaintiffs' dignity, self esteem, comfort and privacy. The defendants' continuing act of putting the plaintiffs under overt surveillance represents a failure of respect for the plaintiffs' dignity and autonomy. It constitutes an intrusive surveillance on the plaintiffs' private and family life and home. The defendants' fear for their safety and security do not justify their actions and cannot override the plaintiffs' right to privacy. Everyone has the right to be free from continuous video surveillance in his own property. A balance must be struck between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with (*Sedfleigh-Denfield v O'Callaghan* [1940] AC 880; [1040] 3 All ER 349). That is the test of liability as being what is reasonable in accordance with common and usual needs of mankind in a society, or in a particular area. This situation in this case is unlike that of overt surveillance in a public place carried out in the interest of law enforcement. As such the continuous CCTV surveillance by the defendants is a unwarranted violation of the plaintiffs' right to privacy.

Learned counsel for the defendants submitted that Malaysian law and the courts do not recognise invasion of privacy rights (Halsbury's Laws of England Vol. 45 4th Edition para. 1383; *Ultra Dimension Sdn Bhd v Kook Wei Kuan* [2004] 5 CLJ 285; *Maslinda Ishak v Mohd Tahir Osman & Ors* [2009] 6 CLJ 653; *Lee Ewe Poh v Dr. Urn Teik Man & Anor* [2010] 8 AMR 583; *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 AMR 301).

With the advent of technological advances in the communications industry over the last decade giving rise to novel legal and ethical issues, the views presented by Ultra Dimension Sdn Bhd, supra are not in keeping with the times. In fact, the more recent authorities cited by the defence (*Maslinda Ishak*, supra; *Lee Ewe Poh*, supra and *Sivarasa Rasiah*, supra) indicate that the Malaysian court are leaning in favour of recognising the right to privacy. Indeed, the categories of such rights are not closed and may expand with new emerging trends and changing societal conditions. The courts and legislature have from time to time responded to this change in times by extending the boundaries of right and liability in tort and other areas of law. This Court is in accord with the emerging trend of giving recognition to the right to privacy. Therefore, if there is a right under the law there must be a remedy for its violation even if the injury does not cause any actual or pecuniary damage. In this light, the Court takes the view that the right to privacy is a fundamental right which is entitled to protection. For the foregoing reasons, the question must be answered in favour of the plaintiffs.

Conclusion

This case raises the important question of whether a person is entitled to carry out overt video surveillance on his neighbour's property. This question is particularly pertinent today due to the popular utilisation of CCTV cameras and other sophisticated surveillance devices available in the market. The plaintiffs' claim for private nuisance has not been made out as they have failed to show that the CCTV cameras have interfered with, disturbed or annoyed them in the enjoyment of their occupation of their house.

The plaintiffs' other complaint relates to breach of privacy. The right to privacy is a fundamental human right. On the peculiar facts of this case, the right to privacy consists of the plaintiffs' right to private and family life and home. This is a basic right and need which everyone cherishes and holds dear. The well known saying that a man's home is his castle holds true. In holding the balance between privacy and safety, the Court must strike in favour of privacy in the particular circumstances of this case. The fact that the 7th plaintiff has been convicted for criminal intimidation against the defendants is no justification to put the plaintiffs under continuous intrusive video surveillance. Both the plaintiffs and the defendants are private individuals. Subjecting the plaintiffs to continuous overt surveillance is demeaning to the plaintiffs. The fact that the 7th plaintiff was convicted shows that the rule of law has prevailed and as such there is no justification for the defendants to carry on video surveillance on the plaintiffs. In the result, the right to privacy of the plaintiffs should be protected.

For the reasons adumbrated above, the Court gives judgment for the plaintiff as follows:

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- (a) an order directing the defendants to forthwith dismantle and remove camera no. 3; and
- (b) an injunction to restrain the defendants from installing any CCTV camera which points into or which is directed at the plaintiffs house.

No order as to costs.

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