

Possum Processing, Picture Pilfering, Publication and Privacy: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*

WILLIAM M HEATH*

The decision of the High Court of Australia in Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd contains important jurisprudential developments in the fields of equity, media law and privacy. In exploring the availability of interlocutory relief to restrain media publication, the majority decisions expound a fixed rule for the award of interim injunctions and cast doubt on the role of broad judicial discretion, unconscionability and a tort of privacy. Additionally, the contrasting judgments of Kirby J and Callinan J offer insight into the fundamental tension in media law: namely, the protection of privacy interests versus the public interest in free speech.

I INTRODUCTION

The High Court's decision in *Lenah*,¹ handed down on 15 November 2001, might be identified initially as a bland, albeit significant, decision on the availability of interlocutory injunctions to restrain media publication. Yet, upon closer inspection, *Lenah* offers much more, positioning the question of injunctive relief within a broader framework of policy considerations, including the tension between privacy 'rights' and the public interest in freedom of communication. In addition, the polarised judgments of Gleeson CJ, Gummow and Hayne JJ, Kirby J, and Callinan J, indicate the difficulties faced in developing the rules of civil procedure and equity under the pressure of a modern media state.

The analysis of *Lenah* in this case note is divided into three parts. Part II briefly explains the background to the litigation in *Lenah*, including the facts of the case, and the issues raised at trial and on appeal. Part III then analyses the High Court's decision in *Lenah*, isolating the three issues upon which the case was decided. Within these three issues, several significant themes are examined, including the High Court's approach to judicial discretion, unconscionability and a potential tort of privacy. Finally, Part IV considers the impact of *Lenah* on broad matters of injunctive relief, privacy and media law.

* Student of Arts/Law, The University of Melbourne. I am grateful to Professor Michael Bryan and my colleagues on the *Melbourne University Law Review* who brought my attention to this case. Nonetheless, the views expressed in this article (and errors therein) remain my own.

¹ [2001] HCA 63 (Unreported, Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ, 15 November 2001) (*Lenah*).

II BACKGROUND

A The Facts

Lenah Game Meats Pty Ltd ('Lenah') lawfully produces and exports brush tail possum meat at its licensed Rocherlea premises. Sometime prior to March 1998, a person (or persons) broke into Lenah's premises and installed, without Lenah's consent, three video cameras. The cameras recorded the operational processes involved in Lenah's production of possum meat. Later, and unbeknownst to Lenah, the tapes in the video cameras were removed. These tapes were supplied to Animal Liberation Ltd, which in turn forwarded a video tape to the ABC. That video tape was of ten minutes' duration and showed aspects of Lenah's possum meat production, including the stunning and killing of brush tail possums. Although the Australian Broadcasting Corporation ('ABC') was aware, or became aware that the video was obtained by unlawful entry and surveillance, it was not a party to these activities. The ABC planned to televise the video nationally on its '7.30 Report' program.

B First Instance Decision and Appeal

At trial in the Supreme Court of Tasmania, Lenah sought in its statement of claim two remedies: first, a mandatory injunction obliging the ABC to return the video (and any copies) to Lenah, and second, damages. Additionally, Lenah made an interlocutory application for an interim injunction² to restrain the ABC from broadcasting the video. Underwood J dismissed Lenah's application for three reasons.³ First, Lenah's statement of claim disclosed no cause of action and therefore there were insufficient grounds for an interlocutory injunction. Second, Underwood J held that even if Lenah could make out a cause of action in defamation, the discretion to grant injunctive relief ought not be exercised. Third, in any event, damages were an adequate remedy for Lenah's application and an interlocutory injunction would therefore be inappropriate.

Lenah successfully appealed the decision of Underwood J in the Full Court of the Supreme Court of Tasmania, which granted an interlocutory injunction against the ABC.⁴ Wright J held that the grant of an injunction was not dependent on the existence of an enforceable cause of action⁵ and awarded an injunction on

² It is noted that the terms 'interim injunction' and 'interlocutory injunction' were used interchangeably by the High Court in describing the plaintiff's application. The subtle distinction between the two remedies was not an issue in *Lenah*: cf R P Meagher, W M C Gummow and J R F Lehane, *Equity: Doctrines and Remedies* (3rd ed, 1992) 605 [2183].

³ See the summary in *Lenah* [2001] HCA 63, [2] (Gleeson CJ).

⁴ *Lenah Game Meats Pty Ltd v Australian Broadcasting Corporation* [1999] TASSC 114 (Wright and Evans JJ, Slicer J dissenting), noted by Peter Wilson, *Lenah Games Meats Pty Ltd v Australian Broadcasting Corporation* (2000) 3 *Telemedia* 105.

⁵ *Lenah Game Meats Pty Ltd v Australian Broadcasting Corporation* [1999] TASSC 114, [10] (Wright J). Wright J suggested in obiter that a potential cause of action might lie for the plaintiff in negligence. However, because negligence was not alleged, his Honour offered no concluded opinion: at [9].

the balance of convenience. Evans J reached the same conclusion, and expressly approved unconscionability as a basis for injunctive relief.⁶ In dissent, Slicer J held that a prima facie case was necessary for the award of an interlocutory injunction.⁷ Slicer J found that no such prima facie case was disclosed, whether in defamation, breach of confidence, infringement of any intellectual property right, misfeasance by a public officer, intentional infliction of economic harm (the tort of conspiracy), or malicious falsehood.⁸ Furthermore, in Slicer J's opinion, Lenah did not and could not (due to the binding High Court authority of *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*⁹) rely on a breach of the supposed tort of privacy by the ABC.¹⁰

III THE HIGH COURT DECISION

In the High Court, a majority upheld an appeal by the ABC and ordered that the interlocutory injunction granted by the Full Court of the Supreme Court of Tasmania be discharged. Three majority judgments were delivered: first, that of Gummow and Hayne JJ (with whom Gaudron J agreed), second, Gleeson CJ, and third Kirby J. Callinan J voiced a strong dissent which found some obiter support from Kirby J.

The range of issues argued at trial and on appeal lead to a complex progression in the logic of both the appellant and respondent's submissions. However, the judgments in the High Court turned on consideration of three essential issues: first, the circumstances in which an interlocutory injunction may be granted by a court; second, whether the plaintiff had satisfied those circumstances; and, third, whether, if the plaintiff had shown requisite grounds for injunctive relief, the court ought to exercise its discretion to grant an interlocutory injunction. The following sections critically discuss the approach of the majority and dissenting judgments to these three issues, as well as significant doctrinal and theoretical developments evident in *Lenah*.

A First Issue: Basis for Award of Interlocutory Injunction

The first issue in *Lenah* was the circumstances in which a court would grant an interlocutory injunction. The majority judgments took an orthodox view of the issue, resolving that according to established equitable principle, an interlocutory injunction would only be granted where the plaintiff showed a prima facie cause

⁶ Ibid [75]-[76].

⁷ Ibid [47].

⁸ Ibid [49].

⁹ (1937) 58 CLR 479.

¹⁰ *Lenah Game Meats Pty Ltd v Australian Broadcasting Corporation* [1999] TASSC 114, [49].

of action.¹¹ Once this threshold criterion has been passed, the court will consider, on the balance of convenience, whether an interlocutory injunction will be granted.¹² In contrast, the judgment of Kirby J departed from the majority's reasoning and held that the award of an interlocutory injunction was not limited by strict principle, but depended upon the broad discretion of the court.¹³ The dissent of Callinan J expressed no concluded opinion.¹⁴

B Rule versus Discretion

The dispute between the majority judges and Kirby J on the need to show a prima facie case for interlocutory relief is significant. Indeed, Kirby J's approval of a broader discretionary approach to the award of interlocutory relief was not a lone dissent on point, but found support in the judgments of Wright and Evans JJ in the Full Court of the Tasmanian Supreme Court. It is, therefore, necessary to evaluate the legal reasoning and policy considerations behind the rule-based and discretionary approaches to the award of interlocutory injunctions.

1 Majority Approach

The majority noted that the power to award an interim injunction arose in this case from the jurisdiction under the *Supreme Court Civil Procedure Act 1932* (Tas) ('*Supreme Court Act*') s 11(12). The leading majority judgment of Gummow and Hayne JJ held that, in form and substance, the role of s 11(12) of the *Supreme Court Act* mirrors that of its historical antecedent, the *Supreme Court of Judicature Act 1873* (UK), ('*Judicature Act*').¹⁵ Accordingly, the purpose of both the *Judicature Act* s 25(8) and the *Supreme Court Act* s 11(12) is procedural: these sections confer on courts the equitable jurisdiction to award interlocutory injunctions.¹⁶ For the majority, the equitable jurisdiction enjoyed under the *Supreme Court Act* must still be interpreted in accordance with the established rules of equity,¹⁷ including, inter alia, the rule that, in order to gain interlocutory relief, the plaintiff's statement of claim must disclose a prima facie case.¹⁸

¹¹ The judgments of Gleeson CJ and Gummow and Hayne JJ also acknowledge that the circumstances in which some injunctions, including those to restrain an alleged public wrong, will be imposed are not susceptible to a strict rule that the plaintiff show a prima facie legal or equitable wrong by the defendant: see *Lenah* [2001] HCA 63, [12] (Gleeson CJ), [93]-[97] (Gummow and Hayne JJ).

¹² *Ibid* [13] (Gleeson CJ).

¹³ *Ibid* [160], [167].

¹⁴ *Ibid* [288]. But see [246] where Callinan J also favoured an orthodox test for an interlocutory injunction: 'the correct test is whether the applicant can demonstrate either a reasonably arguable case on both the facts and the law, or that there is a serious question to be tried. These tests it seems to me are to the same effect.'

¹⁵ *Lenah* [2001] HCA 63, [87].

¹⁶ *Ibid*, Gummow and Hayne JJ referred to the second reading speech which confirmed their Honour's approach to *Supreme Court Act* s 11(12).

¹⁷ *Ibid* [88]-[92], discussing numerous authorities which support an orthodox approach to the grant of injunctive relief.

¹⁸ That is, 'some legal or equitable right of Lenah which the court might enforce by final judgment': *ibid* [105].

Gaudron J explained the logic behind the established rule: 'an injunction is a curial remedy. Because it is a remedy, it is axiomatic that it can only issue [sic] to protect an equitable or legal right or, which is often the same thing, to prevent an equitable or legal wrong.'¹⁹

The policy considerations behind equity's requirement of a prima facie case were explained in the judgment of Gleeson CJ. According to Gleeson CJ, the requirement that the plaintiff show a prima facie case in order to gain injunctive relief was justified by 'the need to prevent the practical destruction of that [prima facie] right [of action] before there has been an opportunity to have its existence finally established.'²⁰ Gleeson CJ held it was erroneous to think that interlocutory injunctive relief can be granted without any underlying cause of action:

If there is no serious question to be tried because, upon examination, it appears that the facts alleged by the respondent cannot, as a matter of law, sustain such a right, then there is no subject matter to be preserved. There is then no justice in maintaining the status quo, because that depends upon restraining the appellant from doing something which, by hypothesis, the respondent has no right to prevent.²¹

2 Kirby J

Contrary to what appears to be considerable authority,²² Kirby J disapproved of the 'universal fixed'²³ rule that the plaintiff need prove 'the existence of an arguable legal or equitable cause of action' in order to obtain an interlocutory injunction.²⁴ Instead, Kirby J opined for the award of interlocutory injunctive relief where a court, in its discretion, finds it (in the literal words of the *Supreme Court Act* s 11(12) 'just and convenient' to do so.²⁵ Several justifications for departing from the traditional position are apparent in his judgment.

Kirby J's main reason for disagreement with the majority's fixed rule relied on the statutory construction of the *Supreme Court Act* s 11(12). In contrast to the approach of Gummow and Hayne JJ, Kirby J emphasised that the *Supreme Court Act* s 11(12) should not be read down as a procedural provision according to its historical origins in the *Judicature Act*.²⁶ Rather, in light of the statutory power granted under the section,²⁷ as well as the 'broad' powers of the courts,²⁸ the phrase

¹⁹ Ibid [60] (citations omitted).

²⁰ Ibid [12].

²¹ Ibid [16].

²² See, eg, *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618, 622; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 617, 621, 632, 641; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 395-6.

²³ *Lenah* [2001] HCA 63, [160]. But see Gleeson CJ's comments at [18].

²⁴ Ibid [156].

²⁵ Ibid [167].

²⁶ 'An Australian court is not excused from obeying legislative provisions merely because their meaning appears to be contrary to earlier non-statutory rules.' Ibid [164] (citation omitted).

²⁷ Ibid [159].

²⁸ Ibid.

'just and convenient' should be construed broadly to justify the award of injunctive relief in some circumstances where no prima facie case can be established. Undoubtedly, the sentiments of Kirby J that 'provisions should not be narrowed by judicial analysis which distorts the meaning derived from the words used'²⁹ have merit. Indeed, Kirby J's approach finds some support in dicta which suggest that statutes, whether in governing procedural or substantive matters, should not be read merely according to the narrow constraints of equity.³⁰

The main problem with Kirby J's approach to the *Supreme Court Act* s 11(12) is his Honour's assumption that the statute is sufficiently unambiguous to be given 'full effect' independent of 'Chancery practice, the history of injunctions, or observations of English judges on those subjects'.³¹ The phrase found in the *Supreme Court Act* s 11(12) - 'just and convenient' - can hardly provide the basis for a satisfactory rule of law. On any commonsense view, the phrase is incapable of objective formulation. In the absence of objective meaning, it is respectfully submitted that Kirby J's 'starting point' should not be to a general 'broad' reading of the statute,³² but, rather, careful consideration of the statutory intention behind the provision. That is what does the *Supreme Court Act* s 11(12) intend to achieve? The Second Reading speech of the *Supreme Court Act* clearly indicated an intention, via provisions such as s 11(12), to adopt the principled system of equity administered under the *Judicature Act*.³³ In the case of interlocutory injunctions, it is clear in equity that the grant of relief depends on the settled rule that the plaintiff shows a prima facie cause of action.³⁴ With respect, Kirby J's statutory interpretation of the *Supreme Court Act* s 11(12) is too broad.

Despite being broad and somewhat radical in its scope, Kirby J's abrogation of the traditional rule that the plaintiff need show a cause of action is said to be justified by the practical nature of interlocutory 'realities'.³⁵ Kirby J puts the argument in terms of procedural justice to the plaintiff:

Of their nature, as in the present case, such injunctions are usually sought urgently. Such applications may not always be accompanied by well-prepared pleadings and evidence. That is why the power of the Supreme Court to provide relief is conferred in broad terms. ... it would be inappropriate, and contrary to the purpose of the remedy and of the statute, to impose a narrow

²⁹ Ibid.

³⁰ In relation to statutory injunctions, Kirby J's approach accords with that of Lord Denning MR in *Chief Constable of Kent v V* [1983] QB 34, 42k, an approach with which the House of Lords disagreed in *Pickering v Liverpool Daily Post and Echo Newspapers Plc.* [1991] 2 AC 370, 420-1. Kirby J's broad approach to statutory analysis has been foreshadowed in many cases, the recent being *Allan v Transurban City Link Limited* [2001] HCA 58, [53]-[54].

³¹ *Lenah* [2001] HCA 63, [159].

³² Ibid.

³³ Ibid [87] (Gummow and Hayne JJ).

³⁴ See the authorities above n 22.

³⁵ *Lenah* [2001] HCA 63, [159].

rule obliging the demonstration in every case of a cause of action, fully pleaded and proved. In most cases it may indeed be appropriate to require pleading and proof. But in others (particularly in urgent circumstances) justice and convenience may warrant the issue of an interlocutory injunction without them.³⁶

For Kirby J, therefore, *Lenah* should be entitled to an interlocutory injunction notwithstanding that it had shown no prima facie case, due to the urgency of the matter and the lack of finality in the trial. The immediate problem in applying this justification is its inapplicability to the facts: *Lenah* had not suffered any procedural injustice due to time constraints. As Gleeson CJ observed:

The time available for argument was not so limited that the parties did not have a full opportunity of presenting their cases. ... The respondent's case ... was not going to improve between the interlocutory hearing and the ultimate trial. ... If, upon such consideration, it appeared that the outcome of the final hearing might turn upon facts that were in dispute, or had not been fully explored, then discretionary considerations may have become decisive. But if it appeared, as to Underwood J it did, that the respondent's case was not going to get any better ... there was no justice in restraining the appellant from broadcasting the material.³⁷

3 Conclusion: Kirby J's Discretionary Approach Doubtful

Kirby J's rejection of the traditional criterion for the award of interlocutory injunctions lacks sufficient justification in terms of its interpretation of the *Supreme Court Act* s 11(12) and the facts of *Lenah*. The opening up of the award of interlocutory injunctions and, more generally, equitable remedies to the unfettered broad discretion of judges must be strongly opposed.³⁸ It is suggested that the orthodox rule-based test for the award of interlocutory injunctions, which is balanced by a subsidiary question of judicial discretion on the 'balance of convenience', strikes an appropriate medium between the stability of the rule of law and the interlocutory realities faced by plaintiffs.

³⁶ Ibid [166] (citation omitted, emphasis added).

³⁷ Ibid [19].

³⁸ Kirby J's broad discretionary approach might be characterised as a form of 'discretionary remedialism'. Discretionary remedialism is a school of legal thought which argues that equitable remedies ought to be awarded where appropriate, according to the discretion of a judge. At ibid [159], Kirby J approves the sentiments of Justice Thomas, 'Judging in the Twenty-First Century' (2000) *New Zealand Law Journal* 228, who is a renowned supporter of discretionary remedialism. In Australia, the leading supporter of this approach is Justice Paul Finn, 'Equitable Doctrine and Discretion in Remedies' in W R Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (1998) 251. For a strong criticism of this approach to equitable remedies, see especially Peter Birks 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 *University of Western Australia Law Review* 1.

C Second Issue: Satisfaction of the Criterion for the Award of an Interlocutory Injunction

The second issue in *Lenah* was whether the respondent could satisfy the requisite criterion for the award of an interlocutory injunction.³⁹ In its submission to the High Court, *Lenah* conceded that it could not establish a prima facie case in any traditional cause of action, such as breach of confidence, trespass or defamation.⁴⁰ However, *Lenah* sought to uphold the Full Court's finding that its statement of claim disclosed a cause of action based on unconscionability: that it would be unconscionable for the ABC to publish the video which had been obtained as a result of a trespass by an unknown third party.⁴¹ In the alternative, *Lenah* submitted that the High Court should recognise a tort of privacy. *Lenah* maintained that if privacy was an actionable tort, it could show a prima facie case sufficient for injunctive relief.

A majority of Gummow and Hayne JJ (with whom Gaudron J agreed) and Gleeson CJ found against *Lenah* on the second issue, holding that *Lenah*'s statement of claim did not disclose an arguable cause of action and that unconscionability did not provide an independent ground for relief.⁴² Further, Gummow and Hayne JJ held that, even if a tort of privacy was to be recognised, it was not applicable.⁴³ In dissent, Callinan J held that *Lenah*'s statement of claim did disclose a prima facie case based on unconscionability,⁴⁴ which could be 'framed as a claim for breach of confidence'⁴⁵ and thus, satisfied the criterion for injunctive relief. Similarly, Kirby J found for *Lenah* on the second issue, holding that injunctive relief would be available to restrain 'unconscionable' use of the video, which had been 'obtained by a trespasser or by some other illegal, tortious, surreptitious or improper means'.⁴⁶

D Three Significant Aspects of the Second Issue

The judgments of the High Court on the issue of whether *Lenah* could satisfy the requisite criterion for the award of an interlocutory injunction are significant in three respects, each of which is discussed below. First, the judgments in *Lenah* give consideration to the role of unconscionability in providing a base for

³⁹ The second issue was, of course, dependent on the first issue: that is, definition of the requisite criterion (or criteria) necessary for the award of injunctive relief.

⁴⁰ On this point, the judgment of Slicer J in the Full Court of the Supreme Court of Tasmania had already considered a myriad of possible causes of action which might apply on the facts but held that none could be sustained: see above Part II(B).

⁴¹ *Lenah* [2001] HCA 63, [30].

⁴² *Ibid* [55] (Gleeson CJ), [105] (Gummow and Hayne JJ).

⁴³ *Ibid* [132].

⁴⁴ *Ibid* [297].

⁴⁵ *Ibid* [311].

⁴⁶ *Ibid* [183]. Technically, Kirby J found 'two bases for authorising the grant of an interlocutory injunction' (at [185]), the first basis being the broad discretion of the court to award an interim injunction where it is 'just and convenient' to do so (at [167]), and the second base being unconscionability (at [183]).

interlocutory relief. Second, in a novel development, the dissent of Callinan J fits Lenah's claim within breach of confidence and fiduciary law. Third, the judgments of the court discuss the likely future of a tort of invasion of privacy and give some insight into its application in the case.

1 *Unconscionability as a Basis for an Interlocutory Injunction?*

MR McELWAIN: Well, I submit that the courts, at least in England, now in New Zealand, had recognised that unconscionability stands alone as a basis to grant equitable relief, albeit in - - -

GUMMOW J: Well, that is rampant judicial imperialism, it seems to me, rampant judicial imperialism.

KIRBY J: Well, it is at one end of the spectrum. At the other end of the spectrum is the Balham dentist. Somewhere in between there must be a principle. What the Court has to have is your help on what the principle is.⁴⁷

Relying on the decisions of Wright and Evans JJ in the Full Court of the Tasmanian Supreme Court, the respondent sought to argue that unconscionability was an independent basis for injunctive relief. The immediate problem with the plaintiff's reliance on unconscionability was that it appeared to describe a broad proposition, rather than a specific type of conduct or prima facie case.⁴⁸ The lack of principled ingredients to the plaintiff's claim based on unconscionability was a clear impediment to its success. In two powerful dicta, Gleeson CJ captured the majority position:

No doubt it is correct to say that, if equity will intervene to restrain publication of the film by the appellant, the ultimate ground upon which it will act will be that, in all the circumstances, it would be unconscientious of the appellant to publish. But that leaves for decision the question of the principles according to which equity will reach that conclusion. The conscience of the appellant, which equity will seek to relieve, is a properly formed and instructed conscience. The real task is to decide what a properly formed and instructed conscience has to say about publication in a case such as the present.⁴⁹

The respondent must explain why the appellant is bound in conscience not to publish; and, bearing in mind the consequences of such a conclusion for the free flow of information, it is not good enough to say that any person who fails to see this dictate of conscience is merely displaying moral obtuseness.⁵⁰

⁴⁷ Transcript of Proceedings, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (High Court of Australia, Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ, 3 April 2001)

⁴⁸ The respondent had not sought to rely on the concept of unconscionable conduct or dealing recognised by the High Court in *The Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447

⁴⁹ *Lenah* [2001] HCA 63, [45].

⁵⁰ *Ibid* [46].

Thus, the majority rejected any idiosyncratic and vague reliance on 'unconscionability' by the respondent. Moreover, a framing of unconscionability as a broad ground for which the court may grant relief based on various 'public interest' factors (including 'protecting private property' and 'the public interest in freedom of speech'), was expressly rejected.⁵¹

In order to identify unconscionability by principled criteria, the respondent sought to rely on the case of *Lincoln Hunt Australia Pty Ltd v Willesee*.⁵² In *Lincoln Hunt*, Young J gave serious obiter consideration to whether an injunction should be granted on the basis that it would be unconscionable to allow the defendant to publish video footage obtained by its trespass on the plaintiff's premises. Although Young J decided that the defendant was liable for trespass and exemplary damages were an adequate remedy, it was said in obiter that

the Court has power to grant an injunction in the appropriate case to prevent publication of a videotape or photograph taken by a trespasser even though no confidentiality is involved. However, the Court will only intervene if the circumstances are such to make publication unconscionable.⁵³

Contrary to the trend of some lower court authority,⁵⁴ a majority of the High Court did not approve of Young J's expansion of the award of interlocutory injunctions restraining media publication on the supposedly independent basis of unconscionability. Instead, the majority sought to explain Young J's dictum from *Lincoln Hunt*, and the cases that approved it, in terms of the traditional categories of breach of confidence⁵⁵ or breach of copyright.⁵⁶ Moreover, it would seem that, even if Young J's dictum could be applied as good law, the dictum may not apply to *Lenah*: whereas in *Lincoln Hunt*, a trespasser sought to publish the fruits of their trespass, *Lenah* involved publication by an innocent recipient of a video obtained by a third party's trespass.⁵⁷ As Gleeson CJ noted, however, subsequent receipt of surreptitiously obtained information will attract liability in breach of confidence where the information possesses the requisite quality of confidence;⁵⁸ in *Lenah*, the video of Lenah's operating facilities possessed no such quality.⁵⁹

⁵¹ Ibid [31] (Gleeson CJ).

⁵² (1986) 4 NSWLR 457 (*Lincoln Hunt*). Noted and discussed by R P Handley, 'Trespass to Land as a Remedy for Unlawful Intrusion on Privacy' (1988) 62 *Australian Law Journal* 216; A H Hudson, 'Consumer Protection, Trespass and Injunctions' (1988) 104 *Law Quarterly Review* 18.

⁵³ *Lincoln Hunt* (1986) 4 NSWLR 457, 463.

⁵⁴ *Emcorp Pty Ltd v Australian Broadcasting Corporation* [1988] 2 Qd R 169; *Church of Scientology Inc v Transmedia Productions Pty Ltd* (1987) Aust Torts Reports 80-101; *Rinsale Pty Ltd v Australian Broadcasting Corporation* (1993) Aust Torts Reports 81-231; *Takhar v Animal Liberation SA Inc* [2000] SASC 400.

⁵⁵ *Lenah* [2001] HCA 63, [52] (Gleeson CJ).

⁵⁶ Ibid [101]-[103] (Gummow and Hayne JJ).

⁵⁷ Cf ibid [178], Kirby J comments that '[i]t was not essential to Young J's reasoning that the publication in *Lincoln Hunt* was by the trespasser. The essence of his reasoning was that the material was acquired in consequence of a trespass upon private property'.

⁵⁸ *Lenah* [2001] HCA 63, [52].

⁵⁹ See below n 72 and accompanying text.

The respondent's submission, and the judgment of Kirby J, sought to adduce additional support for unconscionability as a basis for injunctive relief in the judgment of Hodgson CJ in *Donnelly v Amalgamated Television Services Pty Ltd*.⁶⁰ In *Donnelly*, an injunction was granted to restrain the broadcast of a video depicting the plaintiff, who was wearing only underpants, in a bedroom at his mother's house. Although Hodgson CJ did not clearly articulate the basis for the award of an injunction in that case,⁶¹ Kirby J thought that '[t]he fundamental reason for granting it was that use of such videotape would be unconscionable in the circumstances.'⁶² With respect, Kirby J's appeal to unconscionability appears to overlook an obvious explanation: as Gleeson CJ reasoned, *Donnelly* can be explained as a case of breach of confidence: '[a] film of a man in his underpants in his bedroom would ordinarily have the necessary quality of privacy to warrant the application of the law of breach of confidence.'⁶³ Again, the observation points to a crucial difference between *Donnelly* and *Lenah*: in the former case the video footage was confidential, in the latter it was not.⁶⁴

Without additional facts the respondent's recourse to notions of unconscionability were simply too vague to show a prima facie case necessary for the award of an interlocutory injunction. As Gummow and Hayne JJ opined:

Commercial enterprises may sustain economic harm through methods of competition which are said to be unfair, or by reason of other injurious acts or omissions of third parties. However, the common law does not respond by providing a generalised cause of action "whose main characteristic is the scope it allows, under high-sounding generalizations, for judicial indulgence of idiosyncratic notions of what is fair in the market place". Rather, the common law provides particular causes of action and a range of remedies. These rights and remedies strike varying balances between competing claims and policies.⁶⁵

2 The Dissent of Callinan J:

Breach of Confidence, Fiduciaries and Constructive Trusts

In dissent, Callinan J found that *Lenah* could in fact satisfy the requisite criterion for the award of an injunction.⁶⁶ His Honour held that the facts gave rise to an arguable relationship 'of a fiduciary kind and of confidence'.⁶⁷ This fiduciary

⁶⁰ (1998) 45 NSWLR 570 (*Donnelly*), discussed in *Lenah* [2001] HCA 63, [179]-[180] (Kirby J).

⁶¹ See *Donnelly* (1998) 45 NSWLR 570, 575.

⁶² *Lenah* [2001] HCA 63, [180].

⁶³ *Ibid* [54]. On this point, Francis Gurry, 'Breach of Confidence' in P D Finn, *Essays in Equity* (1985) 110, 111 notes that breach of confidence will 'often provide an effective means of controlling the processes by which *personal* information of a *private nature* may be derived and used, and, thus, may provide a remedy which in effect enables an individual to preserve from publicity information which would give access to his private existence.' (citation omitted, emphasis added)

⁶⁴ See below n 72 and accompanying text.

⁶⁵ *Lenah* [2001] HCA 63, [80] (Gummow and Hayne JJ) (citations omitted).

⁶⁶ *Ibid* [288]-[312].

⁶⁷ *Ibid* [297].

relationship would, in the eyes of Callinan J, 'attach' a constructive trust to the video, entitling the ABC to deliver it up to Lenah.⁶⁸ Callinan J then concluded:

There is no reason why the claim in an appropriate case should not be framed as a claim for breach of confidence, being the misuse of a relationship arising out of the acquisition or retention or use by the defendant of a film made in violation of the plaintiff's right of exclusive possession of which the defendant knew or ought to have known and to which a constructive trust should be attached. The ultimate remedy, to which the plaintiff would be entitled, is delivery up of the film, and an account of any profits made from it.⁶⁹

Callinan J's reasoning suggests two conclusions: first, that Lenah could have 'framed' its claim in breach of confidence, and, second, that Lenah and the ABC were in a fiduciary relationship which gave Lenah rights in the video under a constructive trust. It is respectfully submitted that both conclusions are erroneous and, contrary to the statement of Callinan J,⁷⁰ are inconsistent with established precedent.

The first conclusion of Callinan J, that Lenah had a prima facie claim which could be 'framed' in breach of confidence, seems rather inexplicable. In reaching his conclusion, Callinan J appears to overlook the crucial issue that in order to maintain a cause of action in breach of confidence, the information which is the subject of the claim must be *confidential*; it must possess the 'necessary quality of confidence'.⁷¹ Amazingly, at no point in the judgment of Callinan J was there an explanation of how the information on the video was, in any way, *confidential*. The lack of an explanation is perhaps a result of the fact that both the Full Court of the Supreme Court of Tasmania and Lenah, in its submissions to the High Court, had conceded that the information recorded on the video was not confidential.⁷² Moreover, there are strong reasons, several of which are given in the majority judgments, which explain why the information recorded on the video could not be confidential:⁷³ the operations of the respondent recorded on the video were open to some members of the public,⁷⁴ the operation processes were known to and licensed by a public authority,⁷⁵ and the production processes filmed were no different from other slaughtering operations carried out in Australia.⁷⁶ Perhaps Callinan J's judgment should be taken as an abolition of the requirement of

⁶⁸ *Ibid.*

⁶⁹ *Ibid* [311].

⁷⁰ *Ibid* [298].

⁷¹ *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47 (Megarry J). See also *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, 215; *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414, 437-9.

⁷² *Lenah* [2001] HCA 63, [30] (Gleeson CJ), [73] (Gummow and Hayne JJ).

⁷³ For a more exhaustive list of factors to be weighed, see *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37, 49-50 (Gowans J).

⁷⁴ *Lenah* [2001] HCA 63, [25].

⁷⁵ *Ibid.*

⁷⁶ *Ibid* [78] (Gummow and Hayne JJ), [143] (Kirby J).

'confidentiality' in the law of breach of confidence. However, such an interpretation runs against considerable authority.⁷⁷ With respect, Lenah never had a prima facie claim for breach of confidence because the activities filmed on the video were not, in any respect, confidential.⁷⁸

Callinan J's second conclusion, that a fiduciary relationship existed between Lenah and the ABC, must be read with equal caution. Callinan J does quote the accepted 'undertaking' test for a fiduciary relationship espoused by Mason J in *Hospital Products Ltd v United States Surgical Corporation*.⁷⁹ Yet, at no point does Callinan J explain how the ABC undertook to, in the words of Mason J's test, 'act for or on behalf of or in the interests of Lenah 'in the exercise of a power or discretion'.⁸⁰ Callinan J justifies the imposition of a fiduciary relationship giving rise to a constructive trust by a tenuous analogy with the seminal case of *Keech v Sandford*.⁸¹ But unlike *Lenah*, *Keech* involved a clearly established fiduciary relationship: the defendant trustee was in an express relationship of trust and had subjectively undertaken to act in the best interests of the beneficiary in the exercise of its powers to renew a lease. Thus, any comparison between *Keech* and *Lenah* is unconvincing in the absence of a defined undertaking from the ABC.

In the absence of express evidence of an undertaking, the judgment of Callinan J makes a bold inference that a fiduciary relationship would have existed: 'had there been a pre-existing relationship between the appellant and the respondent it would no doubt have been governed ... upon the basis that the respondent control what might be done, filmed or otherwise reproduced there by the appellant'.⁸² This imposition of a fiduciary relationship based on mere supposition as to what the ABC and Lenah might have done is extraordinary; perhaps it is justified by the equitable maxim that equity treats as done that which ought to be done.⁸³ But, with respect, it is far from logical. It is not clear that, had the ABC not received the video, they would ever have bothered to independently establish a relationship with the respondent so as to lawfully film Lenah's activities. To

⁷⁷ *Argyll v Argyll* [1967] 2 Ch 302; *Church of Scientology of California v Kaufman* [1973] RPC 635; *Talbot v General Television Corp Pty Ltd* [1980] VR 224; *O'Brien v Komesaroff* (1982) 150 CLR 310. In the dictum of Lord Goff in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281, which is quoted by Callinan J at ibid [306], puts the issue beyond doubt in stating 'a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice' (emphasis added).

⁷⁸ Callinan J's assertion in *Lenah* [2001] HCA 63, [301] that his conclusion is 'consistent' with *Franklin v Giddins* [1978] Qd R 72, is not entirely clear. In that case, Dunn J made clear that the defendant's liability was for use of surreptitiously obtained confidential information. Contrary to the assertion of Callinan J, it was a very material and significant fact that 'the property of value that came into the female defendant's possession consisted of a trade secret': see *Franklin v Giddins* [1978] Qd R 72, 80 (Dunn J).

⁷⁹ (1984) 156 CLR 41, discussed in *Lenah* [2001] HCA 63, [293].

⁸⁰ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96-7.

⁸¹ (1726) Sel Cas T King 61; 25 ER 223, ('*Keech*') discussed in *Lenah* [2001] HCA 63, [299].

⁸² *Lenah* [2001] HCA 63, [295].

⁸³ See, eg, *A-G (Hong Kong) v Reid* [1994] 1 AC 324. See further Patricia Louglan, 'The Historical Role of the Equitable Jurisdiction' in Patrick Parkinson (ed), *The Principles of Equity* (1996) 3, 25-6.

assume that the ABC would have entered into a fiduciary relationship to obtain video footage of Lenah's operations is doubtful; it is equally plausible that, without the unlawful acts of third parties, it would have never independently filmed, televised or published the matter at all.

In a highly problematic reference, Callinan J draws a concluding analogy with O'Connor J in *Black v S Freedman & Co.*⁸⁴ Callinan J argues that, like the innocent recipient of stolen money from a thief, the ABC, as a recipient of property from an unlawful act, should hold the video on constructive trust for Lenah. With respect, there is no consistency between *Lenah* and the case of innocent receipt of stolen property. O'Connor J's dictum (and the subsequent cases approving it, such as *Lipkin Gorman v Karpnale Ltd*⁸⁵) stands for the simple proposition that an innocent recipient of stolen property is subject to an obligation to return the stolen property to the true owner.⁸⁶ Prima facie, Lenah never owned the video, the video was, as Gleeson CJ observes, the property of the unknown third party who installed it on Lenah's premises.⁸⁷ Thus, unless Lenah can assert proprietary rights in the images recorded on the video, the ABC cannot be characterised as the recipient of Lenah's stolen property.⁸⁸

With respect, Callinan J's dissenting opinion based on a supposed fiduciary relationship provides no sound reason why Lenah had a prima facie case against the ABC. Moreover, the suggestion that Lenah's claim could be framed as a breach of confidence is highly suspect. There is much to indicate that the majority opinions should be preferred.

3 Future Recognition of a Tort of Privacy

Lenah offers considerable insight into the potential expansion of the common law and equity in protecting 'rights' to privacy.⁸⁹ In an alternative submission to the High Court, Lenah mooted the judicial recognition of a tort of privacy which it said would give rise to a prima facie cause of action (and thus a base for an

⁸⁴ (1910) 12 CLR 105, 110.

⁸⁵ *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 565-6 (Lord Templeman), cited in *Lenah* [2001] HCA 63, [300] n 402.

⁸⁶ In equity, the innocent recipient holds the stolen money on constructive trust for the true owner. At common law, the true owner may be entitled to a claim for money had and received on the basis that the innocent recipient is unjustly enriched at the expense of the true owner: *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 572-4 (Lord Goff).

⁸⁷ *Lenah* [2001] HCA 63, [32].

⁸⁸ Just possibly, Lenah may be able to assert that it held some copyright in the images recorded on the video. Gummow and Hayne JJ explore this possibility in *ibid* [101]-[103] but note that 'Lenah made no claim to copyright'.

⁸⁹ The recent UK Court of Appeal decision of *Douglas v Hello! Ltd* [2001] 2 All ER 289 also contains significant obiter comments in relation to the development of privacy rights outside of the traditional equitable action for breach of confidence. See further Nicole Moreham, 'Douglas and others v Hello! Ltd - The Protection of Privacy in English Private Law' (2001) 64 *Modern Law Review* 767. In Australia, the possibility of a common law right to privacy has received extensive consideration, most recently in the excellent article by Greg Taylor, 'Why Is There No Common Law Right of Privacy?' (2000) 26 *Monash University Law Review* 235.

interlocutory injunction). In reaching their differing conclusions, no member of the High Court expressly recognised or denied the existence of the tort of privacy.⁹⁰ However, each of the judgments in *Lenah* offered 'tentative'⁹¹ comments on the likely development of a new tort of privacy as well as its application on the facts.

In each of the judgments, the discussion of the development of a tort of privacy in *Lenah* began with reference to the seminal case of *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*.⁹² In *Victoria Park*, a narrow majority of the High Court held that a racecourse owner and operator could not prevent the observation and broadcasting of races from a tower on land adjoining the course. According to subsequent judicial and academic comments,⁹³ the case is authority for the proposition that in Australia there is no cause of action for breach of privacy in the common law of Australia.⁹⁴ However, in a careful and thorough analysis, both the judgments of Gummow and Hayne JJ and Callinan J questioned whether *Victoria Park* stood so firmly in the way of the judicial recognition of a tort of privacy.⁹⁵ Indeed, *Victoria Park* must be read subject to the fact that it was decided by a narrow majority over half a century ago, that it preceded the significant development of common law actions protecting privacy interests, that it involved the peculiar facts of the case which involved no physical interference with the plaintiff's 'property' and, that the judges expressed somewhat 'conservative', if not 'anachronistic' views.⁹⁶

If *Lenah* signals a departure from *Victoria Park*, the full extent of that departure may, in the future, involve the recognition of a tort of privacy. However, the principal problem with developing a tort of privacy is the framing of clear elements of the action.⁹⁷ The judgments in *Lenah* referred to American⁹⁸ and New Zealand⁹⁹ jurisprudence on point, which has protected privacy interests via

⁹⁰ *Lenah* [2001] HCA 63, [38]-[43] (Gleeson CJ), [106]-[132] (Gummow and Hayne JJ), [185]-[191] (Kirby J), [313]-[336] (Callinan J). Gaudron J did not comment on the issue but agreed generally with the reasons of Gummow and Hayne JJ: at [58].

⁹¹ *Ibid* [313] (Callinan J).

⁹² (1937) 58 CLR 479, cited in *Lenah* [2001] HCA 63, [38] n 14 (Gleeson CJ), [106] (Gummow and Hayne JJ), [186] (Kirby J), [314] (Callinan J).

⁹³ See, eg, Taylor, above n 89, 237 n 18.

⁹⁴ See the sources cited by Kirby J in *Lenah* [2001] HCA 63, [187].

⁹⁵ *Lenah* [2001] HCA 63, [108] (Gummow and Hayne JJ) quoting New South Wales Parliament, *Report on the Law of Privacy*, Paper No 170 (1973) para 12. See also *Lenah* [2001] HCA 63, [315]-[320] (Callinan J).

⁹⁶ *Lenah* [2001] HCA 63, [315]-[320] (Callinan J).

⁹⁷ Taylor, above n 89, offers insight through a discussion of the comparative approaches of German, American and English law.

⁹⁸ *Time Inc v Hill* 385 US 374, 383 (1967); *Cox Broadcasting Corporation v Cohn* 420 US 469, 488 (1975); *Restatement of the Law* (2nd), *Torts* (1977) s 652A-652E; *Prosser and Keeton on the Law of Torts* (5th ed, 1984) 850-1.

⁹⁹ *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415; *P v D* [2000] 2 NZLR 591; Rosemary Tobin, 'Invasion of Privacy' (2000) *New Zealand Law Journal* 216.

various wrongs, including the tort of intentional intrusion upon seclusion and the tort of giving publicity to private life.¹⁰⁰ Perhaps, then, an American-style tort of privacy could be adopted by Australian courts based upon an intentional intrusion by the defendant into the 'solitude or sanctity' of the plaintiff which would be highly offensive to a reasonable person.¹⁰¹ Even if such recognition were granted, the judgments of Gummow and Hayne JJ and Callinan J emphasised that Australian judicial recognition of a tort of privacy is complicated by several factors, including the lack of a Bill of Rights in Australia and the overlap with already recognised causes of action, such as breach of confidence, defamation and passing-off.¹⁰² In addition, the observations of Kirby J noted that the recognition of a tort of privacy in Australia would be further 'influenced' by the existing provisions relating to privacy interests under art 17 of the *International Covenant on Civil and Political Rights*.¹⁰³ Finally, Gleeson CJ noted that 'the lack of precision of the concept of privacy is a reason for caution in declaring a new tort of the kind for which the respondent contends'.¹⁰⁴

Even if a tort of privacy had been recognised in *Lenah*, the judgments show much aversion to its application on the facts. The reason for the inapplicability of a tort of privacy to *Lenah* arises from the fact that the respondent, as a corporate *persona ficta*, was not an individual and was not alleging any breach of human dignity or personal autonomy.¹⁰⁵ Rather, the effect of any invasion was on the commercial goodwill of the respondent as a corporation. Gummow and Hayne JJ held, therefore, that 'Lenah's reliance upon an emergent tort of invasion of privacy is misplaced. Whatever development may take place in that field will be to the benefit of natural, not artificial, persons'.¹⁰⁶ Likewise, Kirby J noted that it appeared 'artificial to describe the affront to the respondent as an invasion of its privacy'.¹⁰⁷ In contrast, Callinan J would not rule out the possibility that a corporation, government or governmental agency might enjoy some privacy interests, but felt that the question would be one of proportion and balance of issues such as the value of free speech and publication in public interest.¹⁰⁸

¹⁰⁰ *Lenah* [2001] HCA 63, [120] (Gummow and Hayne JJ).

¹⁰¹ Compare the formulation of the protection of 'intrusion upon seclusion' in *Restatement of the Law* (2nd), *Torts* (1977) s 652B.

¹⁰² *Lenah* [2001] HCA 63, [122]-[123] (Gummow and Hayne JJ), [332] (Callinan J). See also Gleeson CJ at [41].

¹⁰³ Opened for signature 19 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976). See also '*GS*' v *News Ltd* (Unreported, Supreme Court of New South Wales, Levine J, 20 February 1998), where Levine J stated obiter that art 17 would be a legitimate guide in developing in a common law action for breach of the human right to privacy.

¹⁰⁴ *Lenah* [2001] HCA 63, [41] (Gleeson CJ). For the voluminous literature on the possible meaning which can be attributed to 'privacy', see Taylor, above n 89, 242 n 44.

¹⁰⁵ *Lenah* [2001] HCA 63, [126] (Gummow and Hayne JJ).

¹⁰⁶ *Ibid* [132].

¹⁰⁷ *Ibid* [191].

¹⁰⁸ *Ibid* [334].

E Third Issue:

Exercising the Discretion to Award Interlocutory Injunctive Relief

The third issue in *Lenah* was whether, if *Lenah* could show a prima facie case, the court should exercise its discretion to grant an injunction on the 'balance of convenience'. As only Callinan J and Kirby J had found an arguable cause of action in *Lenah*'s statement of claim, it was left to these two judges to decide the issue. Reaching the agreement with the orders of Gummow and Hayne JJ, Kirby J found that the court's exercise of discretion was miscarried and the award of an interlocutory injunction should be dismissed.¹⁰⁹ In dissent, Callinan J held that there was 'no reason here why the respondent should not have its injunction continued.'¹¹⁰

F Weighing the Factors: Privacy v Freedom of Speech

At the heart of the disagreement between Kirby J and Callinan J as to the exercise of discretion was a considerable debate on the weight to be attributed to two factors: first, the protection of *Lenah*'s privacy interests and second, the public interest in the freedom of speech.¹¹¹ According to the approach of Kirby J, the public interest in the freedom of speech in governmental and political matters is a relevant consideration which, as an implied constitutional right, must necessarily be considered in exercising the discretion to grant an injunction. Kirby J thus found that the Full Court decision of Wright and Evans JJ had erred in failing to sufficiently consider the public interest in freedom of communication as a relevant competing factor weighing against the grant of an injunction.¹¹² With respect, it is unclear precisely how the public interest in freedom of political communication is relevant to the facts of *Lenah*. Kirby J reasoned that within the system of representative democracy protected in the *Constitution*, 'concerns about animal welfare are clearly legitimate matters of public debate across the nation.'¹¹³ Although animal welfare is undoubtedly an important issue, it seems a bold leap to suggest it gains any express or implied support from the text and structure of the *Constitution*.

Arguably, Kirby J's broad reading of the implied freedom of political communication goes too far, attributing unnecessary weight to a supposed constitutional interest in animal welfare at the expense of *Lenah*'s privacy interests. In dissent, Callinan J expressed dissatisfaction with Kirby J's approach and, in particular, the weight given to the implied constitutional freedom of communication of political matters. For Callinan J, the characterisation of the freedom of communication as an implied constitutional right had the effect of 'the

¹⁰⁹ *Ibid* [214].

¹¹⁰ *Ibid* [352].

¹¹¹ *Ibid* [207], [211]-[212] (Kirby J), [351] (Callinan J).

¹¹² *Ibid* [220].

¹¹³ *Ibid* [217].

detonation of a hydrogen bomb',¹¹⁴ giving the ABC an 'armadillo-like' defence.¹¹⁵ Callinan J disapproved of giving weight to the public interest in freedom of communication at the expense of various factors, including

the continued hurt to a defamed person pending trial; the greater resources generally available to a defendant to contest proceedings; the attrition by interlocutory appeals to which a plaintiff may be subjected; the danger that by the time of vindication of the plaintiff's reputation by an award of damages not all of those who have read or heard of the defamation may have become aware of the verdict; the unreasonableness of requiring the plaintiff, in effect, at an interlocutory stage, unlike in other proceedings for an interlocutory injunction, to prove his or her case; and, the fact that rarely does a publication later, rather than earlier, do any disservice to the defendant or to the opportunity to debate the issues in an informed but not defamatory way, and therefore to free speech.¹¹⁶

The disparate judgments of Kirby J and Callinan J highlight the difficult task required in weighing the protection of privacy interests against the public interest in freedom of communication. In resolving that task, it appears necessary to explore the extent to which the *Constitution* will support the public interest in the freedom of communication. If the freedom is to be given broad scope, extending to matters of animal welfare, it will undoubtedly prove a formidable barrier to the exercise of a court's discretion in granting injunctive relief.

IV LESSONS FROM LENA H

Lenah offers much insight, particularly in the doctrinal aspects of interlocutory injunctions, and the interplay of such doctrine with concepts of discretion and unconscionability. Although the protection of goodwill and reputation is a relevant consideration, the need to demonstrate a prima facie cause of action remains the paramount issue governing the award of an interlocutory injunction.

Aside from doctrinal issues, the costs associated in seeking injunctive relief may also outweigh the practical protection offered by the law. That is to say, the value of the award of interim injunctions may be lost in the judicial process. *Lenah* provides a striking example of this: the first instance decision (which denied an interlocutory injunction) allowed the ABC to telecast excerpts of the video footage.¹¹⁷

¹¹⁴ Ibid [340], adopting the 'nuclear imagery' of Donaldson LJ in *Bank Mellat v Nikipour* [1985] FSR 87, 92.

¹¹⁵ *Lenah* [2001] HCA 63, [342].

¹¹⁶ Ibid [351] (citation omitted).

¹¹⁷ Ibid [234] (Callinan J).

While *Lenah* clarified the basis for interlocutory injunctive relief, it has shed new light on the role of privacy as a legal concept and in informing judicial policy. In so far as corporate entities are concerned, there are strong suggestions to believe that any independent private law action - such as a tort of invasion of privacy - would offer little protection of commercial interests. The role of a tort of privacy appears to be confined to the private sphere, whatever that sphere might entail. It seems most likely that privacy protection at general law will be afforded primarily to personal information of individual human beings. Moreover, even if personal privacy interests are recognised, they must apparently compete with the constitutional pedigree of public interests in the freedom of political communication.

Finally, it is easy to forget that *Lenah* represents a very real example of the application of equitable rules to the circumstances prevailing in the modern media state. Whether one takes a cynical or positive view of the media, the judgment of Callinan J offers extensive insight into several media-related issues facing the development of law and equity, including the development of information technology, the growth of sources of information, the population expansion, and the continued concentration of media ownership.¹¹⁸ There is little doubt that, after *Lenah*, these issues will invigorate the future development of equitable jurisprudence in the 21st century.

¹¹⁸ *Ibid* [251]-[277].