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LAW IN THE 21ST CENTURY
A MISCELLANY OF MUSINGS

Introduction

1. The cynical ones amongst you might think that the topic was chosen at a time when neither President George Cowan or myself could think of a subject that might inform, amuse or entertain. That is only partly true. The thought that we might have both the Chief Justice and the Attorney-General present at the conference had prompted the idea that it might amuse some and entertain others if I spoke on some aspects of our laws which, in my opinion, could do with further thought.
2. I wish to state plainly that I hold the view that the task of drafting, construing and applying the law which is entrusted to persons such as the Attorney-General and the Chief Justice is no easy one and I disclaim any great expertise. But practise of the law does throw up oddities from time to time.

TERRORISM

3. I propose to start with the topic of terrorism and the *Australian Security Intelligence Organisation Act* 1979 (Cwlth).
4. The relevant legislation that I propose to discuss is the Australian *Security Intelligence Organisation Legislation Amendment Act* 2002. I was blissfully ignorant of this legislation until I read an article by Julian Burnside Q.C. entitled "What price 'freedom'? The legacy of 9/11" in the publication **Precedent** (May/June 2005) published by the Australian Lawyers Alliance. What he has to say in that article is well worth reading.
5. As Julian Burnside points out, this legislation suffers from a major flaw – it destroys democracy in order to preserve it. Effectively, our country has become one where incommunicado detention is possible, despite no offence having been committed, where joining an organisation is dangerous and where the right to silence has been aggravated and the privilege against self-incrimination is gone. We all should think long and hard about the merit of such laws.
6. The legislation, of course, was prompted by the attack on America on September 11, 2001. That attack ushered in the so called war against terror. This legislation is the Australian Government's legislative response.
7. In his article, Mr Burnside postulates that the legislation is premised on two bases. First, that terrorism began on 11 September 2001 at 9.30am east coast time. Second, that the scale of the threat of terrorism is so great that we must sacrifice some basic liberties until the "war on terror" is won. He argues that both premises are wrong.
8. He makes the point that the whole of the 20th century was marked by terrorism of one kind

or another. I suspect that however one defines "terrorism", attacks by one group of human beings on another has been a feature of human existence since time began. Of particular interest was Mr Burnside's reference to a report entitled "Patterns of Global Terrorism" tabled by the US Secretary of State in congress. The table includes the annual toll of death and injury caused by terrorist acts worldwide during the previous calendar year. No doubt the accuracy of the report depends upon how one defines an act of terrorism. The table supplied is as follows:

Year	**Acts**	**Killed**	**Wounded**
2003	208	625	3,646
2002	199	725	2,013
2001	346	3,547	1,080
2000	423	405	791
1999	392	233	706
1998	273	741	5,952
1997	304	221	693
1996	296	311	2,652
1995	440	165	6,291

9. In terms of things that cause human beings to die prematurely and about which we might be able to do something, the death and injury toll is insignificant. As Mr Burnside points out, millions die each year of AIDS. Two hundred and fifty thousand die in the US alone each year of smoking related diseases. Thirty thousand die in that country each year by the use of handguns.

10. Against that background, the issue is whether we should be sacrificing basic liberties until the war on terror is won. In truth such a war can never be "won". So we give up important liberties forever. Because that is definitely what we have been told to do with the passing of the *Australian Security Intelligence Organisation Legislation Amendment Act* 2002.

11. The key to the application of the Act is the definition of "terrorist act" which I will now give you.

> "***TERRORIST ACT*** *means an action or threat of action where:*
> *(a) the action falls within subsection (2) and does not fall within subsection (2A); and*
> *(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and*
> *(c) the action is done or the threat is made with the intention of:*
> *(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or*
> *(ii) intimidating the public or a section of the public.*
>
> *(2) Action falls within this subsection if it:*
> *(a) involves serious harm that is physical harm to a person; or*
> *(b) involves serious damage to property; or*
> …
>
> *(2A) Action falls within this subsection if it:*
> *(a) is advocacy, protest, dissent or industrial action; and*
> *(b) is not intended:*
> *(i) to cause serious harm that is physical harm to a person; or*

(ii) *to cause a person's death; or*
(iii) *to endanger the life of a person, other than the person taking the action; or*
(iv) *to create a serious risk to the health or safety of the public or a section of the public."*

12. The first thing to note is in the opening line – a terrorist act is not necessarily an act at all. A "threat of action" is sufficient. Of course, it has always been the law that a threat can be an assault and therefore a criminal act but it needed to be accompanied by some act sufficient to arouse apprehension of physical contact, such as an apparent ability to carry out the threat immediately. No longer is there any need for any actual or apparent present ability to affect the purpose. In other words, ideas alone are enough. As well, the legislation makes it an offence to belong to a "terrorist organisation". Such an organisation can be one so declared by regulation. "Terrorist organisation" means:

   "(a) *an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs); …"*

13. It is an offence to direct the activities of a terrorist organisation; to recruit for a terrorist organisation or to provide funds to or receive funds from a terrorist organisation. It is an offence to provide to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition. You can be in prison for life if you know that the relevant organisation is a terrorist organisation; for 15 years, if you are reckless about whether or not it is a terrorist organisation; and 10 years if you are negligent about whether it is a terrorist organisation.
14. If you intentionally induce someone to join an organisation but you are negligent about whether or not that organisation is indirectly engaged in "assisting in or fostering" the doing of a terrorist act, you are guilty of an offence that attracts 10 years jail. You will have seen from the definition that it is immaterial as to whether or not a terrorist act actually takes place.
15. With the greatest of respect to our Parliamentarians, it is a frightening thing that you can be exposed to 10 years gaol for suggesting that someone might join an organization and not taking sufficient care to find out what the organization is involved in.
16. The other interesting and disturbing aspect of this legislation is that the character of your act turns on your beliefs. As paragraph (b) of the definition makes plain, the action done or threat made takes on a different character when it is done "with the intention of advancing a political, religious or ideological cause".
17. I cannot do better than repeat Julian Burnside's words:

   "*… There are two specific problems with these measures. First, they make serious criminal offences out of otherwise innocent acts, depending on states of knowledge*

> *and ideology. Second, they are likely to be deployed in a highly charged atmosphere in which the ideology or ethnic background of the defendants is a key to the perceived offence.*"

18. Another problem with making it an offence to join an organisation is that any organisation is made up of members and those members might indulge in practices that others would deplore. Let us say you are a member of the Brisbane Club. Unbeknownst to you the committee of the club determines that it will attempt to convince the State Government into adopting a certain policy that is plainly political. Say, the chef at the club decides that the best way to bring this about is by giving to the visiting Cabinet Members one day a dose of food poisoning by the use of some old chicken. You have negligently failed to attend any meetings and know nothing of the club's change in direction. The whole purpose of this is to move Labour's policies more to the right, say on industrial relations. You will laugh at the notion of the Brisbane Club doing this. But what if it is the Afghanistan Refugee's Luncheon Club or the Arabian Émigré's dinner meeting? What was once a rap over the knuckles for a foolish act is now a terrorist act attracting up to life imprisonment.

19. In the same article, Julian Burnside draws attention to Section 34C of the *Australian Security Intelligence Organisation Act* 1979. The Minister may authorise a request for a warrant to detain a person if satisfied that this will substantially assist the collection of intelligence and is important in relation to a terrorism offence and that other methods of collecting that intelligence would be ineffective. It is not necessary that you be suspected of any offence. All that is required is that you might assist with the gathering of intelligence.

20. Innocent people may be detained without access to family or friends for up to a week. The only requirement is that you be a person who, according to ASIO's belief, has information regarding terrorism. There is no right to silence and no privilege against self-incrimination. Withholding information is punishable by 5 years imprisonment.

21. These are quite extraordinary measures. They involve the destruction of ordinary civil liberties.

22. To give some indication of what is in store, I propose playing for you an interview between John Clarke, playing Mr Philip Ruddock, and Bryan Dawe.

ANIMALS

23. My next topic is animals.

24. The law relating to animals involves some wondrous propositions. There is the excellent rule in *Searle v. Wallbank*. I describe it as "excellent" as I am a grazier of sorts. At last count I owned approximately 23 head of cattle. I will not bore you with their names. For those of you who have never heard of it, the rule in *Searle v. Wallbank* is this: an owner or occupier

of land adjacent to a highway owes no duty to users of that highway to maintain fencing or otherwise prevent his animals from straying onto the road. I recently advised Suncorp on a case involving precisely these facts. I was later told by my instructing solicitor that the Suncorp officers could not believe that I had the law right.

25. *Searle v. Wallbank*[1] was decided in 1946 by the House of Lords. Professor Fleming describes the decision as a "singular pique of antiquarianism". Nonetheless, the rule was upheld by the High Court of Australia in *State Government Insurance Commission v. Trigwell*[2].

26. In 1999 the Queensland Court of Appeal did not doubt that the principle applied in this State: *Fabian v. Welsh* (unreported – **[complete]**).

27. The problem with applying the rule is that there are exceptions. Where a defendant has prior knowledge of some vicious propensity in the animal which injures the plaintiff, then it may be that liability might arise. Mason J., as he then was, discussed the matter in *Trigwell* at p. 636 – 637.

28. Strange and anachronistic as the rule in *Searle v. Wallbank* seems to be, there is at least an argument for its retention, the "scienter" principle is indefensible.

29. The principle is this:

> "*The keeper of a domestic animal may be liable for damage done by it which is attributable to its vicious propensity, without proof of negligence on the keeper's part, if he or she has knowledge of the animal's vicious propensity to cause injury or damage to human beings. That knowledge must be of the particular propensity that caused the damage*": 20 *Halsbury's Laws of Australia* para. 20-505

30. The High Court has gone a long way in removing the old and inflexible rules which have previously governed much of the area of negligence. In 1987, the High Court held in *Australian Safeway Stores Pty Ltd v. Zaluzna* (1997) 162 CLR 479 at p. 484-488 that "the old inflexible rules defining the duty of an occupier of land or invitee, a licensee and a trespasser have been absorbed by the principles of ordinary negligence" (per Mason C.J., Deane, Dawson, Toohey and Gaudron JJ. in *Burnie Port Authority v. General Jones Pty Ltd* (1992-94) 179 CLR 520 at p. 548. In 1994, in *Burnie Port Authority*, the High Court held that the rule in *Rylands v. Fletcher* had been absorbed by the principles of ordinary negligence. In 2001 in *Brodie v. Singleton Shire Council* (2001) 206 CLR 512, the High Court discarded the traditional immunity of highway authorities for nonfeasance and subjected them to the ordinary principles of negligence.

31. No case on the scienter principle has yet reached the High Court. The Western Australian Full Court has held that it remains part of the common law of Australia: *Rokich v. Gianoli* (unreported – FUL 28 and 29 of 1996 – 4 March 1997).

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1 [1947] AC 341
2 (1979) 142 CLR 617

32. The following research was prompted by a decision of Justice Dutney in a case in Mackay of *Smith v. Curran & Ors*. Despite holding that the blame for the injury to Smith should be borne equally between Smith and the owner of the bull, Dutney J. found that by reason of the application of the scienter principle the owner of the animal was strictly liable for whatever harm it might cause and contributory negligence was not available.

Reasons to Abandon "Scienter"

33. The reasons justifying the abandonment of the scienter rule and the subsuming of the liability of a keeper of a domestic animal within the ordinary principles of negligence include:

(1) The rule has long been the subject of criticism. Lord Macmillan described the rule in 1947 as this "primitive rule"[3]. In 1957 Devlin J. considered this branch of the law to be "badly in need of simplification" because of "all its rigidity – its conclusive presumptions and categorisations"[4].

(2) The rationale behind the primary categorisation into *ferae naturae* or *mansuetae naturae* is not entirely clear – the question is a matter of law but whether based on considerations that the species is tame or untamed (wild cattle being held to be domesticated: *Scott v.Edington*[5]; but a trained circus elephant to be wild: *Behrens*), indigenous or foreign, harmless or dangerous or simply wild or not has not been made plain. Fleming favours the dangerous/harmless distinction[6].

(3) The test for classifying a species "appears to be its special danger to mankind"[7] but the rule plainly extends to property damage - where the risk may be entirely different. Thus rabbits are in the harmless category although notoriously capable of damaging property.

(4) Precisely what conditions need be satisfied to attract the principle is far from clear. In *Rands v. McNeil*[8] the Court of Appeal in England considered it essential that injury be caused after the animal escapes its keeper following *Knott v. London City Council*[9]. It is unlikely that this is the rule[10].

(5) Given the decision in *Burnie Port Authority v. General Jones Pty Ltd*[11] it is worth noting the close association with the rule in *Rylands v. Fletcher* as is obvious from the judgements in *Rands* and *Knott* and many other cases although the rules would

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3 *Read v. J Lyons & Co Ltd [1947] AC 156,171*
4 *Behrens v. Betram Mills Circus Ltd* [1957] 2 QB 1 at p14
5 (1888) 14 VLR 41
6 *The Law of Torts* (9th edn) p400 at fn 50
7 Fleming op cit p401
8 [1955] 1 QB 253 at 258 per Denning LJ, at 267 per Jenkins LJ, at p272 per Morris LJ
9 [1934] 1 KB 126,138
10 *Higgins v. Inglis* (1978) 1 NSWLR 649; Fleming op cit p400
11 (1993-1994) 179 CLR 520.

seem to have separate roots – one in trespass and the other in case requiring damage as the gist of the action.

(6) The scienter principle – at least with respect to domestic animals – has not been the exclusive determinate of liability. Ordinary negligence has long been available[12]. To a large extent ordinary negligence has overlain the whole area in which the rule operates[13]. Nuisance, trespass and, until subsumed, occupiers liability and the *Rylands v. Fletcher* principle all afforded remedies.

(7) Again, like the rule in *Rylands v. Fletcher*, it is highly unlikely that liability will not exist under the principles of ordinary negligence in any case where liability would exist under the scienter principle[14]. The keeper of an animal, knowing of a dangerous or vicious propensity would be expected to exercise a higher degree of care and, depending upon the magnitude of the danger, the standard of "reasonable care" may involve "a degree of diligence so stringent as to amount practically to a guarantee of safety"[15].

(8) Like the rule in *Rylands v. Fletcher*, it is strongly arguable that where a person keeps an animal known to have a dangerous or vicious propensity that person would be subjected to a non-delegable duty – "the necessary 'special dependence or vulnerability' of the person to whom the duty is owed"[16] would seem to be evident.

(9) The rule has significant potential to act unfairly. For example the rule requires that the harmfulness of the animal "to be judged not by reference to its particular training and habits, but by reference to the general habits of the species to which it belongs"[17]. Thus, tameness and docility over along period are to be ignored. Extensive and apparently successful training after one bite would be irrelevant.

(10) Again, like the rule in *Rylands v. Fletcher*, "some of the distinctions upon which the rule is based are unreasonably arbitrary"[18]. Some such distinctions are:

(i) the rule is based on the fallacy that "it is not in the general nature of horses to kick, or bulls to gore"[19];

(ii) if property in the animal should pass from A to B, A having the requisite knowledge of a vicious propensity and B not, then – to adapt the circumstances

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12 cf *Burnie Port Authority* at p. 548.

13 cf *Burnie Port Authority* at p. 548.

14 cf *Burnie Port Authority* at p. 555.

15 *Donaghue v. Stevenson* [1932] AC 562 at p. 612 per Lord Macmillan; and see comments of Devlin J. in *Behrens at p 14;* cf *Burnie Port Authority* at p. 554 footnote 87.

16 cf *Burnie Port Authority* at p. 551; *Kondis v. State Transport Authority* (1984) 154 CLR 672.

17 *Beherens* at p14

18 cf *Burnie Port Authority* at p. 548.

19 *Fletcher v. Rylands* (1866) L.R. 1 Ex 265 at 280 per Blackburn J. – with considerable irony: *Heath's Garage Limited v. Hodges* [1916] 2 KB 370 at p383; Williams op cit at p 286. per Neville J

of this case – the respondent's entitlements turn entirely on who is the keeper when the animal is released and whether A or B throws open the gate and releases the animal;

(iii) if it is right that contributory negligence is no defence then fine, if not impossible, distinctions must be drawn between a case where a plaintiff is grossly negligent but his actions are not wholly causative of the harm and cases where his actions are wholly causative of the harm;

(iv) the cases seem to support the principle that the lapsing of considerable time[20] or only hours or minutes[21] between the prior manifestation of the trait or propensity and the occasion of injury are both irrelevant. Thus a bite when an animal is very young attracts the principle despite an evening of temperament with maturity, or years of docility and training. Similarly no significant opportunity to react to the prior conduct would seem irrelevant[22];

(v) the cases suggest that the propensity must be one to be vicious or hostile rather than playful or high spirited, no matter that the objective threat or risk posed by the activity may be the same: *Fitzgerald v. ED & AD Cooke Bourne (Farms) Ltd*[23]. Professor Williams suggests however that even "mere boisterousness, in jumping at men and horses, may be carried too far so as to be counted as a vice"[24]. This rule suffers from the drawback that it requires in some degree an examination of the mental state of the animal[25];

(vi) it is necessary apparently to consider the circumstances in which the animal has displayed its propensity – knowledge that a dog has bitten under provocation is not sufficient.[26] How one judges what is sufficient provocation to draw the line is hardly clear;

(vii) precisely what knowledge is sufficient proof of propensity has been the subject of conflicting cases. The merest scintilla of evidence of propensity is all that some have required to fix an owner with strict liability. A dog that had exhibited fierceness when tied up in its master's car was insufficient "for it was no evidence that it was different from other dogs"[27] but knowledge that a dog had attempted

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20 *Sarch v. Blackburn* (1830) 172 E.R. 712 (3 years).

21 *Parsons v. King* (1891) 8 TLR 114 (30 minutes).

22 See Williams op cit at p305

23 [1964] 1 QB 249. As Dr Pannum has suggested in his text, *The Horse and the Law* (2nd edn Law Book Company 1986) at p. 90, "This does not seem to be a very satisfactory state of the law and represents a peculiarly anthropomorphic view of animals".

24 Op cit at p 315

25 ibid at p315

26 ibid at p300

27 ibid at p 301

to bite people passing the kennel where he was tied up was sufficient[28];

(viii) knowledge that an animal has bitten a man is sufficient apparently in a later action involving the attack on another animal but not the converse[29]. It has been held that proof that a boar had previously bitten children was sufficient evidence in an action for the killing of a mare by the boar[30]; knowledge of a previous attack by a dog on a child was sufficient to make the defendant liable for injury done by the dog to sheep[31]. The propensity of a sow to attack poultry appears to be sufficient evidence of general viciousness towards other creatures and sufficient for an action for the killing of a cow[32]. Conversely, knowledge that a dog had previously chased and worried a goat was not sufficient in respect of an injury caused to the plaintiff by the bite of a dog: *Osborne v. Chocqueel*[33] and in *Hartley v. Harriman*[34] Lord Ellenborough observed that "unless it be inferred that a dog accustomed to attack men is *ipso facto* accustomed to attack sheep, there is no evidence to support this declaration";

(ix) despite Barwick C.J.'s statement in *Eather v. Jones*[35] that it was "settled law" that "[t]o be relevantly vicious, the animal must exhibit a tendency to attack human beings in a fashion and to a degree not usual in an animal of its kind" there are many cases in which keepers of animals have been held liable for damage caused by their animals which would seem to have acted in accordance with the generally accepted nature of the species: see *Jackson v. Smithson*[36] (a ram butting), *Hudson v. Roberts*[37] (a bull attacking a man wearing a red kerchief) and *Buckle v. Holmes*[38] (a cat killing pigeons and bantams);

(x) there are cases which suggest that knowledge that animals of the species in question in general have at times a passing phase of temper is sufficient, even without knowledge of any particular prior like behaviour: *Barnes v. Lucille Ltd*[39] (a chow bitch with pups), *Howard v. Bergin*[40] (frightened bullocks) and *Powell v.*

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28 *Worth v. Gilling* (1866) LR 2 CP 1; and see discussion in Williams at p303

29 *Glanville v. Sutton* [1928] 1 KB 571;

30 *Jenkins v. Turner* (1696) 1 Ld. Raym. 109.

31 *Gettring v. Morgan* (1857) 29 L.T. (O.S.) 106.

32 *Quinn v. Quinn* (1905) 39 I.L.T. 163.

33 [1896] 2 QB 109 and see *Buckle v. Holmes* [1926] 2 KB 125 at 128.

34 (1817) 106 E.R. 228.

35 (1975) 49 ALJR 254 at p. 255.

36 (1846) 15 M & W 563.

37 (1851) 6 Exch. 697.

38 (1925) 95 LJKB 158; affirmed [1926] 2 KB 125.

39 (1907) 96 LT 680

40 (1925) 2 IR 110

Sloss[41] (no need to show scienter it being in the nature of grown bulls to fight). As Professor Williams has observed, if this is the rule, it is "open to the serious objection that it is bound to penalise either intelligence or honesty"[42];

(xi) it seems anomalous that an injury caused by an animal with the necessary propensity might have been equally caused by an animal without such propensity – in the instant case, the learned trial judge's finding was that 80% of the bulls would have made contact with a person in the lane[43], ie butted or thrown the person. If a "mid range" bull had been selected, then it more than likely would have caused the same damage but in one case there would be a 50% reduction in damages but not in the other.

34. The limits of the doctrine are entirely obscure. As Salmond observed in 1916[44] "the absolute liability of the keeper of animals may be excluded by certain circumstances of excuse or justification, though it is not easy in the present state of the law to give a definite and exhaustive list of them"[45]. Nothing has changed since. Whilst Salmond listed several defences Professor Fleming allows only one – the act of the plaintiff himself in causing the harm[46]. Whether the intervention of a third party, contributory negligence and act of God are available as defences is far from clear. I will deal with contributory negligence below. The House of Lords has held that the intervention of a third party trespasser excused a defendant[47] but other cases deny the defence is available[48]. As to act of God, Salmond asserts it is available[49] but that is contrary to obiter in *Nichols v. Marsland*[50] approved of by Cozens Hardy M.R. in *Baker v. Snell*[51]. Morgan, in his text[52] considers this view to be "a natural consequence of the fact that the duty to keep a savage animal secure is not a duty merely of reasonable care, and that the standard of care exercised by the animal's keeper is irrelevant to the question of liability". Nonetheless, the contrary view has been held by other text writers, notably Professor Glanville Williams[53].

Contributory Negligence a Defence to a Scienter Action

35. You should not take from the decision the view that it is necessarily plain that contributory

41 (1919) 13 QJPR 81
42 op cit at p292
43 J[18]
44 *The Law of Torts* (4th edn – London – 1916)
45 See p. 432.
46 *The Law of Torts* (9th edn) (1998) at p 405
47 *Fleeming v. Orr*(1855) 2 Macq 14
48 See Fleming op cit p406
49 Supra at p. 432.
50 (1875) L.R. 10 Exch. 255.
51 [1908] 2 KB 825.
52 *Law of Animals* (Butterworths - 1967) at p. 214.
53 *Liability for Animals* at p. 184;

negligence is not a defence to a scienter action. In *Smith v. Curran*, Dutney J. rightly observed that there is a debate in the authorities on the question. He felt obliged to follow two decisions at the Court of Appeal level – *Higgins v. William Inglis & Son Pty Ltd* (1978) 1 NSWLR 649 and *Mary Aird v. Grantham* [1998] WASCA 254, which both held that contributory negligence was not available.

36. I merely observe in passing that the issue is far from clear. There are numerous textbook writers who have expressed the contrary view and the Privy Council has, in obiter dictum, plainly assumed the relevance of a plea of contributory negligence: *Forbes v. M'Donald* (1885) 7 ALT 62.

CORPORATIONS ACT 2001

37. Those of you who do any work in the commercial field will be familiar with the procedure by which a statutory demand could be made against a corporation. The statutory demand procedure has been described as a simple and inexpensive means of identifying and achieving the winding up of insolvent companies. Section 459E of the *Corporations Act* is relevant.

38. For relevant purposes, the legislation provides that a person may serve on a company a demand relating to a debt or debts that the company owes to the person that is or are due and payable and whose amount total at least the statutory minimum. The statutory minimum is defined and is presently $2,000.00.

39. I wish to concentrate, however, on the defence to such a demand. The company can, of course, apply to set aside the demand pursuant to Section 459G. The legislation is important. It provides:

> "***459G (1) [Application to set aside statutory demand]*** *A company may apply to the court for an order setting aside a statutory demand served on the company.*
> ***459G (2) [Time limit on application]*** *An application may only be made within 21 days after the demand is so served.*
> ***459G (3) [Requirements for effective application]*** *An application is made in accordance with this section only if, within those 21 days:*
> *(a) an affidavit supporting the application is filed with the court; and*
> *(b) a copy of the application, and a copy of the supporting affidavit, is served on the person who served the demand on the company.*"

40. There is a recent reported decision of some importance to the application of these provisions: *Cooloola Dairies Pty Ltd v. National Foods Milk Ltd* [2005] 1 Qd.R. 12; [2004] QCS 308 per Chesterman J. The case is one of the many in the file of McMeekin's lost cases. The point of my mentioning these provisions today is to highlight that the provisions are entirely inflexible. The court has no discretion to assist should there be any deviation from the requirements no matter how minor or how little they might affect the justice of the case.

41. In *Cooloola Dairies* the solicitors for the applicant company had a difficult time. They

practised outside Brisbane. They relied on process servers to both file the documents in the court and then serve the documents. The 21 days allowed after service of the demand was running out. The process servers attended on the court, had the documents sealed and served a copy on the company. Unfortunately, the process servers did not endorse on every copy the application number, the return date nor was the seal affixed. They served a copy of the application that was defective in those respects. The solicitors were unaware of the default because the document that they received back from the process server bore all the appropriate information and the seal. They remained unaware of the defects until advised by the respondent's solicitor which, of course, was after the 21 days had elapsed. In that case, there were two related companies and each company had two applications. Thus, there were four related matters. Documents served in the other matters bore the appropriate information. The return dates were the same for all. Thus, the respondent was in no doubt about the return date in fact, although it could claim formally that it had not been properly advised. This proved fatal to the company's application to set aside the statutory demand.

42. The decision in *Cooloola* was that the copy of the application which the section requires to be served must show that an application has been filed and when the respondent is required to attend and answer it. It does not perform these functions if it is not sealed, does not show the action number allocated by the court and fails to include the return date: per Chesterman J. at paragraph [34].

43. It seems very hard that a company might well have good grounds for disputing the debts but because of a mistake unknown to it, unknown to its solicitors and which does not really mislead the other side its rights are lost.

44. A failure to respond to a statutory demand, or dismissal of an application to have it set aside is the first step in the insolvency process: Section 459Q of the *Corporations Act* 2001. A company cannot oppose the application for winding up without the leave of a court on any ground on which it in fact relied in applying for the demand to be set aside or on which he could have relied: Section 459S.

EXPERT EVIDENCE

45. In a recent case, *Wood v. Satriano & FAI Allianz Limited* (unreported - BS8247 of 2004 - 5 May 2005), Chesterman J. described the current *Uniform Civil Procedure Rules* relating to expert evidence as "excessively silly".

46. The rules are to be found in Part 5 of Chapter 11 of the *Uniform Civil Procedure Rules* (Rules 423 to 429S).

47. Chesterman J. has written articles on the subject of expert evidence on a number of occasions.

Experts are a prominent feature of our system of litigation. One can well understand that judges become exasperated at the apparent contests between experts and seek ways to avoid these expensive fights and there are undoubtedly cases where the parties might agree on an expert or have no particular concern as to which expert is appointed. The rules provide valuable guidelines in those circumstances.

48. I do not know the present statistics but it used to be claimed that personal injury litigation formed 80% of the civil litigation in the State. If that remains true, then a significant issue for the courts is the use of expert evidence on medical issues. In a different category is the expert evidence necessary to establish the cause of action. Often such evidence is called from engineers practising in the area of industrial safety and the like.

49. So far as medical witnesses are concerned, I merely will remark that the day is a long way off where any competent practitioner is likely to happily agree on an expert with the consequence provided for in Rule 429H and 429N, namely that that expert is to be the only expert to give evidence in the proceeding on the issue without leave.

50. I appreciate the evil, or one of the evils, that the rules are intended to address. The courts have often lamented that experts tend to argue the case of the party that has retained them. My own experience suggests that the problem is a little more subtle. Parties tend to choose the experts that they know, from previous experience, hold views which are congenial to the case that they wish to present.

51. For those wishing to read a comprehensive discursion on the subject of expert evidence, I recommend to you the judgment of Heydon J.A. (as he then was) in *Makita (Aust) Pty Ltd v. Sprowles* [2001] 52 NSWLR 705.

52. Of more immediate concern in daily life in the courts is Rule 427. It provides:

> "***427*** *(1) An expert may give evidence in a proceeding by a report.*
> *(2) The report may be tendered as evidence only if –*
> *(a) the report has been disclosed as required under rule 429; or*
> *(b) the court gives leave.*
> *(3) The report is to be tendered as evidence-in-chief of the expert.*
> *(4) Oral evidence-in-chief may be given by the expert only –*
> *(a) in response to the report of another expert; or*
> *(b) if directed to issues that first emerged in the course of the trial; or*
> *(c) if the court gives leave.*
> *(5) Any party to the proceeding may tender as evidence at the trial any report disclosed by any party, subject to producing the expert for cross-examination if required.*"

53. The profession assumes that the rule has the effect that an expert may give evidence-in-chief only by way of a written report (which, of course, is now required to be disclosed: Rule 212(2) and 429) unless the provisions of Subrule 427(4) are met.

54. Justice Fryberg has doubted whether that is the correct construction of the rule: *Oates*

v. Cootes Tanker Service Pty Ltd & Anor [2005] QSC 213. His Honour raised the issue of what a party is to do if an expert has the necessary expertise on a subject and you wish to put before the court his opinion (which, I suppose, one could know from his writings or the like) but he refuses to give a report. Is it necessary that you first must gain the court's leave? If so, on what grounds must the court weigh up the competing considerations? Your opponent will almost certainly argue that the giving of the opinion has what will take them by surprise, cause them a significant disadvantage and, perhaps, injustice. What if the opinion is the leading expert in his field but simply has the policy that he will not give reports? Why should the court not be aided by his expertise?

55. Quite apart from that consideration as a part of daily practice, I think it would be of assistance if the rules reflected a less restrictive approach. Although the rules give no indication as to the grounds on which leave might be given, the strong implication seems to be that leave would be given in only rare circumstances. However, there are many occasions where in thinking about matters overnight before trial, considering the reports in the light of new evidence and so on (and not necessarily evidence that has emerged in the course of the trial), counsel wishes to seek further evidence from the expert, if only to explain a view, to strengthen it or to meet a potential argument that he might perceive lies ahead, although not yet contained in any report of another expert. These are standard, everyday issues that every counsel has to grapple with.

56. The point is, as is so often the case, that the attempt to achieve certainty by the enforcement of the rules can work as much in justice as the previous laissez-faire system used to do.

57. Perhaps a better rule would be to reflect what judges usually do – permit questions that are within the parameters of the existing debate – and make plain that any question in evidence in chief likely to take an opponent by surprise should be disallowed or allowed only on terms.

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58. In a paper entitled "Legality – Spirit and Principle", Chief Justice Murray Gleeson, in discussing the fundamental common law doctrine of legality, contrasted that with an example from the world of the ancient Greeks. In his account of the Peloponnesian war, Thucydides constructed a dialog between the Athenian envoys and the commissioners of Melos whose submission the envoys were seeking. In modern terms, Athens regarded Melos as a threat to its vital interests and had decided that it should be subjugated. The envoys began by rejecting any idea that there was a law that governed their conduct. They said:

> "*We shall not trouble you with specious pretences … either of how we have a*

> *right to our empire because we overthrew the Persians, or are now attacking you because of the wrong that you have done us … and make a long speech that will not be believed; … since you know as well as we do the right, as the world goes, is only in question between equal power, while the strong do what they can and the weak suffer what they must.*"

59. In the contest between insurance companies and injured persons, the strong do what they can and the weak suffer what they must.

60. The personal injury landscape has changed dramatically in the last 10 years. The legislation introduced includes the amendments to the *Workers' Compensation Act* of 1990 which commenced on 1 January 1996, the *WorkCover Queensland Act* of 1996 which commenced on 1 February 1997, the introduction of the *Motor Accident Insurance Act* with substantial amendments in October 2000, the *Personal Injuries Proceedings Act* of 2002 and, finally, the *Civil Liability Act* 2003.

61. The *Civil Liability Act* has been passed in conjunction with similar Acts in all other Australian jurisdictions. It followed on from the report of a panel of eminent persons to review the law of negligence (the Ipp Committee). The members of that committee were Justice Ipp (formerly a Justice of the Western Australian Supreme Court, at the time of preparing the report an Acting Justice of the New South Wales Supreme Court and now a Justice of that court), Professor Peter Kane, a torts expert at the Australian National University, Associate Professor Don Sheldon, a surgeon, and Mr Ian Macintosh, a long time mayor of a local council.

62. The preamble to the panel's terms of reference read as follows:

> "*The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.*"

63. The remarkable thing about these terms of reference is that they themselves are not supported by any evidence. No studies were done to demonstrate the truth of the premises that the committee were required to adopt. As Professor Luntz has recently observed in *The Australian Law Journal*, the terms of reference themselves made it clear that the assumptions contained in the preamble were "unchallengeable". The panel was given two months in which to do their work. It was required to ignore any existing empirical evidence and could not conduct any empirical studies of its own.

64. There is no question that the *Civil Liability Act* has altered the law as it applies to claims concerning a breach of a duty to take precautions against risk of harm.

65. There is still no evidence that the basic premises that the Ipp Committee were required to adopt have any validity at all. It is well known that the largest medical indemnity defence

organisation in Australia, United Medical Protection, collapsed through mismanagement. One of the largest public liability and professional indemnity insurers in Australia, HIH, also collapsed through a combination of dishonesty and mismanagement. Rodney Adler and Ray Williams have since been charged and convicted of criminal offences relating to its collapse. This was combined with a temporary reversal of fortunes in the stock market where insurance companies keep their assets. Thus, returns fell. To add insult to injury, insurance companies have been reporting record profits over the last 12 months. Suncorp's share price has gone from $14.00 to $20.00. Most insurers have doubled. The Financial Review has reported that over $600M has been returned to shareholders (AFR 11/7/05).

66. In a recent addition of *The Australian Financial Review* (12 July 2005), Michael Hawker, the president of the Insurance Council of Australia and the general manager of IAG, the leading insurer in Australia, and Gillian Davidson, an insurance partner in the Sydney office of National law firm Sparke Helmore, provided short articles in which they debated the issue. Interestingly, Mr Hawker commented:

> "*It is important that we remain passionate as a community about this issue to ensure injured people continue to receive fair and equitable compensation.*"

67. That, I think, hits the nail right on the head. What evidence is there that injured people were not receiving fair and equitable compensation previously? What evidence is there that there was the slightest need to interfere with the common law? Not once has any insurance company put forward an analysis to demonstrate that their exposure to claims, in respect of public risk, required any change to the existing law. In his article, Mr Hawker said:

> "*Insurers' profitability is not being driven by tort reform. The reality is that liability business makes up less than 8% of insurers' total revenue, hardly a figure on which to build company profits.*"

68. He then says:

> "*Industry profitability in recent years has been driven by other factors including better pricing of risk, strong investment returns and industry consolidation. This is in stark contrast to the billions of dollars insurers lost over the past decade on liability business.*"

69. I would like to see the evidence that insurance companies properly run ie with the premiums set appropriately, have lost billions in past years in this country from liability claims. I would like to see the analysis that the changes to the laws now in place could be shown to make the slightest difference. I suspect that HIH, United Medical Protection, September 11 and the stock market retreat had more to do with those losses. But the evidence has not been published to explain to the public who mostly don't own significant shares in the insurers why their ancient rights have been lost.

70. I very much doubt that $600m would be returned to shareholders if funds had been run so

low. I might be missing something here, but better pricing of risk, strong investment returns and industry consolidation all reflect the management of businesses by the insurers. If the law must protect anyone – why pick insurers?

71. Time does not permit me to make any great analysis of the *Civil Liability Act*. I will make these points:
    - The damages permitted by the Injury Scale Values that now must be applied are, in many cases, ludicrously low. They do not provide "fair and equitable compensation" to use Mr Hawker's words. Take a standard everyday case - a manual worker suffers a prolapsed disc in his spine. Section 61 of the Act requires the court to go to an injury scale and determine an injury scale value. That scale can be found at schedule 4 to the *Civil Liability Regulations* 2003. For our unfortunate manual worker, he will fall into item number 87 in all probability. That is applicable if there is a disc prolapse for which there is radiological evidence at an anatomically correct level for the injury or pain alleged. It is also appropriate if there is nerve root damage for which there is radiological evidence and if there are symptoms such as sensory loss, loss of muscle strength, loss of reflexes, atrophy or a fracture of the vertebral body. These are fairly standard typical back injuries. An ISV of between 10 and 15 is appropriate. Section 62 of the Act provides that if the scale value is between 10 and 15, then the general damages are between $11,000.00 and $18,000.00.
    - I recall, in 1981, Demack J. awarded a plaintiff $50,000.00 for a back injury in a manual worker that was not interfered with on appeal.
    - Incidentally the leading case on the meaning and application of these provisions is judgement of Britton DCJ in *Coop v Johnston* [2005] QDC 079 – it may be the only one

72. The great criticism of the Injury Scale Values is not only the general low level of damages for people with a life long impairment but the lack of any distinction in applying the scale to the individual. A concert pianist who loses a finger is treated in exactly the same way as a meatworker. One has lost everything that they have worked for in their life, the other lost almost nothing. The range of damages, incidentally, for an amputation of an individual finger is from $5,000.00 to $26,000.00.

73. The great complaint is that discretion is taken away. Effectively, it says to the judges that we no longer trust you to assess the damages.

74. Incidentally, it used to be a topic of mild amusement amongst personal injury lawyers as to what the loss of a testicle might be worth. Item 51 of the schedule indicates a scale of 2 to 10, ie $2,000.00 to $11,000.00. Age, cosmetic damage and effect on reproductive capacity

are the important features. One wonders who drew up the scale values.

75. The second point I will make is that various new qualifications have been introduced which impact upon the relevant duties. We now have to work out what "obvious risk" means (Section 13) "dangerous recreational activity" (Sections 18 and 19), the limits of the good Samaritan provisions (Sections 25 to 27). How we are to go about establishing what "was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice" (Section 22) when bringing actions against professionals, and indeed what is the meaning of the phrase "a person practising a profession" (Section 20). How the proportionate liability provisions are to work will take a lot of thought and debate. The "intoxication" provisions (Sections 46 to 49) are far from clear in their effect. The rather startling provisions in Section 47 will need to be worked through – if you are intoxicated when you suffer harm, then you are 25% liable for your injuries unless you can prove (the onus is reversed) that the intoxication did not contribute to the breach of duty or that the intoxication was not self induced. There are many other comments that might be made.

76. Our experience with the now repealed provisions of the *WorkCover Queensland Act* dealing with breach of duty and contributory negligence was that interfering with the common law concepts didn't really work. All one does is to create a whole host of new problems. The same, I think we can confidently predict, will occur with the *Civil Liability Act*. As one of my colleagues said to me recently, the passing of the *Civil Liability Act* has at least assured him that he will be able to afford his children's education and see him through to retirement.

A RIGHT TO PRIVACY?

77. In *Grosse v. Purvis* [2003] QDC 151, Senior Judge Skoien held that a tort of privacy exists under Australia's common law. This, I think, was the first occasion that there had been such a finding in this country. This, of course, was a fairly bold step for a District Court judge to take and that His Honour recognised. Heerey J. sitting in the Federal Court doubted that Senior Judge Skoien was right: *Kalaba v. Commonwealth* [2004] FCA 763. That was also the view of Gillard J. in *Giller v. Procopets* [2004] VSC 113 at [187] to [189].

78. My own view is that if there isn't such a tort there ought to be one and Senior Judge Skoien is to be applauded. The right to privacy was initially accepted in England in *Campbell v. Mirror Group Newspapers Ltd* [2002] FCA 499. The case concerned the well known "supermodel" Naomi Campbell who sued the Mirror Newspaper over allegations in articles that she was a drug addict and was attending meetings of Narcotics Anonymous. She lost the subsequent appeal: [2003] 1 All ER 224.

79. Earlier, a right to privacy had been refused in *Kaye v. Robinson & Anor* – 19 IPR 147.

The United Kingdom Court of Appeal had declined to find that a tort of breach of privacy existed. The facts were instructive. Kaye was a well known English actor. During a gale an advertisement hoarding smashed through his car window causing very severe injuries to his head and brain. After a period on a life support machine he was moved to intensive care and finally to a private room in a hospital. The first defendant was the editor of a newspaper called the Sunday Sport which was notorious for its extremely sensationalist features and its inclusion of advertisements for pornographic products and services (I am quoting from the headnote). The paper was published by the second defendant. One of the second defendant's journalists and a photographer gained access to Kaye's room, ignoring the notices forbidding such entry. They spoke to him at some length and took a number of photographs including several close-ups of the scars on his head using a flashbulb. Nursing staff then realised what was happening and the two men were forcibly ejected from Kaye's room. The defendants made it clear that they intended publishing an article and photographs of Kaye on the basis that he had given his consent to the interview. Medical evidence showed that Kaye was in no fit condition to be interviewed, nor to give any informed consent, such that 15 minutes after the interview he had no recollection of the incident. In the course of his reasons, Glidewell L.J. said:

> "*It is well known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.*"

80. In the later case of *Campbell*, it was observed that given the development of the law of confidence and the obligation on English courts to take account of the right to respect for private and family life enshrined in Article 8 of the *European Convention* on the protection of human rights, it seemed unlikely that the court would now hold that there was no actual right of privacy in English law.

81. New Zealand has recognised the existence of a tort of privacy invasion: *P v. D [2000] 2 NZLR 591;Hosking v. Runting* [2005] 1 NZLR 1 (publication of photographs of two small children of celebrities in a stroller taken without the parents permission). In the former case it was suggested that 4 things needed to be established:

(a) that the disclosure of the private facts must be a public disclosure and not a private one;

(b) facts disclosed to the public must be private facts and not public ones;

(c) the matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities;

(d) the nature and extent of legitimate public interest in having the information disclosed

must be weighed.

82. The facts in *Giller v. Procopets* are instructive in some senses. Effectively, it was a de facto relationship dispute. Even that much was in dispute, that is whether there was a de facto relationship or not. Whatever be the case, there was a sexual relationship. On 12 November 1996 – and the date is important – the plaintiff obtained an interim intervention order against the defendant after an alleged assault two days before. The application was heard ten days later when an order was made providing, inter alia, that the male defendant was prohibited from assaulting or harassing the female plaintiff, approaching her or her children and being within 350 metres of their residence in Port Melbourne. As the trial judge commented:

> "*The surprising aspect of the events of this period is that the parties resumed a sexual relationship on 19 November 1996 (ie three days before the intervention order was obtained) despite the interim order obtained a week before. After the plaintiff obtained the intervention order at the Melbourne Magistrates Court on 22 November 1996, having given evidence on oath that she was in fear of the defendant she and the defendant that afternoon indulged in sexual intercourse. The evidence revealed that they had sexual intercourse on 19, 21, 22, 23, 24, 25, 26 and 28 November and 1 December. For our purposes the relevant point is that these sexual encounters during this period were filmed by the defendant using a video camera. He did so surreptitiously at first for the first six occasions and then with the consent of the plaintiff for the remaining four occasions. Relations between the parties deteriorated thereafter. An altercation occurred on 6 December when the defendant threatened the plaintiff that he would show the video and photographs taken from the video to various people including her employer. Two days later the plaintiff, who had sworn that she was in fear of the defendant, attacked him with a length of steel at a Camberwell market whilst he was filming her and her mother. The defendant suffered what was described as 'bruising injuries'. Subsequently, between 5 and 7 December the defendant showed a video of the sexual activities of the parties to one person, left a video with the plaintiff's father and threatened to show the video to a number of people including the plaintiff's employer. He made contact with the employer on 9 December. He was taken into custody by the police early the following day. He did not attempt to show the video again until about the middle of the following year when he showed it to a female friend.*"

83. The plaintiff made numerous claims but, for present purposes, she claimed compensatory aggravated and exemplary damages relating to the videoing of their sexual encounters and the distribution by the defendant of videos to other persons. She pleaded three causes of action – breach of confidence, a claim for intentional infliction of emotional distress and a claim for invasion of privacy.

84. As I have mentioned, Gillard J. decided that the law had not developed to the point where in Australia the law recognised an action for a breach of privacy.

85. It is important to appreciate that what the plaintiff was after was damages. She did not seek an injunction. It was important also to appreciate what she wanted damages for. Obviously, the showing of the videos to third parties did not cause her physical harm. She

claimed damages for a form of mental harm – distress, humiliation and the like.

86. Even though His Honour was quite satisfied that there was a breach of confidence of a type that equity would restrain by injunction, he held that there was no power to award damages for the distress occasioned by that breach of confidence. He observed that whilst damages for injury to feelings are available in defamation and copyright infringements, like damages are not available in a breach of confidence case.

87. The decision is interesting too for His Honour's determination that there is no right recognised in the law to recover damages for the intentional infliction of mental harm that falls short of actual injury.

88. The law does recognise that where a defendant by an intentional act or statement intends to cause nervous shock to the plaintiff and succeeds in doing so and the plaintiff suffers injury as a result, that plaintiff can recover damages: *Wilkinson v. Downton* [1897] 2 QB 57. That cause of action has been confirmed in the High Court: *ABC v. Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 – see para. [123] per Gummow and Hayne JJ.

89. The English position comes close to recognising a right to privacy although there still seems to be a need to found any cation on a breach of confidence. At least Lord Justice Sedley in the Court of Appeal in *Douglas v. Hello! Ltd* [2001] 2 WLR 992 plainly felt that there was a right of privacy in English law today. He observed (at p. 1025):

> "*What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: It can recognise privacy itself as a legal principle drawn from the fundamental value of personal economy.*"

90. *In A. v. B (a company)* [2002] 2 All ER 545 the Court of Appeal favoured the concept of "reasonable expectation of privacy" but still in the context of an action for breach of confidence. In *Wainwright v. Home Office* [2003] UKHL 53 (strip searching of prisoners) the House of Lords held that there was no general tort of invasion of privacy.

91. *ABC v. Lenah Game Meats Pty Ltd* is the leading case in Australia on the subject. Lenah Game Meats Pty Ltd was in the business of butchering bush possums. Trespassers had broken into their abattoir and videoed the operations surreptitiously. Those trespassers had made the video available to a group Animal Liberation Ltd which in turn had made the video available to the ABC. Lenah Game Meats wished to prevent publication of the video by the ABC and claimed damages. They were denied interlocutory relief and the case reached the High Court. There were two problems with their claim so far as the claim was based on a tort of invasion of privacy. Firstly, it was a corporation not an individual. Secondly, their activities were not relevantly private. It is important too that the action did not involve the

actual trespassers but rather the ABC who had committed no unlawful act.

92. In the United States, a tort based upon the right to privacy has long been recognised and is apparently still evolving. Callinan J. in *Lenah Game Meats* summarised the position at para. [323]. He referred to the work of Prosser and Keeton on the *Law of Torts* as identifying that the tort is a complex of four:

    (1) Intrusion upon the plaintiff's seclusion or solitude or into his private affairs.

    (2) Public disclosure of embarrassing private facts about the plaintiff.

    (3) Publicity which places the plaintiff in a false light in the public eye.

    (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

93. As Callinan J. points out, Canada too seems to be moving towards recognising a common law right to privacy.

94. It seems, with respect, to be extraordinary that someone can break into your home, office or factory, film something that you do not want to be published and then be immune from injunction and perhaps damages. Such an approach simply encourages people to do precisely that if they can obtain some gain from it.

95. The facts in Kaye cry out for a curial remedy – to lie in your hospital bed following brain surgery and in incomplete command of your faculties and be filmed for public display demands that there be a very simple remedy. There should be no need to construct an artifice of breach of confidence. Indeed privacy and confidence are two different things.

96. Callinan J. concluded at para. 335 in *Lenah Game Meats* that:

> "*The time is ripe for consideration whether a tort of invasion of privacy should be recognised in this country, or whether the legislature should be left to determine whether provisions for a remedy for it should be made.*"

Summary

97. I have been in practice since 1977. Since that time, the change in the legal landscape has been startling. In a paper entitled "Why is there no Common Law Right of Privacy?" (2000) 26(2) Monash Law Review 235, Greg Taylor summarises many of those changes. They include:

- *Securities Pty Ltd v. Commonwealth Bank of Australia* (1992) 175 The doctrine of privity was modified, at least in relation to insurance contracts – *Trident General Insurance Co Ltd v. McNiece Bros Pty Ltd* (1988) 165 CLR 107.
- The distinction between mistakes of fact and mistakes of law in the law of restitution was abandoned: *David* CLR 353.
- Native title was recognised: *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1.
- Liability for the escape of dangerous non natural substances from land – the rule in *Rylands v. Fletcher* – was abandoned and incorporated in the general law of

negligence: *Burnie Port Authority v. General Jones Pty Ltd* (1994) 179 CLR 520.

- The implied consent to sexual intercourse derived from the relationship of marriage was, as he puts it, "declared dead": *R v. L* (1991) 174 CLR 379.
- Discrimination by the States against residents of other States was finally dealt with by permitting interstate lawyers to ignore State laws which prevented them from practising in that state: *Street v. Queensland Bar Association* (1989) 168 CLR 461.
- The implied constitutional freedom of communication on political matters was identified: *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106.
- The unconstitutionality of State taxes on alcohol and tobacco was finally recognised: *Ha v. New South Wales* (1997) 189 CLR 465.
- The highway authority's immunity from suit for nonfeasance as distinct from misfeasance was abandoned: *Brodie v. Singleton Shire Council* (2001) 206 CLR 512.

98. There are many more cases that could be cited.

99. The world has changed to a remarkable degree in the space of those 28 years. The law and the courts that are required to determine the law and uphold it are required to change with it.