JUSTICE CALLINAN'S JUDGMENTS IN PRIVATE LAW: STORY TELLING, LEGAL COHERENCE AND CORRECTIVE JUSTICE

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I INTRODUCTION

Justice Ian Callinan brought important qualities to the judgments he delivered in his near-decade on the High Court bench. They included a strong desire to make judging accessible and intelligible to those who have the misfortune to be caught up in litigation; a conviction that the correct application of the law depends on the quality of fact-finding; fidelity to precedent; and a commitment to achieving practical justice. This article will examine the importance he attached to building legal analysis on solid foundations of fact-finding. But its principal aim is to argue that in his judgments on private law Ian Callinan showed a strong preference for achieving corrective justice, and a corresponding reluctance to take into account arguments based on considerations of distributive justice. The partiality for corrective justice is not surprising. It is based on clearly held and expressed views on the proper limits of the appellate judicial role. It is acceptable for judges to improve the coherence of the law, so that doctrines more fully achieve their recognised remedial aims. It is in this sense that 'the common law … works itself pure by rules drawn from the fountain of justice.'[1] But the courtroom is not the place to evaluate the merits of distributive arguments, and attempts to do so are almost always partial and incomplete.

Academics write at their peril about philosophies of judging and the application of legal theory by judges. The most sceptical readers of this genre of legal literature are the judges themselves.[2] Any judge who announces that he or she will apply a 'philosophy' of judging will rightly be accused of deciding cases, not according to the evidence, but according to preconceived views. Indeed a judge who indulged in a programmatic philosophy would be acting in breach of the judicial oath. But academics, for their part, should not accept at face value assertions that adjudication is a matter of applying common sense or practical justice to findings of fact. Common sense and an ability to achieve practical justice are indispensable qualities at any level of adjudication, but there is more to the judicial enterprise than that.

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1 *Omychund v Barker* (1744) 1 Atk 21, 33-4, 26 ER 15, 23 (Lord Mansfield in arguendo).

2 See, for example, Stephen Sedley, review of *The Court of Appeal* by Gavin Drewry, Louis Blom-Cooper and Charles Blake in *London Review of Books* (6th Sept 2007).

Maynard Keynes's dictum that '[p]ractical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slave of some defunct economist'[3] is as applicable to practical lawyers as it is to practical business executives. The decisions made by 'practical judges' owe as much to legal philosophy as the decisions made by successful managing directors owe to economic theory. The only qualification we should make is that the 'defunct' economist or legal theorist is not necessarily discredited, even if he may no longer be fashionable. Legal theory leaves its mark on even the most routine legal decisions, not just in the much discussed 'hard cases',[4] but most of the time the theory remains behind the scenes.

II CORRECTIVE JUSTICE AND JUDGING

The basic idea of corrective justice is that of restoring an equilibrium or equality which has been disturbed by one person committing a wrong against another, or by some event, not being a wrong, which requires restoration of the equilibrium.[5] In the words of its leading theorist, '[c]orrective justice is the idea that liability rectifies the injustice inflicted by one person on another.'[6] The duty imposed on the party who has disturbed the equilibrium is to restore it to the other party. Restoration must be in full, but there is no duty to go any further. Additional sanctions are a matter for the criminal law, not for private law. Moreover, the factors relevant to restoring the equilibrium must relate only to the parties who have lost and gained from the disturbance of the equilibrium. External considerations, whether based on economics, morality or social policy are, for the strict corrective justice theorist, irrelevant to adjudication, however relevant they may be to the legislature or law reform agency.

The simple idea of a mathematical correction of an inequality is as old as Aristotle.[7] Aristotle did not, however, identify the circumstances in which the inequality should be corrected. In other words, he did not identify the normative basis of corrective justice. Modern scholarship has devoted

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3 *The General Theory of Employment, Theory and Money* (1947 ed) ch 24.

4 Ronald Dworkin, 'Is There Really No Right Answer in Hard Cases?' in *A Matter of Principle* (1985).

5 William Lucy, *Philosophy of Private Law* (2007) 256-60. 'Events' refers to situations where the law provides a remedy even though the defendant has not committed a wrong, for example the innocent receipt of a mistaken payment entitling the payer to restitution for unjust enrichment.

6 E Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 *University of Toronto Law Journal* 349, 349.

7 Aristotle, *Nicomachean Ethics* in J Barnes (ed), *The Complete Works of Aristotle* (1984) vol 2.

considerable attention to this question.[8] The challenge has been to develop a normative foundation based on the event which caused the inequality, and not on distributive notions based on efficiency or on the morality of sharing of burdens in society.

The limited purpose of the second part of this article is not to contribute to this theoretical debate but to examine how perceptions of corrective justice affect adjudication. For this purpose I am not concerned with the claims of corrective justice as a complete or partial explanation of private law, or whether it justifies the remedies, such as compensatory damages, which are in fact awarded.[9] My specific concern is with the reasons that judges find acceptable as justifying the decisions they reach. Whether those reasons are acceptable to other participants in the legal community or the community at large is another matter. The judge who considers that he or she is applying corrective justice will identify and apply reasons which relate to the bilateral relationship between the parties, whether that relationship was created by a transaction, such as a contract, a wrong such as a tort, or some other event such as a mistaken payment. The judge will reject arguments based on the interests of parties not before the court, or moral, economic or social reasons for reaching a particular decision. The latter are distributive arguments, not based on the specific relationship between the parties to the dispute.

It is true that corrective justice arguments will almost always have distributive consequences. For example, a High Court decision on negligence may well affect insurance practice. Similarly, the application of distributive arguments to a private law dispute will correct an injustice for a wrong done to an individual litigant. An efficient award of expectation damages for breach of damages will simultaneously rectify an Aristotelian injustice. But these are consequences of applying the reasons, not the expressed justifications for the decisions themselves. It is those justifications that this article considers.

Corrective justice has considerable intuitive appeal to judges deciding private law cases. Few judges feel competent to assess distributive arguments, and (outside the domain of specialist courts and tribunals) the rules of procedure or evidence are not designed to assist courts to exercise a rational choice between distributive alternatives. Distributive arguments typically have implications for parties not represented before the court, and even if those external interests could be identified with certainty, the impact of a judgment based on, say, notions of economic efficiency are hard to quantify.

Judges have no problem understanding and applying the Aristotelian idea of correcting inequalities and imbalances between parties. This is, after all, the bread-and-butter of private law litigation. But judges are not in the business of systematically determining the normative foundations of private

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8 E Weinrib, *The Idea of Private Law* (1995); J Coleman, *The Practice of Principle* (2001).

9 See Lucy, above n 5, ch 8 which canvasses these issues.

law. The best-known and most successful example of a judicially established normative foundation is Lord Atkin's formulation of the neighbour principle in *Donoghue v Stevenson*.[10] But the litigation costs of establishing the scope of that principle in areas such as recovery for pure economic loss and psychiatric injury has been high, and it remains doubtful whether a robust and enduring legal test of liability will ever be established in these areas.

The identification of rational criteria which explain why the law intervenes in some cases, but not in others, when it compensates for losses or orders disgorgement or restitution of gains, is the task of legal theory, or more accurately of a particular type of legal theorist. Judges, for their part, assume that the normative justification for the application of private law doctrine is to be found in the doctrine itself. For example, there are many different justifications for the principle of sanctity of contract – economic efficiency arguments, Kantian arguments based on respect for autonomy of the legal actor, and so on – but for the judge deciding a simple case of breach of contract the principle is deducible from the rules governing performance, breach and excuses for non-performance.

If an economic idea can be allowed to infiltrate this argument, one outcome of centuries of adversarial litigation has been that bad legal rules have been expelled from the law and replaced by better ones. The process is never complete. New technologies, for example in medicine or the media, present new challenges to the moral foundations of doctrine which had previously been thought to be adequate. But such instances are comparatively rare in the general run of cases. More often an appeal to corrective justice is an appeal to improve the overall coherence of legal doctrine, the moral basis of the doctrine being assumed.

It is in this sense that Ian Callinan was committed to achieving corrective justice. He was certainly not committed to one or other of the various normative schools of corrective justice. But he did accept, for example, that the tort of negligence, breach of contract and equitable doctrines all rest on intelligible moral principles which are internal to those areas of private law. The principles are deducible from the cases, without reference to external sources, and the task of the appellate judge is to ensure that their application is coherent and principled. The belief in corrective justice is also linked to the primacy that he gave to the judge's obligation to explain the facts and issues clearly. The values underlying the application of any legal doctrine do not exist in the abstract; their moral force derives from their application to the particular facts in dispute. The internal morality of the law is inseparable from its fact-finding processes.

The most heavily litigated area of private law during Ian Callinan's term of office was the law of negligence. Some of the High Court's negligence decisions are, on any view, landmark authorities.[11] In contrast to

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[10] [1932] AC 562 HL (Sc).

[11] *Perre v Apand Pty Ltd* [1999] HCA 36, 198 CLR 180; *Brodie v Singleton Shire Council* [2001] HCA 29, 206 CLR 512; *Anetts v Austrlian Stations Pty Ltd; Tame v New South Wales* [2002] HCA 35, 211 CLR 317; *Gifford v Patrick*

the years of the Gibbs and Mason courts, few contract cases reached the High Court, and arguably none invited the Court to re–examine basic doctrine.[12] To these can be added a small number of cases on property, equity and restitution. The property and equity cases raised no great questions of principle.[13] On the other hand, an uncontroversial restitution decision is almost a contradiction in terms, so it is not surprising that the decision in *Roxborough v Rothmans of Pall Mall Australia Ltd*[14] has generated intense debate, as have the dicta on unjust enrichment in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*.[15]

Any short article which undertook to survey a decade of High Court decisions on private law would be breathless and formless. This article is content to make two points. First, Ian Callinan had a distinctive 'judicial voice' which spoke simply and clearly to all litigants appearing before the High Court. Secondly, he saw the fulfillment of corrective justice as being the fundamental aim of private law, the corollary being that he systematically excluded considerations of distributive justice from his legal reasoning. Particular attention will be paid to his judgment in *ABC v Lenah Game Meats Pty Ltd*[16] which, on first reading, might be thought to contradict this analysis but which in fact confirms it.

III JUSTICE CALLINAN: THE JUDICIAL VOICE

Judgments have many readerships: the parties, their lawyers, sometimes their parties' insurers, the public, judges hearing similar cases in the future, governments and public agencies, and not least law students. And of course judges who want to write in the grand manner can write for posterity. It does occasionally happen that a judgment is written, so to speak, 'over the heads' of the parties, being directed to other parties who might be minded to engage in the same conduct as the defendant, or to enter into the same transaction that the parties did. Ian Callinan valued intelligibility highly. No legal issue was so complex that it could not be explained clearly. For most of his period of tenure he was the junior judge, often delivering the fifth or seventh judgment. He could have been excused for relying on the summary of facts set out in one the judgments delivered by his seniors on the High Court

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Stevedoring Pty Ltd [2003] HCA 33, 214 CLR 269; *Cattanach v Melchior* [2003] HCA 38, 215 CLR 1; *Harriton v Stephens* [2006] HCA 15, 216 CLR 52.

12 A possible exception is *Bridgewater v Leahy* [1998] HCA 66, 194 CLR 457.

13 An exception might be made for *Pilmer v Duke Group (in liq)* [2001] HCA 31, 207 CLR 165.

14 [2001] HCA 68, 208 CLR 516.

15 [2007] HCA 22, 230 CLR 89. See Lee Aitken, 'Unforgiven: Some Thoughts on Farah Constructions Pty Ltd v Say-Dee Pty Ltd' (2007) 29 *Australian Bar Review* 195. Rob Chambers, 'Knowing Receipt: Frozen in Australia' (2007) 2 *Journal of Equity* 40.

16 [2001] HCA 63, 208 CLR 199.

bench. But in most cases he made a special point of setting out the facts in his own, lucid, uncluttered prose. His primary readership was the parties, because the parties, more urgently than anyone else, need to know why they won or lost. He never wrote for posterity.

A particularly vivid example of Justice Callinan 'speaking to the litigant' is his judgment in *Crimmins v Stevedoring Committee*.[17] The judgment also usefully illustrates the significance of fact selection in identifying the existence of a duty of care and in determining its scope.

The appellant was the widow of a wharf labourer who had died as a result of contracting mesothelioma, caused by the inhalation of asbestos fibres when unloading asbestos cargoes. She sued the statutory authority responsible for co-ordinating stevedoring activities for negligence.

The High Court considered two aspects of the claim. The first was whether the statutory authority's predecessor owed a duty of care to the plaintiff's husband. Ian Callinan joined with the majority in holding that it did. The scope of the duty was limited to taking such steps 'as the respondent is reasonably capable of taking as a matter of practicality in the performance of its functions …'[18] The second question was the respondent's legal responsibility for any breach of the duty of care after it had taken over the statutory powers of the previous co-ordinating authority. The issue here was that any breach of duty had been committed by the previous co-ordinating authority but the risk to the plaintiff's husband had only materialised after that authority had been abolished and replaced by the respondent. Any liability that the respondent inherited from its statutory predecessor was a contingent, and not an accrued, liability. Ian Callinan construed the relevant statutory provision, the *Stevedoring Industry Acts (Termination) Act 1977* s 14, as vesting contingent liabilities in the new statutory authority.

The judgment contains a careful analysis of the nature and extent of the duty of care the respondent authority owed to stevedores in the position of the plaintiff's husband, as well as a close reading of the applicable stevedoring legislation. But it also includes a vivid account, drawn from the evidence adduced at trial, of stevedoring practice in the 1960s, the industrial organization of casual labour on the docks, and the risks run by dock labourers, which varied in nature and intensity according to whether they were working on deck, in the holds or on the wharves.

The ascription of a duty of care to prevent harm is not a mechanical exercise; it requires the selection of the facts which are relevant to the recognition of the duty, as well the discarding of legally irrelevant facts. In *Crimmins* the selection process was simply explained. Ian Callinan's judgment is directed to two readerships. The first is the parties themselves. Its simplicity and vividness suggests that the judge is talking to the parties, and is doing so over the heads of the lawyers who might have been content

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17 [1999] HCA 59, 200 CLR 1.

18 Ibid [360]

with a judgment written in the familiar abstract concepts of the law of negligence. A secondary audience is judges in later cases, since an appellate judgment on the existence of a duty of care often carries the risk that it might, if not carefully qualified, be taken as authority for a much broader proposition than the judge intended. No judge can control the subsequent interpretation of a judgment, but the use of the direct, plain English style does at least minimize the risk of misreading.

For a lucid account of the dangers to which Mr Crimmins was exposed the judgment cannot be bettered:

> A locker was a confined compartment to which access was gained through a small door leading from the hold. The asbestos percolated from the bags which two labourers had to manhandle into slings used for lifting a load out of the hold. The asbestos would float around in the atmosphere. In the hold 'a mass of fibre was coming down … on [them].' The dust was worse in the lockers where the temperature was higher than in the hold. The younger men, including Mr Crimmins, had to work in the lockers. Sometimes bags were broken; there was spillage of dust into the workplace; 'it would spew out'. At times the asbestos dust was so pervasive, according to Mr Crimmins, that he needed to blow his nose frequently in an attempt to expel it from his nostrils. Dust accumulated on clothes, in hair and on arms.[19]

Story-telling is important in the law, but it must be focused storytelling. This is a graphic account of the chaos and toxic occupational risks involved in unloading a heavy cargo ship in 1960s Melbourne. But it is not story-telling for its own sake. It sets out some of the facts which, when combined with the more prosaic language of the stevedoring regulatory legislation, will lay the evidentiary foundations for a finding of a duty of care.

Ian Callinan would probably not claim any affinity in judicial method, or for that matter in judicial prose style, with the long-serving Master of the Rolls, Lord Denning, but in one respect their approaches are comparable. Both judges understood that the power of legal reasoning is generated from the way the story is told. The reasoning of the judgment is never isolated from the presentation of the facts and issues.

IV JUSTICE CALLINAN AND CORRECTIVE JUSTICE

We noticed above that the principle of sanctity of contract is easily justified in terms of theories of corrective or distributive justice. Both types of theory, too, can explain the grounds for rescinding or not enforcing a contract. For the corrective justice theorist the justification for setting aside the contract must be found in the relationship between the parties.

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[19] Ibid [326].

Corrective justice easily explains the equitable grounds for rescinding a contract based on impaired consent or absence of genuine choice to consent, such as mistake, misrepresentation, undue influence or unconscionable conduct. Corrective justice assumes that decisions to enter into contracts are made by independent and informed legal actors who are able to exercise autonomy, so that proof of one of these vitiating factors negatives this assumption. The correctivist will, however, only recognize the existence of one of these grounds if the impairment of consent or improper pressure has been proved. It cannot be assumed to exist. A pure correctivist might therefore regard presumptions, such as the presumption of undue influence applicable to transactions entered into by (say) parent and child or solicitor and client, as unjustified insofar as they rest on a public policy of discouraging the conferral of benefits within those relationships. The presumption is convenient and perhaps even unavoidable, particularly where the party conferring the benefit is dead, but the specific public policy rationale is the kind of argument resting on considerations external to the parties that a pure correctivist would not accept.

A correctivist will go on to argue, moreover, while the grounds for setting aside gifts and contracts are justifiable, the law must go no further than is absolutely necessary in applying these grounds, otherwise it will improperly restrict the autonomy of the individual freely to enter into legal transactions. Soon after he had been appointed to the High Court Ian Callinan joined Chief Justice Gleeson in dissent from what they saw as an illegitimate attempt to extend the application of the equitable principles of unconscientious dealings in a manner that would have impaired an elderly disponor's autonomy. In *Bridgewater v Leahy*[20] a majority of the High Court set aside a nephew's undervalue purchase of a grazing property from an uncle whom he had helped to manage the properties for many years. The uncle was held to be under some special disadvantage, or disadvantages, of which the nephew was aware, and which he had exploited. The matter was remitted to the Queensland Supreme Court which was directed to undertake the somewhat convoluted exercise of determining a fair price for the properties, having regard to the undoubted fact that the uncle wanted him to receive them.

The joint dissenting judgment of Gleeson CJ and Callinan J pulled no punches in rejecting the application of the unconscientious dealings doctrine to these facts. Previous authorities on the doctrine were said to be 'a long way removed from the facts of the present case.'[21] Moreover, 'the findings in the court below establish [the uncle's] independence of mind and capacity for judgment when he entered into the [undervalue] transaction.'[22] The judgment repeats the familiar admonition that courts should not make agreements for parties which they have not made for themselves. It is also a

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20 [1998] HCA 66, 194 CLR 457.
21 Ibid [47].
22 Ibid.

robust reminder of the truism that courts should not readily classify classes of person such as the elderly or disabled as being under a 'special disadvantage' even though particular individuals may, upon a considered application of the equitable doctrine to the facts, be termed 'disadvantaged' on the basis of age or disability. Finally, the judgment insists that previous authorities had drawn the line between respecting security of transaction and relieving against vulnerability, and that the line should not be redrawn. There was no gain in coherence of legal (or in this case equitable) principle in extending the rules governing unconscionable dealings to cover the facts of this case. All these arguments tend to one conclusion, which is that a transactional inequality between the parties should not be rectified if the parties are independent legal actors who have not been shown to be acting under any impaired incapacity.

In negligence cases the objective of promoting corrective justice will often be relevant when a defendant relies on a recognized immunity from liability to defeat the negligence claim. Even if soundly based in authority the immunity will usually be open to challenge on the ground that it detracts from the coherence of the law of negligence. In *Brodie v Singleton Shire Council* [23] a majority of the High Court abolished the long-standing immunity of a public authority responsible for the care and maintenance of a highway from liability for a negligent omission to repair the highway where the omission was the cause of the plaintiff's damage. Ian Callinan dissented from this conclusion. In his opinion the immunity from liability was firmly established by High Court authority. It was also well understood by highway authorities and drafters of highways legislation. He observed that the supposed irrationality of the distinction between misfeasance and non-feasance did not mean that it was indefensible in policy terms:

> It should not be overlooked that in this country road authorities are called upon to construct and maintain roads over vast distances and at great cost, roads whose use is not necessarily confined to those who pay for them. This is no doubt a powerful policy consideration operating on the minds of legislators in enacting legislation in respect of road authorities.[24]

This passage identifies a special reason for departing from the principle of corrective justice, which in general terms favours the general application of the law of negligence. Moreover, the reason given for retaining the immunity has nothing to do with the relationship between the parties. It is an economic argument based on the efficient application of a council's financial resources. This is not the kind of reason that Ian Callinan would usually advance in support of a legal rule. But the reasoning is permissible here because it can, unlike many distributive arguments, be tested in the court room by reference to admissible evidence, being in this case highway

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[23] [2001] HCA 29, 206 CLR 512.
[24] Ibid [367].

legislation. Moreover, it is in fact the abolition of the immunity, not its retention, which carries the greater risk of courts engaging in ill-informed exercises in distributive justice.

The dissent in *Brodie* has been vindicated by subsequent legislation.[25] The road authorities' immunity from liability for negligence in cases of non-feasance has been restored by statute.[26] The distinction between misfeasance and non-feasance, though illogical, was also pragmatic in preventing courts from undertaking selective but expensive inquiries into the spending priorities of highway authorities. It could even be said to have promoted corrective justice because it prevented courts from indulging in distributive choice analysis which they are ill-equipped to carry out.

The later High Court decision of *Leichhardt Municipal Council v Montgomery*[27] was a predictable consequence of *Brodie*. Is the duty to maintain highways a non-delegable duty rendering the authorities liable for the negligent acts of independent contractors? In *Montgomery* the High Court gave a negative answer to this question. Absence of authority for such a proposition apart, the imposition of liability on the basis of the existence of a non-delegable duty was criticised as being a method of reaching desired outcomes 'by devious reasoning and the fictitious use of language.'[28] As a result of *Montgomery* local authorities are liable for the negligent misfeasance and nonfeasance of their employees which cause damage, applying the settled rules of vicarious liability, but they are not liable for the acts of independent contractors. The High Court was rightly suspicious of non-delegable duties, which have a propensity for imposing unquantifiable economic burdens. But if the majority of the High Court had refrained from abolishing the 'immunity for loss caused by non-feasance' rule in *Brodie*, imposition of a non-delegable duty in cases of non-feasance would not even have become an issue in *Montgomery*.

The principle of vicarious liability has often been justified in distributive terms.[29] So it is not surprising that Ian Callinan's objections to distributive analysis find their strongest expression in *Hollis v Vabu Pty Ltd*,[30] the most significant recent High Court decision on vicarious liability principles. In the course of rejecting an approach to the imposition of liability which was said to achieve an economically 'efficient means of passing on losses to insurers' he stated:

> There are further difficulties about these sorts of assumptions. They are only assumptions. They may, I suspect, have been made without

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25 Another example is his dissenting judgment in *Astley v Austrust* [1999] HCA 6, 197 CLR 1. See *Wrongs Act 1958* (Vic) s 26(1B).

26 *Civil Liability Act 2002* (NSW) s 45(1).

27 [2007] HCA 6, 233 ALR 200.

28 Ibid [155] (Hayne J), citing Glanville Williams, 'Liability for Independent Contractors' (1956) 2 *Cambridge Law Journal* 180, 190.

29 Patrick Atiyah, *Vicarious Liability in the Law of Tort* (1967) ch 1.

30 [2001] HCA 44; (2001) 207 CLR 21.

> access to all the relevant information, and not always after rigorous scrutiny by people adequately qualified to process and evaluate that information … How to strike the right balance, where the public interest truly lies, what is the most efficient way of dealing with the rights and obligations of the parties, and to what extent economic efficiency should influence legal principles are not questions which I can, or, in my opinion, the Court, should seek to answer here.[31]

This passage restates the most common fundamental objection to judicial acceptance of distributive arguments, which is that most such arguments are non-justiciable.[32] Their merits cannot be assessed by reference to the circumstances of the litigating parties since non-party interests almost always come into play, as well.

Distributive justice is sometimes thought to be economic in character since the arguments often concern the distribution of finite economic resources. But moral and social arguments are also distributive where they do not relate specifically to the relationship between the particular parties in dispute, extending to the interests of other parties or to wider community interests. How relevant to adjudication are distributive arguments based on moral or social considerations? The first step in answering this question is to acknowledge that a judge is a moral actor who can never become totally detached from a moral viewpoint. The private law case which raised the most profound public policy questions in the last decade was *Cattanach v Melchior*,[33] in which a majority of the High Court held that a doctor was liable to pay the costs of maintaining a healthy child where birth was the consequence of medical negligence. Ian Callinan's judgment notes that social values and moral assumptions have a role to play in adjudication.

> I cannot help observing that the repeated disavowal in the cases of recourse to public policy is not always convincing. Davies JA in the Court of Appeal in this case was, with respect, right to imply that it would be more helpful for the resolution of the controversy if judges frankly acknowledged their debt to their own social values, and the way that these have in fact moulded or influenced their judgments rather than the application of strict legal policy.[34]

His judgment discriminates carefully between, on the one hand, distributive arguments, including some resting on moral assumptions, which do not justify altering fundamental legal principle, and, on the other hand,

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31 Ibid [117].

32 While generally true it is not always the case that distributive arguments are non-justiciable. There are exceptional cases in which they can be established satisfactorily by admissible materials, as Callinan J himself did in *Brodie* [1998] HCA 66, 194 CLR 457, in his discussion of the rationale for the highway immunity.

33 [2003] HCA 38, 215 CLR 1.

34 Ibid [291].

corrective justice arguments which might, in an appropriate case, justify modifying a legal rule.

> Arguments of distributive justice are in my opinion unimpressive. Judges are obliged both in principle and in terms of their judicial oath to do equal justice between rich and poor. On one application of such a principle (of distributive justice), the doctor, or public health authority (or perhaps their insurer) on the basis of having the longer pocket, should pay. I would certainly not decide the case on such a basis. That a negligent person should pay furthers the ends of corrective justice …[35]

On this analysis the only legitimate reason for developing the law of negligence by judicial decision is that the proposed development will accomplish more complete corrective justice than the unreformed law. The distinction between corrective and distributive justice also fixes the boundary between permissible judicial developments of private law which strengthen the overall coherence of the law and reforms which should be left to the legislature.[36]

Ian Callinan's judgment in *Harriton v Stephens*[37] is consistent with this approach. The appellant was born severely disabled as a result of the assumed negligence of a medical practitioner. In refusing to recognize the availability of damages for 'wrongful life' on these facts his Honour expressly disclaimed reliance on moral arguments:

> A case of this kind is so very different, and goes so much to the heart of diverse theological and philosophical opinion, that the courts should leave it to the legislators to state the law to govern it.[38]

But of course judges have to decide genuine disputes; they cannot refer them to legislatures for policy solutions. His rejection of 'wrongful life' damages was based on the fact that:

> [i]t is not logically possible for any person to be heard to say 'I should not be here at all', because a non-being can say nothing at all. If this conclusion is unacceptable to some, or many, it is for the legislature, and the legislature alone, to say so, and in terms which would enable some principled basis of assessment of damages.[39]

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35 Ibid [301].

36 Cf *Harriton v Stephens* [2006] HCA 15, 226 CLR 52, [205] ('the court should leave it to the legislators to state the law to govern [the case]').

37 Ibid.

38 Ibid [205].

39 Ibid [206].

One might argue about whether this conclusion was in fact logically compelled, but what is unarguable is the refusal to allow moral or economic precepts to determine the outcome of a manifest 'hard case'.

V ABC v Lenah Game Meats Pty Ltd: Corrective and Distributive Reasoning

Ian Callinan's dissent in *ABC v Lenah Game Meats Pty Ltd*[40] provides a thought-provoking case study of the comparative merits of corrective and distributive justice. To the extent that the judgment takes into account the social history of the media in Australia in reaching its conclusion it is informed by distributive reasoning. The history, after all, has nothing to do with the relationship which the practices of investigative journalism had created between the parties. But the conclusion he reached was based on corrective justice reasoning which related exclusively to that relationship. It will be suggested that there were better corrective justifications for awarding an injunction against the ABC than the reasons he gave.

Lenah Game Meats applied for an interlocutory injunction to prevent the ABC from showing film taken of the company's brush tail processing facility. The film, which showed the stunning and killing of possums, was made by trespassers and later given to the ABC which intended to show it on the 7.30 Report. A majority of the High Court held that there was no legal basis for granting the injunction.[41] Ian Callinan dissented, holding that the jurisdiction to award the injunction existed and that it had been properly exercised by the majority of the Full Court of the Supreme Court of Tasmania.

The judgment is significant for the extensive discussion of policy considerations under the heading 'circumstances prevailing today.' The circumstances relate to the history of the development of the media, its organization and contemporary media practice. To take two extracts, he first explains:

> Early newspapers were primarily vehicles for the conveyance of news and comment, the latter desirably and responsibly divorced in expression from the former. Since the Industrial Revolution and the continuing expansion in the production of consumer goods, and certainly by the time of Federation, newspapers (and successive other forms of media) have become a major vehicle for advertising, the proprietors looking equally or more to advertisers for their profits than to their subscribers. The new word 'infotainment'

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40 [2001] HCA 63, 208 CLR 199.

41 Kirby J argued separately that there was jurisdiction to grant the injunction under *Supreme Court Civil Procedure Act 1932* (Tas) s 11(12) but held at [214]-[221] that the exercise of discretion miscarried in that the lower courts had given insufficient weight to the constitutional value of freedom of speech.

> captures the essence of the blurring of a distinction between reportage and entertainment, just as 'infomercial' and 'advertorial' aptly capture the essence of disguised advertising. And distinctions between the roles of journalism and the Executive branch of government can also at times be difficult to discern as each seeks to use the other for its own purposes. One aspect of this symbiosis is the frequency with which some journalists move backwards and forwards between positions as advisers to members of the Executive branch and positions as reporters and pundits on daily and other newspapers and on radio and television channels.[42]

And, having given a brief sketch of American journalistic practice, he continued:

> These North American conditions are far from unknown in this country. Much news is in any event provided by overseas services and multinational companies. Wholesale comment, speculation, informed and uninformed, on the part of the authors of articles in daily newspapers seems to be encouraged. There are few articles today reporting what people have said that are free from the author's interpretation of, or, to adopt the parlance of the media, 'spin' on it. This may be a consequence of the fact that almost all reporters, even the most inexperienced, are given a by-line, a practice almost unknown a generation or so ago.[43]

Why was this exegesis on Australian and North American media practice and history relevant to the decision in *Lenah Game Meats*? The plaintiff's application for an interlocutory injunction rested on several jurisdictional bases but in substance the claim was one of invasion of privacy. In response the ABC asserted a right to freedom of expression which was said to flow from the High Court's recognition of freedom of political communication in *Lange v Australian Broadcasting Corporation*.[44] The policy considerations identified in *Lange*[45] as justifying the need to recognize a right to freedom of expression were the size, intrusiveness and lack of transparency of modern bureaucracies. The purpose of Ian Callinan's review of media practice was to show, first, that no evidence had been adduced in *Lange* to show that the relationship between the media and government was essentially different, save in the technology employed, from the relationship existing at the beginning of the twentieth century, and, secondly, that the High Court decision in *Lange* was based on a partial and incomplete review of the relevant policy considerations.

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42 [2001] HCA 63, 208 CLR 199 [254] (citations omitted).
43 Ibid [272].
44 [1997] HCA 25, 189 CLR 520.
45 Ibid 189 CLR 520, 570, citing *Stephens v Western Australian Newspapers Ltd* [1994] HCA 45, 182 CLR 211, 264 (Mc Hugh J).

Ian Callinan's argument in these passages is distributive in the sense that it discusses policy questions which are external to the relationship between the ABC and Lenah Game Meats. But its purpose is only to refute what, in his opinion, are the inadequately argued reasons for recognizing a constitutional right to freedom of political expression. When it comes to the actual decision in *Lenah Game Meats* the judgment is based on familiar doctrine which is explicable in terms of correcting the disequilibrium which the trespass and filming had created between the parties. But it is here, in my opinion, that the judgment takes a wrong turn, and an opportunity to strengthen the coherence of the law is missed.

Ian's chosen instrument of corrective justice was the law of fiduciary obligations. The ABC was held to owe fiduciary obligations to Lenah Game Meats by virtue of having come into possession of the film taken by trespassers on the company's property. The breach of fiduciary duty lay in failing to return the film.

> Equity should, and in my opinion is right to, indeed it has no choice but to, regard the relationship created by the possession of the appellant of a tangible item of property obtained in violation of the respondent's right of possession, and the exploitation of which would be to its detriment, and to the financial advantage of the appellant, as a relationship of a fiduciary kind and of confidence.[46]

The remedy which compelled the return of the stolen film was the imposition of a constructive trust.

Even if *Lenah Game Meats* is treated as a case of 'information theft' it cannot be fitted into the fiduciary template. This much is clear from a much quoted dictum of Mason J in *Hospital Products Ltd v United States Surgical Corporation* to which Callinan J adverts:

> The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.[47]

The ABC had 'a special opportunity' to use the film it had received to the detriment of the plaintiff. But it had not undertaken or agreed to act in the interests of the plaintiff. Indeed, one would have thought that the

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[46] [2001] HCA 63, 208 CLR 199 [297].

[47] [1984] HCA 64; (1984) 156 CLR 41, 96-7 (dissenting, but on the application of the criteria to the facts and not on the criteria themselves).

'relationship' of investigator and investigatee, like that of vendor and purchaser, is one of opposition, not of alignment, of material interest.[48]

It is true, as Ian Callinan points out, that there are cases in which a constructive trust has been imposed which, on first impression, are analogous to *Lenah Game Meats.* For example, *Black v S Freedman & Co*[49] establishes that stolen money is 'trust money in the hands of the thief.'[50] But it is less often noticed that the constructive trust imposed in *Black v Freedman* was imposed in consequence of a breach of an established fiduciary relationship, being an employment relationship.

Judges and writers have long argued that a fiduciary relationship should not be a precondition to tracing property in equity.[51] But *Lenah Game Meats* was not an apt vehicle for abolishing that precondition, always supposing that it is still part of Australian equity. *Lenah Game Meats* was not a tracing case. Tracing is the process of identifying the plaintiff's property, through intermixtures and substitutions, into the hands of the defendant. In *Lenah Game Meats* no property belonging to the plaintiff had been taken by the trespassers, and the film obtained by the ABC had never belonged to the plaintiff.

On what alternative basis might the award of an interlocutory injunction be granted? The most direct approach would be to recognize the existence of a right of privacy extending to natural and corporate persons alike. The recognition of a right of privacy, although radical, is consistent with the pursuit of corrective justice. The normative justification for the protection of privacy is that every legal person has a right to self-respect. Corrective justice ordains the award of a legal remedy if an invasion of privacy removes that self-respect.[52]

Ian Callinan was sympathetic to the recognition of a right of privacy.[53] The most serious objection to recognition is that, even if it could be justified in corrective terms, a new civic right ought not to be an exclusively judicial creation. The enforcement of the right would have to be balanced against competing rights and interests. Courts are used to balancing considerations, but they should not be asked to establish from first principle the framework in which the balancing is to be undertaken. These are matters for legislation or for a rights instrument which identifies the interests, such as press freedom, of which account should be taken.[54]

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48 Cf the finding of a fiduciary relationship in *Chase Manhattan Bank v Israel-British Bank* [1981] Ch 105.

49 [1910] HCA 58, 12 CLR 105.

50 Ibid 110 (O'Connor J).

51 *Foskett v McKeown* [2001] 1 AC 102, 128 (Lord Millett).

52 Weinrib, above n 8.

53 [2001] HCA 63, 208 CLR 199 [313]-[336].

54 See, for example, the impact of Article 8 of the European Convention of Human Rights on the structure of the right to privacy recognised in *Campbell v MGM* [2004] 2 AC 57.

A less ambitious corrective justice approach would be to apply established legal and equitable doctrine with a view to enhancing the overall coherence of existing legal doctrine. We have seen that in the law of negligence this means treating the legal principles governing liability as supplying the normative justification for imposing liability, and requires special reasons for recognizing any exception to, or qualification of, those principles.

If the law is going to provide effective remedies, short of relief for invasion of privacy, where trespassers photograph the lives and business activities of property owners it needs to examine the principles governing accessory liability in private law more closely. As the opening paragraphs of Ian Callinan's judgment explain, there are many situations in which relief, including the power to award injunctions, is available against secondary parties to civil wrongdoing.[55] The major examples are equitable. They include the liability imposed on a recipient of confidential information from the party who has disclosed the information in breach of a relationship of confidence.[56] Equity also imposes obligations on a recipient of property in breach of a fiduciary obligation to restore that property to the principal, and on a party who assists in a breach of fiduciary obligation to compensate for loss caused by the breach.[57] Accessory liability is also, though more rarely, found at common law, the principal examples being drawn from the field of economic torts, such as inducement of breach of contract.[58] No fusion fallacy would be committed if the common law developed coherent principles of accessory liability along lines already established by equity. If the assister in a breach of fiduciary obligation is an equitable wrongdoer, why should not knowingly assisting a trespass by receiving the proceeds of a trespass also not attract damages awards and injunctions, if the criteria for relief are satisfied? From the perspective of corrective justice it is hard to see why accessory liability should not protect the victim of a trespass or a conversion as it already does the defrauded trustee or principal.[59]

The modern law of accessory liability is a product of the jurisdictional separation of common law and equity, as well as of the late and incomplete attempts made by nineteenth century common law judges to develop principles of secondary liability.[60] *Lenah Game Meats* was a missed opportunity to develop some coherent principles governing the liability of secondary parties to civil wrongdoing.

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55 [2001] HCA 63, 208 CLR 199 [223]-[224].

56 *Wheatley v Bell* [1982] 2 NSWLR 544. It was conceded in *Lenah Game Meats* that no breach of confidence had been committed. See *Lenah Game Meats* [2001] HCA 63, 208 CLR 199 [25] (Gleeson CJ).

57 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, 230 CLR 89.

58 *Zhu v Treasurer of NSW* [2004] HCA 56, (2004) 218 CLR 530.

59 Philip Sales, 'The Tort of Conspiracy and Civil Secondary Liability' (1990) 49 *Cambridge Law Journal* 491.

60 *Lumley v Gye* (1855) 2 El & Bl 216. D Heydon, *Economic Torts* (2nd ed, 1978).

VI CONCLUSION

Ian Callinan's High Court career exemplified important judicial virtues. The processes of finding the facts by proper forensic methods, and then of assembling the facts into a coherent and intelligible narrative were essential preconditions to his analysis and application of the law. He was one of the most lucid storytelling judges to have sat on the High Court.

There is an ever-present danger that the legal theorist will impose false unities and patterns on judicial careers, and the danger is all the greater when the judge is meticulous in avoiding speculation or high theory. Nonetheless, it is not, I believe, fanciful to suggest that in his private law judgments Ian Callinan showed a consistent preference for applying corrective justice and a corresponding suspicion of arguments based on distributive justice. The objection to applying distributive principles was not because they were misconceived or irrelevant, but because their merits could not be adequately assessed within the institutional confines of adversarial litigation. As the discussion of his judgment in the *Lenah Game Meats* case demonstrates, a commitment to corrective justice does not imply a static conception of the law or a belief that common law principles are incapable of further development. Correctivists are no more to be equated with legal conservatives than distributivists with legal innovators. A judge who applies corrective justice, however, recognizes precise reasons, connected with the relationship between the parties, as justifying legal intervention, and will reject economic, moral or social arguments which are external to that relationship. The application of corrective justice requires respect for the proper limits of judging. That respect informs Ian Callinan's judgments.