SUPREME COURT OF VICTORIA

COURT OF APPEAL

No 7804 of 1999

ALLA GILLER — Appellant

v

BORIS PROCOPETS — Respondent

JUDGES:	MAXWELL P, ASHLEY and NEAVE JJA
WHERE HELD:	MELBOURNE
DATES OF HEARING:	27 and 28 August 2007
DATE OF JUDGMENT:	10 December 2008
MEDIUM NEUTRAL CITATION:	[2008] VSCA 236

PROPERTY – De facto relationship – Adjustment of property interests under Part IX of *Property Law Act 1958* – Whether time for instituting claim should be extended – Basis of assessment of respective contributions – Whether 'global' or 'asset by asset' approach – Whether judge erred by precluding assessment on global basis – Whether domestic violence made home-maker and parent contributions more arduous - Whether contributions after separation should be taken into account.

EQUITY – Breach of confidence – Publication of videotape of sexual activity – Whether damages available in lieu of injunction – Whether damages available for mental distress not amounting to mental illness – Whether aggravated damages available – *Supreme Court Act 1986* s 38.

TORT – Intentionally causing harm – Plaintiff suffered mental harm not amounting to mental illness – Publication of videotape of sexual activity – Defendant intended to cause distress and humiliation – Whether claim cognisable in Australian law.

TORT – Assault – Domestic violence – Damages – Whether amounts awarded manifestly inadequate – Need to avoid double compensation when domestic violence is taken into account under *Property Law Act* Part IX.

TORT – Privacy – Publication of videotape of sexual activity – Whether action for breach of privacy available.

COURTS AND JUDGES – Precedent – State legislation – NSW legislation substantially identical – Whether State Court should follow decisions of New South Wales Court of Appeal.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr T North SC with Mr K Davis and Mr M J Rivette	Carew Counsel Pty Ltd
For the Respondent		In person

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MAXWELL P:

1 I have had the very considerable advantage of reading in draft the respective reasons for judgment of Neave JA and Ashley JA. For the reasons which Neave JA gives, I agree that the appeal should be allowed. I would make orders in the terms which her Honour proposes.

2 Unlike my colleagues, however, I would also uphold the appellant's claim for intentional infliction of emotional distress. My reasons are as follows.

3 In her statement of claim, Ms Giller alleged that, in distributing and threatening to distribute the videos and in making statements to others about the sexual relationship, Mr Procopets engaged in conduct calculated to degrade and humiliate her and cause her emotional distress. Mr Procopets had thereby committed, so it was alleged, 'the tort of intentional infliction of emotional distress'.

4 The trial judge concluded that he was bound to reject the claim:

> In the absence of any authority to support the contention that damages are recoverable for mental distress, it is my opinion that Australian law precludes [Ms Giller] recovering damages for intentional infliction of mental harm resulting in distress, humiliation and the like.[1]

At the same time, his Honour explained why he considered that there was 'a strong argument for compensation for distress in these circumstances'. He said:

> The purpose of the law of torts is to provide compensation where an injury has been caused by wrongful conduct of another. The facts of the present case demonstrate that if the defendant set out intentionally to cause harm and distress to the plaintiff by wrongfully showing or threatening to show the video film, which caused anger, humiliation, frustration, upset and distress, it is strongly arguable that the law would not be fulfilling its purpose if it did not permit compensatory damages for such mental distress and upset. The distribution and showing of the video is analogous to the publication of a defamatory imputation and the law should permit recovery for distress depending upon the gravity of the wrongful act and the effect upon the victim. [2]

5 This was, with respect, a compelling analysis by a very experienced common law judge. His Honour powerfully demonstrated why, as a matter of principle,

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1 Reasons [186].

2 Reasons [185].

compensatory damages for mental distress should be recoverable in a case of intentional conduct such as this. For reasons which follow, I consider that such a claim is cognisable in law and should, in the present case, succeed.

6 Both the law and psychiatry have come a long way since 1897, when Wright J in *Wilkinson v Downton*[3] first upheld what has come to be known as the tort of intentional infliction of injury ('*Wilkinson* tort'). The recognition of a claim for intentional infliction of mental distress reflects the inevitable, and necessary, development of that tort.[4] On the one hand, a requirement of actual intention to cause harm is surely to be preferred to unsatisfactory notions of imputed intention. On the other, the advance of medical science means that it is no longer necessary to insist on physical proof of mental harm and no longer necessary, or appropriate, to insist on proof of a 'recognised mental illness'.

7 I am aware of no decision in Australia, or in any comparable jurisdiction, holding that such a claim is without legal foundation or otherwise untenable. To the contrary, as will appear, recent statements of high authority in the United Kingdom appear strongly to favour such a development. Moreover, claims of this kind have long been recognised by American courts.[5]

8 The absence of affirmative Australian authority recognising such a claim means that there is an unanswered question as to whether the common law should develop in that direction. It seems to me, with respect, that Kirby J was unarguably correct when he said that intermediate appellate courts must share with the High Court 'the responsibility of declaring and developing general principles of the law.'[6] Of necessity, the number of cases to which the High Court is able to give detailed attention is extremely small. Relevantly for present purposes, it is more

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3 [1897] 2 QB 57.

4 I deal below with the important distinction between the harm which the defendant subjectively intended and the harm actually suffered by the plaintiff.

5 See [37] below.

6 *Burrell v The Queen* [2008] 248 ALR 428, [106] (Kirby J); *Moorabool Shire Council and Anor v Taitapanui* (2006) 14 VR 55, [44] (Maxwell P).

than seventy years since the High Court last had occasion (in *Bunyan v Jordan*[7]) to consider the elements of the *Wilkinson* tort.[8] There are, of course, limits to the proper role of intermediate courts,[9] but none of those is applicable to the present question.

The course of authority

9 Whether or not it is correct to describe this question as lying 'at the frontiers of tortious liability', it seems appropriate to follow the High Court's example in *Magill v Magill*[10] ('*Magill*') and take 'a vantage point to look back to the commencement of the legal journey and to what developed thereafter.'

10 The journey commenced, of course, with *Wilkinson v Downton*.[11] In that case, Wright J held that if a person wilfully did an act 'calculated' to cause harm to another, and did in fact cause physical harm, the injured person had a cause of action (absent lawful justification).[12] The defendant, playing what he regarded as a practical joke, had falsely stated to the plaintiff that her husband had suffered a serious accident. The effect of the statement on the plaintiff

> was a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences at one time threatening her reason, and entailing weeks of suffering and incapacity to her …

Wright J concluded that the defendant's conduct

> was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind.[13]

11 *Wilkinson v Downton* was expressly approved by the Court of Appeal in

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7 (1937) 57 CLR 1.

8 See [12]–[13] below.

9 *Farah Constructions Pty Ltd v Say Dee Pty Ltd* (2007) 230 CLR 89, 151–2 [134]–[135].

10 *Magill v Magill* (2006) 226 CLR 551, 572 [52] (Gummow, Kirby, Crennan JJ).

11 [1897] 2 QB 57.

12 Ibid 58.

13 Ibid 59.

Janvier v Sweeney.[14] There the defendants actually intended to terrify the plaintiff, who suffered 'a terrible shock' as a result and was thereafter incapacitated for work. Bankes LJ (with whom Duke LJ agreed) cited the following statement of Wright J as conveying the substance of the decision in *Wilkinson v Downton*:

> The defendant has … wilfully done an act calculated to cause physical harm to the plaintiff – that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.[15]

12 In *Bunyan v Jordan*,[16] the plaintiff had suffered neurasthenia[17] as a result of having seen the defendant produce a revolver and then having heard him say he was going to shoot someone. The High Court accepted the law as stated in *Wilkinson v Downton* and *Janvier v Sweeney*,[18] but held that the plaintiff's claim must fail because the defendant's statement had not been made to her or in her presence. Moreover, in the view of Latham CJ, the defendant's conduct could not 'be said to be calculated or likely to cause harm to any person …'.[19]

13 In the view of Dixon J, it was open to the jury to find that the defendant's actions

> threw the plaintiff into a sufficiently emotional condition to lead to a neurasthenic breakdown amounting to an illness.
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> I have no doubt that such an illness without more is a form of harm or damage sufficient for the purpose of any action on the case in which damage is the gist of the action … [20]

His Honour considered, however, that it was an essential element of any such cause of action that there have been a reasonable likelihood that harm of some such nature

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14 [1919] 2 KB 316.

15 Ibid 322.

16 (1937) 57 CLR 1.

17 See [28] below.

18 *Bunyan v Jordan* (1937) 57 CLR 1, 11 (Latham CJ).

19 Ibid 12.

20 Ibid 16.

as that claimed by the plaintiff would result from the act done.

14 In *Northern Territory v Mengel*[21] ('*Mengel*'), the High Court was dealing with the tort of misfeasance in public office. In the course of their joint judgment, Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ expressed the view that misfeasance in public office was

> a counterpart to, and should be confined in the same way as, *those torts which impose liability on private individuals for the intentional infliction of harm*. For present purposes, we include in that concept acts which are calculated in the ordinary course to cause harm, as in *Wilkinson v Downton*, or which are done with reckless indifference to the harm that is likely to ensue … [22]

15 More recently, in *Magill v Magill*[23] ('*Magill*'), the High Court was concerned with a novel claim brought by a man against his former wife for false representations made by her that he was the father of two children born during the marriage. In the course of their joint judgment, Gummow, Kirby and Crennan JJ referred to *Wilkinson v Downton* and *Janvier v Sweeney* as examples of successful claims for damages arising out of the making of false statements. In their Honours' view, Wright J in *Wilkinson v Downton* had

> preferred to recognise the cause of action as arising from an imputed intention to cause another physical harm. Likewise false words and threats uttered with a similar imputed intention to cause physical harm, including nervous shock, were held actionable in *Janvier v Sweeney.* Subsequent developments in Anglo-Australian law recognise these cases as early examples of recovery for nervous shock, by reference to an imputed intention to cause physical harm, *a cause of action later subsumed under the unintentional tort of negligence*.[24]

16 Later in the same judgment their Honours said:

> From about 1930, a number of jurisdictions in the United States of America have come to recognise actions in tort for the intentional infliction of emotional distress, as a further development of the approach in *Wilkinson v Downton* and *Janvier v Sweeney*. *As the tort has not been recognised in Australia*, and as differing decisions have been arrived at in different American States in respect of the availability of the tort in respect of circumstances such as here,

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21 (1995) 185 CLR 307.

22 Ibid 347 (emphasis added and citations omitted).

23 (2006) 226 CLR 551.

24 Ibid 589 [117] (emphasis added and citations omitted).

> depending often on the terms of differing State legislation, the decisions are of limited assistance in determining the content of the Australian common law in question here.[25]

In support of the proposition that the tort of intentional infliction of emotional distress had not been recognised in Australia, their Honours cited statements made in the earlier case of *Tame v New South Wales*[26] ('*Tame*'). *Tame* was a negligence case and no question fell for decision regarding the scope of the tort of intentional infliction of harm. With respect, I do not read the respective judgments in *Tame* as having expressed any view about whether damages for distress should be recoverable from a defendant who intended to inflict harm.

17 Very recently, in *Nationwide News Pty Ltd v Naidu*[27] ('*Nationwide News*'), two members of the New South Wales Court of Appeal gave consideration to the *Wilkinson* tort in a negligence case involving workplace bullying of an employee by a manager. Both Spigelman CJ and Basten JA cited the following passage from the judgment of Gummow and Hayne JJ in *New South Wales v Lepore*:[28]

> Negligently inflicted injury to the person can, in at least some circumstances, be pleaded as trespass to the person, *but the intentional infliction of harm cannot be pleaded as negligence*.

By way of emphasising the distinction between negligent and intentional infliction of harm, Spigelman CJ added:

> The imperial march of the tort of negligence is such that, as a matter of practice, it has led the legal profession to abjure the sometimes more demanding requirements of proof of an intentional tort.[29]

18 Spigelman CJ noted the trial judge's finding that the manager had

> wilfully committed a series of acts calculated to cause [the plaintiff] physical harm, being a recognised psychiatric injury. This could constitute an intentional tort of the character identified in *Wilkinson v Downton* … [30]

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25 Ibid 590 [121] (emphasis added and citations omitted).

26 (2002) 211 CLR 317. The following citations were given: 374-375 [171]-[175] (Gummow and Kirby JJ); 402-3 [251] (Hayne J) and 338-9 [44] (Gaudron J).

27 [2007] NSWCA 377.

28 (2003) 212 CLR 511, 602-3 [270] (emphasis added).

29 Ibid [62].

30 Ibid [67].

His Honour noted the remark of Gleeson CJ in *Magill* that *Wilkinson v Downton* and *Janvier v Sweeney* 'would probably now be explained either on the basis of negligence, or intentional infliction of personal injury',[31] and continued:

> As in the case of negligence, the requirement of 'personal injury' means the test does not extend to any form of psychological damage but requires a recognised psychiatric condition.[32]

Spigelman CJ concluded that, if the manager had been sued for the intentional tort, he would have been liable to pay damages to the plaintiff on the basis of the intentional infliction of psychiatric injury:

> There is no finding that [the manager] did actually intend to inflict psychiatric damage. However the nature and scale of his conduct was such, as the expert evidence confirmed, as to constitute a recognised psychiatric injury as a *natural and probable consequence of that course of conduct*. The limitations of foresight and remoteness are not applicable.[33]

19 Basten JA referred to the High Court's recognition in *Mengel* of 'those torts which impose liability on private individuals for the intentional infliction of harm'. His Honour said:

> It may be assumed that reference to 'harm' is a reference to compensable loss or damage. However, in the present context, that would mean harm going beyond embarrassment, injury to feelings, humiliation or psychological distress and constituting a psychiatrically cognizable injury to mental health. This gives rise to nice questions in terms of intention, which must be answered without assumptions based on hindsight. Thus, the fact that the plaintiff has suffered psychiatric injury, caused by the conduct in question, does not mean either that it was inevitable, or that it was intended.[34]

20 With respect, what their Honours said in *Nationwide News* serves to highlight the difficulties which attend the present formulation of the *Wilkinson* tort by reference to an intention to cause 'a psychiatrically cognizable injury to mental health'. First, rarely if ever could the intent of a defendant be so characterised. Hardly anyone would know how to recognise such an injury, let alone how to bring it about intentionally. Secondly, while it should be possible to demonstrate that

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31 Ibid [20].

32 Ibid.

33 Ibid [82] (emphasis added).

34 Ibid [371].

mental harm was a reasonably foreseeable result of the intentional conduct, it would seem inordinately difficult for a plaintiff to have to establish that 'a psychiatrically cognizable injury' was foreseeable.

21 Before addressing these questions further, however, I must deal with the recent English authorities.

Recent English authority

22 In *Khorasandjian v Bush*,[35] the plaintiff, whose friendship with the defendant had broken down, obtained an injunction to restrain the defendant from making threats of violence against her and harassing her with unwanted telephone calls which were putting her under great stress. The English Court of Appeal dismissed an appeal against the grant of the injunction. Dillon LJ (with whom Rose LJ agreed) noted that the injury for which damages had been claimed in both *Wilkinson v Downton* and *Janvier v Sweeney* was described as 'nervous shock'. His Lordship continued:

> On modern authorities in the law of negligence, ["nervous shock"] is understood as referring to recognisable psychiatric illness with or without psychosomatic symptoms (see *per* Lord Bridge in *McLoughlin v O'Brian* [1983] 1 AC 410, 431H) or, as put by Lord Wilberforce in the same case, at p 418B, recognisable and severe physical damage to the human body and system caused by the impact, through the senses, or external events on the mind. It is distinguished from mere emotional distress. From the judgment of Bankes LJ in *Janvier v Sweeney*, it seems that he had much the same concept in mind, in that he refers in various citations to physical damage inflicted through the medium of the mind.[36]

Although there was no medical evidence that the plaintiff was, as yet, suffering from any physical or psychiatric illness, the Court considered that the grant of the injunction was justified because of 'an obvious risk that the cumulative effect of continued and unrestrained further harassment such as she has undergone would cause such an illness.'[37]

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35 [1993] QB 727.

36 Ibid 736.

37 Ibid.

23 In *Hunter v Canary Wharf Ltd*,[38] Lord Hoffmann said:

> The perceived gap in *Khorasandjian v Bush* was the absence of a tort of intentional harassment causing distress without actual bodily or psychiatric illness. This limitation is thought to arise out of cases like *Wilkinson v Downton* and *Janvier v Sweeney*. The law of harassment is now being put on statutory basis…and it is unnecessary to consider how the common law might have developed. But as at present advised, I see no reason why a tort of intention should be subject to the rule which excludes compensation for mere distress, inconvenience or discomfort in actions based on negligence. The policy considerations are quite different.[39]

24 Lord Hoffman returned to the subject in *Wainwright v Home Office*[40] ('*Wainwright*'). In a speech with which all other members of the House agreed, his Lordship said he did not resile

> from the proposition that the policy considerations which limit the heads of recoverable damage in negligence do not apply equally to torts of intention. If someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation.[41]

If damages for 'mere distress' were to be recoverable, however,

> imputed intention will not do. The defendant must actually have acted in a way which he knew to be unjustifiable and either intended to cause harm or at least acted without caring whether he caused harm or not.[42]

25 His Lordship reserved his opinion on whether compensation should be recoverable, even where the plaintiff proved a genuine intention to cause distress:

> In institutions and workplaces all over the country, people constantly do and say things with the intention of causing distress and humiliation to others. This shows lack of consideration and appalling manners but I am not sure that the right way to deal with it is always by litigation. … The requirement of a course of conduct [in the *Protection From Harassment Act 1997*] shows that Parliament was conscious that it might not be in the public interest to allow the law to be set in motion for one boorish incident. It may be that any development of the common law should show similar caution.[43]

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38 [1997] AC 655.

39 Ibid 707 (citations omitted).

40 [2004] 2 AC 406.

41 Ibid [44].

42 Ibid [45].

43 Ibid [46]. Although the *Crimes Act 1958* (Vic) now contains an offence of stalking, defined quite broadly, there is no statutory equivalent in this State or elsewhere in Australia to the *Protection from Harassment Act 1997* (UK), which provides for the recovery of damages for anxiety where harassment involves conduct on at least two occasions.

Consideration

26 One notable feature of the common law's adaptability is its responsiveness to advances in science and technology. For example, as Gummow, Kirby and Crennan JJ described in *Magill*, the development of medical knowledge during the 20th century progressively weakened the common law presumption of paternity.[44]

27 *Wilkinson v Downton* was of course decided before the turn of that century, and there have been enormous advances in psychiatric understanding since then. The significance of these advances is well summarised by the learned authors of *The Law of Torts in Australia*,[45] as follows:

> At the time of *Wilkinson v Downton* (1897) medical science had not progressed sufficiently in its recognition of mental injuries (even such mental injuries as nervous shock) so the courts demanded evidence of mental distress in the form of physical injuries – even going so far as to say that there must be an intention to cause physical injury. By the time *Janvier v Sweeney* was decided (1919) medical science had progressed sufficiently for the courts to say that an action on the case for damages would be available for the intentional infliction of nervous shock. Now, as one writer puts it, 'medical science is capable of satisfactorily establishing the existence, seriousness and ramifications of emotional harm' and there is no reason why the courts should not extend the availability of the action on the case for damages to the intentional infliction of severe mental distress alone. It has also been suggested that 'it would be a reproach to the law if physical injuries [and nervous shock] might be recovered for and not those incorporeal injuries which would cause much greater suffering and humiliation'. Such injuries often occur in cases of sexual harassment, racial harassment and harassment in the work place.[46]

28 In *Bunyan v Jordan*,[47] decided in 1937, the plaintiff's 'injury' was described as neurasthenia. According to a 2007 definition, 'neurasthenia' is

> a set of psychological and physical symptoms, including fatigue, irritability, headache, dizziness, anxiety and intolerance of noise. It can be caused by organic damage, such as a head injury, or it can be due to neurosis.[48]

This list of symptoms suggests that the diagnostic label 'neurasthenia' could have

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44 226 CLR 585 [108].

45 F Trindade, P Cane, M Lunney, *The Law of Torts in Australia* (4th ed, 2007).

46 Ibid 92-3 (citations omitted).

47 (1937) 57 CLR 1. See [12]-[13] above.

48 *Oxford Concise Medical Dictionary* (4th ed, 2007), 486.

been applied to a wide variety of conditions, ranging from the quite mild to the quite severe. Yet Dixon J in *Bunyan v Jordan* had no doubt that a person suffering from neurasthenia had sustained sufficient injury to claim under the *Wilkinson* tort. (I note that neurasthenia is nowhere mentioned in the universally-respected *Diagnostic and Statistical Manual of Mental Disorders*, published by the American Psychiatric Association ('DSM').[49] Doubtless this is because, as DSM itself illustrates, psychiatric diagnosis has moved away from such generalised, non-specific labels.)

29 What DSM makes clear is that there are no clearly-defined diagnostic boundaries separating 'recognised mental illness' from other forms of mental disturbance. Typically, DSM lists for each condition a number of 'diagnostic criteria', only some of which must be satisfied in any particular case for that diagnosis to be applied. Within any one condition, there is a range of sub-types and a range of degrees of severity. Thus, DSM devotes 140 pages to 'mood disorders' and 'anxiety disorders' and their numerous sub-classifications. 'Generalised Anxiety Disorder', for example, is characterised by

> excessive anxiety and worry … [which the] individual finds … difficult to control … accompanied by at least three additional symptoms from a list that includes restlessness, being easily fatigued, difficulty concentrating, irritability, muscle tension, and disturbed sleep …[50]

Once it is appreciated that any disorder of this kind is a recognised mental disorder, it becomes apparent that the common law classification 'recognised mental illness' assumes lines of differentiation which no longer exist.

30 The Introduction to DSM emphasises the (inevitable) lack of precision in this field of diagnosis:

> Although this volume is titled the *Diagnostic and Statistical Manual of Mental Disorders*, the term *Mental disorder* unfortunately implies a distinction between 'mental' disorders and 'physical' disorders that is a reductionistic anachronism of mind/body dualism. A compelling literature documents that there is much 'physical' in 'mental' disorders and much 'mental' in 'physical' disorders. The problem raised by the term 'mental' disorders has been much

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49 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders – Text Revision (DSMIV-TR)* (4th ed, 2000).

50 Ibid 472.

> clearer than its solution, and, unfortunately, the term persists in the title of DSM-IV because we have not found an appropriate substitute.
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> Moreover, although this manual provides a classification of mental disorders, it must be admitted that no definition adequately specifies precise boundaries for the concept of 'mental disorder'. The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations. All medical conditions are defined on various levels of abstraction – for example, structural pathology (eg, ulcerative colitis), symptom presentation (eg, migraine), deviance from a physiological norm (eg, hypertension), and etiology (eg pneumococcal pneumonia). Mental disorders have also been defined by a variety of concepts (eg, distress, dysfunction, dyscontrol, disadvantage, disability, inflexibility, irrationality, syndromal pattern, etiology, and statistical deviation). Each is a useful indicator for a mental disorder, but none is equivalent to the concept, and different situations call for different definitions.[51]

31 This brief examination leads to several important conclusions. First, the requirement to show physical harm as a signifier of psychological harm is anachronistic and should be entirely discarded from this area of discourse. Secondly, the term 'nervous shock' - and its modern synonym 'recognised psychiatric illness' - should also be discarded, based as they are on the unsustainable assumption that a clear line separates 'psychiatric illness' from other (lesser) types of mental distress. Thirdly, and consequently, the focus of a court's inquiry should no longer be on whether a clinician would attach a particular diagnostic label to the plaintiff's condition – about which there will frequently be legitimate differences of opinion – but on the nature and extent of the mental distress actually suffered by the plaintiff as a consequence of the defendant's conduct.[52]

32 Taking this approach will, as Lord Hoffman suggested in *Wainwright*, obviate the need to invoke the fiction of 'imputed intention', on which *Wilkinson v Downton* and *Janvier v Sweeney* both rested. In *Wilkinson v Downton*, the defendant intended no harm at all; in *Janvier v Sweeney*, the intent was to terrify, but no more. In both cases, the court imputed to the defendant(s) an intention to cause the physical/psychological harm which the plaintiff actually suffered, on the premise that the conduct in question was 'calculated' (ie had the natural tendency, or was

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51 Ibid xxx-xxxi.

52 Cf, in a different context, *R v Verdins* (2007) 16 VR 269, [7]–[13].

likely) to cause harm of that kind.

33 As the authors of *The Law of Torts in Australia* suggest, this fiction probably owes its origin to a combination of two factors.[53] On the one hand, 'the ordinary defendant knows little about nervous shock … or how to cause it intentionally'. On the other hand, 'the courts clearly wish to discourage the intentional infliction of mental distress'.[54] As a result, the learned authors say:

> [T]he courts have resorted to the fiction of imputing to a defendant an intention to cause physical injury or nervous shock in order to enable a plaintiff to recover damages, even though the defendant might have done the act or made the statement only with the intention of causing mental distress.[55]

34 The approach which I favour accommodates both these factors while dispensing with an unsatisfactory fiction. In a case such as the present, there is an actual intention to cause mental harm. No occasion arises to impute an intention which did not exist. Instead, the defendant will be held liable for the damage shown to have been caused by his intentionally harmful action, subject to the limit of reasonable foreseeability posited in *Mengel*.[56]

35 As the House of Lords acknowledged in *Wainwright*, since the claim depends on proof of actual intention there is no policy reason for applying here the 'recognised psychiatric injury' limit which has developed in the law of negligence. (I have separately argued that this limiting concept has in any case lost its utility). The measure of damages would, of course, depend upon the nature and extent of the mental harm proved to have been caused.

36 The present case involved a deliberate course of conduct on the part of Mr Procopets, intended to cause maximum distress to Ms Giller. The judge found that his conduct had caused her great distress. In my opinion, this was a separate

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53 F Trinidade et al, above n 42, 87.

54 Ibid.

55 Ibid 88.

56 See [14] and [19] above.

and distinct basis in law for the award of damages 40,000 which Neave JA and I would make on the claim for breach of confidence.

37 As the High Court noted in *Magill*, this tort has for many years been recognised by American courts,[57] but American law has adopted an 'adjectival definition' of it. The Restatement of the Law (Second) Torts 2d describes 'intentional infliction of emotional distress' in these terms:

> One who by *extreme and outrageous conduct* intentionally or recklessly causes *severe emotional distress* to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.[58]

38 The present case fits comfortably within this definition. But I would not wish to be taken as saying that a claim of this kind could not succeed unless (a) the conduct was 'extreme and outrageous'; and (b) the emotional distress intentionally caused was 'severe'. Although it is unnecessary for present purposes to decide the question, I see no need for such words of limitation. The tort of assault and battery, which likewise is capable of encompassing the full range of types of conduct and types of injury, has developed quite satisfactorily without any such limitations. The costs and risks of litigation will impose their own limits as this tort develops further.

ASHLEY JA:

39 I have had the advantage of reading in draft the reasons for judgment of Neave JA. Her Honour clearly identifies the issues which arise on this appeal and the large majority of the relevant circumstances. I respectfully agree with a number of her Honour's conclusions. But there are points at which we part company.

40 First, contrary to her Honour's ultimate conclusion, I consider that the appellant did not make out her claim for an adjustment of property interests ('the adjustment claim') under Part IX of the *Property Law Act* 1958 (Vic) ('the Act').

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57 See W L Prosser, 'Insult and Outrage' (1956) 44 *Cal L Rev* 40; 'Negligently Inflicted Mental Distress: The Case for an Independent Tort' (1970-1) *59 Geo L J* 1237.

58 (Emphasis added).

41 Second, whilst I respectfully agree with her Honour that the appellant made out her claim for relief in respect of breach of confidence, the basis upon which I have reached that conclusion does not entirely coincide with her Honour's analysis.

42 Third, I respectfully disagree with her Honour as to the quantum of compensation which should be awarded to the appellant on the breach of confidence cause of action. I disagree also, if aggravated damages are available for breach of confidence, upon the amount of such damages which her Honour would allow.

43 Fourth, substantially coinciding with her Honour's approach, I am of opinion that damages for distress are not available, as the law now stands, for the tort of intentional infliction of harm. That opinion is contrary, however, to the conclusion of Maxwell P, whose reasons I have also had the advantage of reading in draft. His Honour concludes that it is an open question whether damages for mental distress are available under this cause of action, and that such question should be resolved favourably to the appellant.

44 Fifth, I respectfully disagree with Neave JA as to the quantum of damages – compensatory and exemplary – which should be awarded to the appellant for the proved assaults.

45 Resolution of a considerable number of issues – upon many of which I agree with her Honour, upon some of which I respectfully disagree – has led me to the conclusions just expressed. Those issues must now be identified, and my resolution of them explained.

The adjustment claim

Errors of principle or fact in the judge's approach to the adjustment claim? My conclusions summarised.

46 I agree with Neave JA that the learned trial judge erred in holding that, in his consideration whether the appellant had made out her adjustment claim, he could

not bring to account any contributions made by the appellant, as parent and homemaker, to the children of her relationship with the respondent ('the twins') after that relationship had ended.

47 Neave JA has also concluded that the learned trial judge impermissibly fettered the discretion with which he was invested by s 285(1) of the Act by concluding that it was not open to him to take a global approach to assessment of the contributions made by the appellant, but rather concluding that the valuation must be made by a step by step - or asset by asset - approach. Her Honour's review of the authorities shows that, depending upon the particular case, either approach may be the more appropriate. She further concludes that it might well have been appropriate for his Honour to have taken an asset by asset approach. Nonetheless, she concludes that his putative exercise of the discretion was vitiated because he held himself confined to making an asset by asset evaluation of the appellant's contributions.

48 In my opinion, the passage in his Honour's reasons for judgment which is cited by Neave JA in support of her conclusion[59] does not admit of the error that has been identified. Accepting that the import of his Honour's remarks is not entirely clear, I think he was only saying that it was desirable, in a case of the present kind , that the evidence should descend, so far as possible, to particularity; and that the circumstances of the particular case were such that resort to particularity had been advisable. That said, I need not further address the issue later in these reasons.

49 Neave JA further concludes, and I agree, that the learned trial judge did not err by holding that, in certain circumstances, the contributions of a de facto partner may be rendered more arduous because he or she was subjected to violence during the course of the relationship. Against that background, her Honour analyses the learned trial judge's conclusion that such ill treatment as was inflicted by the respondent upon the appellant did not make her contributions relevantly more

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[59] [2004] VSC 113, [125]-[126].

arduous, and concludes that this was an inference derived from facts found, in respect of which this Court is as well equipped as was his Honour to draw a conclusion. She goes on conclude that an opposite inference should be drawn.

50 I agree that his Honour's ultimate conclusion did rest upon inferential reasoning. On the other hand, I am unable to agree with the inference which her Honour draws. For reasons which I must later develop, I consider that the factual foundation for her Honour's chain of inferential reasoning was not established.

51 In all, I am not persuaded that such abuse as was inflicted by the respondent upon the appellant made the appellant's 'contributions significantly more arduous than they ought to have been';[60] or that -

> … the conduct occurred during the course of the [relationship] and had a discernible impact upon the contributions of the other party.[61]

52 In summary, then, I consider that the learned trial judge erred in his putative application of s 285 of the Act because he did not allow for the effect of such contributions as the appellant might have made to the welfare of her children after the relationship ended. But I have discerned no other error of principle or fact in his treatment of the issue.

53 His Honour having concluded that no adjustment order was justified, it followed that there was no point in him extending time under s 282(2) of the Act for the appellant to apply for such an order. His Honour did not address, in those circumstances, other considerations which might have been pertinent if the application of s 282(2) had been a live issue.

Section 282 of the Act

54 Section 282 reads as follows:

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60 *Kennon v Kennon* (1997) FLC 92-757, 84294 (Fogarty & Lindemayer JJ).

61 Ibid 84295 (Fogarty and Lindenmayer JJ).

Time limit for making applications

(1) If domestic partners have ended their domestic relationship, an application to a court for an order under this Division must be made within 2 years after the day on which the relationship ended.

(2) A court may grant leave to a domestic partner to apply for an order at any time after the end of the period referred to in subsection (1) if the court is satisfied that greater hardship would be caused to the partner applying if that leave were not granted than would be caused to the other partner if that leave were granted.

55 The judge found that the 'domestic relationship' ended on 6 July 1993. The appellant did not challenge that finding.

56 The appellant initiated a proceeding in the Family Court on 26 August 1998. Following *Wakim*,[62] the proceeding was transferred to the Supreme Court. In the event, a separate proceeding, commenced by Writ, was instituted on 3 December 1999.

57 The short point, treating initiation of the proceeding in the Family Court as being intended compliance with s 282(1), is that the application was commenced more than five years after the relationship ended, and more than three years after the end of the period specified by that subsection.

58 Section 282(2) requires a comparison of hardships. There has been some degree of judicial divergence of view in this State whether an applicant for leave under the subsection must also give an explanation for the delay. In my opinion, in the event that a balance of hardship has been shown in favour of the applicant, a Court is entitled to take into account, as a factor bearing upon the exercise of discretion whether to grant leave, the presence or absence of an explanation for the delay; but failure to adequately explain the delay does not preclude a favourable exercise of discretion. That was the thrust of the reasons for judgment of Gillard J in *Harris v Harris*.[63] His Honour went further, however, than I would be prepared to go in relegating in importance the significance of failure to provide an explanation for

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62 *Re Wakim; Ex Parte McNally* (1997)198 CLR 511.

63 (1997) 22 Fam LR 263.

delay. In my opinion, the reasons for judgment of Warren J (as her Honour then was) in *McGibbon v Marriott*[64] more closely approximate the significance which may attach to failure to provide a satisfactory explanation. Beyond that, because it will simply be one of a number of potentially relevant considerations, the weight attaching to the presence or absence of a satisfactory explanation for delay is likely to vary from one case to another.

59 The specific focus of s 282(2) is, as I have said, upon comparative hardships. According to the appellant's written submissions, consideration of hardships 'would take place in the context of a determination that an adjustment in favour of the appellant would be just and equitable in the event that leave was granted'. In other words, the Court was invited to determine that the appellant's claim would yield an order for adjustment in her favour. If it did so, hardship (exceeding any hardship to the respondent) would be established.

60 In this case, by contrast with many others, the evidence bearing on the merits of the s 285 claim was before the Court which had to consider the s 282(2) application. It was not a case in which the applicant for leave asserted an entitlement which, although disputed, remained a question for resolution in respect of which the applicant should not be denied her (or his) day in Court. If, on evaluation of all the evidence, a claim under s 285 could not be established, then the s 282(2) application would necessarily fail. There would be no hardship to the appellant to be balanced out against any hardship to the respondent. If an order for adjustment could be justified, even for a small amount, exercise of the residual discretion would be required. In the latter case, the explanation, if any, for delay in commencing the application could be considered as one item of relevance.

61 In the particular case, then, before resolving the s 282(2) application, the merits or otherwise of the s 285 claim need to be considered.

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64 [1999] VSC 381.

Merits of the adjustment claim

62 I accept that the correct approach to assessing the merits of an adjustment claim is conveniently, if not quite completely, summarised in the reasons for judgment of Brereton J in *Kardos v Sarbutt*.[65] His Honour's summary of that approach is set out in the reasons of Neave JA.[66]

63 As to the first step in the sequence outlined by Brereton J, I agree with Neave JA that in the particular case the pool of divisible property ought be assessed at date of separation – that is, July 1993. But although in the end it makes no difference to my conclusion about the merits of the adjustment claim, I consider that the value of the pool ought be assessed at about $200,000 rather than the amount of $400,000 arrived at by Neave JA.

64 The next step in the analysis is an evaluation and balancing of the contributions, financial and other, made by each of the appellant and respondent to the acquisition, conservation or improvement of property of the parties, and of contributions to the welfare of the other party to the relationship or to the welfare of the broader family.

Contributions between March 1990 and July 1993

65 The learned trial judge concluded, focussing only upon the period between March 1990 and July 1993, that it would not be just and equitable that the respondent's interest in the Orrong Crescent unit – it was that unit upon which the appellant focussed at trial – be adjusted in favour of the appellant. In a passage criticised by Neave JA, his Honour said:

> In my view both parties derived a benefit from the relationship but the financial and non-financial contributions made directly or indirectly by the plaintiff did not exceed the cost of her keep and that of her daughter during the relevant period and there was no contribution made to the acquisition,

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65 (2006) 34 Fam LR 550, 558-561, [28]-[38].

66 Neave JA, [314].

> conservation or improvement of any of the properties or the financial resources of the defendant during that period. So far as the contributions made to the welfare of the family I am quite satisfied that both parties made an equal contribution during this period.[67]

66 Neave JA considers that his Honour's exercise of discretion, so far as it concerns that period, miscarried because:

- In the passage just cited,[68] the learned judge 'tended to equate [the appellant's] position with that of a domestic servant rather than that of a domestic partner', and so devalued the appellant's contributions which were not readily capable of evaluation in monetary terms.[69]

- His Honour failed to take account of the fact that 'the violence and threats to kill to which Mr Procopets subjected Ms Giller would have made it significantly more difficult for her to discharge her role as homemaker and parent.'[70]

67 For two reasons, I respectfully disagree with her Honour's conclusion.

68 First the learned judge undertook, as his reasons for judgment show,[71] a broad-ranging analysis of the contributions, monetary and otherwise, made by each of the appellant and respondent in the period now under consideration. I do not accept that the passage which I cited at [65] should be understood to mean that his Honour conducted a much narrower enquiry than the entirety of his reasons would suggest; or that, having conducted a broad-ranging enquiry, his Honour effectively put much of what he had concluded to one side, and instead reached a conclusion in respect of the balancing exercise by application of a narrow, 'domestic servant', test.

69 Second, as I said earlier, I do not accept the proposition that the judge ought to have treated the appellant's contributions during the period 1990-1993 as having

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67 [2004] VSC 113, [238].

68 And, I should think, in an earlier passage in his reasons: Ibid [229].

69 Neave JA, [354].

70 Neave JA, [299].

71 [2004] VSC 113, [192], [221]–[229], [231]–[236] and [238].

been made more arduous by reason of the proven assaults. His Honour concluded to the contrary. Having regard to the great difficulties which his Honour had in making findings of fact in light of what he held was the endemic dishonesty of both appellant and respondent, and of witnesses called - particularly for the appellant, I would not readily depart from his Honour's conclusions, even accepting that they involved some inferential reasoning. For that reason, I cannot accept a chain of reasoning which takes as its starting point the existence of a level of abuse, physical and/or psychological, which his Honour did not find to have been established.

70 The judge was satisfied, despite concluding that he would not accept any part of the appellant's evidence except if it was corroborated, that in the last 18 months of her domestic relationship with the respondent he had assaulted her on four occasions. Later in these reasons I set out the circumstances of the incidents as he found them to be, and of the injuries – physical, and on several occasions by way of mental distress – which he was satisfied the appellant had sustained. I also explain why, in my opinion, those conclusions should be accepted.

71 The judge was also satisfied that, in association with one of the proven assaults, the respondent had made threats, including a threat to kill the appellant. The threats had dissolved into the respondent throwing a chair at the appellant, the blow causing soft tissue injury to her right arm, upper right breast and right shoulder which resolved within weeks and without medical attention.

72 Then there was evidence about abuse of the appellant which was given by her older daughter. His Honour was satisfied that the evidence which the daughter gave on affidavit was 'grossly exaggerated' in favour of the appellant. Nonetheless, he was satisfied that it corroborated two assaults – one at least of which was a pleaded incident – and that it gave some general support for there having been violent conduct of the respondent against the appellant.

73 Again, a document was put in evidence by the respondent. Compiled by a Jewish welfare organisation, it recounted, presumably based on an account provided

by the appellant, many incidents of domestic violence during the relationship. But as his Honour was not prepared to be satisfied, in the absence of corroborative material, that any of the pleaded assaults had occurred, I doubt that much should be made of a self-serving account which adverted – at least in part - to unpleaded assaults.

74 I should mention also that the appellant alleged, and the learned judge found to be established, an assault which occurred on 10 November 1996. I mention that incident not because it took place in the period of cohabitation but because it represents the only incident of violence which the learned judge found to be established in the period between July 1993 and November 1996, a period in which the appellant and respondent continued to have a good deal of contact. That contact included the appellant residing with the respondent on a regular basis. As alleged by the statement of claim, the respondent assaulted the appellant twice during that period. The learned judge found, however, that only one of the alleged assaults had been established. That is not a picture of persistent or unrelenting violence in the years which followed formal separation.

75 In the event, the appellant alleged, and the judge found established, four assaults which took place in the 14 months between 29 April 1992 and June 1993; whilst the appellant also alleged two assaults in the period between July 1993 and November 2006, one of which the judge found established. In my opinion it ought not be concluded, so far as the plaintiff's allegations of specific assaults were found to be established, that in the period between March 1990 and July 1993 the appellant was subjected to violence, whether physical or verbal, as would have rendered the appellant's contributions significantly more arduous than they would otherwise have been

76 Neave JA observes that 'there were two other alleged assaults which his Honour did not consider for the purposes of [the appellant's] damages claims,

because they were said to have occurred outside the limitation period'.[72] There is a short point. Had the appellant pressed a case that her contributions had been made the more burdensome by a pattern of violence, evidence about those alleged assaults would have been admissible on the s 285(1) claim regardless that the discrete causes of action were time-barred. So also, evidence of systemic physical or mental abuse would have been admissible regardless whether discrete causes of action were pleaded in assault or battery.

77 Even if the evidence had enabled a conclusion that there had been a pattern of physical or mental abuse in the period of the domestic relationship during the period of cohabitation, it would not necessarily follow that it made the appellant's contributions relevantly more burdensome. I accept that it would have such an effect in respect of periods closely connected in time with proven assaults. But other than that, the learned trial judge obviously considered that the appellant was far from being put in fear of the respondent, or otherwise affected by mental distress. He said so more than once in his reasons. He observed, for instance, that -

> On 12 November 1996 the plaintiff obtained an interim intervention order against the defendant after an alleged assault on 10 November 1996. The application was heard on 22 November 1996, when an intervention order was made which provided *inter-alia* that the defendant was prohibited from assaulting or harassing the plaintiff, approaching her or her children and being within 350 metres of the property in Port Melbourne. The surprising aspect of the events of this period is that the parties resumed a sexual relationship on 19 November 1996 despite the interim order. After the plaintiff had obtained an 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, 27, 28 of November and 1 December 1996. The sexual encounters during this period were filmed by the defendant using a video camera, surreptitiously up to 25 November and then with the consent of the plaintiff. Relations between the parties deteriorated rapidly after 1 December. An altercation occurred on 6 December 1996 and the defendant threatened the plaintiff that he would show the video and photographs taken from the video to various people including her employer. On 8 December 1996 the plaintiff, who had sworn she was in fear of the defendant, attacked him with a length of steel at the Camberwell Market whilst he was filming her and her mother.

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[72] Neave JA, [289].

> The defendant suffered bruising injuries.[73]

78 This assault occurred within a month of the last proven assault, and less than a month after the appellant obtained an intervention order against the respondent in pursuit of which the appellant alleged that, by reason of the assault, she was in fear of the respondent. As his Honour observed –

> On the afternoon after obtaining the intervention order, having given evidence on oath that she was in fear of the defendant, she and the defendant indulged in sexual intercourse. She did so on the following six days and 1 December 1996, hardly the conduct of a person who was in fear of the defendant. The video evidence of the sexual encounters hardly supports the view that she was in fear of him.[74]

79 I must make very clear my opinion that no incident of domestic violence is inconsequential. Every such incident should be deplored. Such an incident may call for penal sanction (as in fact was imposed in respect of the November 1996 assault) or entitle a civil remedy in an action for assault. But the authorities to which Neave JA refers[75] do not, in my opinion, support a conclusion that relatively isolated incidents of domestic violence should trigger, in an application under s 285(1) or under similar provisions of the Commonwealth and other States, a conclusion that the victim's contribution to the relationship were made 'significantly more arduous than they ought to have been'. Cases where such a conclusion should be reached have been described as 'exceptional', and in a 'narrow band'.[76] There is good reason why that should be so. The idea that a partner's contributions might be characterised as more burdensome than they would otherwise have been, this telling in money terms in favour of that partner in a property adjustment, originated in the Family Court. It introduced back into family law a conception which had been legislatively removed - the conception of fault. It is understandable that application of the 'more burdensome' principle should be closely confined. I think it would be anomalous if some more generous approach was taken in the case of breakdown of a

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73 [2004[VSC 113 [9], [279].

74 [2004] VSC 113 [22].

75 Neave JA, [294]-[297].

76 *Kennon v Kennon* (1997) FLC 92-757, 84294 (Fogarty & Lindemayer JJ).

de facto relationship.

80 In my opinion, the facts concerning assaults by the respondent on the appellant, so far as the judge was able to find them, fell well short of the exceptional class of case to which I have been referring. So also, his Honour's conclusions as to the impact of the assault upon the appellant's mental state contraindicate this case being in that class of case. I respectfully differ from the conclusions of Neave JA that the proven assaults 'made [the appellant] fearful, apprehensive that she would be assaulted again, and anxious to avoid provoking [the respondent]',[77] and that, (in relation to the making of a delayed application) the same might be explained by 'the climate of violence which existed when the parties were living together and after they separated!'[78] The findings made by the learned trial judge, which in part depended upon his appreciation of the appellant – an appreciation aided by seeing her in the witness box for a protracted period, and observing her in court otherwise during the trial – tell to the contrary.

The period between July 1993 and October 1996

81 Notwithstanding that the learned trial judge considered it to be the law that contributions by the appellant after the domestic relationship ended were not to be brought to account in the adjustment claim, he made findings which bore upon the question what contributions the appellant had in fact made in the period up to October 1996.

82 The learned judge found, in connection with the two units which were constructed at the Orrong Crescent site, that the appellant attended from time to time and collected up building materials and the like, that she assisted, after works had been completed, to clean up the inside of the units, and that she provided some help in establishing small gardens. He said that it was –

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77 Neave JA [299].

78 Neave JA, [310].

> … laughable to suggest that a person makes a substantial contribution to a development because that person happens to be with her partner on a particular day and he says 'well I am going to clean up the site, would you like to come down and help me?'[79]

The magnitude of what the appellant did, as found by his Honour, is suggested by his reference to 'what little contribution she made'.[80]

83 His Honour found that between July 1993 and January 1994 the appellant lived with her parents in Bentleigh. During that period she stayed at the respondent's home from time to time. Then, from January 1994, she lived with her children in a flat at Port Melbourne. But each month she and the twins spent periods residing at the respondent's home.

84 His Honour analysed the extent to which the appellant and the twins resided with the respondent, and related contributions, as follows.

85 In 1994 they resided at the Orrong Crescent premises on average about seven days each month.

86 In 1995, the appellant and the twins continued to stay with the respondent from time to time. The pattern was basically the same, subject to the fact that the respondent, the appellant and the twins resided at the Otira Road premises whilst the Orrong Crescent site was being re-developed.

87 The pattern continued into 1996, but the appellant and the twins progressively spent less time residing with the respondent.

88 On average, between early 1994 and mid 1996, the appellant and the twins resided with the respondent about every two weeks for two or three nights, about six days per month. The appellant, who was still studying, and working part-time, found it convenient to do so because of the respondent's assistance with the twins. He often dropped the children off, and picked them up from, a nearby childcare

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79 [2004] VSC 113, [244].

80 Ibid [249].

centre.

89 During periods of co-residence the appellant assisted with the family chores. She provided some food. Otherwise the respondent provided the food and performed the chores.

90 Arrangements of the kind which I have been describing were practically at an end by May 1996. They ended altogether in late October 1996 – which is not to say that there was not for a shortish period thereafter a sexual relationship between the appellant and respondent.

91 From May 1996 the respondent successively entered into relationships with two other women. In October 1996 the appellant entered into a short-lived relationship with another man.

92 Despite their relationship having substantially broken down by the latter part of 1996, the respondent still undertook some role in respect of the twins. So, for instance, he picked them up from the child-minding centre on 6 December 1996.

93 Although the learned judge made no specific findings about the contributions which must have been made by the appellant as homemaker and parent in respect of times when the appellant and the twins were living apart from the respondent in the period July 1993 to October 1996, he did 'not accept that any contributions made [by the appellant] during this period exceeded that of the [respondent]'; and he held that 'in my view it would not be just and equitable as a basis for adjustment'.[81]

94 Plainly enough, the appellant was both studying and working part time during all or most of the period in question. So it was not a case of the twins being in her care for all of the time that they were not in the respondent's care, or in the care of the appellant and respondent jointly. Nonetheless, I respectfully doubt the validity of his Honour's conclusion. I should say that, to an extent, the appellant's contributions, financially and otherwise, were greater than those of the respondent

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[81] Ibid [237].

during the period under discussion. I would not make much of the additional financial contribution. Significantly, it represented Commonwealth benefits to which the appellant may or may not have been entitled. But it is inescapable that the twins were in her general care for a greater part of the time than they were in the care of the respondent. The fact that such a regime was, as his Honour perceived it, the appellant's doing does not alter the reality of the contributions made.

95 I accept, then, that in the period between July 1993 and October 1996 the appellant's s 285(1)(b) contributions exceeded those of the respondent. I will delay for the moment my conclusion whether that circumstance should lead to an exercise of discretion in favour of the appellant.

96 I see no reason to doubt, however, the conclusion of the learned trial judge that, in effect, the appellant's s 285(1)(a) contributions – that is, in respect of activities carried out at the Orrong Crescent site - were inconsequential. Indeed, argument to the contrary was in substance abandoned by her counsel on the appeal.

The period between October 1996 and trial

97 The learned judge made no findings specifically directed to contributions made by the parties in the period between October 1996 and trial.

98 It is hardly surprising that his Honour made no such findings. The writ was filed on 3 December 1999. Although by paragraph 1 of the Statement of Claim it was alleged that the parties had lived together in a de-facto relationship 'at all relevant times from on or about 13 March 1990', it was pleaded by paragraph 5 that '[o]n or about 20 October 1996 the parties finally separated and the relationship came to an end'. Paragraphs 10 and 11, and incorporated schedules, then identified the alleged contributions made by the appellant, throughout the period of the relationship, which fell within s 285(1)(a) and (b) respectively. The schedules, understandably, said nothing about the period subsequent to October 1996.

99 Nowhere in the statement of claim was it pleaded that, for the purposes of

s 285, the Court should consider contributions made by the appellant after October 1996. Further, the statement of claim was amended as late as May 2003. Nothing was then pleaded as would raise that matter for consideration.

100 The respondent's defence, a lengthy and detailed document, albeit not expressed as a lawyer would do it, addressed the allegations raised by the statement of claim.

101 The respondent made a counter-claim. It raised, inter alia, certain allegations about events subsequent to October 1996. They did not pertain to s 285(1)(b) contributions. Neither did the reply and defence to counter-claim address that question.

102 A study of the appellant's affidavit sworn 26 May 2003, which by order of Kellam J was to stand as the witness's evidence-in-chief, shows that some reference was made to events subject to October 1996. But it was nowhere asserted that relevant contributions had been made after that time. See particularly, paragraphs [213]-[216] and [229]-[238].

103 Notwithstanding that, as I perceive it, no claim was ever raised in respect of contributions allegedly made by the appellant subsequent to October 1996, paragraph [201] of the appellant's written submissions in this Court complains that –

> … his Honour simply failed to address the significant contributions to the welfare of the children associated with the period from October 1996 until … trial.

104 It appears, notwithstanding the state of the pleadings and the content of the appellant's affidavit of evidence-in-chief, that something – it was very imprecise - was said at trial about the period after October 1996 in discussion between the learned trial judge and appellant's counsel. Again, whilst the appellant pleaded that the relationship had ended in October 1996, and the respondent contended that there never had been a relevant relationship, yet his Honour noted that it had been submitted that 'one may take into account contributions made after the relationship

has ceased;[82] and he considered authorities bearing upon that topic. On the other hand, the learned judge focussed upon the period July 1993 to October 1996.

105 In all, the state of the pleadings, the appellant's evidence-in-chief and his Honour's treatment of post-relationship contributions does not encourage a belief that alleged contributions in the period after October 1996 were raised in any proper way for his Honour's consideration.

106 Neave JA has concluded, in effect, that the appellant had sole responsibility for bringing up the twins between late 1996 and trial and thereby provided contributions of the s 285(1)(b) kind which ought go into the balance. She has concluded also that credit ought be given to the respondent for such child support payments as he made in that. Noting the respondent's argument that he was precluded from contact with the children, which he wanted, by an order of the Family Court made at the instance of the appellant, her Honour observes that the respondent could to an extent have relieved the appellant's childcare burden by exercising the supervised access to which he was entitled; and that his failure (or refusal) to do so belied his claim that he wanted to be more involved in their upbringing.[83]

107 If the question of post October 1996 contributions was before this Court, which in my opinion it is not, I would conclude that the appellant's contributions to the welfare of the twins would have outweighed the contributions made by the respondent by way of payment of childcare in the period between October 1996 and trial.

Claim for an adjustment order not established

108 The correct approach to determining whether an adjustment order should be made is described in *Evans v Marmont*[84] relevant passages of which are cited

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82 Ibid [122].

83 Neave JA, [338].

84 (1997) 42 NSWLR 70.

by Neave JA.[85]

109 The starting point is the relevant pool of property. The effect of paragraph 13 of the statement of claim, reflected in the reasons of the learned trial judge, and see also paragraph [209] of the appellant's submissions in this Court,[86] is that adjustment is sought in respect of the property constituted by Unit 2 at the Orrong Crescent site. For those reason, I would treat the potentially divisible pool as being something in the order of $200,000. That is, in the particular circumstances I would not put the value of the Otira Road property into the pool.

110 Next, confining the appellant's claim – as I consider it must be confined – to the period between July 1990 and October 1996, I do not consider it just and equitable that there be any adjustment of the interests of the appellant in the relevant property of the respondent.

111 In respect the period March 1990 to July 1993, I have agreed with the conclusion of the learned trial judge that the appellant's contributions did not exceed those of the respondent. But for reasons to which I will in a moment refer, I think that such conclusion really adverted to what might be called day to day expenditure and care.

112 I have concluded, on the other hand, that the appellant's s 285(1)(b) contributions between July 1993 and October 1996 did exceed those of the respondent. It is plain that due weight must be given to parent and homemaker contributions, and that they should not be assessed in a niggardly way.

113 It is perhaps arguable that the licence to bring post-relationship contributions into account is not without some qualification – as to which see *Jones v Grech*,[87] where both Davies AJA and Ipp AJA (as he then was) referred to what had been said by

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85 Neave JA, [344]-[345]. That approach is consistent with observations of Nettle J in *Robertson v Austin* [2003] VSC 80, [38]-[40], and of Morris J in *Findlay v Besley* [2003] VSC 247, [56].

86 By which it is said that the appellant 'seeks half of the equity in the remaining part of 22 Orrong Crescent'.

87 (2001) 27 Fam LR 711.

Priestley JA in *McDonald v Stelzer*.[88] But I have not relied upon any such qualification in reaching the conclusion which I have expressed.

114 Looking at the situation overall, the respondent's contributions in the period between early 1990 and October 1996 did not only consist of such money as he expended in maintaining the household, and physically in caring for the twins and in assisting the appellant to fulfil her educational ambitions. His Orrong Crescent property provided accommodation for the family; and, when it was being re-developed, he provided alternative accommodation whenever the appellant and the twins wished to reside with him. At times, he provided motor vehicle transport for the appellant and the twins. Looked at on a daily living basis, I have accepted the conclusion of the learned trial judge that the contributions of appellant and respondent were equivalent in the period between March 1990 and July 1993. But that is only a part of the story.

115 Going to contextual matters, the property in respect of which the appellant seeks adjustment is property – more accurately, the successor to property – which was brought into the relationship by the respondent; property which was enhanced (by re-development) at the respondent's expense.

116 Further, the relationship out of which the appellant asserts her claim was relatively short-lived.

117 Making 'a holistic value judgment in the exercise of a discretionary power of a very general kind',[89] I do not accept that such excess balance of homemaker and parent care as ran in the appellant's favour between July 1993 and October 1996 renders it just and equitable to make an adjustment under s 285(1) in respect of the identified property.

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88 (2000) 27 Fam LR 304; Priestly JA had concluded that a trial judge had been entitled to take into account 'matters very closely connected in subject-matters, time and relevance to financial and non-financial matters during the period of the full de-facto relationship', provided that 'some but not fundamental weight' was given to such matters. Davies AJA expressly agreed with what Priestley JA said. Ipp AJA arguably did not do so.

89 *Kardoss v Sarbutt* (2006) 34 Fam LR 550, 561, [36] (Brereton J).

118 But suppose I was wrong in concluding that, in the particular circumstances of this case, the period between October 1996 and trial should be eliminated from consideration in the balancing exercise.

119 Obviously, the appellant acted as homemaker and parent during that period. Her contributions could not be readily converted into money, even if that was an appropriate approach. On the other hand, the respondent's contributions were entirely monetary. There is an obvious difficulty in balancing out contributions which are of an essentially different character; but I would conclude, as I said a little earlier, although without being able to provide any concrete measurement, that the appellant's contributions were the greater.

120 But that would only be part of the story. Contextually, I think that it would be proper to take into account the fact that the period before trial was much elongated by the appellant's delay – first in commencing a proceeding, then in the interlocutory phase. It would be, I think, somewhat odd if the appellant's contributions obliged an adjustment essentially because her dilatory conduct meant that the period of relevant contributions was extended. It would not be an adequate answer to such a complaint, I think, simply to value the potentially divisible property at the date when the relevant relationship ended. For such a valuation would in part meet a different complaint – that is, that it would be unjust to value the property as at trial when – by reason of the appellant's defaults – the value of such property had increased well beyond what would have been the case absent the defaults.

121 I consider also that, contextually, it would be proper to take into account the fact that the appellant's actions precluded the respondent making non-financial contributions in the relevant period. That the appellant acted in such a way operated to increase her own non-financial contributions. Doubtless, the focus is upon contributions actually made. Even so, I see no reason why the existence of a circumstance, consequent upon action taken by the appellant, which circumstance denied the respondent the ability to make non-financial contributions, should be wholly ignored. That is at least so where, as the learned trial judge found was here

the case, the appellant engaged in wholesale lying and deception; and where some of the lies must have mirrored assertions made in the Family Court proceedings.

122 In the event, I would make no order for adjustment even if it was open, in the circumstances of the case, to have regard to contributions made by the appellant up to time of trial.

123 Because it would be futile to do so, I would therefore refuse leave under s 282(2) of the Act for the appellant to apply out of time for an order under s 285(1).

Causes of action connected with distribution of the videotapes

124 The respondent videorecorded he and the appellant engaging in a variety of sexual activities, in the privacy of a bedroom, on ten occasions between 19 November and 1 December 1996. The learned trial judge found that the appellant was unaware that videorecording was taking place on the first five occasions; but that the contrary was the case on the next five occasions. He referred to her 'playing up to the camera'.

125 Following more discord between them, the respondent distributed, and attempted to distribute, copies of the videotape to the appellant's family and others. He sought to persuade the recipients to view what was depicted. At least two people did so. Further, the appellant made statements to various people which asserted or implied that the appellant was an immoral woman. The respondent's wrongdoing was largely confined to the period between 5 and 7 December 1996. On 10 December, a complaint having been made, he was taken into police custody. The respondent's wrongdoing was largely quarantined in time. But the appellant, who was made aware of what the respondent was doing, was evidently and understandably embarrassed and upset. That she should have been so affected – although, as the judge concluded, by no means as severely as she claimed – was not surprising. It was not inconsistent with her being 'a determined woman who (was)

not over-sensitive.[90]

126 By her statement of claim the appellant pleaded three causes of action arising out of the respondent's distribution and attempted further distribution of the videotape and his related conduct: breach of confidence; intentional infliction of emotional distress; and invasion of privacy.

127 The substantial allegations were set out in the claim for breach of confidence. Particular variations – for instance, that the dissemination of material was a deliberate act calculated to cause distress to the appellant, and that such conduct violated the appellant's right to privacy – were pleaded in respect of the other causes of action. But essentially the variations were different characterisations of the same conduct. Further, the appellant particularised her alleged personal injury, loss and damage in exactly the same way in respect of all three causes of action. In respect of each of them she claimed, by her prayer for relief, 'damages including aggravated damages', 'exemplary damages' and delivery up of the videotapes.

128 It follows that the plaintiff's success on any one of the three causes of action - except if the injury which could be compensated was something less than the injury which could be compensated under one of the other causes of action, or except if the available relief was something less than that which could be granted under one of the other causes of action – would mean, because the appellant should not be entitled to recover twice over for the same injury - that there was no practical point to the other causes of action.

129 In fact, as I apprehend it, only the action for breach of confidence offered the appellant the opportunity for redress. That is because a generalised tort of invasion of privacy is not yet recognised in Australia, and because a claim for intentional infliction of harm does not encompass, in my opinion, a situation in which the harm is confined to mental distress.

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90 [2004] VSC 213, 279.

130 I will say something more about the last-mentioned propositions later in these reasons. For the moment, I focus upon the appellant's claim for breach of confidence.

Breach of confidence

131 I respectfully agree with Neave JA that –

- The respondent's challenges to relevant findings of fact made by the learned trial judge are not made out.
- The appellant's challenge to the finding of the learned trial judge that she did not suffer psychiatric injury in consequence of the respondent's distribution (and attempted distribution) of the videotapes is not made out.[91]
- The learned trial judge was correct in concluding that showing the videotapes constituted a breach of confidence.
- The appellant's claim was one for breach of an equitable obligation of confidence.
- In consequence of the breach, the appellant suffered distress – which I take to encompass matters such as emotional upset, loss of self esteem and embarrassment.

132 The remaining question is whether the breach can give rise to entitlement to compensation or damages for distress.

133 No Australian authority was cited at trial or on appeal to support the proposition that, in the context now under discussion, equitable compensation or equitable damages (although text writers and authorities, with varying degrees of emphasis, treat equitable compensation and equitable damages as referring to

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91 Had it been necessary, I would have held that there was material, other than that to which Neave JA refers, which tended to that conclusion.

different things, for sake of convenience I will use the latter term as a synonym for monetary remedies available in equity) can be awarded for mental distress alone. It was submitted at trial, however, and reiterated in this Court, that English authorities support the view that a monetary remedy is available for distress occasioned by breach of the equitable obligation of confidence.

134 The *Judicature Act 1873*[92] was intended to deal with administrative and procedural problems. Its object, it has been said, was not 'the fusion of two systems of principle but of the courts which administer the two systems'.[93] From that starting point, the notion of the 'fusion fallacy'[94] has taken root. Reliant upon its existence, decisions in Australia and overseas have been criticised as instances of the fallacy at work. One area in which decisions have been attributed[95] to the fallacy is in the application of Lord Cairns' Act.[96] See, for instance, the commentary in *Equity Doctrines and Remedies*[97] concerning *Seager v Copydex Ltd*.[98]

135 The equivalent of Lord Cairns' Act in Victoria is now s 38 of the *Supreme Court Act* 1986. In the present case, the applicability, and in such a case the operation of s 38 in respect of the equitable obligation of confidence, could arise in a number of

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92 36 and 37 Vict c.66; subsequently enacted in the legislation of the Australian States. See now, inter alia, *Supreme Court Act* 1986 (Vic), s 29 and Supreme Court Act 1970 (NSW), ss 57-63.

93 *O'Rourke v Hoeven* [1974] 1 NSWLR 622, 634 (Glass JA); and see statements to similar effect collected in the judgment of Heydon JA (as his Honour then was) in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 391-392, [353] ('*Harris*').

94 As formulated, it was criticised by Mason P in his dissenting judgment in *Harris*: 325-328, [132]-[152]. The other, and majority, side of the coin in that case can be found in the judgment of Heydon JA at 391-392, [353]-[354]. Evidently, Gummow J is of like mind with Heydon J about the issue. That is so at least because of his Honour's observations in *Concept Television Productions Pty Ltd v Australian Broadcasting Corporation* (1988) 12 IPR 129, 136. Strictly obiter dicta, they criticised the conclusion of Harris J in this Court in *Talbot v General Television Corporation Pty Ltd* [1980] VR 224, 241 that 'the most obvious, and perhaps the only source, of a power to award' damages for breach of the equitable obligation of confidence was s 62(3) of the *Supreme Court Act* 1958, the predecessor of s 38 of the *Supreme Court Act* 1986. See also his Honour's remarks, again obiter dicta, in *Smith Kline & French Laboratories (Aust) Ltd and others v Secretary, Department of Community Services and Health* (1990) 22 FCR 73, 83.

95 At least, provisionally.

96 21 and 22 Vict. c27.

97 Meagher, Gummow and Lehane's *Equity Doctrines and Remedies* (conveniently, 'MGL') (4th ed, 2002) 2-155, p 61.

98 (1967) RPC 349.

ways.

136 First, there is the question whether it is correct to say that s 38 now represents the only vehicle by which damages – equitable or otherwise – can be recovered for breach of such an obligation. In Victoria, as Neave JA points out, there are two decisions to that effect. It may be said, unless the word 'damages' in s 38, of itself, expands or contracts the monetary remedy which would otherwise have been available for breach of a purely equitable obligation, or unless (as the trial judge held) a plaintiff could not recover monetary relief except if an injunction had been sought,[99] that not much would turn in a practical sense upon the correctness or otherwise of those decisions. Nonetheless, the decisions are there, and I think that they should be followed[100] - even assuming that the Full Court did not have to determine the correctness or otherwise of the decision at first instance upon the particular point in *Talbot v General Television Corporation Pty Ltd*.[101] It was held in the cases to which Neave J has referred that the predecessor of s 38 – s 62(3) of the *Supreme Court Act* 1958 – addressed breaches of purely equitable obligations. It could not sensibly be argued that s 38 – which removed, for reasons unknown, an important ground for reaching a contrary conclusion – has nonetheless produced that contrary result when s 62(3), as has been held, did not do so. Further, the Victorian position cannot be described as eccentric. There exists what the learned authors of *MGL* describe as alarming dicta in the High Court to the same effect.[102]

137 Second, there is then the question whether the appellant must have sought an injunction as well as damages. The trial judge held, as I have said, that the appellant's damages claim failed because she had not sought an injunction. In my opinion, for the reasons given by Neave JA, the latter conclusion was incorrect. I

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99 Or for specific performance; but no such relief was or could have been sought here.

100 I have not ignored the strong criticism by the learned authors of MGL of a conclusion that Lord Cairns' Act had anything to say about matters in the exclusive jurisdiction; nor the obiter dicta remarks by Gummow J in *Concept Television* and *Smith Kline*, cited at n 36. But there is the fact of the Victorian decisions, and there is the present text of s 38.

101 [1980] VR 224, particularly 253 (Lush J).

102 *MGL*, [123]-[105], 854.

would only add that s 38, like s 2 of Lord Cairns' Act, is couched in terms of the Court having jurisdiction to entertain an application for an injunction or specific performance. Its predecessor, s 62(3) of the *Supreme Court Act 1958*, commenced by saying '(i)n all cases in which the Court entertains an application for an injunction …' That language was arguably less clear in its effect.

138 Third, the question arises whether s 38, particularly by its reference to 'damages', has - without more - produced the result that common law concepts of damages are now imported into the range of remedies available for breach of a purely equitable obligation. I consider that it has not done so. It might be different in jurisdictions where a real intermingling of rights and remedies has occurred in reliance upon fusion legislation, but that is not the Australian position. Mason P did not suggest in his scholarly dissenting judgment in *Harris* that the fusion of law and equity had produced such a result. Although his remarks addressed s 57 of the *Supreme Court Act 1970* (NSW), they should yield no different result in the context of s 68 of that Act, which is the NSW equivalent of Lord Cairns' Act. His Honour expressed the opinion that the 'fusion fallacy' -

> . . . treats the permission of the statute to fuse administration as if it were an enacted prohibition against a judge exercising the fused administration from applying doctrines and remedies found historically in one 'system' in a case whose roots may be found in the other 'system.'
>
> Both 'Equity' and 'Common Law' had adequate powers to adopt and adapt concepts from each other's system well before the passing of the *Judicature Act* (UK), and nothing in that legislation limits such powers. They are of the very essence of judicial method which was and is part of the armoury of every judge in every 'common law' jurisdiction.
>
> Neither system consistently and automatically ignored the other before the *Judicature Act* (UK); and there is even less justification for suggesting otherwise since the fusion of the administration of law and equity. I emphasise the words 'consistently and automatically.'[103]

139 In *Talbot*, Marks J rejected a submission that s 62(3) of the *Supreme Court Act 1958* denied monetary relief to a plaintiff who sued on an equitable cause of

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[103] (2003) 56 NSWLR 298, 326 [140]-[141].

action.[104] It had been submitted that 'damages' in that section meant the common law remedy of damages, and that equity did not award damages but only compensation. His Honour concluded that the plaintiff was entitled to 'equitable damages', being (as counsel for the plaintiff had submitted) -

> money compensation which, in the events which have happened, Courts of Equity would award to restore to the plaintiff the value he has lost in the rights those courts recognised as belonging to him.

Both his Honour, and later the Full Court, addressed the question how that entitlement should be assessed in money terms. Young CJ stated the relevant enquiry this way:

> What damage did the [plaintiff] suffer by reason of the unauthorised use of the confidential information?

140 The answer to the question posed by the learned Chief Justice, in a commercial setting, must be different to the proper solution in a case of personal injury attributable to breach of the obligation of confidence. But the point of principal significance is that, in a case of breach of an equitable obligation, both Marks J and the judges in the Full Court treated the reference to 'damages' in s 62(3) of the *Supreme Court Act 1958* as denoting the monetary relief which equity would allow. That approach, in my respectful opinion, was correct on the assumption that s 62(3) applied in such a case.

141 I should next say that, upon the question of the availability of damages for mental distress, the common law would provide no assistance to the appellant even if s 38 was treated as making common law remedies available in a case within the exclusive jurisdiction. With few exceptions, the common law has turned its face against awards of damages for distress.

142 In the event, though it might be said to do no more than state the obvious, it seems to me that if there is a right to (equitable) damages for distress, that right must arise in equity.

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104 [1980] VR 243.

143 I consider that such damages ought be available, both as a matter of principle, and in accordance with authority.

144 As to the former, I have carefully considered the warnings of Spigelman CJ in *Harris* concerning the application of judicial method, historical continuity, and the role of precedent.[105] Though stated in the context of a particular debate, they are of general importance.

145 That said, the respondent breached a purely equitable obligation. In the events which occurred, the appellant had no realistic opportunity of seeking injunctive relief, because breach had largely occurred by the time that the appellant learned of it. Absent monetary relief, the respondent's serious breach of the obligation of confidence, productive of mental distress, would lead nowhere.

146 It can be said that, characteristically, the kinds of cases which attracted the jurisdiction of courts of equity were cases of breach of trust and breach of fiduciary duty, the breach impacting upon property or proprietary rights; and that recognition of relief by way of equitable compensation developed in that context. But that is not to deny the possibility of emergence of another purely equitable cause of action. Indeed, it is recognised that there has been a veritable explosion in causes of action of that kind. Given such emergence, I think it should not be held that equity is incapable of moulding relief appropriate to the circumstances.

147 It might be argued that a right to monetary relief should be denied if the developed basis for the awarding of equitable compensation or damages could not be applied to the emergent cause of action. We were hampered by the circumstance that the respondent appeared unrepresented. Allowing that this created a difficulty, I consider that the most that could be said against the availability of compensation or damages in equity in a case such as the present is that breach resulted in mental distress rather than impacting upon the property or proprietary rights which were the traditionally the areas in which equity intervened.

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105 (2003) 56 NSWLR 298, 304-307, [6]-[26] and 310-312 [45]-[56].

148 Then it might be argued that equitable damages ought not be available for mental distress, even assuming their availability for physical injury or (recognised) psychiatric injury. I would reject such an argument. It is true that the common law has, by and large, set its face against awards of damages for mental distress. But that does not mean that equity must do so. There are, I think, a number of reasons why it should not do so in a case such as the present.

149 First, equity is here dealing not with some careless act, but with intentional conduct in defiance of a good faith obligation of confidence.

150 Second, an anticipated breach would surely have attracted injunctive relief. On any balance of convenience test, the appellant must have succeeded. It would have been readily within contemplation that breach would lead to the appellant suffering at least distress and embarrassment. The breach having occurred, I think it would be anomalous if - predictable distress and embarrassment having occurred - it was now held that no compensation for the same was available.

151 Third, it is a variant of the second consideration, it would be odd if breach of an equitable obligation could attract no remedy when anticipated breach would do so.

152 Fourth, for historic reasons - associated with 'floodgates' arguments, perceived difficulties of proof, and concern (sensible or otherwise) about the ability of civil juries to separate the real from the fictitious - the common law, as I said a little earlier, has generally shied away from permitting damages for distress. But equity, starting with a clean slate, has no reason to do so.

153 Fifth, one area of actions at law in which damages for distress are available is in proceedings for defamation. Defamation impacts upon the victim's reputation, and so may understandably give rise to distress. It seems to me that there is a considerable similarity between such a case and a case like the present - in which the victim's reputation is damaged, and distress ensues, by reason of material disclosed

in breach of confidence - such material being prima facie defamatory.[106] Those circumstances suggests to me that, following its own course, equity would recognise predictable mental distress as proper for an award of equitable damages.

154 I said a little earlier that authority supported the conclusion that damages may be awarded for distress ensuing from breach of the equitable obligation of confidence. That conclusion emerges from the English decisions to which Neave JA refers. It is true that, to an extent, those decisions make assumptions rather than decisions about the availability of such damages. It is also true that particular statutory provisions intruded. But I do not consider that the gist of the authorities is set at nought by such criticisms as can legitimately be made.

155 Then there arise issues concerning what are called, in the common law, aggravated and exemplary damages.

156 Although appellant's counsel submitted in writing that breach of the equitable obligation of confidence should attract exemplary damages, in oral argument he did not much press the matter.[107] He recognised, I should think, that such authority as there is in Australia is opposed to the availability of such damages.

157 The very learned judgments in *Harris*[108] recognise the vigorous debate that has been had both in Australia and overseas concerning the availability or otherwise of exemplary damages in the exclusive jurisdiction. The debate has not been stilled by *Harris*. Dr Spry, in his *Equitable Remedies*,[109] says shortly that it 'does not accord with equitable principle'. It may also be observed that *Harris* considered the availability of exemplary damages in the particular context of breach of fiduciary duty, that the substantive conclusion of Heydon JA was broader than the conclusion reached by Spigelman CJ and that Mason P dissented.[110] In the event, there are

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106 It is not in point that, in an action for defamation, defences might be available.

107 He had accepted at trial that such damages were unavailable. [2004] VSC 113, [171].

108 (2003) 56 NSWLR 298.

109 (7th ed, 2007) 636, n 22.

110 It is also the fact Heydon JA - always accepting the power of his reasons – had earlier been

aspects of the decision in *Harris* which render it somewhat worrying - both as to the principle which it expresses, and the reach of the principle. But I think, there having been no attempt to satisfy this Court that it was plainly wrong,[111] that it ought be followed, notwithstanding that the breach in this case was of a different equitable obligation.

158 Although it has been said that there is an element of the punitive in aggravated compensatory damages, punishment is not their purpose. Rather, they focus upon the effect upon the victim of the manner in which the hurt was inflicted. The English authorities imply, I think, that what would be called aggravated damages in an action at law are to be taken into account in assessing damages for breach of the equitable obligation of confidence. *Harris* does not stand in the way of acceptance of that conclusion. Further, it seems to me to be entirely consistent with the premise that the purpose of equitable damages is compensation a consideration should not be quarantined so as to preclude such damages being truly compensatory.

159 In all, I consider that the appellant should have been awarded equitable damages for mental distress; and that it was permissible to take into account in assessing such damages the manner in which the harm was inflicted by the respondent, insofar as it impacted upon the appellant's feelings.

160 The trial judge would have awarded the appellant $5,000 ordinary compensatory damages and $3,000 aggravated compensatory damages had he considered it possible to make an award of damages for breach of confidence. Neave JA proposes an award of $40,000 including $10,000 aggravated damages upon this cause of action. In my opinion, an award should be made which reflects the impact of the offending conduct upon the appellant's mental state, which recognises

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one of the joint authors of the edition of *MGL* in which the decision at first instance had been roundly criticised, and in which the approach of both the trial judge, and by implication the former President of the New Zealand Court of Appeal, had been criticised in a very personal way.

111 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 81 ALJR 1107, 1140 [135] (Gleeson CJ, Gummow, Callinen, Heydon and Crennan JJ).

the likelihood that the manner in which the harm was inflicted probably had a particular impact upon the appellant's feelings, but which recognises also that the offending conduct occurred over a quite short period of time. The last-mentioned circumstance does not mean, of course, that the appellant's mental distress was necessarily just as short-lived. But the trial judge made some very clear findings - to the effect that the impact upon the appellant of what the respondent did was neither severe nor prolonged. I see no reason to depart from those findings, informed as they were by a long trial in which his Honour had heard the appellant at length. In my view, any award beyond $27,500 – this including an amount of about $7,500 for what would be called aggravated damages in an action at law – would step into the impermissible realm of punishment.

Wilkinson v Downton. Damages for mental distress unaccompanied by physical or psychiatric injury?

161 Maxwell P is of opinion that there is no Australian authority which denies recovery for mental distress in a claim for intentional infliction of harm. In his opinion there is an unanswered question whether the law should develop in that direction, and it should be answered favourably to the appellant.

162 One of the reasons why his Honour considers that the content of the tort should be so developed, as I apprehend it, is that the understanding of mental illness has developed greatly with the passage of years; and that there should be no magic to whether or not a psychiatric label is attached to a person's response to a wrong done to them.

163 Neave JA agrees with Maxwell P that no Australian case 'positively precludes the expansion of the tort to cover cases in which the plaintiff suffered distress, humiliation or other forms of emotional discomfort, rather than physical or psychiatric injury.'[112] In a considerable review of authorities and text writings, she demonstrates, I think, that the present limitation is on one view – but not the only

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[112] Neave JA, [471].

view – anomalous. She concludes that, although it is unnecessary to decide whether the tort should be expanded to cover mental distress, the better course may be for the legislature to determine how the balance should be struck. In the end, she rejects the appellant's claim based on that cause of action.[113]

164 In my opinion, contrary to the conclusion reached by Maxwell P, the Australian authorities to which he refers are predicated upon the plaintiff, if he or she is to succeed, suffering either physical hurt or recognised psychiatric injury. Further, it is not as if the distinction between (recognised) psychiatric injury and 'mere distress' could have been misunderstood by the courts. It is a distinction, whether for reason good or bad, which runs through the civil law. I mentioned a number of the causes of action which require the former, or can alternatively be satisfied by the latter, in *Aldersea and others v Public Transport Corporation*.[114]

165 In the event, with respect for the opinion of Maxwell P, I consider this Court is not free to conclude that something less than (recognised) psychiatric injury is a sufficient harm to establish the tort of intentional infliction of harm. For that reason, I consider that the learned trial judge was correct to reject the appellant's claim founded on that cause of action.

166 I should only add this: I respectfully agree with Maxwell P that in more recent years medicine has apparently advanced far in its understanding, inter alia, of mental illness.[115] But whether the line which has been drawn hitherto between recognised psychiatric injury and distress should be dismantled, and if so, then in respect of what cause or causes of action, is another matter. This Court largely obliterated that distinction, in respect of circumstances going in mitigation of sentence, in *R v Verdins*.[116] Allowing that the context is very different to that which would be involved if *Wilkinson v Downton* harm was extended to mental distress, the

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113 Neave, JA, [476], [478].

114 (2001) 3 VR 499.

115 Whether DSM IV (TR) should be regarded as a helpful arbiter in resolving issues of nomenclature is another matter.

116 (2007) 16 VR 269.

working-out of *Verdins* suggests that the removal of one perceived problem may give rise to others.

A tort of invasion of privacy?

167 The existence of a generalised tort of unjustified invasion of privacy has not been recognised by any superior court of record in Australia. The development of such a tort would require resolution of substantial definitional problems. This, of itself, might contraindicate such a development.[117] It has been suggested that a better approach may be the 'development and adoption of recognised forms of action to meet new situations and circumstances.[118]

168 In the present case, a claim founded in breach of confidence was, as I have concluded, available to the appellant. It conferred upon her an entitlement to equitable compensation. This case, like *Lenah*, is therefore one in which it is unnecessary to consider whether a generalised tort of invasion of privacy should be recognised. It is also an instance of the way in which the law has otherwise developed to address a particular situation. That may provide a good reason why, if a tort of invasion of privacy did come to be recognised, it would not extend to a case of the present kind.

Assaults

169 By her statement of claim the appellant alleged eight assaults.[119] Two of the alleged assaults[120] were statute barred. The other six assaults were the subject of affidavit evidence of the appellant.[121] The respondent did not cross-examine the appellant on her account of the first four of those assaults. The judge found those

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117 *Australian Broadcasting Corporation v Lenah Game Meats Ltd* (2001) 208 CLR 199, 225-226, [41]-[42] (Gleeson CJ).

118 Ibid 249-250, [108]-[110] (Gummow and Hayne JJ).

119 Paragraphs 60-76 of the Statement of Claim.

120 Pleaded by paragraphs 61-64 of the Statement of Claim.

121 Paragraphs 81-93 of her affidavit sworn 26 May 2003.

assaults to be established.[122] The respondent cross-examined the appellant on her account of the fifth and sixth assaults. The judge found the fifth assault not established.[123] He found the sixth assault to be established.[124] In all, he awarded the appellant $4,928. That included property damage referable to the sixth assault of $428. Although, by paragraph E 1 and 2 of her prayer for relief the appellant claimed both aggravated and exemplary damages, his Honour made no specific reference to those claims when assessing damages.

170 By her amended notice of appeal, the appellant relies upon the following grounds, inter alia, in attacking the quantum of damages awarded by his Honour -

> 38. The learned trial Judge was in error in that he failed to give sufficient weight to the effects upon the Appellant of the [first], [second], [third], [fourth] and [sixth] assaults, and he under assessed the damages awarded to the Appellant by reason of such assaults and in any event his assessment was manifestly inadequate.
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> …
>
> 41. Having dismissed the Respondent's claim against the Appellant for damages for assault in respect of the incident at the Camberwell market on 8th December, 1996 set out in paragraph 13 of the Respondent's counter claim as statute barred, the learned trial Judge was in error and misdirected himself in taking the allegations of this assault into account to determine the effects on the Appellant of the injuries suffered by her in the course of the eighth assault, thereby further under assessing the damages to be awarded to the Appellant by reason of such assault.

171 The appellant seeks the following orders in respect of the assaults:

> C. Pursuant to grounds 38-41 … –
>
> C1. Damages including aggravated damages in the sum of $51,000.
>
> C2 Alternatively to C1 above, damages in such sum as to this Honourable Court seem fit.

172 Thus, no complaint is made that the judge should have awarded exemplary damages in respect of the assaults.

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122 [2004] VSC 113, [259] (i), (ii), (iii) and (iv).

123 Ibid [259] (v).

124 Ibid [259] (vi).

173 In counsel's written outline of submissions, the following was contended:

> Although the award of damages was an exercise of the learned trial judge's discretion, and His Honour failed to detail how he calculated the award of damages, it is submitted that in line with the principle in *House v R* this Honourable Court is able to review the exercise of the discretion, and substitute an appropriate award of damages based on the evidence. (Footnote omitted)
>
> It is submitted that the learned trial judge failed to consider the important head of damage for an assault being the injury to feelings, the indignity, mental suffering, disgrace and humiliation that may be caused. For the reasons outlined above under the heading of 'intentional infliction of harm', (which we do not propose to further elaborate on in this outline) the learned trial judge failed to recognise the extent of the emotional injuries caused to the appellant, as highlighted by her evidence, corroborated by the telephone transcripts, and confirmed in the opinion of Professor Mendelson.
>
> The learned trial judge also failed to assess aggravated or exemplary damages, although he found the respondents conduct reprehensible, and intended to cause the appellant harm. On any analysis, the respondent's conduct amounted to 'conscious wrongdoing in contumelious disregard of the [appellant's] rights.' According to the principles in *Whitefield v De Laurant & Co Ltd.* If not for the assault, then it is submitted it most definitely was for the release of the videotape. (Footnote omitted)

174 So there, by contrast with the notice of appeal, and albeit in the course of a submission which addressed other claims also, reference was made to exemplary damages.

175 Neave JA has concluded that each of the individual awards of damages made by the learned trial judge was 'manifestly inadequate'. In tabular form, the awards made by the learned trial judge and the awards proposed by her Honour look like this:

	Trial Judge	**Neave JA**
Assault 1	$1,000	$ 5,000
Assault 2	$ 500	$ 4,000
Assault 3	$1,500	$ 8,000
Assault 4	$ 750	$10,000
Assault 5[125]	$ 750	$10,000

[125] For convenience in comparing our reasons, I have assigned to this assault the number assigned to it by Neave JA.

176 The amounts proposed by Neave JA include, in each instance, an unstated amount by way of aggravated compensatory damages. Her Honour would also allow $13,000 overall for exemplary damages in respect of the first, second, third and fourth assaults.

177 The principles which govern appellate consideration of an award of damages for personal injuries made by a judge sitting without a jury are well known. Winneke P described the situation this way in *CSR Readymix (Australia) Pty Ltd v Payne.*[126]

> The principles by which an appellate court will be guided in an appeal of this nature are not in doubt. Where it is alleged on appeal that a judge's assessment of damages is manifestly excessive an appellate Court, before it interferes, should be satisfied that the judge has acted on a wrong principle, or has misapprehended the facts or, for these or other reasons, can be seen to have made a wholly erroneous estimate of the damages suffered. It is not enough that the appellate court itself might have awarded a different sum: Per Lord Wright, *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at 616-7; *Miller v Jennings* (1954) 92 CLR 190 at 195-6, per Dixon, CJ and Kitto, J. It is apparent from such statements of principle that a trial judge, in assessing damages, is involved in the exercise of a form of discretionary judgment and, as such, that judgment should stand unless the appeal court is clearly satisfied that the judicial function has not been duly performed: *Minchin v Public Curator of Queensland* [1965] ALR 91, per Kitto, J at pp95-6; *Bratovich v Mitchell* [1968] VR 556 at 557-8).
>
> Notwithstanding the principles to which I have adverted, it remains true that an assessment of damages made by a judge is not as inscrutable as an assessment made by a jury: *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362 at 369, per Gibbs, J. Unlike the jury, the trial judge is expected to give reasons for the assessment which he makes and, in a case like this where damages are claimed under several heads, it is usually desirable that the reasons should descend to some degree of particularity in respect of each head of damage.

and

> The imposition of the requirement upon a trial judge to state his reasons for arriving at his assessments for the various components of damage should not, in my view, be permitted to obscure the fact that the assessment of an appropriate sum in respect of a component of damage such as pain and suffering and loss of amenities is more likely to result from the trial judge's observation of an injured plaintiff and his judgment of the effect which the injuries have upon him than is the assessment of an appropriate sum for loss of earnings or earning capacity which is more likely to be derived from the drawing of inferences from facts proved: see, for example, per Lord Wright,

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126 [1998] 2 VR 505, 508-509. See also *Murphy v Mark* [1977] VR 316, 320 (Full Court).

Davies v Powell Duffryn Associated Collienes Ltd, supra, at pp616-7; *Moran v McMahon* (1985) 3 NSWLR 701 at 723 per Priestley, JA and 726-7 per McHugh, JA.

178 This may be added. If a plaintiff's credit was in issue at trial, ordinarily it will be appropriate to remit determination of quantum of damages for re-trial in the event that error has been demonstrated.[127] That is not an inflexible rule, but the problem will always be, in such a case, to determine 'fair compensation between the parties.'[128]

179 A starting point for consideration of the appellant's attack upon the awards of damages, against the background of the principles described, is analysis of the task which confronted his Honour. In my opinion, for the following reasons, that task was extremely difficult.

180 First, the judge had to make findings about events which had occurred long ago.

181 Second, the burden of proof rested upon a plaintiff about whose credit the judge could scarcely have made more adverse findings – findings made in a trial which has occupied 26 days, for eight of which the plaintiff had been under cross-examination.

182 Third, the burden of proof rested upon a plaintiff whose evidence about the pertinent incidents was almost entirely uncorroborated. There was, particularly, no relevant medical evidence.

183 Fourth, the only damages claimed were for pain and suffering. That element of damages is the least capable of explanation by a judge, because it will turn upon matters of impression, most particularly in the absence of objective confirmation of injury or of contemporaneous evidence of complaint of injury.

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127 See, for example, *Vandeloo v Waltons Ltd* [1976] VR 77, 87 (Gowans J); and compare *Murphy v Mark* [1977] VR 316, 321.

128 *Lee Transport Co Ltd v Watson* (1940) 64 CLR 1, 14 (Dixon J).

184 Fifth, the damages claimed were, in all but one instance, damages for physical hurt and mental upset – the last-mentioned being variously described in the statement of claim as 'stress', 'nervous shock', 'fear for … physical safety', 'emotional upset', 'emotional distress' and 'shock';[129] and being variously described in the appellant's affidavit sworn 26 May 2003 as shock, emotional upset and fear for safety; shock, distress and fear for safety; shock, severe emotional distress and fear for safety: shock and continuing fear for safety.[130]

185 Sixth, the judge rejected the appellant's evidence that she suffered any psychological or psychiatric injury arising out of the stress of her becoming aware that the respondent was handing around the videotapes of their sexual activities. He rather held that she was a strong-minded woman who had exaggerated her (emotional) response not only to the videotapes incident, but also to the assaults. He said –

> I approach her evidence as to the effect on her of the threats, distribution, and showing the tape with a degree of reservation. I have considered the tapes of the conversations had around this time over the telephone with the defendant. I have observed the video of the attack upon the defendant at the market by the plaintiff and I have also observed the plaintiff in the witness box and in the Court. She is a determined woman who is not over sensitive. Indeed her complaints about the assaults are exaggerated.[131]

He further rejected the evidence of Professor Mendelson, psychiatrist, who had opined, after interviewing the appellant in October 2002, that she was suffering from

> . . . a clinically significant anxiety disorder with indications of autonomic nervous system hyper arousal which, he was of the view, was developed as a consequence of the emotional abuse and physical violence to which she had been exposed during her relationship with the defendant.[132]

186 I turn to the findings which his Honour made. They were as follows:

(i) On or about 29 April 1992 an assault at Orrong Crescent.

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129 See the particulars to paragraphs [66], [68], [70], [72] and [76] of the statement of claim.

130 See [83], [85], [88] and [93].

131 [2004] VSC 113, [279].

132 Ibid [280].

I find that the defendant struck the plaintiff with a metal framed kitchen chair on the right arm and her right shoulder. Police were called. I am satisfied that the assault occurred. The injuries were bruising and lacerations to the lower right arm and some restricted painful movement of right shoulder. The plaintiff said that she suffered the effects for about a month. It is difficult to know whether that is true. However she was not cross-examined on her evidence. I am prepared to accept her evidence on the effect of the assault. I assess the damages at $1,000. No medical treatment was sought. The police were called and the Jewish welfare organisation became involved. Whilst the injuries were not serious, I am satisfied that they were not minor.

(ii) In or about August 1992 at Glenhuntly Primary School.

I find that the defendant and the plaintiff were sitting in a car outside Glenhuntly Primary School. The defendant struck the plaintiff with a clenched fist to her mouth. She suffered a deep cut inside her mouth and was severely bruised and had a swollen lip for a period in excess of one week. I find the assault proven. Again I note that the plaintiff did not seek any medical treatment. I accept that she had bruising and discomfort for about a week. I assess the amount of damages at $500.

(iii) In or about 1992 at Orrong Crescent.

The plaintiff is unable to give a date in relation to this assault but I am satisfied that the defendant did assault her by hitting her with his belt, dragging her onto a sofa and striking her in the face with a clenched fist. She suffered bruising to the lower part of the frontal bone of her head, just near the eyebrows and this lasted for about ten days. She also had severe bruising to her eyes which lasted for about ten days and extensive bruising to the jaw. She had painful movement of the jaw for about two or three weeks and her ears rang and buzzed for about two months. This is the incident that [her daughter] observed. The plaintiff also suffered from headaches which persisted for about two months, and dizziness. She lost her appetite and was shocked and remained distressed.

I am satisfied that the assault took place. The effects of the assault were felt for some substantial period of time and I assess the damages at $1,500.

(iv) In or about June 1993 at Orrong Crescent.

An argument occurred, the defendant threatened to kill the plaintiff, he threw a chair at her which struck the plaintiff in the right arm and breast, causing her to fall to the floor. He made threats and the police later attended. The police report was placed in evidence by the defendant. The plaintiff suffered bruising to the right arm and upper right breast which lasted for about a week and pain in the right breast for about two weeks and painful movement in the right shoulder for about a month. She suffered shock and severe emotional distress.

I am satisfied the assault took place. I assess the damages at $750.

. . .

(vi) On or about 10 November 1996 at Port Melbourne.

> The defendant admitted that there was a confrontation between the parties but he said that the plaintiff suffered injuries because he grabbed her clothing at the front of her neck to restrain her and that she, in the course of struggling, suffered injury. She states that on 10 November 1996 they were talking outside her flat in Port Melbourne, that he became enraged and took hold of her with his left hand, pulled her body down towards his knee and proceeded to strike her twice with a clenched fist to the left side of her face. In so doing he tore a gold chain from her neck, severely scratching and bruising her. The plaintiff reported the matter to the police that evening. She made a statement which is consistent with her evidence. But more importantly the defendant was charged with the assault and on 14 April 1998 he pleaded guilty to the charge at the Magistrates' Court. He informed the Court that the plea of guilty was a commercial one because he was facing so many charges that it was far better to plead and finish the whole saga and avoid expense rather than fight the case. A plea of guilty by a person charged with a criminal offence is an admission of all the essential elements that comprise the offence. I am satisfied that the plaintiff was assaulted by the defendant on that occasion. I accept her evidence that she suffered a severely bruised left cheek, a severely bruised and scratched neck and had a buzzing in her left ear and discharge from the ear and headaches for about a month.
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> In assessing damages I take into account that she did not seek medical treatment. I have seen photographs of the injuries. I also take into account that the plaintiff suffered from a skin condition which had the effect of making her injuries look more prominent but this does not assist the defendant with respect to the appearance of the injuries which the plaintiff had to endure. Further I note that despite obtaining an interim intervention order on 12 November 1996, allegedly because she was in fear of the defendant, the plaintiff had sexual intercourse with the defendant on 19 November 1996 during the day, on 21 November 1996 and on the afternoon of 22 November 1996 after she obtained the permanent intervention order. In addition I note that on 8 December 1996 at the Camberwell Market the plaintiff approached the defendant with an iron bar and struck him a number of times whilst he was filming the plaintiff and her mother. I take those matters into account in determining the effect of the injuries upon the plaintiff. I assess the damages at $750 taking into account the injuries and their effects upon the plaintiff. The plaintiff also claims a sum of $428 for damage to a gold necklace. I have grave doubts about the value of the necklace. When asked about it she was vague as to its value. Nevertheless I am prepared on the balance of probabilities to assess the damage to the necklace at a value of $428. Accordingly she is entitled to recover $1,178 as a result of that assault.

187 It is my understanding that Neave JA considers the various individual awards

were manifestly inadequate, at least in part, because –

- In the case of the **first assault**, the appellant's particularised loss and damage included 'stress, nervous shock and fear for [her] own safety'. Account should be taken of such presumed consequences despite the appellant having not given any pertinent evidence.

- In the case of the **second assault**, the appellant had suffered facial injuries which would have been difficult to conceal. She had given unchallenged evidence that she had suffered 'severe pain and shock, and emotional upset, and [fear] for [her] own safety' caused by the respondent's act.[133] Her evidence had been 'entirely plausible'.[134] The judge had not indicated that he was rejecting that part of her evidence. He had simply not mentioned the matter.[135]

- In the case of the **third assault**, the attack had 'continued for about half a minute'. The incident had been one of 'repeated striking'. The physical consequences had been more serious and more longstanding than in the case of either of the first two assaults.[136] The judge had accepted that the appellant 'lost her appetite and was shocked and remained distressed'. The fact that she 'had been assaulted on two previous occasions would have increased her fear for her physical safety'. The presence of her daughter 'would have contributed to the indignity and humiliation suffered as a result of this assault'.[137]

- In the case of the **fourth assault**, there had been a threat to kill, a physical attack which was 'very serious', and then a further threat which was 'quite shocking', and 'no doubt intended to be taken seriously'. The judge had

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133 Neave JA, [484].

134 Neave JA, [486].

135 Neave JA, [484].

136 Neave JA, [488].

137 Neave JA, [488].

not mentioned the appellant's unchallenged evidence that she feared for her physical safety.[138]

- In the case of the **fifth assault**, the judge had not referred to the appellant's evidence of having suffered 'shock and continuing fear for [her] safety' – evidence which should be accepted.[139] The judge had been wrong to consider that the failure of the appellant to seek medical treatment, the fact that the appellant soon re-engaged in sexual activities with the respondent, and the fact that not long thereafter the appellant assaulted the respondent with an iron bar were matters relevant to assessing the injuries suffered by the appellant in the assault on 10 November 1996.[140]

188 I regret very much that I cannot agree with aspects of that analysis. So, as I see it, such analysis does not provide an explanation why the awards were, as Neave JA has concluded, manifestly inadequate. But that does not mean, see below, that the learned trial judge did not err in approach to, and assessment of, damages.

189 My disagreement with the analysis of Neave JA rests upon these considerations First, the appellant did not depose (contrary to the allegation made in the statement of claim) that she suffered any form of mental distress in consequence of the first assault.

190 Second, it appears to me that what his Honour did was to state what evidence he was prepared to accept in respect of each of the assaults. He was obviously sceptical about the appellant's evidence generally - perhaps particularly, in the present context, about her claims of mental upset and fear. In some instances, his reasons show, he was prepared to accept that she had suffered mental upset. He did so in the case of the third and fourth assaults, which seem to me to have been the most serious. Where he made no reference to such a consequence, I consider that it

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138 Neave JA, [490]-[491].

139 Neave JA, [493].

140 Neave JA, [494]-[495].

indicates not that he did not consider it, but that he was not prepared to accept the appellant's evidence – if any – about the matter. It is also significant, I think, that in no case, as I understand his conclusions, did he accept that the appellant had been put in fear.

191 Third, to opine that the appellant gave 'entirely plausible' evidence of mental distress of different kinds in consequence of the assaults could be a tenable conclusion if nothing was known about the appellant which might give the lie to it. But here the judge gave book, line and verse, at various points in his judgment, why he was very reluctant to accept any evidence which the appellant gave; and he specifically stated his conclusion that her complaints about the assaults were exaggerated. These were assessments made by an extremely experienced common law judge after a long trial in which credibility loomed large. I do not consider that a basis has been demonstrated for departing from them.

192 Fourth, for a number of reasons I consider that there are problems with the conclusion of Neave JA - pertaining to the third assault - that the appellant, having been twice assaulted before, would have had increased fear for her physical safety. It seems not to have been a circumstance to which the appellant deposed. It was not a circumstance called in aid by appellant's counsel. The respondent, in the event, had no opportunity to address it. In terms it relates to anticipation of assault, and not the consequences of assault. If somehow– assault having eventuated – it could be a circumstance of aggravation, the way in which it could do so is not elucidated. Finally, the circumstance is viewed from the standpoint of the appellant, not the respondent. So viewed, it would not seem be relevant to exemplary damages.

193 Fifth, I cannot accept that the threat of which the appellant gave evidence in connection with the fourth assault - that the respondent said he would cut her to pieces and feed her 'meat' to the dogs so that her parents would not find her when they arrived - was of the character perceived by Neave JA. I should think that it was no more than a wild threat made in the course of an altercation between two excitable people. There is no difficulty in concluding that both of them were

excitable, and given to a variety of anti-social behaviours which many in the community would find unacceptable.

194 Sixth, in my view the appellant's failure to seek medical attention in respect of injury allegedly sustained on 10 November 1996 – or on the occasion of any of the other proved assaults – was relevant to an assessment of the severity of injury sustained.

195 Seventh, in my view it was relevant that the appellant obtained an interim intervention order against the appellant on 12 November 1996, and that she then resumed sexual activities with him seven days later. What the judge treated as being of some significance was that the appellant obtained the interim order by alleging that she was in fear of the respondent. What he also regarded as being of some significance was that she obtained a final order some ten days later – apparently on the same basis - and then engaged in sexual activities with the respondent that same day.

196 Eighth, the fact that the appellant assaulted the respondent with an iron bar in a public place on 8 December 2006 was in my opinion relevant – as the judge held it to be – to an assessment of injuries sustained by the appellant in the assault on 10 November 2006. After all, the appellant deposed that following that assault she suffered, inter alia, from headaches for about a month, and from continuing fear for her physical safety.

197 Ninth, absent direct evidence – and the appellant was scarcely chary in raising allegations against the respondent – it appears to me to be speculative to conclude that the appellant was likely to have been disturbed by the fact that her daughter saw her being assaulted.

198 In the event, subject to consideration of the questions of aggravated and exemplary damages, I approach consideration of the assessments made by the learned trial judge having regard to the very difficult task which, for reasons I have attempted to explain, confronted his Honour; and by considering the assessments as

the basis of the facts which his Honour found to be established.

199 As I have already mentioned, the appellant laid claim to aggravated damages for the assaults. But it was not a matter which the learned trial judge mentioned discretely when assessing damages. Again as I have mentioned, no complaint is made in the notice of appeal about the judge's failure to award exemplary damages. But counsel submitted that exemplary damages ought to have been awarded.

200 There is a difference in principle, but one which may become difficult of application, between aggravated compensatory damages and exemplary damages. The dictum in *Lamb v Cotogno*[141] to which Neave JA refers[142] is clear in language, but not necessarily so in its operation. I discussed the relevant principles, in a passage approved by this Court,[143] in *McFadzean & Others v Construction Forestry Mining & Energy Union & Others*,[144] as follows:

> 103. Sixth, in *Lamb v Cotogno*, the High Court, after referring to what had been said by Lord Davlin in *Rookes v Barnard*, observed that –
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> > 'aggravated damages, in contrast to exemplary damages, are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like.' Exemplary damages, on the other hand, go beyond compensation and are awarded 'as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.'
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> 104. The Court said also that '… in some cases it may be difficult to differentiate between aggravated and exemplary damages. That is evidently so, although as a matter of legal theory aggravated damages look at events from the standpoint of the plaintiff, whilst exemplary damages focus particularly upon the quality of the defendant's conduct.'
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> 105. It seems to me, with respect, that the difficulty of which the High Court spoke was well described by Winneke P in *De Reus v Gray* where his Honour said –
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> > 'In contrast to exemplary damages, aggravated damages are compensatory in nature, and are "awarded for injury to the

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141 (1987) 164 CLR 1, 8.

142 Neave, JA [498].

143 *McFadzean & Others v CFMEU & Others* [2007] VSCA 289, [141].

144 [2004] VSC 289 [103]-[114]. Footnotes omitted.

plaintiff's feelings caused by insult, humiliation and the like." Because they are compensatory in nature attention is therefore focused on the harm to the plaintiff caused by the manner in which the harm has been inflicted. However, because such damages, albeit awarded to compensate the plaintiff, are to be measured by the manner in which the wrong was done – and indeed by the defendant's attitude down to the time of trial – the distinction between aggravated and exemplary damages has often been characterised by looseness of expression to the point where it is, perhaps, more easily conceptualized then described. Indeed, it is because aggravated damages are awarded for the increased hurt to the plaintiff caused by the manner in which the defendant has committed the wrong that Windeyer J was constrained to acknowledge in *Uren v John Fairfax & Sons Pty Ltd* that there is an element of the punitive in aggravated damages. This is particularly so in defamation cases where the extent of the defendant's malice is relevant to an award of aggravated compensatory damages. As McHugh J pointed out in *Carson v John Fairfax & Sons Ltd*:

> "To say that no element of punishment enters into the assessment of aggravated compensatory damages and that the effect of such an award is merely to compensate the plaintiff for the increased harm which that person suffers is to resort to fiction in many cases."'

106. Seventh, the difficulty of which the High Court and Winneke P spoke is not, I think, limited to defamation cases. According to Batt J in *Private Parking Services (Vic) Pty Ltd and ors v Huggard*, a case of detinue and conversion, the element of punishment which lay within 'a combined award of general and aggravated damages', needed to be considered when reviewing an award of exemplary damages.

107. Eighth, the approach commended in *Private Parking* is compatible with principles later expounded in *Backwell v AAA* concerning exemplary damages. There the Court of Appeal concluded that, in a jury trial, the jury should be instructed to display restraint or moderation in relation to an award of such damages. No doubt the same approach should be applied by a judge sitting alone.

108. Further in *Backwell*, the Court held that the law was as described by Lord Devlin in *Rookes v Barnard* to this extent:

> 'a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum.'

109. In the working out of that approach, as Ormiston JA said, much will depend upon the nature and circumstances of the particular case. It might be more readily concluded, always depending upon the particular case, that compensatory damages will be adequate

punishment in cases where compensatory damages are at large, a fortiori where an award is made of aggravated compensatory damages.

110. Ninth, although in proposition 6 I briefly referred to the circumstances which may call for an award of exemplary damages, a little more should be said in that connection. The leading contemporary authorities are *Lamb* and *Gray v Motor Accident Commission.*

111. In *Lamb*, the High Court identified punishment and deterrence as relevant objects. As to the punitive aspect, their Honours referred to what had been said by Brennan J in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd:*

> 'As an award of exemplary damages is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again, the considerations that enter into the assessment of exemplary damages are quite different from the considerations that govern the assessment of compensatory damages. There is no necessary proportionality between the assessment of the two categories.'

As to the deterrent aspect, their Honours said that

> 'the deterrence which is intended extends beyond the actual wrongdoer and the exact nature of his wrongdoing . It is an aspect of exemplary damages that they serve to assuage any urge for revenge felt by victims and to discourage any temptation to engage in self-help likely to endanger the peace.'

They said also that

> 'So far as the object of deterrence is concerned, not only does it extend beyond the defendant himself to other like-minded persons, but it also extends generally to conduct of the same reprehensible kind.'

112. *Gray* raised the issue of exemplary damages in a particular context – that is, the particular significance of the imposition of a substantial criminal punishment for conduct which was at the heart of a civil proceeding in which exemplary damages were claimed. In that connection, the majority held that there was no availability of exemplary damages. Kirby and Callinan JJ, to the contrary, regarded criminal punishment as simply a factor going to the exercise of a discretion whether to award exemplary damages. There was, however, discussion in *Gray* of exemplary damages generally. In that connection it was affirmed, in the joint judgment, that the phrase 'conscious wrongdoing in contumelious disregard of another's rights' describes at least the greater part of the relevant field. Whilst their Honours were somewhat critical of the imprecision of authorities which say that there is a discretion to award exemplary damages, they did not deny that a decision to award exemplary damages, and their quantification, involves – except where there is no room for discretion, as in the case there at hand – the exercise of a discretion.

113. Tenth, the sense of the word 'contumelious' in the context of the phrase 'contumelious disregard of another's rights', was considered by the Court of Appeal in *State of Victoria v Horvath and ors*. The Court said:

> 'Contumelious' is not a word which enjoys wide currency in modern society but, when used in the context in which the law uses it, is calculated to describe conduct which is disgraceful, humiliating or contemptuous of the rights of others.'

I will act upon that understanding if and insofar as it is necessary to consider exemplary damages in this proceeding.

114. Eleventh, in deciding whether aggravated damages should be awarded, and if so their quantum, an estimate must be made in each case whether the plaintiff suffered, at the defendant's hands, injury to his or her feelings – by insult, humiliation or the like. That must be so as a matter of principle. McDonald J was speaking, I think, of 'ordinary' compensatory damages for false imprisonment when he said in *Myer Stores* that:

> 'In assessing the indignity, mental suffering, disgrace and humiliation suffered by the plaintiff in consequence of being falsely imprisoned in the circumstances referred to it is appropriate to have regard to the assessment by the trial judge of [the plaintiff].'

But it is an observation that, in my opinion, equally applies to consideration of aggravated compensatory damages.

201 Focusing for the moment upon aggravated damages, the learned judge made no mention of such damages when first outlining the appellant's claim in respect of the assaults.[145] By contrast, when first referring to the causes of action for breach of confidence, etc, he referred to claims for 'compensatory, aggravated and exemplary damages'.[146] The same dichotomy appears later in his judgment.[147] The only hint that his Honour might have considered the possibility that aggravated damages should be awarded for the assaults is in this passage:

> In determining the amount of damages in respect of any cause of action that has been established, I emphasise that the damages are compensatory. The damages are to compensate the plaintiff for any injury suffered, pain and suffering and loss of enjoyment of life, together with any distress, indignity and humiliation. There is no element of punishment in the assessment of damages. The gravity of the assault, the severity of the injuries and the

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145 [2004] VSC 113 [16].

146 Ibid [18].

147 Ibid. Compare [146] and [285] with [259] and [260].

period of suffering are all relevant to the assessment.[148]

202 The reference to 'distress, indignity and humiliation' could be a reference to the appellant's response to the manner of infliction of the wrongs upon her; and so reflect his Honour's awareness that the appellant had raised a claim to aggravated damages. But I doubt that this is how the words should be read – particularly in light of his Honour's observation that '(t)here is no element of punishment in the assessment of damages'. It has been recognised that there is 'an element of the punitive' in aggravated damages.

203 In my opinion, for reasons which I mention later, aggravated damages ought to have been awarded in respect of each of the established assaults. But as I see it, his Honour did not bring that consideration to account. For that reason, I should say that he erred in principle.

204 Subject to his Honour not addressing the question of exemplary damages – and it is not clear from the material before this Court why he did not do so - I can discern no other specific error by the learned judge which was possibly productive of an inadequate assessment of damages.

205 The failure of the learned trial judge to consider and award aggravated compensatory damages is enough, in my opinion, to require that his Honour's assessments be set aside, and that damages be re-assessed. But in case that was not so, I should consider whether, having made proper allowance for the difficulty of his task, his Honour's assessment of damages in respect of any of the assaults was a 'wholly erroneous' estimate. None of the awards were necessarily of that character only because his Honour did not allow aggravated compensatory damages. It is theoretically possible that the awards were respectively sufficient to allow for such damages.

206 Although I have been unable to accept some of the reasoning of Neave JA leading to her conclusion that each award was a 'wholly erroneous estimate', I

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148 Ibid [259].

respectfully agree with her conclusion. Allowing for aggravated compensatory damages, I consider that the assessments were far too low, variably by a factor of between three and nine.

207 In so concluding, I have synthesised my experience of the assessment of damages, as counsel and as judge, in this State and interstate, over a period of more than 40 years. I think, with respect to Neave JA, that only a very limited amount is to be gained by considering damages awarded in a very few cases of assault 'occurring in a domestic context'. That is so for two reasons.

208 First, every case is unique. In my view, the damages appropriate to a particular assault in a domestic context should be assessed having regard to all the circumstances established by the evidence in that case. There is no occasion to take a starting-point that there is a particular sub-class of assaults – assaults in a domestic context - which should be segregated out from other assaults, and then treated differently. In my opinion, in resolving what amount of damages should be awarded for a particular assault in a domestic setting, it does not advance the situation to say that all domestic assaults are serious. However true that statement may be, it says nothing about the effects of the assault which are to be compensated.

209 Second, the awards identified by Neave JA[149] are only three in number, and none of them is recent.[150] The awards to which her Honour refers, in my opinion, are of limited usefulness. Brief reference to the circumstances of each of them shows why that is so. In *Johnstone v Stewart*,[151] the plaintiff suffered significant injuries to jaw, which carried a slight risk of grave future trouble, when her home was invaded by the defendant and a private enquiry agent in search of proof of adultery. The circumstances called for significant aggravated and exemplary damages, and it is clear that Bray CJ made such allowance. He said that he would only have awarded

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149 Neave JA, Footnote 507.

150 It appears that there are few reported cases of awards of damages for assault in a domestic setting. That is unlikely to be because there are no such cases, but rather because they are dealt with by statutory compensation schemes, or by lower courts.

151 (1968) SASR 142.

$1400 had the plaintiff's injuries been caused in a motor vehicle accident. In *Marsh*,[152] the husband assaulted his wife by striking her to the face a number of times. She suffered extensive injury to her cheeks, lips, nose, right side of the head and ear, and chest, together with multiple abrasions to her hands. She sought medical attention. The judge accepted – though not without some reservation – the submission of her counsel that ordinary compensatory damages should assess at $2000. To that he added aggravated and exemplary damages. He did not address the question of moderation. In *Kennon*,[153] the Full court of the Family Court held, relevantly, that the award of damages was 'within a legitimate range'. That is, it applied an appellate test. It is notable that, in the course of their joint reasons, Fogarty and Lindenmayer JJ said this:

> There is not, we think, any legitimate basis for concluding that the Family Court is uniquely suited to the adjudication of domestic violence damages claims. Its daily work brings it into contact in a variety of ways with domestic violence but the same may be said of the magistrates' Courts and District Courts of the States which have the additional advantage of being more familiar with claims for damages. It is obviously inappropriate to attempt to compare the suitability of different courts to deal with domestic violence claims but we think it is legitimate to make the point that the Family Court cannot be said to be so uniquely attuned to the adjudication of these cases that that is a basis for preferring this Court and for offsetting the circumstance that the State courts are the 'natural' tribunals for the adjudication of common law claims.

This suggests, I think, that one should be careful about making too much of assessments of damages by the Family Court in that era.

210 Notwithstanding the reluctance of this Court to re-assess damages when a credit issue is present, I consider that the Court should re-assess in this case. It should do so by keeping in mind the judge's assessment of the creditworthiness of the appellant and by acting upon his Honour's findings in each instance as to injury sustained. It would be quite unsatisfactory, unless it was obligatory, to remit any part of this proceeding for retrial. Its history shows why that is so.

211 Keeping firmly in mind the need to determine fair compensation between the

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152 (1993) 17 Fam LR 289.

153 (1997) 139 FLR 118, 127.

parties, I would re-assess damages as follows:

- Assault 1 $3,500
- Assault 2 $2,000
- Assault 3 $8,500
- Assault 4 $7,000
- Assault 5 $5,000

212 Each of the assaults was committed by one domestic partner upon another. Some were committed in the family home, which should have been a place of safety. Several others were committed in public places. The appellant, I am prepared to infer, was likely to have been affected by a feeling of humiliation when struck by an apparent companion in such circumstances. In all, the circumstances were such that the manner of inflicting the assaults was likely to have been the more keenly felt by the appellant, albeit that, as the learned judge found, she was not a person who was over sensitive. The circumstances were thus such as to justify an award, in each instance, of aggravated compensatory damages. I have made an allowance of that kind in each case. It is included in the amounts which I set out above. I allow some differences in the extent of likely hurt to the appellant's feelings 'caused by insult, humiliation and the like' from one assault to another. For that reason, aggravated compensatory damages represent 10% of the amount which I would award for assault 1, 20% of the amounts which I propose for assaults 2 and 4, and 25% of the damages proposed in respect of assaults 3 and 5.

213 I turn to the question of exemplary damages. There is a serious question whether the Court should consider the appellant's possible entitlement to such damages. The learned trial judge said nothing about them in the context of the assault claims. That might indicate that they were not pressed at trial. Further, nothing was said about such damages, in the present context, by the notice of appeal. The most that can be said is that counsel's submissions in this Court did refer to them. Again, the respondent appeared unrepresented. A question of fairness

potentially arises.

214 Not without doubt, I have concluded that the appellant should be permitted to contend that exemplary damages ought to have been awarded. A claim for such damages was alive on the pleadings, the evidence addressed the issue, and the matter was addressed by appellant's counsel in this Court.

215 Allowing that compensatory damages, perhaps particularly aggravated damages, do have a punitive effect, the question is still whether, if the circumstances would otherwise justify an award of exemplary damages, an award should not be made because the defendant has already been sufficiently punished.

216 In the present case, I consider that the circumstances in which the assaults were inflicted, and the nature of the assaults, involved disgraceful conduct by the respondent which prima facie merited an award of exemplary damages.

217 I further consider that the awards of compensatory damages, including aggravated damages, which I propose would not of themselves sufficiently express condemnation of the respondent's conduct.

218 With respect to the fifth assault, it seems that a criminal prosecution was commenced. Further, the appellant obtained an interim intervention order against the respondent on 12 November 1996, and a final order on 22 November. It was apparently founded upon her allegation that she was in fear of the respondent because he had assaulted her. Later on, charges of assault and for breach of the intervention order were pursued. The appellant spent more than a month on remand before the matters came to Court. In the Magistrates' Court he was convicted and fined for the assault; and ordered to be imprisoned for four months for the breach of intervention order. On appeal to the County Court, the fine for the assault was confirmed; and a fine was imposed for breach of the intervention order.

219 In the event, what was said by the majority in *Gray v Motor Accidents*

Commission[154] applies in respect of the criminal proceeding arising out of the assault. Further, although the prosecution for breach of the intervention order would not seem to squarely fall within *Gray*, I think that the order and its sequelae may and should also be brought to account in deciding whether the appellant has been sufficiently punished for his disgraceful conduct on 10 November 1996.

220 It follows that I would order the respondent to pay exemplary damages to the appellant in respect of assaults numbered 1-4, but not in respect of assault numbered 6.

221 Bearing in mind the various principles which I have identified, not least that there is no necessary proportionality between compensatory and exemplary damages, and that consideration must be given to restraint and moderation when awarding exemplary damages in order that the total amount of damages awarded will adequately but not excessively punish the wrongdoer, I would allow exemplary damages as follows:

- Assault 1 $1,500
- Assault 2 $1,000
- Assault 3 $5,000
- Assault 4 $4,000

222 For completeness, I would add this: the awards of exemplary damages which I propose do not greatly differ from those proposed by Neave JA. But it is clear, I think, that the amounts of compensatory damages which her Honour proposes must include very substantial amounts by way of aggravated compensatory damages. Her Honour has concluded that the amounts of compensatory damages (ordinary and aggravated) which she proposes do not stand

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154 (1988) 196 CLR 1.

in the way of awards of exemplary damages.[155] For my part, awards of compensatory damages – including significant amounts for aggravated damages – on the scale which her Honour proposes would leave no room for awards of exemplary damages.

Orders

223 I would allow the appeal in order to make an award of equitable damages upon the breach of confidence cause of action and so as to increase the awards of damages for the assaults.

NEAVE JA:

Background

224 The appellant, Ms Giller, lived with the respondent, Mr Procopets, in a de facto relationship from 13 March 1990 until 6 July 1993. They had twin sons. After the couple ceased to live together, Ms Giller visited Mr Procopets with the two boys and stayed overnight from time to time, and Mr Procopets assisted with the children. Their sexual relationship continued until December 1996.

225 After the relationship ended, Mr Procopets sought residence orders for the children in the Family Court and Ms Giller claimed an interest in Mr Procopets' property. Following the decision in *Re Wakim*; *ex parte McNally*,[156] the Family Court matters were discontinued. Ms Giller began proceedings against Mr Procopets in the Supreme Court on 3 December 1999.

226 Ms Giller sought:

- an interest in the rear unit of 22 Orrong Crescent, the property which she had formerly occupied with Mr Procopets, either under a constructive trust or under Part IX of the *Property Law Act*

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155 *Backwell v AAA* [1997] 1 VR 182

156 (1999) 198 CLR 511.

1958 [157] ('the Part IX claim');[158]

- damages for detinue and conversion, relating to chattels allegedly retained by Mr Procopets;
- damages for breach of confidence, intentional infliction of mental harm and/or invasion of privacy, relating to a video depicting sexual activity between Ms Giller and Mr Procopets, which Mr Procopets was alleged to have shown, or threatened to show, to others ('the videotape claims'); and
- damages for assaults allegedly perpetrated by Mr Procopets during their relationship.

227 After a trial lasting some 25 days, the learned trial judge dismissed Ms Giller's claims to an interest in Mr Procopets' property. He ordered removal of caveats lodged by her in relation to the Orrong Crescent property and another property at 37 Otira Road, Caulfield North, owned by Mr Procopets. His Honour dismissed all of the videotape claims, holding that Ms Giller was not entitled to damages for breach of confidence, breach of privacy or the tort of intentionally causing mental harm. He found that five of the six alleged assaults had occurred, and awarded Ms Giller $4,928 in damages for these assaults. Ms Giller's claim in detinue and conversion was dismissed.[159]

228 Ms Giller now appeals against the dismissal of her Part IX claim and of the videotape claims. She also contends that the damages awarded for the assaults were manifestly inadequate and, further, that Mr Procopets should have been ordered to pay her costs for the four days in which he cross-examined her.

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157 Hereafter referred to as 'the Act'.

158 On 15 April 2008, the *Relationships Act 2008* received royal assent. The *Relationships Act 2008*, amongst other things, repeals and replaces in similar but not identical form a number of the provisions currently contained in Part IX of the Act (see eg *Relationships Act 2008*, ss 43 and 45) but also requires the Court to take account of a broader range of factors. It also covers a much broader range of relationships. The *Relationships Act 2008* will commence on a day to be proclaimed or if it does not commence by 1 December 2008, on that date.

159 *Giller v Procopets* [2004] VSC 113, [301] ('Reasons'). Mr Procopets' claim for damages caused by the lodging of the caveat was adjourned to a date to be fixed.

Summary of Conclusions

229 For reasons which follow, I would allow the appeal. I would uphold the Part IX claim, the action for breach of confidence arising out of the showing of the videotape, and the appeal relating to the inadequacy of the award of damages for assault. My conclusions may be summarised as follows.

230 On the Part IX claim, I have concluded that the learned trial judge erred –

- in holding that post-separation contributions by Ms Giller as homemaker and parent were excluded from consideration under s 285(1)(b) of the Act;
- in holding that the global approach to assessing contributions was not appropriate under the Act and only an 'asset by asset' approach was open; and
- by failing to take account, in assessing Ms Giller's homemaker and parent contributions, of the effect on her of the assaults which the judge found Mr Procopets had committed.

231 I have concluded, further, that an order should be made under s 282(2) of the Act extending the time within which Ms Giller can bring her application under Part IX. I have concluded that, having regard to the respective financial and non-financial contributions, it would be just and equitable for there to be a lump sum payment of $45,000 by Mr Procopets to Ms Giller in adjustment of their property interests.

232 On the videotape claims, I have concluded that the learned judge erred –

- in holding that, because Ms Giller had not sought an injunction against Mr Procopets, she was not entitled to damages under s 38 of the *Supreme Court Act 1986*; and
- in holding that Australian law did not permit an award of damages for

breach of confidence for mental distress falling short of psychiatric injury.

233 I have concluded that Ms Giller should be awarded damages for breach of confidence, both as equitable compensation and under *Lord Cairns' Act*, and for intentional infliction of harm. I have further concluded that, because Mr Procopets breached his duty of confidence with the deliberate purpose – and having the effect – of humiliating, embarrassing and distressing Ms Giller, it is appropriate to include a component for aggravation in the award of compensation. I would award Ms Giller the sum of $40,000, including $10,000 for aggravated damages.

234 The judge also upheld five of six assault claims brought by Ms Giller against Mr Procopets. He awarded total damages of $4,928 for the five assaults. I have concluded that the amount awarded in each case was manifestly inadequate and that Mr Procopets should be ordered to pay Ms Giller damages totalling $50,000 (including exemplary damages of $13,000) for the assaults.

Preliminary Observations

235 Before I discuss the grounds of appeal, I make some preliminary observations about the nature of the proceedings and the appeal, as well as the credibility of the parties. I also deal briefly with submissions made by Mr Procopets about the overall conduct of the trial.

Adverse findings on credibility

236 The learned trial judge commented that the resolution of the factual disputes between the parties in this case had been extremely difficult.[160] Not only were the issues bitterly contested, but his Honour made extremely adverse findings about the credibility of both Ms Giller and Mr Procopets.

237 In relation to Ms Giller he said:

[Ms Giller] as a witness has no credibility and falls into the category of

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160 Ibid [20].

> witnesses whose evidence cannot be accepted unless confirmed by evidence from a reliable and credible source, or admitted or corroborated by false denials of [Mr Procopets]. She is an attractive, intelligent, cunning woman who is manipulative and will lie deceive and mislead if it is in her interests, especially her financial interests.[161]

238 The judge went on to list organisations which Ms Giller had apparently deceived to gain financial advantage (including the Department of Social Security, a childcare centre and two schools). He highlighted many inconsistencies in her statements to police and her evidence in other proceedings. He also said:

> There were many instances in the proceeding when the plaintiff gave evidence that was hard to accept or unbelievable and, on occasions, was [a deliberate lie]. She is very intelligent, and it was apparent that she on occasions anticipated the cross examination and was prepared to make up a story or speculate to head off the questions. Not only did [Ms Giller] tell lies, but she appears to have induced others to tell like lies.[162]

239 In relation to Mr Procopets the learned trial judge said:

> … [H]e is intelligent, cunning and determined. Equally I am satisfied that he would lie and cheat if he could gain something from it. He also falls into the category of a witness whose evidence the Court would not accept unless confirmed or corroborated in some way by independent evidence, admission or false denials of the other party. There were many instances in his evidence where I am satisfied that he was telling deliberate untruths.[163]

240 Counsel for Ms Giller did not challenge the learned trial judge's findings about Ms Giller's credibility. He did, however, seek to challenge several findings of fact that his Honour made.[164] Mr Procopets made numerous challenges to his Honour's findings of fact.

Conduct of the trial

241 Mr Procopets was self-represented at the trial and also on the hearing of the appeal. He submitted that the trial miscarried because he had not had an adequate opportunity to cross-examine relevant witnesses, particularly Ms Giller, on various

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161 Ibid [21].

162 Ibid [25].

163 Ibid [28].

164 See, for example, [387]- [393] below.

factual matters. That submission related particularly to Ms Giller's evidence about the assaults on her and to the evidence of Ms Giller and other witnesses relating to the showing of the video-recordings. (I refer to submissions on these matters in more detail below.)

242 Mr Procopets also made the more general complaint that his Honour prevented him from challenging evidence relevant to Ms Giller's claims, by cutting his cross-examination short. That complaint is baseless. His Honour gave Mr Procopets ample opportunity to cross-examine Ms Giller and other witnesses. His cross-examination of Ms Giller lasted almost eight days.[165] As I have said, his Honour made adverse findings on the credit of both parties.

The Part IX Claim

The facts [166]

243 Ms Giller was born in Kiev in the former USSR. In February 1990, she migrated to Australia with her then husband and seven-year-old daughter ('Julia'). By the time they arrived, Ms Giller and her husband had 'more or less agreed to separate'.[167] Mr Procopets assisted the Giller family following their arrival. On 13 March 1990, about a month after they arrived in Australia, Ms Giller and her daughter began to live with Mr Procopets in his house at 22 Orrong Crescent, Caulfield. At that time Ms Giller was aged 29 and Mr Procopets, who was also born in the former USSR, was aged 45. He was keen to have children and Ms Giller became pregnant almost immediately. Their twin boys were born in December 1990.

244 Ms Giller's parents and her brother arrived from Israel in July 1993 and initially lived with Ms Giller and Mr Procopets in their Orrong Crescent home. Mr Procopets provided them with some financial assistance to migrate. There were

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165 Reasons [24], [253]. See further [481] below.

166 What follows reflects the findings of fact at trial, unless otherwise indicated.

167 Reasons [36].

disagreements between Ms Giller's parents and Mr Procopets, and they left his house on 6 July 1993. According to Ms Giller, she and her family were violently evicted. Mr Procopets' evidence was that he asked the parents and the brother to leave but that Ms Giller also left with her parents, taking her daughter and the couple's twins with her.

245 From 6 July 1993 to January 1994, Ms Giller, her daughter and the twins lived with her parents in Bentleigh. From January 1994 they lived in a Housing Commission flat in Port Melbourne. From July 1993 untill late 1994, Mr Procopets lived by himself at the Orrong Crescent property. When that house was demolished in late 1994 so that two units could be constructed (the front unit was later sold), Mr Procopets lived at the Otira Road property. His Honour found that from July 1993 to October 1996, Ms Giller 'resided with the defendant intermittently … and on average stayed about six days per month.'[168]

246 Up until December 1996, when contact between the parties finally ceased, Mr Procopets sometimes picked up the twins and delivered them home from their childcare centre. At the trial, there was a dispute as to the extent to which Mr Procopets was involved in caring for the children during the period of cohabitation and between July 1993 and December 1996. A number of his Honour's findings on this issue were challenged by Ms Giller.[169] I return to those issues below.

247 At the trial Ms Giller claimed that the couple were living in a continuous de facto relationship from March 1990 until October 1996, or alternatively they had separated on 6 July 1993 but later resumed their de facto relationship and then lived as de facto partners until October 1996.[170] Mr Procopets denied that the couple had ever lived in a de facto relationship.

248 His Honour found that the couple were de facto partners from 13 March 1990

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168 Ibid [209].

169 See, in particular, grounds of appeal 10, 11, 14 and 16.

170 Reasons [104].

until 6 July 1993, but that thereafter they were in a 'relationship of "boy–girl"'.[171] That finding was not challenged on appeal.

249 The couple's relationship was a violent and abusive one. Ms Giller left their home briefly in June 1992 and obtained an intervention order against Mr Procopets, but later returned to live with him. As mentioned earlier, she sought damages for eight separate assaults. Two of the alleged assaults were outside the limitation period and the judge below made no finding as to whether they had occurred. His Honour found that Ms Giller had been assaulted by Mr Procopets on five occasions within the limitation period as follows: 29 April 1992, August 1992, on another occasion in 1992, June 1993 and 10 November 1996.

250 On 12 November 1996, following the 10 November assault, Ms Giller obtained an interim intervention order against Mr Procopets. On 17 November, Mr Procopets was admitted to hospital after an apparent suicide attempt. On 19 November, the couple met and resumed their sexual relationship after Mr Procopets promised that he 'would behave'.[172] The couple attended court together on 22 November. Mr Procopets attempted to persuade Ms Giller to abandon the application for a final intervention order, but she refused and the order was granted. The couple continued to have sexual relations, which Mr Procopets videotaped, until 1 December 1996, when their relationship ended permanently.

251 Ms Giller subsequently complained to the police that Mr Procopets was following her and threatening to show a videotape of their sexual activities. On 10 December 1996, Mr Procopets was taken into custody, questioned about his activities and told that he might be charged with breaching the intervention order. (The factual findings made by his Honour, and the claims which resulted from the events of late November and early December 1996, are discussed in more detail below.)

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171 Ibid [244].

172 Ibid [27].

The decision below

252 Ms Giller brought a property claim under Part IX of the Act. At the relevant time, s 285(1) of that Act provided that:

> A court may make an order adjusting the interests of the de facto partners in the real property of one or both of them that seems just and equitable to it having regard to—
>
> (a) the financial and non-financial contributions made directly or indirectly by or on behalf of the de facto partners to the acquisition, conservation or improvement of any of the property or to the financial resources of one or both of the partners; and
>
> (b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the de facto partners to the welfare of the other de facto partner or to the welfare of the family constituted by the partners and one or more of the following—
>
> (i) a child of the partners;
>
> (ii) a child accepted by one or both of the partners into their household, whether or not the child is a child of either of the partners; and
>
> (c) any written agreement entered into by the de facto partners.

253 Section 282 of the Act required an application for such an order to be made within two years of the ending of the de facto relationship. The judge found that the de facto relationship had ended on 6 July 1993, a finding which was not disputed on appeal. Under s 282(2) an order may be made extending that time:

> if the court is satisfied that greater hardship would be caused to the partner applying if that leave were not granted than would be caused to the other party if that leave were granted.

Ms Giller sought leave to make an application out of time.

254 His Honour held it would not be just and equitable to make an order adjusting Mr Procopets' interest in the Orrong Crescent property, because Mr Procopets had made virtually all the financial contributions to the property and the parties had made equal contributions to the welfare of the family during the period of cohabitation. Further, his Honour said, the financial and non-financial contributions made directly or indirectly by Ms Giller did not exceed the moneys

expended by Mr Procopets in supporting her and her daughter.[173] In the circumstances, his Honour found it unnecessary to decide whether the extension of time should be granted.

Grounds of appeal

255 The amended notice of appeal filed on behalf of Ms Giller relied on 26 grounds of appeal.[174] Grounds of appeal 2—7, 12 and 13, 18—20 and 21—24 relate to various factual findings made by his Honour, which were preparatory to assessing the financial and non-financial contributions of the parties. It is unnecessary to consider most of these challenges, because I have concluded that the appeal must be allowed on other grounds. Furthermore, I would have regarded it as extremely difficult for Ms Giller to make out any of these grounds of appeal because his Honour's factual findings were almost entirely based on his assessment of the parties' credibility.[175]

256 Grounds of appeal 8-11 relate to his Honour's assessment of the comparative value of the 'homemaker or parent' contributions made by each of the parties. Grounds 1, 14, 17A and 25 allege that his Honour made errors of principle in evaluating the extent of the parties' contributions and in determining whether or not it was just and equitable to adjust their interests in property.

The alleged errors of law

257 The submission for Ms Giller was that his Honour had erred by:

- not taking account of contributions after the date when the de facto relationship ended;
- not having regard to Ms Giller's contribution in assisting in the construction of, and improvement to, the property at 22 Orrong Crescent;

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173 Ibid [238].

174 See amended notice of appeal filed 29 June 2004.

175 See paras [236]–[240] above and *Fox v Percy* (2003) 214 CLR 118.

- disregarding homemaker and parent contributions by Ms Giller which did not contribute to the building up of Mr Procopets' assets;

- regarding himself as precluded from assessing the parties' respective contributions on a 'global' basis and therefore applying an 'asset by asset' approach to contributions;

- treating the assaults on Ms Giller as irrelevant in assessing the extent of her contributions; and

- undervaluing the extent of Ms Giller's contributions to the welfare of the family.

At the hearing of the appeal, counsel did not pursue the second of these alleged errors, though it was not formally withdrawn. I deal with the other grounds in turn.

Failure to consider post co-habitation contributions

258 In the view of the trial judge, the task set for the court by s 285 was 'to determine and evaluate the contributions made by the parties during the de facto relationship'. The provision did not, his Honour said, authorise the court to examine contributions made either before the commencement of the relationship or after its cessation. Referring to the phrase 'the welfare of the family constituted by the partners', his Honour said:

> It is a statutory cause of action. It is grounded upon a relationship *being a de facto relationship subsisting between the parties.* It is the relationship which founds the jurisdiction.[176]

259 At trial (and again on appeal) counsel for Ms Giller relied on the decision of the Full Court of the Family Court in *In the Marriage of P R and D I Williams*.[177] That case concerned section 79(4)(c) of the *Family Law Act 1975* (Cth),[178] which refers to

> the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage,

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176 Reasons [118] (emphasis added).

177 (1984) 9 Fam LR 789 ('*Williams*').

178 Hereafter referred to as the '*Family Law Act*'.

> including any contribution made in the capacity of homemaker and parent … (emphasis added).

The Full Court held that this provision required the Court to take into account a contribution made by a spouse to the care of the children after cohabitation had ceased. Fogarty J (with whom Joske and Baker JJ agreed) said:

> [T]he words 'constituted by the parties to the marriage and any children of the marriage' are really descriptive of the word 'family' and are not intended, I am sure, to be a qualification to the otherwise clear wording of the section. Otherwise one would have the rather startling consequence that contributions made by a parent to young children after the other party has left the marriage, and perhaps in the circumstances of considerable stress, would be disregarded under s 79. Not only is that not the intention of s 79(4)(c), I think such a conclusion runs strongly counter to the actual words of that paragraph.[179]

The High Court on appeal expressly agreed that the mother's care of the children after cohabitation ceased 'was a factor within s 79(4)(c)'.[180]

260 Counsel submitted to the trial judge that the wording of s 79(4)(c) of the *Family Law Act* was substantially similar to that of s 285 and that the same reasoning should apply to the State provision. His Honour held, however, that the decision in *Williams* did not 'assist or persuade' him. The *Family Law Act*, he said, took into account 'a larger and broader range of matters when dealing with property disputes'. He continued:

> I can see an argument that a contribution made in contemplation of the establishment of the de facto relationship may be taken into account. However, I cannot see that a contribution is relevant if made after the relationship ceases. It is the relationship which grounds the cause of action. In the present case [counsel] sought to rely upon the contribution made by [Ms Giller] in looking after the children after the relationship ceased. In regard to that I note that [Mr Procopets] was obliged to and did pay maintenance for the children. Secondly, the contributions referred to in paragraph (b) concern 'the welfare of the family constituted by the partners' and the children. *That in my view can only mean a contribution whilst a family relationship exists.* In my view [Ms Giller] would not be making a contribution looking after the children to 'the welfare of the other de facto partner or to the welfare of the family constituted by the partners'. But in any event how could one determine the adjustment to the real property based upon a post-relationship contribution constituted by looking after the children. If this case

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179 Ibid 794.

180 (1985) 61 ALR 215, 216 (Mason ACJ, Wilson, Brennan, Deane and Dawson JJ).

> had been heard within six months of the break up of the relationship, how would the Court approach the question? In my view it is not open to a Court to consider contributions made after a relationship has ceased.[181]

261 I respectfully disagree. In my view, the decision of the Full Family Court in *Williams* is both relevant and persuasive. The language of s 79(4)(c) is, for practical purposes, identical to that of s 285(1)(b). The former speaks of contributions to 'the family constituted by the parties to the marriage and any children of the marriage'; the latter speaks of contributions to 'the family constituted by the [de facto] partners and … a child of the partners'. What Fogarty J said in relation to the former applies with equal force to the latter. It would be a 'startling consequence' indeed if the Court were obliged, when assessing what was 'just and equitable' with respect to property, to disregard contributions made by a de facto partner looking after young children after one or other partner had left the relationship, 'and perhaps in circumstances of considerable stress.'

262 Erroneously, in my view, the approach of the trial judge treated 'the family constituted by' the de facto partners (or the parties to the marriage, as the case may be) as coming to an end when cohabitation ceases. But it does not – or at least it need not. The children of the relationship continue to have a familial relationship with each parent and, typically, the parents continue to have a familial relationship with each other in respect of the children and their welfare. The post-separation contribution of one parent 'in the capacity of homemaker or parent' is directly conducive to the welfare of that 'family'.

263 Moreover, this construction of s 285(1) tends to promote the purpose of Part IX of the Act.[182] As with the NSW Act,[183] the statutory purpose was to redress the injustice arising from the limited capacity of the law to recognise non-financial contributions, in dividing property after the breakdown of a de facto relationship.[184]

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181 Reasons [122] (emphasis added).

182 *Interpretation of Legislation Act* 1984 s 35(a).

183 NSW Law Reform Commission, *Report on De Facto Relationships*, LRC 36 (1983) 99 [5.9].

184 See *Evans v Marmont* (1997) 42 NSWLR 70, 80-81, (Gleeson CJ, McLelland CJ in Eq).

That remedial purpose is advanced if s 285 is treated as applicable to contributions made both before cohabitation begins and after it ends. For a contribution to be relevant, of course, it must be able to be characterised as a 'contribution … to the welfare of the other de facto partner or to the welfare of the family constituted by the partners and [their children]'.

264 There is a further, independent, reason for preferring this conclusion. The language of s 285(1) is almost identical to that of s 20 of the *Property (Relationships) Act 1984 (NSW)*. The New South Wales Court of Appeal has interpreted s 20 as permitting consideration of contributions made both before the commencement of cohabitation and after its cessation. The course of decisions is as follows.

265 In *Roy v Sturgeon*,[185] Powell J said that the NSW Act was not intended to equate the position of de facto partners to that of a married couple. In his Honour's view, courts should not too readily embrace the decisions of the Family Court.[186] In particular, he pointed out, the Family Court was required to take account of factors which had no equivalent under State de facto legislation, including the duration of the marriage; the extent to which it had affected the earning capacity of a party whose maintenance was in question (s 75(2)(k)); and 'any fact or circumstance, which in the opinion of the Court, the justice of the case requires to be taken into account' (s 75(2)(o)).

266 In *Del Gallo v Frederiksen*,[187] a de facto wife appealed to the NSW Court of Appeal against a Master's award, on the ground that the Master had not taken account of contributions made by her before the couple moved in together. The Court of Appeal held that it was unnecessary to decide whether the Master had erred in this respect because, on the facts of the case, such an error would have made no difference to the final result. As a member of the Court of Appeal, Powell JA reiterated the view he had earlier expressed in *Roy v Sturgeon*, that contributions

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185 (1986) 11 NSWLR 454.

186 Ibid 466.

187 (2000) 27 Fam LR 162.

made before the couple had lived together could not be taken into account.[188] Rolfe AJA, on the other hand, said that it was arguable that pre-cohabitation contributions 'made in mutual contemplation of and for the purposes of the relationship' could be taken into account for the purposes of the property adjustment jurisdiction.[189]

267 In *Jones v Grech*,[190] the de facto couple had been in a relationship since 1965, but had only lived together from 1985 to 1991 and again from 1993 to 1997. One of the issues on appeal was whether contributions made prior to the last period of cohabitation could be taken into account. Davies AJA said:

> The actions of the parties must be placed into context and given weight and relevance according to the incidents of their relationship over time, including during any prior time when a relationship existed between them. As Gleeson CJ and McLelland CJ in Eq said in *Evans v Marmont*:[191]
>
> > It would be unrealistic to attempt to evaluate contributions of the kinds referred to in paras (a) and (b) for the purpose of determining what is just and equitable having regard to those contributions, in isolation from the nature and incidents of the relationship as a whole …
>
> In *McDonald v Stelzer*,[192] Priestley JA held that Bergin J had been entitled to take into account, 'matters very closely connected in subject matter, time and relevance to financial and non-financial contributions during the period of the full de facto relationship' provided that her Honour gave 'some but not fundamental weight' to such factors. I respectfully agree with his Honour's remarks.
>
> Moreover, the factors specified in s 20 may include actions which have taken place prior to the commencement of the period of relationship which gives rise to the jurisdiction of the court. Thus, one or both of the parties may have contributed to the acquisition, conservation or improvement of the subject property at an earlier time. One or both of the parties may then have contributed in the capacity of homemaker or parent to the welfare of the other de facto partner or to the welfare of the family constituted by the partners and a child of the partners or a child accepted by the partners into the household. These are factors which may require examination. In the present case, the matters to which the master referred were, although of varying weight,

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188 Ibid 163.

189 Ibid 177.

190 (2001) 27 Fam LR 711, 718.

191 (1997) 42 NSWLR 70, 75; 21 Fam LR 760, 764.

192 (2000) 27 Fam LR 304.

relevant to the task which the master was required to undertake.[193]

268 Ipp AJA also reviewed the relevant authorities on the question:

In *Roy v Sturgeon*,[194] Powell J concluded[195] that it is not open to the court, when dealing with applications under s 20, to have regard to contributions made prior to the commencement of the de facto relationship.

In *Foster v Evans*[196] however, Bryson J did not follow this approach. His Honour said:

> In my respectful view para 20(1)(b) does not contain within its own terms a limitation to the period during which there was a de facto relationship as the period during which any contributions to the welfare of the family might have been made. … It is inherently unlikely but it is not impossible and contributions of kinds referred to in paras (a) and (b) might be made to the property financial resources of welfare of another [sic - the other] de facto partner after the relationship ended: people sometimes care for former partners. The possibility of a contribution to the welfare of a family including a child of the partners after the de facto relationship itself has ended can be clearly seen. I do not see what purpose would be served by limiting the contributions to family welfare which may be considered so as to exclude contributions made after a separation. There is to my reading no expression in subsection 20(1) of an intention to limit the time at which contributions are to be made.

And concluded:

> I respectfully differ from Powell J's obiter dictum about the meaning of para 20(1)(b). In my opinion it is not required that a contribution under para 21(1)(b) [sic — 20(1)(b)] be made during the relationship.

In *Griffiths and Brodigan*[197] Chisholm J, exercising cross-vested jurisdiction, considered an application for an order under s 20. His Honour also declined to follow *Roy v Sturgeon* and held that contributions under s 20 could include contributions made before the commencement of the de facto relationship. In *Fuller v Taaffe*,[198] Rourke J, also exercising cross-vested legislation in an application for relief under s 20, adopted the same approach as Chisholm J in *Griffiths and Brodigan* and held that contributions made by the parties after the de facto relationship had terminated were relevant to be taken into account under s 20.

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193 *Jones v Grech* (2001) 27 Fam LR 711, 721–722.

194 (1986) 11 NSWLR 454; 11 Fam LR 271.

195 Ibid NSWLR 466, Fam LR 278.

196 SC (NSW), No 4439/95, (Unreported, Bryson J, 31 October 1997).

197 (1995) 20 Fam LR 822.

198 (1997) 23 Fam LR 702.

McDonald v Stelzer[199] is determinative on the issue as to whether the court may have regard to contributions made before the de facto relationship commenced. At first instance Bergin J referred to *Griffiths and Brodigan* and said that she would take into account the nature of the relationship of the parties prior to the de facto relationship in reaching her conclusion as to what was just and equitable. The appellant submitted that her Honour had erred in that respect. Sheller JA (with whom Handley JA agreed) upheld the approach of Bergin J, saying:

> I am not persuaded that her Honour erred in reaching her decision.

Priestley JA said:

> … in the circumstances of the present case, if Bergin J did take into account in reaching her conclusion any circumstances of or related to the relationship between the parties which occurred before April 1994, I would not think that that vitiated her decision.

His Honour concluded that in the particular circumstances Bergin J was entitled to take prior de facto relationship contributions into account provided she treated the financial and non-financial contributions during the de facto relationship as fundamental.

In my opinion, there is no difference in principle between contributions made before the de facto relationship commenced and those made thereafter. The court may have regard to both.[200]

269 The views of Davies AJA and Ipp AJA in *Jones v Grech* were followed by the New South Wales Court of Appeal in its unanimous decision in *Kardos v Sarbutt*.[201] Brereton J (with whom Basten JA and Hunt AJA agreed) said that 'contributions made before cohabitation commences are relevant contributions for the purposes of [the adjustive jurisdiction], as are contributions made after separation'.[202]

270 In the present case, the trial judge expressed agreement with the view of Powell J, as first enunciated in *Roy v Sturgeon*.[203] His Honour noted the subsequent decisions of the New South Wales Court of Appeal to the contrary,[204] but rejected those views views, saying that they

> overlook … the history of the law leading to the passing of the Act, its object,

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199 (2000) 27 Fam LR 304.

200 *Jones v Grech* (2001) 27 Fam LR 711, 731-732 (emphasis added).

201 (2006) 34 Fam LR 550 ('*Kardos*').

202 Ibid 561.

203 (1986) 11 NSWLR 454.

204 *Del Gallo v Frederiksen* (2000) 27 Fam LR 162; *Jones v Grech* (2001) 27 Fam LR 711.

> and importantly that it is a statutory cause of action based upon the existence of a relationship.[205]

Ms Giller submitted that his Honour erred in taking that view.

271 In my view, his Honour ought to have followed the views of the Court of Appeal, as most clearly expressed in *Jones v Grech*. Decisions of an intermediate appellate court on what is, in this respect, uniform legislation should be followed unless considered to be clearly wrong.[206]

272 It follows that his Honour fell into error in holding that post-separation contributions were excluded from consideration under s 285(1)(b). After the couple separated in July 1993, Ms Giller contributed to the welfare of the family by undertaking domestic work and caring for the twins. Mr Procopets also made homemaker and parent contributions until December 1996. From December 1996, Ms Giller had complete responsibility for caring for the couple's twin sons.[207] These contributions should have been taken into account.

Requiring a nexus between 'homemaker and parent' contributions and the property of the parties

273 In assessing the extent of Ms Giller's homemaker and parent contributions, his Honour referred to the approach taken by Wilson J in *Mallet v Mallet*.[208] The relevant passage of his Honour's judgment is as follows:

> In considering the contributions under [s 285(1)(b)] the Court should evaluate the quality of the contributions made. They will vary.
>
> The point was made by Wilson J in *Mallet v Mallet*. Whilst observing that the contribution made as a homemaker and parent must be assessed not in a merely token way, His Honour emphasised that it must be 'in terms of its true worth to the building up of assets.' He pointed out that the quality of the

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205 Reasons [121].

206 *Australian Securities Commission v Marlborough Gold Mines Limited* (1993) 177 CLR 485; see also *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259, 270; cf *French v Queensland Premier Mines* Pty Ltd & Ors [2006] VSCA 287.

207 See [338] below.

208 (1984) 156 CLR 605, 636.

homemaker and parent may vary enormously.[209]

274 Counsel for Ms Giller pointed out, correctly, that Wilson J was speaking of a quite different provision. *Mallet* concerned s 79(4)(b) of the *Family Law Act* which, at that time, provided that in altering the interests of the parties in the property, the court was required to take account of

> the contribution made directly or indirectly to the acquisition, conservation or improvement of the property by either party, including any contribution made in the capacity of homemaker or parent.

Plainly, the only homemaker and parent contribution relevant to that enquiry was a contribution which was linked to the 'acquisition, conservation or improvement of the property'. As Brereton J noted in *Kardos*,[210] the *Family Law Act* was amended in 1983 to remove the requirement to show such a link. A new s 79(4)(c) was introduced, requiring the Court to take account of:

> the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contributions made in the capacity of homemaker and parent.

275 Section 285(1)(b) of the Act – like s 20(1)(b) of the NSW Act - does not require any link between homemaker/parent contributions and the acquisition, conservation or improvement of property.[211] The link which must be shown is a link to the welfare of the family. Thus, if his Honour had considered Ms Giller's work as a homemaker and parent to be relevant only if it contributed to the acquisition, conservation or improvement of Mr Procopets' assets, this would have been an error of law.

276 Read as a whole, however, his Honour's reasons disclose no such error. Although his Honour relied upon *Mallet v Mallet* in the passage cited above,[212] later in his reasons he said he was satisfied 'that during the period from 13 March 1990 to 6 July 1992 [Ms Giller] did make a contribution to the welfare of both [Mr Procopets]

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209 Reasons [123]–[124].

210 (2006) 34 Fam LR 550, 560 [34].

211 Ibid.

212 See [273] above.

and the family constituted as it was in this period by Julia and the boys'.[213]

277 Thus his Honour did not ignore Ms Giller's contributions to the welfare of the family. He concluded that the parties had made equal contributions to the welfare of the family while they were living together, and that Ms Giller was more than adequately compensated for her contributions by the financial and other benefits she received from living with Mr Procopets.[214]

278 It follows that this ground of appeal is not made out.

'Global' versus 'asset by asset' approach

279 Counsel for Ms Giller submitted that his Honour erred in law by holding that it was not open to him to adopt a 'global' approach to the assessment of the parties' contributions and that he must instead consider the value of the parties' contributions on an asset by asset basis. As a result, it was said, his Honour had undervalued Ms Giller's contributions, particularly her non-financial contributions.

280 The relevant passage in the reasons is in these terms:

> In my view it is important to make an evaluation of the quality of the contributions. It has been said that this can open up a Pandora's box and create problems at trial. I do not agree. In some cases the evidence may be such that a Court cannot make such an evaluation with any degree of certainty. The Court expects the best evidence in relation to contributions. In my view the parties should, in conformity with that rule, provide evidence as to the financial contributions made and the other contributions and this should not be difficult if the legal representatives focus on the real issues in the case. Unfortunately in the present case that was not followed. Very little effort was made on the plaintiff's part to provide direct evidence of financial contributions she made. *In my view the global approach to contributions is not appropriate. It may be appropriate under the Family Law Act but it is not appropriate in an application such as the present*. The parties should endeavour to place before the Court with as much certainty as possible the contributions that were made, financial and non-financial.
>
> A sweeping global approach in my view may lead to an injustice which in an emotion filled piece of litigation may leave the parties dissatisfied. When all is said and done *when applying the principles of equity in relation to the constructive trusts, the Court expects that a step by step financial approach will be*

213 Reasons [231].

214 Ibid [238].

> *established and in my view the Court should expect the same in an application under the legislation*. De facto cases can engender as much emotion, distress and hatred as can a family law case. Indeed it was very apparent in the present proceeding that the parties hated one another and were determined to succeed in the proceeding by any means available to them, including wholesale lying on oath.[215]

281 Those remarks are somewhat ambiguous. On one reading, his Honour's apparent rejection of a 'global approach' was simply intended to emphasise the need for evidence as to the extent of the parties' financial and non-financial contributions. Again, his Honour might have viewed the asset by asset approach as more appropriate than a global approach because the period of cohabitation was short and because Mr Procopets had made almost all of the financial contributions.[216] If his Honour had formed either of those views, he would have been acting within the scope of the discretion under s 285 of the Act, and the conclusion would only be challengeable on appeal if the requirements in *House v R*[217] were satisfied.

282 In my view, however, his Honour was not here explaining his choice of a particular approach as applicable to the circumstances of the case at hand. Rather, he was purporting to express a general proposition about the appropriate approach to de facto property disputes. This is apparent from the contrast his Honour drew – in quite general terms – with the position under the *Family Law Act*. It is also apparent from the following statement:

> [W]hen applying the principles of equity in relation to the constructive trusts, the Court expects that a step by step financial approach will be established and in my view the Court should expect the same in an application under the legislation.[218]

I refer in particular to his Honour's general statement about what the Court 'should expect … in an application under the legislation'.[219]

283 I consider that it was an error of law for his Honour to fetter his discretion in

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215 Ibid [125]-[126] (emphasis added).

216 See, eg *Davis v Tayles & Anor* [2006] VSC 219, particularly [77].

217 (1936) 55 CLR 499, 504–505 (Dixon, Evatt and McTiernan JJ.

218 Reasons [126].

219 Ibid.

this way. In *Norbis v Norbis*,[220] the High Court made clear that it was for the trial judge to decide whether to adopt an asset by asset approach or a global approach in assessing the parties' contributions under s 79 of the *Family Law Act*, and that either approach might be appropriate in a particular case. Mason and Deane JJ said that:

> Which of the two approaches is more convenient will depend on the circumstances of the particular case. However, there is much to be said for the view that in most cases the global approach is the more convenient. It follows that the Full Court is quite entitled to prescribe that approach as a guideline in order to promote uniformity of approach within the court. In saying this we are not to be understood as denying the legitimacy of the trial judge's ascertainment in the first instance of the financial contributions of the parties by reference to particular assets. It is difficult to conceive how the trial judge in many cases could otherwise take account of such contributions as he is required to by s 79(4)(a)[221] of the Act. In this respect we agree with the comment of Nygh J in *G and G* that, although mathematical precision is certainly not required, there is ordinarily a need to know the circumstances in which assets were acquired and the general extent of each party's contributions to them. …
>
> The Family Court has rightly criticized the practice of giving over-zealous attention to the ascertainment of the parties' contributions, and we take this opportunity of expressing our unqualified agreement with that criticism, noting at the same time that the ascertainment of the parties' financial contributions necessarily entails reference to particular assets in the manner already indicated.[222]

284 Brennan J agreed with Mason and Deane JJ, except on the issue of whether the Full Court could establish a binding rule as to the approach which a trial judge should take in exercising the discretion to adjust the parties' property interests. Wilson and Dawson JJ also warned that such guidelines could not fetter the trial judge's discretion, but acknowledged that:

> the legislation confers a discretion on the court which, provided the required matters are taken into account, does not dictate the employment of any particular method in the formulation of an appropriate order for the alteration of property interests. The matters which are to be taken into account will sometimes require the division of assets, or some of them, upon the basis of their individual values, but in other cases no more than an overall division will be required. In some cases either approach may be adopted in

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220 (1986) 161 CLR 513.

221 The case concerned the application of s 79 prior to the 1983 amendment: see *Family Law Amendment Act 1983* (Cth), s 36.

222 *Norbis v Norbis* (1986) 161 CLR 513, 523–524.

part or in whole.[223]

285 Courts in New South Wales have taken a similar view in relation to the adjustment of property rights of de facto partners. In *Black v Black*,[224] Clarke JA said:

> [T]he decision of the High Court in *Norbis v Norbis* that a trial judge is not obliged to adopt either a global or an asset by asset approach to the exclusion of the other in an application under s 79 [of the *Family Law Act*] applies, in my opinion, with equal force, to an application under s 20 of the [NSW] Act.[225]

In that case the NSW Court of Appeal took an 'asset by asset' approach, because the parties had acquired a particular property as a joint investment and intended that each of them should derive half of the benefit of the investment.

286 In *Kardos v Sarbutt*, the Court of Appeal rejected the contention that, because the parties had cohabited for only a little over three years, the trial judge had erred 'in failing to adopt an asset-by-asset approach or, at the least to quarantine, certain assets from the process of adjustment'.[226] Brereton J stated:

> [51] The legislation does not dictate the employment of any particular method in the formulation of an appropriate order for the adjustment under s 20 of property interests, and it is not desirable to attempt to formulate principles or guidelines designed to constrain judicial discretion within a predetermined framework: compare *Norbis v Norbis*. *Although, in the majority of cases, the global approach is likely to be more convenient than an asset-by-asset approach, the application of the asset-by-asset approach does not of itself amount to an error of law* (Mason and Deane JJ). In *Norbis*, Mason and Deane JJ cited with approval observations of Nygh J in *G & G* to the effect that it cannot be required of the Family Court that it assesses contributions with mathematical precision with respect to each item, and that while the Family Court was divided between those who favoured the so-called global approach and those who seek to achieve some degree of precision, both approaches were legitimate provided that those who take the global approach heed the warning that the origin and nature of the different assets ought to be considered, and that those who favour the more precise approach do not mistake the trees for the forest and add up their individual items without standing back at the end to review the overall result.
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> [52] In *Lenehan v Lenehan*, the Full Court of the Family Court (Fogarty, Maxwell and Gun JJ) said:
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> > The judgments of the High Court in *In the Marriage of Norbis*

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223 Ibid 533.

224 (1991) 15 Fam LR 109.

225 Ibid 118–119 (Kirby P, Clarke and Handley JJA) (citations omitted).

226 (2006) 34 Fam LR 550, 564 (Brereton J).

> demonstrate the very wide discretion which a trial Judge has in the approach that he may adopt under s 79. In particular the judgments in that case discuss the 'global' and the 'asset by asset' approaches, and demonstrate that this is largely a matter for the trial Judge to determine in the exercise of his discretion. However *Norbis*' case is not a *carte blanche* to adopt either view irrespective of the circumstances of the individual case. There are cases where one approach or the other is clearly appropriate and a failure by the trial judge to adopt that approach may demonstrate error. We think this is one such case. His Honour's initial approach of treating the parties' contributions to the home as separate from their contributions to the other (largely business) assets was, we think, a proper approach in the circumstances.
>
> [53] To this might be added that, in the necessarily inexact exercise involved in discretionary matrimonial property adjustment, judicial reasoning can be aided by the use in any case of more than one approach, so that one serves as a check method for the result reached by the other.[227]

287 The judge in the present case was thus required to choose between the two approaches. It follows that he erred in law by taking the view that a global approach was not open. This ground of appeal is made out.

Relevance of domestic violence

288 Ms Giller submits that his Honour erred in concluding that he could not take account of the assaults on Ms Giller during the course of cohabitation. Alternatively, it was said, his Honour gave insufficient weight to this matter in determining that Ms Giller was not entitled to any adjustment of property rights in her favour.

289 His Honour found that Mr Procopets had assaulted Ms Giller on four occasions while they were living together, and on one occasion after they had ceased to do so. There were two other alleged assaults which his Honour did not consider for the purposes of Ms Giller's damages claims because they were said to have occurred outside the limitation period. As to the relevance of the domestic violence to the Part IX claim, his Honour said:

> [Counsel for Ms Giller] submitted that if [she] had been subjected to physical and/or further abuse or violence so that the contributions made were rendered significantly more arduous as a result … that was a very relevant factor in assessing the value of such contributions. He referred to the

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227 Ibid 564 (citations omitted, emphasis added).

> Full Court of the Family Court decision of *Kennon v Kennon*[228] and *Conn v Martusevicius*.[229] A sweeping general observation such as that has a tendency to mislead. It is necessary for the Court to consider the contributions. Whether or not a plaintiff has been subjected to violence or the like, and whether that does in fact affect the ability to make the contribution must depend very much upon the evidence. It may be relevant but I would not think that in most cases, even if there were acts of violence from time to time, or verbal abuse or the like, that such contributions would be made more arduous. It would depend upon the effect on the plaintiff of the conduct and its effect upon her ability to carry out her household and parenting tasks.[230]

His Honour concluded:

> The so-called ill treatment of [Ms Giller] by [Mr Procopets] constituted by the assaults, even assuming the court was to accept [Ms Giller's] evidence of the alleged assaults, did not make her household duties any more arduous than they were.[231]

290 His Honour thus accepted that the contributions of a de facto partner might be made more arduous because of violence during the course of the relationship. The critical conclusion, however, was that this principle did not apply on the facts of the case. His Honour considered that Ms Giller 'was a determined woman who is not over sensitive.' He noted that, when Mr Procopets filmed her at the Camberwell Market, Ms Giller responded by hitting him with a steel rod.[232]

291 Affirmative assault findings having been made, the conclusion reached by his Honour on this issue did not depend on his Honour's view of Ms Giller's credibility. The significance of the violence in assessing Ms Giller's contributions is a matter of inference from the facts, which this Court is as well-equipped as the learned trial judge to draw. The question for this Court then is whether Mr Procopets' violence did make Ms Giller's contributions more arduous. It is relevant to consider the history of decisions under both the *Family Law Act* and under de facto property legislation in Victoria and other States.

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228 (1997) 139 FLR 118.

229 (1991) 14 Fam LR 751.

230 Reasons [127].

231 Ibid [236].

232 Ibid [279].

292 In the early years of the *Family Law Act*, the Family Court held[233] that domestic violence was not relevant to a claim for adjustment of the property interests of spouses under s 79 of the *Family Law Act*, except where that violence had a direct financial consequence (for example where a spouse deliberately damaged the property[234] or where the injury affected the claimant's earning capacity[235]). That approach reflected the Court's desire to move away from the fault-based approach to divorce which preceded the introduction of no-fault divorce by the *Family Law Act*.

293 From the early 1990s, there was increasing criticism of this approach in journal articles and in some cases.[236] Critics argued that the Court should be able to take account of domestic violence as a 'negative contribution' to the welfare of the family by the perpetrator, or as a factor which made the contributions to the family by the victim significantly more arduous.[237]

294 In *In the Marriage of Kennon*.[238] the Full Court of the Family Court reviewed the

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233 The history is detailed in *In the Marriage of Kennon* (1997) 139 FLR 118, 133–135.

234 See, for example the decision of the Victorian Supreme Court in *In the Marriage of Ferguson* (1978) 34 FLR 342. In that case the Court relied on s 75(2)(o) which allowed the Court to take account of 'any fact or circumstance which, in the opinion of the court the justice of the case requires to be taken into account.' It was not claimed that the conduct was relevant to contributions. There is no equivalent to s 75(2)(o) in Part IX of the Act.

235 As in *In the Marriage of Barkley* (1976) 1 Fam LR 11, 554 where the wife had become deaf as the result of her husband's assault on her. In these circumstances the matter was relevant to earning capacity under *Family Law Act*, s 75(2).

236 The examples cited in *In the Marriage of Kennon* (1997) 139 FLR 118, 134–135 (as in original) include the following: *In Marriage of Waters and Jurek* (1995) 126 FLR 311, 320-321; *In Marriage of Doherty* (1996) 127 FLR 343; *In Marriage of Manna* (Unreported, Family Court of Australia, Coleman J, 20 May 1996); *Rosati*; Behrens, 'Domestic Violence and Property Adjustment: A Critique of No Fault Discourse' (1993) 7 *Australian Journal of Family Law* 9; Behrens, 'Violence in the Home and Family Law: An Update' (1995) 9 (1) *Australian Journal of Family Law* 70; Justice Murray, '"Domestic Violence and the Judicial Process", A Review of the Past Eighteen Years Should it Change Direction?' (1995) 9 *Australian Journal of Family Law* 26; Behrens, 'Recent Developments in Compensation for Violence in the Home', October 1996, 7th National Family Law Conference; Wiegers: 'Compensation for Wife: Abuse: Empowering Victims?' (1994) 28 UBC Law Review 247; Justice Morgan: 'Domestic Torts - Fertile Fields or Shifting Sands', Leo Cussen Institute, May 1997; Australian Law Reform Commission (1994): 'Equity Before the Law: Justice for Women' Report No 69; Justice Chisholm, 'Matrimonial Property Reform: Current Proposals and Issues', March 1994; Justice Dessau, 'Domestic Violence and Family Law Cases', October 1995; Carp, 'Beyond the Normal Ebb and Flow ... Infliction of Emotional Distress in Domestic Violence Cases' (1994) 28(3) *Family Law Quarterly* 389.

237 Juliet Behrens' work (cited in n 236 above) was particularly influential.

238 (1997) 139 FLR 118.

case law and concluded that:

> … where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s 79. We prefer this approach to the concept of 'negative contributions' which is sometimes referred to in this discussion.[239]

295 The Full Court recognised, however, that taking account of violence or other conduct which had made the contributions of the party more arduous carried the risk that spouses would routinely make allegations of misconduct in property adjustment proceedings. Fogarty and Lindenmayer JJ said:

> However, it is important to consider the 'floodgates' argument. That is, these principles, which should only apply to exceptional cases, may become common coinage in property cases and be used inappropriately as tactical weapons or for personal attacks and so return this Court to fault and misconduct in property matters — a circumstance which proved so debilitating in the past. In addition, there is the risk of substantial additional time and cost.
>
> However, in our view, s 79 should encompass the exceptional cases which we described above. It would not be appropriate to exclude them as a matter of policy because of this risk. It is a matter of commonsense for the lawyers involved and, where that may not be sufficient, it is a matter for a firm hand by the court at an early stage when a case appears to raise those issues.
>
> It is essential to bear in mind the relatively narrow band of cases to which these considerations apply. To be relevant, it would be necessary to show that the conduct occurred during the course of the marriage and had a discernible impact upon the contributions of the other party. It is not directed to conduct which does not have that effect and of necessity it does not encompass (as in *Ferguson*) conduct related to the breakdown of the marriage (basically because it would not have had a sufficient duration for this impact to be relevant to contributions). Similarly, in *Killick v Killick* (1997) 21 Fam LR 331 at 341, in proceedings under the *De Facto Relationships Act 1984* (NSW), the Court of Appeal rejected the argument for the male partner that incidents of infidelity during the relationship by the female partner should be taken into account as diminishing her contribution as homemaker or parent.[240]

296 A similar approach has been taken under State de facto property legislation in assessing the contributions of de facto partners. In *Conn v Martusevicius*

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239 Ibid 140.

240 Ibid 140-141.

(which preceded the decision in *Kennon*), Vincent J treated verbal and physical abuse as a relevant factor, while noting that the legislation was not intended to punish a de facto partner for reprehensible conduct.[241] In *Jackson v Jackson*,[242] the male partner had assaulted his de facto wife on four occasions. Macready M treated this as relevant in assessing the extent of her homemaker and parent contributions. Because the assaults took place within 'a period of some weeks, [they were] of minor significance'[243] in their 13 year relationship. Macready M awarded damages for the assaults and referred to the need to avoid 'double-counting' by both awarding damages and taking the assaults into account in assessing the de facto wife's homemaker and parent contribution.[244] The de facto husband in that case had also subjected his partner to 'appalling' abusive and racist language for about 10 years.[245] The Master took this into account in assessing the quality of his homemaker contributions.[246]

297 In *Hughes v Egger*,[247] the assaults on the female partner included slapping her across the face, punching, choking and hitting her, pushing her down the stairs and ripping out an earring from her earlobe. White J said:

> I think it is self-evident that the contributions made by the defendant as a homemaker were more arduous by reason of the fact that the person for whom she was working about the house descended, on occasion, to such conduct. It is a factor which increases the weight to be given to her role as a homemaker.[248]

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241 (1991) 14 Fam LR 751, 758.

242 [1999] NSWSC 229.

243 Ibid [56].

244 Ibid [48].

245 Ibid [35].

246 Ibid [55]. This appears to be inconsistent with the criticism of the 'negative contributions' approach by Fogarty and Lindenmayer JJ in *In the Marriage of Kennon* (1997) 139 FLR 118. In *Ledwos v Angilley* (2001) 28 Fam LR 384, Macready M gave no credit for homemaker contributions to a man who was short tempered and angry and assaulted the woman on a number of occasions. See also *Giacceri v Fitzsimmons* [2004] NSWSC 536.

247 [2005] NSWSC 18.

248 Ibid [151].

In *BLM v RWS*,[249] Mackenzie J said:

> While the full extent of actual physical violence was in my view difficult to gauge, the evidence was sufficient to convince me that there was physical violence, and also verbal abuse, of a level that made the applicant's contribution to the homemaking and parenting role more onerous. For that reason some allowance in her favour will be made in the final assessment.[250]

298 In the present case, his Honour made the following findings of fact in relation to the assaults which occurred in the course of the relationship: [251]

- In relation to the assault on 29 April 1992, his Honour said '[w]hilst the injuries were not serious, I am satisfied they were not minor';

- In relation to the assault in August 1992, his Honour said 'I accept that she had bruising and discomfort for about a week';

- In relation to the assault in 1992 at Orrong Crescent, his Honour said that Ms Giller

  > suffered bruising to the lower part of the frontal bone of her head, just near the eyebrows and this lasted for about ten days. She also had severe bruising to her eyes which lasted for about ten days and extensive bruising to the jaw. She had painful movement of the jaw for about two or three weeks and her ears rang and buzzed for about two months. This is the incident that Julia observed. The plaintiff also suffered from headaches which persisted for about two months, and dizziness. She lost her appetite and was shocked and remained distressed. … The effects of the assault were felt for some substantial period of time; and

- In relation to the assault on June 1993 at Orrong Crescent

  > [T]he plaintiff suffered bruising to the right arm and upper right breast which lasted for about a week and pain in the right breast for about two weeks and painful movement in the shoulder for about a month. She suffered severe shock and emotional distress.

299 In my view, the violence and threats to kill to which Mr Procopets subjected

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249 [2006] QSC 139.

250 Ibid [85].

251 Reasons [259].

Ms Giller[252] would have made it significantly more difficult for her to discharge her role as homemaker and parent. Like White J in *Hughes v Egger*, I regard this as self-evident. Plainly, the effects of domestic violence are not limited to physical injury. The assaults on Ms Giller made her fearful, apprehensive that she would be assaulted again, and anxious to avoid provoking Mr Procopets. In my opinion, his Honour erred by failing to take account of this matter in assessing Ms Giller's homemaker and parent contributions.

300 In doing so, his Honour would have had to consider the relationship between the Part IX claim and his award of damages for assault, so as to avoid compensating Ms Giller twice. At the same time, those assaults which were not compensable in damages – because they fell outside the limitation period – remained relevant in determining the value of Ms Giller's contributions. I deal with the issue of double compensation below.[253]

Conclusion: discretion vitiated

301 For the reasons set out above, I consider that his Honour erred in law when he assessed Ms Giller's claim under Part IX of the Act. Accordingly, his Honour's exercise of discretion is vitiated.

302 Counsel for Ms Giller submitted that, if it was established that his Honour had erred in law in exercising his discretion under s 285 of the Act, the Court should consider whether an extension of time should be granted and, if so, should then determine the Part IX claim, rather than remitting the matter for a retrial. Counsel contended that, despite his Honour's adverse findings as to the credibility of the parties, there was a sufficient factual basis to enable this Court to do so.

303 In my view this is an appropriate course of action.[254] I note that a similar

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252 See for example, Reasons [259(iv)]. See also [479]-[496] below.

253 See [483] below.

254 Under *Supreme Court Act 1986*, s 10(3).

approach has on a number of occasions been taken by the NSW Court of Appeal.[255] It is obviously desirable for this matter to be resolved as soon as possible, in view of the very lengthy delay in resolving the claim, the history of domestic violence and the obvious hostility between the parties. It is an approach which accords with s 284 of the Act, which provides that '[s]o far as is practicable a court must make orders that will end the financial relationships between the de facto partners and avoid further proceedings between them.'

304 I now consider whether the application for leave to extend time should be granted and whether an order adjusting Mr Procopets' property interests should be made in Ms Giller's favour.

Should an extension of time be granted?

305 As noted earlier, an application for an order under Part IX must be made within two years of the ending of the de facto relationship. This application was brought more than six years after the de facto relationship ended. Under s 282(2), an order may be made extending time:

> if the court is satisfied that greater hardship would be caused to the partner applying if that leave were not granted than would be caused to the other party if that leave were granted.

306 The Victorian time limit provision is in similar terms to s 18 of the *Property (Relationships) Act 1984* (NSW).[256] The NSW Law Reform Commission Report which preceded the enactment of that legislation said that the time limit reflected the policy that 'financial questions between the parties should be finalised within a reasonable period after the breakdown of the relationship'.[257]

307 In my view, Ms Giller's application should be granted. Any other conclusion would ignore the reality that, before the trial judge, the parties exhaustively litigated

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255 See, for example *Black v Black* (1991) 15 Fam LR 109; *Jones v Grech* (2001) 27 Fam LR 711; *Evans v Marmont* (1997) 42 NSWLR 70; *Kardos v Sarbutt* (2006) 34 Fam LR 550.

256 Originally the *De Facto Relationships Act 1984* (NSW).

257 NSW Law Reform Commission, *De Facto Relationships,* LRC 36 (1983), [9.23].

Ms Giller's claim to an adjustment of the property interests. That course of events is explicable only on the basis of a common assumption that, if the judge was satisfied that an adjustment should be made in her favour, an extension of time would be granted. Mr Procopets certainly acquiesced in the course adopted.

308 His Honour concluded that Ms Giller's claim for an adjustment failed on the merits. As I have now concluded that his Honour's analysis was attended by several errors, it would work a powerful injustice if Ms Giller were to be denied the opportunity to have the question of adjustment decided according to law. Mr Procopets told the court that his financial situation has changed since the couple separated more than 14 years ago. That is a matter which the court can take into account in exercising its discretion under s 285 of the Act.[258]

309 In *Lockett v Duckett*,[259] Cummins J referred to a divergence of view as to whether it was necessary for an applicant to provide an explanation for not having commenced proceedings earlier. In *Harris v Harris*,[260] Gillard J said that this was unnecessary, but Cummins J preferred to follow the approach of Warren J (as she then was) in *McGibbon v Marriott*.[261] Her Honour said that the applicant should provide a reasonable explanation for the delay, but that:

> the standard is not a rigorous or high standard of satisfaction, but rather a standard of reasonableness; that is, a reasonable explanation, allowing, in particular, for the emotional and human factors involved in domestic arrangements and the complex of factors involved in such arrangements.[262]

I respectfully agree with that view.

310 There are factors in the present case which make Ms Giller's delay understandable. The first is the climate of violence which existed while the parties were living together, and after they separated. The second is the continuation of the

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258 *Harris v Harris* (1997) 22 Fam LR 263, 272 (Gillard J).

259 *Lockett v Duckett* (2004) 32 Fam LR 346.

260 (1997) 22 Fam LR 263.

261 [1999] VSC 381.

262 *Lockett v Duckett* (2004) 32 Fam LR 346, 350.

parties' relationship after their de facto relationship ceased in July 1993. His Honour found that from July 1993 to October 1996 Ms Giller 'resided with [Mr Procopets] intermittently … and on average stayed about six days per month'[263] and that Mr Procopets provided Ms Giller with some assistance with their children.

311 Furthermore, Ms Giller's delay in initiating proceedings should not be confused with the delays which have occurred since her action commenced. Any hardship which Mr Procopets may suffer as a result of the passing of time is largely attributable to the parties' failure to pursue and resolve the claim, rather than to Ms Giller's initial delay in initiating proceedings.

312 Regrettably, the trial of this action did not occur until early in 2004 and this appeal was not heard until 2007, that is, 14 years after the parties separated. Delays following the initiation of Ms Giller's claim in the Family Court, and later in the Supreme Court, were partly the result of factors outside the control of the parties.[264] Fundamentally, however, the responsibility lies with the parties themselves, in failing to comply with court orders relating to the filing of documents, which in turn created a need for interlocutory hearings. Ms Giller and her solicitors bear the greater share of responsibility for these delays,[265] though Mr Procopets was also dilatory on a number of occasions.

313 Although the delays which have occurred since proceedings were initiated are not relevant to the balance of hardship test in s 282(2) of the Act, it is a factor which may be taken into account in determining the quantum of any order under s 285 of the Act.[266] A court might decide that it would be unjust and inequitable for a person

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263 Reasons [209].

264 For example, the shift of the proceedings from the Family Court to the Supreme Court following the decision in *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 and the fact that in October 2003, Nathan J disqualified himself on the grounds of ostensible bias.

265 For example, Ms Giller failed to comply with the orders of Guest J in 1999 in the Family Court and Beach J and Kellam J in 2000–01 in the Supreme Court: see *Giller v Procopets* [2002] VSC 305, [7]–[13]. Further, there were failures to comply with the rules and resulting applications to the Court of Appeal, regarding the appellant's failure to prosecute the appeal and whether it should have been taken to be abandoned, on both 13 May 2005 and 3 June 2005.

266 For example, this may be done by valuing the property as at the date of separation, rather

to benefit by delaying in the prosecution of a claim.

Should there be an adjustment?

314 The three-step process to be followed in deciding whether to adjust the property interests of de facto partners was described by the NSW Court of Appeal in *Kardos v Sarbutt*.[267]

> The first is the identification and valuation of the property of the parties, which determines 'the divisible pool of property' — that is 'the property of the parties to the relationship or either of them' … which may be the subject of an adjustive property order … The second is the evaluation and balancing of the respective contributions of the parties of the types referred to in [s 285] and typically though not invariably results in an apportionment between the parties on a percentage basis of the overall contributions of the types referred to in [the legislation] of each of them, made to the date of hearing. The third is the determination of what order is required sufficiently to recognise and compensate the applicant's contributions, and typically results in an order which leaves the applicant with that percentage identified in the second step of the divisible property identified in the first step.[268]

I deal with the three steps in turn.

Step 1: valuing the property

315 When the couple separated in July 1993, Mr Procopets owned real estate at 37 Otira Crescent, Caulfield; 59 Hotham Street, St Kilda; 120 Westbury Street, St Kilda; and 22 Orrong Crescent, Caulfield, where the couple lived with their children during the period of cohabitation. The Hotham Street and Westbury Street properties were sold in 1996.

316 His Honour discussed the value of the Orrong Crescent and Otira Road properties as follows:

> At the time of the commencement of the proceeding he owned two properties,

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than at the date of trial. See [318] below. Delay in the institution of proceedings may also be taken into account in the same manner.

267 (2006) 34 Fam LR 550.

268 Ibid 558. Brereton J pointed out that this was a simplification of the four-step approach first used by Powell J in *D v McA* (1986) 11 Fam LR 214. See also *Roy v Sturgeon* (1986) 11 NSWLR 454; *Wilcock v Sain* (1986) 11 Fam LR 302; *Evans v Marmont* (1997) 42 NSWLR 70; *Jones v Grech* (2001) 27 Fam LR 711.

namely Otira Road and Orrong Crescent. Once the development at Orrong Crescent had been completed, the defendant was the proprietor of two lots and this occurred on 10 September 1996. Each property was mortgaged to the Commonwealth Bank. At the date of commencement of the proceeding the unit at the front had been sold and accordingly there were two pieces of real estate, namely the back unit and Otira Road. The plaintiff has identified the remaining unit at 22 Orrong Crescent as the real property in which she claims an interest and seeks an adjustment of the defendant's interest.

At the commencement of the de facto relationship the legal and beneficial interests were owned by the defendant. The plaintiff had no interest in the property.

Evidence was called as to the value of the property at Orrong Crescent and the values of the units.

Barry John McLennan, a licensed real estate agent and certified practicing valuer, gave evidence. He has had considerable experience in valuations. However he suffered from a distinct disadvantage in valuing the properties. He was asked to value the properties in September/October 2002 at dates 13 March 1990,[269] 20 October 1996[270] and 29 October 2002. He suffered a particular disadvantage in relation to the value of the property at Orrong Crescent. It was demolished in 1994. He did not have any opportunity to inspect the property and make some assessment of the value of the improvement on it. So far as Otira Road was concerned he was looking at the property in October 2002 and had to determine the values at a date some twelve years previously. In addition, in seeking to rely on comparable sales he was denied the opportunity of checking the improvements on the comparable land sales at the relevant times. He valued 37 Otira Road and 22 Orrong Crescent. The evidence revealed that Otira Road was a more sought after address and more valuable than Orrong Crescent. He valued 37 Otira Road at 13 March 1990 for $190,000. He was cross examined suggesting the true value was in the high $200,000's at that time. The defendant had purchased Otira Road in late 1986 for $188,500. It was put to him and he accepted that from 1986 there had been steady increases in values in the order of some 22 percent each year. He agreed that in the year 1987 there was an increase of 21.4 percent on values in that area and this would add another $40,339 to the valuation. He did say that every valuation had a margin of error of about ten percent. However despite that concession, accepting that there had been an overall increase of 21.4 percent this would bring the price up around $228,839. He said that in the latter part of the 1980's there was a downturn. However he accepted that this was mainly in the commercial area but had some effect on the residential areas. Taking into account the fact that there had been steady increases in the values during these years I do not accept his valuation at $190,000. Indeed in my view the valuation was somewhere around $250,000. He valued 37 Otira Road on 20 October 1996 at $335,000. He valued it at 29 October 2002 at about $636,000. The defendant did not appear to contest these figures.

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269 That is the date when cohabitation commenced.

270 That is the date that Ms Giller claimed the de facto relationship ceased and shortly before the ending of the sexual relationship.

> Turning to Orrong Crescent, Mr McLennan valued that property on 13 March 1990 at $180,000. He accepted that he could be out by some ten percent. The defendant purchased the property in 1987 for $171,000. It was difficult for Mr McLennan to value the property because he did not know the improvements on it and said that he basically valued it as land value only. In my view he was at a disadvantage. He was shown a photograph of the property and was told that it had a sauna, spa, swimming pool and workshop and he agreed that those improvements would have increased the value. He referred to a comparable sale but had to admit that he had not seen the property and could not say the value of the improvements. It was valued at $310,000. In my opinion his evidence of valuation is at a marked under value. It is difficult to know what it was. However taking into account that there had been substantial increases in the values over the years between 1987 to 1990, one would expect that the value would be somewhere in the vicinity of $225,000 to $250,000. Mr McLennan valued the back unit, which was unsold as at 20 October 1996, at $300,000. The defendant thought that that amount was in the ball park area. In my view the valuation is correct. Finally Mr McLennan valued the back unit as at 19 September 2002 at $480,000. In my opinion this valuation was correct.[271]

317 In exercising its power to adjust the property interests of de facto partners, the court normally values the property at the date of the trial.[272] As explained by the New South Wales Court of Appeal, this is because:

> the jurisdiction … is to adjust interests with respect to 'the property of the parties to the relationship or either of them' and speaks from the date at which the jurisdiction is exercised, so that what is in issue is the property of the parties and each of them at the date of trial. Establishing the divisible pool at any other date may lead to failure to have regard to relevant assets available for division or to the bringing into account of property no longer available.[273]

On the other hand, the Court said –

> Although usually the preferable approach is to value property as at the date of trial, giving where appropriate separate and special consideration to contributions to value made between separation and trial, nonetheless the ultimate task of evaluating the respective contributions of the parties may sometimes be facilitated by adopting the date of separation for identifying and valuing the property, particularly where there have not been ongoing contributions by one party which have benefited the other since separation.[274]

318 In my view, because of the lengthy delay in pursuing this matter, it would be just and equitable to value Mr Procopets' property at the date of separation

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271 Reasons [215]–[219].

272 *Parker v Parker* (1993) 16 Fam LR 863, 875 (Young J).

273 *Kardos v Sarbutt* (2006) 34 Fam LR 550, 558 (Brereton J).

274 Ibid 559 (Brereton J). See, eg *In the Marriage of Cozanitis* (1978) 4 Fam LR 709.

('the separation date'), rather than at the date of trial.[275]

319 The Westbury Road property was sold after the parties separated on 29 June 1997. The Hotham Street property was sold on 3 August 1997.[276] These properties could have been taken into account in determining the divisible pool of property, though orders cannot be made for the transfer of property which a party no longer owns. As this matter was not raised on appeal, I do not consider it further.

320 In determining the order (if any) which should be made to recognise Ms Giller's contributions, it is appropriate to take account of the value of both the Otira Road and Orrong Crescent properties, although Ms Giller claims only an interest in the back unit of the Orrong Crescent property.[277] His Honour found that in October 1996, at the time of the final rift between the parties, the value of the Otira Road property was $335,000 and the value of the back unit at the Orrong Crescent property was $300,000. There was no evidence as to the value of these properties at the separation date. Nor was there any valuation as at October 1996 of the front unit of the Orrong Crescent property, which was sold in 1994.

321 Each of these properties was subject to a mortgage. There is no evidence as to the precise amount of principal owing under these mortgages as at the separation date. His Honour noted that, as at 30 June 1990, the principal owing on the Orrong Crescent mortgage was $91,099.45.[278] Mr Procopets reduced the principal owing by $11,759 between 30 June 1990 and 30 June 1993.[279] As at 30 June 1990 Mr Procopets owed $95,021.54 on the Otira Road mortgage.[280] No reference is made in his Honour's judgment to the amount paid off this mortgage loan between 1990 and 1993, though his Honour said that Mr Procopets had paid off substantial sums

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275 See [313] above.

276 Respondent's Chronology.

277 See for example *Conn v Martusevicius* (1991) 14 Fam LR 751, where Vincent J (as he then was) took account of all of the assets of the parties, though the plaintiff sought an order transferring a particular property to her.

278 Reasons [213]–[214].

279 Ibid [221].

280 Ibid [214].

on his four mortgages between 1990 and 1993.[281]

322 Counsel for Ms Giller did not make submissions as to the value of the property as at the date of separation. Based on his Honour's findings at the trial, however, it appears safe to assume that the net value of the Orrong Crescent and Otira Road properties as at that date was not less than $400,000.[282]

Step 2: evaluating the contributions

323 Under sub-paragraph(1)(a), the Court must take account of financial and non-financial contributions, made directly or indirectly, to any of the property or to the financial resources of the parties. The couple cohabited for just over three years (13 March 1990 to 6 July 1993). Mr Procopets made the major financial contributions to the acquisition, conservation and improvement of the Orrong Crescent and Otira Road properties. All of the real property which he owned at the date of separation was acquired before he began living with Ms Giller.

324 His Honour found that during the parties' relationship, Mr Procopets made all of the mortgage payments.[283] He also contributed to Ms Giller's financial resources, by caring for the twins while she was studying to qualify as an interpreter and by driving her to and from the schools where she worked part-time.[284]

325 If Ms Giller had established that she made financial contributions to family expenses, which indirectly assisted Mr Procopets to reduce his mortgage loans, those financial contributions could have been taken into account under s 285(1)(a). At the beginning of the relationship, Ms Giller had no savings and she and her daughter were supported by Mr Procopets. In 1990, however, she and her then husband began receiving some form of social security. His Honour found that:

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281 In the years ending 30 June 1990, 1991, 1992 and 1993 the defendant paid $75,180, $73,464, $63, 300 and $53,736 off his mortgages. Ibid [221].

282 The divisible pool would have been much greater if the Westbury Road and Hotham Street properties had been included.

283 Reasons [229].

284 Ibid [41], [225].

(a) by 1991, Ms Giller and Mr Procopets' 'household was in receipt of benefits of the order of $230 per week';

(b) the parties' fraudulently entered into a lease which was used to extract a rent subsidy from the Commonwealth'; and

(c) from March 1993, Ms Giller was receiving a sole parent payment.[285]

Ms Giller's evidence was that she gave Mr Procopets all the social security payments she received and that he did not give her any money of her own. Mr Procopets said that she kept all of her social security payments. His Honour did not believe either of the parties on this matter.[286]

326 In relation to the period from 13 March 1990 to 6 July 1993, his Honour concluded that '[t]he reality is that [Ms Giller] was kept by [Mr Procopets] during this period and any monies from pensions would have been well and truly spent on the cost of housing and looking after [Ms Giller] and her daughter.'[287] In relation to the period July 1993 to October 1996, his Honour said that he had 'no doubt at all that the contribution [of food or money] made by [Ms Giller] would not have represented anything over and above the cost of looking after her when she stayed at Otira Road'.[288] Grounds of appeal 2-7 challenged these and a number of other factual findings relevant to the indirect financial and non-financial contributions made by Ms Giller. Since, however, counsel for Ms Giller made no submissions on these grounds on the hearing of the appeal, I do not consider them.

327 His Honour also rejected Ms Giller's claim that she and/or her parents had made direct financial contributions to the development of the Orrong Crescent property.[289] Mr Procopets' version of events was that he had repaid various

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285 Ibid [37]–[39].

286 Ibid [222]–[229] (relating to the period of cohabitation), [230] (relating to the period between July 1993 and October 1996).

287 Ibid [229].

288 Ibid [230].

289 Ibid [242].

amounts lent to him by the appellant and her parents. Once again, his Honour considered that neither party's evidence on these matters was credible.[290] This finding was not challenged on appeal.

328 Ms Giller also claimed she had made non-financial contributions to the Orrong Crescent property by putting in substantial labour on the site while the property was being developed. His Honour commented as follows:

> I accept that the plaintiff did attend from time to time. I accept the evidence that she did assist to clean the inside of the units after the works had been completed and that she also from time to time attended at the site and collected up building materials and the like from the site. I also accept that during the period when the small gardens were being established she did provide some work in relation to those activities. However when one has a relationship of 'boy-girl', it is not unusual to do things together from time to time. It is laughable to suggest that a person makes a substantial contribution to a development because that person happens to be with her partner on a particular day and he says 'well I am going to clean up the site, would you like to come down and help me?'[291]

329 Ms Giller's contributions in cleaning the units and collecting building materials fall within s 285(1)(a), because they were non-financial contributions to the improvement or conservation of Mr Procopets' property. They were only minor contributions, but should not be entirely disregarded. It is, nevertheless, clear that Ms Giller's financial and non-financial contributions to Mr Procopets' property were far outweighed by the financial contributions which he himself made.

330 That, of course, is not the end of the matter. As discussed earlier, s 285(1)(b) required the Court to assess the homemaker or parent contributions made by either of the de facto partners to the welfare of the other de facto partner or to the welfare of the family. This provision must be given a beneficial construction.[292] Contributions to the welfare of the family must be recognised 'not in a token way but in a substantial way'.[293] The contributions of a de facto partner as homemaker and

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290 Ibid [52].

291 Ibid [244].

292 *Black v Black* (1991) 15 Fam LR 109, 113–114 (Clarke JA).

293 For Family Court decisions to this effect, see *In the Marriage of Rolfe* (1979) 25 ALR 217, 219 (Evatt CJ); *Mallet v Mallet* (1984) 156 CLR 605, 609 (Gibbs CJ), 623 (Mason J), 636 (Wilson J); *In*

parent should not be regarded as inferior to the corresponding contributions of a spouse,[294] nor should contributions as homemaker or parent be valued by reference to the commercial value of those services.[295] Family Court decisions dealing with the assessment of homemaker and parent contributions under s 79 are also of assistance in assessing the value of such contributions,[296] although they cannot be applied uncritically given that s 79 requires reference to factors (in s 75(2) of the *Family Law Act*) which have no equivalent in the Act.

331 I respectfully adopt what the New South Wales Court of Appeal said in *Kardos v Sarbutt* about the approach which should be taken in evaluating the respective contributions of the parties:

> … [T]the court is not required to take a reductionist process analogous to the taking of partnership accounts by examining every alleged 'contribution' of the kinds described in the section with a view to putting a monetary value on each in order to reach an accounting balance one way or the other, then to be eliminated by the requisite financial adjustment; rather, the court is required to make a holistic value judgment in the exercise of a discretionary power of a very general kind: *Davey v Lee* (1990) 13 Fam LR 688 (McLelland J).
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> Some contributions are readily capable of evaluation in monetary terms. Others - such as those made in the capacity of homemaker and parent - are not.[297]

332 It is necessary to consider Ms Giller's contributions as homemaker and parent in three separate periods — during the three years that the couple were living together; in the period from July 1993 to October 1996, when Mr Procopets continued to see Ms Giller and their children; and in the period following the end of the relationship.

333 His Honour found that, in their first two years of cohabitation, Mr Procopets

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the Marriage of Ferraro (1992) 111 FLR 124, 159; *Jones v Grech* (2001) 27 Fam LR 711; *Liu v Gao* [2006] NSWSC 1144.

294 *Black v Black* (1991) 15 Fam LR 109, 114 (Clarke JA) (Kirby P and Handley JA agreeing). See also *Evans v Marmont* (1997) 42 NSWLR 70, 74 (Gleeson CJ and McLelland CJ in Equity).

295 *Black v Black* (1991) 15 Fam LR 109, 117 (Clarke JA); see also *Evans v Marmont* (1997) 42 NSWLR 70, 74 (Gleeson CJ and McLelland CJ in Equity).

296 *Black v Black* (1991) 15 Fam LR 109, 113 (Clarke JA).

297 (2006) 34 Fam LR 550, 561 (Brereton J).

supported Ms Giller by providing her and her daughter with a home. Ms Giller worked in the home and cared for the twins after they were born, while Mr Procopets continued to support the family. In 1991, Ms Giller studied to improve her English, and in 1992 enrolled in a Bachelor of Education course at the University of Melbourne. His Honour found that '[t]he times of her lectures varied, some early in the morning, some late afternoon and [Mr Procopets] undertook a number of chores concerning the children, including Julia, and also performing cooking and doing household chores'.[298] He observed that, whilst Mr Procopets was not working, he also spent his time 'looking after his rental properties, the home, and acquiring and fixing second hand goods and buying and selling cars'.[299] Ms Giller relied on Mr Procopets to 'provide assistance with the twin boys'[300] when she was at university. His Honour did not accept Ms Giller's assertion (in her statement of claim) that she was responsible for household tasks and solely responsible for the care of the twins during this period, but he accepted that she 'helped maintain the home, that she did clean and cook and care for the children'.[301] In his Honour's view the parties made equal contributions to the welfare of the family during this period.

334 From July 1993 onwards, the twins lived with Ms Giller. Between October 1993 and January 1994, Ms Giller spent a few days per week with Mr Procopets. Thereafter she stayed with him on average six days per month.[302] During this period Ms Giller completed her qualifications as an interpreter and the children went to a childcare centre. Mr Procopets sometimes took the twins to or from childcare. In her affidavit of 2 February 1997, Ms Giller said that her parents picked up the children two nights per week and that Mr Procopets collected them one night a week. His Honour appears to have considered that Ms Giller underestimated the extent of assistance provided by Mr Procopets. He said that

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298 Reasons [40], [232].

299 Ibid [232].

300 Ibid [201].

301 Ibid [233].

302 Ibid [207]. However at [48] his Honour said this occurred about seven days per month.

'between June and December [Mr Procopets] had constant contact. He was picking up the children and delivering them to a child minding centre and this would be sometimes two to three days per week.'[303] His Honour also said that:

> [Ms Giller] found it convenient from time to time to seek the services of [Mr Procopets] with the twins which he gladly gave and her decision to stay with [Mr Procopets] from time to time was much influenced by the assistance that he could provide.[304]

335 On 12 November 1996, Ms Giller obtained an interim intervention order against Mr Procopets.[305] On 2 December 1997 the Family Court made a sole custody order in favour of Ms Giller, with provision for Mr Procopets to have supervised direct contact with the children, subject to specified conditions. Mr Procopets told this Court that he had exercised his rights to supervised contact on a couple of occasions but had not continued to do so. After that time, Ms Giller assumed complete responsibility for care of the children.

336 Of the period after July 1993, His Honour said:

> I have already stated that in my opinion the alleged contributions made by [Ms Giller] to the welfare of the family after 6 July 1993 are not relevant. However if it is relevant I am satisfied that in this period [Mr Procopets] also made a substantial contribution in the area of home maker and parent. From time to time [Ms Giller] stayed at his home with the two children. He supplied all of the food and amenities. From time to time he assisted with looking after the twins. This enabled [Ms Giller] to continue her studies and to obtain work as an interpreter. She was in receipt of a substantial pension and income at this time and yet made no contribution to [Mr Procopets'] household. It was her choice in my view to follow the lifestyle that she pursued during this period. She maintained her own household but more importantly her own independence. I do not accept that any contribution made during this period exceeded that of [Mr Procopets] and if it was relevant in my view it would not be just and equitable as a basis for adjustment.[306]

337 Between 1993 and 1996 the children were quite young and must have required considerable care. The fact that Ms Giller 'maintained her own household

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303 Ibid [24].

304 Ibid [201].

305 A final intervention order was obtained on 22 November 1996.

306 Reasons [237].

and independence' does not detract from the value of her contributions in caring for the twins, for whom she took primary responsibility, though she received some assistance from Mr Procopets. During this period, Ms Giller undertook the double load of caring for the children and earning an income. Mr Procopets assisted her by picking up and collecting the children on some days of the week, but these contributions to the welfare of the children were no more than incidental. On no view could they be regarded as equivalent to the responsibility borne by Ms Giller. She was, for practical purposes, a sole parent, shopping, cooking and caring for twins aged between three and six years old. On his Honour's own findings, the children accompanied Ms Giller to Mr Procopets' home on only six or seven nights a month after January 1994.

338 From 1996, Ms Giller was entirely on her own in bringing up the two boys. Mr Procopets said in evidence that it was Ms Giller's choice to live apart from him, that he was paying child support and that he had wanted to be more involved in the raising of the children, but had been precluded from doing so because Ms Giller had obtained the sole custody order from the Family Court. There was, of course, nothing to prevent Mr Procopets from having supervised access to his children pursuant to the Family Court's order. His failure (or refusal) to do so belies his claim that he wanted to be more involved in their upbringing. But he is not to be punished for his lack of involvement. The Court simply deals with the contributions which were actually made.

339 Mr Procopets submitted that child support payments made by him must be taken into account as contributions to the welfare of the family. I accept this submission. Section 79(4)(g) of the *Family Law Act* specifically requires child support payments to be taken into account.[307] Although there is no similar provision in Part IX of the Act, I consider it just and equitable that the payment of child support be taken into account as a contribution to the welfare of the family. Counsel for Ms Giller conceded that this was so.

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307 See also *Kirby v Kirby* (2004) 32 Fam LR 321.

340 Counsel for Ms Giller said that during the trial Mr Procopets had paid child support arrears of $15,000. Mr Procopets said that the arrears had only arisen because he had been paying child support at one rate, before Ms Giller applied for an increase, which was backdated. He also claimed that the amount of arrears paid was greater than $15,000.[308] Although it is clear that Mr Procopets paid some child support, his Honour made no finding as to the amount.[309] Nor is it clear whether Mr Procopets continued to meet his child support obligations after the trial. (He will cease to be liable for child support when the twins reach the age of 18). Further, the fact that he incurred substantial arrears means that Ms Giller had to manage without some of this income for a period.

341 For the reasons I have given, I consider that Ms Giller's contributions in caring for the children were substantially greater than those made by Mr Procopets.

Step 3: deciding what order should be made

342 The third step is to determine a just and equitable division of the property. Once again, the NSW Court of Appeal has provided considerable guidance on the approach which should be taken.

343 Until the decision of that Court in *Evans v Marmont,*[310] there had been a difference of view on the extent to which the court could take into account factors other than financial, non-financial, and homemaker and parent contributions. In *Dwyer v Kaljo* Handley JA[311] said:

> The power to make a just order must therefore authorise orders to remedy any injustice the applicant would otherwise suffer because of his or her

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308 His Honour found that Ms Giller had lied in her affidavit when she said that she had not received any child support since 7 December 1998 and that the arrears exceeded $30,000: Reasons [24]. His Honour also said that 'the defendant was obliged to and did pay maintenance for the children': Reasons [122].

309 During the trial, his Honour noted that Mr Procopets paid $10,426.63 in child support to cover the period from 24 October 1997 to 18 November 1998 and that there were also regular payments until 26 July 2000. Ms Giller said that she had received a payment of $2,800 in August 2003.

310 (1997) 42 NSWLR 70.

311 With whom Priestley JA agreed.

> reasonable reliance on the relationship (a reliance interest) or his or her reasonable expectations from the relationship (an expectation interest). The section would also authorise orders which restored to the applicant benefits rendered to the other partner during the relationship or their value (the restitution interest).[312]

In *Wallace v Stanford*,[313] Mahoney JA, who was the dissentient in *Dwyer v Kaljo*, said the legislation did not permit such factors to be taken into account.[314] Sheller JA agreed that the appeal should be dismissed for the reasons given by Mahoney JA, but found it unnecessary to reach a conclusion on the correctness of the views expressed by Handley JA in *Dwyer v Kaljo*.[315]

344 This conflict of judicial opinion was resolved by a five member bench of the Court of Appeal in *Evans v Marmont*.[316] The majority view in that case (Gleeson CJ, McLelland CJ in Eq and Meagher JA; Mason P and Priestley JA dissenting) was that the provisions relating to contributions constituted:

> the focal points by reference to which the discretionary judgment as to what seems just and equitable must be made. They are not merely two matters, or groups of matters, which take their place amongst any other relevant considerations. It is by having regard to those matters that the court may adjust property interest in a just and equitable manner.[317]

The Court rejected Handley JA's view that the section authorised the court to take account of reliance, expectation or restitution interests. The majority agreed, however, with the view expressed by Hodgson J (as the trial judge in *Dwyer v Kaljo*[318]) that, although the factors set out in s 20 of the NSW Act (the analogous provision to s 285 of the Act)[319] were fundamental, other matters might also be relevant.

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312 (1992) 27 NSWLR 728, 744.

313 (1995) 37 NSWLR 1.

314 Ibid 8–13.

315 Ibid 23.

316 (1997) 42 NSWLR 70.

317 Ibid 80.

318 (1987) 11 Fam LR 785.

319 Note that the Act requires any written agreement between the parties to be taken into account. There is no equivalent provision in the NSW Act. That issue is not relevant here, but see *Rowe v Dassios* [2007] VSC 218.

345 The majority endorsed the following statement by Hodgson J:

> [Contributions are] not the only factor which can be taken into account. In my view, if one considers the plaintiff's contributions and nothing else, this cannot conceivably lead to any view on what is just and equitable in the circumstances. However, it seems to me that the other factors can have no independent bearing on what is just and equitable. Their relevance is only by reason of such relevance as they may have to the question: what is just and equitable having regard to the plaintiff's contributions?
>
> In my view, some other factors will be relevant in this way in all cases. One such factor arises from the question whether the contributions of the plaintiff have been sufficiently compensated. The relevance of this question is confirmed by the terms of s 17 of the [the NSW] Act. This in turn requires the court to reach some view of the value of the contributions of the plaintiff, and some view of the value of what the plaintiff has received in return.
>
> In most cases, I think the financial circumstances of the parties will be relevant. Certainly, it is necessary for the court to ascertain what the property of the parties comprises at the time of the hearing, because it is to this that any adjustments of interest have to be made. Further, I think that in most cases the needs and means of the parties will have general relevance, as subsidiary factors, to the question of what is just and equitable having regard to the plaintiff's contributions. However, as indicated earlier, I accept that the needs and means of the parties has no relevance except via its relevance to this question: in particular, the court cannot say that because the defendant has $11 million, and the plaintiff has something less than $50,000, for that reason it is just and equitable to make an adjustment.
>
> Other circumstances which may be relevant include such matters as the length of the relationship, any promises or expectations of marriage, and also I think opportunities lost by the plaintiff by reason of the plaintiff's contributions. This is by no means intended to be exhaustive. I do not think any limit can be set on what circumstances may be relevant, remembering always that the relevance must be to the question, what is just and equitable having regard to the plaintiff's contributions.[320]

Gleeson CJ and McLelland CJ in Eq added the following:

> It would be unrealistic to attempt to evaluate [financial, non-financial and homemaker and parent contributions] for the purpose of determining what is just and equitable, having regard to those contributions, in isolation from the nature and incidents of the relationship as a whole, relevant aspects of which may well include factors of the kind mentioned by Hodgson J.[321]

346 Victorian judges have expressed a variety of views on the point. In *Conn v*

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320 *Evans v Marmont* (1997) 42 NSWLR 70, 75 (Gleeson CJ and McLelland CJ in Equity), 97 (Meagher JA, agreeing with the construction of Gleeson CJ and McLelland CJ in Equity).

321 Ibid.

Martusevicius,[322] Vincent J considered it appropriate to follow the approach of the NSW courts in interpreting the Act. He said:

> [T]he Court is vested with a wide discretion and must attempt to arrive at a result which is just and equitable in the circumstances. Accordingly, it must have regard to the whole of the relevant context within which an application is made.
>
> Any assessment of the significance and value of the assistance and support provided by de facto partners which did not place them within a framework provided by all of the circumstances of the relationship, would introduce a measure of unreality into the process and a degree of tension would arise between the adoption of a restrictive approach to the factors to be taken into account, and the duty of the Court to attempt to achieve equity between the partners.[323]

347 In *Robertson v Austin*,[324] Nettle J said:

> [I]n *Bennett v Parker*,[325] O'Bryan J considered that *Conn* and the cases which had followed it should no longer be followed. In his Honour's opinion they were based on the decision of Handley JA in *Dwyer v Kaljo* and that had been disapproved of by the New South Wales Court of Appeal in *Evans v Marmont*.
>
> But if I may say so with respect, I do not think that there is any inconsistency between *Conn* and what was said in *Evans*, unless it is to be found in the observation of Vincent J that 'the legislature has not attempted to confine narrowly the concept of 'contribution' and there is, in my opinion, no good reason for the courts to do so'. The decision in *Conn* was not based on what Handley JA said in *Dwyer* - it preceded the Court of Appeal's decision in *Dwyer* - and in *Conn*, Vincent J (just like the judge at first instance in *Dwyer*) expressly adopted the four stage approach to the adjustment of property interests which was laid down by Powell J in *D v McA* (but subsequently disapproved by Handley JA on appeal in *Dwyer*). Inasmuch as the Court of Appeal in *Evans* disapproved of what Handley JA had said, and held that *Dwyer* should not be followed, *Evans* tends to vindicate the approach adopted in *D v McA* and thus implicitly to provide support for *Conn*.
>
> At all events, as the law appears to me, the only things to which the court is to have regard are direct and indirect financial interests. But it remains that in quantifying those contributions one should not attempt to confine narrowly the concept of contribution.[326]

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322 (1991) 14 Fam LR 751. See also *Powell v Supresencia* (2003) 30 Fam LR 463; *Manns v Kennedy* (2007) 37 Fam LR 489, 511.

323 *Conn v Martusevicius* (1991) 14 Fam LR 751, 754. See also *Lesiak v Foggenberger* (Unreported, Supreme Court of Victoria Hedigan J, 23 August 1995); *Hughes v Curwen-Walker* (Unreported, Supreme Court of Victoria, Mandie J, 15 November 1994).

324 [2003] VSC 80. See also *Steinbarth v Peters* [2005] VSC 87.

325 (2000) 27 Fam LR 8.

326 *Robertson v Austin* [2003] VSC 80, [38]–[40].

348 In *Findlay v Besley*,[327] Morris J summarised the relevant legal principles as follows:

> In considering whether or not to make an order adjusting the interests of domestic partners in the property of one or both of them, the Court must have regard to, and only to, the financial and non-financial contributions made by each of them of the type referred to in para(a) and para(b) and to any written agreement entered into by the domestic partners. However, in considering what is just and equitable having regard to these factors, the Court will ordinarily have to consider them in context. Contextual matters might include the financial circumstances of the parties, the length of the relationship, the extent to which the financial affairs of the parties have been integrated, and opportunities lost by a party by reason of their contributions. Another important contextual matter will be the consumption enjoyed, by or on behalf of a domestic partner, by reason of the financial and non-financial contributions. However these contextual matters are just that: they are not criteria to which reference should be had in determining what is just and equitable.[328]

349 I consider that the approach in *Evans v Marmont* should be followed in Victoria.[329] The contextual factors which are relevant in assessing the parties' contributions in this case include:

- the relatively short duration of the relationship;
- the fact that Mr Procopets provided support to Ms Giller while she obtained educational qualifications during their cohabitation; and
- the considerable delay in resolving the parties' claims.[330]

350 As I have said, Ms Giller made only minor, non-financial, contributions to Mr Procopets' property. But she made contributions to the welfare of the family while the couple were living together, despite the difficulties caused by Mr Procopets' violence, and has continued to care for the children of the relationship after their separation. Mr Procopets made virtually all of the financial contributions

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327 [2003] VSC 247.

328 Ibid [56] (citations omitted). See also *Rowe v Dassios* [2007] VSC 218.

329 It should, however, be noted that the Act requires the Court to take account of any written agreement between the parties, as well as the financial and non-financial contributions which they have made to property and to the welfare of the family.

330 See [313] and [318] above.

to the property; contributed to the welfare of the family while the couple were living together; assisted Ms Giller in caring for the children in the three years after the couple separated; and has paid some child support.

351 His Honour held that no order should be made adjusting the parties' property interests because:

> both parties derived a benefit from the relationship but the financial and non-financial contributions made directly or indirectly by the plaintiff did not exceed the cost of her keep and that of her daughter during the relevant period and there was no contribution made to the acquisition, conservation or improvement of any of the properties or the financial resources of the defendant during that period. So far as the contributions made to the welfare of the family I am quite satisfied that both parties made an equal contribution during this period. I have carefully considered the evidence and in my opinion [Ms Giller] has not established a right to an adjustment of the [Mr Procopets'] interests in either Orrong Crescent or Otira Road. Accordingly her claim under Part IX of the Property Law Act fails.[331]

352 In *Robertson v Austin,* Nettle J referred to the difficulties of precisely defining a person's non-monetary contribution to the assets and welfare of the parties. He said:

> Views will differ widely as to the existence and extent of the contribution. The defendant perhaps perceives it as having been of great importance and value; the plaintiff, something less.[332]

353 Mr Procopets submitted that his previous contributions to the welfare of Ms Giller were already sufficient recognition of her contributions. He said that he had supported her while she had established and educated herself in Australia, and he had helped her family to emigrate here. This meant that 'even if the Court [was] of the opinion that [he] should pay her something, [he had] already done it one hundred fold'.

354 I do not agree. In my view, some real weight must be given to Ms Giller's contributions to the welfare of the family, particularly her contributions in caring for the children after the couple separated, when she was both working to earn an income and caring for the children alone. His Honour's conclusion that Ms Giller's

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331 Reasons [238].

332 *Robertson v Austin* [2003] VSC 80, [76].

contributions 'did not exceed the cost of her keep and that of her daughter' tended to equate her position with that of a domestic servant rather than that of a domestic partner. Characterising her contributions in that way had the effect of 'devaluing those contributions which are not readily capable of evaluation in monetary terms'.[333]

355 The principal relief sought by Ms Giller was an order that Mr Procopets transfer to her half his interest in the back unit at 22 Orrong Road (or half of the value of that unit) to her.[334] Alternatively she sought an order adjusting the interests, as the Court deemed just and equitable.[335]

356 The first of these would not, in my view, be just and equitable, having regard to the very significant financial contributions made by Mr Procopets, to his non-financial contributions and to the relatively short period of cohabitation. At the same time, I consider that there must be some adjustment to the respective property interests in recognition of the homemaker and parent contributions which Ms Giller made both before and after the parties separated.

357 Under s 291 of the Act, the Court can make an order for payment of a lump sum. Doing the best I can, I consider that the payment of a lump sum of $45,000 (which amounts to a little over 10 per cent of the value of Mr Procopets' property at the date of separation) would appropriately adjust the property interests between Ms Giller and Mr Procopets.

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333 *Kardos v Sarbutt* (2006) 34 Fam LR 550, 561 (Brereton J).

334 Ms Giller sought a number of alternative orders, including a declaration pursuant to s 278 of the Act that Mr Procopets held 50 per cent of the beneficial interest in the property on trust for Ms Giller. That claim for a declaration was not pursued on the hearing of the appeal.

335 Again, Ms Giller sought a number of alternative orders to this effect. See Amended Notice of Appeal.

The videotape claims

Findings of fact

358 I have already referred to the fact that Ms Giller obtained an interim intervention order against Mr Procopets on 12 November 1996. As is often the case where a relationship involves violence,[336] Ms Giller continued to see Mr Procopets after the interim intervention order was granted. Ms Giller's claim for damages for breach of confidence, breach of privacy and intentionally causing mental harm arose out of the events which followed the granting of this intervention order. The relevant factual findings made by his Honour are summarised below.[337]

359 The couple had intercourse on 19 November 1996 and on a number of other occasions between then and 1 December 1996. Mr Procopets filmed their sexual activities on a hidden video camera. Until 25 November, Ms Giller was unaware of the filming. Thereafter she became aware of the filming and acquiesced in it.

360 Shortly after 1 December 1996, relations between Ms Giller and Mr Procopets deteriorated, to the point where Mr Procopets began threatening to show videos of their sexual activities to Ms Giller's friends and family.

361 On 5 December 1996, Mr Procopets took a video of himself and Ms Giller having sex, to the home of Ms Giller's parents and tried to show it to her father, in the presence of Ms Giller's 17 year old brother. They refused to look at the video and Mr Procopets left the cassette with Ms Giller's brother. The video was handed back to Ms Giller, who was distressed by the thought of the video being shown to her family.

362 On the same day, Mr Procopets went to the home of a husband and wife who were friends of Ms Giller. He told the wife that Ms Giller was a bad person and a prostitute, and unsuccessfully tried to persuade her to view a video. When

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336 See Victorian Law Reform Commission, *Review of Family Violence Laws Report* (2004) [2.52]-[2.66].

337 Unless otherwise stated, these facts come from paragraphs [269]-[275] of the Reasons.

Mr Procopets was asked to leave, he tried to give the cassette to the husband, who refused to accept it.

363 On 6 December 1996, Mr Procopets picked up his children from the childcare centre and saw Ms Giller and her mother in a car nearby. He then showed Ms Giller's mother photographs of Ms Giller depicting 'some sexual activity and nudity', and told the mother that her daughter was an immoral woman.[338]

364 On 7 December 1996, Mr Procopets showed a video to an elderly woman, Mrs Volkova, who was the mother of a male friend of Ms Giller. Mrs Volkova did not know Mr Procopets.[339] The trial judge found that:

> Mr Procopets produced a video cassette and asked her to view it. When she informed him they had no VCR Mr Procopets returned with a VCR and connected it to the TV and commenced to play the video cassette. It was shown for about two or three minutes. Mrs Volkova realised that it showed a male and female having explicit sex and she demanded Mr Procopets to leave the home. He said he would bring another tape. About ten minutes later Mrs Volkova's husband returned home. Later on the son Leonid Volkov came home and he rang the police who took possession of the VCR and the video cassette. Mr Leonid Volkov said that he did not look at the video.[340]

365 On 8 December 1996, Mr Procopets went to the Camberwell market with his video camera and began to film Ms Giller and her mother. Ms Giller picked up a steel rod and hit Mr Procopets several times.

366 On 9 December 1996, Mr Procopets rang the Operations Manager of Victorian Interpreting and Translating Service (the company for which Ms Giller worked), saying that he was concerned about a group of interpreters indulging in unethical behaviour. He said that one of the interpreters was using her position to gain sexual favours and that he had a video cassette in which the interpreter was engaging in sexual activity. His Honour did not believe Mr Procopets' denial that he had made the telephone call.

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338 Reasons [58].

339 Ibid [64].

340 Ibid [270].

367 After the phone call to the Victorian Interpreting and Translation Service, Ms Giller reported the matter to the police. In her statements to the police, Ms Giller referred to Mr Procopets' threat that he would show the video and the fact that he had tried to show it to her parents. She also said that she did not want to have any contact with Mr Procopets, who appeared to be following her. Mr Procopets was interviewed by the police and asked what he had done with the tapes. He said that he had sealed the video and some documents in an envelope and given them to a woman friend, Mrs Drobitsky, for safe-keeping.

368 In mid-1997, Mrs Drobitsky, who herself had had a relationship with Mr Procopets, reported to the police that he had shown her a video of himself having sex with Ms Giller. On 6 November 1997, Mr Procopets was arrested and charged with breaching the intervention order, which had been varied to restrain him from distributing any videotapes depicting Ms Giller in any offensive activity. His bail was revoked and he spent 31 days in jail. On 20 January 1998, he was convicted of unlawful assault, breach of the intervention order and stalking. He was sentenced to 4 months' imprisonment, but the sentence was stayed upon payment of fines totalling $2,500 and costs totalling $3,300.

369 Ms Drobitsky was called as a witness for Ms Giller. His Honour found that 'she was shown the video, admittedly during the course of her relationship with Mr Procopets and in the privacy of his home'.[341]

370 His Honour held that, when Mr Procopets attempted to show the video to others and showed it to Mrs Volkova:

> [H]e did so with the intention of hurting the plaintiff and to cause her distress, upset and annoyance. …
>
> I am satisfied that the plaintiff has established that the relationship was a confidential one, that she did not authorise him to distribute the video or show it, that his unauthorised distribution was a breach of that confidence and she would be entitled to relief for that breach of confidence.
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> I also find in respect of the threats to show, the distribution and the showing

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341 Ibid [273].

> of the tape in December 1996, that the defendant intended to cause the plaintiff mental harm and that in distributing the video the plaintiff was distressed, annoyed and embarrassed.[342]

371 His Honour also found that, when Mr Procopets later showed the video to Mrs Drobitsky in his own home in 1997, he was intending to denigrate Ms Giller but not to cause her any mental distress.[343]

Grounds of appeal and the notice of contention

372 Grounds 27 and 28 of the amended notice of appeal challenge his Honour's factual findings about the extent of distribution of the videotape. Grounds 32 and 33 allege that his Honour erred in the factual findings he made about Mr Procopets' reasons for showing the videotape to Ms Drobitsky and the possible consequences of him doing so. Ground 35 alleges that the judge failed properly to consider the effect of his having shown Ms Giller's mother sexually explicit photographs. Little was made of these five grounds by Ms Giller and I do not deal with them.

373 Grounds 29, 30 and 31 allege that his Honour erred in finding that Ms Giller did not suffer any psychological or psychiatric injury as a result of the showing and distribution of the videotape. It was submitted on behalf of Ms Giller that his Honour's finding on this matter was 'glaringly improbable'[344] or 'contrary to compelling inferences'[345] and should therefore be set aside.

374 Ground 37 alleges that his Honour erred in law in dismissing Ms Giller's actions for breach of confidence, intentional infliction of mental harm and breach of privacy.[346]

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342 Ibid [274], [276]–[277].

343 Ibid [275].

344 *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) ALJR 842, 844. See also *Fox v Percy* 214 CLR 118, 128 [29] (Gleeson CJ, Gummow and Kirby JJ).

345 *Chambers v Jobling* (1986) 7 NSWLR 1, 10. See also *Fox v Percy* 214 CLR 118, 128 [29] (Gleeson CJ, Gummow and Kirby JJ).

346 Ground 36 was that '[h]aving regard to the totality of the evidence the … order dismissing the actions for breach of confidence, breach of privacy and intentionally causing mental harm were so unreasonable and plainly unjust that it may be inferred there has been a failure to properly exercise the discretion reposed in the trial judge.'

375 Mr Procopets alleged, both in a notice of contention and at the hearing, that the learned judge made a number of factual errors regarding the distribution of the videotapes. Unsurprisingly, given that he was unrepresented, Mr Procopets' arguments focussed on his Honour's findings of fact, rather than on the complex legal issues raised by Ms Giller's grounds of appeal.

376 I begin by considering the respective challenges to his Honour's findings of fact. I then consider whether his Honour erred in law in dismissing Ms Giller's actions for breach of confidence, intentional infliction of mental harm and breach of privacy. Finally, I consider the availability, and quantum, of damages in relation to the videotape claims.

Mr Procopets' challenges to factual findings

377 Mr Procopets contended that his Honour should not have found that he had shown Mrs Volkova and Mrs Drobitsky a video tape of himself and Ms Giller engaged in sexual activities, or that he had threatened to do so.

378 Mr Procopets' contentions were as follows:[347]

- The tapes which were in evidence and viewed by his Honour were not the same tapes as were given to Ms Giller's father or as were shown to Mrs Volkova. Mr Procopets said that the tapes seen by the witnesses did not involve sexual activity, and that the tapes that went into evidence were tapes which Ms Giller had substituted. Alternatively, he suggested, there might have been a conspiracy between Ms Giller and Senior Constable Cain, the investigating policeman. Further, he said, the judge could not have seen the original tapes because their destruction had been ordered by the Magistrates' Court pending the hearing of various criminal charges against him.[348]

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347 Some of these were included in a Notice of Contention filed by Mr Procopets and some were made at the oral hearing. For reasons of fairness to an unrepresented litigant, we deal with them all.

348 In support of his claim, Mr Procopets took the Court to a certificate of the County Court as to the outcome of appeals by him from orders/convictions of the Magistrates' Court for various

- The tapes which he had taken or shown to Ms Giller's parents and Mrs Volkova were innocuous, and intended simply to show that Ms Giller was still having a relationship with him after 1993, something she had denied to them.

- The interpreter had made an inaccurate translation of the evidence of Mrs Volkova and Ms Drobitsky, and this was because the interpreter was in Ms Giller's camp. The Court should therefore disregard those of his Honour's findings which were based on this evidence and, in particular, on the interpreter's version of Mrs Volkova's evidence that Mr Procopets had shown her a tape of a man and woman having sex.

- The audio tapes of phone calls between himself and Ms Giller had been inaccurately translated, again by an interpreter sympathetic to Ms Giller's cause.

- Mrs Volkova was not a credible witness, as it had been demonstrated in cross-examination that she lied about whether she had worked in Australia. Ms Drobitsky was also an unreliable witness.

- Mr Procopets had not in fact threatened Ms Giller that he would show to her family, friends or employer tapes depicting sexual activity. Alternatively, the threats made by him in the telephone conversations recorded by Ms Giller were made in the heat of the moment, when he was drunk, distressed and 'teased' by Ms Giller, and he had never intended to carry out the threats.

- His Honour's adverse findings on Ms Giller's credibility should have led to the conclusion that she had lied about his threats to show the videotapes.

I deal briefly with each of these submissions below, before making some general comments about Mr Procopets' assertions.

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offences including breaching an intervention order and stalking. It was dated 30 June 1998. In the section headed Sentence Appealed Against the certificate says 'Order following Property/s seized be forfeited and destroyed: VIDEOTAPE'.

The wrong videotapes

379 There was some confusion about the provenance of the tapes viewed by his Honour. In his reasons, his Honour said that 'the video did get into the possession of Mrs Drobitsky who was handed the tapes and some documents in a sealed envelope by the defendant' and refused to hand them back to him.[349]

380 Mr Procopets was unable to point to any convincing evidence supporting his claim that the tapes which his Honour viewed were not the original tapes, and/or were not the tapes seen by the witnesses. Mrs Volkova gave evidence that the tapes showed a man and woman participating in sexual activity, though she did not identify Ms Giller and Mr Procopets. Mrs Drobitsky's evidence was that Mr Procopets had shown her a video depicting sexual activity between Ms Giller and Mr Procopets. This occurred in his home at some time in 1997.

Evidence of Mrs Volkova and Ms Drobitsky

381 Mr Procopets did not put to Mrs Volkova in cross-examination that she had not in fact seen a tape showing sexual activity. In this Court, he said that he had not done so because Mrs Volkova was not a credible witness; there would have been no point in cross-examining her on this point because she was lying; and, in any case, the interpreter's translation of her evidence was unreliable. Significantly, Mr Procopets did not complain during the cross-examination itself that the interpreter was not translating accurately. As a fluent Russian speaker, he might have been expected to do so if he had had any concern about the accuracy of the translation.

382 His Honour found that Mrs Drobitsky was an unsatisfactory witness, but he accepted that she had been shown a tape of Mr Procopets and Ms Giller participating

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[349] Reasons [67]. He also said that 'the videos were delivered to the County Court pursuant to an order on 24 June 1998. They remained with the Court.' However, this observation was made in the context of finding that no injunction would have been available. See Reasons [165].

in sexual activity. Mr Procopets said that he had given the tapes to Mrs Drobitsky to hide, to prevent the police from finding them. He was unable to explain why he had done so if the tapes were, as he claimed, entirely innocuous.

Threats to show the video tapes

383 Recordings of telephone conversations between Ms Giller and Mr Procopets were admitted in evidence at the trial. They supported Ms Giller's claims that Mr Procopets had threatened to show the tapes to her friends and family and that she was distressed by these threats. Ms Giller's claims were made more probable by the fact that Mrs Volkova said he had shown her the tapes; that Mr Procopets attempted to show video tapes (which he claimed were innocuous) to Ms Giller's parents and friends; and that he told Ms Giller's employer that he had a tape showing her participating in sexual activity.

Conclusion

384 The judge observed that there were many instances during the course of the trial where he was satisfied that Mr Procopets was 'telling deliberate untruths' or '[indulging] in dishonest conduct'.[350] I discerned a similar pattern in Mr Procopets' behaviour on appeal. For example, his assertion that he had not assaulted Ms Giller, and had only admitted to doing so to propitiate her in a telephone conversation which she had taped, was quite incredible. The same can be said of his assertion that Ms Giller exchanged tapes depicting sexual activity between her and Mr Procopets for tapes which were entirely innocuous.

385 There were also striking inconsistencies in Mr Procopets' claims. For example, he said that he gave the tapes to Mrs Drobitsky when Ms Giller was seeking an intervention order because he wanted to prove that Ms Giller was not then fearful of him. But the hearing of the intervention order application had already taken place before the date on which Mr Procopets claimed that he gave the

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350 Ibid [28].

tape to Mrs Drobitsky. As the learned trial judge said:

> One thing is clear, the defendant was inconsistent in what he said. His answer or representation depended on what he thought he should say to assist his cause at the time. The extracts of evidence from the trial before Smith J must be considered together; they show inconsistent evidence. So do the interviews with the police and the recorded telephone calls.[351]

386 The factual issues relevant to these grounds of appeal and to Mr Procopets' submissions were fully canvassed by his Honour. As I have said, the resolution of the factual issues in this case was extremely difficult. These findings of fact were clearly open to the learned trial judge. In my opinion, Mr Procopets' challenges to these findings of fact fail.

Ms Giller's challenge to finding that she did not suffer a psychiatric injury

387 Although the learned trial judge found that Ms Giller had established the elements of her claims for breach of confidence and intentional infliction of mental harm, his Honour found that the law did not permit the recovery of damages in either cause of action for mere annoyance and distress. Before I consider this alleged error of law (ground 37), I briefly discuss Ms Giller's challenge to his Honour's finding that she did not suffer a psychiatric injury as a result of the distribution of the videotapes (grounds 29, 30 and 31).

388 The learned trial judge found -

> … [I]n respect of the threats to show, the distribution and the showing of the tape in December 1996, that [Mr Procopets] intended to cause [Ms Giller] mental harm and that in distributing the video [Ms Giller] was distressed, annoyed and embarrassed.
>
> [Ms Giller] gave evidence that she suffered from severe emotional distress, loss of self esteem and her confidence had been depressed as a result of the distribution of the video. She in fact said that she had been told by a substantial number of people that the defendant had attempted to or did provide copies to them. They are listed in the Statement of Claim but there is no evidence to that effect and I do not accept her evidence. She said that she became embarrassed, annoyed and self conscious when in public and she was aware of the gossip, sniggering and laughing behind her back. She said the stress occasioned by the separation, the constant threats and then the video

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351 Ibid [210].

> tape distribution has caused her insomnia, depression, loss of appetite and a sense of shame and disbelief. She said her credit was greatly injured and her character and reputation have been brought into shame, ridicule and contempt.
>
> She did not give evidence that she suffered any psychiatric or psychological injury. She did not seek any medical advice. There is no medical evidence that she suffered any physical, psychological or psychiatric injury. If the evidence of Professor Mendelson suggests she did, I do not accept it. Because of her lack of credibility, I approach her evidence as to the effect on her of the threats, distribution, and showing the tape with a degree of reservation.[352]

389 Ms Giller's claim that she suffered a psychiatric injury was based on the evidence of Professor George Mendelson, a psychiatrist who examined her in October 2002, in the lead up to the trial. Professor Mendelson concluded that:

> …Ms Giller suffers from a clinically significant anxiety disorder, with indications of autonomous nervous system hyperarousal … [H]er psychiatric condition is due to the physical violence and emotional abuse to which she had been exposed during her relationship with Mr Procopets, including the emotional distress that she had experienced as a result of the dissemination of the videotape of them in the act of sexual intercourse.

His Honour did not accept Ms Giller's evidence about the effect of Mr Procopets' behaviour on her. Further, he considered that the evidence of Professor Mendelson should not be accepted, because it was based on what Ms Giller had told him.

390 His Honour commented on Professor Mendelson's evidence as follows:

> He saw her on 22 October 2002 for one and a half hours in his consulting rooms. He saw her for psychiatric examination. He was provided with a letter from the solicitors and a draft affidavit which apparently was [Ms Giller's] main affidavit in this proceeding. In making his assessment and diagnosis and forming an opinion as to [Ms Giller] he had to rely upon what she told him and what appeared in the affidavit. As he told the Court his opinion was based purely and simply on what she had told him. He was not making any diagnosis or forming any opinion on his observations. He agreed that she was not clinically depressed. He came to the view however that she was suffering from a clinically significant anxiety disorder with indications of autonomic nervous system hyper arousal which, he was of the view, was developed as a consequence of the emotional abuse and physical violence to which she had been exposed during her relationship with [Mr Procopets]. The Professor frankly conceded in cross examination that on the scale of anxiety, her anxiety was at the minor end. He was also skilfully cross examined by [Mr Procopets] who highlighted all the matters of stress that [Ms Giller] was exposed to after she left the Ukraine in 1988. She moved from the depressing situation in the Ukraine to a camp in Italy in circumstances where the family had little money and life was extremely difficult. They

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352 Ibid [277]-[279].

> hoped to go the United States of America. They were disappointed when this did not happen. They came to a new country which was strange, not understanding the language, culture or way of life of Australia. The break up of her marriage, the difficulties associated with her daughter and the marriage break up, her deception of various bodies to obtain pensions, subsidised rent, subsidised childcare, free education for her daughter Julia, all of which backfired on her and ended up in demands being made for her to reimburse the various suppliers of the financial assistance, all contributed to her anxiety. The Professor frankly conceded that they were all factors which would cause a degree of anxiety to [Ms Giller]. The Professor suffered from the fact that he only saw her for an hour and a half in October 2002, and he was relying on what she told him. I have already indicated that her credibility is questionable. He was prepared to base his opinion on what she said. He thought that she may be suffering from battered wife syndrome but went on to observe that the Court was in a far better position than he was to make some assessment of her condition based on all the evidence before the Court. I reject any suggestion of battered wife syndrome in this relationship. The relationship effectively ended in July 1993 and thereafter [Ms Giller] pursued her own life independently of [Mr Procopets]. The incident in December 1996 I have no doubt was a cause of annoyance and distress to her but I do not accept that it in any way contributed to an anxiety condition that the Professor thought she may be suffering from at the moment. … I do not accept that the incident in December 1996 caused her an anxiety disorder and if she suffers from one I am quite satisfied that the causes were found in areas other than that incident. I refer to the police statements made at the time.[353]

391 Counsel for Ms Giller said that these findings could not be sustained because:

- Professor Mendelson's expert evidence that she was suffering from a significant anxiety disorder was not based solely on what Ms Giller told him, but was also based on what he observed during examination and on the mental state examination he conducted.

- The transcripts of the telephone conversations between Ms Giller and Mr Procopets, at the time he was threatening to show the videos, were evidence of her anxiety and fear and showed that her mental state was deteriorating.

- There was no evidence that any anxiety disorder or psychiatric illness from which Ms Giller suffered was caused by events prior to the distribution of the video tape. In any event, it had not been put to Ms Giller that her anxiety was due to her relocation from the Ukraine.

- His Honour erred in finding that the threat of revelation of the

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353 Ibid [280].

content of the tapes could not have caused Ms Giller anguish because the fact that she had a sexual relationship with Mr Procopets was already known to her community and because his threats were 'nipped in the bud' when the police arrested him on 10 December 1996.

392 I am not persuaded, however, that his Honour erred in concluding that Ms Giller did not suffer any psychological or psychiatric injury as a result of the videotape incidents. It cannot be said that the conclusion was 'glaringly improbable'[354] or 'contrary to compelling inferences'[355]. As his Honour noted, in the period from 1989 to 1996, Ms Giller had experienced a variety of stresses unconnected with Mr Procopets; moreover, insofar as stress was attributable to conduct by Mr Procopets, there were various aspects of that conduct apart from the distribution of the video. As his Honour noted, Ms Giller's statement to the police in December 1996 discussed matters in addition to the distribution of the videotapes, namely: Mr Procopets' other attempts to ruin her professional reputation; his threats;[356] his having followed her and watched her with binoculars; and the fact that she feared for her life.[357] The emphasis of the statement, the judge said, 'was on matters other than the videotape incidents'.[358]

393 As to the diagnosis itself, while it is true that Professor Mendelson expressly relied on his own 'mental state examination' of Ms Giller, the results of that examination were essentially negative, apart from a reference to Ms Giller having been 'tense throughout … and … tearful at various times'. Moreover, Prof Mendelson was – inevitably – dependent on the account which Ms Giller gave him of her history and of her past and present symptoms. As noted earlier, his

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354 *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) ALJR 842, 844. See also *Fox v Percy* 214 CLR 118, 128 [29] (Gleeson CJ, Gummow and Kirby JJ).

355 *Chambers v Jobling* (1986) 7 NSWLR 1, 10. See also *Fox v Percy* 214 CLR 118, 128 [29] (Gleeson CJ, Gummow and Kirby JJ).

356 Mr Procopets was originally charged with making threats to kill, although it does not appear he was ever convicted of those charges.

357 Reasons [281]-[282].

358 Ibid [282].

Honour had the advantage of seeing and assessing Ms Giller, and his findings on this issue were largely, if not entirely, based on his findings as to Ms Giller's credibility, which have not been challenged.[359] Grounds 29, 30 and 31 are not made out.

Breach of confidence

The judgment below

394 Ms Giller claimed damages for breach of confidence based on the showing of the sexually explicit videotapes.[360] His Honour found that the relationship between the parties was a confidential one:

> In my view persons indulging in a sexual activity in the privacy of their own home create a confidential relationship during such activity. In my view it is difficult to think of anything more intimate than consensual sexual activities between two parties in the privacy of their home. It involves a relationship of mutual trust and confidence which is to be shared between the persons but is not to be divulged to others without the consent of both parties.[361]

In his Honour's view, Mr Procopets had breached the relationship of confidence by showing the videotape to Mrs Volkova, without Ms Giller's consent. However he held that Ms Giller could not recover damages for breach of confidence for two reasons.

395 His Honour held, first, that Ms Giller was not entitled to damages under s 38 of the *Supreme Court Act 1986* because she had not sought an injunction. Section 38 provides:

> If the Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.

Because Ms Giller had not sought an injunction, s 38 did not apply. His Honour

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359 See *Fox v Percy* (2003) 214 CLR 118.

360 Although the subject of ground 35, little was made of a similar claim in relation to the showing of the photographs to Ms Giller's mother.

361 Reasons [156]. In support of that view, his Honour went on to quote from *Argyll v Argyll* [1967] Ch 302, 322.

said:

> The Court would not be awarding damages in addition to or substitution for an injunction. The videos were delivered to the County Court pursuant to an order on 24 June 1998. They remained with the Court. No case had been quoted to me which recognises such damage for breach of confidence.[362]

Secondly, his Honour held, Australian law did not permit an award of damages for breach of confidence for mental distress falling short of psychiatric injury.[363]

396 Counsel for Ms Giller submitted that his Honour had fallen into error on both counts. Before discussing the alleged errors of law, it is necessary to refer briefly to the principles governing the protection of confidential information. Where the right to protect such information arises under the express or implied terms of a contract, the claimant is entitled to common law damages for breach of contract. In addition, an injunction may be granted to prevent future breaches.[364] Where there is no contractual basis for the claim (as was the case here), the claimant may seek a remedy for breach of the equitable duty of confidence.

397 Prior to the *Judicature Act 1873* (and its later Australian equivalents), only equitable remedies (including injunctions and orders for equitable compensation) were available when a claim arose in the exclusive jurisdiction of a court of equity. The enactment of *Lord Cairns' Act*[365] (and of its later Australian equivalents) permitted a court with equitable jurisdiction to award damages to an injured party either in addition to, or in substitution for, an injunction. In its original form, s 2 of *Lord Cairns' Act* provided that:

> In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as

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362 Reasons [165].

363 Ibid [166]-[170].

364 Assuming that the court has equitable jurisdiction.

365 21 & 22 Vict c 27.

the court shall direct.[366]

398 The learned authors of *Meagher, Gummow and Lehane's Equity – Doctrines and Remedies* argue that this provision does not authorise awards of damages in addition to, or in substitution for, injunctions, in aid of purely equitable rights, such as the equitable duty of confidence. They comment that:

> If it does so then it has created a curious situation. For the Act does not make clear in such a case what criteria are to be used beyond those already applied in compensation cases in the exclusive jurisdiction … This suggests that Lord Cairns' Act is to be construed as applicable only to the auxiliary jurisdiction and that the 'wrongful acts' referred to therein are torts and not also breaches of fiduciary duties and equitable obligations.[367]

399 This view has not, however, been accepted in Victoria. Before the enactment of s 38 of the *Supreme Court Act 1986*, Victorian case law supported the award of damages under s 62(3) of the *Supreme Court Act 1958 (*the provision then equivalent to s 2 of *Lord Cairns' Act*) for breach of a right recognised only in equity, such as the equitable duty of confidence.[368]

400 In *Talbot v General Television Corp Ltd*,[369] Harris J held that an equitable breach of confidence was a 'wrongful act' for this purpose and that the plaintiff was entitled to an award of damages for loss of the chance of profiting from use of the confidential information, in addition to an injunction.[370] Marks J assessed damages on that basis, commenting as he did so that there was 'no authority in the case law regarding the principles on which damages should be awarded for the wrongful use of information which is of a purely personal nature'.[371] The Full Court (Young CJ, Lush and Beach JJ) dismissed an appeal from Marks J's assessment of damages,

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366 Quoted in R Meagher, D Heydon and M Leeming, *Meagher Gummow & Lehane's Equity Doctrines & Remedies* (4th Ed, 2002) [23-030], 843 (hereafter 'MGL'). The equivalent Australian provisions are also set out in that text. Most follow the original form fairly closely, but see discussion of the effect of s 38 of the *Supreme Court Act 1986* (Vic) below.

367 MGL [23–105], 853 (citations omitted).

368 There was also support for this view in England, see *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718 and the other cases cited (and criticised) in MGL above and at [41–135], 1140.

369 [1980] VR 224.

370 Ibid 241.

371 Ibid 244. It is not entirely clear whether this assessment was based on equitable principles or the damages were equated to common law damages, see 243.

though Lush J said that it was unnecessary to decide whether s 62(3) of the *Supreme Court Act 1958* was applicable.[372]

401 In *Gas & Fuel Corporation of Victoria v Barba*,[373] Crockett J held that damages could be awarded under s 62(3) to a plaintiff whose equitable easement had been interfered with by the defendant.

402 The view that damages are payable under *Lord Cairns' Act* for breach of a purely equitable right was also supported in *obiter* of the High Court. In *Wentworth v Woollahra Municipal Council*, the Court said:

> An incidental object of [*Lord Cairns' Act*] was to enable the Court to award damages in lieu of an injunction or specific performance, even in the case of a purely equitable claim.[374]

403 Although the correctness of *Talbot v General Television Corp Ltd* was doubted by Gummow J in *Concept Television Productions Pty Ltd & Anor v Australian Broadcasting Corporation*,[375] the situation in Victoria has now been placed beyond doubt by the enactment of s 38 of the *Supreme Court Act 1986*.[376] The removal of the reference to a 'wrongful act' (which had appeared in s 62(3) of the *Supreme Court Act 1958*) makes it clear that damages can be awarded for breach of a purely equitable obligation, in addition to, or in substitution for, an injunction.

The first error of law

404 With respect to the learned trial judge, the fact that Ms Giller had not sought an injunction to restrain Mr Procopets from showing or distributing the video did

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372 Ibid 253.

373 [1976] VR 755, 766. His Honour referred to *In re Leeds v Hanley Theatres of Varieties Ltd* [1902] 2 Ch 809; *Wroth v Tyler* [1974] Ch 30 in support of the proposition that damages could be awarded for infringement of a purely equitable right.

374 (1982) 149 CLR 672, 676 (Gibbs CJ, Mason, Murphy and Brennan JJ). Cases cited in support of that proposition include *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, 857 (Viscount Finlay); *Landau v Curton* [1962] E Gaz 369, 374-375 (Cross J); *Ferguson v Wilson* (1866) LR 2 Ch App 77, 88 (Turner LJ and Cairns LJ); *Elmore v Pirrie* (1887) 57 LT (NS) 333, 335 (Kay J).

375 (1988) 12 IPR 129, 136.

376 As the authors of Meagher, Gummow and Lehane acknowledge. See MGL [23-030], 843.

not deprive the Court of its power to award damages. That power exists so long as a court has jurisdiction to grant an injunction. In his book on *Equitable Remedies*, Dr Spry says:

> [I]f there is in fact jurisdiction to award an injunction or specific performance, it is probably unnecessary that an injunction or specific performance should have been claimed by the plaintiff, it being sufficient under these circumstances that the plaintiff merely should claim equitable damages.[377]

405 The case law supports this proposition. In *Dixson v Tange*,[378] the question before Owen J was 'whether the Court has power in a suit not claiming an injunction or specific performance, to make a decree for damages'. Owen J said:

> [U]nder [the applicable *Lord Cairns' Act* provision[379]] — which provides *not* that the Court shall grant an injunction, but merely that it shall have jurisdiction to entertain an application for an injunction — I have power to grant damages.[380]

Similarly, in *Barbagallo v J & F Catelan Pty Ltd* the Full Court of the Supreme Court of Queensland said:

> Decisions both before and after the *Judicature Act* have established a series of propositions applicable to the exercise of the jurisdiction under s. 62, or its equivalent elsewhere, to award damages in substitution for an injunction. They are as follows. First, that the power so conferred may be exercised although damages are not specifically claimed in lieu of an injunction that is expressly sought: *Betts v. Nelson* (1868) 3 Ch.App. 429, 441. Even the fact that no injunction is sought may not be fatal to an award of damages under the section if the matters relied on show circumstances in respect of which an injunction might have been claimed: *Dixson v. Tange* (1891) 12 L.R. (N.S.W.) Eq. 204.[381]

406 It is both necessary and sufficient that an injunction could have been sought.[382] Even the presence of discretionary factors which would have resulted in the refusal of an injunction does not prevent the award of damages under the

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377 I C F Spry, *Equitable Remedies* (7th ed, 2007) 631-632. See also MGL [23-030]-[23-060].

378 (1891) 12 LR (NSW) Eq 204.

379 Section 32 of the *Equity Act 1880*.

380 *Dixson v Tange* (1891) 12 LR (NSW) Eq 204, 206 (emphasis added).

381 [1986] 1 Qd R 245, 251 (citations in original). See also *Permanent Trustee Australia Ltd v Perpetual Trustee Co Ltd* (1994) 15 ACSR 722.

382 See Michael Tilbury and Gary Davis, 'Chapter 22 - Equitable Compensation' in Patrick Parkinson (ed), *The Principles of Equity* (2nd ed, 2003) 797, 829-830 [2222]-[2223] and MGL [23-040].

Lord Cairns Act provisions.[383] A contrary view was expressed by Perry J in *Executor Trustee Australia Ltd v Deloitte Haskins Sells*[384] but that case concerned a different statutory provision, s 574 of the *Companies (SA) Code.*

407 In my view, the language of s 38 is quite clear. If the cause of action is such as to give the court *jurisdiction* to grant an injunction, then the power to award damages is enlivened. There is nothing in the section, or in the statutory history, to suggest that the power was intended to be exercisable only where an application for injunction had actually been made.

Damages for 'mere distress'?

408 For reasons which follow, I have concluded that his Honour was also wrong to hold that damages for breach of confidence could not be awarded for 'mere distress' not amounting to psychiatric injury.

409 In *Campbell v Mirror Group Newspapers Ltd*,[385] the model, Naomi Campbell, claimed damages for breach of the equitable duty of confidence (and under the *Data Protection Act 1998* (UK)) for the distress which she suffered when the defendant newspaper published details of her attendance at Narcotics Anonymous meetings and a photograph of her leaving the premises. The claim succeeded at first instance. Morland J held that 'the total sum for both damages for breach of confidentiality and for compensation under s 13 of the *Data Protection Act 1998* was £3500'.[386] That amount included £1,000 in aggravated damages because the defendant had published an article after she had launched her claim which 'trashed her as a person

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383 See MGL [23-040] where the authorities for and against this proposition are cited. See also the cases cited in *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245, 251, namely *Johnson v Wyatt* (1863) 2 DeG J & S 18; 46 ER 281, 284-285; *Isenberg v East India House Estate Co* (1863) 3 DeG J & S 263; 46 ER 637, 641; 46 ER 637, 641; *Sayers v Collyer* (1884) 38 Ch D 103, 109, 110; *Chapman Morsons & Co v Guardians of Auckland Union* (1889) 23 Ch D 294. See also Michael Tilbury and Gary Davis, 'Chapter 22 - Equitable Compensation' in Patrick Parkinson (ed), *The Principles of Equity* (2003) 797, 830 [2222] and the cases cited in n 178.

384 (1996) 22 ACSR 270.

385 [2003] QB 633.

386 *Campbell v Mirror Group Newspapers Ltd* (2002) 54 IPR 645, 672.

in a highly offensive and hurtful manner'.[387]

410 The Court of Appeal held that the newspaper was not liable for breach of confidence,[388] though the Master of the Rolls said that if the findings on liability had been valid, 'it would have been open to [the trial judge] to award aggravated damages.'[389]

411 In the present case, the judge held that *Campbell v Mirror Group Newspapers Ltd* did not assist Ms Giller. This was because neither the judge at first instance nor the Court of Appeal had discussed whether distress type damages could be recovered for breach of confidence.[390]

412 After the learned trial judge had handed down his decision in this case, a majority of the House of Lords reversed the Court of Appeal's decision, holding that Mirror Group Newspapers was liable to Naomi Campbell for breach of confidence and affirming the order for damages made by the trial judge.[391] It was assumed without discussion that Ms Campbell was entitled to damages for distress.[392] Ms Campbell did not claim that she had suffered any psychiatric injury.

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387 Ibid.

388 On the basis that publication was justified in the public interest, because she had said publicly that she did not take drugs, or alternatively because the publication of information about her attendance at Narcotics was peripheral and not so significant on the facts of the case as to amount to a breach of confidence. Ms Campbell did not claim that the defendant was liable for disclosure of the fact she had a drug addiction or was receiving treatment for it, but limited it to the revelation of details about her attendance at Narcotics Anonymous and the use of the photographs.

389 See *Campbell v Mirror Group Newspapers Ltd* [2003] QB 633, 678.

390 Reasons [166]-[167].

391 *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457. Lord Hope, Lord Carswell and Baroness Hale were in the majority. Lord Hoffman and Nicholls dissented on the issue of whether any breach of confidence had occurred as a result of the publication of this material, because it had already been conceded that there was no breach of confidence in publishing the fact that Naomi Campbell was a drug addict. Note that the House of Lords recognised that an action for breach of confidence was no longer based on the existence of a confidential relationship between the claimant and the particular person said to have breached confidence, but extends to a person who knows or ought to know that the information is confidential. See 464–465 (Lord Nicholls), 471–472 (Lord Hoffman), 480 (Lord Hope) and 504 (Lord Carswell).

392 Ibid 493 (Lord Hope), 502 (Baroness Hale) and 505 (Lord Carswell). See also *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [216] and [235].

413 On the hearing of this appeal, counsel for Ms Giller submitted that the House of Lords decision in *Campbell v Mirror Group Newspapers Ltd* supported an award of damages for distress not amounting to psychiatric injury, where breach of confidence was made out. Counsel also relied on two other English cases. The first was *Douglas v Hello! Ltd*.[393] Film stars Michael Douglas and Catherine Zeta Jones contracted to give OK! magazine the exclusive right to publish selected photographs of their wedding. A photographer took unauthorised photographs at the wedding reception and offered them for sale to Hello! magazine. Hello! was aware that the photographs were taken without authorisation and was planning to publish them before OK! published the authorised photographs. An application for an interim injunction was granted, preventing publication of the photographs in breach of confidence.

414 Hello! appealed to the Court of Appeal. Under s 12(3) of the *Human Rights Act 1998* (UK), the Court had to consider the merits of the case; balance the competing rights conferred by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('*European Convention*'), including the right to freedom of expression contained in article 10, and the right to respect for private and family life contained in article 8; and be satisfied that at the trial the balance was likely to be struck in favour of restraining publication.

415 The Court of Appeal (Brooke, Sedley and Keene LJJ) discharged the interim injunction. The Court was not satisfied that publication was likely to be restrained at the trial and considered that damages were likely to be an adequate remedy for the harm the film stars had suffered. In the view of Sedley LJ, the harm was 'in principle, compensable in money, whether by way of an account of profits or damages'.[394] Keene LJ said that an injunction should not be granted because it was 'a matter where any damage to the claimants [could] be adequately dealt with in

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393 [2001] QB 967 and [2006] QB 125.

394 *Douglas v Hello! Ltd* [2001] QB 967, 1006.

monetary terms'.[395]

416 At the subsequent trial of the matter,[396] Lindsay J held that Hello!'s publication of an unauthorised photograph of the wedding was in breach of confidence and that the stars were entitled to damages for the distress they had suffered as a result. They were awarded the sum of £3,750. That decision was affirmed by the Court of Appeal.[397] Lord Phillips MR, who delivered the judgment of the Court, commented that the amount of £3,750 for distress was 'a very modest sum in the context of this litigation'.[398] It was again assumed without discussion that a plaintiff who established a breach of confidence was entitled to damages for distress. Lord Phillips MR commented in *obiter* that the Court of Appeal bench which had discharged the interim injunction appeared to have given insufficient weight to the likely level of damages which would be recovered if an injunction was refused and it was later held that the publication of the photographs was a breach of confidence. He said:

> [T]he Douglases would never have agreed to the publication of the unauthorised photographs. In those circumstances, bearing in mind the nature of the injury they suffered, namely mental distress, a modest sum by way of damages does not represent an adequate remedy.[399]

417 In *Cornelius v De Taranto*,[400] a psychiatrist had been consulted by Mrs Cornelius in relation to an employment claim. Without her consent, he sent a copy of his report to her general practitioner and to another consultant psychiatrist. The report expressed the view that she was suffering from a psychiatric condition. The trial judge, Morland J, awarded damages of £3,000 to Mrs Cornelius for injury to her feelings caused by the breach of confidence.[401] He commented:

> Although it is a novel instance of such a remedy, it is in accord with the

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395 Ibid 1013.

396 *Douglas v Hello! Ltd* [2003] 3 All ER 996.

397 *Douglas v Hello! Ltd* [2006] QB 125, 201.

398 Ibid, 163.

399 *Douglas v Hello! Ltd* [2006] QB 125, 202.

400 [2001] EMLR 12.

401 Ibid, [84]. He awarded a further £750 for the cost of retrieving the report

> movement of current legal thinking. My decision is incremental rather than revolutionary.[402]

That decision was also affirmed by the Court of Appeal,[403] though Mantell LJ (who delivered the main judgment) did not discuss the basis of the damages award for distress caused by breach of confidence.

418 It must be acknowledged that in *Campbell v Mirror Group Newspapers Ltd,* and again in *Douglas v Hello! Ltd*, the Court of Appeal and the House of Lords were primarily concerned with the balance to be struck between the competing human rights recognised by the *European Convention* – the right to privacy under Article 10 and the right to freedom of expression under Article 8. In my view, however, that circumstance in no way weakens the force of these decisions of high authority in endorsing the proposition that, if a breach of confidence is shown to have occurred, damages (or more correctly an order for equitable compensation or damages in lieu of an injunction) can be awarded for distress falling short of psychiatric injury caused by that breach of confidence. I point out that in *Campbell v Mirror Group Newspapers Ltd* the damages award affirmed by the House of Lords was based solely on the plaintiff's claim for breach of confidence.[404]

419 The Australian position appears to be at large on this issue. I am not aware of any appellate court decision which has considered it. As one commentator puts it:

> In truth, the availability of damages for distress, or injury to feeling, in actions for breach of confidence is completely unresolved. It is therefore unclear whether actions for breach of confidence should be regarded, in the same light as actions for defamation, as exceptions to the general rule that damages are not ordinarily recoverable for distress or injury to feelings. Recent English decisions in breach of confidence cases, however, have found no difficulty whatsoever in awarding damages for distress.[405]

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402 [2001] EMLR 12, [77].

403 [2001] EWCA Civ 1511.

404 Baroness Hale said that it was agreed that the *Data Protection Act 1998* added nothing to the action for breach of confidence, see [2004] 2 AC 457, 494 [130]. See also 480 [86] and 493 [125] (Lord Hope) and 503 [162] (Lord Carswell).

405 David Lindsay, 'Casenote: Giller v Procopets - Distress but no damages' (2004) 11(3) *Privacy Law & Policy Reporter* 86, Australian Legal Information Institute <http://www.austlii.edu.au/au/journals/PLPR/2004/41.html#Heading1> at 21 November 2008.

On what basis are 'damages' recoverable?

420 As I have said, English authorities assume that 'damages' are recoverable for 'mere distress' not amounting to psychiatric injury, but do not explain whether the basis for such an award is an order for equitable compensation, damages under *Lord Cairns' Act*,[406] or on some other basis. Accordingly, it is necessary to decide on what basis 'damages' may be awarded.

421 I begin by discussing whether equitable principles support the making of an order for equitable compensation to a person who suffers distress or embarrassment as the result of a breach of confidence. I then consider the availability of damages under s 38 of the *Supreme Court Act 1986* as an alternative remedy in these circumstances.

(a) Equitable compensation?

422 In *Smith Kline & French v Secretary, Department of Community Services and Health*, Gummow J said the conferring of equitable jurisdiction on a court:

> … brings with it, in a case such as the present, the inherent jurisdiction to grant relief by way of monetary compensation for breach of an equitable obligation, whether of trust or confidence.[407]

423 Equitable remedies such as injunctions are available to prevent publication of confidential material because of its private nature.[408] It is unnecessary in such applications to show that, if unrestrained, the breach of confidence will cause financial loss or psychiatric injury. By parity of reasoning there should be no barrier to the making of an order for equitable compensation to compensate a claimant for the embarrassment or distress she has suffered as the result of a breach of an equitable duty of confidence which has already occurred. As Morland J said in

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406 See the criticism in MGL [41–020] 1112.

407 (1990) 22 FCR 73, 83. Note that Gummow J expressly said that this would not be compensation under s 68 of the *Supreme Court Act 1970* (NSW), the *Lord Cairns' Act* provision.

408 See for example *Argyll v Argyll* [1967] Ch 302 (confidential material relating to a marital relationship); *Stephens v Avery* [1988] Ch 449 (confidential material relating to the sexual relationship between two women); *Theakston v MGN Ltd* [2002] EWCH 137 (publication of article and photograph regarding claimant visiting a brothel).

Cornelius v De Taranto:

> …[I]t would be a hollow protection of [the right to protection of confidential information] if in a particular case in breach of confidence without consent details of the confider's private and family life were disclosed by the confidant to others and the only remedy that the law of England allowed was nominal damages. In this case an injunction or order for delivery up of all copies of the medico-legal report against the defendant will be of little use to the claimant. The damage has been done. … In cases of commercial or business breach of confidence the powers of the court are not barren. Such remedies as injunction, delivery-up, account of profits and damages may be available… similarly in the case of personal confidences exploited for profit or peddled to the media. … In the present case in my judgment recovery of damages for mental distress caused by breach of confidence, when no other substantial remedy is available, would not be inimical to considerations of policy but indeed to refuse such recovery would illustrate that something was wrong with the law.[409]

424 I respectfully agree with that view.[410] An inability to order equitable compensation to a claimant who has suffered distress would mean that a claimant whose confidence was breached before an injunction could be obtained would have no effective remedy.

(b) Damages under Lord Cairns' Act?

425 Typically, damages have been awarded under *Lord Cairns' Act* in lieu of an injunction where the defendant has infringed the plaintiff's property rights[411] or has benefited by exploiting commercially valuable information. There is no Australian authority on the issue of whether damages under this head can be awarded to a plaintiff who has suffered distress or embarrassment as a result of the breach of confidence.

426 Under the law of negligence, damages are not recoverable for an injury to

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409 [2001] EMLR 12, [66]-[67] and [69].

410 In *McKaskell v Benseman*, Jeffries J in the High Court of New Zealand awarded $1,000 in equitable compensation to the plaintiffs for the emotional stress caused by the solicitor's breach of fiduciary duty in failing to disclose the contents of a letter sent to them by Mr Procopets' solicitors. The compensation was described as damages for 'any pain, discomfort, tears and anxiety the plaintiffs suffered as a result of the conduct of the defendants': [1989] 3 NZLR 75, 91.

411 See for example the cases discussed in A J Bradbook and M A Neave, *Easements and Restrictive Covenant in Australia* (2nd ed, 2000) 465–472.

feelings which is unaccompanied by another recoverable loss (for example, physical injury). As Lord Wensleydale said in the old English case of *Lynch v Knight*:

> Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested.[412]

427 By contrast, damages for upset and distress[413] can be awarded for torts such as defamation and deceit.[414] In contract law, the general principle is that damages 'cannot ordinarily be awarded for distress or disappointment arising from breach' of the contract. Damages for loss of pleasure or enjoyment may, however, be payable if the contract expressly or impliedly promises to provide pleasure or enjoyment to the promisee.[415]

428 Damages under *Lord Cairns' Act* are *sui generis*, and can be awarded in some circumstances where common law damages are not recoverable.[416] In my view, such damages should be available where the essence of the plaintiff's case is that he or she has been embarrassed by the exposure of private information, rather than that the defendant has profited from the wrongful use of that information. In *Talbot v General Television Corporation Pty Ltd*,[417] Young CJ treated damages under *Lord Cairns' Act* as compensating the plaintiff for what he or she had lost.[418] It is consistent with that approach to compensate Ms Giller for the mental distress suffered as a result of the

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412 (1861) 9 HLC 577, 598; 11 ER 854, 864 as quoted in Michael Tilbury, 'Coherence, Non Pecuniary Loss and the Construction of Privacy' (Paper presented at the Second International Symposium on the Law of Remedies, Auckland, NZ, 16 November 2007) 10, to be published in J Berryman and R Bigwood (eds), 'The Law of Remedies: New Directions in the Common Law' (Irwin Law and Federation Press, 2008) (forthcoming).

413 See generally, Harvey McGregor, *McGregor on Damages* (17th ed, 2003) 56-59.

414 See *Aldersea v Public Transport Corporation*; *Chandler v Public Transport Corporation* (2001) 3 VR 499, 507 (Ashley J).

415 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 394 (McHugh J), 380 (Deane and Dawson JJ) and 361-362 (Mason CJ). For a discussion of other exceptions, see 381 (Deane and Dawson JJ). See generally Harvey McGregor, *McGregor on Damages* (17th ed, 2003) 62-70.

416 For example, in the case of breach of a proprietary right, common law damages cover only breaches occurring up to the date of commencement of proceedings, whereas damages under *Lord Cairns' Act* can cover future breaches: see *Bracewell & Another v Appleby* [1975] Ch 408.

417 [1980] VR 224.

418 Ibid, 251.

defendant's actions.

429 This conclusion is also consistent with the approach of the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd.*[419] The Full Court of the Supreme Court of Tasmania had granted an injunction to Lenah Game Meats to prevent the ABC from broadcasting a video of possum killing operations. The video was obtained by an unidentified person who had entered Lenah's abattoir as a trespasser. On appeal, the High Court (by majority) discharged the injunction.

430 Their Honours found it unnecessary to decide whether a tort of invasion of privacy should be recognised in Australian law, but Gummow and Hayne JJ said:

> … Lenah encountered … difficulty in formulating with acceptable specificity the ingredients of any general wrong of unjustified invasion of privacy. Rather than a search to identify the ingredients of a generally expressed wrong, the better course, as Deane J recognised [in *Moorgate Tobacco Ltd v Philip Morris Pty Ltd (No 2)*[420]], is to look to the development and adaptation of recognised forms of action to meet new situations and circumstances.[421]

Gleeson CJ agreed and said:

> If the activities filmed were private, then the law of breach of confidence is adequate to cover the case. … There would be an obligation of confidence upon the persons who obtained [images and sounds of private activities], and upon those into whose possession they came, if they knew, or ought to have known, the manner in which they were obtained. … The law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy.[422]

431 This approach – of strengthening the protection afforded to privacy interests by existing causes of action – supports my conclusion that monetary awards damages should be available for breach of confidence occasioning distress, either as equitable compensation, or under *Lord Cairns' Act*.

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419 (2001) 208 CLR 199 ('*Lenah Game Meats*').

420 (1984) 156 CLR 414, 444-445. That case related to the claim that there was a general tort of unfair competition.

421 *Lenah Game Meats* (2001) 208 CLR 199, 250. See also 255 and 258.

422 Ibid 225.

Quantum of award

432 The notice of appeal sought damages, including aggravated damages, for breach of confidence. In their written submission, counsel for Ms Giller argued that English authority supports the award of damages for breach of confidence which can include an award for aggravated damages. It was also said that an award for exemplary damages could be made. No authority was cited for the latter proposition.

433 In *Harris v Digital Pulse Ltd*,[423] Spigelman CJ alluded to the importance of using correct terminology in referring to monetary awards. He said:

> 'Damages' are a remedy at common law. The issue before the Court is whether a punitive monetary award can be made in equity. Inexact use of terminology is here, as so often, prone to cause confusion of thought. The use of the word 'damages' with respect to both compensatory damages and exemplary damages obscures the fact that a common law litigant who received an award of the latter has not in fact suffered any 'damage' in the relevant respect. The fact that compensatory damages at common law and equitable compensation have a similar justification does not necessarily indicate that a different kind of monetary award at common law, which has come to be referred to as a form of 'damages', can or should be reflected in equity.[424]

(a) Can a punitive monetary award be made for breach of confidence?

434 Although his Honour dismissed Ms Giller's claim because she did not suffer psychiatric injury he also said:

> The behaviour of the defendant in the circumstances was outrageous and is deserving of an award of exemplary damages. However the law does not permit the awarding of exemplary damages where the tortfeasor has been punished by the criminal law.[425]

These comments were made in the context of his Honour's findings on the tort of intentional infliction of mental harm, but they are equally applicable to the action for breach of confidence.

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423 (2003) 56 NSWLR 298.

424 Ibid 303 [2].

425 Reasons [287]. The learned trial judge cited *Gray v Motor Accident Commission* (1998) 196 CLR 1 in support of that proposition.

435 The question whether an award of equitable compensation can include a punitive element was extensively reviewed by the New South Wales Court of Appeal in *Harris v Digital Pulse Pty Ltd*.[426] The majority (Spigelman CJ and Heydon JA) held that the Court had no power to make a punitive monetary award for breach of fiduciary duty arising out of the breach of an express term of the defendant's employment contract.[427] The Court did not decide whether an order for equitable compensation could ever include a punitive element. The members of the court expressed different views. Heydon JA said:

> There is no power in the law of New South Wales to award exemplary damages for equitable wrongs. But a narrower proposition suffices for the purposes of deciding this case. There is no power in the law of New South Wales to award exemplary damages for equitable wrongs of the type involved in the circumstances of this case… In short, equity does not bear the same relationship to the instinct for revenge as the institution of marriage does the sexual appetite.[428]

436 Spigelman CJ said:

> It is, in my opinion, unnecessary and undesirable to decide this case on the basis that a punitive monetary award can never be awarded in equity. Remedial flexibility is a characteristic of equity jurisprudence.[429]

Mason P (in dissent) said that there was no reason in principle why exemplary damages could not be awarded in equity for breach of a fiduciary duty where the fiduciary's behaviour was deserving of punishment.[430]

437 I am not aware of any authority supporting a punitive monetary award for breach of confidence,[431] nor as damages in lieu of an injunction under s 38 of the *Supreme Court Act 1986.* Further, as the learned trial judge noted, Mr Procopets had already been penalised by the criminal law.[432] In these circumstances, I do not

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426 (2003) 56 NSWLR 298.

427 Argument in the case proceeded on the basis that exemplary damages were not available for breach of contract: Ibid 307 [28] (Spigelman CJ).

428 Ibid 422 [470].

429 Ibid 304 [4].

430 Ibid 330-341, particularly [160]–[166], [175]–[176], [195]–[199], [224]–[228].

431 See *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [197].

432 See [368] above and *Gray v Motor Accident Commission* (1998) 196 CLR 1.

consider it appropriate to make a punitive monetary award for breach of confidence.

(b) Can aggravated damages be awarded for breach of confidence?

438 At common law, aggravated damages may be awarded to compensate a plaintiff 'when the harm done to [him or her] by a wrongful act is aggravated by the manner in which the act was done.'[433] Such damages are compensatory, not punitive. In the *Campbell v Mirror Group Newspapers Ltd,* the monetary award was said to include a component for aggravation as a result of publication of an article which criticised Ms Campbell for initiating proceedings for breach of confidence.[434]

439 There is academic support for the view that, in a claim for equitable compensation, it is possible to recover for aggravated damage.[435] I can see no reason in principle why this should not be so. Nor is there any reason why damages awarded under s 38 of the *Supreme Court Act 1986*, in lieu of an injunction, could not include a component for aggravation.

440 His Honour seems to have regarded Ms Giller's distress as relatively minor. He said that:

> I have observed the video of the attack upon the defendant at the market by the plaintiff and I have also observed the plaintiff in the witness box and in the Court. She is a determined woman who is not over sensitive. Indeed her complaints about the assaults are exaggerated. She had no reservations about attacking the defendant at the Camberwell Market with a steel rod. In addition one has to analyse precisely what it was that was being distributed. What was being shown is sexual activities between consenting adults. It was known to all those who were shown the video that she and the defendant had had a sexual relationship over many years. The revelation of that to the community was of no consequence and could not have caused her any anguish. No doubt the showing of the intimate relationship to others was a matter of distress, embarrassment, annoyance and upset. However by 10 December it had been nipped in the bud. She had made her complaint with the police, the police had moved in and taken the defendant to the police

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433 *Uren v John Fairfax & Sons Pty Ltd* (1966) CLR 118, 149 (Windeyer J).

434 (2002) 54 IPR 645, [164] (Morland J).

435 Michael Tilbury and Gary Davis, 'Chapter 22 - Equitable Compensation' in Patrick Parkinson (ed), *The Principles of Equity* (2003) 797, 809-810. The philosophy which underpins the New Zealand case of *Mouat v Clarke Boyce* [1992] 2 NZLR 559 which they cite in support of that proposition accepts the notion of the mingling of law and equity which is criticised in MGL.

> station where he was interviewed for a substantial number of hours early in the morning about these very incidents. By the end of December statements had been made by the various witnesses to the police. It must have been very apparent to her by the end of December that the defendant's conduct was viewed by others as shameful and that his conduct was condemned by all. There is no evidence that the more intimate details of their sexual activities were shown. Indeed it is very apparent that one has to go a long way into the video to see the more intimate activities of the parties. One cannot overlook the fact that the damages are compensatory and that the question of aggravation and more particularly exemplary damages involve different considerations.[436]

441 It may be accepted that Ms Giller is a person of some resilience. This does not, in my view, preclude the making of a compensatory award which includes an element for aggravation. The fact that Ms Giller's friends and family knew that she had had a sexual relationship with Mr Procopets was, in my view, irrelevant to an assessment of the impact on her of knowing that others had seen her actually engaging in sexual activity, just as it would be irrelevant where the partners were married and were therefore known 'to have had a sexual relationship over many years'. The showing of the video was inevitably humiliating and distressing. Mr Procopets well knew from his telephone conversations with Ms Giller that she was disturbed and upset by his threats. That, evidently, was his purpose. He is fortunate that she appears not to have suffered any lasting injury. Although Mr Procopets ceased trying to distribute the video after Ms Giller reported him to the police, in mid-1997 he showed it to his new partner Mrs Drobitsky.

442 I am satisfied that Mr Procopets breached his duty of confidence with the deliberate purpose of humiliating, embarrassing and distressing Ms Giller, and that his conduct had that effect. I therefore consider it appropriate to include a component for aggravation in the award of compensation.

Adequacy of damages

443 The learned trial judge said that if damages were available for distress, he would have awarded compensatory damages of $5,000 and aggravated damages of

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436 Reasons [279].

$3000, for the dissemination of the videotape.[437] Ground 34 alleged that this assessment was manifestly inadequate.

444 Counsel for Ms Giller referred to s 35 of the *Defamation Act 2005*, which imposes a limit of $250,000 on damages for non-economic loss. He contended that a case such as this, if brought in defamation, would attract damages on the highest level of this scale. Accordingly, he argued, an award in this amount should be made in favour of Ms Giller.

445 Such an award would be considerably higher than previous awards for distress made in both England[438] and Australia. In *Grosse v Purvis*, Senior Judge Skoien awarded $20,000 in 'compensatory damages' for 'wounded feelings'[439] and $10,000 in 'aggravated compensatory damages'[440] for 'non [post traumatic stress disorder] wounded feelings'.[441] In *Doe v ABC & Ors*, Judge Hampel awarded the plaintiff $25,000 in equitable compensation in the action for breach of confidence, for 'hurt, distress, embarrassment, humiliation, shame and guilt'.[442]

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437 Albeit in the context of the claim for intentional infliction of mental harm: Reasons [286].

438 In *Campbell v Mirror Group Newspapers Ltd*, £2500 in compensatory damages and £1000 in aggravated damages were awarded for distress [2004] 2 AC 457, 464 [10]; in *Cornelius v Taranto* £3,000 damages were awarded for injury to the claimant's feelings [2001] EMLR 12, [84]; in *Douglas v Hello! Ltd* £3,750 were awarded for distress: [2006] QB 125, 163; and in *Archer v Williams* £2,500 were awarded for distress [2003] EMLR 869 [52]-[53]. See also B Maeesis, Colm O'Cinneide, Joerg Fedtke and Myriam Hunter-Henin, 'Concerns and Ideas about the Developing English Law of Privacy (and how Knowledge of Foreign Law Might Be of Help)' (2004) 52 *American Journal of Comparative Law* 133, 173-174 which discusses the level of damages awarded for mental distress that have been awarded in other European jurisdictions.

439 [2003] QDC 151, [475]. Of that amount, $15,000 related to pre-trial distress.

440 Ibid [476]-[480]. In total $50,000 in 'aggravated compensatory damages' were awarded because the 'hurt to the feelings, humiliation and affront to dignity experienced by the [plaintiff] was aggravated by the way the [defendant] acted': Ibid [476].

441 The plaintiff was awarded damages totalling $178,000 for breach of privacy, intentional infliction of harm, trespass, nuisance, battery and assault, arising out of six years of stalking and harassment by the defendant. The remaining damages were referable to the post traumatic stress disorder, economic loss, vindicatory damages and exemplary damages: Ibid [475]-[490].

442 [2007] VCC 281, [186]. In total the plaintiff recovered $234,190 for breach of statutory duty, negligence, breach of confidence and breach of privacy. The remaining amount was made up of $124,190 for pecuniary losses resulting from loss of earnings and medical expenses and $85,000 for post traumatic stress disorder: [2007] VCC 281, [172]-[184]. No aggravated or

446 In my opinion, an award in the range of $250,000 would be quite excessive. I would award Ms Giller damages in the sum of $40,000, including $10,000 in aggravated damages.

Tort of privacy

447 Counsel for Ms Giller also contended that the trial judge erred by failing to consider authorities which supported the development of a tort of invasion of privacy in Australian law. For reasons which follow, it is unnecessary for us to decide this issue.

448 In recent years, two main approaches have emerged in response to claims that English, Australian and New Zealand law should recognise such a tort.[443] The first – epitomised by *Lenah Game Meats* - has been to develop existing causes of action to provide greater legal protection for privacy interests. English courts have not yet recognised an 'over-arching, all-embracing cause of action for invasion of privacy'[444] but, as *Campbell v Mirror Group Newspapers Ltd* and *Douglas v Hello! Ltd* show, the *Human Rights Act 1998* (UK) and the *European Convention* have provided the impetus for expansion of the action for breach of confidence to provide remedies to people who complain of publication of private matters.[445]

449 The second approach - exemplified by the decision of the New Zealand Court of Appeal in *Hosking v Runting*[446] – is to recognise a new tort of invasion of privacy.[447] By majority, the Court of Appeal[448] held the tort would be committed by

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exemplary damages were awarded: [2007] VCC 281, [187]-[193].

443 We do not refer here to United States law on breach of privacy. See however 'Privacy' in Restatement of the Law, Second, Torts 2d (1977).

444 *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457, 464 [11] (Lord Nicholls of Birkenhead) citing *Wainwright v Home Office* [2004] 2 AC 406.

445 See for example the comments on this matter in *Douglas v Hello! Ltd* (2001) QB 967, 1011-1012 [166]-[167] (Keene LJ); and compare Sedley LJ at 1001 [126]; *Douglas v Hello! Ltd (No 3)* [2006] QB 125, 150 [53] and 157 [83]; *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457, 464-465 [13]-[14] (Lord Nicholls), 472 [46] (Lord Hoffman), 480 [86] (Lord Hope). See also *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [7]-[9].

446 [2005] 1 NZLR 1.

447 Ibid 32 [117].

the publication of facts about the private life of a person, where the giving of publicity to such facts would be considered 'highly offensive to an objective reasonable person'.[449] Gault P rejected the approach of expanding the duty of confidence:

> Privacy and confidence are different concepts. To press every case calling for a remedy for unwarranted exposure of information about the private lives of individuals into a cause of action having as its foundation trust and confidence will be to confuse those concepts.[450]

450 Finally, I note two Australian first instance decisions which have responded explicitly to Gleeson CJ's suggestion in *Lenah Game Meats* that in the future the law should be more astute to protect privacy interests. In *Grosse v Purvis*,[451] Senior Judge Skoein of the District Court of Queensland held that a plaintiff who was persistently and intentionally stalked and harassed by the defendant for six years was entitled to damages for invasion of her privacy. In *Doe v ABC & Ors*,[452] Judge Hampel of the County Court of Victoria held that a sexual assault victim was entitled to an award of damages for the breach of privacy which occurred when, contrary to s 4(1A) of the *Judicial Proceedings Reports Act 1958*, the ABC published her name and the fact that her former husband had been convicted of raping her.

451 The question whether there should be a cause of action for invasion of privacy has been examined – separately - by the New South Wales Law Reform Commission,[453] the Australian Law Reform Commission,[454] and the New Zealand

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448 Gault P and Blanchard and Tipping JJ.

449 [2005] 1 NZLR 1, 32 [117] (Gault P and Blanchard J) and 60-62 [247]-[251] and [259] (Tipping J). Keith and Anderson JJ dissented on this issue. See [176], [221] [261] and [267]. It was held that the tort did not provide a remedy to a celebrity arising out of publication of photographs of his children, which were taken in a public place.

450 Ibid 16 [48]. See also [50]-[51].

451 [2003] QDC 151.

452 [2007] VCC 281.

453 For terms of reference see NSW Law Reform Commission, *Invasion of Privacy*, Consultation Paper No 1 (2007) vii.

454 For terms of reference see Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper No 72 (2007) vol 1, 15-16.

Law Commission.[455] The question whether a tort of invasion of privacy should be recognised necessarily requires consideration of the different types of privacy invasion which might fall within the scope of such a tort. Professor Michael Tilbury, the Commissioner-in-charge of the reference to the New South Wales Law Reform Commission, has commented:

> The difficulties of defining the conduct to which an action for invasion of privacy does, or should, extend are notorious. At the heart of the problem lies the variety of contexts in which ordinary language uses 'privacy', as the four American torts[456] protecting privacy illustrate.[457]

452 The Australian Law Reform Commission has recently published a report which recommends that Federal legislation should provide for a 'statutory cause of action for a serious invasion of privacy'.[458] Because I have already concluded that Ms Giller has a right to compensation on other grounds, it is unnecessary to say more about whether a tort of invasion of privacy should be recognised by Australian law.

Intentional infliction of emotional distress

453 Ms Giller claimed that Mr Procopets was liable for damages for 'the tort of intentional infliction of emotional distress' because of his behaviour in distributing and threatening to distribute the videotape. I have had the benefit of reading Maxwell P's draft judgment concerning this aspect of the appeal. In that judgment,

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455 Terms of reference available at www.lawcom.govt.nz.

456 These four torts were described by Prosser as (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. In *Lenah Game Meats* (2001) 208 CLR 199, 325, Callinan J observed that Prosser's categorisation had been accepted by the United States Supreme Court and the *Restatement of the Law Second, Torts* (s 652A).

457 Michael Tilbury, 'Coherence, Non Pecuniary Loss and the Construction of Privacy' (Paper presented at the Second International Symposium on the Law of Remedies, Auckland, NZ, 16 November 2007) to be published in J Berryman and R Bigwood (eds), 'The Law of Remedies: New Directions in the Common Law' (Irwin Law and Federation Press, 2008) (forthcoming).

458 Australian Law Reform Commission, *For your Information: Australian Privacy Law in Practice*, Report No 108 (May 2008), Vol 1, Recommendation 74-1, 88.

his Honour sets out the relevant facts of the decisions to which I refer below. To avoid unnecessary repetition, I have generally resisted referring to those facts.

The *Wilkinson v Downton* principle

454 The principles governing the tort of intentional infliction of harm were summarised by Ashley J (as he then was) in *McFadzean v Construction, Forestry, Mining and Energy Union*.[459]

> There is a cause of action if a person without lawful justification wilfully does an act calculated to cause harm to another and in consequence causes physical harm, in the sense which I shall describe in a few moments, through 'mental distress'.
>
> It is not necessary that the infliction of mental distress involving physical injury was desired by the defendant. It is enough that the defendant's aim was to frighten, terrify or alarm the victim, provided that his conduct was of a kind reasonably capable of terrifying a normal person, or was known or ought to have been known to him to be likely to terrify the plaintiff for reasons special to him.[460]
>
> It is not necessary that the defendant's act be directed at the plaintiff. It is sufficient, it seems, that the plaintiff be within the range of foreseeability of risk of pertinent harm – as, for instance, one person witnessing the defendant's attack upon another.[461]
>
> In this cause of action, 'act' includes words spoken by a defendant to a plaintiff. So, for example, *Wilkinson v Downton* was a case of the latter type; whilst *Bunyan v Jordon* was a case of a physical act.[462]
>
> In Australia, according to Fleming, courts have 'postulated a high degree of robustness in the average citizen's reaction to the vicissitudes of life and have consistently refused "to expose all forms of human behaviour to the arbitrary and unfettered discretion of a jury so long as some person is ready to swear

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459 [2004] VSC 289, [122]-[127].

460 John Fleming, *The Law of Torts* (9th ed, 1998) 38, citing *Bunyan v Jordan* (1936) 36 SR (NSW) 350, 353. See also, concerning 'calculated', *Carrier v Bonham* [2002] 1 Qd R 474, [25] (McPherson JA with whose reasons Moynihan J agreed); and the slightly different formulation of McMurdo P, [12]. What their Honours said reflects the approach of Ferguson J, speaking for the Court, in *Johnson v The Commonwealth and ors* (1927) 27 SR (NSW) 133, 137. By analogy with the tort of misfeasance in public office it may also be the case that the intentional infliction of harm embraces conduct done with reckless indifference to the harm that is likely to ensue; see *Northern Territory and ors v Mengel* (1995) 185 CLR 307, 347, cited by McPherson JA in *Carrier*, [23], and by Debelle J in *Rowan v Cornwall and ors* (No 5) (2002) 82 SASR 152, [599].

461 See *Battista and ors v Cooper* (1976) 14 SASR 225, 231 (Bray CJ), albeit that this proceeding concerned a claim under statute for criminal compensation.

462 Albeit that the claim failed.

that the behaviour caused him injurious fright"'. [463]

> As a further factor limiting availability of the cause of action, the plaintiff's emotional distress must have been accompanied by 'objective and substantially harmful physical or psychopathological consequences, such as actual illness. Mere anguish or fright will not do'.[464]

455 The judge below held that Ms Giller could not recover damages from Mr Procopets, because she did not suffer any physical or psychiatric injury as the result of him threatening to show or showing the videotape.[465]

456 *Wilkinson v Downton*[466] was the case which gave birth to the tort of intentional infliction of harm. When *Wilkinson* was decided, damages for nervous shock could not be recovered in negligence.[467] Wright J distinguished cases then precluding recovery of damages for negligently caused nervous shock, and held that Mrs Wilkinson was entitled to compensation for the injury which Mr Downton had intentionally caused by falsely stating that her husband had been involved in a serious accident. As Lord Hoffman said in *Wainwright v Home Office*:[468]

> Quite what the judge meant by this is not altogether clear; Downton obviously did not intend to cause any kind of injury but merely to give Mrs Wilkinson a fright. The judge said, however, ... that as what he said could not fail to produce grave effects 'upon any but an exceptionally indifferent person', an intention to cause such effects should be 'imputed' to him.[469]

457 *Wilkinson* was expressly approved by the English Court of Appeal in *Janvier v Sweeney*,[470] where the plaintiff also recovered damages. In the latter case, the defendants intended to terrify the plaintiff, who was incapacitated as a consequence.

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463 Fleming, 40, citing *Bunyan v Jordan*, 355, decision affirmed (1937) 57 CLR 1; as to 'a person of normal fortitude' see also, though not in a case pleaded as an intentional tort, *Midwest Radio Ltd v Arnold*, Court of Appeal, Queensland, 12 February 1999, [28]-[29] (McPherson JA and Williams J).

464 Fleming, 40. See also Rosalie Balkin & Jim Davis, *Law of Torts* (2nd ed, 1998) 50.

465 Reasons, [186].

466 [1897] 2 QB 57 ('*Wilkinson*').

467 *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222.

468 [2004] 2 AC 406 ('*Wainwright*').

469 Ibid 424 (citing *Wilkinson* [1897] 2 QB 57, 59).

470 [1919] 2 KB 316 ('*Janvier*').

By the time that case was decided, damages were recoverable for negligently caused nervous shock, so that it was unnecessary for the plaintiff to rely on *Wilkinson*. However Bankes LJ (with whom Duke LJ agreed) cited the following statement of Wright J from *Wilkinson*:

> The defendant has … wilfully done an act calculated to cause physical harm to the plaintiff – that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.[471]

458 In *Bunyan v Jordan*,[472] the High Court accepted the law as stated in *Wilkinson* and *Janvier*, but dismissed the plaintiff's claim because an ordinary person would not have suffered illness in the same circumstances.[473]

459 In Australia, *Wilkinson* has been more recently accepted in obiter dicta in *Northern Territory v Mengel*,[474] *Magill v Magill*[475] and *Nationwide News Pty Ltd v Naidu & Anor*,[476] although it has been noted that the cause of action for intentionally inflicting harm has largely been overtaken by negligence causing nervous shock.[477] These cases have assumed that recovery of damages under *Wilkinson* is limited to cases where the plaintiff suffered physical harm, though it has not been necessary to decide that question in any of them. A similar approach has been taken in New Zealand.[478]

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471 Ibid, 322 (citing *Wilkinson* [1897] 2 QB 57, 58-59).

472 (1937) 57 CLR 1.

473 Ibid 14 (Latham CJ), 15 (Rich J), 17 (Dixon J), 18 (Mc Tiernan J).

474 (1995) 185 CLR 307, 347. That case concerned the tort of misfeasance in public office.

475 (2006) 226 CLR 551 ('*Magill*'), 589 [117] (Gummow, Kirby and Crennan JJ). That case was concerned with the tort of deceit.

476 [2007] NSWCA 377 ('*Nationwide News*'), [67] Spigelman CJ.

477 See *Magill* (2006) 226 CLR 551, 589 [117] (Gummow, Kirby and Crennan JJ); *Nationwide News* [2007] NSWCA 377, [62] (Spigelman CJ).

478 *Stevenson v Basham* [1922] NZLR 225; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415, 420.

Criticisms

460 The judge below criticised the requirement that Ms Giller show that the video incident had caused her physical harm.

> The purpose of the law of torts is to provide compensation where an injury has been caused by wrongful conduct of another. The facts of the present case demonstrate that if the defendant set out intentionally to cause harm and distress to the plaintiff by wrongfully showing or threatening to show the video film, which caused anger, humiliation, frustration, upset and distress, it is strongly arguable that the law would not be fulfilling its purpose if it did not permit compensatory damages for such mental distress and upset. The distribution and showing of the video is analogous to the publication of a defamatory imputation and the law should permit recovery for distress depending upon the gravity of the wrongful act and the effect upon the victim.[479]

461 Academic commentators have also argued that the *Wilkinson* principle should be extended to cover words or acts intended to cause mental distress or done with reckless indifference as to whether that harm will ensue.[480] The main argument for expansion of *Wilkinson* is that mental distress and emotional harm caused by the intentional act of another may cause as much suffering as physical injury, including nervous shock. It is said to be anomalous for the law to permit recovery of compensation only for the latter.

462 In the area of negligence, there is a need to ensure that socially desirable activities are not unduly hindered by the risk of incurring liability. For that reason, negligence law contains a number of 'control devices'[481] which limit liability for negligent words or acts. These include the principle that damages are not payable for 'distress, alarm, fear, anxiety, annoyance, or despondency, without any resulting recognised psychiatric illness'.[482] It is arguable that this 'control device' is unnecessary in the case of the tort of intentionally causing harm, because intentional

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479 Reasons, [185].

480 Francis Trinidade and Peter Cane and Mark Lunney, *The Law of Torts in Australia* (4th ed, 2006) 86-95. See also, 'Negligently Inflicted Mental Distress: The Case for an Independent Tort' (1970-1) 59 *Georgetown L*J 1237, 1245-1248. But see R P Balkin and J L R Davis, Law of Torts (3rd ed, 2004) [3.23].

481 See *Tame v New South Wales* (2002) 211 CLR 317, 329 (Gleeson CJ), 404 (Hayne J).

482 Ibid 329 (Gleeson CJ).

words or acts which cause mental distress typically lack the social justification of business or private activities which can give rise to liability for negligent injury.

463 Damages are available for mental distress (including humiliation and wounded feelings) caused by other intentional torts, such as defamation and false imprisonment. Learned authors Trindade, Cane and Lunney pose the question why damages should not be awarded to a plaintiff who suffers severe mental distress which was caused by the intentional act of the defendant?[483]

464 *Wilkinson* does not actually require that the defendant intend to cause a psychiatric injury. In that case, the defendant intended only to play a 'joke' on the plaintiff. Trindade, Cane and Lunney argue that the current limitation to intentionally caused psychiatric injury requires the court to resort:

> to the fiction of imputing to a defendant an intention to cause physical injury or nervous shock in order to enable a plaintiff to recover damages, even though the defendant might have done the act or made the statement only with the intention of causing mental distress.[484]

Basten JA expressed similar criticisms in *Nationwide News*, where he emphasised the need to assess intention 'without assumptions based on hindsight'.[485] The extension of *Wilkinson* to cover mental distress would allow the fiction to be abandoned.

465 Finally, as Maxwell P has said, there is often no clear boundary between recognisable psychiatric injury and 'mere' mental anguish.[486] The current restriction on recovery under *Wilkinson* may encourage victims to exaggerate symptoms of emotional distress, to bring themselves within the category of psychiatric injury.[487] Instead of maintaining an artificial division between those who suffer mental distress and anguish it is said to be preferable to simply compensate claimants for

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483 *The Law of Torts in Australia* (4th ed, 2006) 89-90.

484 Ibid 88.

485 [2007] NSWCA 377, [371].

486 See [29] above.

487 Calvert Magruder, 'Mental and Emotional Disturbance in the Law of Torts' (1936) 49 *Harvard LR* 1033, 1059.

intentionally caused mental distress.[488]

The law in other jurisdictions

466 In the United States, the tort of 'intentional infliction of mental suffering, or mental anguish, or mental disturbance, or emotional distress' was well recognised by the mid-twentieth century.[489]

467 English courts also seem to be moving in that direction. In *Khorasandjian v Bush*,[490] the English Court of Appeal dismissed an appeal against the grant of an injunction. One basis for the grant of the injunction was the law of private nuisance, which does not concern us here. However Dillon LJ (with whom Rose LJ agreed) also noted that in both *Wilkinson* and *Janvier*, damages were awarded for 'nervous shock'.

> On modern authority in the law of negligence, ['nervous shock'] is understood as referring to recognisable psychiatric illness with or without psychosomatic symptoms (see per Lord Bridge in *McLoughlin v O'Brian* [1983] 1 AC 410, 431H) or, as put by Lord Wilberforce in the same case, at p 418B, recognisable and severe physical damage to the human body and system caused by the impact, through the senses, of external events on the mind. It is distinguished from mere emotional distress. From the judgment of Bankes LJ in *Janvier v Sweeney*, it seems that he had much the same concept in mind, in that he refers in various citations to physical damage inflicted through the medium of the mind.[491]

468 In *Khorasandjian*, the injunction was granted because of the risk that the harassment of which the plaintiff complained would in the future give rise to a physical or psychiatric illness, though there was no evidence that the plaintiff had yet suffered such an illness.

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488 Francis Trinidade and Peter Cane and Mark Lunney, *The Law of Torts in Australia* (4th ed, 2006) 93.

489 See William L Prosser, 'Insult and Outrage' (1956) 44 *Cal L Rev* 40, 40; 'Negligently Inflicted Mental Distress: The Case for an Independent Tort' (1970-1) 59 *Georgetown LJ* 1237; and *Restatement of the Law (Second) Torts (2d)* Volume 1 (1965) 71. For further discussion of the situation in the United States see *Tame v New South Wales* (2002) 211 CLR 317, 375 [172]-[174](Gummow and Kirby JJ).

490 [1993] QB 727 ('*Khorasandjian*').

491 Ibid 736 (Dillon LJ).

469 In *Hunter v Canary Wharf Ltd*,[492] the Court of Appeal overruled *Khorasandjian*, so far as it decided that a mere licensee of private property could sue in private nuisance. However Lord Hoffmann noted that:

> The perceived gap in *Khorasandjian v Bush* was the absence of a tort of intentional harassment causing distress without actual bodily or psychiatric illness. This limitation is thought to arise out of cases like *Wilkinson v Downton* … and *Janvier v Sweeney* … The law of harassment has now been put on statutory basis … and it is unnecessary to consider how the common law might have developed. But as at present advised, I see no reason why a tort of intention should be subject to the rule which excludes compensation for mere distress, inconvenience or discomfort in actions based on negligence … The policy considerations are quite different.[493]

470 In *Wainwright*, Lord Hoffmann[494] referred to the Court of Appeal's rejection in *Wong v Parkside Health NHS Trust*[495] of the proposition that damages for intentionally caused mental distress (falling short of psychiatric injury) were recoverable.[496] His Lordship went on to say that he did not resile –

> from the proposition that the policy considerations which limit the heads of recoverable damage in negligence do not apply equally to torts of intention. If someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation.[497]

That being said, his Lordship reserved his opinion about whether damages should be available for intentionally caused mental distress. However he considered that:

> [i]f, … one is going to draw a principled distinction which justifies abandoning the rule that damages for mere distress are not recoverable, imputed intention will not do. The defendant must actually have acted in a way which he knew to be unjustifiable and either intended to cause harm or at least acted without caring whether he caused harm or not.[498]

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492 [1997] AC 655, 707.

493 Ibid.

494 Lord Hope of Craighead and Lord Hutton agreeing. Lord Scott of Foscote appears to have considered that infliction of humiliation, without more, does not constitute a tort.

495 [2001] EWCA Civ 1721.

496 *Wainwright* [2004] 2 AC 406, 425 [41].

497 Ibid 425 [44].

498 Ibid 426 [45].

Conclusion

471 I agree with Maxwell P that no Australian decision positively precludes the expansion of the tort of intentional infliction of harm to cover cases in which the plaintiff suffered distress, humiliation or other forms of emotional discomfort, rather than physical or psychiatric injury. In this case, however, I have held that Ms Giller is entitled to recover damages for breach of confidence. In my opinion, it is therefore unnecessary to decide whether the tort of intentional infliction of harm should be expanded to cover mental distress.

472 However, if this Court were to hold that damages can be awarded for intentionally caused mental distress, the approach discussed by Lord Hoffman has some advantages. It would permit recovery for mental distress, while abandoning the legal fiction of imputed intention which provided the basis for recovery of damages in cases such as *Wilkinson.* The requirement to prove an actual (rather than imputed) intention to cause harm in the sense described by Lord Hoffman, would confine the scope of the tort and go some way towards meeting concerns that its expansion could lead to a flood of litigation.[499]

473 Although there are arguments in favour of such an expansion, there are also some contra-indications. It must be conceded that the law of torts operates inconsistently by providing compensation for intentional infliction of purely mental distress in torts such as defamation and false imprisonment, but not in the case of the tort of intentionally causing harm. However the expansion of the *Wilkinson* principle to cover mental distress would also create inconsistencies. Over the past decade, legislatures across Australia have imposed limits on the availability and amount of damages recoverable in negligence for physical injury. It would seem anomalous to expand the possibility of recovering damages for hurt feelings, even when intentionally caused, at a time when recovery of damages for non-economic loss

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[499] Although these concerns are said by one academic commentator to be ill-founded – see P R Handford, 'Intentional Infliction of Mental Distress: Analysis of the Growth of a Tort' (1979) 8 *Anglo-American LR* 1, 11.

arising out of physical injury has become increasingly limited.[500]

474 An expanded tort could potentially apply to a very broad range of situations, including harassment based on race, gender and sexual orientation, bullying, practical jokes, unkindness in family and social relationships and the insensitive management of medical patients, employees,[501] and consumers. As Lord Hoffman commented in *Wainwright*:

> [i]n institutions and workplaces all over the country, people constantly do and say things with the intention of causing distress and humiliation to others. This shows lack of consideration and appalling manners but I am not sure that the right way to deal with it is always by litigation … The requirement of a course of conduct [in the *Protection From Harassment Act 1997*] shows that Parliament was conscious that it might not be in the public interest to allow the law to be set in motion for one boorish incident. It may be that any development of the common law should show similar caution.[502]

475 A person who has suffered mental distress as the result of a defendant's intentional acts may recover compensation under some other legally recognisable claim, as can Ms Giller. In other situations, domestic violence and anti-stalking laws may provide more effective remedies to victims than the payment of compensation after the event. Some acts done, or words spoken, with the intention of causing mental distress are regulated by anti-discrimination laws and statutory complaints schemes, which may or may not provide compensation. Where there is no statutory compensation for victims of such behaviour, I am not convinced that the common law should fill the gap.

476 A court which has the task of deciding an individual case is poorly equipped to consider the balance which should be struck between providing compensation for intentionally caused mental distress and recognising that the exigencies of life result

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500 Regarding the development of the common law by legislative analogy, see David St L Kelly, 'The Osmond Case: Common Law and Statute Law' (1986) 60 *Australian Law Journal* 513.

501 See the comments of Basten JA in *Nationwide News* [2007] NSWCA 377, [373], in the context of deciding whether an employer was liable for the intentional infliction of harm by an employee on another employee.

502 [2004] 2 AC 406, 426 [46]. (Although the *Crimes Act 1958 (Vic)* now contains an offence of stalking, defined quite broadly, there is no statutory equivalent in this State or elsewhere in Australia to the *Protection from Harassment Act 1997 (UK)*, which provides for the recovery of damages for anxiety where harassment involves conduct on at least two occasions.)

in some people intentionally causing mental distress to others from time to time. If the intentional infliction of mental distress is to be recognised as a tort, the legislature is in a better position to determine how that balance should be struck.

477 As Lord Hoffman noted in *Wainwright*,[503] the *Protection From Harassment Act 1997* (UK) prevents recovery of damages for single incidents of harassment.[504] In the United States, *The Restatement of the Law (Second) Torts 2d* describes the tort of 'intentional infliction of emotional distress' as requiring the intentional or reckless causing of severe emotional distress by 'extreme and outrageous conduct'.[505] Both these limitations may operate as sensible controls on the availability of damages. As I have said, these are matters which should be considered by the legislature.

478 I would therefore dismiss Ms Giller's appeal against the learned judge's failure to award her damages for intentional infliction of emotional distress.

Damages for assault

479 Eight assault claims were pleaded. Two were statute-barred. Of the remaining six, the trial judge upheld five. As noted earlier, the essential ground of attack on the judge's conclusions was that the awards of damages were manifestly inadequate. In order to make out that claim it is necessary to show that his Honour erred in principle, misunderstood the facts or that his estimate of damages was entirely wrong.[506]

480 For reasons which follow, I am satisfied that, in each case, this ground is made out. As the judge correctly stated, Ms Giller was entitled to compensation

> for any injury suffered, pain and suffering and loss of enjoyment of life, together with any distress, indignity and humiliation.[507]

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503 Ibid 426 [46].

504 See *Protection From Harassment Act 1997* s 7(3), where a 'course of conduct' is defined to mean conduct on at least two occasions.

505 *The Restatement of the Law (Second) Torts (2d)* Volume 1 (1965) 71.

506 *CSR Readymix (Australia) Pty Ltd v Payne* [1998]2 VR 505, 508-509.

507 Reasons [259].

In my view, the amounts awarded to Ms Giller cannot be regarded as properly compensating her for the pain and suffering, distress and humiliation which must have been the inevitable consequence of these assaults. In reaching that view I have taken account of damages awards made in other cases for assaults occurring in a domestic context.[508]

481 I deal with the assaults in chronological order, as his Honour did. In each case, I begin with the relevant part of his Honour's reasons. It is important to point out that Mr Procopets did not cross-examine Ms Giller on the first four of the five assaults which were found proven. Mr Procopets objected at trial, and again on the appeal, that the Court had limited his cross-examination. His Honour dealt with the objection in these terms:

> It is indeed correct that the Court did limit the cross examination of the plaintiff. All told the defendant cross examined the plaintiff for some eight days. The defendant was informed that there was to be a limit on his cross examination and this warning was given on a Friday permitting cross examination until 4:15 pm the following Monday. As things turned out he was given another half hour for cross examination on Tuesday morning. the Court pointed out that he should give consideration to cross examination of the plaintiff concerning the alleged assaults. I do not accept his assertion from the Bar table that he was denied the opportunity. He had the opportunity and he chose not to take it.

I have reviewed the transcript of the relevant exchanges and respectfully endorse his Honour's conclusion. The assault findings are dealt with on that basis.

29 April 1992 at Orrong Crescent ('Assault 1')

> I find that the defendant struck the plaintiff with a metal framed kitchen chair on the right arm and her right shoulder. Police were called. I am satisfied that the assault occurred. The injuries were bruising and lacerations to the lower right arm and some restricted painful movement of right shoulder. The plaintiff said that she suffered the effects for about a month. It is difficult to know whether that is true. However she was not cross-examined on her

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508 See for example, *Johnstone v Stewart* [1968] SASR 142, where Bray CJ awarded $2,400 in damages for assault, but did not differentiate between compensatory and exemplary damages. In *In the Marriage of Marsh* (1993) 17 Fam LR 289, Coleman J made a damages award of $7,000 (including general, aggravated and exemplary damages) in respect of a single assault. In *In the Marriage of Kennon* (1997) 139 FLR 118, the Full Court of the Family Court upheld a total award of damages of $43,000 for four batteries (three of which gave rise to an award of exemplary damages). In that case, the appellant's awards of compensatory damages included a significant component for psychological suffering.

> evidence. I am prepared to accept her evidence on the effect of the assault. I assess the damages at $1,000. No medical treatment was sought. The police were called and the Jewish welfare organisation became involved. Whilst the injuries were not serious, I am satisfied that they were not minor.

482 A review of Ms Giller's evidence-in-chief shows that these findings accord with her account of this assault and its effects on her. In her particulars of loss and damage, Ms Giller claimed damages for 'stress, nervous shock and fear for her physical safety', but gave no evidence that she had suffered from distress or fear as a result of this assault. Nevertheless, this was a serious assault which affected Ms Giller for a month. Ms Giller was in her home, a place where she was entitled to feel safe, when she was assaulted. I consider that damages of $1,000 are manifestly inadequate.

483 The effects of this and the later assaults have already been taken into account in assessing the extent of Ms Giller's homemaker and parent contribution. Having regard to the need to avoid double compensation and doing the best I can, I would assess the damages at $5,000.[509]

August 1992 at Glenhuntly Primary School ('Assault 2')

> I find that the defendant and the plaintiff were sitting in a car outside Glenhuntly Primary School. The defendant struck the plaintiff with a clenched fist to her mouth. She suffered a deep cut inside her mouth and was severely bruised and had a swollen lip for a period in excess of one week. I find the assault proven. Again I note that the plaintiff did not seek any medical treatment. I accept that she had bruising and discomfort for about a week. I assess the amount of damages at $500.

484 Once again, his Honour accepted Ms Giller's account of the assault and its physical effects on her. She gave unchallenged evidence that she 'suffered severe pain and shock, and emotional upset and again feared for [her] physical safety'. These matters were all itemised in the particulars of loss and damage. His Honour gave no indication that he was rejecting that part of the evidence of Ms Giller. It was simply not mentioned.

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509 I have also taken account of the need to avoid double compensation in assessing the damages for the other assaults.

485 Ms Giller and Mr Procopets were sitting in his car, away from the public gaze, when he punched her on the mouth. In assessing damages for this and later assaults, his Honour regarded Ms Giller's complaints about the effects as exaggerated and said that she was 'a determined woman who is not over sensitive'.[510]

486 Ms Giller's determination, and her failure to be cowed by Mr Procopets' assaults, is not inconsistent with her fearing him and suffering mental distress as a result of the violence she suffered. It cannot be doubted that the victim of such an assault would have feared for her own safety. Nor are the mental distress and fear caused by such an assault diminished by the fact that she did not seek medical treatment. She suffered facial injuries, which would have been difficult to conceal. Ms Giller's evidence of the psychological effects of the attack on her is entirely plausible, and should be accepted.

487 The award of $500 damages is manifestly inadequate. I would assess the damages at $4,000.

In or about 1992 at Orrong Crescent ('Assault 3')

> The plaintiff is unable to give a date in relation to this assault but I am satisfied that the defendant did assault her by hitting her with his belt, dragging her onto a sofa and striking her in the face with a clenched fist. She suffered bruising to the lower part of the frontal bone of her head, just near the eyebrows and this lasted for about ten days. She also had severe bruising to her eyes which lasted for about ten days and extensive bruising to the jaw. She had painful movement of the jaw for about two or three weeks and her ears rang and buzzed for about two months. This is the incident that Julia observed. The plaintiff also suffered from headaches which persisted for about two months, and dizziness. She lost her appetite and was shocked and remained distressed.
>
> I am satisfied that the assault took place. The effects of the assault were felt for some substantial period of time and I assess the damages at $1,500.

488 Although his Honour accepted that Mr Procopets did assault Ms Giller

> by hitting her with his belt, dragging her on to a sofa and striking her in the face with a clenched fist,

he did not record her unchallenged evidence that Mr Procopets had struck her

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510 Ibid [279].

'repeatedly' and that the assault continued for 'about half a minute'. Since his Honour otherwise accepted in full Ms Giller's account of the assault and its effects on her, and gave no indication that he was rejecting those important details, I am satisfied that they should be accepted. This was a case of repeated striking. The physical consequences were more serious and more long-lasting than in either of the first two assaults. Ms Giller's unchallenged evidence was that, as a result of the assault, she

> lost [her] appetite, remained shocked and very distressed and also again… feared for [her] physical safety.

His Honour found that 'she lost her appetite and was shocked and remained distressed'. Ms Giller had been assaulted on two previous occasions, which would have increased her fear for her physical safety. The presence of her daughter, Julia, would have contributed to the indignity and humiliation suffered as a result of this assault.

489 Damages of $1,500 are manifestly inadequate. I would assess the damages for this assault at $8,000.

June 1993 at Orrong Crescent ('Assault 4')

> An argument occurred, the defendant threatened to kill the plaintiff, he threw a chair at her which struck the plaintiff in the right arm and breast, causing her to fall to the floor. He made threats and the police later attended. The police report was placed in evidence by the defendant. The plaintiff suffered bruising to the right arm and upper right breast which lasted for about a week and pain in the right breast for about two weeks and painful movement in the right shoulder for about a month. She suffered shock and severe emotional distress.
>
> I am satisfied the assault took place. I assess the damages at $750.

490 The judge accepted that Mr Procopets threatened to kill Ms Giller. He also accepted that, for a second time, Mr Procopets threw a chair at Ms Giller. It struck her on the right arm and on the right breast and caused her to fall to the floor. Ms Giller's unchallenged evidence was that Mr Procopets

> then threatened to cut me to pieces and feed my 'meat' to his dogs so that my parents would not find me when they arrived.

As to this, the judge found that Mr Procopets 'made threats' but he did not refer to their content. The threat made was quite shocking. In the context of the earlier threat to kill, it was no doubt intended to be taken seriously. Again, while his Honour accepted Ms Giller's evidence that she suffered shock and severe emotional distress, he did not record her unchallenged evidence that she 'feared for her physical safety'. Once again, it is hardly surprising in the circumstances that she did.

491 The assault occurred at home, where Ms Giller was entitled to feel safe. As I said earlier, throwing a piece of furniture at a defenceless person is a very serious assault. In my view, the threats which Mr Procopets made are properly to be regarded as part of the assault.[511]

492 Damages of $750 are manifestly inadequate. I would assess the damages at $10,000.

10 November 1996 at Port Melbourne ('Assault 5')

> The defendant admitted that there was a confrontation between the parties but he said that the plaintiff suffered injuries because he grabbed her clothing at the front of her neck to restrain her and that she, in the course of struggling, suffered injury. She states that on 10 November 1996 they were talking outside her flat in Port Melbourne, that he became enraged and took hold of her with his left hand, pulled her body down towards his knee and proceeded to strike her twice with a clenched fist to the left side of her face. In so doing he tore a gold chain from her neck, severely scratching and bruising her. The plaintiff reported the matter to the police that evening. She made a statement which is consistent with her evidence. But more importantly the defendant was charged with the assault and on 14 April 1998 he pleaded guilty to the charge at the Magistrates' Court. He informed the Court that the plea of guilty was a commercial one because he was facing so many charges that it was far better to plead and finish the whole saga and avoid expense rather than fight the case. A plea of guilty by a person charged with a criminal offence is an admission of all the essential elements that comprise the offence. I am satisfied that the plaintiff was assaulted by the defendant on that occasion. I accept her evidence that she suffered a severely bruised left cheek, a severely bruised and scratched neck and had a buzzing in her left ear and discharge from the ear and headaches for about a month.

493 As the judge recorded, Mr Procopets pleaded guilty to a charge of assault. That charge was based on the statement which Ms Giller made to police about this

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511 Francis Trindade, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (4th ed, 2006), 51.

incident. As the judge noted, the police statement was consistent with the evidence which Ms Giller gave of the assault. So too are the photographs of the injury which I have seen. As his Honour pointed out, Mr Procopets' plea of guilty was an admission of 'all the essential elements that comprised the offence'. His Honour said he was satisfied that Mr Procopets did assault Ms Giller on this occasion. Although his Honour did not say so expressly, I take it from his Honour's reasons that he treated the plea of guilty as an admission by Mr Procopets that the assault occurred as described by Ms Giller in her statement and in her evidence. The judge accepted Ms Giller's evidence as to the injuries she suffered. Once again, however, he did not refer to her evidence of having suffered 'shock and continuing fear for my physical safety'. For similar reasons to those given earlier, that evidence should be accepted.

494 His Honour referred to several matters which he said were relevant to 'determining the effect of the injuries upon the plaintiff'. The first was that she had not sought medical treatment. The second was that, despite having obtained the interim intervention order on 12 November 1996, Ms Giller had sexual intercourse with Mr Procopets on 19, 21 and 22 November 1996. The third was that she had struck Mr Procopets with an iron bar on 8 December 1996 at the Camberwell market.

495 With respect, I do not regard any of those matters as bearing upon the assessment of damages for the assault on 10 November 1996. It was a brutal assault, which caused the injuries described and would have caused great shock and distress. The fact that Ms Giller resumed sexual relations with Mr Procopets nine days later cannot alter those facts. Nor does it diminish the seriousness of the assault that Ms Giller did not seek medical treatment for her injuries. The fact that she herself pursued Mr Procopets when he filmed herself and her mother at the Camberwell market cannot reduce the amount of damages she should receive for this assault.

496 Damages of $750 are manifestly inadequate. I would assess the damages for this assault at $10,000.

Aggravated and exemplary damages

497 In the prayer for relief in her statement of claim, Ms Giller sought both aggravated damages and exemplary damages for the assaults. His Honour did not separately address either head of damage.

498 The distinction between the two was clearly explained by the High Court in *Lamb v Cotogno*,[512] as follows:

> Aggravated damages, in contrast to exemplary damages, are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like. Exemplary damages, on the other hand, go beyond compensation and are awarded 'as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself'.[513]

499 There is no occasion for a separate award of aggravated damages in the present case, as I have already taken account of the effect of the assaults on Ms Giller's emotional state. I do consider, however, that this is a case where exemplary damages should be awarded. The physical violence of Mr Procopets towards Ms Giller would have shocked any jury.[514] Such brutal behaviour must be deterred. Physical violence of any kind is to be deplored, but it is all the more reprehensible when the perpetrator has shared with the victim an intimate domestic relationship of trust and confidence and the two have had children together. One of these assaults occurred in the presence of Ms Giller's daughter, Julia, and Mr Procopets must have known that the girl would have been distressed by seeing him beat her mother.[515] The second assault and fourth assaults involved the striking of Ms Giller with a metal chair, which created the risk of grave injury. Mr Procopets

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512 (1987) 164 CLR 1.

513 Ibid 8.

514 The distinction between aggravated and exemplary damages has also been described as follows: '[a]ggravated damages are given for conduct which shocks the plaintiff and hurts his or her feelings. Exemplary damages are awarded for conduct which shocks the tribunal of fact, representing the community', *Gray v Motor Accident Commission* (1998) 196 CLR 1, 35 [101] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

515 The effects of domestic violence on children have been recognised by the Family Court in parenting order decisions: see for example, *In the Marriage of Jaeger* (1994) 18 Fam LR 126; *In the Marriage of Patsalou* (1994) 18 Fam LR 426. See generally HA Finlay, RJ Bailey-Harris and MFA Otlowski, *Family Law in Australia* (5th ed, 1997) [7.154,], [9.36].

acted with utter contempt for Ms Giller's rights as a person. His behaviour was cowardly in the extreme and should be denounced. Mr Procopets showed no contrition for his actions.[516] The compensatory damages awarded for these assaults are inadequate to punish him for his conduct.[517]

500 In my view, there should be an award of exemplary damages in the total sum of $13,000, comprising the following awards for the first, second, third and fourth assaults:

- Assault 1 $2,800
- Assault 2 $2,200
- Assault 3 $4,000
- Assault 4 $4,000

Exemplary damages should not be awarded in respect of Assault 5, for which Mr Procopets has already been punished. In total, therefore Mr Procopets should be ordered to pay Ms Giller damages of $50,000.

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516 *In the Marriage of Marsh* (1993) Fam LR 289, 296 (Coleman J).

517 *Backwell v AAA* (1997) 1 VR 182. In that case it was held that, even though compensatory and exemplary damages are awarded for different purposes, if the compensatory damages are adequate to serve the purpose of punishment and deterrence, additional exemplary damages should not be added. See 186 (Tadgell JA), 207-208 (Ormiston JA). An application for special leave to appeal to the High Court was refused.