IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CIVIL DIVISION

Revised

Case No. CI-03-07657

JANE DOE — Plaintiff

v

AUSTRALIAN BROADCASTING CORPORATION — Firstnamed Defendant

TERENCE RICKARD — Secondnamed Defendant
and
VALERIO VEO — Thirdnamed Defendant

JUDGE:	HER HONOUR JUDGE HAMPEL
WHERE HELD:	Melbourne
DATE OF HEARING:	15, 16, 20 February, 29, 30 & 31 May, 5 & 6 June 2006
DATE OF JUDGMENT:	3 April 2007
CASE MAY BE CITED AS:	Doe v. ABC & Ors
MEDIUM NEUTRAL CITATION:	[2007] VCC 281

REASONS FOR JUDGMENT

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M.J. Colbran QC with Mr I.W. Upjohn	McKean & Clark
For the Defendants	Mr P.J. Flanagan SC with Ms R. Orr	Cornwell Stoddard

HER HONOUR:

Introduction

1 On 6 March 2001, the plaintiff, Jane Doe, was attacked and raped by her estranged husband, YZ[1]. YZ was charged with rape and various other offences and presented for trial in the County Court at Melbourne. He was convicted by a jury of two counts of rape. On 21 March 2002 he was sentenced on the two counts of rape, and one further count of common assault to which he pleaded guilty, to be imprisoned for a total effective sentence of four years and six months, with a non-parole period of two years and three months.

2 In its 4.00 p.m., 5.00 p.m. and 6.00 p.m. news bulletins on the day sentence was passed, ABC radio news reported on the sentencing of YZ. In the 4.00 p.m. and 6.00 p.m. bulletins, YZ was identified by name, and the offences of which he was convicted were described as rapes within marriage. The broadcast reports also revealed the offences had occurred in Jane Doe's home, named the suburb, and described the part of Melbourne where that suburb was. The five o'clock bulletin, in addition to this information, referred to Jane Doe by name, and identified her as the victim. She had, after the rape, reverted to her maiden name, and it was that name which was broadcast.

3 Valerio Veo, the ABC journalist who filed the report which formed the basis for the broadcasts, and Terence Rickard, the sub-editor who received the report and was responsible for putting it to air, are the second and third defendants in this proceeding. They were both charged with an offence under s.4(1A) of the *Judicial Proceedings Reports Act* 1958, which makes it an offence, in the circumstances there described, to publish information identifying a victim of a

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1 As these proceedings concern a claim for damages for wrongful publication of information identifying the plaintiff as the victim of a sexual assault, an order was made protecting her identity in these proceedings, and directing that she be referred to as Jane Doe. To maintain that protection from identification, I will refer to her former husband as YZ.

sexual offence. No charge was laid, (or at least, not proceeded with) against their employer, the Australian Broadcasting Corporation, the first defendant.

4 Mr Veo and Mr Rickard both pleaded guilty to publishing information in those broadcasts and have been dealt with. A written apology, addressed to Jane Doe and signed by each of them, was provided to her and produced to the Court on their pleas. It said in part:

> "*We apologise for the publication of the report which named you as the victim and for the distress we understand that this has caused you, which was not our intention and for which we deeply regret.*(sic) *We accept responsibility for what has happened. We have taken this matter very seriously. We clearly understand that we cannot report on the identification of victims of sexual assault either by name or by any other information*".

5 It is as a result of these broadcasts that Jane Doe brings these proceedings. She seeks damages, including aggravated and exemplary damages, for breach of statutory duty, negligence and breach of privacy, and equitable compensation including exemplary damages for breach of confidence.

The attack on Jane Doe and its effect

6 Jane Doe was 27 years old when YZ assaulted and raped her. At the time, they had recently separated after a marriage which had lasted only a year. YZ was charged almost immediately after, and remanded in custody, where he remained until his trial. Ms Doe gave evidence in these proceedings that after the attack, she cried constantly, was unable to sleep properly, and felt angry, afraid and sorry for herself. Although YZ was in custody up to the time of his trial she felt unsafe. She said she felt paranoid, and thought the whole wide world knew that she had been raped. She compulsively washed and changed her clothes frequently. She was unable to cope with work, and resigned from her job. She was unable to maintain social contact with people, and became housebound.

7 According to the expert evidence led at this trial, these responses fall within

the range of responses commonly experienced by victims of sexual assault.

8 The trial of YZ took place a year after the rape. By the time of trial, Ms Doe had developed chronic symptoms of post traumatic stress disorder as a result of the sexual assault by YZ. Although her symptoms were chronic, she had, in the time leading up to the trial, made some progress in engaging in socialising with family members outside the home, and had engaged, for two short periods, in some work.

The trial, sentence and Ms Doe's response

9 Ms Doe gave evidence at the committal and the trial, and unusually, was cross examined again during the plea. YZ was sentenced later the same day the plea was conducted. By the time of sentence, Ms Doe had left Court. The informant rang her soon after to tell her of the sentence imposed. She described her state after being told of the sentence as being emotional, feeling a little relieved that YZ was going to gaol for what he had done, but then feeling deep sadness. She said "*I felt like that's put behind me now and I can just start living every day*, *and I felt sad*". She said that she thought she could now start living her life "*like normal, starting to go out to dinners and going out in public and dealing with it*".

The broadcasts

10 Later that same afternoon, the ABC published the broadcasts the subject of these proceedings. Ms Bernadette Hughes, a psychologist who, through the Western Region Centre Against Sexual Assault, had counselled Ms Doe between the time of the rape and the trial, heard the 5.00 pm news broadcast, which was the one which named Jane Doe as well as referring to the other identifying information. Ms Hughes was aware of the terms of s.4(1A) and, in order to try to prevent further publication of the identifying information, contacted Ms Doe to obtain her permission to contact the ABC on her behalf. She was not able to stop the report being published again in the 6.00 pm

bulletin. Ms Doe listened to the 6.00 pm news and heard the report herself.

Ms Doe's initial response to the broadcasts

11 Ms Doe said that when told by Ms Hughes of the broadcast, she felt shocked, angry, anxious, scared, sorry for herself, vulnerable and as if she was exposed to the whole world. She said: "*I felt I had no control at all over anything that was happening in my life at that moment when probably an hour ago I had a piece of my life given back to me when he was found guilty and I felt I was, I don't know, stripped naked in public again. I felt humiliated. I felt like everyone in the street and everyone around me knows that it was on the radio*".

12 Ms Hughes was in a unique position to give evidence of the effect on Ms Doe of the knowledge she had been identified in the ABC broadcasts. She had counselled Ms Doe from the time of the rape, spoken to her after sentence, before she knew of the broadcast, was the one who told her of the broadcasts, and counselled her in the immediate aftermath of the broadcasts.

13 Ms Hughes said after learning of YZ's sentence, Ms Doe had expressed a sense of relief and containment. There was a marked difference in her level of distress after learning of the broadcast. In the next counselling session Ms Doe was able to describe with great clarity how she felt. Ms Hughes described that response as "*a mirroring or a parallel process in terms of hurtling her back into the powerlessness and the fear that she would have experienced when she was abused".*

Ms Doe's progress since the broadcasts

14 Ms Doe said that the broadcast caused her great distress. She said it was heard by many of her friends and acquaintances. She gave evidence that there were many calls made to her phone following the broadcasts, which she did not answer or respond to. She said that she later learnt her family had also

received many phone calls or enquiries from people in the community who had not previously known but who had found out. She feared that her reputation would suffer. She felt that after the broadcast people treated her differently, that she was being judged.

15 After the broadcasts, Ms Doe again felt unable to cope with contact with people. She felt unable to engage in ordinary social contact for two years. She started looking for work in 2003. She obtained employment in an administrative position in March 2003, on a 6 month contract. At the end of that time, although offered a permanent position, Ms Doe declined it because she felt unable to cope. Ms Doe said she started to improve and take steps towards getting back into society from about June 2004, when she went overseas for six months. She said she felt better when she was away, because nobody knew what had happened to her. She returned to Australia in December 2004, but the improvement she had felt whilst overseas dissipated and she became hurt, unhappy and miserable again. She remained in this state until September 2005.

16 In September 2005, at the urging of a friend, Ms Doe attended a four-day workshop called “Greatness in you” which she described as focusing on healing feelings from personal trauma. Ms Doe said it had transformed her attitude. She said "*I looked at myself and who I really am, and I learned how to let go of all my fear, my shame, my guilt and I learned how to love me for who I really am … It was wonderful*". She said since then she had felt better and more confident about her future.

17 Shortly after completing the course, she obtained employment, again in an administrative role, and has been in that job ever since. She now considers her life is now pretty much back to normal. She is able to go out socially wherever she is invited, and has formed a new relationship.

Expert opinion as to the effect of the broadcasts

18 Evidence was led from Ms Hughes, and from two psychiatrists, Dr Epstein, and Dr Brann, about the effect of the rape and the broadcasts on Ms Doe. A report from another psychiatrist, Dr Fail, was also tendered. All four experts, but particularly Ms Hughes and Dr Brann, had special expertise in treating victims of sexual assault. Where there was difference between these experts, in relation to the effect on Ms Doe of the sexual assault and the broadcasts, it was essentially one of emphasis or degree, not substance. All four experts were of the opinion the broadcasts significantly worsened Ms Doe's symptoms, and prolonged her recovery.

19 In expressing this view, all four experts took into account the other stressors affecting Ms Doe at the time of the broadcasts, and acknowledged they were relevant to the intensity and duration of Ms Doe's symptoms of post traumatic stress disorder. They included, most significantly, the rape itself, the build up to the trial, and the effect of giving evidence. There were other factors also, including: the pending divorce and property division proceedings, the fact one of the investigating police had made inappropriate overtures to Ms Doe, and the impact on her sense of safety when YZ was released on bail between verdict and sentencing. However, despite those other stressors, all experts agreed the broadcasts were a major, or significant factor in Ms Doe's continuing symptoms of post traumatic stress disorder. For example, Ms Hughes said "*I feel that there have been several things that would have exacerbated her trauma and depression symptoms, but the broadcast needs to be acknowledged as a major factor in complicating and prolonging her recovery because it was such a massive loss of control and the antithesis of what she required at the time, which is a sense of control and empowerment*."

20 Drs Brann and Epstein made specific reference to Ms Doe being particularly vulnerable at the time of the broadcasts, because of their closeness to the trial and sentencing. This resulted, in their opinions, in the broadcasts having a

much greater impact than they might otherwise have had if they had occurred at some other time. The impact of the broadcasts, in identifying Ms Doe as a victim of sexual assault, was also compounded by the fact that the assailant was identified as her estranged husband, not a stranger. This meant that he, too, was likely to be known to people who knew her.

21 Ms Doe's family belonged to an ethnic community which she characterised as conservative, prone to gossip, and to whom divorce was a shameful thing. Many members of that community socialised together, including her parents and other family members. YZ, although not of the same ethnicity, also socialised with the community. Jane Doe herself did not socialise much within that community but had contact with people, including family members who did.

22 One of the issues in the trial was the extent to which, before the broadcasts, the information was already known within circles in which Ms Doe or her family moved, and the circumstances in which the information had been imparted to others. Before the trial, Ms Doe had told her parents, sisters, and some close friends and relatives, she had been raped by YZ. Her mother had told two of her friends. Although neither had expressly imposed secrecy on those they told, the effect of their evidence was it was understood the information was secret. Ms Doe was aware, by the time of trial that family and friends of YZ knew he was on trial for raping her. Some of them attended the trial, although they were not present in court during her evidence.

23 In cross examination, Ms Doe agreed she had she told Ms Hughes ten months before the broadcasts that she wanted to go overseas and get away. She agreed she had given as her reasons for wanting to go away that she did not feel safe, even though XY was in gaol; that the ethnic community knew about what had happened and commented and asked, and this triggered memories and sadness; and that she wanted an opportunity to start again. She referred in her evidence, and had reported to some of the professionals

who counselled her, and assessed her for the purposes of the trial, to her belief that everyone knew. It was a belief she described as paranoid. The experts noted it was a common response of victims of sexual assault to believe, without foundation, that everyone knew they had been sexually assaulted.

24 Ms Hughes' counselling notes contained a reference to Ms Doe saying the community knew what had happened. Ms Hughes was cross examined about the entry. She said Ms Doe told her the community knew of her separation and pending divorce from YZ, and that as divorce was shameful in the community, it was something which was being talked about, and was distressing her, and triggering the memories of the rape and sadness about what had happened. Ms Hughes was adamant the counselling note related to knowledge of the separation and pending divorce, and not to the sexual assault. I accept her evidence on this issue.

25 Although at one stage Ms Doe, when asked in cross examination about what was meant by the community knowing about what had happened, agreed with a suggestion that she believed the community knew she had been raped by YZ, I am not satisfied the evidence, taken as a whole, supports a finding that the knowledge she was raped was widespread in the community. Ms Doe was unable to identify anyone else who knew, other than the people already identified, all of whom fell within the categories of Ms Doe's "trusted circle", family and friends of YZ, those involved in the investigation and prosecution and those providing professional assistance to Ms Doe. The defendants interrogated Ms Doe about the issue (as the cross examination of Ms Doe revealed), sought and obtained admissions from her about who knew and the circumstances in which they had been told, conducted their own inquiries, and served subpoenas on a considerable number of the plaintiff's family and friends. Yet no evidence was adduced to support the knowledge was more widespread than the identified people falling into the four categories referred

to earlier.

26 Dr Brann was asked by the defendants specifically to consider the significance of the spread of the information before the broadcasts, to the impact of the broadcasts on Ms Doe. She was provided with a list of the people who the evidence established knew of the rape before the broadcasts, and the categories into which they fell. Although Dr Brann described the list as "considerable" she held firm to her opinion that the effect of the broadcasts remained significant and considerable. That was so, in her opinion, because the main issues relate to trust, intimacy and control. She noted that, apart from those who were aware of Ms Doe's identity because of the investigation and trial process, the balance were either what could be described as Ms Doe's "trusted circle", or people associated with YZ. As she noted, Ms Doe had good reason to believe YZ would not want the information revealed as it would disclose his conviction and sentence. It followed from that, that control had not been lost by the pre broadcast disclosures.

27 Ms Hughes gave evidence that victims of sexual assault often make significant gains immediately after a trial, particularly after conviction and if they felt they had been heard, as was the case with Ms Doe. She considered there were, in addition, other factors tending in favour of a significant gain after trial in this case: Ms Doe's age, as those who suffer adult trauma generally have a better prognosis than those who suffer childhood trauma; the presence of supportive people around her; and her personal qualities of determination and a sense of her own strength.

28 Dr Epstein considered that Ms Doe's symptoms of chronic post-traumatic stress disorder would have persisted for some time after the trial and sentence. In his view, her symptoms would have settled to some degree within a month or two, and the bulk of the symptoms would have settled within 12 months of resolution of the trial. It was likely she would have had residual symptoms after that time which could have been reactivated in situations of

potential violence or potential sexual assault, or with reminders of such events. In his opinion, although Ms Doe found the trial distressing, that was overtaken to a significant degree by her distress about the broadcast.

29 According to Ms Hughes and Dr Brann, the guiding principles of recovery from sexual assault are empowerment and reconnection. The broadcasts affected both her empowerment and reconnection capabilities.

30 They explained that one important aspect of empowerment is control over disclosure. This covers not only who is told or not told, but what is disclosed, and the time and circumstances in which disclosure is made. The broadcasts removed Ms Doe's sense of control over who knew about what had happened to her. Loss of control over the disclosure process affected Ms Doe's capacity to rebuild a positive image of self. The powerlessness, or loss of control over disclosure delayed or made it more difficult for her to rebuild her psychological capacities of autonomy and competency, reduced her sense of safety because it exacerbated her trauma symptoms, and made it more difficult for her to trust.

31 Reconnection, or rebuilding a positive sense of self, was explained as requiring a person to reconnect with themselves as someone other than a rape victim, a person who has competencies, qualities and experiences separate from the rape. One important way people do that is to spend time with people who do not know about what has happened to them, so they can put that mentally aside and be someone other than a rape victim. As Ms Hughes said "*Jane Doe was robbed of any or many opportunities because all of a sudden anyone could know and she would be having to ask herself, when she attempted to reconnect with others and reconnect with a positive sense of herself, 'Does this person know? What do they think about me? Who else have they told? How do they now feel? Do they now feel they have permission to be able to go and talk to everyone else because it has been broadcast on the ABC anyway? What judgments have been made about*

me?'. So the danger would be that she would withdraw socially for a time when we need her to reconnect. Any issues that she'd have around shame would also be complicated in addition".

32 Dr Epstein explained the effect of the broadcasts somewhat differently, but not in a way which conflicted with the opinions of Ms Hughes and Dr Brann. In his opinion, the broadcasts brought to the forefront Ms Doe's very conflicted feelings about the rape. He said it was common for many women to feel violated and also somehow guilty. Ms Doe felt that everyone became aware of her shame and her guilt. She felt, as do many victims, that she was weak and pathetic. The broadcasts exacerbated those feelings, and thereby added to her level of distress. In addition, she felt her trust had been violated by the broadcasts, and this too aggravated her symptoms. He considered the broadcast was the final straw and from that time on her capacity for coping remained pretty limited.

33 Dr Epstein was the only expert who referred to symptoms of obsessive compulsive disorder, and he said the impression he gained was they occurred after the broadcast. Ms Doe's evidence included experiencing such symptoms before the broadcast. Although Dr Epstein said it was not unusual in his experience for people not to mention these symptoms directly, and that obsessive compulsive disorder and post-traumatic stress disorder are both disorders in which the predominant symptom is anxiety, I am not satisfied that Ms Doe experienced obsessive compulsive disorder symptoms which can be attributed to the broadcasts.

34 Ms Hughes and Dr Epstein both considered the broadcasts had a significant effect on Ms Doe's capacity to return to work. Ms Hughes said: "*If somebody is able to get back to work, that's significant gain in terms of being able to reconnect with other people and a sense of yourself being competent and rebuilding your identity. The broadcast meant there was no safe place now, and that would include work, so entering an old workplace or going to a new*

one could possibly be quite daunting".

Preliminary Arguments

35 The defendants raised three preliminary points. First, they submitted that s.4 of the *Wrongs Act* 1958 confers on the defendants a qualified privilege in respect of publishing faithful and accurate reports of proceedings in a Court. The qualified privilege, they submit, bars the plaintiff from maintaining an action against them in respect of the publication. Secondly they submitted, even if s.4 of the *Wrongs Act* is not a bar to the claim, the plaintiff's sole remedy rests in defamation. Thirdly, they submitted the broadcasts did not contravene s.4(1A) of the *Judicial Proceedings Reports Act* as they occurred after the conclusion of the proceeding. In final submissions, they also argued there could be no finding against the second and third defendants, as it was the first defendant, not the second and third defendants, who published the information.

Does s.4 of the *Wrongs Act* bar the plaintiff's claim?

36 This involves a consideration of both s.4 of the *Wrongs Act* and s.4(1A) of the *Judicial Proceedings Reports Act*, and their relationship to each other. *Section* 4 of the *Wrongs Act*, in force as at the date of broadcast, was in these terms:

> "*4. No action maintainable against a person for faithfully reporting.*
>
> *No action or presentment shall be maintainable against any person for publishing a faithful and accurate report of proceedings in any court of justice, or other legally constituted court or in any inquest under the Coroners Act 1958 or investigation under the Coroners Act 1958: provided always that it shall not be lawful to publish any matter of an obscene or blasphemous nature nor any proceedings in any court which are not concluded and which the judge, magistrate, coroner or other presiding officer may pronounce it improper to publish at their then stage.*"

37 Section 4(1A) of the *Judicial Proceedings Reports Act* provides:

> *A person who publishes or causes to be published any matter that*

contains any particulars likely to lead to the identification of a person against whom a sexual offence, or an offence where the conduct constituting it consists wholly or partly of taking part, or attempting to take part, in an act of sexual penetration as defined in section 35 of the Crimes Act 1958, is alleged to have been committed is guilty of an offence, whether or not a proceeding in respect of the alleged offence is pending in a court.

38 By s.4(1):

"publish" *means—*

(a) insert in a newspaper or other periodical publication; or

(b) disseminate by broadcast, telecast or cinematograph; or

(c) disclose by any means to any other person—

other than for a purpose connected with a judicial proceeding.

39 Sections 4(1B) and 4(1C) set out defences to a charge under s.4(1A). The circumstances they cover are not relevant to this case. They concern publication by court order where proceedings are pending, or where proceedings are not pending, where no complaint has been made to the police, or if permission had been granted by the victim, or by a Court.

40 The defendants contend that the privilege created by s.4 of the *Wrongs Act*, although generally invoked in defamation proceedings, is not limited in its terms to such proceedings, and applies to bar any proceedings brought in respect of faithful and accurate reports of court proceedings. This proceeding, it submits, is an action against a person for publishing a faithful and accurate record of proceedings in a court. This requires a consideration of the meaning of "action" and of "faithful and accurate record of proceedings".

41 There is nothing in the wording of s.4 of the *Wrongs Act* itself which limits it to actions or presentments in respect of defamation proceedings. The words "no action or presentment" are not qualified by any reference to defamation proceedings, and "action" is not further defined. If "action" is given the literal meaning contended for by the defendants, it would cover all civil proceedings, or at least all civil proceedings commenced by writ, whether or not they related to defamation proceedings.

42 In deciding whether “action” should be given the meaning contended for by the defendants, I must consider its meaning, in the context of the *Wrongs Act,* the purpose of s.4, and the consequences of the interpretation contended for. As McHugh, Gummow, Kirby and Hayne JJ observed in *Project Blue Sky v Australian Broadcasting Authority*[2]*:*

> *“the context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.”*

43 The context in which the word “action” appears, the specific purpose of s.4(1A) of the *Judicial Proceedings Reports Act* and the general purpose of s.4 of the *Wrongs Act*, the desirability of giving each of those provisions, so far as is possible and consistently with their legislative aims, a meaning compatible with each other, and the consequences of the interpretation contended for all point, in my opinion, to the word “action” being read in a way which limits it to actions for defamation proceedings.

44 Section 4 is contained in Part 1 of the *Wrongs Act*, which, at the time of the broadcasts, was headed "Defamatory Words and Libel". All the other provisions of Part 1 relate to defamation proceedings. Although s.4 itself has not been amended since the date of the broadcasts, the heading of Part 1 has. It now reads "Criminal Defamation". By s.36(1) of the *Interpretation of Legislation Act* 1984 the heading is part of the Act. It is proper to consider the heading as one of the matters supporting the view that it confines the more general language of the section. Accordingly, there is nothing in the context in which the section appears which suggests it was intended to have a wider application than to defamation proceedings.

45 This is confirmed by the legislative history comprehensively detailed by Byrne J in *Smith v Harris*[3]. As he demonstrated, from its first appearance in colonial

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2 (1998) 194 CLR 355 at [78]

3 [1996] 2 VR 335 at 338-9

legislation in Australia, the predecessors to the current s.4 have been in Acts, or parts of Acts dealing specifically with defamation proceedings.[4] Similarly, its equivalents in other jurisdictions have appeared in Acts generally entitled *Defamation Act*[5], and amended by acts bearing names such as *Law of Libel Amendment Act*[6], or the *Western Australian Newspapers Libel and Registration Act 1884 Amendment Act*[7]. Byrne J pointed out that the original s.5 of the *Slander and Libel Act* 1847 predated the enactment of such a provision in the UK, and appeared to have been based on recommendations of an 1843 House of Lords select committee report on Defamation and Libel.

46 Thus, the context of the words, and the purpose of the provision both point to s.4 being limited to defamation proceedings. So too, does the legislative history.

47 When considering the context of the words in s.4(1A) of the *Judicial Proceedings Reports Act* and their purpose it is clear Parliament's intention was to confer a protection on victims of sexual offences from the prospect of being harmed by the public disclosure of the fact or allegation they had been sexually assaulted.

48 The terms of s. 4(1A) of the *Judicial Proceedings Reports Act* seek to balance the right to protection from public disclosure of the identity of a victim of sexual assault with the importance of conducting criminal proceedings in open court. It does so by making it an offence to publish information identifying a person as a victim of a sexual offence, rather than by directing that a Court dealing with a sexual offence trial be closed, that victims be referred to by pseudonym, or that publication of reports of such proceedings be suppressed in their entirety. There is, as a result, the least interference with the principle of

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4 So, it has been contained in the *Slander and Libel Act* 1847 of the Colony of New South Wales , its colonial Victorian successor the *Libel Law Act* 1856 , and then in the *Wrongs Acts* of 1865, 1890, and the post colonial *Wrongs Acts* of 1915, 1929 and 1958 and in the amendments to s.4 introduced in 1993.

5 1952 (UK), 1958, 1972 (NSW), 1889 (Qld), 1936 (SA), and 1957 (Tas)

6 UK, 1888

7 WA, 1888

conducting criminal proceedings in open court, and the right to publish reports of criminal proceedings.

49 To give "action" in s.4 of the *Wrongs Act* the broad meaning contended for by the defendants would render meaningless this protection from identification conferred on victims of sexual offences by s.4(1A) of the *Judicial Proceedings Reports Act*, provided the report was "faithful and accurate" (a matter considered below). If the defendants' argument about the reach of s.4 of the Wrongs Act is correct, s.4 would also bar actions or presentments brought alleging breach of suppression orders made in the exercise of the court's inherent jurisdiction, or expressly conferred by provisions such as s.80 of the *County Court Act* 1958[8].

50 The consequences of the broad or literal construction contended for by the defendant also point to s.4 being confined to defamation proceedings, or at least not extending to proceedings where, by virtue of an express order of a court, or by operation of a specific statutory prohibition, publication of a record of all or part of a proceeding is prohibited.

51 In any event, a faithful and accurate report is also something other than a report published in good faith. It is, in my view, in this context, one which complies with restrictions on publication imposed by law. As it is no defence to a charge under s.4(1A) that identifying information was published in ignorance of it, nor is it a necessary feature of a breach of s.4(1A) that identifying information is published in knowing contravention of its provisions, I do not consider 'faithful' can be given a meaning which would import into s.4(1A) a requirement to establish a knowing contravention of its terms, or for a person to rely on a defence of ignorance of its terms.

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[8] Section 80 permits a judge to make orders closing a court, permitting only certain people to be present in court or prohibiting certain people from being present in court during all or part of the proceedings, or prohibiting the publication of all or part of a proceeding or information derived from it. Such orders can be made on grounds including national security, risk of prejudice to the administration of justice, for personal safety or public decency, as well as the avoidance of distress or embarrassment of witnesses giving evidence concerning allegations of sexual assault.

52 It follows from this that the fact that the sentencing remarks were made in open Court does not assist the defendants in invoking the protection of s.4 of the *Wrongs Act*, because the specific protection from publication of identifying information provided by s.4(1A) of the *Judicial Proceedings Reports Act* operates to prevent publication of that part of the proceeding conducted in open court which identifies a victim of a sexual assault.

53 For all these reasons, I do not consider s.4 of the *Wrongs Act* applies to bar the plaintiff's claim.

Is the plaintiff limited to a claim for damages for defamation?

54 The defendants next contend that the plaintiff's case, that she has suffered injury as a result of the broadcast which identified her as a rape victim is in truth a claim based on defamation. So, the submission runs, although the claim has been framed as one involving breach of a duty of care, breach of statutory duty, breach of confidence and breach of privacy, the whole case is based on communication of information by the defendant to third parties, which caused the plaintiff harm. The injuries claimed by the plaintiff to have been suffered by her as a result of the publication, are injuries which are compensable in defamation proceedings. In these circumstances, the defendants submit, the plaintiff should be limited to bringing a claim for defamation in respect of any harm said to have been suffered by her as a result.

55 This is so, submit the defendants, in order to preserve the coherence of the law, because the law of defamation has, over the centuries, established a series of fine checks and balances between freedom of speech and rights of individuals, which can and should determine whether the publication complained of here has created a compensable harm. The duties and obligations imposed upon publishers, it submits, as a result of the development of that law, should not be interfered with by the imposition on

publishers of other duties and obligations which may be inconsistent with the rights and obligations existing under defamation law.

56 In my view, this submission overstates the effect of *Sullivan v Moody* [9] and *Tame v New South Wales*[10] in its application to claims for damages of compensation in cases involving the communication of information. In any event, the circumstances of this case differ in material respects from those considered in *Sullivan v Moody* and *Tame.* I do not consider the duty of care alleged here imposes duties on the defendants inconsistent with its rights and duties under defamation law. Nor do I consider the other causes of action impose duties or obligations on the defendants inconsistent or incompatible with their rights, duties or obligations under defamation law.

57 In *Sullivan v Moody* the plaintiffs alleged that as a result of the negligent examination, diagnosis and reporting of sexual abuse of their children by medical practitioners and social workers employed by the State of South Australia, they had suffered shock, distress, psychiatric injury and personal and financial loss. The duty of care alleged by the plaintiffs related to the communication of information by the medical practitioners and social workers to the plaintiffs and third parties, as well as the competence with which the medical practitioners and social workers conducted their examinations or other procedures. The Court held no duty of care arose in respect of the communication of information in the circumstances. It held such a duty was not compatible with the other duties which the medical practitioners and social workers owed in respect of suspected sexual abuse of children, by reason of the functions, powers and responsibilities vested in them. In addition, the Court found, to impose such a duty of care as there claimed would permit a plaintiff to recover damages in negligence for publishing statements to their discredit, in circumstances where the law of defamation would not permit recovery.

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9 (2001) 207 CLR 562

10 (2002) 211 CLR 317

58 There is a significant difference between the circumstances considered in *Sullivan v Moody* and the circumstances of this case. In *Sullivan v Moody*, the plaintiffs' case was based, in part, on the fact the statements complained of were to their discredit, and caused them psychiatric injury, distress and other harm. Although their case was that the statements were to their discredit, they were not actionable in defamation. That, however, is not the way the plaintiff put her case here. She does not say the information published was to her discredit. Her claim is not that she was defamed or discredited, but rather that she suffered injury loss and damage, as a result of her identity as a victim of a sexual assault being revealed by the defendants when it should not have been, because of the protection afforded by s.4(1A) of the *Judicial Proceedings Reports Act*.

59 In *Sullivan v Moody,* the Court was concerned not to impose a duty of care on a person in respect of the communication of information, where to do so would be to impose a duty on such a person which was not compatible with other duties owed by them by reason of functions, powers or responsibilities vested in them. It was in that context that the Court referred to the importance of coherence in the development of duties owed by a person under the law. The decision is not authority for the proposition that defamation law should be permitted to cover the field in respect of actions based on communication of information.

60 The same reasoning is evident in *Tame v New South Wales*. There, the Court had to consider whether there was a potential for conflict between the duty of a police officer to provide accurate information of a person's blood alcohol reading following an accident, and the duty to take reasonable care to avoid psychiatric injury to the person to whom the reading related, in the event the information provided was incorrect, as a result of a mistake made by the police officer in recording the results of testing. The Court held there was no duty in such circumstances to take reasonable care to avoid psychiatric injury

to the person as a result of compiling an erroneous record and providing it to a third party. It found it was not reasonably foreseeable that a person would sustain a recognisable psychiatric injury or illness as a result of discovering such an error had been made.

61 In my view, *Sullivan v Moody* and *Tame v New South Wales* are authority for the proposition that Courts should not find a duty of care exists in relation to the provision of information to third parties if such a duty would conflict with an existing duty or obligation imposed upon the person providing the information. This is what I understand the Court was referring to when speaking of coherence in the development or application of the law. I do not consider these cases provide any support for the proposition that coherence requires defamation law be left to cover the field in all circumstances concerning claims for damages resulting from the publication of information.

62 In *GS v News Limited*[11], Levine J was faced with an application to strike out a claim for damages for breach of statutory duty. One of the bases relied upon by the defendant was the availability of an alternative right of action, namely defamation. Levine J was not persuaded that the availability of defamation as an alternative cause of action was a sufficient ground to strike out the breach of statutory duty claim. Although the defendants argued that the law of defamation covered the field where a plaintiff's case was based on wrongful publication of information to third parties, Levine J held there was a critical difference between the two causes of action, and that as a result it could not be said that the law of defamation covered the field. That is because, in a claim for breach of statutory duty by reason of wrongful publication of the identity of the plaintiff, a plaintiff seeks damages, not for the vindication of her reputation, but for the loss of the protection of her identity.

63 This is the essence of the plaintiff's claim in this case, and I agree, for the reasons identified by Levine J, the plaintiff's claim is not one which is properly,

11 (1998) Aust Torts Reports 81-466

or solely, met by the possible availability of a cause of action in defamation.

64 I am not satisfied that this is an area where it can be said that the law of defamation covers the field, or that a duty of care in respect of publication of information leading to loss of a right not to be identified, is inconsistent with a duty not to damage a person's reputation. This is not a case about defamation. The plaintiff is not complaining she has suffered a loss of reputation following publication of discreditable information about her, and is entitled to damages as a result. The plaintiff's complaint is that the defendant published information which identified her, in the face of the prohibition on publication of such information by virtue of s.4(1A) of the *Judicial Proceedings Report Act*. It is for the loss of the right not to have her identity published, and the harm flowing from the publication of information identifying her that she claims damages.

65 The plaintiff, on advice, has chosen to bring her proceedings, not in defamation, but in other causes of action, namely, negligence, breach of statutory duty, breach of confidence and breach of privacy. Whether she succeeds, as a matter of law or fact, on these causes of action is a risk she has chosen to take. In my view, a plaintiff is entitled to choose which causes of action she wishes to prosecute, and which ones she does not. Subject of course to the right of a defendant to apply to strike out all or part of a statement of claim on the ground it does not disclose a cause of action, or is scandalous, frivolous or vexatious, may prejudice or embarrass or delay a fair trial or otherwise constitute an abuse of process[12], a plaintiff should not have her choice of cause of action dictated by the defendant.

66 For all these reasons, I do not consider that the plaintiff's claim falls to be determined by reference only to the law of defamation.

67 I am also satisfied that the protection afforded to a victim of a sexual assault

[12] Rule 23.02 *County Court Rules of Procedure in Civil Proceedings* 1999

by s.4(1A) of the *Judicial Proceedings Reports Act* is not extinguished once sentence has been passed. I am satisfied that the use of the words "alleged to have been committed" and "alleged offence" in s.4(1A) are not used "in order to afford that protection only so long as the offender has not been convicted or, perhaps, the offence is otherwise disposed of"[13]. As the Court of Appeal said in *Hinch*:

> "*It is enough that a sexual offence is once alleged to have been committed against the person whom the section is directly concerned to protect, and that it was so alleged remains the position both before and after conviction. ... It would in large measure frustrate the whole purpose of the legislation if s.4(1A) ceased to have any operation once the offence which was alleged had been proved. The purpose is to protect the victim's anonymity and the victim is entitled to that protection as much after that time as before it*".

68 As an extension of the coherence argument, the defendants submitted that the plaintiff could not, in any event, succeed against the second and third defendants, as they did not publish the broadcasts. They submitted that it was the first defendant who, having a statutory duty to broadcast news bulletins, published the broadcasts. They acknowledged the first defendant was vicariously liable for the acts of the second and third defendants in respect of the publication, but maintained the position the second and third defendants could not be liable to the plaintiff in respect of publication of the broadcasts as they did not publish the identifying information.

69 I do not accept this submission. It is inconsistent with the second and third defendants' pleas of guilty to breaching s.4(1A) of the *Judicial Proceedings Reports Act* by publishing information identifying Ms Doe, and with the terms of their apology. They are, and in my view, have by this conduct admitted they are parties to the publication of the information.

The Substantive Claims

A Breach of statutory duty

[13] *Hinch v DPP* (1996) 1 VR 683 at 689.

70 The plaintiff alleges breach of s.4(1A) of the *Judicial Proceedings Reports Act* gives rise to a private right to damages to a person who suffers injury loss or damage following unlawful disclosure of their identity. The defendants submit it does not.

71 Section 4(1A) of the *Judicial Proceedings Reports Act* makes it an offence to publish information identifying a person as the victim of the sexual offences committed on her by YZ. The Act prescribes a penalty for breach, and limits the power to prosecute breaches to the Director Of Public Prosecutions. The Act is silent as to whether a breach of s.4(1A) creates a private right of action.

72 The principles governing the private right of action in respect of a breach of statutory duty, were articulated by Kitto J in *Sovar v Henry Lane Pty Ltd*[14]:

> "*In the case of an enactment ... prescribing conduct to be observed by described persons in the interests of others who, whether described or not, are indicated by the nature of a peril against which the prescribed conduct is calculated to protect them, the prima facie inference is generally considered to be that every person whose individual interests are thus protected is intended to have a personal right to the due observance of the conduct, and consequently a personal right to sue for damages if he be injured by a contravention*…
>
> *The legitimate endeavour of the courts is to determine what inference really arises, on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation ...*
>
> *A particular difficulty arises where the enactment which prescribes the conduct is accompanied by the express provision of a criminal sanction for the enforcement of its requirements. On the prima facie principle that expressio unius est exclusio alterius there is ground for a countervailing inference of an intention that in the event of a contravention the specifically provided remedy shall be the only remedy*".

73 The question whether the presumption in favour of a private right to sue for damages is displaced by the imposition of criminal sanctions (such as those

[14] (1967) 116 CLR 397 at 404-5

imposed by the *Judicial Proceedings Reports Act*) was answered in favour of the existence of a private right to sue in *Byrne v Australian Airlines*[15]. There, Brennan CJ, Dawson and Toohey JJ said:

> "*A cause of action for damages for breach of statutory duty arises where a statute which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of the obligation causes injury or damage of a kind against which the statute was designed to afford protection*".[16]

74 In my view, s.4(1A) is a provision which imposes an obligation for the protection or benefit of a particular class of persons, namely victims of sexual offences. If the obligation not to publish is breached, and a victim is identified, and suffers injury loss or damage as a result of being wrongfully identified, such injury or damage is capable of being characterised as "of a kind against which the statute was designed to afford protection". It follows that the *Byrne v Australian Airlines* reasoning would give rise to a cause of action for breach of statutory duty to a victim of a sexual offence who suffers injury loss or damage as a result.

75 Section 4(1A) of the *Judicial Proceedings Reports Act* is a provision designed to protect the identity of victims of sexual assault. In the Second Reading Speech of its predecessor Act, the *Judicial Proceedings (Regulation of Reports) Bill* on 4 September 1957, the then Attorney-General Mr Rylah said:

> "*The purpose of the proposed legislation is to prohibit the publication, in reports of court proceedings, of the names and other identifying particulars of women and boys who are the victims of sexual and unnatural offences ... no good result can flow from the publication of the names of the innocent victims. On the other hand, particularly in the case of young girls and boys, very great harm can result from the undesirable publicity which attaches to such cases*".

76 In language more suited to modern times, this view of the intention of the legislature was confirmed by the Court of Appeal in *Hinch v DPP*[17], where the

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15 (1995) 185 CLR 410

16 At 424

17 [1996] 1 VR 683 at 689

Court said its intention was "*to protect the anonymity of the victim of a sexual offence*".

77 This case is distinguishable from *X (Minors) v Bedfordshire County Council*[18]. In that case the plaintiffs sought damages for breach of statutory duty imposed on various authorities to carry out particular functions. They claimed they had suffered damage as a consequence of the performance or non performance of those statutory functions by the various authorities. In holding these statutory obligations did not give rise to an action for damages for breach of statutory duty, the House of Lords distinguished between regulatory or welfare legislation, imposing a general administrative function on public bodies, and involving the exercise of administrative discretions, and cases where a very limited and specific statutory duty was imposed. Although acknowledging, as a matter of fact, that regulatory or welfare legislation affecting a particular area of activity provides protection to individuals particularly affected by the activity, nonetheless such legislation was legislation passed for the benefit of society as a whole, not for the benefit of those individuals[19].

78 The defendants next submitted that s.4(1A) did not create a positive statutory duty, but merely limited pre-existing publication rights. I do not agree. The clear words of the section make it an offence to publish identifying information. Whether or not that has the effect of limiting pre existing publication rights is not to the point. Whatever else the section may do, or whatever other rights the section may affect, it imposes an obligation not to publish identifying information, and sets out the sanction for breach.

79 It follows, in my view, that applying the principles set out in the passages I have quoted, the purpose of section s.4(1A) is to impose an obligation for the protection or benefit of the class of persons there referred to, namely victims

18 (1995) 2 AC 663

19 See particularly, Lord Browne-Wilkinson at 751 - 2

of sexual offences, and as a consequence, a person in Jane Doe's position has a personal right to the due observance of s.4(1A), and a personal right to sue for damages if injured by a contravention of that right.

80 Information identifying Jane Doe as a victim of a sexual assault was published in clear contravention of s.4(1A), and of Ms Doe's personal right to due observance of that right. That the information was published in contravention of s.4(1A) was admitted by the second and third defendants by their pleas of guilty, and the terms of the apology provided to Ms Doe and the court which dealt with them. Those pleas of guilty, and the admissions made on behalf of the three defendants in paragraph 7 of the revised defence, dated 20 February 2006, of their respective roles in preparing, approving and publishing the broadcasts make it clear all three owed a duty not to contravene s.4(1A), and all three defendants breached it. It is surprising, in my view, that the defendants could submit, as they did, that the plaintiff had not established a basis for liability of the second and third defendants in light of those admissions.

81 The obligation was imposed on all three defendants in this case, not to publish information which identified Jane Doe as the victim of a sexual assault. That obligation has clearly been breached by all three of them, and the defendants are liable in damages to the plaintiff as a result.

B Duty of care

82 Do the defendants owe a duty of care to the plaintiff in respect of the publication of information which identifies her as a victim of a sexual offence, in circumstances where the publication is prohibited? The plaintiff alleges that the defendants owed her a duty of care. She had a legitimate expectation arising from the law that her identity as a victim of sexual assault would not be published, and there was a reasonably foreseeable risk that if they did publish identifying information, she would be injured.

83 The defendants, on the other hand, submit that no duty of care arises in the circumstances, on three primary bases. First, they rely on the coherence/defamation covers the field arguments also argued as its second preliminary ground. Secondly, they submit there is not, in any event, a sufficient relationship between the plaintiff and the defendants to give rise to a duty of care, and finally, they submit public policy considerations point against finding such a duty in these circumstances. I will deal with the first and third of these submissions before addressing the nature of the relationship, and the duty of care.

84 I have already dealt with the reasons why the coherence/defamation covers the field arguments do not, in my view, apply to these proceedings. The public policy considerations advanced by the defendants were, in effect, no more than a restatement of the coherence/defamation covers the field submissions I have already dealt with. For the reasons already advanced, I do not consider this is a defamation case, and therefore public policy reasons relating to defamation law are of no assistance. I do not consider public policy dictates that a plaintiff should be prevented from claiming damages for a breach of duty of care in these circumstances.

85 In *Tame v New South Wales; Annetts v Australian Stations Pty Ltd*[20], the High Court considered the question of the circumstances in which a person owed a duty of care to avoid causing psychiatric injury to a victim, or the nature of the relationship giving rise to a duty of care where the claimed breach of duty of care resulted in psychiatric injury. In holding that liability in negligence arose from a failure to protect the interests of someone with whose interests a defendant ought be concerned, the Court reinforced the centrality of reasonableness when defining the ambit of a person's proper concern for others.

86 As Gleeson CJ said, it is the reasonableness of the requirement that a

20 (2002) 211 CLR 317

defendant should have certain persons, and certain interests in contemplation, that determines the existence of a duty of care[21]. This requires an evaluation of the nature of the relationship between parties, the nature of the activity engaged in by the alleged tortfeasor, as well as the nature of the harm suffered by the victim, in order to determine whether a duty of care exists. Gleeson CJ formulated the question in these terms:

> *"whether it is reasonable to require one person to have in contemplation injury of the kind that has been suffered by another and to take reasonable care to guard against such injury."*[22]

87 *Annetts*, the second of the two cases considered in *Tame* concerned a claim for damages for nervous shock brought by parents against the employer of their son, a minor, in respect of his death whilst in the care of the respondent employer. The applicants had agreed to permit their son to leave home and work as a station hand. They did so only after making inquiries about the arrangements that would be made for his safety, and being assured that he would be under constant supervision. Contrary to those assurances, he was sent alone to a remote place. He went missing in the desert and was not found until four months later. He had died of exhaustion, dehydration and starvation. Their claim was not based on sudden shock, but on the prolonged wait for him to be found, and the ultimate confrontation with circumstances of his death.

88 The Court found a duty of care to avoid psychiatric harm could exist in such circumstances. It took into account the combination of the assurance the child would be supervised, which was material to the decision of the parents to permit him to go to work for the respondent, and the failure to supervise as promised, in finding a relationship was created between the applicants and the respondent in which it was reasonable to require the respondent to contemplate harm of the kind actually suffered by the plaintiffs resulting from

21 At [9]
22 A [18]

the failure to supervise.

89 By contrast, in *Tame*, a police officer made a mistake in filling in an accident report and erroneously attributed a positive blood alcohol reading to the applicant, who had been tested following a car accident. The error was soon detected and corrected, but not before the report was sent to her insurer. Although the erroneous report was not acted on to the applicant's detriment, and she did not find out about it until some time later after the error was corrected, the effect on her of the discovery was a material cause of a psychiatric condition which then developed. In finding no liability on the part of the respondent in that case, the Court found, consistently with its recent decision in *Sullivan v Moody,* that the existence of a duty of care in those circumstances was inconsistent with the other duties and obligations imposed on the respondent. It applied the same test as it applied in *Annetts*, but in this case finding it was not reasonable to require a police officer to have in contemplation the possibility an erroneously recorded blood alcohol reading in a routine accident report could result in psychiatric harm of the sort suffered by the applicant.

90 The defendants submitted that there was no special relationship of the sort found by the Court to exist on the facts of *Annetts.* In my view, the principle articulated in *Tame,* and applied in the applicants' favour in *Annetts,* does not require there to be a "special" relationship. What is required is simply a relationship between the parties of such a nature that it is reasonable to require a defendant to have in contemplation the kind of injury to a plaintiff that he or she in fact suffered, if the defendant acts without reasonable care.

91 The defendants submitted that the only relationship that existed between the plaintiff and the defendants was that of a member of the public and a broadcaster. Such a relationship was, they submitted, insufficient to create a relationship of the sort contemplated in *Tame's* case. This submission ignores the causal connection between the relationship, the conduct and the

type of harm which the *Tame* test requires. The *Tame* test does not stipulate that it is necessary for a defendant to know any special fact about the plaintiff herself, or that there be a "special" relationship. The submission also ignores the significance of the nature of the activity being conducted by the defendants. The defendants were carrying out part of the ABC's essential function, namely to broadcast daily regular broadcasts of news and information relating to current events.

92 In my view, there was a relationship here between the plaintiff and the defendants, other than that of broadcaster and member of the public. The relationship here was one between persons under an obligation not to publish information identifying a victim of a sexual assault, and a victim entitled to the protection from publication of identifying information conferred on them by the operation of s.4(1A). The first defendant is the national broadcaster whose statutory functions include broadcasting news and information concerning current events, and the second and third defendants are employees of the first defendant whose duties were to make decisions about what to put to air, and to file reports for broadcasting respectively. This places a higher obligation on them not to publish information in breach of s.4(1A) than might exist with a private citizen who is not in the business of broadcasting, and does not have the capacity to spread the information as widely as the defendants can.

93 Section 4(1A) makes it an offence to publish information identifying a victim of a sexual assault. This obligation applied, by force of law, to all three defendants. The second and third defendants have, by their pleas of guilty and the terms of their apology, admitted that it applied to them. As paragraph 7 of the revised defence makes clear, the second and third defendants were acting in the course of their duties as employees of the first defendant. By this admission, and by the express acknowledgment in final submissions, the first defendant has acknowledged its responsibility for the acts of the second and third defendants. The defendants were under an obligation to know, and obey

the law, and to publish, or refrain from publishing, in accordance with it. Equally, under the terms of s.4(1A), the plaintiff, as a victim, was in that class of persons who were entitled to the protection from the publication of information identifying them. A relationship therefore existed between the plaintiff and the defendants by virtue of the obligation imposed on the defendants, and the protection afforded the plaintiff under s.4(1A).

94 Having identified the nature of the relationship, the next question is whether it is reasonable to contemplate that injury of the sort suffered by the plaintiff might result, if the defendants negligently, in breach of the obligations imposed on them by the relationship, deprive the plaintiff the protection afforded her by s.4(1A). If it is reasonable to contemplate that harm of the sort alleged might flow from a breach of the obligation, then, provided the circumstances of the breach are proved to be an actionable failure of the duty of care, the *Tame* test is satisfied.

95 The ABC is the national broadcaster. It engages in the activity of publishing regular daily news bulletins. Reporting on court proceedings is a regular part of that activity. Cases concerning sexual offences form a significant part of the caseload of a criminal court, and are often perceived to be newsworthy. Although the terms of the prohibition have been expanded from time to time, there has been a specific prohibition on publication of identifying information about victims of sexual offences under Victorian law since at least 1929.[23] This was not an obscure law, or one rarely operating. The ABC had an obligation to ensure s.4(1A) was not breached. That obligation extended to ensuring that the reporters and sub-editors responsible for filing reports and putting them to air were aware of the terms of s.4(1A).

96 No evidence was put before me about any training or procedures to ensure the provisions of s.4(1A) were complied with. By its revised defence, the defendants plead that the third defendant was not a court reporter, and was

[23] See the *Judicial Proceedings (Regulation of Reports) Act* 1929.

unaware of s.4(1A), and that the second defendant did not consider the provisions of s.4(1A). This does not excuse the defendants' conduct. The publication which occurred in this case was caused by an inexcusable failure to ensure compliance with the prohibition on publication of information identifying a victim of sexual assault contained in s.4(1A). There was a clear and culpable breach by the ABC, Mr Rickard and Mr Veo to take reasonable care not to identify Jane Doe.

97 This is very different from the circumstances which led the Court in *Tame* to find it was not reasonable to contemplate harm of the sort suffered by the applicant could result from the respondent's acts. There the applicant suffered a psychiatric disorder as a consequence of an erroneous, and quickly corrected statement that she had registered a positive blood alcohol reading, which was provided by the police for an insurance claim. The nature of the relationship was different. Although the applicant may have had a reasonable expectation that information provided concerning her blood alcohol reading would be accurate, she had no right to protection from publication of identifying information. She was not a victim of sexual assault, who is entitled to protection from publication of identifying information by reason of the acknowledged harm which could result to a victim if identified. The information, although provided to a limited class of persons, did not expose her to risk, for example of having an insurance claim rejected, or of facing criminal charges. It was not published by the defendant in the manner of publication at issue here, namely by a national broadcaster, in the course of its everyday business of broadcasting news to the public at large. The severe psychiatric disorder which the plaintiff suffered was not a consequence a defendant could be reasonably expected to contemplate as a result of the publication of a record produced for a limited purpose, which erroneously asserted the plaintiff had registered a positive blood alcohol reading.

98 It is reasonable in my view, to contemplate that harm of the kind alleged,

namely psychiatric injury, could result from a publication of information identifying a victim published in breach of s.4(1A) in ABC news bulletins.

99 This is so because of the violating nature of sexual assault, the well known and oft reported effects sexual assault can have on victims, and the reasonable expectation victims have, as a result of s.4(1A), that their identity will not be published.

100 The defendants therefore owed a duty of care to Ms Doe to avoid causing her psychiatric injury as a result of their negligent publication of information identifying her as the victim of a sexual assault.

Breach of confidence

101 The plaintiff submits the information published by the defendants was private, or confidential, and that the publication of the information breached her confidence.

102 The defendants maintain that there was no breach of confidence because the defendants did not owe a duty of confidence, and in any event, the information had lost its quality of confidentiality before the broadcasts.

103 In *ABC v Lenah Game Meats Pty Ltd*[24], Gleeson CJ identified the usual elements of a claim based on breach of confidence as:

> "*first, that the information is confidential, secondly, that it was originally imparted in circumstances importing an obligation of confidence, and thirdly, that there has been, or is threatened, an unauthorised use of the information to the detriment of the party communicating it.*"

104 Breach of confidence claims have expanded in their reach in recent years, and there has been considerable judicial scrutiny, particularly in the United Kingdom. Some care needs be taken in considering recent developments in this area in the United Kingdom, because the *Human Rights Act 1998* requires Courts to take into account the rights enshrined in the *European*

[24] 208 CLR 199 at [30]

Convention for the Protection of Human Rights and Fundamental Freedoms[25]. So, breach of confidence claims may raise issues relevant to the Convention rights to privacy and freedom of expression[26]. However, the parts of the UK decisions to which I will refer all concern the common law development of breach of confidence and breach of privacy causes of action.

105 In *Douglas v Hello! Ltd* Keene LJ observed:

> "*Breach of confidence is a developing area of the law, the boundaries of which are not immutable but may change to reflect changes in society, technology and business practice*"[27].

106 Gleeson CJ's reference to "circumstances reflecting an obligation of confidence" reflects a shift from the requirement that there be a pre-existing confidential relationship between the parties. In *Douglas v Hello!*, Keene LJ said:

> "*The nature of the subject matter or the circumstances of the defendant's activities may suffice in some instances to give rise to liability for breach of confidence…there would seem to be merit in recognising that the original concept of breach of confidence has in this particular category of cases now developed into something different from the commercial and employment relationships with which confidentiality is mainly concerned"*

107 This reflected a shift in, or development of the common law cause of action. Neither the Court of Appeal, nor the House of Lords invoked the Convention to support the development or creation of a new cause of action. Similarly, in *Campbell v MGM Ltd*[28], Nicholls LJ said:

> "*The common law or, more precisely, courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence. A breach of confidence was restrained as a form of unconscionable conduct, akin to a breach of trust. Today this nomenclature is misleading. The breach of confidence label*

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25 This case does not call into consideration the effect of s.32 of the *Charter of Human Rights and Responsibilities Act* 2006 which will, from 1 January 2008 require Victorian courts to interpret statutory provisions, consistently with their purpose, in a way that is compatible with civil and political human rights.

26 Articles 8 and 10 of the Convention

27 (2001) QB 967 at [165]

28 [2004] 2 AC 457

harks back to the time when the cause of action was based on improper use of information disclosed by one person to another in confidence. To attract protection the information had to be of a confidential nature. But the gist of the cause of action was that information of this character had been disclosed by one person to another in circumstances 'importing an obligation of confidence' even though no contract of non-disclosure existed: see the classic exposition by Megarry J in Coco v AN Clark (Engineers) Ltd… The confidence referred to in the phrase 'breach of confidence' was the confidence arising out of a confidential relationship.

This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so, it has clearly changed its nature. In this country this development was recognised clearly in the judgment of Lord Goff of Chieveley in Attorney General v Guardian Newspapers Limited No. 2.. Now the law imposes a 'duty of confidence' whenever a person receives information who knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called confidential. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.

In the case of individuals this tort, however labelled, affords respect for one aspect of an individual's privacy. That is the value underlying this cause of action".[29]

108 Lord Hoffman also referred in *Campbell's* case to a developing acknowledgment of the artificiality of distinguishing between confidential information obtained through the violation of a confidential relationship and similar information obtained in some other way[30]. Lord Hoffman made express reference to the effect of human rights jurisprudence in identifying private information as something worth protecting "*as an aspect of human autonomy and dignity*". However, that jurisprudential development was used to reinforce his analysis of the development of the law in this area, rather than to use it as the sole basis informing his approach. He said:

"*The result of these developments has been a shift in the centre*

29 At [13]-[14]
30 At [46]

> *of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information. It recognises that the incremental changes to which I have referred do not merely extend the duties arising traditionally from a relationship of trust and confidence to a wider range of people. As Sedley LJ observed in a perceptive passage in his judgment in Douglas v Hello! Ltd, the new approach takes a different view of the underlying value which the law protects. Instead of a cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity - the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people*".[31]

109 Consistently with that reasoning, Gleeson CJ said in *Lenah Game Meats*:

> "*the foundation of much of what is protected, where rights of privacy, as distinct from rights of property, are acknowledged, is human dignity*"[32]

110 In my view, these observations from *Campbell* and *Douglas v Hello!* are as apposite to the development of the law here as they are in the UK. As Gleeson CJ's formulation of "circumstances importing an obligation of confidence" recognises, it is no longer necessary for there to be a relationship of trust and confidence in order to protect confidential information. The obligation of confidence extends to a wider range of people, and is defined by reference to the circumstances, not a relationship.

111 It follows from the identification that an obligation of confidence extends to a wider range of people, and to circumstances other than those arising from a duty of good faith applicable to confidential personal information and trade secrets alike that the definition of what is confidential information must also encompass information other than trade secrets of confidential personal information obtained in circumstances where a duty of trust or confidence exists.

112 Bound up with the question of what constitutes circumstances importing an obligation of confidence, is the question of what is properly to be regarded as

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31 At [51]

32 At [43]

capable of constituting confidential information in these circumstances. Once the nexus with a relationship importing trust and confidence is broken, and the right being protected is seen as shifting from enforcing the duty of trust arising from the relationship to protecting the publication of confidential information whether it be personal or commercial, formulations developed to apply to commercial and personal information obtained in the course of such a relationship may no longer be adequate to cover all cases where the obligation of confidence arises.

113 The defendant submitted the correct test for determining whether information was confidential was that formulated by Gowans J in *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd*[33], namely, whether it could fairly be said that there would be difficulty in acquiring the information except by improper or unlawful means. In my view, that test is now too restrictive to be applied in all cases where an obligation of confidence arises.

114 In *Lenah Game Meats,* Gleeson CJ observed there was no "bright line" which could be drawn between what is private and what is not. He observed that although the term "public" was often a convenient method of contrast, there was a large area in between what was necessarily public and what was necessarily private. After giving examples of information "*easy to identify as private"* and referring to activities which people would expect to able to engage in without being observed, he said:

> "*disclosure or observation of information or conduct [which] would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private*"[34].

115 As Gleeson CJ made clear, the test is a "*useful practical test*" not one of universal application. It is also important to emphasise, in my view, that the "*highly offensive*" formulation applies to disclosure, that is publication of the

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33 (1967) VR 37 at 39. See also *Equity Doctrine and Remedies*, Maher Gummow & Lehane 4th Edition paragraph 41-060 at p.1123.

34 At [42]

information, not to the nature or quality of the information itself. The essence of what is protected is not highly offensive information, or information which has the capacity to reflect discreditably on the person to whom it relates, but highly offensive behaviour, namely publication of information which would generally be regarded as sufficiently personal or confidential to give the person to whom it relates an expectation that it not be disclosed or published without their consent. As the underlying value is no longer enforcing the duty of trust arising from the relationship but protecting confidential information from publication, it also follows that a breach of confidence occurs, not because of a breach of a duty of trust arising out of the relationship, but because publication would rob the person to whom the information relates of their right to keep their personal or confidential information private.

116 So understood, this is consistent with the UK approach, namely that confidential or private information is information in respect of which a person has a reasonable expectation of privacy, and that confidence, or privacy is breached if a person publishes the information in circumstances where they knew or ought to have known of that reasonable expectation of privacy.

117 In *Campbell*, Lord Nicholls, although agreeing the "highly offensive" formulation was "a useful test in most cases", cautioned:

> "*This particular formation should be used with care, for two reasons. First, the "highly offensive" phrase is suggestive of a stricter test of private information than a reasonable expectation of privacy. Second, the "highly offensive" formulation can all too easily bring into account, when deciding whether the disclosed information is private, considerations which go more properly to issues of proportionality; for instance, the degree of intrusion into private life, and the extent to which publication was a matter of proper public concern. This could be a recipe for confusion*".[35]

118 In my view, both concerns raised by Lord Nicholls dissipate once it is understood that Gleeson CJ's "highly offensive" formulation relates to the

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35 At [21]-[22]

disclosure of the information, not to its nature or quality. The risk that it will lead to the application of a stricter test of private information than the reasonable expectation of privacy test is overcome, and the test is properly one to consider at the stage of determining proportionality.

119 I am satisfied that the nature of the information under consideration in this case, identifying a person as the victim of a sexual assault, is information capable of being characterised as information which the person to whom it relates has a reasonable expectation would remain private. The information is not only about participation in sexual activity, which is generally a private matter, but also about non consenting sexual activity, that is about Ms Doe being subjected to criminal acts of a sexual nature. In addition, the identity of the perpetrator as her estranged husband, is relevant to the characterisation of the information as private. These factors add significantly to its private nature. As the evidence from Ms Hughes, Dr Brann and Dr Epstein, in particular, demonstrates, victims of sexual offences often experience feelings of humiliation, shame and guilt. When the offence is committed by a person with whom they have previously had an intimate relationship, those feelings can be compounded, not lessened. They may also experience questioning of their veracity. The prohibition on publication of the information by s.4(1A) adds to that reasonable expectation of privacy. In any event, in my opinion, the existence of the prohibition in itself gives rise to a reasonable expectation of privacy.

120 There is a distinction between something which is secret, on the one hand, and something which is private, or confidential on the other. It is not necessary for information to be secret, in the sense that it has not been communicated by the person or person to whom it relates, for it to satisfy the test of private or confidential. As ***Campbell*** demonstrates, the fact that other people were aware of the information does not of itself rob it of its private or confidential nature. Ms Campbell was a person in the public eye. It was likely

that some people would know she was attending NA meetings and that she would be recognised at them. It was not whether Ms Campbell's attendance at NA was known to others, but the personal nature of the information, her right as the person to whom it related to keep it confidential, in the sense of private, and to decide to whom, and in what circumstances it should be communicated which the Court found were the determinants of whether the information was to be regarded as confidential.

121 I do not consider there was any conduct on Ms Doe's part inconsistent with a desire to keep the information private, or confidential, or to do anything other than exercise her right to decide to whom, and in what circumstances, she would communicate the information.

122 A statement of admitted facts compiled from a notice to admit served on the plaintiff was tendered in the hearing. It identified 14 people told by Ms Doe before the broadcast of the sexual assault by YZ. They were all immediate family or close friends of Ms Doe. Although Ms Doe admitted she had not expressly asked any of them to keep the information confidential, I am satisfied they constituted what Dr Brann referred to as her "trusted circle" and that in telling them, she had a reasonable expectation they understood from the nature of the information that it was confidential. I am not satisfied the disclosure to the family members and close friends constitutes conduct inconsistent with a reasonable expectation of privacy.

123 I do not consider the fact that YZ communicated the information to people robs it of its confidential nature so far as the plaintiff is concerned. The information still remained information of a personal nature concerning the plaintiff. The possession of the information by YX does not alter its private character, and its disclosure by him to third parties does not constitute disclosure by the plaintiff in circumstances incompatible with a desire to keep such information confidential. Again, this is reinforced by the protection from publication conferred by the *Judicial Proceedings Report Act*.

124 Of course, whether a reasonable expectation of privacy arises in a particular case is a matter for evidence. If, for example, a person consents to being interviewed and identified in a broadcast or article in a newspaper, their conduct may well be seen as inconsistent with a reasonable expectation of privacy. There is no evidence in my view in this case which suggests conduct on the part of the plaintiff inconsistent with a reasonable expectation of privacy.

125 The statement of admitted facts also listed a number of police and medical personnel involved in the investigation and prosecution of YZ to whom information identifying Ms Doe as a victim of sexual assault was conveyed by her before the broadcasts. A much longer list of recipients of the information was particularised in paragraph 11B of the defendants' revised defence. Despite its length, the people listed are either those involved in the investigation, prosecution and trial of YZ, Ms Doe's trusted circle, or family and friends of YZ. The circumstances in which the people in those categories came into possession of information identifying Ms Doe as the victim of a sexual assault are not indicative of conduct inconsistent with a reasonable expectation of privacy by Ms Doe.

126 In particular, I do not consider Ms Doe's reporting of the rape to the police, her appreciation that the investigation of her report would inevitably involve disclosure of her identity to those involved in the investigation, and that the laying of charges would inevitably involve the risk YZ would reveal the fact he had been charged with raping her to his family or friends, that a trial or plea would involve disclosing her identity as the victim to all those involved in the proceedings, or that the proceedings would be conducted in open court, can be regarded as conduct on Ms Doe's part inconsistent with a reasonable expectation of privacy. To suggest disclosures made in the course of reporting a sexual assault to the investigating authorities, or as a result of an investigation or trial evidence conduct inconsistent with a desire for

confidentiality ignores the protection intended to be conferred on victims of sexual assault by s.4(1A), and would act as a powerful disincentive to reporting sexual offences. Recent studies suggest there is already a significant under reporting of sexual offences[36]. Public confidence in the criminal justice system is eroded if victims are discouraged from reporting criminal offences. There should not be any further barriers put in the way of reporting sexual offences.

127 The evidence all points, in my view to conduct on Ms Doe's part consistent with a reasonable expectation of privacy. The disclosure of the information beyond Ms Doe's trusted circle to those involved in the investigation, prosecution and trial of YZ is not inconsistent with a reasonable expectation of privacy.

128 In the event that my formulation of the test of what constitutes confidential information is found to be too broad, I should add that I consider this information in any event fits into the category of "easy to identify as private", to use the first part of Gleeson CJ's formulation in *Lenah Game Meats* referred to earlier. Information concerning a person's willing and lawful participation in sexual activity conducted in private would be regarded as private. Forced participation in non consenting activity makes it more worthy, not less, of being regarded as easy to identify as private. That is enough, in itself, to invest the information with the necessary quality of private. Again, the fact that the publication of such information is prohibited by the *Judicial Proceedings Reports Act* gives it a private character. The nature of the information, the circumstances in which the defendants became aware of it, namely by it being revealed in the course of the sentencing remarks, and the effect of the *Judicial Proceedings Reports Act* are each, considered alone, circumstances which, in my view import an obligation of confidence. In combination they create powerful circumstances importing an obligation of confidence.

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[36] See, for example, Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004) xxi-xxii

129 The defendant then submitted that even if I were to find the information was capable of being found to be confidential, or private in the relevant sense, confidentiality had been lost before it was published by the defendants, and therefore there was no actionable breach of confidence. Confidence was lost, it was submitted, because the information had entered the public domain in the sense that it was "so generally accessible that in all the circumstances it cannot be regarded as confidential"[37]. This had occurred in two ways, by the pronouncement of the reasons for sentence in open court and as a result of disclosures made by the plaintiff or by people who she had told.

130 The open court argument was based on an application of this passage from Kirby P's decision in *Raybos Australia Pty Ltd v Jones*[38]:

> "*The principles which support and justify the open doors of our courts likewise require that what passes in court should be capable of being reported. The entitlement to report to the public at large what is seen and heard in open court is a corollary of the access to the court of those members of the public who choose to attend".*

131 The general principle identified by Kirby P in *Raybos* cannot, in my view, operate so as to override the specific statutory prohibition on publication of information, simply because the information was referred to in open court. In cases such as this, although information identifying a victim is referred to in open court, its publication is prohibited. The *Judicial Proceedings Reports Act* seeks to strike a balance between protecting a victim of sexual assault from having identifying information about her or him published, and that important general principle of conduct of proceedings in open court. It has done so, not by closing the court, thereby paying deference to the importance of conducting such proceedings in open court, but by taking what could be seen to be the least restrictive means by which the victim's right to anonymity is respected, namely by prohibiting publication of identifying information concerning the victim. The entitlement to report what is seen and heard in

37 *The Attorney General v Guardian Newspapers No.2* (1991) 1 A.C. 109 per Goff LJ at 282.
38 (1985) 2 NSWLR 47 at 55

open court cannot extend to an entitlement to report that which any person present in open court is specifically prohibited from publishing. I do not consider therefore the information had entered the public domain because sentence was passed in open court.

132 Despite the lengthy list of people who were aware that Ms Doe had been sexually assaulted to which I have referred earlier, the disclosures before the broadcasts were, as I have found, made to people falling into three categories, Ms Doe's inner circle, those who received the information in the course of the investigation, prosecution and trial of YZ, and YZ's family and friends.

133 The disclosure of the information to Ms Doe's trusted circle occurred, as I have already found, in circumstances where Ms Doe had a reasonable expectation it would remain confidential. The evidence about how far it had spread beyond those confidantes, or as a result of disclosure by YZ, is scant and unreliable. There was some evidence to suggest that Ms Doe was aware, despite her assumption those she told would not themselves tell anyone else, that two of her confidantes had each told one other person. Ms Doe's mother said she had told two of her friends. I accept that she, like her daughter, expected the nature of the information disclosed was such as to be understood and treated by her friends as confidential. For the reasons given earlier, I do not consider Ms Doe's stated belief that the whole community knew is reliable evidence that the knowledge she had been raped by YZ was widespread throughout the community. Amongst the agreed facts submitted as a result of Ms Doe's response to the defendants' notice to admit was an acknowledgement that Ms Doe did not know who, or how many people in the community knew of what had happened to her, let alone who, or how many knew before the broadcasts. There is nothing in this evidence which would support a finding the information had become widespread in Ms Doe's ethnic community or the broader community.

134 Nor can the revelation of Ms Doe's identity as a victim of a sexual assault to those involved in the investigation, prosecution and trial of YZ provide, alone, or in combination with the evidence about the knowledge spreading from Ms Doe's trusted circle or from those associated with YZ, a basis for a finding its quality of confidence was lost. There is no evidence information about what had happened to Ms Doe was spread within her ethnic community, or more widely in the community as a result of the information becoming known to those involved in investigation, prosecution and trial of YZ. If anything, the combination of the operation of s.4(1A) and the professional obligations of confidence imposed on those involved in the investigation, prosecution and trial, would tend to suggest the information would not have spread widely. But that is as speculative as would be a finding, on this evidence, that the information had lost its quality of confidence because it had become so generally accessible that in all the circumstances it could no longer be regarded as confidential.

135 The defendants also adduced evidence the information was still available, and accessible to the public through Australian Associated Press. AAP was described as a wholesaler of news whose reports were available for publishing by end users, such as the ABC and commercial broadcasters, at national regional or local levels. A database of past reports was accessible, to subscribers, and was accessible to the public if conducting a search at, for example, at the State Library of Victoria. The defendants tendered two reports, filed with AAP between 5 and 6pm on the day of the broadcasts at issue here under the name of Nick Lenaghan. Those reports contained information, apparently also based on the sentencing remarks, identifying the plaintiff as the victim of the sexual offences of which YZ was convicted.

136 The defendants relied on the evidence of the AAP reports, and their accessibility to researchers in support of their submission the information had lost its confidential character. I do not consider the information has lost its

confidential character as a result. The existence of the AAP reports may constitute a further breach of s.4(1A), and may constitute a breach of a duty owed by the Mr Lenaghan or AAP to Ms Doe. Whether they do is not a matter to be resolved here. The existence of the AAP reports do not absolve the defendants of responsibility for their conduct. There is no evidence the AAP reports ever went to air or about their use generally. They do not constitute evidence that the information had lost its quality of confidence because it had become so generally accessible that in all the circumstances it could no longer be regarded as confidential.

137 Although I do not consider the information had, before the broadcasts, lost its confidential character, the extent of its spread, the extent to which its spread can be attributed to the defendants, and the consequences to the plaintiff of the defendants' actions are relevant to the question of the relief to be granted. In circumstances where the information has already entered the public domain, or where the claim is litigated long after the publication occurred, injunctive relief cannot undo the harm that has been done by publication, and attention is more likely to be turned to an assessment of the extent to which the wrongful publication by the defendants contributed to any injury loss or damage suffered by the plaintiff.

138 The remedy for breach of confidence is equitable compensation, not common law damages. The defendants, relying on the decision of Gillard J in ***Giller v Procopets*** submitted equitable compensation does not encompass damages for "distress type injuries".[39]

139 The plaintiff submitted that ***Giller v Procopets*** was distinguishable, as Gillard J's finding on this issue placed reliance on the decision of the Court of Appeal in ***Campbell*** which has since been overturned. When the House of Lords overturned the decision of the Court of Appeal, it reinstated the orders made at first instance, in which damages for distress were awarded for the breach of

[39] [2004] VSC 113 at [159] – [170]

confidence there found to have occurred. There was no suggestion in any of the judgments in *Campbell* that distress type damages were not available for breach of confidence. Thus, *Campbell* is not authority for the proposition that distress type damages are not available for breach of confidence.

140 Gillard J's decision on this issue did not rely solely on *Campbell*. He referred to, but distinguished *Talbot v General TV Corp Pty Ltd*[40], in which the Full Court of the Supreme Court of Victoria had upheld an entitlement to damages for loss of opportunity for breach of confidence. He distinguished *Talbot*, on the basis the court's jurisdiction to award loss of opportunity damages had been enlivened because the plaintiff had also sought injunctive relief in the same proceeding[41]. For the reasons set out below, I do not consider *Talbot* is authority for the proposition that it is necessary to claim injunctive relief in order to claim damages.

141 *Talbot* confirmed the trend of authority to the effect that damages should be fixed by the method most appropriate to compensate the plaintiff for the loss or damage caused by the breach. There was, it found, no single standard method for assessing damages for breach of confidence[42]. Marks J, who conducted the assessment of damages at first instance, examined a line of cases in which damages were assessed by the method most appropriate to compensate the plaintiff for the loss or damage suffered as a result of the breach of confidence. They included cases in which injunctive relief had not been sought. He noted, as did the United Kingdom Law Commission's Working Paper No. 58 (1974) on Breach of Confidence, that there was no authority in the case law regarding the principles on which damages should be awarded for wrongful use of information which is of a purely personal nature[43].

142 Marks J's approach was upheld on appeal, Young CJ observing that once it

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40 [1980] VR 224

41 Under what was then s.63(2) of the *Supreme Court Act* 1958, now replaced by s. 38 of the *Supreme Court Act*, the Victorian equivalents of *Lord Cairns' Act*.

42 per Marks J 245 at first instance, confirmed on appeal by Young CJ at 250, and Lush J at 253

43 At 244

was appreciated that the right which equity recognised was the right to have confidential information kept confidential, it followed that the correct approach to assessment of damages was to assess what damage the respondent suffered by reason of the unauthorised use of the confidential information.

143 *Talbot* does not therefore provide support for the proposition advanced in *Giller* that equitable damages do not include "distress type damages". On the *Talbot* approach, damages should be assessed by the method most appropriate to compensate the plaintiff for the loss or damage suffered as a result of the breach of confidence. It is not necessary for a plaintiff to claim injunctive relief for breach of confidence in order to be entitled to claim damages.

144 I consider, therefore, I am bound by *Talbot* to assess damages for breach of confidence by assessing the loss and damage suffered by Ms Doe as a result of the breach by the defendants of her right to have the confidential information as to her identity as a victim of a sexual assault, committed by her estranged husband, kept confidential. In making that assessment, I should adopt the method most appropriate to compensate the plaintiff for the loss or damage caused by the breach.

145 The type of loss and damage claimed is damages for personal injury, the affront to the plaintiff's feelings, and effect on her personally of the breach of confidence. She is not claiming loss of a commercially exploitable idea or process, as is the case in trade secrets cases, or a commercially exploitable reputation or image, as was the case in *Campbell* and *Douglas v Hello!* Damages for personal injury of the sort claimed by the plaintiff are traditionally compensated for by an award of monetary damages for the pain and suffering caused by the actionable breach, and for any loss occasioned by it. In my view, that is the method most appropriate to compensate the plaintiff for the injury loss or damage caused by the breach.

Invasion of privacy

146 The plaintiff contended that as a result of the decision of the High Court in *Lenah Game Meat*, the High Court left open the development, in appropriate cases, of a tort of privacy, rejecting the long held view that *Victoria Park Racing and Recreation Ground Co Ltd v Taylor*[44] stood in the path of the development of a cause of action for invasion of privacy[45]. The plaintiff submitted this was an appropriate case for the development and application of the tort of invasion of privacy.

147 The defendants submitted there is no tort of invasion of privacy known to Australian law, and no warrant for the creation of one in this case.

148 As the analysis of the decisions referred to under breach of confidence demonstrates, development of a tort of invasion of privacy is intertwined with the development of the cause of action for breach of confidence. What is seen to underpin both causes of action is the acceptance or recognition of the value of privacy as a right in itself deserving of protection. That in turn, springs from a recognition of the value of, and importance of the law recognising and protecting human dignity.

149 It was this reasoning which led Gleeson CJ to observe in *Lenah Game Meats:*

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> *"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."*[46]

Similarly, in *Douglas v Hello! Ltd*, Sedley LJ said:

> "*The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from a fundamental value of personal autonomy*".[47]

150 There has been some blurring of the distinction between breach of confidence

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44 (1937) 58 CLR 479
45 At 248, 277, 321 and 231
46 At [40]
47 At 1001 [126]

and breach of privacy in the UK cases to which I have referred. The UK cases have, in the course of considering what is involved in a claim for breach of confidence, extended the definition of confidential information, dispensed with the need for a pre existing obligation of confidence, and redefined breach of confidence as breach of privacy.

151 So, in *Wainwright v Home Office*[48], Lord Hoffman said:

> "*I read these remarks [of Sedley LJ in Douglas v Hello!] as suggesting that, in relation to the publication of personal information obtained by intrusion, the common law of breach of confidence has reached the point at which a confidential relationship has become unnecessary. As the underlying value protected is privacy, the action might as well be renamed invasion of privacy. 'To say this' said Sedley LJ 'is in my belief to say little, save by way of a label, that our courts have not said already over the years.'*
>
> *I do not understand Sedley LJ to have been advocating the creation of a high-level principle of invasion of privacy. His observations are in my opinion no more (although certainly no less) than a plea for the extension and possibly renaming of the old action for breach of confidence*".

152 In *Campbell*, although Lord Hoffman again referred to the right to privacy as a value which underlay a number of more specific causes of action both at common law and under various statutes, he made specific reference to breach of confidence as an equitable action[49]. By contrast, in the same case, Lord Nicholls, having recognised the development of actions for breach of confidence not only recognised the term "private" as a more appropriate one than "confidential", referred to breach of confidence or privacy actions as torts[50].

153 It is against what appears to be a merging of a tortious and equitable cause of action into an expanded common law breach of confidence action, that the House of Lords' reluctance to develop or create a separate tort of breach of privacy must be understood. Whatever may be the case in the UK, the courts

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48 (2003) 3 WAR 1139 at 1145-6

49 At [43]

50 At paragraphs 14 and 15.

have been assiduous to maintain the distinction between equitable and tortious causes of action, and between compensation and damages available as a result.

154 In *Campbell* the House of Lords also referred to the difficulty of formulating a general principle of privacy capable of sufficient definition to enable the conditions of liability in a particular case to be ascertained. The development of a separate tort of privacy was, the House of Lords considered, a matter for a detailed approach which could only be achieved by legislation, rather than the broad brush of common law principle.

155 In *Lenah Game Meats*, the Court considered that most private activities would be protected by equitable principles governing confidential information, even in circumstances where the information was not transmitted in circumstances imposing an obligation of trust and confidence. It also considered that the lack of precision of the concept of privacy and the tension between privacy and freedom of speech were reasons for caution in approaching the development of a new tort of invasion of privacy, however, it did not rely on these matters as reasons why the development of a tort of invasion of privacy should be left to legislative reform.

156 This is not a case where it is necessary for me to resolve the tension between privacy and freedom of speech, as that has already been resolved by Parliament, by the enactment of s.4(1A) of the *Judicial Proceedings Reports Act*.

157 Accepting the force of the concerns expressed by the High Court, and despite the spirited attempts by senior counsel for the defendants to dissuade me from taking what he repeatedly described as a bold step, I have nonetheless come to the conclusion that this is an appropriate case to respond, although cautiously, to the invitation held out by the High Court in *Lenah Game Meats* and to hold that the invasion, or breach of privacy alleged here is an

actionable wrong which gives rise to a right to recover damages according to the ordinary principles governing damages in tort.

158 In coming to this conclusion, I have carefully considered the decisions of Senior Judge Skoien in *Grosse v Purvis*[51], and Gillard J in *Giller v Procopets*. In *Grosse v Purvis*, Senior Judge Skoien responded to the invitation held out in *Lenah Game Meat* and took what he described as the bold step of being the first

> *"to hold that there can be a civil action for damages based on the actionable right of an individual person to privacy."*[52]

159 In *Grosse v Purvis* Senior Judge Skoien, recognising the novelty of his finding, also declined to state the limits of the cause of action, or to state exhaustively any special defences which should be available. He identified the essential elements of the cause of action in the context of the case before him. That case involved breach of privacy by persistent and intentional stalking, a circumstance very different from the circumstances under consideration here. Although defining a willed act as an element of the breach of privacy under consideration by him, he expressly left open the question whether, in different circumstances, negligent acts could give rise to a breach of privacy[53]. There is nothing in the reasoning in that case inconsistent with my finding here.

160 In *Giller*, a breach of privacy claim arose as a side issue in a case primarily concerned with disputed claims to the legal and beneficial ownership of real property, in the context of the break up of a de facto relationship between the plaintiff and defendant. Gillard J dealt summarily with the breach of privacy claim, which concerned the showing and threatened distribution of a video showing the parties engaged in sexual acts. In a succinct reference to *Lenah Game Meats*, Gillard J said it was authority for the propositions that a breach of privacy cause of action was in a process of development, that there was a

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51 (2003) Aust Torts Reports 81-706

T[52] At [442]

53 At [446]

degree of encouragement expressed in the judgment of Gummow and Hayne JJ for such a cause of action, but the right to sue for breach of privacy had not, before judgment in *Lenah Game Meats*, been recognised by an Australian court. Without any further discussion, reference to later authority or expression of reasons, Gillard J dismissed the claim based on breach of privacy on the ground that, in his opinion, the law had not developed to the point where such an action was recognised in Australia. Although *Grosse v Purvis* had been decided by then, there was no reference to it, or recognition that it stood as an instance, albeit in another Australian jurisdiction, and at District Court level, of recognition of the development of the law in Australia to the point where breach of privacy had been recognised as a cause of action in another Australian jurisdiction.

161 There will always be a tension between determining rights by reference to a developing cause of action, and declining to do so because no other court has yet done so. If the mere fact that a court has not yet applied the developing jurisprudence to the facts of a particular case operates as a bar to its recognition, the capacity of the common law to develop new causes of action, or to adapt existing ones to contemporary values or circumstances is stultified. *Lenah Game Meats*, and the UK cases I referred to earlier, in particular those decided since *Lenah Game Meats*, demonstrate a rapidly growing trend towards recognition of privacy as a right in itself deserving of protection. This trend, or development has also been reflected in other common law jurisdictions and academic writings[54]. All this demonstrates, in my view, is Gillard J's opinion that, at the time he delivered judgment in *Giller* we were not then ready to recognise a right to privacy, has been overtaken by later developments. For all these reasons I do not consider *Giller* stands in the way of a finding of an actionable breach of privacy in the very different circumstances of this case.

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54 Eg, *Hoskings v Runting* [2004] NZLR 385; Butler, 'A Tort of Invasion of Privacy in Australia?' (2005) MULR 339; Richardson, 'Whither Breach of Confidence: A Right of Privacy for Australia?' (2002) MULR 20.

162 Consistently with the approach in *Grosse v Purvis,* I do not consider it is appropriate for me to attempt to formulate an exhaustive definition of privacy. It has rightly been described as an imprecise concept. In accepting the invitation, I am doing no more than taking the next, incremental step in the development of the recognition of the right to protection against, or provide remedy for, breach of privacy by seeking to identify the principle applicable to the facts of this case.

163 The wrong that was done here was the publication of personal information, in circumstances where there was no public interest in publishing it, and where there was a prohibition on its publication. In publishing the information, the defendants failed to exercise the care which could be reasonably required of them to protect the plaintiff's privacy and comply with the prohibition on publication imposed by s.4(1A). This, coupled with the absence of public interest, the clearly private nature of the information, and the prohibition on publication, all point to the publication being unjustified. In my view, a formulation of unjustified, rather than wilful, in these circumstances provides a fair balance between freedom of speech and the protection of privacy. For the reasons I have already canvassed when considering breach of confidence, the information is personal or confidential information which the plaintiff had a reasonable expectation would remain private, and clearly private. Its disclosure was plainly something which an individual was entitled to decide for herself.

164 I find therefore the defendants breached the plaintiff's privacy by the unjustified publication of personal information, and are liable in damages as a result.

Causation

165 This leads to a consideration of whether the plaintiff has suffered any and if so what injury loss or damage as a result of the breach of statutory duty,

negligence, breach of privacy, and breach of confidence found to have occurred.

166 The plaintiff claims damages for psychiatric injury, and post traumatic stress disorder, and, in respect of the breach of confidence claim, compensation for psychiatric injury and post traumatic stress disorder and for hurt, distress, embarrassment, humiliation, shame and guilt.

167 The defendants submit the plaintiff has not established a causal link between the breaches and the injuries claimed. They submitted first, there was no evidence anyone other than Ms Hughes and the plaintiff heard the broadcasts, and secondly that the plaintiff had conceded she would have experienced the same level of distress if a report of the sentencing was broadcast, even if she had not been identified in it. I reject both submissions.

168 The gravamen of the harm here is not established by doing a numerical count of the people who heard the broadcasts, but by assessing the harm done to the plaintiff by the knowledge that she had been wrongfully identified, that her right to keep the information private had been forever taken away by the broadcasts, that she would not know whether people she knew or came into contact with were aware of the fact or circumstances of the rape, and that her capacity to control who and in what circumstances she told of the rape had taken away from her.

169 In making that assessment, I accept the evidence Ms Doe had good reason to believe the information would not spread beyond her trusted circle, a small group of YZ's family and friends, and those associated with the investigation, prosecution and trial. I also accept the evidence that Ms Doe, and members of her family received numerous phone calls within a short time after the broadcasts, and that inquiries were shortly after that made of family members about the matter. It is a safe inference that the calls and inquiries were precipitated by the spread of the news following the broadcasts.

170 A careful examination of the evidence leads me to conclude the contention that the plaintiff would have experienced the same level of distress if a report of the sentencing was broadcast even if she had not been identified in it, does not fairly or accurately reflect the evidence. Ms Doe was asked a hypothetical question, and to express a view, many years after the event, about how she would have responded to a situation different from the one she was confronted with. She was shown an edited version of the broadcast which, although removing her name and the references to the offences as rapes in marriage, still named YZ. Not surprisingly, she said she would still have been distressed by a broadcast in those terms, and would still have expected people to contact her and ask what had happened. It was clear, once the report named YZ, as the sanitised version put to her did, that she could have been identified as the victim. There was still a potential for harm, as the evidence of Ms Hughes and Dr Brann explained, because of the close knit community, its conservative attitude to divorce, the questions and speculation already in the community about the reasons for the separation and divorce, and its propensity for gossip. However, as the broadcasts did name and identify the plaintiff, the question of how she might have reacted had the broadcasts taken a different form is of no assistance. At best, it invites speculation, at worse, diverts attention from the real issue.

171 Of more assistance in determining whether there was a causal connection, is the evidence of the plaintiff and the experts. As the summary I have given earlier sets out, it was all one way. I am satisfied the broadcasts significantly worsened her symptoms of post traumatic stress disorder and prolonged her recovery. Ms Doe's evidence that when she went overseas in the second half of 2004 she felt better, because nobody knew her or what had happened to her is, in my opinion, a telling illustration of the effect of the disclosure of her identity caused by the broadcasts. It gave life to the clinical descriptions of empowerment and reconnection, and of the compounding effect the broadcasts had on the disempowerment and disconnection she had

experienced as a result of the sexual assault.

Assessment of damages: breach of statutory duty, negligence and breach of privacy

General Damages

172 Assessment of damages in this case is not easy. Ms Doe clearly suffered considerable hurt and distress as a result of the rape. Those symptoms did not abate, and developed into chronic symptoms of post traumatic stress disorder. Ms Doe was obviously disabled by those symptoms. She was sad, cried easily, was unable to engage in normal social contact with people, found it difficult to leave the home, was anxious and depressed. She felt ashamed, guilty, and fearful. She felt, for most of the time before the trial, incapable of working. Before the rape, she had always worked in a clerical/administrative role. She gave up that work shortly after the rape, as she felt unable to cope. Her work performance before that had not been exemplary, and she was aware she was to be dismissed.

173 It is against this background that the measure of damages for the worsening of symptoms and prolongation of recovery must be measured. Ms Doe was, as I have already noted, particularly vulnerable at the time of the broadcasts, because of their proximity to the trial. Apart from a two month stint doing process work, which ultimately she felt unable to cope with, Ms Doe did not do any other paid work before the trial. She was showing some signs of improvement in the lead up to the trial. She had started to work, as a volunteer, at a car wash near where her sister worked. This gave her some contact with other people, but the security of being able to have lunch with her sister every day. Despite the build up to YZ's trial and the fact she gave evidence at that trial, I accept Ms Doe's evidence that she felt, once the trial and sentence were over, that she could start to put what had happened behind her. I also accept, and this is consistent with that evidence, and the

expert opinions, that it still would have been some time before she was likely to recover, for her symptoms of post traumatic stress disorder to abate and for her to feel capable of returning to paid employment.

174 As it happened, after the broadcasts, it was not until September 2005 that Ms Doe could be regarded as no longer suffering chronic symptoms of post traumatic stress disorder. In my opinion, Ms Doe was significantly disabled by those symptoms for most of that time. I consider she was genuine and persistent in her attempts to help herself. Those efforts included continuing counselling, trying to work, and going overseas.

175 Although Ms Doe described her life since September 2005 as back to normal, where she was able to form a new relationship, to work and enjoy it, to go out and socialise, I also accept the evidence that she remains vulnerable to a recurrence of symptoms.

176 There are no like cases to which I was referred and which could have provided some guidance. Ultimately, although the matters to be taken into account can be summarised as I have attempted to do, assessment of the amount of damages is a question of fact, judgment and degree. Doing the best I can, I assess damages for the post traumatic stress disorder symptoms caused by the broadcasts in the sum of $85,000. This means that, for the tortious cause of action, damages are assessed in that sum.

Special damages

177 Ms Doe claims damages for past loss of earnings in the amount of $118,332, and an agreed amount of $5,858 for medical and like expenses. The loss of earnings claim is a gross amount, based on a weekly figure of $657.40, for the 201 weeks from date of the broadcasts until the commencement of the trial. The plaintiff did not work from the time of the broadcast until 27 February 2006, save for the 6 month administrative position she took in 2003, and has claimed loss of earnings for that period.

178 The defendants dispute the amount claimed for loss of earnings on two bases. First, they submit Ms Doe was not ready to return to work immediately before the broadcast, because of the continuing effect of the sexual assault and her post traumatic stress disorder symptoms on her capacity to work. They relied on the evidence Ms Doe did not work, save for the two month factory job, in the year between the rape and the broadcast, and her belief, at the time of the trial, and before the broadcast, that she was not capable of returning to work and would not be ready to return to work for some time.

179 Secondly, the submit the plaintiff's work history demonstrated she would not have been likely to have engage in permanent full time employment in any event. They relied on the evidence Ms Doe had not been in continuous full time employment in the years before the sexual assault, (she had not worked for a continuous 12 month period in the previous 6 years), her acknowledged poor work performance during 2000, and the fact she was aware she was facing dismissal at the time she resigned from her job shortly after the rape.

180 The plaintiff submitted that, by virtue of s.24AP of the *Wrongs Act 1958* it was not necessary to apportion between the effect of the sexual assault and the broadcasts on her inability to work, if satisfied that the defendants' wrongful conduct was an operating cause of her inability to work from the time of the broadcasts. I am satisfied, on the evidence of Ms Doe and the experts of the effect of the broadcasts in worsening Ms Doe's symptoms and prolonging her recovery, that the broadcasts were an operating cause of Ms Doe's inability to work from the time they were made.

181 The defendants also referred me to the award to Ms Doe of compensation from the Victims Of Crime Assistance Tribunal in respect of the rape, which included an amount for loss of earnings. By s.62(2) of the *Victims Of Crime Assistance Tribunal Act* 1996, the tribunal may seek a refund of an award from a victim if she receives a payment of damages from a person other than the perpetrator. As s.24AP of the *Wrongs Act* does not require me to

apportion loss of earnings, and as s.62(2) of the *Victims Of Crime Assistance Tribunal Act* permits the tribunal to seek recovery of any amount recovered from another wrongdoer, I do not consider I should reduce loss of earnings award by the amount of the VOCAT payment.

182 Ms Doe's past work history does point to the possibility that, but for the rape and the broadcasts, she might, from time to time in the future, have worked part time or taken periods of time off. However, the evidence did not reveal what percentage of a full time position Ms Doe worked when she worked part time, how often or for how long she took time off between periods of continuous employment. She is more mature now, and demonstrated a positive attitude to employment. I consider her attempts to work before and after the broadcasts also demonstrated that. I do not consider the evidence permits me to make a finding Ms Doe would not have been likely to work full time, or permanently, and to reduce her loss of earnings claim accordingly.

183 Although there was evidence of poor work performance, I do not consider that to be of great significance, as it occurred during the period leading up to, and after Ms Doe's separation from YZ. That must be balanced with the evidence of Ms Doe's positive attitude in attempting to return to work both before and after the broadcasts, and of her positive approach to work after the improvement in her state in September 2005. I do not consider the evidence of her past period of poor work performance is indicative of a likely continuing pattern of poor performance likely to lead to periods of unemployment.

184 Accordingly, I fix the amount for loss of earnings in the sum claimed, namely $118,332, and for medical and like expenses in the sum of $5,858.

Equitable Compensation: Breach of confidence

185 There is a degree of artificiality in assessing compensation for breach of confidence separately from the damages claimed in respect of the psychiatric injury for the tortious claims, as I have found the appropriate measure of

compensation is by reference to common law principles by which damages are assessed. Whilst keeping the determinations separate, it is nonetheless necessary to be consistent. I therefore assess the appropriate amount of compensation for psychiatric injury caused by the breach of confidence in the amount of $85,000.

186 In addition, it was clear from the evidence Ms Doe suffered hurt, distress, embarrassment, humiliation, shame and guilt as a result of the broadcasts. On the expert evidence, those responses are commonly experienced by victims of sexual assault, and, according to the expert evidence, the broadcasts significantly compounded those feelings. Again, doing the best I can, I fix a further amount of $25,000 as compensation for the hurt, distress, embarrassment, humiliation, shame and guilt experienced as a result of the broadcasts.

Exemplary and aggravated damages

187 The plaintiff sought both exemplary and aggravated damages for breach of statutory duty, negligence and breach of privacy, and exemplary damages for breach of confidence.

188 Exemplary damages are punitive in nature. Their purpose is to punish defendants for reprehensible conduct, to deter them from committing such conduct again, and to deter others from engaging in like conduct.[55] Exemplary damages are an exceptional remedy in the sense that they arise in cases of conscious wrongdoing in contumelious disregard for a plaintiff's rights[56].

189 Aggravated damages, unlike exemplary damages are compensatory, not punitive, in nature. Their purpose is "to compensate the plaintiff when the harm done to him (sic) by a wrongful act was aggravated by the manner in

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55 *Lamb v Cotogno* (1987) 164 CLR 1 at 9

56 *Gray v Motor Accident Commission* [1998] 196 CLR 1 at [20] (Gleeson CJ, McHugh, Gummow and Hayne JJ)

which the act was done".[57]

190 I have some serious concerns about the manner in which the case for the defendants was conducted. In particular, I was very troubled by the denial the broadcasts were published by the second and third defendants despite their pleas of guilty to publishing the identifying information in breach of s.4(1A) of the *Judicial Proceedings Reports Act*, and the arguing, in these proceedings, but not in response to the prosecution of the second and third defendants, that s.4 of the *Wrongs Act* permitted the ABC to publish the information, despite the prohibition on publication contained in s.4(1A) of the *Judicial Proceedings Reports Act*. This made the apology provided to Ms Doe and to the Magistrates' Court by Mr Rickard and Mr Veo on their pleas of guilty, and their assertions they understood they were not permitted to publish information identifying a victim of a sexual assault, meaningless. It was inconsistent with their conduct in the Magistrates Court, their pleas of guilty, expressions of remorse and regret, and their assertion they took their responsibilities seriously. Mr Stephen Collins, general counsel for the ABC said in evidence the ABC was not governed by the Commonwealth's obligation to act as a Model Litigant, but sought to abide by the model litigant guidelines. It is, in my view inconsistent with the standards of behaviour required of model litigants in the conduct of litigation, particularly the requirements to act consistently in the handling of claims and litigation, not requiring a party to prove a matter which the Commonwealth agency knows to be true, and apologising for wrongful or improper conduct[58].

191 I was also concerned by the evidence the ABC's legal advisers had, by letters to counsel and the solicitors acting for Ms Doe, asserted the plaintiff's claim was manifestly hopeless or had no real prospect of success, and threatened to pursue then personally for costs. Whilst the defendants may have

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57 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149 (Windeyer J), cited with approval in *Gray* at [6]

58 See paragraphs 2(c), (e)(i) and (i) of Appendix B to the *Legal Service Directions 2005* made under s.55ZF of the *Judiciary Act 1903*

considered the law was uncertain, or that they had good, or reasonable prospects of defending the claims brought by the plaintiff, I do not consider their opinion of the plaintiff's prospects of success to be well founded. To write in the terms they did in those circumstances is in my view, oppressive, unfair and inappropriate. It places unfair pressure on litigants, particularly those who do not have the resources of a corporation like the ABC behind them, to abandon difficult but not hopeless cases, and places an invidious and unfair pressure on legal advisers in such circumstances. I do not consider it can be characterised, as Mr Collis did, as "a usual and ordinary step" in litigation.

192 Serious as this conduct was, there was no evidence it aggravated the harm suffered by the plaintiff as a result of the broadcasts. Similarly, there was no evidence of aggravation of harm by reason of those aspects of the defendants' conduct of the litigation, which can loosely be described as indicators of a vigorous and thorough approach to the preparation and presentation of the defendants' case.

193 Despite these concerns about the defendants' conduct, I do not consider it is appropriate to order exemplary damages. The concerns I have are about the conduct of the litigation, not about the conduct of the defendants in publishing the broadcasts. Although deserving of criticism, I do not consider it such as to justify an award of exemplary damages.

Orders

194 There will be judgment for the plaintiff in the sum of $234,190.

195 I will hear from the parties in respect of interest and costs.