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Edited by Professor Michael Adams, Professor David Barker AM and Ms Katherine Poludniewski

ALTA Secretariat
PO Box 222
Lindfield NSW 2070
AUSTRALIA
Tel: +61 (2) 9514 5414
Fax: +61 (2) 9514 5175
admin@alta.edu.au
www.alta.edu.au

JANE DOE V ABC AND MEDIA LIABILITY FOR DISCLOSING PERSONAL INFORMATION: FOUR MORE BOLD STEPS?

DES BUTLER*

I INTRODUCTION

It was long believed that *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*¹ was authority for the proposition that Australian law knew no cause of action that specifically protected personal privacy. However, in 2001 the High Court of Australia in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd*² rejected such thinking. Nevertheless, the court stopped short of actually recognising such a claim. Whilst several judges discussed developments in privacy in England and the United States, only Callinan J could be said to have supported recognition of a new cause of action.³ The most that could be said of *ABC v Lenah Games Meats*, therefore, is that it removed what was believed to be the main obstacle to the development of a tort offering protection against invasion of privacy and accordingly opened the door to recognition of such a claim in an appropriate case.

In the Queensland District Court case *Grosse v Purvis*⁴ Skoien SJDC took what he acknowledged was a “bold step” in accepting that invitation. This case involved a claim by a plaintiff against her former lover who had been stalking her. This included loitering near her places of residence, work and recreation; instances of unauthorised entry to her house and yard; offensive telephone calls and the use of offensive language and behaviour to her, her friends and colleagues. The plaintiff’s case relied on a number of

* Professor of Law, Faculty of Law, Queensland University of Technology.

¹ (1937) 58 CLR 479, 496, 521.

² (2001) 208 CLR 199.

³ (2001) 208 CLR 199, 327-8.

⁴ [2003] Aust Torts Reports ¶81-706. See also D Butler, ‘Personal Privacy: Boldly Going Where No Australian Court Has Gone Before’ (2003) 24 *Queensland Lawyer* 72 (Part I), (2004) 25 *Queensland Lawyer* 183 (Part II).

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causes of action, including trespass and intentional infliction of psychiatric harm. While certain elements of the behaviour were found to have satisfied these torts, overall the defendant's behaviour was held to have amounted to an intrusion upon the privacy or seclusion of the plaintiff, in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities, which caused the plaintiff detriment in the form of mental, psychological or emotional harm or distress or which prevented or hindered the plaintiff from doing an act which she was lawfully entitled to do. Substantial damages were therefore awarded.

This finding reflected one of the four forms of privacy tort recognised in the United States – namely that concerning “unreasonable intrusions”.⁵ His Honour did not need to make reference to the other three manifestations of privacy that have been recognised by American courts – that is, public disclosure of private facts, display of the plaintiff in a false light to the public, and appropriation of another's name or likeness.⁶

In April 2007 Hampel J in the Victorian County Court case *Jane Doe v Australian Broadcasting Corporation*⁷ took another bold step in the area of privacy protection, this time in relation to the disclosure of private facts. However, this was not the only noteworthy aspect of her Honour's judgment. Indeed, in upholding the plaintiff's claim for compensation she also based her decision on three alternative grounds, each of which in its own way represented a bold step.

II THE FACTS

*Jane Doe v Australian Broadcasting Corporation*⁸ concerned a 27 year old woman who was twice raped by her estranged husband. As a consequence, she suffered post traumatic stress disorder. Although her symptoms were chronic, in the time leading up to

⁵ See *Restatement (Second) of Torts* §652B.

⁶ *Restatement (Second) of Torts* §652C-652E.

⁷ [2007] VCC 281.

⁸ *Ibid.*

the trial of her husband a year later she had made substantial progress in improvement of her condition. Her husband was convicted and sentenced to a period of imprisonment. That afternoon in its 4.00 pm, 5.00 pm and 6.00 pm news bulletins ABC radio news reported on the sentencing of the husband and the offences of which he was convicted, which were described as rapes within marriage. The reports also reveal the offences as having occurred in the plaintiff's home and named the suburb, and in one broadcast also revealed the plaintiff's name and identified her as the victim.

The ABC journalist and sub-editor responsible for these reports were subsequently charged with an offence under *Judicial Proceedings Act* 1958, s 4(1A) for publishing information identifying a victim of a sexual offence. Both pleaded guilty. The broadcasts had a devastating impact upon the plaintiff. Expert evidence was given that the broadcasts significantly worsened the plaintiff's symptoms of post traumatic stress disorder. The broadcast had been heard by many of her friends and acquaintances who had not known of the original attacks and she received many phone calls and inquiries. She became more withdrawn and was unable to engage in ordinary social contact for two years.

The plaintiff commenced action against the ABC, the journalist and the sub-editor seeking damages based on four separate causes of action: breach of statutory duty, negligence, breach of confidentiality and breach of privacy. In the final result, Hampel J found all four causes of action to have been established and awarded damages in an amount just over \$234,000. The ABC has now lodged an appeal.⁹

III FOUR BOLD STEPS?

Hampel J upheld the claim on the basis of all four pleaded grounds. However, on analysis her reasoning seems stronger in relation to some than others. Nevertheless, in

⁹ 'ABC Appeal on Privacy Payout' *Herald Sun* 18 April 2007.

one way or another her findings on all four claims may also be seen as involving “bold steps.”

A Breach of Statutory Duty

In a rare case a statute that imposes a duty may also allow a person who is intended to benefit from performance of that duty to bring an action for compensation in the event that the duty is breached. As Brennan CJ, Dawson and Toohey JJ stated in *Byrne v Australian Airlines*:

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.¹⁰

Ultimately it is a question of construction of the statute. A particular difficulty may be where a statute imposes a criminal penalty, since it may be inferred that the legislature intended for the criminal penalty to be sufficient punishment for transgression without also imposing civil liability.¹¹ Section 4(1A) is such a provision. However, the existence of a criminal sanction is not conclusive.¹²

Hampel J considered s 4(1A) to be a provision which imposes an obligation for the protection or benefit of a particular class of persons, in the form of victims of sexual offences.¹³ It followed that if a victim was identified in breach of the obligation not to publish, and suffered injury loss or damage as a result of being wrongfully identified, such injury or damage was capable of constituting injury or damage ‘of a kind against

¹⁰ (1995) 185 CLR 410, 424.

¹¹ *Sovar v Henry Lane Pty Ltd* (1067) 116 CLR 397, 404.

¹² *Byrne v Australian Airlines* (1995) 185 CLR 410.

¹³ See also *Hinch v DPP* [1996] 1 VR 683, 689.

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which the statute was designed to afford protection'.¹⁴ This was a case unlike, for example, regulatory or welfare legislation which imposed a general administrative function on public bodies and involved the exercise of administrative discretions, which may be seen as being passed for the benefit of society as a whole as opposed to a specific statutory duty passed for the benefit of specific individuals.¹⁵ Accordingly, the plaintiff was held to have 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, as occurred here.

Hampel J's decision is the first to recognise that a civil claim for breach of statutory duty may be established in cases involving breach of a statutory prohibition against publication of identifying details of victims of sexual offences. These statutory prohibitions are well known in media circles and the decision sounds a salient warning that a failure to observe the duty thereby imposed a result in not only criminal sanction but also substantial civil liability in the event that loss or damage results from a publication in breach of the prohibition.

B Negligence – Breach of Duty of Care

To the extent that the publications were in breach of a specific statutory prohibition and resulted in personal injuries, the decision might have been viewed as having a limited impact. However, of perhaps wider significance was the finding by Hampel J that the publication also amounted to a breach of a common law duty of care. Much of the media's attention following the decision related to recognition of a cause of action for breach of privacy. The potential of such a cause of action is a matter of present concern to the media.

Jane Doe v ABC is also the first case in the Commonwealth to recognise that the media may in certain circumstances owe a duty of care to members of the public. Previously,

¹⁴ [2007] VCC 281, [74].

¹⁵ Cf *X (Minors) v Bedfordshire County Council* [1995] 2 AC 663.

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the closest to such recognition of a duty of care was a Canadian case in which two dissenting judges suggested that the media could owe a duty of care in relation to the compiling of a story.¹⁶ In such a case, they thought that the content of the duty would be an obligation to take reasonable care in the investigating and writing of the story, as opposed to a duty to get the facts right. In Australia, Levine J in *GS v News Ltd*¹⁷ was not prepared to strike out a claim for breach of duty of care where a plaintiff claimed to have suffered psychological harm after being chased down a street by the media after appearing at a tribunal hearing.

A number of considerations may be relevant when considering whether a duty of care is owed in a particular case.¹⁸ The defendants argued that if the plaintiff had suffered damage as the result of a broadcast which identified her as a victim of rape then any remedy should be determined under the laws of defamation, which provide for an appropriate balance for free speech. Recognition of a duty of care would therefore introduce incoherence into the law by encroaching upon that balance.¹⁹ However, as Hampel J found, the coherence argument did not apply in the case at hand because the plaintiff was not suing for damage to her reputation. Instead, the plaintiff's complaint was that the defendants published information which identified her, in the face of the statutory prohibition on publication of such information. Her claim was for the loss of the right not to have her identity published, and the psychiatric harm flowing from the publication of information identifying her.²⁰

As such, the case properly fell to be decided under the principles governing recovery for psychiatric injury, as decided in *Tame v New South Wales*.²¹ In this case the court

¹⁶ *Guay v Sun Publishing Co* [1953] 4 DLR 577 (Rinfred CJC and Cartwright J).

¹⁷ (1998) Aust Torts Reports 81-466.

¹⁸ See D Butler and S Rodrick, *Australian Media Law* (3rd ed, 2007), [11.20].

¹⁹ Her Honour considered *Sullivan v Moody* (2001) 207 CLR 562; *Tame v New South Wales* (2002) 211 CLR 317. Other relevant cases include *Sattin v Nationwide News Pty Ltd* (1996) 39 NSWLR 32, 42; *Gould v TCN Channel 9* [2000] NSWSC 707, [27]; *Gacic v John Fairfax Publications Pty Limited* [2005] NSWSC 1210, [49].

²⁰ [2007] VCC 218, [64], [84].

²¹ (2002) 211 CLR 317.

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emphasised the importance of reasonableness when defining the ambit of a person's duty of care towards others. This involves an evaluation of the nature of the relationship between the parties, and 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.²² Her Honour held that:

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).²³

Since the ABC was a national broadcaster whose statutory functions include broadcasting news and information concerning current events, and the duties of journalist and sub-editor were to file reports for broadcasting and deciding what was broadcast respectively, there was a higher obligation on them not to publish information in breach of the statutory prohibition than might exist with a private citizen who is not in the business of broadcasting, and who did not have the capacity to spread the information as widely as the defendants could. Further, it was reasonable to expect the defendants to contemplate harm of the kind alleged by the plaintiff could result from a publication of information identifying a victim published in breach of the statutory prohibition. Hampel J suggested that this was "because of the violating nature of sexual assault, the well-known and oft recorded effects that sexual assault can have on victims" and the reasonable expectation victims have, as a result of the statutory prohibition, that their identity will not be published.²⁴ Accordingly, there was in each case a sufficient relationship between the plaintiff and defendant to create a duty of care on the part of each of the defendants.

²² [2007] VCC 218, [86].

²³ Ibid [92].

²⁴ Ibid [98]-[99].

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Moreover, there had been a clear and culpable breach by each of the defendants to take reasonable care not to identify the plaintiff.²⁵

This recognition of a duty of care on the part of the media towards a member of the community is potentially a significant one in light of the wide variety of circumstances in which individual members of the public could arguably be in specific contemplation of the media as being at risk of harm as a result of a publication or broadcast.²⁶

C Breach of Confidence

The difficulties confronting an Australian plaintiff seeking to rely on breach of confidence to obtain compensation for revelation of private facts were shown by the Victorian Supreme Court case *Giller v Procopets*.²⁷ In that case the female plaintiff claimed (inter alia) that she suffered distress and humiliation as a result of the defendant, her former partner, showing and threatening to distribute a video of them engaging in sexual activities. The plaintiff relied on three separate causes of action: breach of confidence, intentional infliction of mental harm and breach of privacy, but Gillard J of the Victorian Supreme Court dismissed all three claims. In relation to the claim for breach of confidence, his Honour accepted that the persons engaging in a sexual activity in the privacy of their home involved a relationship of mutual trust and confidence, but stressed that it was an equitable action. Accordingly, he held that general damages for physical or mental injury, distress or upset were not available because they were common law remedies. While it was true that the Victorian equivalent of *Lord Cairns' Act* allowed equitable damages to be granted in lieu of the equitable remedies of specific performance or injunction, in this case the plaintiff had only sought damages and not an injunction.

In *Jane Doe v Australian Broadcasting Corporation* Hampel J noted that “breach of

²⁵ Ibid [96].

²⁶ See Butler and Rodrick, above n 16, Chapter 11.

²⁷ [2004] VSC 113.

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confidence claims have expanded in their reach in recent years” and that there had been “considerable judicial scrutiny, particularly in United Kingdom”.²⁸ Whilst acknowledging that care needed to be taken because these cases had been decided in light of the *Human Rights Act 1988* and the requirement that English courts take into account so far as possible the European Convention on Human Rights, her Honour regarded that the parts of the United Kingdom decisions she relied on “all concern the common law development of breach of confidence and breach of privacy causes of action”.²⁹ She further ventured, after reference to Gleeson CJ’s suggestion in *ABC v Lenah Game Meats* that Australia might follow the English approach to breach of confidence as the appropriate cause of action for breach of privacy, to hold that the English approach as also representing the common law development of breach of confidence in Australia.³⁰ Pursuant to this view, it is no longer necessary for there to be a relationship of trust and confidence in order to protect confidential information since “the obligation of confidence extends to a wider range of people and is defined by reference to the circumstances, not a relationship”.³¹ Her Honour thought that since the underlying value was no longer enforcing the duty of trust arising from a relationship but instead concerned protecting confidential information from publication, it followed that a breach of confidence occurred not because of a breach of a duty of trust arising out of a relationship but because it would rob the person to whom the information relates of their right to keep their personal or confidential information private.³² In the case at hand, the information was to be considered private because not only was it about participation in sexual activity – which is generally regarded a private matter – but was about non-consenting sexual activity. The identity of the perpetrator as the plaintiff’s estranged husband and the statutory prohibition of publication further supported this conclusion.³³ In the language of English courts, the plaintiff had “a reasonable expectation of privacy” in the circumstances.

²⁸ [2007] VCC 218, [104].

²⁹ *Ibid.*

³⁰ *Ibid* [110].

³¹ *Ibid.*

³² *Ibid* [115].

³³ *Ibid* [119].

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In relation to the refusal to grant compensatory damages for breach of confidence in *Giller v Procopets*, her Honour noted that the Gillard J had relied on the Court of Appeal decision in *Campbell v MGN*, which had been overturned on appeal by the House of Lords with the original orders, including a damages award, reinstated. He had also distinguished *Talbot v General TV Corp Pty Ltd*,³⁴ where damages were awarded, on the ground that in that case the plaintiff had also sought injunctive relief. However, Hampel J did not consider that *Talbot* was authority for of the proposition that damages could not be awarded unless injunctive relief were also sought.³⁵ Instead, the case held that damages should be fixed by the method most appropriate to compensate the plaintiff for the loss or damage caused by the breach. It found that there was no single standard method for assessing damages for breach of confidence. Her Honour held that in this case, which concerned a breach of confidence that caused an affront to the plaintiff's feelings and resulted in personal injury, the most appropriate method of compensation was an award of monetary damages for pain and suffering.³⁶

Perhaps the most difficult aspect of Hampel J's reasoning may be her assumption that the developments in the law of breach of confidence in the United Kingdom are "apposite to the development of the law here".³⁷ Whilst her Honour acknowledged that care was required when making reference to the United Kingdom cases due to the presence of the *Human Rights Act 1988*, the extent to which she exercised that care is not clear. That Act requires English courts to give effect to the European Convention on Human Rights as far as possible when interpreting legislation and developing the common law. The Convention's guarantees of protection for privacy and freedom of expression have played the central role in developing the action for breach of confidence in order to provide a remedy, in an appropriate case, for a breach of privacy. They provided the very context for the development. It may therefore be artificial to treat the developments in the action

³⁴ [1980] VR 224.

³⁵ [2007] VCC 281, [140].

³⁶ *Ibid* [144]-[145].

³⁷ *Ibid* [110].

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for breach of confidence as being development of the common law divorced from the influence of the Convention. This is good reason for arguing that these developments in the common law in the United Kingdom do not translate the developments in common law in this country. In this connection, it is worth noting that no other member of the High Court shared Gleeson CJ's views.

Instead, Australian courts have a strong history recognising that the basis of the action for breach of confidence is the obligation of conscience which binds the confidant,³⁸ although it has been acknowledged by equity that in certain circumstances third parties may also be bound by the obligation. This is perhaps an acknowledgement of a point reflected in *Giller v Procopets*, namely the orthodox Australian view that while the administration of common law and equity has become fused, they are nevertheless based upon different systems of justice, or as it is said "the two streams of jurisprudence, though they run in the same channel, run side by side and do not mingle their waters".³⁹ This is an important difference in attitude between Australian and English courts. English courts, in contrast to their Australian counterparts, would seem to have less difficulty accepting a single law of obligations which integrates equity and the common law.⁴⁰

The prevailing Australian view also makes it more difficult to recover compensatory damages for a breach of confidence, particularly in circumstances where without forewarning someone in the media disseminates private information so that "the genie is out of the bottle" and an injunction is not worth seeking. It remains to be seen whether Hampel J's interpretation of *Talbot v GTV* may prevail in light of this attitude or instead will be regarded as mere sophistry.

³⁸ See, eg, *Moorgate Tobacco Ltd v Philip Morris Limited (No 2)* (1984) 156 CLR 414, 438; *Johns v Australian Securities Commission* (1993) 178 CLR 408.

³⁹ See, eg, *Felton v Mulligan* (1971) 124 CLR 367, 392. It is worth noting that two current members of the High Court, William Gummow and John Heydon, have been or are authors of the foremost text on principles of equity, which is a key proponent of this view: see R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, 2002).

⁴⁰ See, eg, *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, 924-925. Cf [2007] VCC 281, [153] where Hampel J suggested that English courts may share the reluctance to merge common law and equity.

D Invasion Of Privacy

Hampel J recognised the difficulties associated with merging tortious and equitable doctrines when trying to reshape the action for breach of confidence in order for it to accommodate breaches of confidence.⁴¹ Hampel J was therefore prepared to take the “bold step” and also recognise a new tort which provided protection from disclosure of private facts as an alternative ground for allowing the plaintiff’s claim for compensation. Her Honour noted that Gillard J in *Giller v Procopets* had declined to recognise privacy as allowing recovery in a disclosure-type case on the ground that the law had not developed to that point in Australia but had made no reference to *Grosse v Purvis*, which had been decided by that time.⁴² She observed that if the mere fact that there was no previous decision that applied the developing jurisprudence to similar facts operated as a bar to recognition, the capacity of the common law to develop to reflect contemporary values would be “stultified”.⁴³

However, like Skoien SJDC in *Grosse v Purvis*, Hampel J did not think it was necessary to state an exhaustive definition of the cause of action. Accordingly, her Honour found that an action could lie where there was an unjustified publication of personal information which the plaintiff had a reasonable expectation would remain private. She considered “unjustified” to be preferable to “wilful” in this formulation to strike a fair balance between freedom of speech and protection of privacy. Here the reasonable expectation of privacy already identified when discussing the breach of confidence claim, the statutory prohibition and absence of public interest meant that the defendants had breached the plaintiff’s privacy and were liable in damages.

⁴¹ [2007] VCC 281, [153].

⁴² Ibid [160].

⁴³ Ibid [161].

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It is evident, therefore, that Hampel J had in mind recognising a cause of action in the case of a disclosure of private information where the plaintiff has a reasonable expectation of privacy and there is no countervailing public interest in the disclosure. It is also apparent that her Honour may also see a place for a requirement that the defendant must have engaged in behaviour which would be regarded as highly offensive to a reasonable person of ordinary sensibilities, although she made no reference to such a test in her final analysis.⁴⁴ This may be because she was satisfied that such a requirement had been satisfied in the case before her and therefore was not an issue.

IV CONCLUSION

All four causes of action relied upon by the plaintiff in *Jane Doe v Australian Broadcasting Corporation* involved some degree of novelty, whether in application of existing legal principle or development of new doctrine. Perhaps least controversial of the four was Hampel J's recognition of an action for breach of statutory duty. Notwithstanding the criminal sanction for breach of the statutory prohibition against publication of the identifying details of a victim of a sexual offence, the statute clearly was designed for the protection of specific individuals who may suffer loss or damage if the statutory duty is not observed. The inference that the statute intended to create a civil cause of action in addition to the criminal sanction must therefore be very strong.

Recognition of a duty of care in the circumstances was, it is submitted, a natural application of the principles governing recovery of damages for recognisable psychiatric illness as established in *Tame v New South Wales*. The mere fact that the defendants

⁴⁴ See *ibid* [118] where Hampel J discusses this test in the context of breach of confidence being developed to accommodate privacy. If such a "normality" requirement were recognised there would be an interesting contrast with the law of negligence relating to psychiatric injury. At common law, which still operates in Queensland and the Northern Territory, such a requirement has been abandoned: see *Tame v New South Wales* (2002) 211 CLR 317. However, it has been imposed by statute elsewhere: see *Civil Law (Wrongs) Act 2002* (ACT), s 34; *Civil Liability Act 2002* (NSW), s 32; *Civil Liability Act 1936* (SA), s 33; *Civil Liability Act 2002* (Tas), s 34; *Wrongs Act 1958* (Vic), s 72; *Civil Liability Act 2002* (WA), s 5S.

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were a media organisation, a journalist and editor did not automatically provide a policy ground for excluding the duty of care since freedom of speech was never a factor that could properly be considered. This was because the statutory prohibition against publication meant that there was no relevant freedom of speech in the circumstances. Nevertheless the case is significant as being the first to recognise that the media may owe a duty of care to a member of the community who may suffer foreseeable harm as a result of the media's operations or publications. While of freedom of speech will be an important consideration in future cases in which a duty of care is asserted, there may be other circumstances where common law or statutory restrictions minimise or exclude its effect. In such cases, there may be good grounds for arguing recognition of a duty of care owed by the media.

In upholding the plaintiff's claim for breach of confidence, her Honour proceeded on the assumption that the developments of the common law in the United Kingdom reflected developments of the common law in Australia. In doing so, she perhaps artificially excised from those developments the influence of the European Convention on Human Rights pursuant to the *Human Rights Act 1988*. Without the influence of the convention, and with neither a guarantee of free speech nor privacy in Australian law, it cannot be assumed that the common law in this country has moved in the same direction as that in the United Kingdom. This is particularly so in light of the strong support in Australian cases for the obligation of conscience as being the basis of the action for breach of confidence.

Moreover, the doctrinal angst associated with awarding tortious compensatory damages for an equitable cause of action may be avoided by the head on development of a specific tort protecting privacy, if the threshold question of whether privacy rights should be recognised as worthy of protection is answered in the affirmative. The answer to this threshold question may lie in the pressure of international developments, and of the ever expanding capabilities of technology as a tool for invasions of privacy. If this is the case,

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then like Skoein SJDC in *Grosse v Purvis* before her in another field of privacy, Hampel J's bold step will have been an important first step.