'The Two Limbs of Privacy'

'The Right to Protection of Privacy and Freedom from Harassment''

'Identifying the Emergence of a Framework for the Recognition of Privacy'

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With the recent success of actions for breach of privacy in the Queensland and Victorian District Courts, the codification of invasion of privacy under the Queensland *Criminal Code*,[1] and the initiation of inquiries into statutory reform in other states,[2] the emergence of a tort of invasion of privacy inspires fresh debate. The polarity in approaches taken in the recognition of invasion of privacy in the civil law[3] cases of *Grosse v Purvis*[4] and *Jane Doe v Australian Broadcasting Corporation*[5] may provide the basis for the recognition of privacy under two limbs, one pertaining to the right to protection of privacy and the other relating to freedom from harassment. Through an examination of the recognition of privacy in civil law and statute, this paper identifies that a distinction emerges between the right to keep something private and the freedom to be left alone. Protection of privacy and freedom from harassment are concomitant, and therefore there is overlap between the types of conduct that fall under each limb. However, as will be demonstrated, it may be possible to recognise a marked juncture between privacy and harassment that supports the development of separate torts, since the right to privacy does not always coincide with the freedom to be left alone.

By reflecting on the approach used to recognise privacy in both civil law and statute it may be possible to conceptualise the direction of development of privacy and harassment in tort. The *Criminal Code* (Qld) emulates the dichotomy between privacy and harassment that supports the recognition of two limbs in civil law and an examination of the aforementioned cases reveals that there is a tendency to distinguish between privacy and harassment and to draw a statutory inference to characterise and strengthen the nature of the subject matter as private.

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[1] *Criminal Code Act 1899* (Qld), ('*the Code*' or '*Criminal Code*') pursuant to section 2.
[2] Australian Law Reform Commission, *Review of Privacy*, IP31, 20 September 2006 ('ALRC'); NSW Law Reform Commission; *Invasion of Privacy*, Consultation Paper 1, May 2007 ('NSWLRC'); Victorian Law Reform Commission, *Inquiry into Surveillance in Public Places*, due for release 2008.
[3] For the purposes of this inquiry, 'torts law' is referred to as 'civil law' to avoid confusion between criminal and civil actions.
[4] [2003] QDC 151 (Unreported, Senior Judge Skoien, 16 June 2003) ('*Grosse'*).
[5] [2007] VCC 281 (Unreported, Judge Hampel, 3 April 2007) ('*Jane Doe*').

In *Grosse v Purvis,* Senior Judge Skoien, used reason by analogy with stalking, an offence under the *Criminal Code* (Qld),[6] to justify the recognition of an invasion of privacy in civil law. Similarly, in *Jane Doe* the reference to the *Judicial Proceedings Report Act* (Vic)[7] established that the publication of information identifying a victim of a sexual offence was private. On this reasoning, by investigating legislative recognition of offences in the *Criminal Code* that reflect a broader approach to privacy, it may be possible to classify emerging civil law categories of privacy that gain their strength of character by statutory analogy, without inhibiting the incremental development of the law.

In *Australian Broadcasting Corporation v Lenah Game Meats*[8] Callinan J identified that the 'time is ripe' for the consideration of the recognition of a tort of invasion of privacy.[9] If we accept that the tort is recognised based on the cases succeeding in such an action, the question then becomes, what is privacy, and how do we develop a framework in which it can be operate effectively? The nature of the tort needs to be distilled to foster appropriate development and protection of privacy at civil law.

This investigation seeks to identify the justification for the broad acceptance of the demarcation between two limbs of privacy. Beginning with an attempt to identify categories of what is private and an examination of the civil law cases that have canvassed an action in privacy and harassment, statutory analogies are then drawn to strengthen the impetus for the separate civil law recognition of invasion of privacy and freedom from harassment. Following this, a more comprehensive civil law conceptual framework for privacy is outlined based on the assumptions that are drawn from civil law principles and statutory inference. In constructing a civil law skeleton that may recognise privacy effectively, particular issues will be addressed including: identifying the ambit of a reasonable expectation of privacy and the application of the highly offensive test to highlight the segregation of privacy from harassment.

[6] *Criminal Code Act 1899* (Qld), section 359A and B.
[7] Section 4(1A) *Judicial Proceedings Report Act 1958* (Vic).
[8] (2001) 208 CLR 199 ('*Lenah Game Meats*').
[9] Ibid 328.

In conclusion, it will be shown that a *holistic* view of privacy is required to compensate for the 'perverse ingenuity [that] can readily devise new means of harm',[10] and that this may be achieved through the recognition of two limbs of privacy. 'The civil law has not proved powerless to attach new liabilities and create new duties when experience has proved that it is desirable', but in relation to privacy, it is the lack of conceptual framework in which this can occur that may have inhibited this power.[11] However, it may be possible to identify a new approach to recognising privacy in civil law that may overcome some of the theoretical uncertainty by distinguishing between privacy as protection of a bundle of interests and privacy as freedom from conduct.

Identifying an Emerging Framework

The conceptual difficulties identified in the development of a tort of invasion of privacy are recognised as existing in defining the exact nature of privacy.[12] To overcome this obstacle to development, in *Lenah Game Meats* and subsequent cases,[13] there has been emerging support for the integration of a hybrid American, United Kingdom model of categorising invasion of privacy, which has also manifested in the structure for the statutory recognition of privacy under the *Criminal Code*.[14] However, these models merely describe the nature of the invasion through negative conduct, and do not assist in defining the form of privacy itself.

[10] *Victoria Park Racing and Recreation Grounds Company Ltd v Taylor* 1937 WL 27007, 519 ('*Victoria Park*') Rich J quoting *Detroit Baseball Club v. Deppert* (1886) 61 Mich, 69, Cambell CJ.
[11] *Victoria Park* 1937 WL 27007, 501.
[12] *Lenah Game Meats* (2001) 208 CLR 199, 256.
[13] *Grosse* [2003] QDC 151 (Unreported, Senior Judge Skoien, 16 June 2003)*; Jane Doe* [2007] VCC 281 (Unreported, Judge Hampel, 3 April 2007).
[14] *Criminal Code Act* 1899 (Qld), section 227A, B and C.

The indeterminate nature of privacy led Lord Justice Mummery in *Home Office v Wainwright*[15] to 'foresee serious definitional difficulties and conceptual problems in the judicial development of a "blockbuster" tort vaguely embracing such a potentially wide range of situations'.[16] His Lordship considered that attempting to force privacy into an already established tort was akin to a 'straightjacket' where it was not a proper derivative, and that this would only lead to confusion.[17] On this basis, whilst privacy may be imprecise and difficult to define, the potential for greater confusion exists through lack of characterisation and attempts to find its 'best fit' within subsisting torts. By distinguishing between privacy and harassment as recognised by the courts and statute, this paper seeks to identify distinct subcategories that may fall under each limb that would partially alleviate the indeterminate nature of privacy. The following discussion attempts to overcome conceptual difficulties by identifying a template for the categorisation of privacy appropriate to an Australian civil law context.

Privacy, what is it? Who has it? Moreover, how do we recognise it?

In *Lenah Game Meats*, Gleeson CJ stated that privacy is an abstract notion akin to a human right.[18] He cautioned against declaring a tort of privacy based on the 'lack of precision of the concept' and he considered that privacy should be referred to as an interest rather than a right since our system of law 'has no counterpart to the First Amendment to the United States Constitution or to the *Human Rights Act 1998* (UK)'.[19] This is consistent with the view of the Australian Law Reform Commission, where the use of the word 'interest' rather than 'right' was intentionally used since a right is always an interest but an interest may not always be a right. The ALRC viewed privacy as 'a bundle of interests that individuals have in the personal sphere free from interference from others'.[20]

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[15] *Home Office v Wainwright and Others* [2001] EWCA Civ, (Unreported, Lord Woolf CJ, Mummery, Buxton LJJ, 20 December 2001).
[16] Ibid [60].
[17] Ibid [66].
[18] (2001) 208 CLR 199, 208, 226, [41], referring to; *Roth v Roth* (1991) 4 OR (3d) 740, 757, 758; *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81, 97, 98; *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130, 1179; Brennan, 'Principle and Independence: The Guardians of Freedom' (2000) 4 *Australian Law Journal* 749, 757.
[19] *Lenah Game Meats* (2001) 208 CLR 199, 208, 226.
[20] ALRC, above n 2, 58, [1.110] referring to R Clarke, 'What's 'Privacy?' (2004) *Australian National University* <http://www.anu.edu.au/people/Roger.Clarke/DV/Privacy.html> at 7 August 2006; whether privacy is a right or an interest is outside the scope of this paper and the term 'right' and 'interest' are used interchangeably.

In its review of civil and statute law, the ALRC highlighted a top-down approach to categorising privacy that identified the 'essence of privacy' by a 'common denominator'. The ALRC noted this did not apply effectively to the 'multitude of situations and problems involving privacy[21] but also recognised the support for an overarching definition that argued that it was necessary in order to avoid perpetuating 'the piecemeal, haphazard approach to privacy that has marked the privacy landscape so far'.[22] This illustrates that in developing a framework for privacy, balance may be required between privacy as a collective term and the more 'bottom-up approach' of the incremental development of the law. It may be possible to meet the top-down bottom-up approach half way by embracing two limbs of privacy to temper an all-encompassing definition. The civil law may cover a wider ambit of situations by dichotomising privacy, whilst still maintaining some specificity by recognising two overarching themes.

This assumption may be supported by the approach taken in The NSW Law Reform Commission Report on civil and statutory recognition of privacy.[23] The NSWLRC took the view that within a limited framework, the 'indeterminate nature of privacy' meant that the recognition of a cause of action in relation to privacy could not 'embrace a free standing right to privacy' but that 'more particularised rights of privacy' should be able to attract statutory protection and the imposition of civil liability.[24] On this basis, the particularisation of privacy rights or interests that may fall under the ambit of two limbs of privacy may aid in constructing a workable framework for recognition in civil law.

Under the two-limbed approach to privacy, the first limb is relative to an invasion of privacy that invades an individual's personal sphere through conduct that encroaches on human dignity and autonomy where a reasonable individual would expect privacy.[25] The second limb is relative to an intrusion upon an individual's personal sphere through conduct beyond the endurance of a

[21] ALRC, above n 2, 58-59, [1.111] referring to D Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087, 1099.
[22] ALRC, above n 2, 59, [1.113] referring to R Bruyer, 'Privacy: A Review and Critique of the Literature' (2006) 43 *Alberta Law Review* 553, 576.
[23] NSWLRC, above n 2.
[24] Ibid 11, [1.19]; 21, [1.47] it should be noted that the provisional conclusions of the Commission were that a cause of action for invasion of privacy in NSW should be made by statute rather than through development of the civil law.
[25] See generally *Douglas v Hello! Ltd* [2001] QB 967, 1001.

reasonable person with ordinary sensibilities.[26] The ensuing discussion draws attention to disparities that exist between the right to privacy and the freedom to be left alone in an attempt to recognise an emerging framework for the protection of privacy. The following discourse on the recognition of two limbs of privacy supports as its foundation a multi-faceted approach to the development of privacy that incorporates both recognised categories of subject matter that may be established as prima facie private as well as the incremental development of the law. The dialogue centres on the development of a tort of harassment and an examination of the emerging civil law recognition of privacy to highlight a distinct dichotomy between privacy and harassment that supports the development of separate torts.

The two limbs of Privacy
Distinguishing between Intrusions into Autonomy and Dignity, and Harassment

There is potential to develop a tort of harassment separate from privacy within Australian jurisprudence, which would draw a distinction between conduct that amounts to an invasion of human dignity and offensive conduct that goes beyond what a reasonable person would endure. Given that there is no statutory protection in place that adequately covers the field of conduct categorised as harassment, there is no bar to its development.

By characterising privacy as having two limbs, privacy has both positive and negative qualities that may protect an individual's interest or inhibit an individual's conduct. The fact that privacy and freedom from harassment are intrinsically connected does not mean that privacy is *sine qua non* to harassment since the right to privacy does not always coincide with the freedom to be left alone.[27]

[26] See generally *Grosse* [2003] QDC 151(Unreported, Senior Judge Skoien, 16 June 2003); Stephen Todd, 'Protection of Privacy' in Nicholas J. Mullany (ed), *Torts in the Nineties* (1977) 174, 200.
[27] Compare D Butler, 'A Tort of Invasion of Privacy in Australia?' (2005) 29 *Melbourne University Law Review* 339, 373.

Privacy satisfies the need in a civilised society for the protection of personal integrity on one hand and the freedom from harassment on the other.[28] To harass is a verb indicating the doing of a persistent annoying act.[29] On the other hand, privacy is a noun, which relates to 'human dignity' and autonomy.[30] Privacy connotes secrecy and confidentiality belonging to one person, and on this basis, is more attune to a personal right or interest. An invasion is the act that infringes on that right and thus, the tort of privacy focuses on the protection of a right rather than the freedom from conduct.

Whilst harassment may cover circumstances that parallel those that relate to protection of privacy, harassment may be characterised as standing apart from other conduct that may intrude on the 'bundle of interests relating to an individual's personal sphere'. Harassment may be general in nature but it may also consist of specific subcategories that may be sexual, racial, physical, religious, gender or disability related.[31] Categorising conduct which is easily identifiable as 'harassing, intimidating or malicious', may provide certainty for individuals as to what is or is not acceptable conduct. This is in contrast to the uncertainty of not establishing that conduct is unacceptable until it encroaches on an individual's reasonable expectation of privacy, which occurs on an ad hoc basis.

Delineating privacy by reference to both positive and negative attributes of *what is* and *what is not* may facilitate curtailment of conduct, and the development of recognition of rights and freedoms at civil law. To focus solely on protection of privacy is to concentrate on the cure for the wrong, not the prevention whereas the bifurcation of harassing conduct may also act as a preventative measure. The development of separate torts of privacy and harassment reflect this approach and the protection of privacy may be conceptualised as the shield against wrong and freedom from harassment, the sword.

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[28] Martin Lishexian Lee, 'The Need for a Tort of Harassment' (2001) 5 *Southern Cross University Law* Review 189, 192.
[29] G. A. Wilkes and W. A. Krebs (eds), *Collins Concise Dictionary*, (2nd Ed, 1988), 512.
[30] *Lenah Game Meats* (2001) 208 CLR 199, 208, 255.
[31] Martin Lishexian Lee, above n 31, 189, 190.

Fleming recognised that there may be a role for torts to play in the prevention of harm,[32] and it may be that tort of harassment can fulfil this task. Drawing on the initial civil recognition of the tort of harassment in the US to demonstrate this potential, to obtain an injunction it was necessary to prove damage, and then subsequently as the tort progressed, this principle was enlarged to allow an injunction where there was risk of injury. Thus, the tort of harassment has grown in that jurisdiction from a 'weapon against harm' to a 'weapon against risk', which may also be possible within an Australian civil law context.[33]

The development of the tort of harassment has been tremulous within Australian jurisdictions. In Queensland, aside from stalking under the *Criminal Code*, there is inadequate legislation in place to deal with harassment and statutory protection has limited utility since its focus is on racial and sexual harassment, to the exclusion of other forms.[34] On this basis, the development of a tort of harassment may close the gap in the recognition of offensive, harassing, discriminating or intimidating conduct and potentially provide civil redress to the recognised categories of statutory harassment that stand aside from an issue of privacy.

In Australia, there has been encouraging mention of the possibility of a separate tort of harassment but on the circumstances of the decided cases, no need to determine if one exists.[35] However, by tracing the recognition of a tort of harassment through other jurisdictions it may be possible to envisage its potential development within Australian jurisprudence.[36] The first prominent English cases that may be characterised as relating to harassment were *Wilkinson v Downton*[37] and *Janvier v Sweeney*[38]. Both these cases were argued under action on the case, and the conduct clearly fell within the ambit of harassment. As proof of actual damage was necessary, each case relied upon nervous shock to establish the action and these decisions set the stage for the recognition of 'malicious and intimidating' conduct as tortious.[39]

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[32] John G. Fleming, 'Preventative Damages' in Nicholas J. Mullany (ed), *Torts in the Nineties* (1977) 56-72.
[33] Ibid.
[34] *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth); Martin Lishexian Lee, above n 31, 194.
[35] *Lenah Game Meats* (2001) 208 CLR 199, 255*; Grosse* [2003] QDC 151 (Unreported, Senior Judge Skoien, 16 June 2003) [451].
[36] See Martin Lishexian Lee, above n 31, 90, for a comparative analysis of the UK/US position.
[37] [1897] 2 QB 57.
[38] [1919] 2 KB 316.
[39] Martin Lishexian Lee, above n 31, 90.

In *Patel v Patel*[40] however, the English Court of Appeal stated that 'there [was] no tort of harassment'. Although the conduct complained of in that case was a campaign of repeated harassment, there was no actionable basis for granting the injunction since the tort was not recognised. Waterhouse J stated that unless an actual tort was committed or likely to be committed, restraining a person from approaching another's home was not a cause of action restrainable by injunction.[41]

In the subsequent case of *Pidduck v Molloy*[42] however, Lord Donaldson MR stated that whilst 'speaking to the plaintiff was not of itself a tort or… crime,' as it was 'usually for the purpose of intimidating, threatening or abusing', this was clearly capable of amounting to one and an injunction could be granted.[43] The Court of Appeal in *Burnett v George*[44] subsequently confirmed this approach when it held that where there is proof of actual damage to health resulting from harassment the conduct is tortious. On this basis, the Court came full circle and re-affirmed the principles in *Wilkinson v Downton*[45] and *Janvier v Sweeny*[46]. The difficulty in following these decisions though rests on the restricted ambit of action on the case and establishing proof of damage, which is often indeterminate in nature.

A further attempt to 'fit' harassment into action on the case occurred in the case of *Khorasandjian v Bush*[47] where the court recognised that an injunction was available to curb potential risk of harm. This reaffirms Fleming's 'weapon against risk' theory relayed earlier and is consistent with the assumption that a tort of harassment represents freedom from conduct. Injunctions may be an appropriate remedy for conduct that constitutes harassment since the conduct is capable of persisting beyond that already endured.

[40] [1988] 2 FLR 179.
[41] Ibid 182.
[42] [1992] 2 FLR 202.
[43] Ibid 205.
[44] (1992) 1 FLR 525.
[45] [1897] 2 QB 57.
[46] [1919] 2 KB 316.
[47] (1993) 3 All ER 669.

The UK development of harassment under action on the case ended abruptly when the court in *Hunter v Canary Wharf*[48] subsequently overruled the decision in *Khorasandjian v Bush*[49]. Lord Goff laid any further discussion of the development of the tort of harassment to rest when he stated that there was now statutory protection in place, which meant that the civil law was no longer troubled with the question of whether to develop such a remedy.[50]

Similar to the position in the UK, the initial development of the tort of harassment in the United States recognised that proof of actual physical injury was also necessary to establish an action[51] and provided the harassing acts were recognised as 'outrageous', which was equated with offensive, they were regarded as tortious. Following this, the courts established that where the act was intentional, proof of actual physical injury was not necessary.[52] This did not extend to negligent conduct, but where the acts were willed and 'outrageous' there was 'no social utility in granting an exemption from liability based on an absence of physical injury'.[53]

Most notably though, was the development of the principle that the nature of the act as outrageous may lead to an inference that the conduct was reckless or intentional.[54] This is congruent with the approach taken in *Jane Doe*, that the act need not be willed or negligent to establish breach of privacy if it is unjustified. In *Grosse v Purvis*, the court considered a willed act was an essential element to establishing harassment. However, if an intrusion is established as highly offensive, and where the intrusion is highly offensive, an inference that the conduct was willed or negligent, then a willed act as an element of an action in privacy would loose its efficacy. The focus is on whether the conduct was offensive, not on whether it was willed, which seems more appropriate since privacy is concerned with conduct that encroaches on the personal sphere.

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[48] [1997] 2 ALL ER 426.
[49] (1993) 3 All ER 669.
[50] *Hunter v Canary Wharf* [1997] 2 ALL ER 426; *Protection from Harassment Act 1997* (UK).
[51] *Read v Maley* (1903) 74 SW Ct App Kentucky 1079; *Samms v Eccles* (1961) 358 P.2d Sup Ct Utah 344; the progression in the US is summarized from Martin Lishexian Lee, above n 31, 193.
[52] *State Rubbish Collectors Association v Siliznoff* (1952) 240 P.2d Sup Ct California 282.
[53] Ibid; Martin Lishexian Lee, above n 31, 193.
[54] *Rogers v Loews L'Enfant Plaza Hotel* (1981) 526 F.Supp. US District Ct Columbia 523; *Howard University v Best* (1984) 484 A. 2d Columbia Ct App 958; Townshend-Smith R, 'Harassment as a tort in English and American Law; the Boundaries of *Wilkinson v Downton* (1995) 24 (3) *Anglo-American Law Review* 299; Martin Lishexian Lee, above n 31, 193.

Similar to the discussion on the development of the tort of privacy, there are questions in relation to the ambit of the tort of harassment, and the types of defences that may be appropriate. Since there is a tendency to use statutory analogy to assist in characterising the nature of the subject matter as private or the conduct as harassment in the cases that have recognised invasion of privacy,[55] statute may assist in identifying other principles in relation to the development of separate torts. The following analysis of the statutory recognition of privacy is limited to the *Criminal Code*, since the focus of this paper is predominantly concerned with the statutory analogy drawn in *Grosse*. However, prior to the discussion on statutory privacy, it is relevant to set out the historical context of the recognition of privacy or the lack of it, at civil law.

From Parks and Possums to Perves and Publishers

Traditionally, the decision in *Victoria Park Racing and Recreation Grounds Company Ltd v Taylor*[56] was considered a bar to the development of a tort of invasion of privacy. In this case, invasion of privacy was only considered in a narrow sense, from the view that if it arose, it did so in nuisance or as a right that ran with the land. The majority of judges in *Victoria Park* by a narrow margin of three to two held that breach of privacy based on a right to freedom from the view of one's neighbours was not actionable in nuisance and that neither was there such a thing as property in a spectacle.[57] The court found *per curium* that the rule in *Rylands v Fletcher*[58] did not apply, since there was no unusual use of the defendant's land that had interfered with the plaintiff's property rights.

The majority stated that 'if a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title these two things must concur, damage to himself, and a wrong committed by the other'.[59] That fact that the plaintiff sustained damage was not of itself sufficient, and the majority found no legal principle that the court could apply to remedy or protect the plaintiff.[60]

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[55] *Grosse* [2003] QDC 151 (Unreported, Senior Judge Skoien, 16 June 2003); *Jane Doe* [2007] VCC 281 (Unreported, Judge Hampel, 3 April 2007).
[56] 1937 WL 27007.
[57] Ibid 493, 497, 506, 510, 526, 527.
[58] (1868) LR 3 HL 330.
[59] *Victoria Park* 1937 WL 27007, 525.
[60] Ibid 496, 497, 506, 510, 526, 527.

The majority based its decision on declaratory theory, that the law is not free to develop or adopt new principles, it must be founded on those that already exist and thus their approach narrowed the circumstances in which the court could consider the recognition of action in privacy.[61] On this basis, the damage suffered by the plaintiff was *damnum sine injuria*. The court recognised the loss of privacy as harm but the law could not protect from it. A result of the decision was the 'misconception' that there was no scope for the recognition of invasion of privacy and the focus on nuisance and proprietary rights had thus fettered the development of a tort at civil law for more than half a century until the court in *Lenah Game Meats* quashed the fallacy.

In *Lenah Game Meats*, the action lay in trespass to land and breach of privacy. The plaintiff sought to establish an injunction against the defendant to restrain the use of information obtained from another's trespass. However, to obtain an injunction in equity it is necessary to establish that the use of the information would be unconscionable.[62] The respondents conceded that the information regarding possum slaughtering was not confidential, nor imparted in confidence. On this basis, an injunction was unavailable[63] as there was no maintainable cause of action against the appellant through which to infer the use of information would be unconscionable.[64]

Chief Justice Gleeson spoke favourably of the future recognition of invasion of privacy, when he said that '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'.[65] His Honour however, recognised that that a 'reference to 'some private act' was central to the respondent's problem. He stated that although the activities that were filmed took place on private property, they were not 'shown, or alleged to be private in any other sense. Therefore, he could not impose an obligation of confidence, as no reasonable person would understand that the information was intended to be secret.[66]

[61] This approach was later criticised by Callinan J, who stated that declaratory theory was a 'legal fiction', *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92; *Lenah Game Meats* (2001) 208 CLR 199, 328, 330.
[62] (2001) 208 CLR 199, 223.
[63] Ibid 266, 223.
[64] Ibid 223.
[65] Ibid 225, 266.
[66] Ibid 223.

The fact that the activities filmed did not retain their quality of 'privacy' since the process behind the killing and preparation of possum meat was knowledge already in the public arena, was an obstruction to establishing that there was an intrusion into the respondent's privacy.[67] The recognition that there was no unconscionable use of the information was founded on the fact that the information itself was not secret rather than by establishing that subject matter was private. Although the respondents conceded the information was in the public arena, they had not argued that there is a large difference between public knowledge available and actual empirical knowledge brought to the public's attention. Knowledge of the slaughtering and processing of possum meat may have been notorious but what the respondents did in the course of their business was their own 'private matter', and therefore confidential. On this basis, to equate the equitable principle of unconscionability with privacy may have substantially restricted the effective recognition of privacy since the focus was limited to confidentiality and secrecy of the information itself rather than whether there was a reasonable expectation that the subject matter was private.

Both Kirby and Callinan JJ were in dissent on the issue of whether an injunction would be available. Kirby J stated that a common thread of earlier cases involving invasions of privacy was that an injunction would be available in equity where the plaintiff could demonstrate that the use of the information would be unconscionable.[68] He cautioned against striking out an injunction on the basis that there was no viable cause of action, at least where there may be reason to expect that upon a closer examination of the applicable law and relevant facts, 'colour and content' may be added to the 'application and development of legal principle'.[69]

From His Honour's dictum, it appears he considered that upon reflection, the development of the law in relation to privacy was a possibility, and that an injunction should be available to curb potential risk. This view was similar to that expressed by Callinan J who felt that an injunction should be available and that it was an appropriate time for the consideration of the development of a tort of privacy within 'a distinctly Australian context'.[70]

[67] Ibid 227.
[68] Ibid 273.
[69] Ibid 268.
[70] Ibid 328.

In relation to the development of a tort of invasion of privacy, the court quashed the common misconception that *Victoria Park* had rejected a civil law right to privacy by stating that it did 'not stand in the path of the development of such a cause of action'.[71] Kirby J stated that '[it] may be that more was read into the decision in *Victoria Park* than the actual holding required'[72] and Callinan J drew attention to the fact that the case had been 'decided by a narrow majority' and that were it decided today, it may not have been decided the same way.[73] On this basis, the court identified the rationale for the development of a tort of privacy, but was unable to apply it to the facts of the case since the majority view was that a corporation could not bring an action in invasion of privacy.[74]

The first Australian civil law recognition of an action in privacy may be attributable to the decision in *Grosse v Purvis*, a Queensland District Court case that dealt with invasion of privacy through stalking. Whilst this type of intrusion into privacy is distinguishable from that in *Lenah Meats* and *Victoria Park* since these cases were primarily concerned with privacy of information, the case is relevant to the present discussion of two limbs of privacy and the argument in favour of the development of two separate torts.

Senior Judge Skoien chose to take what he considered to be the 'logical, and desirable', but 'bold step' of developing a tort of invasion of privacy to compensate those wrongs which did not fall within the ambit of other recognised torts.[75] His Honour considered the essential elements of the tort of invasion of privacy to be:

> (a) a willed act by the defendant
> (b) which intrudes upon the privacy or seclusion of the plaintiff
> (c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities
> (d) and which causes the plaintiff detriment in the form of mental psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do [76]

[71] Ibid 248.
[72] Ibid 278.
[73] Ibid 321, 322, 324.
[74] Ibid 326, Callinan J dissenting on this issue.
[75] *Grosse* [2003] QDC 151 (Unreported, Senior Judge Skoien, 16 June 2003) [442].
[76] Ibid [444].

The test outlined by Senior Judge Skoien draws attention to the distinction between privacy and seclusion that supports the two-limbed approach to privacy. His Honour clearly considered that privacy and seclusion were different factors in their own right when he stated that an essential element of a tort of privacy was a willed act, 'which intrudes upon the privacy or seclusion of the plaintiff'. His Honour's distinction between privacy and seclusion reflects a step towards the recognition of two limbs of privacy. It also may highlight the practical difficulties in dealing with the two limbs of privacy under one tort.

The juxtaposition between privacy and seclusion validates the argument for separate torts. To emphasise this point, invasion of privacy may be characterised as the observation or communication of subject matter that is proximate to an individual's sphere of privacy. This may not necessarily involve a contemporaneous awareness by the individual of the conduct that constitutes the intrusion but when it does, then the act or acts also intrude on an individual's seclusion. In relation to harassment however, the individual must be aware of the conduct and the act or acts must be protracted, since the principle behind harassment is that behaviour goes beyond what a reasonable person would endure. Harassment may also include observation and/or communication however communication is usually directed at the individual rather than about the individual. Thus, this distinction in addition to others outlined earlier, widen the gap in the relationship between privacy and harassment and strengthen the proposition that adequate protection of privacy requires the recognition of two separate torts.

Senior Judge Skoien justified the application of the tort of privacy to conduct amounting to harassment and in doing so illustrated one of the limbs of privacy. His Honour drew a correlation with section 359B of the *Criminal Code* to characterise the nature of the conduct as stalking, and strengthen the proposition that harassment was an invasion of privacy. He referred to the fact that of nearly all the offences in the *Code* under which an individual may be indicted, an 'actionable tort' is available, 'so that the victim would have the right to sue in a civil court for damages'. In his opinion, there was no reason why this would not extend to the new offence of stalking.[77]

[77] Ibid [420].

His Honour considered an essential element of the tort of privacy was that the intrusion must be highly offensive to a reasonable person of ordinary sensibilities. To support the introduction of a highly offensive test, Senior Judge Skoien referred the approach adopted by Gleeson CJ in *Lenah Game Meats*,[78] and the analogy the Chief Justice drew with the first of the four classes of privacy accepted in the United States.[79] Gleeson CJ favoured this view since it included the 'highly offensive' test to determine what is private. However, it must be emphasised that His Honour referred to this test as 'useful' in establishing what was considered 'private'. He did not state that this test was necessary, as a threshold to ascertaining there had been an intrusion that was unreasonable, such as that devised in Senior Judge Skoien's test.

One interpretation of Gleeson CJ's reasoning is that if an intrusion is 'highly offensive' it may prima facie establish that the intrusion breached that which may be considered 'private', and where the intrusion or disclosure is not 'highly offensive' then the plaintiff may need to establish that the intrusion breached that which was considered private. However, on Senior Judge Skoien's approach, unless the intrusion is highly offensive it will not establish that the matter is private which may unnecessarily narrow the circumstances in which a breach may arise. On this basis, the highly offensive test may be more appropriate as a salient factor in determining the subject matter is private, rather than as an element of the tort of privacy itself.

Whether something is private is not the subject of the inquiry in *Grosse*; it is the freedom to be left alone. Since the issue in *Lenah Game Meats* was privacy of information based on a reasonable expectation of confidentiality, the reference to highly offensive must viewed in the context of its application to the consideration of establishing unconscionability in equity. On this view, to justify the application of a highly offensive test in tort based on its application in equity alone may be inappropriate, since it reflects a more serious degree of conduct equated with unconscionability.

[78] (2001) 208 CLR 199, 226; referring to the United States *Restatement (Second) of Torts* § 652A (1977) ('*Second Restatement*').
[79] *Grosse* [2003] QDC 151 (Unreported, Senior Judge Skoien, 16 June 2003) [437].

One possible justification for the use of the highly offensive test may be Senior Judge Skoien's conclusion that harassment may be an aggravated form of invasion of privacy. It follows from this that to establish harassment a more stringent test is required than that relating to other invasions of privacy and the highly offensive test may be a necessary element to establishing harassment at civil law.

In addition, the fact that Senior Judge Skoien chose to apply a highly offensive test to the issue of harassment rather than the reasonable expectation of privacy and confidentiality test adopted in *Lenah Game Meats* supports the proposition that two limbs of privacy diverge and must be approached differently. However, if the courts adopt Senior Judge Skoien's view, and do not delineate between privacy and harassment and treat harassment as an aggravated form of privacy, how is it determined when consent is available and when it is not? Since it defies common sense to consider that an individual could consent to acts beyond their endurance, consent would not be a defence to harassment whereas in relation to observations and communications it would.[80] On this basis, adopting harassment as an aggravated form of invasion of privacy fosters uncertainty and may inevitably lead to drawing an imaginary line to distinguish aggravated conduct. This may involve value judgements on the degree that the acts are highly offensive, which seems an inappropriate way to develop the law.

The alternative to treating harassment as an aggravated invasion of privacy is to recognise it as a separate tort under the two-limbed approach to privacy. In *Grosse v Purvis,* Senior Judge Skoien canvassed the possibility of a developing tort of harassment 'separate and distinct from an invasion of privacy' based on remarks of Gummow and Hayne JJ (and Gaudron J) in *Lenah Game Meats*.[81] In *Lenah*, their Honours gave credence to an interpretation put forth by Todd of a possible cause of action for harassment as being[82]

> … unwanted harassing and annoying conduct which the defendant knows or ought to know will cause fear or distress to the victim and which is of such degree of seriousness that an ordinary person should not reasonably be expected to endure it.[83]

[80] Ibid [400].
[81] Ibid [448].
[82] (2001) 208 CLR 199, 266.
[83] Stephen Todd, above n 29, 200, 204.

In Senior Judge Skoien's view, although the 'essentials' suggested by Todd where clearly made out, there was no need to consider whether 'harassment' existed as a separate cause of action since the action in invasion of privacy had been presented as one of stalking, which he regarded as synonymous with harassment. His Honour's preference instead, was to characterise the conduct on the part of the defendant as protracted and persistent, which in his opinion was 'merely an aggravated form of invasion of privacy'.[84] This supports the proposition that some sort of distinction divides invasions of human dignity and harassment, but it raises the question, do we treat harassment as an aggravated form of privacy or as a separate action? The forthcoming investigation into the distinction between privacy and harassment in both civil law and statute suggests the latter may be more appropriate.

The difficulty with accepting *carte blanche* the outcome in *Grosse v Purvis* is that the precedent value of the District Court has little weight. This is highlighted by the fact that in the ensuing case of *Giller v Procepets*[85] in the Supreme Court of Victoria, where invasion of privacy arose as a result of the communication and threatened distribution of video material revealing the plaintiff and the defendant engaged in sexual activities, the court did not refer to *Grosse* at all. The omission may be dismissed on the basis that the facts in issue were decidedly different. However, this may also reinforce the two-limb approach to privacy and the fact that the right to keep something private does not necessarily relate to the freedom to be left alone.

His Honour only briefly referred to *Lenah Game Meats* as authority for the proposition that the tort of privacy was developing since that case related to information privacy[86] and declined to countenance a claim of breach of privacy on the basis that the law in Australia had not yet developed to a satisfactory point where the tort was recognised.[87] However, His Honour's decision does not negate a consideration of the emergence of a tort of privacy. The decision highlights that the courts must adequately develop a framework before the tort is fully recognised.

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[84] *Grosse* [2003] QDC 151 (Unreported, Senior Judge Skoien, 16 June 2003) [451].
[85] [2004] VSC 113 (Unreported, Gillard J, 7 April 2004) ('*Giller'*).
[86] Ibid [187]; see also *Kalaba v Commonwealth* [2004] FCAFC 326 (Unreported, Tamberlin, North and Dowsett JJ, 14 December 2004) [8], where the court referred to the trial judge in that case Heerey J, who had stated that 'on the present state of authorities there was no tort of privacy'.
[87] *Giller* [2004] VSC 113(Unreported, Gillard J, 7 April 2004) [188].

In addition, the outcome in *Grosse* may establish more than just the recognition that there has been a successful action for stalking in civil law since it draws attention to the distinction between privacy and harassment. The omission to canvass the *Grosse* case in *Giller* and the lack of jurisdictional value in the decision in *Grosse* should not detract from the significant contribution that the decision may bring to the development of a conceptual framework for the recognition of two limbs of privacy.

Contrary to the lack of recognition in *Giller*, in the *Jane Doe* case Judge Hampel not only referred to the decision in *Grosse*, Her Honour positively affirmed it as the first authority to recognise that a tort did now exist.[88] The plaintiff brought an action based on breach of confidence, invasion of privacy and breach of 4(1A) of the *Judicial Proceedings Report Act 1958* (Vic) which prohibited the publication of information identifying a victim of a sexual offence. Since this case involved an invasion of privacy through the communication and broadcast of details of the plaintiff who had been the victim of a rape, the facts of this case involved privacy of information, rather than conduct that constituted harassment which Her Honour considered required a different approach to that taken in *Grosse*.[89] This brings to light the recognition that the divergence between the right to privacy and the right to be free from harassment requires a separate and distinct approach.

Her Honour considered the conduct of the defendants to be 'unjustified' as opposed to willed acts, which had breached the plaintiff's reasonable expectation of privacy through the communication of confidential information. Since Her Honour considered it necessary to use the reasonable expectation of privacy approach rather than the highly offensive test this may support the proposition that acts that intrude on privacy must be distinguished from those that constitute harassment. It also emphasises that privacy is a diverse notion that easily encompasses a diaspore of issues that may not always be capable of being resolved in the same manner.

[88] [2007] VCC 281 (Unreported, County Court of Victoria, Judge Hampel, 3 April 2007) [158].
[89] Ibid [159].

In *Lenah Game Meats,* the action failed partly because there had already been communication of the information to the public. Contrasting this outcome and highlighting the difficulties that arise in a consideration of what is iniquitously public, Judge Hampel rightly avoided the secrecy vs. privacy debate that was the demise of the action in *Lenah*. There was clearly an expectation that information of a sexual nature would remain private, and any disclosure of that information was a decision for the plaintiff herself.[90] On this basis, the communication of the information to the public at large did not affect the quality of the information being private.[91] The contrary positions in *Lenah* and *Jane Doe* imply establishing a breach of information privacy should not rest solely on the degree that a fact is known or the intrinsic value of the information. This may inappropriately restrict the protection of private matter and divert the focus from the true nature of the inquiry, which is whether it is reasonable to expect that information is private.

Adopting Judge Hampel's approach, the type of information would strengthen the assumption that there was a reasonable expectation that the information would remain private regardless of whether the information was in the public arena. The fact that information of a sexual nature is recognised by statute as private reinforces the presumption that it is private at civil law. Judge Hampel's reliance on statutory inference to confirm that sexual subject matter is private is consistent with the reasoning in *Grosse*, where His Honour drew an analogy with stalking under the *Criminal Code* to establish breach of privacy.[92] Thus, it is possible to categorise different aspects of what is private by reference to statute just as it is possible to identify harassment by statutory analogy. However, in the absence of an inference with matter recognised as private through statute such as that of a sexual nature, categories of privacy may need to be developed incrementally, on a case-by-case basis.

[90] Ibid [163].
[91] Ibid.
[92] *Grosse* [2003] QDC 151 (Unreported, Senior Judge Skoien, 16 June 2003) [420].

In her decision to adopt the reasonable expectation approach to information privacy, Judge Hampel canvassed the practicality of the 'highly offensive test' that Gleeson CJ had referred to *Lenah Meats.*[93] Her Honour stated that Gleeson CJ had 'made clear, the test is… not one of universal application' and that in her view, the test applied to disclosure of information, 'not to the nature or the quality of the information itself'.[94] In Her Honour's opinion, what is being protected is not 'highly offensive information' but 'highly offensive behaviour'. Thus, Her Honour considered the application of the highly offensive test was to protect an individual's privacy from conduct not to protect their private information. The distinction drawn highlights the two limbs of privacy and the divergence between approaches appropriate to adequate protection. Whilst the highly offensive test may be pertinent to an action in harassment since the focus is on the conduct rather than any expectation by the individual, difficulties arise in its application to information privacy.

Judge Hampel made mention of the caution that Lord Nicholls had made in *Campbell v Mirror Group Newspapers Ltd* [95] in relation to the 'highly offensive test' when His Honour said

> 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... This could be a recipe for confusion.[96]

Judge Hampel stated that these concerns dissolve once it is recognised that the 'highly offensive test' formulated by Gleeson CJ,

> [r]elates to the disclosure of 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.[97]

[93] (2001) 208 CLR 199, 226.
[94] *Jane Doe* [2007] VCC 281 (Unreported, Judge Hampel, 3 April 2007) [115].
[95] *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457.
[96] Ibid [21], [22].
[97] *Jane Doe* [2007] VCC 281 (Unreported, Judge Hampel, 3 April 2007) [118].

The reasoning of Lord Nicholls and Gleeson CJ's provided the basis for Her Honours dismissal of the 'highly offensive' test, and Her Honour was satisfied 'that the subject matter was capable of being characterised as information which the person to whom it relates has a reasonable expectation would remain private'. The decision to omit the highly offensive test avoids judgement on the degree of intrinsic value of the private matter. However, in the absence of a statutory inference to aid in identifying the subject matter as private, the scope of privacy may need to be tempered.

A test of proximity provides an alternative to the highly offensive test, which may be more appropriate in determining the boundaries of the personal sphere of an individual's privacy. Consequently, proximity may be more effective as a limiting factor that attaches to a 'reasonable expectation of privacy' in the absence of recognised private matter. The adoption of proximity to confine the scope of a reasonable expectation of privacy may also alleviate the propensity to consider a 'highly offensive test' a necessary element of a tort of privacy, which from the tone of its reception by the courts to the issue of information privacy, may be inconsistent. Accordingly, under the two-limb approach, the highly offensive test may appropriately confine its operation to harassment, which is concerned with conduct.[98]

In constructing a framework for the recognition of privacy, the 'personal sphere' may be capable of a wide definition that relates to proximity to the individual. It may involve closeness, nearness or some connection, including the nature of any relationship between the parties and causal proximity as between the particular act and the subsequent injury.[99] As Justice Deane recognised in relation to negligence, 'proximity [is] a broad and flexible touchstone…and the identity and relative importance of the considerations relevant to an issue of proximity will obviously vary in different classes of cases'.[100] Applying the same logic to augment privacy, proximity may assist in the recognition of privacy at civil law by delimiting the scope of privacy and supporting the progression of the law incrementally rather than aiding in its development in leaps and

[98] Compare *Sutherland Shire Council v Heyman* (1985) 157 CLR, 43, 44, Brennan J who considered the 'proximity' test to be a 'juristic black hole' in relation to negligence.
[99] See *Jaensch v Coffey* (1984) 155 CLR 549, 584-5, for a definition of proximity in relation to negligence.
[100] Ibid 584-585; see also Sutherland *Shire Council v Heyman* (1985) 157 CLR 424.

bounds.[101] The law may develop 'novel' categories of privacy by analogy, but where there is no inference drawn from established class or principle then a test of proximity may ascertain that the subject matter was private. The proximity test as a limiting factor to the broader notion of privacy seeks to define the precise ambit of the personal sphere that an individual would expect to be private in the absence of a recognised category.

In *Jane Doe,* Judge Hampel referred to the prohibition on publication of information under section 4(1A) of the *Judicial Proceedings Report Act* as strengthening the conclusion that the information was private and that a reasonable expectation of privacy arose. Her Honour drew an analogy with the statutory provision to establish prima facie that the information was of a private nature since the existence of the statutory prohibition 'in itself [gave] rise to a reasonable expectation of privacy'.[102] By being able to characterise the nature of the subject matter by reference to the recognition in statute that it is private, the personal nature of the subject matter is uncontested and strengthened in character.[103] However, where the subject matter is not overtly private, Her Honour's test may not be adequate, and it is in this context that the proximity test as a limiting factor to a reasonable expectation of privacy may be relevant.

The introduction of a test of proximity should not be dismissed on the basis that it has not been applied to a new area of law before. In Judge Hampel's opinion,

> 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 civil law to develop new causes of action, or to adapt existing ones to contemporary values or circumstances is stultified[104]

This approach may validate conceptualisation of privacy under two limbs and support the introduction of a test of proximity. The acknowledgment of two limbs of privacy paves the way

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[101] Such has been the commentary of the approach of the New Zealand Courts in relation to invasion of privacy; See D Butler, above n 30, 357; where the comments arose specifically in relation to *Hosking v Runting;* See also *Hosking v Runting* [2005] 1 NZLR 1, [92], [117], where the court recognised that the scope of invasion of privacy should be developed incrementally in the future.
[102] *Jane Doe* [2007] VCC 281 (Unreported, Judge Hampel, 3 April 2007) [119].
[103] See John Carroll, Gretchen Bennett, *Australia: Privacy Protection In The Courts: The Jane Doe Case***,** (2007) Clayton Utz <http://www.claytonutz.com/areas_of_law/controller.asp?aolstring=17&ns=313> at 8 October 2007.
[104] Ibid [161].

for the development of approaches that are more specifically designed to protect the category of privacy to which they relate. Moreover, the fact that privacy is only just emerging as a cause of action and the courts are yet to acknowledge harassment as a separate tort should not act as a bar to its recognition provided the principles behind their development are firmly grounded.

Judge Hampel used the capacity of the law to develop as the basis for distinguishing the decision in *Giller*. Her Honour noted that Gillard J had expressly stated that the law had not developed far enough to recognise the tort but stated that it was Gillard J's opinion at that time, and that since then, then civil law had been 'overtaken by later developments'.[105] Although the facts in *Giller* also involved privacy of information of a sexual nature, Judge Hampel did not consider that it stood in the way of establishing an intrusion in the 'very different circumstances' of the case before her.[106]

Judge Hampel's decision to distinguish the facts in *Giller* highlights that the fundamental issue in the debate on privacy is not so much lack of a precise definition, but confusion in identifying privacy as rights, interests or duties. The issue in *Giller* was information privacy relating to the communication of material relating to sexual acts, as it was in *Jane Doe* and it is difficult to reconcile distinguishing the facts as 'different circumstances' based on nuances relating to the nature of the information. Through distinguishing between the right to privacy and the freedom to be left alone, the perplexity of identifying the material fact in issue by analogy with earlier decisions may dissipate. The fact that breach of privacy was not the prime issue involved in the *Giller* case, but a side issue that was resolved summarily, does not detract from the importance of the rationale for the outcome. If the Supreme Court of Victoria had held only two years previously that the civil law in that jurisdiction had not yet developed sufficiently to recognise breach of privacy, then it is arguable that it is for that court or higher to decide that the time is right for recognition. The decision in *Jane Doe* may be more of a leap in the development of the tort in this context, rather than the incremental development that Her Honour described in her decision.[107]

[105] Ibid.
[106] Ibid.
[107] Ibid [162].

Both Australian cases that have established that a tort of privacy exists are decided at a district court level, which reflects uncertainty in the state of the law given their diminutive precedent value. In addition, the inconsistent use of the 'highly offensive' and 'reasonable expectation' tests and the fact that the tort of privacy was not recognised at a Supreme Court level exacerbates the ambiguity of the law. However, the dichotomy between the approaches in *Grosse* and *Jane Doe* indicates on another level, how it is possible to conceptualise privacy through the recognition of two separate torts and the failure of the court in *Giller* to recognise privacy as actionable may reflect the problems inherent in conceptualising privacy as having two distinct limbs.

The preceding discussion has laid the foundation for the recognition of privacy and harassment as separate torts. As the decisions in *Grosse* and *Jane Doe* reflect a tendency to use statutory analogy to characterise the nature of the act as private, the following discussion centres on the same dichotomy of privacy that exists under the *Queensland Criminal Code* to strengthen the impetus for recognition of two limbs of privacy at civil law.

Argumentum a Pari
Distinguishing Privacy from Harassment through Statutory Analogy

Through an investigation of developments in the *Criminal Code* that reflect the distinction between the right to privacy and the freedom to be left alone, it may be possible to justify parallel recognition of two limbs of privacy in civil law. The fact that parliament has seen fit to separate privacy from harassment supports the view that in order to build a framework for the protection of privacy that operates effectively, privacy should not be viewed from one overarching theme.

The recent introduction of new offences codify invasion of privacy as a criminal offence and provide redress for offences against individuals in private and public places where a reasonable individual would expect privacy.[108] The sections reflect the recognition in statute that the existing provisions were inadequate to deal with the right to keep something private and that

[108] *Criminal Code Act 1899* (Qld), section 227A and B.

privacy requires its own distinct catalogue of offences separate from those recognised as stalking.

Following the legislative example, in civil law distinct categories of privacy and harassment are capable of development through acknowledging those statutory classes that already exist. The following discussion highlights the legislative recognition of distinct categories of privacy and stalking in order to support the proposition that the two-limbed approach to privacy is appropriate in civil law and demonstrate the possibility that foundational principles may be identified that assist in the effective operation of a framework for the protection of privacy.

Human Dignity and Autonomy

Under the *Criminal Code*, invasion of privacy sits under the umbrella of 'offences against morality' and is categorised as an indecent act against the person.[109] This nomenclature is consistent with civil law, which equates privacy with human dignity and autonomy.[110] The object of the provisions is to criminalise conduct that amounts to voyeurism in circumstances where a reasonable person would expect their privacy protected.[111] However, the legislation is limited to protecting an individual from being observed or visually recorded without their consent, in private places or while engaged in private acts.[112]

The provisions signal that in statute, there is no 'free standing' right to privacy, but they demonstrate that more particularised interests in privacy are capable of being recognised. In civil law, often the distinction that is drawn between what is private and what is not centres on

[109] The provisions were introduced under the *Justice and Other Legislation Amendment Act 2005* (Qld).
[110] *Jane Doe* [2007] VCC 281 (Unreported, Judge Hampel, 3 April 2007) [108], [109]; *Campbell v MGM* [2004] 2 AC 457, [51]; *Douglas and Others v Hello Ltd and Others* [2005] 65 IPR 449; *Lenah Game Meats* (2001) 208 CLR 199, 266.
[111] Hon. LD Lavarch, Minister for Justice and Attorney-General, Justice and Other Legislation Amendment Bill, *Weekly Hansard*, 8 Nov 2005, 3745.
[112] Nicolee Dixon, Unauthorised Photographs and the Justice and Other Legislation Amendment Bill 2005 (Qld), *Queensland Parliamentary Library*, Research brief No 2005/24, 5, 6; A misdemeanour is committed under s 227A (1) where a person observes or visually records another person, in circumstances where a reasonable adult would expect to be afforded privacy— without the other person's consent; The maximum penalty is two years which is consistent with the penalty already provided under section 227 for indecent acts.

whether the conduct is public or private.[113] This is inadequate, as 'there is a large area between what is necessarily public and what is necessarily private'.[114] However, the legislative distinction between public and private has the potential to delimit the sphere of privacy, since it defines the ambit of place by the type of activity that would prima facie occur there. The *Code* differentiates between observation and communication of private matter, and between private places and private acts to identify different forms of privacy.

Under subsection (1)(i) the observation must be of a person in a private place[115] or under (1)(ii) in any place where engaging in a private act.[116] Private places are those where it is reasonably expected that a private act might take place and private acts are confined to esoteric activities that relate to ablutions, nudity and sexuality.[117] There is no requirement of being engaged in a private act where the observation is of a private place as the expectation of privacy is much higher.[118] Provided the place is one where an individual might reasonably expect to be engaged in a private act the provision is activated. Similarly, where the complainant is engaged in a private act there is no restriction on whether the place is private or public, as the expectation again, would be commensurately higher.

Therefore, private places may not mean the grounds around an individual's home as the expectation that intimate activities would be taking place there would be minimal. Similarly, a 'place' may be a place where there is a reasonable expectation that a private act might take place, but lose its quality of privacy where other individuals are permitted to enter. The circumstances in which the invitees are admitted into the private place may therefore be central to establishing whether the 'place' will still be considered 'private'. For instance, it is unlikely that the breach of privacy complained of in *Victoria Park* would fall within the ambit of the provisions. Although

[113] *Lenah Game Meats* (2001) 208 CLR 199, 266.
[114] Ibid.
[115] Section 207A defines private place to mean a place where a person might reasonably be expected to be engaging in a private act.
[116] 116 Private act to mean (a) showering or bathing; or (b) using a toilet; or (c) another activity when the person is in a state of undress; or (d) intimate sexual activity that is not ordinarily done in public; state of undress, for a person, means— (a) the person is naked or the person's genital or anal region is bare or, if the person is female, the person's breasts are bare; or (b) the person is wearing only underwear; or (c) the person is wearing only some outer garments so that some of the person's underwear is not covered by an outer garment.
[117] See section 207 definition.
[118] Hon. LD Lavarch, above n 114, 3745; it was Parliament's intention that it was not necessary that 'a person in such a place should be engaging in a private act, before the protection of the law was triggered'.

the conduct constituted observations, it is the type of conduct observed and the fact that the private place lost its quality of privacy that excludes the invasion from the scope of the statutory offence. This demonstrates that whilst the distinction between private and public and the identification of esoteric activity as private is constructive in the recognition of an appropriate framework, the categorisation of privacy in civil law must extend further than esoteric activities to adequately protect privacy under a two-limbed approach.

The inadequacy of drawing the distinction between public and private may be reduced in civil law where the subject matter is capable of establishing that the place is private. There is no civil law bar to developing categories of privacy based on the statutory recognition that nudity and sexual activities are private. Nor is it inappropriate to accept at civil law the legislative acknowledgment that a public amenity may be available to the public, but private given the nature of the acts that take place there. By recognising that some types of acts, matter or places are prima facie private, this may assist in determining whether a reasonable person would expect to be afforded privacy at civil law. By focusing on different aspects of an individual's private sphere to develop categories of privacy on one hand and recognise categories of conduct that constitutes harassment on the other, a comprehensive framework may be developed that adequately protects an individual's privacy under two limbs.

The fact that section 227 is concerned with an individual's sphere of privacy is in direct contrast to the stalking provisions, which do not focus on identifying what is private but the offensive conduct that encroaches on what is private. The categorisation of harassment is confined to types of conduct, not matter and do not differentiate between public or private places whereas the catalogue of privacy is capable of being broken down into specific acts, matter and places. This reiterates that the identification of harassment requires a different approach to other intrusions into privacy that rely on establishing that it is reasonable to expect that the subject is private.

A Reasonable Expectation of Privacy

Under section 227, a reasonable expectation of privacy is an essential element. However, unlike the approach outlined in *Grosse v Purvis*,[119] the statutory provisions do not require the 'highly offensive' test to establish the nature of an invasion. Whilst the statutory inclusion of a reasonable expectation of privacy under s 227 is congruent with the approach in *Jane Doe,* the motivation for the omission of the highly offensive test may be different. In *Jane Doe*, the decision to omit the highly offensive test in relation to information privacy was based on the risk of it leading to a stricter test of private information. However, the fact that the legislation proscribes unlawful intrusions into sexuality and nudity means that a highly offensive test may have been considered unnecessary, as the intrusion into a private act is prima facie offensive.

Equally, where the reasonable expectation of privacy test is used, this may subsume the highly offensive test since conduct that amounted to an invasion that was highly offensive may establish that a reasonable expectation of privacy arose.[120] The reasonable expectation test is much broader in application than the highly offensive test and an expectation of privacy may exist where the invasive conduct is not highly offensive 'to a reasonable person of ordinary sensibilities'.[121] Through the adoption of the reasonable expectation test, the highly offensive requirement is absorbed and its efficacy as an individual test is minimised.

What may be concluded from this observation is that in relation to privacy of information and issues of sexuality, both the civil law and statute have recognised that the highly offensive test is unnecessary.[122] This is in direct opposition to the recognition in both civil law and statute that harassment is highly offensive.[123] The differential treatment of both harassment and privacy in civil law and statute reiterates that the two limbs cannot be dealt with under a unified approach and reinforces the proposition that separate torts are appropriate. In *Grosse,* Senior Judge Skoien viewed harassment as an aggravated invasion of privacy at civil law, and it follows from this that the imposition of a 'highly offensive' test may be necessary to establish harassment. However,

[119] *Grosse* [2003] QDC 151 (Unreported, Senior Judge Skoien, 16 June 2003) [437].
[120] NSWLRC, above n 2, 164, [7.6].
[121] Ibid.
[122] *Jane Doe* [2007] VCC 281 (Unreported, Judge Hampel, 3 April 2007) [115]; section 227A, B and C.
[123] *Grosse* [2003] QDC 151 (Unreported, Senior Judge Skoien, 16 June 2003) [437]; section 359B; *R v Ali* [2002] QCA 64 (Unreported, McMurdo P, Davies JA, Byrne J, 15 March 2002) [20].

the test may be inappropriate to other intrusions since it may narrow the circumstances in which an invasion of privacy can arise and subvert the distinction between the seriousness of the conduct that constitutes either an invasion of privacy or harassment.

Senior Judge Skoien's decision to view harassment as an aggravated form of invasion of privacy is congruent with the approach under *Code,* which distinguishes between breach of privacy as a misdemeanour and harassment as a crime. This draws attention to the distinction between the two limbs privacy and the appropriateness of differential treatment. The legislative intent behind the stalking provisions was to target 'gross' invasions of privacy specifically.[124] In *R v Ali,*[125] a case brought under section 359B, the learned trial judge described stalking as a 'deliberate, carefully planned, concerted campaign' of harassment that was protracted and intentional, which in the judge's opinion, amounted to a 'gross invasion of… privacy'.[126] This view supports Senior Judge Skoien's inference that stalking constitutes a gross invasion of privacy but highlights the civil law 'highly offensive' test may be unnecessarily harsh on the plaintiff and restrictive on the type of invasions recognised outside its application to harassment.

Whilst the highly offensive test appears to be inadequate and problematic outside its application to harassment, the use of a more restrictive test in civil law may be rationalised based on public policy. Society has progressed to a point of openness in relation to private activities and information due in part to increased access to communications.[127] On this basis, a higher standard at civil law may be necessary to establish what is reasonably expected to be private and the 'highly offensive' test may be appropriate. The highly offensive requirement, by narrowing the circumstances in which a reasonable expectation can occur, excludes vexatious or trivial claims, and in some cases, inadvertent intrusions. However, entering into an analysis of varying degrees of triviality and offensiveness focuses on the intrinsic value of the subject matter, which masks the true nature of issue at hand, whether the subject matter is private.[128] If public policy

[124] Hon. LD Lavarch, above n 114, 3745; see also *R v Ali* [2002] QCA 64 (Unreported, McMurdo P, Davies JA, Byrne J, 15 March 2002) [20] where McMurdo P held that stalking constituted a 'gross' invasion of privacy.
[125] [2002] QCA 64 (Unreported, McMurdo P, Davies JA, Byrne J, 15 March 2002).
[126] Ibid [20].
[127] See generally, Judge David Harvey, 'Cyberstalking and Internet Harassment: What the Law can do' (2003) <http://www.netsafe.theoutfitgroup.co.nz/Doc_Library/netsafepapers_davidharvey_cyberstalking.pdf> 15 October 2007.
[128] Stephen Todd, above n 29, 192.

reasons provide the basis for the imposition of a highly offensive test to establish an intrusion into privacy outside its application to harassment, this will not overcome the practical difficulties in relation to privacy emphasised throughout this discussion.

The fact that Judge Hampel in *Jane Doe* did not follow the test in *Grosse,* since Her Honour considered it necessary to distinguish stalking from the publication of private information reflects that Her Honour did not consider that policy reasons compelled the application of a highly offensive test. Indeed her Honour made mention of her decision striking a 'fair balance between freedom of speech and protection of privacy', which illustrates that Her Honour had considered policy.[129] Her Honour preferred instead to follow the reasonable expectation of privacy approach, which by analogy is consistent with section 227B. It may be theorised that Her Honour's omission of the 'highly offensive' consideration and her decision to avoid the test in *Grosse*, supports the proposition that the necessary elements to establish an invasion of privacy into human dignity may be categorised as different from those that are beyond a reasonable persons endurance.

Acts beyond the Endurance of a Reasonable Person

It may be possible at civil law to develop accepted categories of harassment based on those already recognised in statute and by separating privacy from harassment, each may shape a distinct catalogue that distinguishes between the right to protection of privacy and the freedom to be left alone. Since harassment equates with the doing of an act or acts that persistently annoy or intimidate, this may be distinguished from the voyeuristic type of conduct previously examined. It is easier to categorise specific conduct which is identifiable as 'harassing, intimidating or malicious' than it is to characterise conduct which invades a reasonable expectation of privacy, thus the more specific catalogue of conduct proscribed under the stalking provisions, which is absent from the privacy provisions.

In *Grosse,* when Senior Judge Skoien used reasoning by analogy to infer from the statutory offence of stalking the recognition of an invasion of privacy under civil law he stated that the

[129] *Jane Doe* [2007] VCC 281 (Unreported, Judge Hampel, 3 April 2007) [163].

conduct complained of could generally be described as stalking.[130] Since the common usage of the term '*to stalk*' meant '*to harass*', he considered the two words were synonymous[131] and therefore an actionable tort should be available to a new offence such as stalking where 'the victim suffers personal injury or some other detriment'.[132]

Section 359B of the *Code* defines unlawful stalking as intentional conduct, directed at 'a person' that consists of at least one or more acts, which could generally be described as 'harassing, intimidating or malicious'.[133] Only one occasion is needed to establish the offence if the conduct is protracted, which suggests the provision is designed to punish behaviour that persists beyond the endurance of a reasonable person.[134] The intention referred to under section 359B(a) is that the act is directed at the person not the consequences that flow from the act. It is immaterial that the conduct is directed at another person or his or her property,[135] or that the conduct was not intended to cause apprehension, fear or detriment, or that actual violence was caused.[136] Whether the person intends that the stalked person be aware that the conduct was directed towards them or whether there is a mistake as to identity of the person at whom the conduct has been directed, are also immaterial to establishing the offence.[137] In addition, it is not necessary that the conduct protracted or otherwise, consist of the same or different acts.[138]

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[130] [2003] QDC 151 (Unreported, Senior Judge Skoien, 16 June 2003) [415]; *Criminal Code Act 1899* (Qld), section 359A and B; compare Stephen Todd, above n 29, 206, where it was stated that the use of statutory analogy was 'highly uncertain'.
[131] *Grosse* [2003] QDC 151(Unreported, Senior Judge Skoien, 16 June 2003) [416], [451].
[132] Ibid [420].
[133] The act refers to one or more acts of the following or a similar, type (which suggests that the list is non-exhaustive)– (i) Contacting a person in any way, including, for example, by telephone, mail, fax, e-mail or through the use of any technology; (ii) Loitering near, watching, approaching or entering a place where a person lives, works or visits; (iii) Leaving offensive material where it will be found by, given to or brought to the attention of, a person; (iv) Giving offensive material to a person, directly or indirectly; (v) An intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence; (vi) An act of violence, or a threat of violence, against, or against property of, anyone, including the defendant.
[134] *Grosse* [2003] QDC 151 (Unreported, Senior Judge Skoien, 16 June 2003) [420], where it was confirmed that the statutory offence of unlawful stalking involved an invasion of privacy; see also *R v Ali* [2002] QCA 64 (Unreported, McMurdo P, Davies JA, Byrne J, 15 March 2002) [20]; The types of acts referred to under the section also overlap with other statutory offences such as assault, threats, breach of privacy and indecent acts, see sections 245, 359, 227, 227A and 227B.
[135] Section 359C(2).
[136] Section 359C(4) and (5).
[137] Section 359C(1)(a) and (b).
[138] Section 359C(3).

The incorporation of a willed act as an element of a tort of privacy in *Grosse* allows a wider scope for establishing a breach than the provision since it is not necessary that the act is intended toward the person. However, the statutory exceptions to intention outlined above mean that the outcome may essentially be the same since it does not matter whom the act is directed at provided it is directed at someone. This is in contrast to establishing breach of privacy under section 227 and the test in *Jane Doe,* which do not require intention or a willed act as an element. The test of intention may be incompatible with the application of a reasonable expectation of privacy, since whether the act was intended or not is immaterial to whether a reasonable expectation of privacy has been breached.

The fact that stalking and harassment are consistent with the doing of an intentional act differs from privacy where the focus is on protecting an individual's human dignity and autonomy. In relation to stalking, the centre of attention is on the act of the accused and in privacy, the focus is on the reasonable expectation of the plaintiff. This strengthens the proposition that there should be individual application of two limbs to privacy.

Consent

The demarcation between the conduct that constitutes harassment and other behaviour that may intrude on privacy is inherently clear when focused on the issue of consent.[139] Lack of consent is an element of statutory breach of privacy. However, unlike section 227A, B and C, absence of consent is not an element of the offence under section 359B. This is consistent with the assumption that acts that constitute harassment must go beyond what may be reasonable for an individual to endure. Moreover, consent may not be valid consent where there is harassment or intimidation since the conduct may have been tolerated for a variety of reasons. For instance, in *Grosse* the plaintiff continued contact with the defendant regardless of the harassment because she wanted to maintain their extended relationship that involved both work and social activity. However, at no point did she consent to the harassment but was forced to tolerate it.

It is difficult to envisage circumstances where the victim would consent to acts, which he or she could not endure. Senior Judge Skoien affirmed this view in relation to the civil law when he

[139] Whilst the consideration of civil law defences is outside the scope of this paper, consent has been examined on the basis that it forms an element of section 227A, B and C offences.

stated that it would 'defy logic and any understanding' to accept that events which had been particularised as stalking or harassment would actually be consented to,[140] even where the victim had continued contact with the offender.[141] As evident from the comparison between section 227A and B breaches of privacy and offences that constitute harassment under section 359B some intrusions into privacy will require absence of consent as a necessary element and others will not. This corroborates the view that not all forms of intrusions into privacy may be catered for within one broad banner. While the types of offences that may fall under each limb may overlap, this does not detract from the necessity of differentiating between breach of privacy and harassment particularly where consent is concerned.

Constructing a New Conceptual Framework

The preceding discussion demonstrates that in statute, there is a marked divergence in the recognition of privacy and harassment, which reinforces the distinction between two limbs. As is evident from the discussion on *Grosse* and *Jane Doe*, whether or not by design, the progression of the civil law recognition of privacy has taken on board many aspects of the statutory provisions and their distinction between privacy and harassment.

In *Lenah Game Meats,* Gummow, Hayne and Gaudron JJ agreed that 'the disclosure of private facts and unreasonable intrusion upon seclusion, perhaps come closest to reflecting a concern for privacy as a legal principle drawn from the fundamental value of personal autonomy'.[142] These views reflect the dichotomy between right to keep something private and the freedom to be left alone that characterise the two limbs of privacy.

However, as this paper concludes the right to keep something private should not be limited to disclosure of private facts, but may also include observations and recordings of private acts, matter and places. Viewed in this way, all unreasonable intrusions upon seclusion constitute harassment and all other intrusions an invasion of privacy.

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[140] *Grosse* [2003] QDC 151 (Unreported, Senior Judge Skoien, 16 June 2003) [400].
[141] Ibid [401]; although future cases may differ on this point as the circumstances of this case were that the victim valued her friendship with the offender and by maintaining some contact the most offensive harassing behaviour was minimised.
[142] (2001) 208 CLR 199, 256.

'Harassment is a genuinely new cause of action in the process of gaining recognition'[143] and the suggestion that the development of a tort of unreasonable intrusion subsumes the tort of harassment under this approach must fail, since a tort of unreasonable intrusion upon seclusion is narrowed to the ambit of the tort of harassment. In this way, the focus is on protecting an individual's interest on one hand, and inhibiting an individual's conduct on the other, which provides a much clearer framework for the recognition of privacy.

Through the recognition of the two limbs of privacy, the civil law has the potential to develop a coherent and practical structure for the protection of privacy. The recognition of harassment in US and UK jurisdictions demonstrates the potential development of a tort of harassment within an Australian context separate from the recognition of privacy and enhances the possibility of the mutual recognition of the two limbs of privacy within civil law.

The decisions in *Lenah Game Meats* and the other cases canvassed expose an emerging recognition of the need for protection of privacy within Australian civil law and a possible approach to developing a framework to provide adequate redress. However, until a claim is brought before a superior court that is prepared to take up the challenge of addressing the issue of liability and the availability of defences, whether a tort of privacy or harassment exists beyond the abovementioned cases remains unclear.

[143] Stephen Todd, above n 29, 210.

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