

# DISTRICT COURT OF QUEENSLAND

CITATION: *Grosse v Purvis* [2003] QDC 151

PARTIES: **ALISON ROBYN GROSSE** Plaintiff  
and  
**ROBERT JAMES PURVIS** Defendant

FILE NO: D110 of 2002

DIVISION: District Court

PROCEEDING: Trial

ORIGINATING COURT: Maroochydore

DELIVERED ON: 16 June 2003

DELIVERED AT: Brisbane

HEARING DATES: 3-7; 10-12; 18 February; 31 March; 3 April; final written submissions 16 April 2003

JUDGE: Senior Judge Skoien

ORDER: **Judgment for Plaintiff for \$178,000 with interest**

CATCHWORDS: Action for damages for breach of right to privacy, quantum of damages

COUNSEL: Mr P Dunning for the plaintiff  
Mr J Curran for the defendant

SOLICITORS: Klooger Phillips Scott for the plaintiff  
Richard O'Bryen Solicitors for the defendant

[1] The plaintiff's claim against the defendant is for:-

- (a) damages for invasion of privacy;
- (b) damages for harassment;
- (c) damages for intentional infliction of physical harm to the plaintiff;
- (d) damages for nuisance;
- (e) damages for trespass;
- (f) damages for assault;

- (g) damages for battery;
- (h) damages for negligence;
- (i) a permanent injunction restraining the defendant from touching, approaching, harassing, pestering or communicating with the plaintiff in any way;
- (j) a permanent injunction restraining the defendant from visiting or entering upon any dwelling at which the plaintiff resides;
- (k) interest;
- (l) costs,

and the damages sought are compensatory, aggravated and exemplary.

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[2] These reasons are divided into chapters under the following headings:-

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## **Background**

- [3] The plaintiff was born on 30 August 1949 and thus is now aged 53 years. She was educated to matriculation level in Victoria but passed only the art course. She went to Art College and then married Mr Peter Kerr in 1969, having three children of their own and adopting a fourth. They moved to the Sunshine Coast in the early 1970's, where they ran a guesthouse.
- [4] She then became actively engaged in adult education and put a great deal of effort into the establishment of a Technical and Further Education ("TAFE") College as well as the betterment of unemployed and homeless youth. Then, especially from about 1992 onward she turned her attention to the establishment of a University on the Sunshine Coast, a goal which was ultimately achieved in 1996.
- [5] From about the end of the 1970's the plaintiff actively worked towards what I gather was a novel scheme to help unemployed youth, attending public meetings and becoming a member of a steering committee. She went to Sydney to engage the support of the ACTU Lend Lease Foundation. As a result, in about 1983 there was incorporated a non-profit company called Sunshine Coast Regional Group Apprentices Ltd which is commonly referred to as "SCRGAL" (and pronounced "scraggle"). The plaintiff became a foundation director of SCRGAL and in about 1992, the chairman of directors. SCRGAL (and other similar bodies) was designed to overcome a perceived difficulty in young people obtaining apprenticeships because of the reluctance of tradespeople, faced with lack of work continuity, to sign articles of apprenticeship for the required period of four years. Since its incorporation SCRGAL has employed many apprentices, placing them with tradesmen engaged in work.

- [6] On the evidence given in this trial I am satisfied that the establishment of the TAFE, the University and of SCRGAL on the Sunshine Coast was very much because of the efforts of the plaintiff, in recognition of which she was awarded the Medal of the Order of Australia in 1994. The defendant was one of her sponsors. In his examination in chief he spoke of her contribution to the establishment of the above three institutions in the most glowing terms thus:-

*“If it wasn’t for Alison Grosse I wouldn’t have been sitting in the chair I was sitting in. We wouldn’t have a university. We wouldn’t have a TAFE College.”*

- [7] The defendant was born on 17 December 1940 and is thus now aged 62 years. His training was as an electrician and was later an electrical salesman. He moved to the Sunshine Coast in 1980. In 1984 he became the founding Chief Executive Officer of SCRGAL, later filling the position of its Managing Director, a position he retained until 21 December 2001. There is no dispute that he was a worthy appointment. He quickly got SCRGAL established so that very soon and certainly by the end of its first decade, it was running very efficiently. During that period the plaintiff, as a director, attended meetings as required and her relationship with the defendant was a friendly, professional one. However to a large extent, during the years 1986-1988 she was heavily involved in representing local government at such events as World Expo 88.
- [8] The plaintiff’s marriage to Mr Kerr broke up in about 1985 and they divorced in 1988. She remarried to Mr John Jones, a newspaper executive in 1989 and they also divorced in July 1996. However they had fully separated in the matrimonial sense at the end of 1993 although they continued to live together under the same roof until September 1998, that is, even after their divorce. The plaintiff has remained on friendly terms both with Mr Kerr and Mr Jones. On 9 September 2000, the plaintiff married her present husband Mr Rene Grosse, a vegetable farmer. He is considerably younger than the plaintiff.
- [9] In 1994 the defendant separated from his wife and that has been the situation since then. They remain on good terms although there have been some matrimonial disputes between them.
- [10] In March 1997 the plaintiff was elected a councillor for Division 8 of the Maroochy Shire Council. On 25 March 2000 she was elected Mayor of the Shire, a position which she continues to occupy.

- [11] To assist in identifying times, places and events it is helpful to list the parties' residential addresses and phone numbers. During the following material periods the plaintiff has resided at the following addresses at which the stated land phone lines were connected:-

<b>DATES</b>	<b>ADDRESS</b>	<b>PHONE NUMBERS</b>
Various/Intermittently	19 Cootamundra Drive, Mountain Creek	5477 6524 5477 6523
January 1992 to 29 August 1996	27 Karawatha Drive, Mountain Creek	478 0420 (ph) 478 1504 (fax)
29 August 1996 to September 1999	39 Wharf Road, Bli Bli	5448 5235 (ph) 5448 5231 (ph/fax)
Approximately September 1999 To January 2000	69 Point Cartwright Drive, Buddina	54776396 (plaintiff) 5452 5896 (fax) 5444 5827 (Rae Barry)
January 2000 to June 2000	21/20 Village Green, Buderim Boulevard, Buderim	5476 7821 (ph) 5477 0601 (fax)
11 June 2000 to approximately August 2000	207-209 Lindsay Road, Buderim	5492 8369
July/August 2000 to approximately February 2001	79 Blackall Terrace, Nambour	5476 2513 (ph) 5476 1112 (fax)
Since February 2001	Lot 260 Pryor Road, Verrierdale	5449 1865 (ph)

- [12] In addition to those land lines, the plaintiff had, during the stated periods, the use of the following mobile phones:-

<b>DATES</b>	<b>SUBSCRIBER</b>	<b>PHONE NUMBERS</b>
Approximately January 1994 to December 1994	SCRGAL mobile	018 060 848
Approximately January 1995 to December 1996	SCRGAL mobile	019 628 969
Approximately January 1996 to June 2000	SCRGAL mobile	0419 667 520

Approximately May 2000 Onward	Maroochydore Shire Council mobile	0407 678 149
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- [13] At all material times the defendant lived at 11 Essex Court, Brisbane and made use of the following phones during the stated periods:-

DATE	TELEPHONE NUMBER
1992 – Present	5445 3784
1992 – 1993	018 713 677
1993-1994	018 060 848
1994 – 2001	SCRGAL mobile: 0419 662 174
1988 – 30/8/2000	SCRGAL Switch Board @ Big Top Shopping Centre: 544 2914 & 5443 2144
30/8/2000 – Dec 2001	SCRGAL Switch Board @ Evans Street: 5443 2914 & 5443 2144

- [14] Pre-occupation with her children kept the plaintiff away from active work with SCRGAL until the early 1990's, when she became the Chairman of the Board. This threw her into close contact with the defendant and each of them agrees that they worked together efficiently and effectively. She described to me her feelings towards him in 1992 as friendly, "like having another brother", his manner as "very easy-going".

### **Litigation**

- [15] As will appear, relations between the plaintiff and the defendant have gradually soured since 1992, culminating in the issue of those proceedings on 8 April 2002. From the beginning the claim was as set out in para [1] above but the statement of claim (not drawn by Mr Dunning) left much to be desired. There then ensued a number of interlocutory applications, to strike out, for leave to re-plead, for particulars, etc. Ultimately such an application came before me on 11 October 2002 (Mr Dunning by then appearing for the plaintiff). Mr Curran has at all times been counsel for the defendant.

- [16] In an effort to get the matter heard as soon as possible I gave leave to re-plead again. On 25 October 2002, recognising the length of the relevant period and the multiplicity of events said to be relevant, I made directions pursuant to rule 367 of the Uniform Civil Procedure Rules limiting the events to be particularised to a representative number and setting the trial for the week commencing 3 February 2003 before me. In the event, the number of sitting days required was not five but thirteen. Both counsel strove to stay within the spirit of my directions.
- [17] The overall legal issue which must be answered is first, whether the causes of action relied on (or some of them) exist and, second, whether they have been made out. The factual issues are diverse but broadly speaking are whether the alleged acts of the defendant occurred, and if so, whether they were wrongful or were done with the express or implied consent of the plaintiff or should be regarded as lawful because they were done for the benefit of the plaintiff. Then, of course, there is potentially the assessment of damages, compensatory, aggravated and exemplary.
- [18] In her statement of claim and its further particulars the plaintiff alleges a persistent course of loitering by the defendant at or near her places of residence, work or recreation, instances of spying on her private life, instances of unauthorised entry to her house and yard, instances of unwelcome physical contact, instances of repetitious offensive phone calls to her, some at unreasonable times, instances of the use by him of offensive and insulting language to her and instances of his offensive behaviour to her friends and relatives.
- [19] The defence generally denies those allegations and where admissions are made of acts of the defendant they are generally alleged to have been innocent. Although the defence does not, to my mind, expressly say so, it seems implicit in it that the defendant also sets up that such of his conduct as was, prima facie, intrusive of the plaintiff's privacy, was justifiable in that it was done for the protection of the plaintiff's reputation and career and/or for the protection of the reputation of SCRGAL, in which both had a deep interest. Certainly the defendant's case was developed that way.
- [20] Of necessity the evidence was wide ranging and often consisted of what might at first have been taken to be inadmissible. For example evidence of statements by a party that a phone call which had just concluded was from a particular person was sometimes admitted as part of the *res gestae* (following the principles laid down by Lord Wilberforce in *Ratten v R*

(1972) AC 3787 at 389-391 requiring the condition of such spontaneity or involvement in the event that the possibility of concoction can be disregarded). Some evidence seeming to be hearsay was admitted as going to the state of belief of the witness. Then there were occasions when objectionable evidence was not objected to, most likely because counsel (both of them experienced) perceived a tactical reason for refraining.

### **Sexual Relationship, Plaintiff/Defendant**

- [21] A Christmas break-up party of SCRGAL was held at the end of 1993 and afterwards the plaintiff and defendant left together. They talked of personal relationships and held hands. The plaintiff gave evidence that the defendant displayed a personal interest in her, which made her uncomfortable; the defendant gave evidence that the attraction seemed mutual. The plaintiff said that the defendant asked her to accompany him to a Christmas function in Brisbane on the following Monday and to stay the night which she initially refused but to which she agreed on the Sunday. The defendant said that the plaintiff, who had occasionally hinted at a possible romantic liaison between them, asked him if she could accompany him. In any event they went to Brisbane and spent the night together at the Travelodge where sexual intercourse occurred.
- [22] The plaintiff's evidence was that sexual intimacy between them re-occurred, the total number of acts being not more than six to ten, ending in late 1994 or early 1995 since when it has not occurred. The defendant's evidence was that it occurred regularly from the beginning of 1994 until the last occasion, 5 January 2000. He said it occurred 35-45 times a year until about 1996 when it tapered off to between once or twice a month; later he said four or five times a month, never less than four times a month.
- [23] The plaintiff said she was somewhat reluctant to commence this sexual relationship because, while she understood the defendant's marital life with his wife to be non-existent, she knew him to be married. She said that she thought his interest in her would pass, but she candidly conceded that she willingly engaged in sexual intercourse on the six to ten occasions when approaches were made to her by the defendant. In cross examination she maintained that even then her feelings for the defendant were never greater than close friendship, and that she did not enjoy their sexual acts.

- [24] She said, most emphatically, that she avoided the defendant's frequent attempts to kiss her and denied that she ever kissed him sexually, something which she said revolted her. The tenor of the defendant's evidence was that she was at all times a willing, even enthusiastic sexual partner, right up until 5 January 2000. He kept a diary and his evidence was that he made a practice of writing a, "√" or "yes" on those days when sexual intercourse between them occurred. The diary evidences many of those notations.

### **Massage Business**

- [25] In 1989/1990 the plaintiff undertook a twelve month course with the Swedish Massage Institute and obtained a diploma in that discipline. I understand, and the contrary was not suggested, that to be a recognised form of genuine therapeutic massage. During 1994 she decided to put her training to work to earn an income and so set up the business in a room in the house owned jointly by her and Mr Jones at 27 Karawatha Drive, having obtained the necessary permission of the Shire Council to operate it. She advertised in the local newspaper under the "Therapeutic Massage" column and clients attended the business.
- [26] In evidence in chief she said that one client asked her to perform sexual favours and, taking hold of her hand, demonstrated that he sought masturbation. She said she told him she was not interested. She emphatically denied that she ever offered sex in any form to clients of the business. In cross-examination she agreed that clients had propositioned her for masturbation on more than one occasion.
- [27] She said that the defendant reacted adversely to the carrying on of the massage business saying that she was risking her reputation and her OAM, that she was under investigation for running a brothel, that he himself had records of clients' number plates, that unspecified people ("they") were "on to you", that a written report had been prepared on her. He said that he had pleaded with people to stop them taking the OAM and that it was up to him to save it. Indeed, she said, he went further and alleged that she had performed sexual intercourse with clients, masturbated them and permitted them to masturbate in her presence. He repeated to her, accurately, a conversation she had actually had with a client. His reports of the identity of clients and description of their vehicles were disturbingly accurate. He insisted that he regale these alleged activities of hers to her. She said that he expressed these concerns and made those allegations daily while the business was in operation, with

increasing emphasis. She said that his (or any) allegations of sexual impropriety were baseless.

- [28] One night, the plaintiff said, the defendant came to her home with a document (exhibit 5) which was an unsigned purported report of a woman who had come to the massage establishment and talked to her. He said that it was only one of many documents “*they’ve got on you*” and “*they’ve had people in here watching you*”. He said “*This is just one of heaps of other documents they’ve got on you*”. He mentioned a Brisbane solicitor called Peter Maher, the police, and unspecified investigators as people interested in her activities.
- [29] Exhibit 5 is a photostat copy of a document dated 19 August 1994 which appears to be in the form of a report from an investigator about the activity of “our female agent”. Immediately I notice that the document has no letterhead or address of any description. It appears to be an entire report but it is unsigned although I consider there is sufficient room for that at the foot of the second, the last, page. In the body of the report the masseuse is reported as saying she permitted clients to masturbate while she looked away, made a reference to Ian Pashen who was said to be starting up a fantasy phone call service and escort agency, and referred to the possibility of the client/agent being a suitable escort for a prominent Caloundra politician called John about whom she made some equivocal remarks, possibly indicating the sexual expertise of John. She said that her husband did not know what went on in the massage room, and winked.
- [30] The plaintiff gave evidence of the visit of a young woman client whom she massaged but who, the plaintiff said, seemed more interested in enquiring how she might become a professional escort, a job in which she said big money could be made. The plaintiff said she spoke discouragingly and tried to make light of it although she said it made her quite distressed. It is clear that this client was the agent referred to in exhibit 5.
- [31] In cross-examination the plaintiff conceded that she told this client/agent of an occasion when a male client requested masturbation and when he persisted she threw a towel at him and said “*I’m sick of this. I’m going out. You do it yourself*” and left the room. On her return she said it became apparent that he had been joking and she conceded she probably hadn’t been strict enough, but that it had been a bit of a shock to her. She also conceded that she and the client/agent had discussed a particular male patron of the business as a possible

person for the client/agent to take up with and they theorised on his ability as a lover. She said that in the context of their conversation this was “just joking”.

[32] From about this time, the plaintiff said, the defendant would berate and belittle her regularly using such expressions as “*you’re sick*”; “*you need my help*”; “*I’m here for you*”; “*you’re finished without me*”. He spoke of records which had been kept of many car number plates, of lots of records and photographs. He referred to psychiatrists to whom those records had been shown. When she asked to see them he said that he did not have them and that “they” had merely shown them to him. He also mentioned, unfavourably, the name Ian. She had a client called Ian.

[33] Finally, she said, she became so upset with these threats and accusations and the provision by him of many accurate details of her activities that she determined to move the massage business to a medical centre where there would be less likelihood of untrue accusations and the attendance of undesirable clients. She operated the business there for a few months, I gather in 1995.

[34] In cross-examination she recalled that either before or after she moved the business to the medical centre she moved it to the Big Top Shopping Centre in Maroochydore, where SCRGAL had its offices and said that this was at the insistence of the defendant. She said he was obviously anxious to keep an eye on the business. Furthermore, they planned to offer a course of therapeutic massage to be taught at SCRGAL and to that end had advertising material printed. The plaintiff was to be the instructor, in conjunction with a trained nurse. However the plan did not prosper and she kept up the business there only for a matter of weeks before moving to the medical centre. She attended to a total of five clients, two of whom were hers and three were part of the SCRGAL programme.

[35] The defendant in evidence denied that he ever spied on the massage business or made the threats ascribed to him by the plaintiff. To the contrary, he said, the plaintiff boasted to him of the money she was making and once triumphantly waved \$600 in notes, saying that it represented only two days work “with extras”. He pointed out to her the possible consequences of these activities (which included the threat to her OAM) and tried unsuccessfully to persuade her to word her advertisements to specify that no “extras” would be available.

- [36] He said that the plaintiff actually named men she had provided extras for and specified an Ian Pashen (now deceased), a Rohan Wise, a man from Cadbury's, an Indian man and an Ian Flett.
- [37] In about August 1994, at the Big Top, he said he was accosted by a man whom he recognised as a debt collector who had done some work for SCRGAL, who asked him if he knew the plaintiff. On being told that the defendant did, the man said "*Do you realise she's mixed up in the massage business? Can you get word to her that she's being watched? Tell her to watch out; it's a very, very dangerous business and she's being watched.*" A few weeks later he found exhibit 5 in his office, apparently having been pushed under the door. He copied it.
- [38] He said he showed exhibit 5 to Mr Wilkinson, SCRGAL's solicitor, who told him that he had heard the plaintiff had been doing "favours for politicians in the area for some time". He said that Mr Wilkinson shortly afterwards told him he believed the client/agent to have been an employee of a firm of solicitors, which he named.
- [39] It is worthy of mention that when Mr Wilkinson was asked in chief about the occasion when he saw exhibit 5 (some time before 5 July 1999), he said that it was the defendant who emphasised that it established prostitution on the plaintiff's part. He said that he regarded it as a "fairly bland and at best ambiguous outline of what was going on". It certainly was not his evidence that he, at any stage, had any information or belief that she was behaving immorally.
- [40] According to the defendant, the plaintiff moved the massage business to the SCRGAL premises at the Big Top because, he said, she had become paranoid and felt it would be safer to operate there. He denied he had suggested the move. He said that the room in which she worked was beside his office and lack of soundproofing made it possible to hear what went on there. On one occasion the customer was Ian Flett (whom the plaintiff had told him used to seek masturbation) and the defendant heard him ask the plaintiff for that service. She was unwilling because of the lack of privacy but he persuaded her. The defendant, who then stormed into the room, caught them in the act. In cross-examination it was put to the plaintiff that the defendant objected to her providing "extras" in SCRGAL premises but this Ian Flett incident was not put to her.

- [41] When under cross-examination, it was put to the plaintiff that a Rowan Wise acted aggressively towards her and had requested masturbation. She admitted the former (a karate demonstration) but denied the latter proposition.
- [42] It was put to her that she had told the defendant that she had masturbated Ian Flett (denied), Mal Pratt (denied), Ian Pashen (denied) and John McGaw (she responded that he had placed her hand on his penis but she removed it within five seconds and declined - see para [26] above). She said that all of these suggestions had first been made to her by the defendant while she was running the business. She said that he reported to her in accurate detail the nature of the propositions, which a few clients (for example John McGaw) had made. She said that the defendant angrily demanded that she masturbate him, which she refused to do.
- [43] The evidence on the subject of the massage business was relevant and important because, on the plaintiff's case it was the beginning of the defendant's intrusive interest in her private life, of his aggressive denigration of her conduct, of his description of the close interest which unnamed "other people" were taking in her and of his particular role in protecting her. On the defendant's case it was relevant because it was said to be a course of conduct, which the defendant believed, was likely to react very adversely on the plaintiff (his close friend and lover) and on SCRGAL (their common business interest).

### **Peripheral Matters**

- [44] A good deal of the evidence concerned suggestions that the plaintiff (and perhaps also the defendant) had misspent SCRGAL money and misused SCRGAL property for the private advantage of her, of him and also Mr Jones, matters investigated by the Cole Royal Commission. This evidence was designed to attack the credit of the plaintiff, the defendant and Mr Jones. I gained no critical advantage from this aspect of the case which, in any event, touched only lightly on what must have involved very much more complicated circumstances than I was made privy to. Despite this, I propose later to return to some aspects of this evidence.
- [45] Another section of the evidence concerned the extent to which the defendant assisted the plaintiff at the elections of 1997 and 2000. While it may be that the defendant's help for the mayoral election in March 2000 was considerably less than in 1997, there is no doubt that he did assist her materially, at least in the last days of the campaign. I do not see much in this.

Whatever view be taken of the relationship between the plaintiff and the defendant, it seems clear that he generally assisted her to succeed in her career moves, at least up to March 2000. The real question, as I see it, relates to their out-of-hours, non-business relationship.

[46] A large number of witnesses were called by the defence who gave evidence of the apparently good relationship between the plaintiff and the defendant at material times. They spoke of them lunching together on working days and generally behaving in an overtly friendly way. Others spoke of their apparent friendship, even affection, on social occasions. Indeed, Mr Malcolm gave evidence of their dancing together at a SCRGAL function (probably in November 1998) in a style, which he described as “dirty dancing”. Mr Manley said that on occasions between November 1994 and November 2002 (he did not identify the particular dates) he saw them socially, looking as if they were “very much in love with each other”. However, he also said that they were acting “very professionally”, a description also used by Miss Bacon (para [135]).

[47] When asked to describe, “dirty dancing”, Mr Malcolm said that they were in a tight clinch with the fronts of their bodies touching. That is to me a reasonable description of dancing as it was practiced by many people for decades, until separate dancing became common in more recent times. I do not think that it was looked on by the participants then as a form of sexual activity. Mr Manley, in elaboration of his assessment of the relationship between the plaintiff and the defendant spoke of their tone of voice, their conversation, holding hands and occasionally dancing. Interestingly, he did not suggest that their dancing was of the type to cause comment of the type Mr Malcolm made. Nor did Miss Bacon, who gave evidence of seeing them dancing together.

[48] In my opinion, the descriptions given by Mr Malcolm and Mr Manley cannot be accepted. They describe the public display of closeness, familiarity, intimacy between the parties, which goes well beyond the evidence of any other witness and more importantly beyond the evidence of the parties themselves. The plaintiff’s evidence was that she did not like familiar physical contact with the defendant and tried to avoid and discourage it. The defendant’s evidence was that there used to be some affectionate physical contact in public but he did not suggest that it was ever extreme and he never said that they ever danced together in a way which would attract a comment of the type made by Mr Malcolm. Nor did he ever say that he and the plaintiff were very much in love. He described a continuing sexual relationship with the plaintiff during which, he said, the plaintiff also bestowed her favours on other men.

The tenor of his evidence of his feelings towards her suggested an infatuation rather than love. The plaintiff, of course, said that there was never anything more than close friendship, which included, in 1994, a small number of acts of sexual intimacy.

[49] All in all, I cannot take the evidence of the witnesses referred to in para [46] as establishing very much of relevance. Experience of life teaches us that people, even quite close friends, often have no real understanding of the true relationship between two people who are seen regularly but on only fairly brief, unremarkable, occasions. The fact that two people give an outward show of friendship, even affection, can be very misleading. Indeed, the breakup of a relationship between two people (even, for example, marriage) frequently astonishes their friends who have seen them often and intimately for many years but obviously have not been able to discern a serious deterioration in the relationship.

[50] There is a further complicating feature, which affected many of these witnesses, especially those who gave evidence of the behaviour of the defendant at the Buderim Bowls Club. In general they gave evidence of phone calls received by the defendant which he answered in such a way as to indicate that the caller was the plaintiff. Any opinion they formed of the relationship between the parties could only have been based on what they gathered from the defendant, hardly a dispassionate basis for assessment. For example Mr. Millerick gave evidence that the defendant told him that he and the plaintiff were “a couple”. And, at best, this evidence established that frequently (but over a rather vague period) the inference to be drawn was that the defendant left to have a meal with the plaintiff. That was, as was readily conceded by the plaintiff, the case at least until late 1996, and occasionally later. Those who had seen the events up to late 1996 would no doubt assume that thereafter a phone call received by the defendant, followed by his departure, was just more of the same and it is not difficult to imagine them telling newcomers that the defendant was off to see the plaintiff with whom he enjoyed a close domestic relationship, thereby establishing that as a fact in their minds.

[51] Then there is the well known difficulty experienced by almost all people who are asked to recall, without reference to an aid such as a diary, unremarkable events which occurred well in the past and to identify the period over which they occurred, or in the case of a particular event, the date on which it occurred. It is obvious that if such a person is first approached by one of the parties who lacks the forensic understanding of a lawyer, a leading question can,

perhaps quite innocently, put into the mind a period or a date which does not reflect the actual memory of the person.

- [52] In my view it is quite likely that such a thing occurred in respect of the evidence of Miss Owen who gave evidence of the receipt by the defendant at his home of a phone call at about 11 pm on Monday 17 April 2000, a date made relevant by other evidence. Her typewritten statement gives that date, but is itself dated 28 February 2003, almost three years later. I found her attempts to explain why the day and date of a fairly unremarkable event would remain so long in her mind to be unconvincing. At the end of cross examination she said:-

*“.... If someone walks past me and makes a comment and every other night nothing else happens that’s when I know – that’s why I knew it was a Monday night, probably.”*

Then, when asked if she knew what she was doing on 17 April last year she said:-

*“The 17<sup>th</sup> of April was Easter. I went to – I was in Victoria”.*

Reference to my calendar/diary for 2002 satisfies me that 17 April 2002 was not any part of the Easter period, which fell between 29 March and 1 April. So I was not favourably impressed by her ability to recall specific dates and certainly not three years after the event. I cannot accept her evidence of events of the night of 17 April 2000.

- [53] The evidence of Miss Owen also referred to another issue raised in the defence, namely an allegation that the plaintiff’s husband Rene Grosse dealt in marijuana. She said that she passed on to the defendant some information on the subject. Her evidence of that information was relevant to the defendant’s state of belief even though the information itself was, as Mr Curran conceded, hearsay. In fact it turned out to be hearsay on hearsay, being what a flatmate told her (Miss Owen) that another person had told the flatmate. Of course it did not go any way to establish the truth of the allegation (of a drug deal) and it seems to me that anyone who was given that information and placed the slightest credence on it would have a very undeveloped sense of fair play and no idea at all of what amounts to hard evidence of a fact.

- [54] When Mr Grosse gave evidence he emphatically denied that he was either a drug user or a drug dealer. In cross examination it was not put to him as a fact that he had ever dealt in drugs. He was merely asked whether he had ever smoked cannabis, to which his answer was “No”. But it was not put to him as a fact that he had smoked the drug so it seems clear that

Mr Curran did not at that point have any firm instructions of either drug use or drug dealing. Nor did any evidence of either of those activities emerge during the trial despite a particular of the defence alleging sale and supply by him of marijuana. The defendant simply said in cross-examination that he had “some evidence” of Mr Grosse dealing in drugs. In re-examination he conceded that it was hearsay information but supplied no elaboration to indicate the strength of that information as a basis for his belief. He added the comment, gratuitously, that Mr Grosse had introduced the plaintiff’s adopted son to marijuana at the age of 13 and “he’s now schizo”. In the absence of explanation and in the light of his other evidence I assume that also to have been based on hearsay. There was other evidence that the boy’s schizophrenia was inherited.

[55] The evidence of Mr Grosse was that on 30 August 2000 the defendant, in a phone call to the plaintiff also spoke to him and accused him in an abusive voice of being both a drug addict and a drug dealer, warning him that to marry the plaintiff would be her downfall. Further, he said that on two occasions when he was sitting on a side porch of the house at Blackall Terrace (ie between August 2000 and February 2001) he smoked roll-your-own tobacco cigarettes and immediately after each occasion the defendant phoned to say “*I’ve seen you, caught you rolling joints and smoking them*”, which would indicate that the defendant was spying on the house. Only the evidence of those last two episodes was challenged as a fabrication in cross examination. He also said that on 28 February 2001, when he and the plaintiff were in the SCRGAL office of Mr Williamson to sign some documents the defendant entered, physically assaulted him by pushing a fist into his face and called him a drug dealer and a drug user.

[56] Thus there was not a scrap of evidence given in this trial that Mr Grosse had ever had any connection at all with illicit drugs. Furthermore it is clear that any belief which the defendant may have had on the subject was based solely on rumours. To form such a belief on that basis, to maintain that belief and then to act towards Mr Grosse as he did reflects poorly on the defendant’s credit. Finally, the relevance of this aspect of the case as an attack on Mr Grosse’s credit, there being no suggestion at all that the plaintiff aided, abetted or even knew of any such conduct by him is somewhat puzzling.

[57] Discussion of Mr Grosse leads me to discuss evidence relating to allegations in the defence that he is the father of a child, Taylor, born to Mr Grosse’s daughter, Miss Kerr (formerly Mrs Radke) on 21 January 1993. Miss Kerr’s evidence was that Mr Grosse had been her

boyfriend in the late 1980's. She said that there was in that period a sexual relationship for a couple of years that is, some years before the birth of Taylor. She was asked in cross examination merely:-

*“Is it possible that he is the father of Taylor?”*

To which she replied:-

*“Absolutely not.”*

[58] Assuming the topic to be relevant to this action it is significant that Mr Grosse was not asked in cross examination any questions at all on the subject, for example whether he had been intimate with Miss Kerr on any occasion before the birth of Taylor which could have led to conception of the child. Nor was Miss Kerr herself asked anything more than what appears in para [57] above. Evidence was led of opinion held by some people, for example Mr Raynor, that someone, (it was suggested the plaintiff) had some sort of public duty to have the boy's paternity established by DNA tests. That such a thing was suggested, in evidence was not just irrelevant, but would be repellent to any decent person.

[59] The plaintiff's evidence suggested that she valued Mr Grosse, above all, as a protector against the defendant's alleged harassment. I accept that her marriage to Mr Grosse, her daughter's boyfriend of some ten or eleven years earlier, would be considered by most people to be unusual but I doubt that it would be regarded by fair minded people as scandalous so as to be a worthy subject of disapproval as some witnesses seemed to think. The matter is complicated by the fact that the plaintiff is a political figure and political figures must expect their private lives to be the subject of interest, even scrutiny (provided that scrutiny is reasonable). However the defence, supplemented by the further particulars given, does not seek to justify the behaviour of the defendant critical of Mr Grosse and the marriage on that basis. The defence simply alleges his paternity of the child Taylor without saying why this might be relevant.

[60] There is not a scrap of evidence of that paternity. I am unable to see any basis on which the promulgation or repetition of gossip or rumour about the alleged paternity could in any way reflect credit on those responsible for it or participating in it. In particular the receipt by the plaintiff of exhibit 12, (a document crudely suggesting that Mr Grosse was the father of Taylor) via the defendant and Mr Hulett, could have served no useful purpose and would have been greatly upsetting to any reasonable recipient. The plaintiff said she found it to be most offensive and the implication contained in it, to the best of her knowledge, to be totally

untrue. Again, it is difficult to see how, in any event, the question was relevant to the issues in this trial or even to anyone's credibility.

### **Credibility of Witnesses other than Plaintiff and Defendant**

[61] Many of the witnesses gave evidence on matters which in my view were of no special relevance or gave little assistance on the matters in issue. It is unnecessary to dwell on their evidence or to make findings on their credibility. There were, however, some witnesses whose evidence fell into quite a different category and assisted me not just in making findings of fact, but also in assessing the credibility of the two central characters, the plaintiff and the defendant. I now summarise the evidence of these witnesses, the significance of which, if not immediately obvious will emerge later.

[62] Mr McGrady gave evidence that in mid 2000 he lived at 77 Blackwell Terrace, Nambour beside the house into which the plaintiff and Mr Grosse moved, No 79. About two weeks after that date, at twilight, he saw a man standing inside the driveway of No 79 peering around the corner of the house. He said the security light came on. Speaking from a distance of about 4 metres he asked:-

*"Are you all right?"*

to which the man replied:

*"I'm all right mate; are you?"*

and he said he saw the same man at the house a couple of days after the plaintiff had moved out. Soon after, he was shown a photo of a man by Mr Williamson (who gave evidence that it was a photo of the defendant) and identified it as of the man he had seen.

[63] Identification evidence is notoriously suspect but on the balance of probabilities I would have concluded, given the closeness of the two men, the reasonable light conditions, the double sighting and the challenging nature of the response (that being consistent with the nature of the defendant) that the man was the defendant. To put the matter beyond doubt, there is acceptable evidence that the defendant actually admitted it to Mr Williamson. See para [122].

[64] Mr Miguel said he was in the SCRGAL office with the plaintiff in May 1996 when he observed the defendant pressed against the wall just outside the door of the office. This continued, he said, for some ten minutes. When challenged by the plaintiff the defendant

briefly came into the office. I accept that evidence. Mr Miguel accepted in cross examination that he had an “amorous relationship” with the plaintiff but no elaboration of that very broad phrase was sought.

[65] Mrs Cansdell said in June 2000 (at a time when the plaintiff, by then the mayor, had made known her aversion to contact with the defendant) she saw the defendant drive at night into the car park of the building where a council meeting was to take place, and take up a park. He drove with the car’s lights off.

[66] Mrs Herbert, a reservations clerk at the Carlton Crest Hotel gave evidence that on 9 June 2000 she sent a fax, which is exhibit 13, which confirmed that the plaintiff was booked to stay at the hotel for the night of 10 June. This was sent at the request of a man who phoned, claiming to be an employee of the plaintiff. He also asked to be told her room number but this was declined on hotel policy grounds. This appeared to annoy him. There is no reason to doubt her evidence, and it is much more probable than not that the man was the defendant.

[67] Detective Constable Lee gave evidence that on 4 April 1999 at 10 pm as a result of a phone call from Mr Lewis, he went to Armour Place, Bli Bli, to a position behind the plaintiff’s house (in Wharf Road). It was raining and he found the defendant, his clothes wet, in a car, who said he had been out walking. At a confrontation shortly afterwards between the plaintiff and the defendant in the Wharf Road house the plaintiff initially told the defendant that she did not want him to come to her house but subsequently the discussion became “clouded” by business discussions. He also gave evidence of the defendant being brought to the Maroochydore police station on the night of 26 March 2000. The plaintiff was also there. Their presence related to a possible complaint of stalking. Mr Williamson phoned and had a lengthy conversation with the detective and, it seems, the plaintiff. Detective Lee did not recall Mr Williamson describing the defendant as his client but had the impression that that was the position. I accept Detective Lee’s evidence.

[68] Mr Binney, on a date he could not recall went to the opening of an advertising agency called Universal Agencies and saw both the plaintiff and the defendant, to whom he spoke separately. The defendant told him that the plaintiff and he were “an item”. I accept Mr Binney’s evidence.

[69] Mr Clatworthy gave evidence that he first met the plaintiff in early 2000 when he was asked by her daughter Paula Kerr (then Mrs Radke) to help in the plaintiff's mayoral campaign. As a result he became very actively involved with her, seeing her on a virtually daily basis, a frequency which decreased markedly after her election to the mayoralty in March 2000 since when it became occasional phone contacts. He described receiving many phone calls from the defendant of an abusive nature, usually late at night, after 10 pm. These calls decreased marginally up until the time the plaintiff and Mr Grosse became engaged, since when there has been no contact at all.

[70] Mr Clatworthy recalled an incident in which he and the plaintiff were having coffee at the Big Top Shopping Centre when he saw the defendant apparently hiding behind a pillar, watching them. He gave evidence of an evening in February 2000 when he and the plaintiff were on a balcony at his unit and, on leaving, the plaintiff gave him a kiss on the cheek at which the defendant jumped out of bushes in the garden of the unit (an enclosed yard) and said words to the effect of "*caught you again*". The defendant abused both of them, actually pushing Mr Clatworthy in the chest. He also told of an occasion before the election when, on leaving Mrs Grosse's house in Village Green (ie the first quarter of 2000), he found all four tyres of his car let down, a unique event in his experience. That night his phone message bank had a recording of sarcastic laughter on it. When this circumstantial evidence is viewed in the context of the entire evidence, it is impossible to avoid the conclusion that the defendant was responsible for the deflated tyres and the phone call.

[71] Nothing emerged about Mr Clatworthy in evidence which would make me suspect he would be untruthful on oath to help the plaintiff. Indeed when asked, of the defendant:

*"Did he make unflattering remarks about Mrs Grosse?"*

he said:

*"Look, I honestly can't remember."*

Thus he did not take up the opportunity which was open to him had he been antipathetic to the defendant, or partial to the plaintiff, to give evidence to support her cause.

[72] It is of significance, given that the defendant in his further and better particulars named Mr Clatworthy as one of "the plaintiff's continuous stream of lovers", that it was not put to him that he had ever been intimate with the plaintiff. Nor was the plaintiff asked whether she had

been intimate with him. Indeed the only evidence of such intimacy comes from an entry in the defendant's diaries.

[73] Mr Kerr, the plaintiff's first husband, gave evidence that in July 2000, at the Cootamundra Drive house he spoke to the defendant who showed him a document about bi-polar mental disorder, which he said he had got from Mr Hulett (which was, I conclude, exhibit 11). They disagreed on whether the plaintiff had the condition and an argument developed about the harassment of the plaintiff, which Mr Kerr accused him of pursuing. The defendant claimed not to know where the plaintiff then lived but Mr Kerr's evidence was that he himself had seen the defendant parked outside the plaintiff's then residence at Lindsay Road, Buderim, only to drive off when Mr Kerr arrived. He also gave evidence of receiving unsolicited phone calls from the defendant in which the defendant complained of the men the plaintiff was seeing. He also spoke of seeing the defendant driving in the immediate vicinity of the plaintiff's house. When he was recuperating from illness at the plaintiff's house in late 1998 he found the defendant's abusive attitude to the plaintiff annoying to the extent that he would retire to bed and ultimately left the house. In cross examination he said that the plaintiff was expressing concerns about the defendant's stalking of her during 1998, 1999 and 2000. Mr Kerr struck me as being a dispassionate witness and I accept his evidence.

[74] Ms Flux is the personal assistant to the mayor at the Maroochy Shire Council, a position she held before the plaintiff's election. She gave evidence of many incoming phone calls on the Council's land line from the defendant, varying from a few a day to once a week. Obviously these have been since March 2000. On five or six occasions she has observed the plaintiff break down after one of these calls, sometimes culminating in a physical collapse to the floor. She described the plaintiff on these occasions as distraught. On two occasions she has found the plaintiff in a state of collapse in the car park, each time complaining of a phone call from the defendant. Her evidence of the identity of the caller, as stated by the plaintiff, was admitted as part of the *res gestae*. She also said she saw the defendant at two Council meetings. In cross examination she said that the calls which resulted in the plaintiff physically collapsing occurred during the period of dispute relating to the defendant's employment at SCRGAL. I saw no reason to reject Ms Flux's evidence.

[75] Mr Spiller, the Chief Executive Officer of the Maroochy Shire gave evidence of seeing the plaintiff in a distressed state, crying uncontrollably, at least ten times in the first 18 months since her election as mayor, that is, since March 2000. These episodes followed phone calls

from, as the plaintiff told him, the defendant. He himself received a phone call at home from the defendant who said that he wanted to meet him to tell him things he should know about the mayor. Mr Spiller declined that invitation. He said that the plaintiff has been an enthusiastic and diligent mayor. In cross examination he said he has never seen the plaintiff become heated or upset in relation to other phone calls. I accept Mr Spiller's evidence.

[76] Mrs. Barry, the mother of the plaintiff, gave evidence of the plaintiff living with her at 69 Point Cartwright Drive, (September 1999 – January 2000). Late one night in 1999, when Mr Hungerford had called to see the plaintiff, she heard her call out "*Come out Robbie, I know you're there*" whereafter she saw the defendant emerge in the back yard. He then talked to the plaintiff in a loud, bossy, belligerent angry voice. In cross-examination she said the defendant had also, on occasions, behaved like a gentleman and had helped the plaintiff, for example, to move house. I accept her evidence.

[77] Mr Hungerford, a farmer, was a constituent of the plaintiff in 1999. He gave evidence that he called to see her at 69 Point Cartwright Drive, about a political problem on (it seems most likely) 14 October 1999. The two of them were looking at plans in the kitchen, when she went to the window and called "*Rob, I know you're out there*" and then went outside from where he heard a conversation that was not friendly. The plaintiff and defendant then came inside and "had their issue out". They were agitated. This was obviously the same occasion as is described in para [76]. I note that although the defendant's pleadings particularised Mr Hungerford as one of the plaintiff's "continuous stream of male lovers", that allegation was not put to him in the witness box.

[78] Mr Lewis, an RSPCA inspector and former New South Wales policeman, met the plaintiff through her participation in an animal welfare committee in late 1998 or early 1999. Very early she expressed concern at being stalked so he inspected the movement activated lights at her house at Wharf Road, Bli Bli (which on the evidence the defendant had installed) and found that the light globes had been unscrewed sufficiently to de-activate them. He recalled another evening at about 8.30, seeing a man in a car parked near her home begin to use a mobile telephone when he and the plaintiff in their car approached her house. At the end of the street he saw the defendant's car. They then drove to her house and within thirty seconds her phone rang. The plaintiff spoke on the phone, immediately becoming very distressed, and saying loudly "*leave me alone Rob, I don't need this*". He told the plaintiff he was going to take her to a safer place, and they walked outside. As he was seating her in his car

the defendant approached, shouting at the plaintiff. He then approached Mr Lewis, shouting at him that he was “a criminal”. Mr Lewis tried to calm the defendant, without success. The defendant threatened physical harm to Mr Lewis, referring to the fact that he, the defendant, had “connections”. He pushed Mr Lewis so hard that he fell back into the door of his car, denting it.

[79] Early in this confrontation, Mr Lewis activated a mini tape recorder in his pocket and after being pushed he produced it, an action which apparently startled the defendant who then withdrew, made a show of noting the number plate of Mr Lewis’s car before driving away. Although the plaintiff was hysterical, she refused to be taken elsewhere and went inside her house. After unsuccessfully attempting to persuade her to phone the police, Mr Lewis left and while driving home he was called on his mobile phone by the defendant who abused him angrily, again referring to his “contacts” and saying “*You don’t know what you’ve got yourself into*”. Mr Lewis again activated his tape recorder during this phone call.

[80] Mr Lewis said that he then phoned the police to report the matter, but did not take it any further. In the years intervening between that night and being contacted by the plaintiff’s solicitors he has lost or recorded over that tape. In evidence the defendant clearly accepted that Mr Lewis did indeed produce the tape recorder on the night in question.

[81] Mr Lewis said that on a subsequent night, (which other evidence identified as 4 April 1999) at the plaintiff’s Wharf Street house, a phone call was received by her. She became upset, saying, “*Rob, leave me along, I don’t want this any more, I can’t cope with this*”. Mr Lewis then set off in his car and located the defendant in his car in the street behind the plaintiff’s house. Donning a raincoat (against the pouring rain) he walked up to the defendant’s car where he saw him to be using a phone. He could hear the defendant shouting, using the name “Alison”. The defendant, apparently oblivious of Mr Lewis’s presence, got out of his car and walked into the yard of the house which was immediately behind the plaintiff’s house. Mr Lewis immediately phoned the police and soon after saw the police with the defendant. This was the occasion of which Constable Lee gave evidence (see para [67]). He phoned the plaintiff to tell her what he had seen, advised her to co-operate with the police, and left.

[82] Mr Lewis was also particularised in the defence pleadings as one of the plaintiff’s “continuous stream of male lovers” but he was simply asked by Mr Curran in cross-

examination “*Did you have a romantic relationship with her*” to which his answer was “*no*”. He confirmed to Mr Curran that his firm advice to the plaintiff was to make a complaint to the police. He also confirmed that he had heard various short phone conversations apparently from the defendant to the plaintiff, which had been cordial.

[83] I saw no reason to reject the evidence given by Mr Lewis.

[84] Mr Jones, the plaintiff’s former (and second) husband gave evidence. He was in the habit of keeping detailed daily diaries and he was able to refer to them in evidence to identify certain events and, helpfully, the dates on which they occurred. I accept that his diary entries were accurate.

[85] At 7.30 pm on 14 June 1995 Mr Jones heard the defendant talking, as if on a mobile phone, outside the house at 27 Karawatha Drive. When he went outside the defendant was not there. He said that the defendant once told him that he wanted the plaintiff to move the massage business to the SCRGAL office. On 18 July 1995, when the massage business had been re-located to the doctor’s surgery at Mountain Creek, he saw the defendant parked over the road apparently observing the surgery. On 23 July 1995, at night, he saw a figure in the side yard of their home consistent with the physique of the defendant. It is significant in relation to his credibility that he declined to identify the man positively as the defendant although the plaintiff did so. On 12 September 1995 at 8.30 p.m. the house security lights came on illuminating the defendant who was on the other side of the fence, apparently watching the house. When the plaintiff challenged him, he ran off.

[86] On 21 May 1966, Mr Jones said, the defendant was a guest in the house. At about midnight there was a shouted exchange between the plaintiff and the defendant. A similar episode occurred on 5 June 1966. Mr Jones intervened and made a personal remark of the defendant to which he replied “*I’ll knock your block off, Jones*”. He recalled another occasion when a similar altercation involving the three of them resulted in his picking up a chair and the defendant pushing him to the floor. He gave evidence of other, less dramatic, occasions when the conversations became heated. He said that on these occasions the defendant was reluctant to leave. These things happened, it must be remembered, in Jones’s own home. At 8 p.m. on 24 September 1996, Mr Jones said he saw the defendant standing outside their Bli Bli house for no apparent good reason.

- [87] On 6 April 1997 at 8 p.m. Mr Jones said he saw the defendant standing outside the front of the house looking at it. At about 8 p.m. on 22 May 1997 he again saw the defendant loitering outside the house. On 22 October 1997 the defendant phoned the house and, the plaintiff being absent, Mr Jones answered. He told the defendant she was at a political meeting in Brisbane. When he looked outside a few times during the night (until the late hours) he saw, on each occasion, the defendant there.
- [88] Mr Jones' 1998 diary records further examples of heated altercations between the plaintiff and the defendant at her residence.
- [89] Mr Jones said that on 9 April 1999 at the request of the plaintiff he went to her Wharf Road house (they had by then ceased to live in the same house) where he found her to be very agitated at an event which had occurred concerning the defendant being at or near her house a few nights before (the episode of 4 April 1999 as to which see paras [67] and [81]). They were joined by Mr Hewitt, Mr Manly and Mr Hulett. A discussion took place about the defendant's fitness to manage SCRGAL. Shortly after Messrs Hulett and Manly left, the plaintiff received a series of phone calls, each of which seemed to upset her greatly. Mr Jones answered one of the calls. It was from the defendant who was very aggressive. I have no doubt that all the calls were from the defendant. The plaintiff said, "*I've had enough of this*", took an overdose of sleeping pills, collapsed and was taken to hospital where she was admitted, her stomach was pumped and she remained overnight.
- [90] It is obvious to me that the events of 4 April (the defendant being apprehended by police near the house after being seen by Mr Lewis to be approaching it via the yard of the house behind), the reaction of the defendant to the calling of the police (abusive of the plaintiff) and the phone calls of the night of 9 April upset the plaintiff greatly. Indeed, these things would have been upsetting to almost anyone. Given that the pills were taken in the presence of others, I consider that the prospects of her dying were remote and I doubt that it was a serious attempt at suicide. However, I accept that it was the act of a woman who had been driven to make a dramatic gesture, a "cry for help" as it is often tritely put. The dramatic extent of the gesture may have been contributed to by the histrionic personality of the plaintiff but it was nonetheless an expression of the anguish she undoubtedly was experiencing.
- [91] Mr Jones gave evidence of hearing the defendant's voice on the plaintiff's answering machine saying, "*We're watching you Ali*". His diary of 24 March 2000 (when he was living

for a brief period at her unit at Village Green) records his being awakened at 12.30 a.m. by the plaintiff talking on the phone, apparently to a friend. He called out "*What are you doing Alison?*" and heard from outside his bedroom window the defendant's voice say "*She's fucking Nick Clatworthy, John, that's what she is doing*". He saw the defendant the next day who said "*Sorry about last night, John*".

[92] Mr Jones said that on the night of 25 March 2000 at about 7 pm the defendant phoned him and wanted to give him details of sexual liaisons he said the plaintiff was having. Mr Jones refused to discuss the matter. At about 6.30 p.m. on 22 April 2000 he, the plaintiff and a couple of her relatives walked out of the Village Green unit to see the figure of a man run off. He and the plaintiff followed the man and found it to be the defendant who was squatting behind a parking sign. He said he had come to deliver Easter gifts.

[93] The evidence of Mr Jones, though tested in vigorous cross-examination, did not waver on any point which I thought to be material. He candidly conceded matters which he would not have done had he been so partial to her cause as to be willing to depart from the truth. For example, he said that in 1999, at the Wharf Road house, he saw the two on a bed with the defendant "cuddling" the plaintiff, which in context seemed to be massaging her legs. He agreed that he had frequently advised the plaintiff to cease contact with the defendant. He agreed that the defendant had been active in the mayoral election campaign. To the question "*Mr Purvis treated Alison like a proper gentleman should, in your presence*" his answer was "*mostly*". This answer, favourable to the defendant, suggests impartiality on the part of Mr Jones.

[94] The final question in Mr Jones's cross-examination followed that exchange. It was "*I suggest he invariably did*" to which the recorded answer is "*yes*". However I cannot accept that as a recanting by him of all of his evidence of the defendant's aggressive confrontations, of loitering, and of abusive phone calls. It frequently occurs that a witness answers "yes" to a suggestion, meaning no more than an acknowledgment that the suggestion has been put. Whether this answer amounted to more than that was not investigated.

[95] I accept Mr Jones as an important and truthful witness in relation to the matters I have summarised.

[96] The plaintiff's husband Mr Grosse gave evidence. I have already referred to that part of it which concerned allegations of his involvement in illegal drug production and use and allegations concerning his paternity of the plaintiff's grandson (paras [54] – [60]). I have rejected those allegations. Of relevance is his evidence (see para [55]) that on two occasions between August 2000 and February 2001 the defendant was apparently spying on the plaintiff's and his house at Blackall Terrace. He also gave evidence of an occasion in early August 2000 at about 9 pm when he surprised two intruders who had been in the backyard. He gave chase and saw two cars drive off. One of them, he saw, was being driven by the defendant. He also gave evidence of the night of 30 August 2000 (the plaintiff's birthday) when the two of them were spending the night at the Mercure Hotel at the Gold Coast. At about 10 pm the plaintiff began to receive a succession of phone calls from the defendant (Mr Grosse listened in and identified the voice). He spoke to the defendant himself (see para [55]). All told he said there were about seven calls that night during which he could hear the defendant speaking rudely and aggressively. He recalled an occasion at the Big Pineapple for an Arts Awards night, when he observed the defendant to be constantly staring at her. Mr Grosse's evidence was not shaken in cross-examination and I accept it.

[97] Mr Wilkinson was a very important witness. He is a solicitor who acted for SCRGAL from about 1993 onward and on 5 July 1999 became employed by SCRGAL as its in-house solicitor a position he retained until 31 January 2003. An objection was taken to his giving evidence on behalf of the plaintiff on the grounds that a solicitor/client relationship existed between them in respect of matters the subject of his evidence. Mr Wilkinson vehemently denied that proposition.

[98] On the evidence it seems that from time to time the defendant told Mr Wilkinson of matrimonial difficulties he was experiencing and, as a favour, he gave him brief pieces of "one off" advice. In 2001 when the defendant received a solicitor's letter he helped him draft a reply. At that time he said to the defendant "*If I'm to do anything about this, you'll need to give me facts and figures*" but he never received them. His name appears as solicitor for the defendant (as purchaser of some real estate) on a contract dated July 1996 but there is no evidence how it came to be there and Mr Wilkinson denied that he ever acted in the transaction. He said that he has never had a file for the defendant as a client for anything, has never rendered an account and never been paid any money by him for professional services rendered.

- [99] Mr Wilkinson said he has never given legal advice to the defendant in relation to the plaintiff and any dispute between them. He has on occasions told him not to stalk the plaintiff, but said he did so simply as the solicitor for SCRGAL, being concerned at what might ensue. He said that it was in that capacity that he spoke to Detective Constable Lee on the night of 26 March 2000 when he was phoned by the defendant from the Maroochydore police station in the early hours of the morning in connection with his arrest on suspicion of stalking the plaintiff. He conceded that he could have described himself as the defendant's solicitor but if he did so he said it was just to facilitate his attempts to extricate SCRGAL, the plaintiff and the defendant from a potentially disastrous situation.
- [100] It is not unusual for a lawyer to give off the cuff legal advice to a colleague or friend without any solicitor/client relationship being created. The creation of that relationship depends on the common intention of the parties to enter into a contract, that is, a retainer (44 *Halsbury's Laws of England*, 4<sup>th</sup> ed. para 83). Generally the retainer relates only to the specific business in hand (*Saffron Walden Second Benefit Building Society v. Rayner* (1880) 14 Ch.D. 406 at 409, per James LJ). I am of the view that no such intention existed on the part of either of them at any material time in relation to any matter discussed between the defendant and Mr Wilkinson concerning the plaintiff. I might say, in passing, that if the defendant's vehemently expressed opinion of Mr Wilkinson's poor performance as the solicitor for SCRGAL over the years was even partly genuinely held by him, it would be astonishing if he ever engaged Mr. Wilkinson to act for him.
- [101] If, however, the relationship did exist, privilege only attaches to confidential communications passing between a client and a legal advisor if made for the dominant purpose, either:
- (a) to enable the client to obtain, or the advisor to give, legal advice; or
  - (b) with reference to litigation that is actually taking place or is in the contemplation of the client.
- See Heydon, *Cross on Evidence*, Australian Looseleaf Ed. Para 25210; *Esso Australia Resources Ltd v. FCT* (1999) 201 CLR 49.
- [102] Even if the defendant were the client of Mr Wilkinson, none of the latter's evidence about what was said to him by the defendant would qualify under (a). On each occasion (except in relation to the arrest on 26 March 2000) the defendant was simply telling Mr Wilkinson of events and there is no suggestion that he was doing so in order to get advice on the

relationship between the plaintiff and him. To the contrary, he was boasting. Nor did (b) apply because at the time of each of the discussions no litigation was contemplated.

[103] As to the discussion between the defendant and Mr Wilkinson at the police station on 26 March 2000, two things can be said. First, there does not seem to have been any exchange in order to get legal advice, simply a request for Mr Wilkinson to contact the plaintiff and get her to withdraw the complaint. Second, even if that was an instruction to a solicitor, the privilege was waived by the defendant's instructions to speak to her and actually pass on to her the matters which he and the defendant had discussed.

[104] With his written submissions Mr Curran forwarded to me two letters which Mr Wilkinson appears to have written on behalf of the defendant in relation to a neighbour dispute about a tree. I assume I was being asked to admit them in evidence. I decline to do that at that stage of the proceedings. In any event they could not establish or tend to establish a solicitor/client relationship in relation to the plaintiff's current action.

[105] Mr Wilkinson first became aware of allegations by the plaintiff that she was being stalked by the defendant in the latter half of 1998 when she came to his office in a hysterical state. Until then he had observed only a co-operative business relationship between them. But from early 1999 he became increasingly drawn into the deteriorating state of affairs between them.

[106] Mr Wilkinson said the defendant often spoke of the plaintiff in the most glowing of terms, praising her achievements, especially in relation to SCRGAL. At other times, he said, the defendant would describe her to him as disgusting, a woman of low morals or no morals, even a prostitute, using these epithets many times to him. He said that he did not want to marry her, nor live with her, but wanted to live near her so as to be closely associated with her.

[107] Once Mr Wilkinson began to work full time for SCRGAL (July 1999) he developed the habit of phoning the defendant each work morning at 7.30 and each time the defendant would raise what the plaintiff had done the night before, which "they" had reported to him. Sometimes he named and described men she had been with, even socially, in a disapproving way, and often suggested sexual contact. The names Benny Pike and Ian Pashen were often mentioned. The defendant showed Mr Wilkinson a copy of exhibit 5 which the defendant

said “they” had commissioned. He said that the defendant’s comment was, “*There it is, prostitution. She’s prostituting herself*”. On other occasions he referred to her as a prostitute.

[108] During the 7.30 am phone calls the defendant’s language about the plaintiff tended to be very basic, for example “*She was fucking (a named man) last night*”. Frequently the plaintiff would later speak to Mr Wilkinson and would mention the name of her companion of the preceding evening and the venue they had attended which accorded with what the defendant had told him.

[109] The defendant told Mr Wilkinson of the plaintiff’s relationship with Mr Lewis and was obviously hostile to it. He said that he had caused a friend to phone Mr Lewis pretending to be a former colleague from their days in the New South Wales police in Sydney to try to obtain some information about Mr Lewis’s activities as a policeman.

[110] The defendant gave Mr Wilkinson a vehicle registration number and asked him to have a search made to identify the owner of the vehicle. He did so and found it was Mr Hungerford. The defendant said he had seen the car in front of the plaintiff’s house a couple of times.

[111] After the suicide attempt of 9 April 1999 Mr Wilkinson said he was aware that both the plaintiff and the defendant sought counselling. He said that subsequently the defendant reported to him that he had been able to convince the counsellor that it was not he, but the plaintiff, who needed treatment. When asked why he did not simply cut off social connection with the plaintiff he told Mr Wilkinson that he could not, because of his caring and nurturing nature. He said that it was thanks to the efforts of him and “them”, that the plaintiff’s OAM had been saved.

[112] Mr Wilkinson said that the defendant spoke derisively of Mr Jones’s complete inability to prevent him from entering their home and said that he just used to ignore Mr Jones. He boasted to Mr Wilkinson of his courage in physically confronting Benny Pike. When, as he often did, he spoke of “all those men”, Mr Pike’s name was always the first mentioned. The defendant also boasted of physically confronting Mr Lewis, (see para [78]). He told him of his annoyance that when approached by police one night he had been wearing jeans on which the fly had come undone. He told Mr Wilkinson of throwing tennis balls at the plaintiff’s house and of wrapping a toad around a tennis ball which he left near the house of male friend

of the plaintiff's. He described her relationship with Mr Miguel as an example of her "disgusting behaviour".

- [113] There were many occasions, said Mr Wilkinson, of phone calls to him from the plaintiff complaining of some interference from the defendant. When Mr Wilkinson spoke to the defendant to tell him of the complaint, sometimes he would deny it, sometimes he would admit the contact but trivialise it, by not accepting it as a serious matter for complaint.
- [114] Mr Wilkinson said he told the defendant "*Rob, you are stalking Alison. You've got to stop. This is stalking*". The defendant was apparently unconcerned, got off his chair and kicking the two bottom drawers of his filing cabinet said "*If ever she came at me with any of that stuff I've got enough in there on her to put her away*". He said this interchange occurred more than once, in the latter part of 2000.
- [115] Mr Wilkinson said that on one occasion the defendant told him that he looked through the window of the plaintiff's mother's house at Point Cartwright Drive and saw her having sexual intercourse with Mr Clatworthy. This is clearly the occasion referred to in the defendant's diary entry of 17 April 2000, which appears to record an event he observed, even though the defendant gave evidence that the event was merely reported to him. I accept that he told Mr Wilkinson that he himself saw the activity. On this point, I am quite unable to see that the defendant's home phone records show that he was home all that night. They show calls made on six occasions between 6:00 p.m. and 9:04 p.m. They do not show the defendant to have made these calls. On the evidence there were at least two other people living in the defendant's residence at that time. Mr Wilkinson told of seeing the defendant on another occasion at the Big Top Shopping Centre, apparently concealing himself behind a pillar and on the arrival of Mr Wilkinson said "*She's over there with Clatworthy*", pointing out the plaintiff and Mr Clatworthy. This is most likely the occasion described to by Mr Clatworthy, see para [70].
- [116] Mr Wilkinson gave evidence of driving with the defendant past the plaintiff's house at Wharf Road, which the defendant identified. He said that he had "*some people down there who are friends of mine who sometimes let me know what goes on at Alison's place*". He also identified places nearby where, he said, he sometimes parked and was able to get to the plaintiff's backyard. He told Mr Wilkinson of overhearing, from outside her Village Green unit, a phone conversation the plaintiff was having with a friend, Helen McGregor, and

repeated the substance to him. Mr Wilkinson later repeated the substance to the plaintiff, who appeared astonished that he knew these facts.

[117] Mr Wilkinson said that the defendant showed him a document he said he had received from Mr Hulett which described the condition known as bi-polar disorder and which he said described the plaintiff perfectly. I am satisfied that was exhibit 11, or a copy of it.

[118] Mr Wilkinson said that in June 2000 the defendant told him of phoning the Carlton Crest and pretending to be the plaintiff's secretary, to get details of her bookings and of passing the information to Mr Hulett who posted a card to her at the hotel. The defendant's phone call is no doubt that described in para [66].

[119] Mr Wilkinson said that in about March 2000 the defendant complained to him that he could not locate where the plaintiff was living, other than that she was with her daughter in Lindsay Road Buderim. He complained that the driveways of the houses there were long and sweeping and difficult to see down. He drove Mr Wilkinson to Lindsay Road, stopped, got out, and using a pair of binoculars, apparently looked up one drive. A car driven by Mr Loetsch drove up.

[120] Mr Wilkinson said that he was never aware of any restrictions laid down for the driving of SCRGAL cars. He also said that there would have been very few SCRGAL documents, which necessitated the plaintiff's signature and could think of none, which would need signing urgently. This is relevant to evidence given by the defendant that he often had to call to see the plaintiff to get SCRGAL documents signed as a matter of urgency.

[121] I have described evidence about alleged SCRGAL defalcations as peripheral [para 44]. However it is noteworthy that according to Mr Wilkinson, on the occasion of the purchase by the plaintiff from SCRGAL of the Cootamundra Drive property, it was the defendant who obtained a valuation to indicate that the price was a fair one, and at the office of the Sunshine Daily Newspaper in late 1999/early 2000, the defendant vigorously defended the propriety of the sale. Mr Wilkinson also denied any knowledge of the plaintiff wrongfully claiming SCRGAL expense money.

[122] Mr Wilkinson gave evidence that he showed a photograph of the defendant to Mr McGrady, (see para [62]). He told the defendant he had done so. The defendant reacted

angrily at first but then described with pride how he had not run off, but challenged Mr McGrady. Mr Wilkinson gave evidence in similar terms to the plaintiff and Mr Grosse of the incident on 28 February 2001 in the SCRGAL office (see para [55]).

[123] The SCRGAL employment of the defendant was terminated on 21 December 2001 and that of Mr Wilkinson on 31 January 2003.

[124] In cross examination Mr Wilkinson said that he had acted as the plaintiff's solicitor on a few occasions. He denied that he regarded the defendant as an enemy and said he is not a personal friend of the plaintiff's. Much of the cross examination related to matters of SCRGAL business which were relevant to credit. However nothing of particular note was uncovered. I am of the view that so far as the plaintiff and the defendant are concerned he had both their interests at heart because of their positions with SCRGAL but became increasingly conscious of what he judged to be inappropriate behaviour of the defendant which caused him concern and led him to warn the defendant of the possible legal consequences. Ultimately I thought Mr Wilkinson's credit was unshaken. Much of what he said on the relevant matters could not be mistaken; if they were untrue they would have had to be deliberately untrue. I have no reason to conclude that and I accept the evidence of Mr Wilkinson.

[125] I have found it necessary to descend into some detail of the evidence given by Mr Wilkinson, which was obviously of central importance. I have not recounted all of the events of which he gave evidence by any means, merely those which I consider bear relevantly on the issues in the case.

[126] Miss Paula Kerr, the eldest daughter of the plaintiff gave evidence. She was previously married to a Mr Radke and is the mother of the child Taylor. She gave evidence of a family gathering at Cootamundra Drive on the night of 26 March 2000 when a silver car was the subject of discussion because it was being driven up and down the street. Someone noted its registration number and thereupon the plaintiff went to her car and dialled a number on the hands free car phone. She said that in the ensuing phone conversation she was able to hear both the voice of the plaintiff and of the defendant. The plaintiff said words to the effect of "*Please Robby, leave me alone; go away; we don't want you around*". The response of the defendant was an angry one and included his saying "*You're dead Ali-Rob you're dead.*" "Ali-Rob" is a nickname of the plaintiff's.

- [127] Miss Kerr told of an incident in about May 2000 at the Cootamundra Drive house when, from the dining room, she saw the defendant beside the wall of the house. The defendant ran off. She was present in the Lindsay Road house in August 2000 when a rustling noise outside caused Mr Grosse to run out of the house in pursuit (see para [96]).
- [128] Cross examination of Miss Kerr did not undermine her credit and I accept her evidence. It is appropriate to record that the plaintiff's phone records do not record a phone call to the defendant which corresponds to the call referred to in para [126]. However there is an explanation why that might be so consistent with the truth of her evidence, see para [277].
- [129] Miss Purvis, the daughter of the defendant, gave evidence. She said that between 1994 and 2000 the plaintiff would call into the defendant's house (in which she also resided) some three to four times a week. In 2000 the visits were not frequent. She said that these visits were during the day or early evening. If the defendant was not home the plaintiff would leave "pretty quickly". If she and the defendant were both home the visit would be brief. If she arrived home to find them both present the plaintiff would leave soon after. She saw them have cups of tea, talking together. When together their relationship was cordial. She said that when the plaintiff lived at Village Green (January to June 2000) the plaintiff, once or twice a week when on a morning walk, would bring the morning newspaper to the door. She also said that the plaintiff would phone the defendant every day between 1994 and 2000 including "all different" or "unusual" hours of the night, at least once a night. These fell off somewhat during 2000. She also said that up until 2000, nearly every night, the defendant would bring home a meal at night, usually a roast.
- [130] I do not doubt Miss Purvis's honesty but I do not accept her as an accurate witness. Not even the defendant said that the plaintiff gave him a prepared meal to take away nearly every night and the better view of the evidence is that it was not a regular or frequent occurrence after 1996. During the period 1994 to 2000 she was employed more often than not so she would have only limited occasions "during the day or early evening" to see the plaintiff. The evidence of nightly phone calls from the plaintiff to the defendant is not borne out by the plaintiff's phone records, which show few out of business hours' calls. All in all I consider that in Miss Purvis's memory, perhaps aided by family discussions about the litigation, the number and dates of visits and phone calls have multiplied, and her recollection of the time at which they took place has been distorted. Indeed there is probably some assistance to be

gained by comparing her evidence with that of Mr Loetsch and of Mrs Small the defendant's neighbour, neither of whom suggested that the plaintiff was a very frequent telephone caller or visitor.

[131] Mr Hoiberg was the auditor for SCRGAL from 1984 to 2000. He spoke highly of the plaintiff's creative ambitions and the defendant's practical skills in the setting up of a very successful business. In the late 1990's, he said, while he was the plaintiff's accountant the defendant began to look after the collection of her accounting documents because of her involvement in the setting up of the Sunshine Coast University and the Sunshine Coast Cultural Centre. The evidence of her involvement in those activities would suggest that a more accurate date might be the mid 1990's, a time when, furthermore, relations between the two were relatively untroubled.

[132] He said that he saw the two together socially from time to time and that they appeared to be very friendly. He saw the plaintiff, for example, stroke the defendant's arm (although he said that she habitually did that to all of her friends and acquaintances often calling them "darl"). Other witnesses gave similar evidence (see para [142]).

[133] I have not been persuaded that there is much of relevance in the quite lengthy evidence given by various witnesses about the financial dealings involving SCRGAL, which included a business venture for the publication of a diary of Mr Jones. However I consider it to the credit of the plaintiff that, according to Mr Hoiberg, she gave security over her property in respect of an advance which had earlier been made by SCRGAL to Mr Jones for the diary publishing project, that is, a debt for which she personally was not liable.

[134] A number of witnesses gave evidence about a memorial service held for Mr and Mrs Adamson on 20 September 2002. The plaintiff and some witnesses gave evidence that the defendant attended and stared at her throughout. The defendant denied that and witnesses called by him gave evidence tending to support him. Whether one person stares at another (in a crowded room) is not the sort of thing that observers usually can give accurate evidence about. If the plaintiff believed that she was being stalked by the defendant it would not be surprising that she would believe that this was another example of it. Ultimately, I place no particular weight on the evidence of this occasion one way or another.

- [135] Miss Bacon, the defendant's personal assistant at SCRGAL gave evidence of the apparently good relationship between the plaintiff and the defendant from 1993 to 2000. About once a month, she said, she would see the two of them, for example, going off to lunch together. She saw them at SCRGAL awards nights and described their behaviour together as "very professional". That does not suggest the public display of affection. She also said they would dance together. She did not suggest the dancing was remarkable. She observed tension between them after the Mayoral election, which was on 25 March 2000 and could not say their conversations were cordial and friendly then. She gave evidence of an angry exchange between them in October 2001.
- [136] Mr Loetsch, a real estate agent, has known the defendant since 1995 and has lived in his unit, with him, since January 1999 (with the exception of about three months in 2000). He recalled three or four times seeing the plaintiff at those premises. This might be contrasted with the evidence of Miss Purvis at para [129]. On a similar number of occasions he saw them at shopping centres, behaving amicably. He recalled phone calls to the defendant, mostly in the morning or late afternoon, apparently from the plaintiff. He once saw the defendant and Mr Wilkinson in the defendant's car in Lindsay Road but saw nothing of the use of binoculars or the defendant being outside his car. In my view there is at least the possibility that he did not notice the binoculars and just does not recall the defendant being outside his car. On this, I prefer the evidence of Mr Wilkinson.
- [137] Mr Adam Purvis, the son of the defendant, gave evidence that he was at O'Mally's hotel on 26 March 2000, from 9.30pm to 2 am the next day. He had arranged to meet the defendant there but he did not turn up. When he next spoke to the defendant he was told that he had been there but had had an altercation with a person called Doug Radke (then the husband of Miss Paula Kerr). Presumably it is implied that this occurred before 9.30 and the defendant left because of that altercation. He also said he had seen the plaintiff at the defendant's house two or three times before March 2000 (but when was not stated) and two or three times in the Big Top Shopping Centre (again, when was not stated). In cross examination he conceded the O'Mally's visit could have been on 25 March. Whatever date it was I regret to say the relevance of the evidence of not seeing the defendant after 9.30 pm escapes me.
- [138] Mr Manly gave evidence of the plaintiff phoning him on 9 April 1999 as a result of which he went to her house at Wharf Road. Also present were Mr Jones, Mr Hulett and Mr Herriott. Either Mr Jones or the plaintiff spoke of the defendant having recently been caught in the

neighbour's backyard "apparently with his penis out", and it was said that he had been caught by the neighbours. As to that I note that it is the only suggestion by any witness of the defendant actually exposing his penis or of the participation of any neighbours in the events. He said that Mr Jones and Mr Hulett were trying to have the plaintiff make a complaint to the police about it. He then left to speak to the defendant and soon after he had a phone call from Mr Herriott who told him the plaintiff had attempted suicide. He told the defendant this and described his attitude as "devastated". He said that subsequently the relationship between the plaintiff and the defendant carried on as before, both socially and in SCRGAL matters. Their relationship became less close during 2000 and in October and November 2000 at SCRGAL meetings there was open animosity.

[139] In cross examination it emerged that in late 2000 a group of SCRGAL employees, including Mr Manly (none of them directors), were seeking to have the plaintiff resign as chair of the board. He conceded that the plaintiff had become upset at the appointment of his son and the son in law of one other member of the group (Mr Peters) to positions in SCRGAL by methods said by the plaintiff to be improper. He said that the behaviour of the plaintiff and the defendant at SCRGAL social functions indicated a close relationship in that they danced together and held hands. In cross examination, he appeared to concede that from about 1998 onwards the plaintiff took a partner to these functions and I doubt that on those occasions the holding of hands by the plaintiff and the defendant would have occurred. Mr Manly recalled other nights when the plaintiff was accompanied by a partner other than the defendant. He conceded that his reference to the defendant's penis being exposed could be wrong.

[140] I was left with the distinct impression that Mr Manly was more likely to favour the defendant's case in his recollection of events, for example the apparent relationship between the plaintiff and the defendant. It is especially difficult to accept that an overtly warm relationship continued after 9 April 1999.

[141] Mr Peters, the employee of SCRGAL referred to in para [139] gave evidence of apparently cordial relations between the plaintiff and the defendant even, he said, after her marriage to Mr Grosse. He also is likely to favour the defendant over the plaintiff.

[142] A number of witnesses described the plaintiff as a naturally overtly affectionate person even, it seems, to people with whom she was not a close friend, let alone an intimate friend. She is inclined to touch the person while in conversation and to call the person "Darling" or "Darl".

In the light of this I am inclined to put even less significance on evidence of apparent affection in public from the plaintiff to the defendant.

- [143] Witnesses like Mr McDonald, Mr Manley and Mr Peters make it clear that by late 2000 relations between those engaged in the running of SCRGAL had deteriorated. It seems that those three witnesses and the defendant formed one camp and the plaintiff (and Mr Wilkinson) formed the other. Some of the dissatisfaction of the three named witnesses seems to have related to adverse publicity attaching itself to the plaintiff and, I consider, their preference of the defendant over the plaintiff. I am satisfied that by then the relationship between the plaintiff and the defendant had fallen down to the stage that even in their SCRGAL affairs they were opposed to each other.
- [144] In my view most of their evidence did not directly bear on the issues which are central to this case, that is, the out of hours, non-business relationship of the plaintiff and the defendant and I am sure that the fact that their sympathy is with the defendant has coloured their recollection of events. Ultimately their evidence does not assist me greatly.
- [145] On 8 August 2000, an incident occurred in which a car containing the plaintiff and Mr Grosse (then her fiancé) apparently rolled or was driven on to a golf course and caused some damage to the grass. The evidence in this case did not reveal how it came about although the event, it seems, generated various rumours. All of that is irrelevant to the proceedings before me. What is of some relevance (to the question of the defendant's conduct to the plaintiff and to his credit) is whether the defendant acted to publicise the incident, which would most probably cause her detriment, as Mr Dunning argues. Mr Wilkinson gave evidence that on 9 August he and the defendant drove to the scene and that when there the defendant spoke to a newspaper reporter from the Courier Mail. The defendant's phone records show that on each of the 8<sup>th</sup> and 9<sup>th</sup> August he made a call to the Sunshine Coast Daily. It is impossible to avoid the conclusion that the conversation and the phone calls dealt with the car incident.
- [146] Voluminous telephone records of the plaintiff and the defendant were tendered in evidence. At the outset of the trial the phone records of the defendant for the period 1998 to 2001 became exhibit 1 and the records of his home telephone for the period 1994 to 2001 became exhibit 2.

- [147] Subpoenas were issued by the defendant to Telstra to obtain the plaintiff's relevant telephone records. These came in, in instalments, from time to time during the course of the trial, which extended over a calendar month. Because the plaintiff's cross examination was completed before most of them arrived I made it clear that if the defence required it she could be recalled for further cross examination. As it turned out that was not sought.
- [148] It is appropriate to record that more than once the defendant expressed the opinion that the difficulty in obtaining these phone records was somehow the work of the plaintiff or those sympathetic to her cause. There is no evidence to support that. I recall sighting the returned subpoenas duces tecum (the practice now is for it to be informally returned to the registry and then given to the judge) and attached to it was a letter from Telstra saying that the delay was caused by the failure of the defence solicitors to pay the necessary cost.
- [149] The records reveal that the defendant phoned the plaintiff very many times over the periods contained in exhibits 1 and 2, most relevantly between 1998 and 2001 when, on the plaintiff's evidence she had become overborne by the defendant's conduct to her. There are also records of many calls made by the plaintiff to the defendant over the same period. If anything became clear in this trial it is that they were both enthusiastic users of the telephone, particularly their mobile phones.
- [150] The records show that, with few exceptions calls made by the plaintiff to the defendant were made in ordinary business hours. Few that I have located were earlier than about 8.00 am (the earliest seems to be at 7.19 am on 22 February 2000) and few after 8.00 pm (the latest being at 10.31 pm on 16 December 1998). The great majority fall inside ordinary business hours.
- [151] The records reveal very many more phone calls from the defendant to the plaintiff than vice versa, the disproportion increasing markedly as time progressed. Furthermore, while the defendant does not seem to have been an early caller, many of his calls were made well outside business hours, 9 or 10 pm, or even, occasionally, much later.
- [152] I am not persuaded one way or the other by the sheer volume of the phone calls. Each of the parties is a very talkative person and it must be remembered that during this period each had genuine business interests to discuss, that is, SCRGAL affairs and, from time to time, political matters. It is not part of the plaintiff's case that she shunned contact with the

defendant. Rather her case is that she tried to normalise the contact by keeping up a successful business relationship and by seeking to divert what she saw as inappropriate attention into productive friendship. Indeed the plaintiff conceded that even when the defendant's inappropriate attention became too much for her he would often be pleasant and helpful and I expect this attitude prevailed during many of the phone conversations between them. Of more relevance is the evidence of phone calls made on particular, relevant days to which reference can be had.

### **Credibility of Plaintiff**

[153] The plaintiff was described by the psychiatrist, Dr Cantor as having a histrionic personality, a description which was seized on by Mr Curran. Dr Cantor described the term as including:-

*“the need to be the centre of attention, a tendency towards the sexually seductive or provocative interaction with others, consistent use of physical appearance to draw attention to self and a tendency to self dramatisation and theatricality.”*

To the lay observer of the plaintiff in the witness box that might seem to be an appropriate description. She dressed each day very attractively as, it seems, she always does and obviously had taken a great deal of care with her appearance. To a greater or lesser extent at times she seemed quite at ease in the witness box. Indeed she once expressed pleasure at finally reaching this stage of her dealings with the defendant. She was sometimes given to express herself in ways, which might be thought to be artificial. And there was an extraordinary collapse (literally) in hysterics while under cross examination. But overall she was a remarkably composed witness, rather warm and conversational in manner to both counsel and with me. She did however often display a lack of ability to find a right word or phrase. I bear in mind however the fact that no matter how composed a witness might appear to be, to have to give evidence of the nature given by the plaintiff, for the length of time she did, and to be cross examined vigorously, (though fairly) at length and in considerable detail would be an ordeal for anyone, even one used to the cut and thrust of politics. It all took place in the presence, each day, of a large press gallery and a full public gallery. She would no doubt have expected press reports to concentrate on the salacious, and they did. Finally, as for being histrionic, her manner may have fitted Dr Cantor's description, but so does the manner of very sincere and truthful people.

[154] The plaintiff's personality was described by the psychologist, Dr Douglas as one who is

*“at high risk for over-personalising and distorting her interpretation of what she observes, and this increases her risk for losing emotional and/or behavioural control.”*

This helps me to understand such things as her physical collapse in the witness box and during a television studio interview. There is uncontradicted evidence that she suffers from a mild form of epilepsy, which has in the past caused her to collapse. Her responses were sometimes discursive, sometimes dramatic and could be said to be “flowery” but this is not to say that such a tendency, of itself, suggests untruthfulness. None of the two psychologists and three psychiatrists who examined her considered her to be untruthful or unreliable. That, of course, does not excuse me from forming my own view of her credibility, nor assist me in that task, but it establishes that the descriptions of her given by Dr Cantor and Dr Douglas are not intended to suggest that her personality is that of a liar or someone who is inherently inaccurate to the point of unreliability.

[155] But, aware of the psychological and psychiatric assessments and of her demeanour, which I have described, it seemed to me that I should treat the plaintiff's evidence with caution and look, where possible, for reliable corroborative evidence.

[156] I turn first, however, to some of the more serious specific attacks levelled by Mr Curran on the plaintiff's credibility. Some of them I have already dealt with.

[157] It was submitted that the plaintiff herself admitted in evidence that she performed masturbation when running her massage business (see para [42]). In my opinion that was not her evidence. The submission was based on a literal reading of a remarkably frank answer by the plaintiff, but the whole tenor of her evidence on the point is that she was taken aback by the client's act, that she was absolutely averse to it, but that it took some five seconds to respond to her instincts. That course of conduct is not beyond human understanding.

[158] It was submitted that the plaintiff's failure to employ contraception on the occasions of sexual intercourse with the defendant defied belief. Very many people are careless about the risk of pregnancy. In this instance it was a case of six to ten acts of intercourse by a woman in her mid 40's. In any event, there is no evidence or even suggestion that she wanted to become pregnant to the defendant, or even turned her mind to it. Indeed she seemed rather vague about whether or not ejaculation ever occurred within her.

- [159] It was submitted that the plaintiff told a deliberate lie in court by saying that the defendant had been masturbating in the yard of her home on 4 April 1999. Again, a literal adoption of one answer by her would suggest that. But her evidence, read fully, was that someone, of four or more possible people, had raised the possibility that he had been masturbating but she could not remember who. That it would have been raised as a possibility is not surprising or suggestive of malice, he having been discovered in the dark and rain in the vicinity of her house, his fly half undone, as he himself admitted in evidence. But it seems to me that if she had really been malicious and prepared to lie, she could easily have persevered with the harmful accusation, even embroidered it, but she did not. I immediately record my finding that there is absolutely no evidence that on this or any other occasion did the defendant exhibit any such deviate behaviour.
- [160] Mr Curran submitted that the real cause of the plaintiff turning on the defendant, of objecting to his conduct which she had been at least content, if not happy, to experience earlier was that he had “turned off the SCRGAL tap”, that is, he had brought to an end her enjoyment of the financial benefit she had enjoyed since 1994.
- [161] As I have said I regarded the SCRGAL financial evidence as peripheral. I am sure that it only scratched the surface of a complex matter. But so far as the evidence went I am quite unable to draw the conclusion sought by Mr Curran. I am also unable to see a sinister connection between the plaintiff and Mr Jones’s failed diary publishing enterprise, which was partly funded by SCRGAL. In fact (see para [133]) the plaintiff quite unnecessarily gave security over her own asset to support the loan after it had been made. I have recorded that the plaintiff’s purchase from SCRGAL of the house at Cootamundra Drive was supported by valuations obtained by the defendant. I do not accept that she wrongly used the SCRGAL car after her election as mayor and prefer the evidence of Mr Spiller on the point. As to the payment to her by SCRGAL for expenses she said she incurred, the evidence is that she made claims which the defendant sighted and authorised payment for. The only one refused was a minor matter and, of course, she never received that money. I reject the submission that the plaintiff’s present action is related to these matters.
- [162] The plaintiff has retained, uses, and admits to liking a gold watch and a cane basket given her by the defendant. It was suggested that this is quite at odds with her claim that the donor has caused her misery. On reflection I see nothing of critical importance about it. The plaintiff’s complaint about the defendant was of his obsessively domineering and intrusive conduct.

The two gifts were not representative of that conduct. Or it may be, as Mr Dunning submitted, that she simply likes them.

- [163] Much of the evidence dealt with allegations relating to the immorality of the plaintiff, which is said by the defence to explain much of the defendant's conduct. Very much of this evidence was based solely on rumour and guesswork. For example, as these reasons have demonstrated, allegations that the plaintiff had a "continual stream of lovers" was simply not established. Indeed the men whom the defendant's pleadings actually identify were either not questioned at all about it, or were questioned only in passing and denied it. The plaintiff herself was not questioned on the subject. In any event, one must ask, even if it had been established that the plaintiff, a mature woman who was at all material times either divorced or whose marriage had irreparably ended, had indulged in a discreet sexual affair, whose business is it other than hers and the man concerned?
- [164] As to the massage business (paras [25]-[43]), I reject the suggestion that she acted immorally by giving "extras" to male clients in the form of masturbation or other sexual favours. When considered calmly one must wonder whether an advertisement in the Therapeutic Massage column of the newspaper inserted by a 45 year old qualified masseuse would attract the numbers of men seeking sexual relief that the defendant said the plaintiff boasted of. One would think that such men would be far more likely to consult the other advertisements which are printed in newspapers using wording much more likely to attract them.
- [165] One does not have to be an expert in the study of human nature to accept that a woman who practices the genuine science of therapeutic massage will be the object of the occasional opportunistic lewd suggestion or physical approach. Indeed such things can occur in other branches of the health profession. But to say that a qualified therapeutic masseuse who practices that profession thereby invites sexual attention is an insult to those who carry out that professional occupation.
- [166] As to the contents of exhibit 5, the report of the client/agent, I prefer the plaintiff's evidence on what occurred rather than what is contained in that unsworn, very suspicious document. I seriously doubt that it was prepared by a genuine enquiry agent. Apart from its lack of identification and signature it contains no purported quotes so it would seem that the "client/agent" had no tape recorder concealed, for example, in her handbag. One would expect a professional to have such equipment. Its accuracy cannot be relied on. It contains a

reference to a discussion about a certain man's romantic possibilities (and the plaintiff conceded that) but it must be remembered that this was a private conversation between two mature people of the same sex and in any event the reported discussion could hardly be described as shocking.

[167] What is noteworthy, of course, is that although the client/agent was obviously out to encourage the plaintiff to make unguarded admissions about her own sexual activity or about her knowledge of how to offer sex for money, no such admissions were made.

[168] As I have said I do not accept that the report emanated from a genuine enquiry agency. Rather I suspect it was the work of someone who wanted to frighten the plaintiff out of her massage business, who enlisted the aid of a woman associate or acquaintance. The fact is that the report did perturb the plaintiff, as might be expected.

[169] I closely observed and listened to the plaintiff during her two days in the witness box. I heard a great deal of evidence corroborating important parts of her evidence. I refer particularly to the evidence of Mr Wilkinson, Mr Jones, Mr Clatworthy, Mr Lewis and Miss Kerr. When it is all boiled down I heard little reliable evidence which could be said to be damaging of her character or credibility. I am driven logically to a finding that she has been truthful and accurate in her evidence.

### **Credibility of Defendant**

[170] If the plaintiff could accurately be described as having a histrionic personality then the defendant's personality, as displayed during the course of the thirteen sitting days, is at least equally histrionic. The form his answers often took and his body language when in the witness box were, I consider, a studied performance. He tended to make self-serving speeches. If faced with a difficult question he was often evasive, sometimes adopting lengthy, discursive and unresponsive answers. On many occasions he gratuitously introduced an offensive reference to people, sometimes plaintiff's witnesses to whom such a suggestion had not been put, sometimes people who were not called and were never given any opportunity to respond. Many of these references were obviously based on hearsay and the defendant must have known hearsay to be inadmissible unless specially allowed. Indeed I doubt that some of the information on which he said he based his evidence had actually been given to him. On many occasions during the course of the evidence of the plaintiff and

her witnesses he uttered audible comments from the well of the court. One such (“bullshit”) was obviously heard by the plaintiff and drew a sharp retort from her. A number of times he stormed from the courtroom either shaking his head to indicate his disbelief at the evidence being given or making audible angry retorts. Almost invariably he reacted to damaging evidence (or even submissions) by hurrying forward to the bar table to whisper instructions, the real intent being, in my view, to indicate to me that he had a good answer or explanation. During one session of cross examination of the plaintiff he pointedly took up a seated position in the courtroom so as to be directly in her line of vision and then stared at her fixedly and with hostility. His attitude when Mr Wilkinson was in the box was similarly confrontational.

[171] In one most important feature the defendant’s credibility took a telling blow. The disclosure he gave of his diary pages was selective and had to be supplemented from time to time. That could partly be explained by the fact that it seemed to have been left to him to decide what was and was not relevant to these proceedings, and of course he is not a lawyer. He chose to cover up entries which he considered to be irrelevant, or which he said related to affairs of SCRGAL (which are the subject of other court proceedings) by gluing paper over them. But careful examination of the entries (for example) for 2 April 1999, 20 April 1999, 6 May 1999, 8 May 1999, 28 July 1999, 14 October 1999, 20 March 2000, 23 March 2000, 30 May 2000, 3 August 2000 and 25 August 2000 shows that he has attempted, by gluing paper or erasing entries to conceal entries, which could not possibly be regarded as irrelevant nor as relating purely to SCRGAL. Furthermore many of the entries which were disclosed are, on their face, suspicious and give rise to the conclusion that they were, more probably than not, manufactured for the purposes of this trial. I refer by way of illustration to the entries of 8 March 1994, 21 April 1994, 23 May 1994, 30 January 1995, 7 February 1995, 6 March 1995, 17 March 1995, 11 September 1995, 22 February 1996, 29 July 1999, 14 December 1999, 25 May 2000, 15 June 2000 and 20 August 2000. I also consider it highly unlikely that the notations of “√” or “yes” (see para [24]) were made contemporaneously. To keep such a record of sexual conquest is, I would think, most unusual and I think it is far more likely that they were added later to give credibility to his claim that his sexual affair with the plaintiff was more frequent and more long-lasting than it really was. Finally, I have read through the typed copies of diary entries said by Mr Curran to be highly relevant. I have to say that, in form or content, they are not persuasive of their accuracy and truth.

[172] The defendant frequently referred to people whom he simply described as “they”, or even “we” who, he asserted, supplied relevant information to him or who were engaged in surveillance of the plaintiff. He was unable specifically or satisfactorily to identify any of those people and in the end I do not accept that for the most part they exist.

[173] It was the defendant’s evidence that the plaintiff admitted (even proudly) to have prostituted herself on many occasions when engaged in her massage business during 1994/5. It would be hard to describe the activity of masturbating men for money as other than prostitution. He admitted in his defence that he may have said that she “*was acting like a slut in the context of the services provided by her whilst operating her massage business*”. According to Mr Wilkinson, whom I accept, he described her conduct as prostitution. He also admitted in his defence discussing with the plaintiff her “continual stream of male lovers” and in evidence and in his pleadings he named a number of men who he alleged fell into that category. Despite this, his evidence was that he maintained a regular, frequent sexual relationship with her until January 2000 oblivious, it seems, to any concerns of a moral or physical nature. I cannot accept that the defendant would, or could, do that. That would lead me logically to reject either his evidence that he had a lengthy sexual relationship with her, or that he really believed that she was promiscuous the while. Indeed, on all of the evidence, while it is possible that he believed she was promiscuous I do not accept that their sexual relationship extended beyond the limits described by the plaintiff. I will return to the question whether the defendant believed the plaintiff was promiscuous or that there were any reasonable grounds for such a belief.

[174] It is, I consider, revealing, to set out at length a passage of the defendant’s evidence in chief. I have added some alphabetical letters in the margin to aid identification in my ensuing discussion, and some emphasis:

*MR CURRAN “All right. Now, your diary records that on 11 August 1997 you arranged with Grosse that she was going to take up your bowls pants?-- Yes, that’s – well, actually I’d arranged it a couple of days before.*

*All right?-- I play bowls on a Thursday afternoon.*

*(A) All right. Can you tell us what happened on that day that you were supposed to have your pants taken up?-- Yeah, well I think Alison had basically forgotten and I drove over to her place and I’d come a different way. I’d come from – actually work – I’d been and picked up my bowls pants and I’d come from work because I come down the motorway and along the old Bli Bli road and towards the roundabout there and just before then Alison had started this business about I had to approach her around about May or June to reappraise my next year’s wage, you know, set up, you know, how much I was going to get, et cetera. And over the*

years Alison had said, "Well, you know, if you get a Caprice, I get a Caprice", et cetera. So it had just turned out only a few days before that we were entitled to our new Caprice. The two years was up or the 40,000. In this situation it was the two years so she had a silver one – oh, just – 575FEY I think the registration was and she'd only had it for a couple of days. And as I approached the roundabout to come back around to Alison's place I noticed the car go around the roundabout and I thought, "That's not Alison driving that car."

Whose car was it?-- It was SCRGAL's – it was SCRGAL's car. Alison calls all these her own. Alison calls SCRGAL-----

Okay. But-----?-- .... "my company".

-----was it – was it the SCRGAL car allocated to Alison?-- Yes, that's exactly right, your Honour-----

All right?-- -----sorry, Mr Curran.

(B) And what did you do when you noticed that she wasn't driving it?-- Well, first of all I thought it was strange but then when it went around the roundabout the second time, just going around in circles, I thought it was really strange.

So what did you do?-- So I thought-----

HIS HONOUR: Where were you?-- I was going to Alison's place and I-----

No, I know that, I know that, but if this car goes round the roundabout twice, what were you doing?-- I was ready to come around the inside of the roundabout. It went around in front of me once and I thought, "That was Alison's car-----"

Yes?-- -----and then it come around in front of me again-----

Did you remain stationary?-- Yes, I did.

I see.

(C) MR CURRAN: Mmm?-- And then it came around again and then it went around the corner and I thought - so -----

All right. So after you gave it some thought, what did you do?-- I followed it, which was only about 200 metres round the corner, and it – and it turns out that it was Benny Pike's place.

All right?-- But I didn't know Benny Pike lived there.

What was company policy in relation to the use of SCRGAL vehicles?-- The company policy has always been that it – you know, they allocate it to the person that works for the company. It's been made more stringent over the last five years that if somebody was going to a party and a husband was going to drink who worked for the company, then they should let me know that, "I mightn't be driving the car on Friday night. Margaret will be, or whatever. Is that okay?" I would enter that in my diary as being permission to do so. So that was the situation.

What, otherwise – otherwise the driver had to be who?-- Yep, that had to be the one the car was allocated to. Can I just refer back there, Mr Curran?

(D) Yes?-- In Mrs Grosse's evidence earlier, when she talked about this night, she said that she'd been to Trader Duke's and she'd driving Ben Pike and Bruce or whatever his name was home because they were inebriated.

Mmm?-- Right? Then she said she when out again with Ben Pike to give him a drive of the car. Now, if he was inebriated enough-----

Well-----?-- -----10 minutes earlier to take home, what the hell was he doing driving the car?

(E) In any event, when you followed the vehicle, what happened next?-- Well, I just followed it just around the corner a couple of hundred metres; it pulled up so I got out of the car and said to Alison, "Alison, what is going on?", and you know, "What about my bowls pants?", she'd forgotten about them.

Okay. And what was Alison doing?-- Oh, look, Benny Pike was just leaning up against the garage door and Alison was all over him. He'd got out the driver's side; she got out the passenger's side.

Uh-huh?-- I mean – I mean, I'd known about Alison's habits from then so – I wasn't surprised. And I had been told by other people that there was--  
---

All right. We'll leave-----?-- -----an affair going on.

We'll leave it there, thanks.

HIS HONOUR: What do you mean, she was all over him?-- Oh, basically had him – the big fellow pinned up against the door; she was leaning on top of him.

They – they had both just got out of the car, had they?-- They had got out of the car. I sort of pulled up a little bit behind them-----

But you-----?-- -----on the other side-----

-----were right on their tail?-- Oh, I wasn't right on their tail but I wasn't far behind. But I got out and thought, "Where's-----

No, please, please, let – just listen to me?-- Yes.

You were very close behind, were you?--I was probably around about 50 – 60 – 70 metres behind.

And you just drove up and stopped?-- Stopped.

And got out?-- Yeah. I thought, "Where's she gone?"

Never mind. And in that period of time they were embracing, were they?-- Yeah.

Against the garage-----?-- Yes.

I see.

MR CURRAN: Okay, and what did you say?-- I said, "Alison what's going on here? Have you forgotten about the bowls pants?"

Mmm. All right?-- Benny Pike said something about, "Piss off and get off my property."

All right. And then there was a – words exchanged between yourself and Pike?-- Well, I said something to him, and then I thought, what's the use?

(F) HIS HONOUR: Was there a physical confrontation between you?-- I think we got fairly close.

Well, what does that mean?-- Well, it means that he's a lot bigger than me, and he's an Olympic boxer. I'm 11 stone wringing wet, and it was the same with the night with Radke, at the -----

Well, no, no, just talk about this?-- Well, I just wasn't going to let him get too close to me and swing a punch.

Well, now, I was asking how close did you get?-- Oh, probably that far apart.

*Fifteen centimetres?-- Yeah, probably. I – I – I can't – I can't remember, your Honour. Alison stepped back. He told me to piss off, and moved towards me. I just stood there, and while I was talking to Alison, he kept move – moving towards me, so I didn't take a backward step. Well, if you didn't take a backward step and he's advancing, aren't you going to come into contact?-- If he'd come any further. He stopped, too, did he?-- Yeah. I see.*

[175] I refer to my identifying sub-paragraphs:-

- (A) I note overall the discursiveness of his answer which is an example of his habit of making a self-serving speech. Of particular note is the passage, I have underlined expressing his subservience to the plaintiff within SCRGAL affairs. It must be said that the evidence demonstrated a lack of strict observance of ordinary corporate rules in the running of SCRGAL but the defendant accepted on a number of occasions in his evidence that the plaintiff was his superior. See ex 21. Why then, one wonders, would the defendant take it on himself to monitor the plaintiff's use of her car?
- (B) I note the odd description of the event – a double circuit of the roundabout by the plaintiff's car, the defendant's car stationary at an entrance to the roundabout all the while, apparently unobserved by the plaintiff and Mr Pike.
- (C) I note that he said he followed the plaintiff's car for 200 metres, yet on arrival (50-70 m behind) the occupants were already outside the car and embracing (E). I note the reference to "company policy" about the driving of cars, and the requirement of the permission of the defendant for "unauthorised driving". There was no evidence of formal SCRGAL policy to this effect and, as I have said, it is odd that in this respect the implication is that the plaintiff was subservient to the defendant.
- (D) This is an example of the defendant using the witness box to mount an argument against the credibility of the plaintiff.
- (E) Even allowing for the difficulties of witnesses in estimating times and distances, the alighting and embracing would seem to be difficult to fit into the time available. I note the reference to "other people" and the adoption of the opportunity to refer to the plaintiff's "habits", obviously referring to alleged promiscuity.

(F) This is significant in the light of evidence by the plaintiff and Mr Wilkinson of the defendant boasting of his physical courage in the face of male friends of the plaintiff.

[176] In the light of the foregoing discussion of the evidence of the defendant, of the evidence of other important witnesses and a comparison with the credibility of the plaintiff I conclude that I am unable to accept the defendant's evidence other than on the occasions it agrees with or supports the evidence of the plaintiff.

### **Evidence of Stalking**

[177] Pursuant to my order of 25 October 2002 the plaintiff gave particulars representative of the conduct complained of in the Statement of Claim. I now set out in bold type each particular followed by the evidence of the plaintiff relating to each particular with reference to any evidence of other witnesses which corroborates or tends to corroborate her evidence.

[178] **In or about July 1994 the defendant loitered outside the residence at 27 Karawatha Drive, Mountain Creek, outside the room in which the plaintiff was carrying out activities related to her therapeutic massage business. This room was located at the front of the house next to the lounge room. The defendant would call the plaintiff on the telephone and repeat conversations and/or report on people's number plates who had visited her business.**

[179] The plaintiff's evidence is set out in paras [25] – [27] which I find to be accurate. What was put to her in cross examination (paras [41] and [42] is also relevant. The conclusion is obvious that the defendant must himself have loitered to eavesdrop and collect information or had engaged someone else to do it.

[180] **In or about August 1994, the defendant gave to the plaintiff exhibit 5, being a document dated 19 August 1994, and saying to her words to the effect she was being watched and that very serious consequences were going to occur for her.**

[181] The plaintiff's evidence is set out in paras [28] – [31] which I accept. I have discussed some aspects of this in paras [166] – [168]. The inference that the defendant was behind the visit of the client/agent is irresistible. I reject the defendant's evidence of the circumstances in which he obtained exhibit 5.

[182] **On several occasions in or about August 1994, the defendant said to the plaintiff “you’re sick”, “you need help Ali”, “you have a problem Ali”, “I’m the only one who can help you”, “they’ll take your Order of Australia off you”, “they have photos of you and all these men” or words to that effect.**

[183] The plaintiff’s evidence is set out in para [32] and its effect on her is set out in paras [33] and [34] which I accept. This provides further evidence of the defendant spying on her in her professional life. The result was that she felt obliged to give up the occupation.

[184] **14 June 1995 – The defendant was loitering in the side yard outside the garage at Karawatha Drive at approximately 9.00 pm for an unknown period of time.**

[185] Evidence of this was given by Mr Jones (para [85]) and I accept it. The plaintiff, it seems, was not at home at that time. There is no evidence that the defendant had any legitimate reason for his conduct and I conclude that he was loitering in order to spy on her.

[186] **On 22 June 1995 some time prior to 9.30 pm, the defendant broke into the plaintiff’s residence at 27 Karawatha Drive and went into her bedroom in an attempt to remove the report which is Exhibit 5.**

[187] The plaintiff’s evidence was that when she and Mr Jones returned to the house after a Rotary function they discovered that the house alarm had been triggered at 9.30 pm, the door had been opened and dirty footmarks led to her bedroom. It does not appear that anything had been taken. The defendant had often and firmly asked for the return of exhibit 5. She had on some eight occasions found the defendant in the yard of the house. Mr Jones gave confirmatory evidence of the triggered alarm.

[188] Standing alone it would not be possible to draw any inference from that circumstantial evidence contrary to the defendant. However when looked at in the light of the overall facts as I find them, I conclude on the balance of probabilities that the entrant was the defendant and that his purposes could well have been the recovery of exhibit 5.

[189] **On 14 July 1995 during the evening, the defendant was in the side area of the plaintiff’s yard at 27 Karawatha Drive making a noise, specifically talking on his mobile phone.**

[190] The plaintiff's evidence was that on this evening the defendant had been a guest for dinner. After he left, she prepared for bed and retired. She heard the noise of someone talking at the front of the house and crept to a window where, on looking out, she saw the defendant. She ran to the door and confronted the defendant angrily. He gave no reason for his presence outside and was dismissive. I accept that these events occurred and conclude that the defendant was spying on her.

[191] **On 23 July 1995 the defendant was in the side yard of the plaintiff's Karawatha Drive residence looking into her residence at approximately 8.30 pm. The duration of loitering is unknown as the defendant was disturbed once the plaintiff noticed him.**

[192] The plaintiff's evidence was that on this occasion she and Mr Jones observed a man in the side yard of the house. The man was wearing sunglasses and dark clothing. The plaintiff recognised him as the defendant. Mr Jones was simply prepared to say that the man's physique was similar to that of the defendant. (See para [85]). The plaintiff ran outside, angrily swearing at the man, who jumped the fence and ran off. I accept that it was the defendant who was loitering in order to spy on the plaintiff.

[193] **In or around July or August 1995 Mr Purvis loitered across the road from the surgery of Dr Carew.**

[194] The plaintiff's evidence was that the defendant was seen regularly parked across the road looking at the surgery. Mr Jones saw this on one occasion (para [85]).

[195] **On 31 August 1995 the defendant loitered in the plaintiff's yard at 27 Karawatha Drive at an unknown time for an unknown duration causing the wheelie bins to be knocked over and their contents spilt.**

[196] I accept that the bins were knocked over. However the possibility of this being done by someone other than the defendant either accidentally or mischievously cannot be ignored. On the balance of probabilities I decline to draw an inference contrary to the defendant.

[197] **In or around August 1995, one of the plaintiff's clients called after leaving the surgery stating that the defendant's car was parked outside the surgery and the defendant was in the car.**

[198] This evidence is pure hearsay and I reject it.

[199] **12 September 1995 – The defendant loitered at the back gate of the Karawatha Drive residence at approximately 8.30 pm looking into the plaintiff’s residence for at least 15-20 minutes until noticed.**

[200] The plaintiff’s evidence was that she and Mr Jones were having coffee in the sunroom when the outside security lights came on. Each saw, and recognised, the defendant just outside the fence staring at the house. See para [85]. He was wearing sunglasses. When the plaintiff called out, the defendant ran off. The plaintiff said she rang the defendant’s mobile phone and abused him. The defendant denied that he was the culprit, but later when referred to sunglasses said “*I’ve got rid of them now*”.

[201] **On or around 19 May 1996 the plaintiff was present in the offices of SCRGAL located at the Big Top Shopping Centre completing SCRGAL related work. The defendant was present for at least ten minutes hiding against the wall near the door of an office observing her until she spoke to him.**

[202] The plaintiff’s evidence confirmed the particular and was corroborated by the evidence of Mr Miguel, a man with whom she had formed a business and personal relationship (see para [64]). When confronted, the defendant claimed the right to be there. Mr Wilkinson said that the defendant identified Mr Miguel as an example of the plaintiff’s “disgusting” behaviour”. (See para [112]). In the circumstances I am prepared to infer that it was the defendant who damaged the model excavator which Mr Miguel had given to the plaintiff.

[203] **21 May 1996 at approximately 8.00 pm, the defendant showed up at the plaintiff’s residence at 27 Karawatha Street and left at approximately midnight. Purvis had an altercation with her and said words to the effect “*Why don’t you love me; why aren’t I good enough for you; I’m the only one who can help you Ali; you’ve got problems; you’re in denial.*”**

[204] The plaintiff’s evidence of this is an illustration of many similar episodes. On this occasion, the plaintiff said, the defendant came to the house and stayed on until an altercation developed between them, a typical one, she said. There was reference by the defendant to information she had received from people and that without him she would be in trouble. He

referred disparagingly to Mr Jones's bankruptcy. I accept her evidence on the point, corroborated materially by Mr Jones (para [86]). It is noteworthy that the defendant should be aggressive both to the plaintiff and Mr Jones in their own house.

[205] **On 5 June 1996 during the evening at around 6.00 pm, the defendant called at 27 Karawatha Street stating he wanted to stay and have dinner with Ms Grosse and John Jones. The defendant during the evening, said to John Jones words to the effect of "you're a piss pot, you're a fat useless old man who can't look after your wife" and pushed him to the floor.**

[206] The plaintiff and Mr Jones (para [86]) gave evidence of this, which is generally similar. It is not absolutely clear who initiated the violence but it was probably Mr Jones who had been drinking and resented the defendant's overbearing and aggressive attitude to the plaintiff after she, by offering the defendant a meal, had been kind to him. The defendant had also displayed contempt of Mr Jones, who was a co-owner of the house, and effectively ignored his orders to leave, before besting him physically and humiliating him. Mr Wilkinson para [112] confirmed the dismissive way the defendant spoke of Mr Jones and boasted of his dominance over him.

[207] **On 24 September 1996 at approximately 8.00 pm the defendant was loitering near a lamp post on the other side of Wharf Road opposite the residence, looking in for an unknown duration of time.**

[208] The plaintiff's evidence was that her attention was drawn to the presence of the defendant near the lamp post and after observing him for some time she called out to him. He was eating from a box and was apparently startled at her call, spilling some of the food. When asked what he was doing there, his excuse was unconvincing. In context this otherwise innocent event exemplifies the defendant's interest in keeping the plaintiff under observation.

[209] **Two to three weeks prior to 11 August 1997, during the evening the defendant went to Benny Pike's house at Dotterell Street, Bli Bli to observe the plaintiff.**

[210] The plaintiff's evidence was that after dinner one night with Mr Pike, she returned to his house with him and they spoke of very personal matters. Mr Pike drank wine and the plaintiff drank a glass of port. She is virtually a non-drinker and this caused her to black out.

She woke later, fully clad, but Mr Pike was naked. A security light came on and she left, Mr Pike showing her to the door. Next day the defendant phoned and confronted her with accurate details of her conversation with Mr Pike. He said “people” had photographed Mr Pike naked at the front door. He said that “Margaret Dean” had supplied all this information to him. He demanded to know if she had been intimate with Mr Pike, who became a constant topic of his accusations of immorality. Evidence which corroborates that detail, was supplied by Mr Wilkinson (para [107]).

[211] **On 11 August 1997, the plaintiff was at Dotterell Street, Bli Bli. The defendant was loitering across the street near a lamp post at approximately 8.00 pm observing her. The defendant approached her yelling, “some friend you are” and pushed Pike.**

[212] The defendant’s evidence on this episode is set out in para [174] and my comments on it in para [175]. The plaintiff said that because she had just taken delivery of a new car she allowed Mr Pike to drive it briefly whereupon the defendant materialised and used the particularised words, or similar. He was abusive to both of them, then physically challenging to Mr Pike, who sensibly declined the challenge. Subsequently the defendant boasted to Mr Wilkinson about the incident (para [112]). The next day the defendant phoned her, abusively, calling her “a slut” and “a wayward woman”.

[213] It is impossible to believe that the defendant just happened to see Mr Pike driving the car, or that he had any valid reason, other than obsessive jealousy, to spy on the plaintiff and humiliate her so.

[214] **22 October 1997 the defendant loitered outside the plaintiff’s residence in the yard for approximately six hours during the evening until the early hours of the morning.**

[215] Mr Jones’s evidence on this episode, which I have accepted, is set out in para [87]. I cannot accept that the defendant had any valid reason for his presence outside the plaintiff’s house.

[216] **On 8 December 1997 at approximately 6.30 pm, the defendant attended the plaintiff’s house at 39 Wharf Road. The defendant without consent touched her on the knees whilst sitting at the dinner table with herself and John Jones.**

- [217] The evidence of this was given by Mr Jones but I put no weight on its significance other than that it demonstrated familiarity and a kind of possessory claim, it being done in the presence of Mr Jones.
- [218] **In or around late 1997, the plaintiff was staying at the Carlton Crest Hotel in Brisbane. The defendant called her mobile phone while she was having a meeting there with the Honourable Vince Lester MLA.**
- [219] According to the plaintiff, on her way to a meeting in Canberra she had a meeting, partly political, partly social, with Mr Lester, at the hotel where they had coffee. During the early evening the defendant phoned her on her mobile phone harassing her and calling her “all sorts of things”. (It is relevant to note that, during his evidence he gratuitously introduced a slanderous reference to a sexual encounter between the plaintiff and Mr Lester, which had not been opened or particularised). During the phone call the plaintiff could hear the background noise of heavy traffic. He told her he was in the carport of his home. When she referred to the noise he said he was on the highway. I conclude that he was more probably than not in a Brisbane street, observing the hotel.
- [220] **The defendant attended an opening function of the plaintiff’s daughter’s business Universal Agencies in Church Street, Maroochydore, and said to Mike Binney words to the effect that he and the plaintiff were “an item”.**
- [221] Mr Binney gave evidence of this claim by the defendant. The date is not made clear, but in context it seems to have been in about late 1997. It is interesting to look at this statement by the defendant in the light of evidence given by various friends and associates of the defendant who believed that the plaintiff and the defendant were “an item”. (See para [50]).
- [222] **January to December 1998 at approximately 6.00 pm on 3 or 4 nights per week, the defendant invited himself over to the plaintiff’s residence, or she on some occasions had invited him, for evening meals whilst she and John Jones were living at 39 Wharf Road. The defendant would see her in person or call her on her mobile telephone and say “I’ll bring fish and chips over for tea” or words to that effect. On some occasions, the defendant would leave after an altercation with her saying words to the effect of “all these men”, “you need my help Ali”. On most occasions, the defendant would physically**

**try to kiss the plaintiff saying words to the effect of “*come on, come on, why don’t you give Robbie a kiss*” and “*what’s wrong with me*”.**

[223] This particular seeks to exemplify a course of conduct during 1998, which the plaintiff said became increasingly distasteful to her. On her evidence, which I prefer, the need to discuss SCRGAL work was often the defendant’s pretext for coming for dinner. Compare the evidence of Mr Wilkinson at para [120]). In fact, such matters would ordinarily have been discussed on the telephone. On occasions the defendant would invite himself around. On other occasions the plaintiff would invite him around. She felt sorry for him and felt that he needed a meal. However, the conversation often turned unpleasant during the evening. It did so in the following ways:-

- (a) The defendant would constantly ask the plaintiff why she could not be in love with him and what he had to do now to make her love him;
- (b) The defendant questioned her persistently about her sexual activities and insisted on regaling her with details of his sexual activities, although she said that she was not interested;
- (c) He used to say to the plaintiff that she had a problem; that there was something the matter with her; “*all these men, Ali, all these men; there is something wrong; you need love and you need some help.*”;
- (d) The defendant would try to kiss her;
- (e) He would tease her and attempt to force himself upon her. Her response was to avoid the physical contact as much as possible, trying not to offend him.

[224] What appeared to bring on these bouts of unpleasantness was if the plaintiff had been known to speak to another man other than in relation to business, or had him to her home, or had dinner with him. Evidence generally confirmatory of this comes from Mr Jones, Mr Kerr and Mr Wilkinson as well as the defendant’s pleadings and his own evidence.

[225] **On 8 August 1998 at approximately 11.15 pm, the defendant telephoned the plaintiff at the Carlton Crest Hotel in Brisbane. The defendant had made enquiries to locate her.**

[226] The plaintiff’s evidence was that on the day previous to this, she had been travelling with her first husband Mr Kerr to northern New South Wales to visit their daughter Kylie. On the way down the plaintiff received phone calls from the defendant. They stayed at their

daughter's place on the Friday evening, and were returning the Sunshine Coast the following evening.

[227] On the trip back it was raining heavily. At about 8.00-8.30 pm, the defendant rang on the mobile phone questioning what she was doing and the plaintiff told him that they were on their way home. Because it was raining and it was late, they decided they would spend the night in Brisbane, and come back to the Sunshine Coast the next day instead. They decided to stay at the Crest Hotel in Brisbane, but she did not tell the defendant this. They were asleep in the hotel when at about 11.00 pm the telephone in the room rang. The plaintiff had turned her mobile telephone off. It was the defendant and in an abusive tone he questioned the plaintiff about whether she was with Mr Kerr and whether he was sleeping in the same bed as her. He said "*Why aren't you at home and what are you doing you sneaky woman*". He also called her a slut. I accept this evidence. It indicates not only the defendant's obsession but also the lengths to which he was prepared to go to track her down and harass her.

[228] **During October/November 1998 on several occasions the defendant, without invitation, called at 39 Wharf Road whilst the plaintiff's ex-husband, Mr Kerr, was staying at the residence.**

[229] Evidence of this was given by the plaintiff and by Mr Kerr who, in late 98, had a serious operation. The plaintiff invited him to come to stay at her residence at 39 Wharf Road to convalesce. The defendant thrust himself into the household on a regular basis, behaving cockily and intimidating Mr Kerr. This intimidation continued to such an extent that Mr Kerr on these occasions used to retreat to his bedroom. The defendant's intrusion became so intensive that Mr Kerr left the residence, which destroyed any chance he and the plaintiff had of getting back together, a thought she had harboured. This evidence (para [73]) which I accept can be compared with that discussed in paragraphs [203] – [206] relating to the defendant's attitude to Mr Jones. It is another example of the defendant giving himself precedence over someone whom he seems to have regarded as a nuisance and a possible rival.

[230] **Some time prior to April 1999 the defendant said to John Herriot words to the effect that he was her lover.**

- [231] The plaintiff gave evidence, which I accept, that Mr Herriot told her that he thought she and the defendant were lovers. This is evidence of the fact that Mr Herriot said those words, and presumably had that belief. Her evidence was that Mr Herriot told her that the defendant had given him this information. That is hearsay and cannot be acted on.
- [232] **On 3 April 1999 at approximately 8.00 pm, Mr Lewis and the plaintiff were getting into Mr Lewis' four wheel drive vehicle outside the resident of 39 Wharf Road. The defendant approached the vehicle, abused the plaintiff and Mr Lewis saying words to the effect of "get out of the way", "she belongs to me" and then pushed Mr Lewis into the rear passenger side of the four wheel drive vehicle dinting it.**
- [233] The evidence of Mr Lewis on this episode is set out in paras [78] to [80] and I have accepted it. The plaintiff's evidence is materially identical. It provides clear evidence of the defendant spying on the plaintiff, of his jealousy of any male companion and of the abuse, which any such contact provoked, both to her, and the companion. I refer also to the boast he made to Mr Wilkinson of the episode (para [112].) Finally, the telephone records, exhibit 1, reveal nine phone calls from the defendant to the plaintiff on that occasion between 6.49 pm and 9.17 pm. Many of them probably went to message bank but a couple are quite lengthy. The plaintiff, without going into details, gave evidence of abusive phone calls from the defendant that night.
- [234] **4 April 1999 between approximately 7.00 pm and 9.00 pm, the defendant loitered out the back of the plaintiff's residence for an unknown period of time in the rain until caught by police.**
- [235] Mr Lewis's evidence of this is set out in para [81], and Detective Lee's in para [67]. The plaintiff's evidence was that when the police brought the defendant to her house, a policeman informed her of her right to make a complaint, and the possible consequences to him. The plaintiff was concerned about the effect that would have on SCRGAL and on the defendant's family, to whom she felt some affection. She also thought that the defendant would change his ways after the severe dressing down the police gave the defendant as well as their warning to him not to go near her.

[236] However soon after the police left, the plaintiff received “vengeful” phone calls from the defendant. The phone records show three calls at 9.53 pm, 9.56 pm and 10.30 pm. All told, he made nineteen calls to her that day.

[237] I accept the plaintiff’s evidence on these matters. It is helpful to note the credible evidence of Mr Wilkinson in para [116] referring to the undone fly on the defendant’s jeans on this occasion which he admitted to as indeed he did in his evidence. I also note that the defendant in evidence displayed a detailed knowledge of not only Wharf Road but also the surrounding roads.

[238] **In or about April 1999 the defendant loitered outside the residence at 39 Wharf Road. The defendant was outside the lounge room window whilst the plaintiff was in the lounge room and conversing with Rob Lewis.**

[239] The plaintiff’s evidence was that she was having a personal conversation with Mr Lewis in her house. The next day the defendant spoke to the plaintiff and recounted her conversation with Mr Lewis word for word. The defendant also said to her “*How dare you see Lewis; this man is no good; he’s a crook; I have done my homework on Lewis and he is a criminal.*” The plaintiff realised that the defendant had been listening to her conversation with Mr Lewis.

[240] **In or around April/May 1999 the plaintiff was in the sunroom at the back of the house at 39 Wharf Road with Mr Lewis. During the early evening the defendant was loitering in the backyard watching and caused her house telephone to ring.**

[241] Mr Lewis was playing a song on his guitar for the plaintiff in the sunroom of her house. After he finished the song, she gave him a kiss to thank him. Immediately the house phone started ringing. The plaintiff answered it and it was the defendant, who said words to the effect of “*Why are you always throwing yourself at men*”, making reference to Mr Lewis. I accept her evidence of this.

[242] **On 8 July 1999 late in the evening, the defendant was loitering in the yard at the 39 Wharf Road residence whilst the plaintiff was in her bedroom upstairs with a male companion. The defendant caused tennis balls to be thrown at the bedroom windows.**

[243] The plaintiff's evidence was that she had begun to see a man whom she had met through dancing lessons. One evening, late at night, tennis balls began striking the bedroom window. She must have told Mr Wilkinson of the incident because Mr Wilkinson said he put it to the defendant, who denied it but, perhaps twelve months later, described throwing the balls (see para [112].) I accept this as another exhibition of the defendant's jealousy and of spying on the plaintiff.

[244] **On or about 14 July 1999 during the evening, a male companion's car was parked outside the residence at 39 Wharf Road whilst the male and the plaintiff were inside the residence. The defendant interfered with this vehicle by way of snapping off the aerial.**

[245] The evidence of the plaintiff on this seems to be clearly hearsay and I pay no attention to it.

[246] **In or about August 1999 at approximately 10.00 pm, the defendant was hiding in the plaintiff's back yard and loitering around the side of the house. The duration of loitering is unknown as the defendant ran away once noticed.**

[247] The plaintiff's evidence, which I accept, is that at about 9.30 pm she was about to go to bed when the backyard spotlight came on. She looked outside and saw the defendant, dressed in black and wearing a beanie, bent over, running away. She phoned his mobile number and when he answered he denied being present. When she insisted she had seen him he said he had been in the back yard looking for tiles to match up with his roof. The plaintiff explained to him that he had frightened her.

[248] **14 October 1999 at approximately 8.30 or 9.30 pm, the defendant loitered in the plaintiff's mother's back yard for at least half an hour and then came to the door of the sunroom.**

[249] The plaintiff's evidence was that at this time she was staying at her mother's house. She had an arrangement to see a constituent, Mr Hungerford. When driving to the house she recognised the defendant's car parked nearby, under a tree where it was partially concealed. They proceeded to the house and began to discuss the drawings Mr Hungerford had brought with him but the plaintiff was unable to concentrate. She went to the door and called to the defendant to come out. It was dark and raining. The defendant emerged wearing a dark

beanie and raincoat and was immediately aggressive. She tried to calm him down, but he continued to berate her.

[250] Corroboration of this evidence comes from Mr Hungerford (para [77]) and Mrs Barry (para [76]). Of further note is the evidence of Mr Wilkinson (para [110]) that the defendant had asked him to conduct a search to discover the ownership of a vehicle, which proved to be that of Mr Hungerford. Although the defendant denied wearing a beanie, Mr Wilkinson recalled him referring to wearing one. This a clear example of the defendant spying on the plaintiff.

[251] **On or around 16 October 1999, the defendant entered the house at 69 Point Cartwright Drive and erased the tape on the answering machine containing a death threat from him to the plaintiff.**

[252] The plaintiff's evidence was that the domestic phone answering machine, when she played it, had a recording of the defendant's voice. He said something like "*you're dead if you do that*"; "*you'll be a dead woman*". She described it as a "very solid death threat", the tone I voice being frightening. She was intimidated by it. She confronted him about it the next day and threatened to take the tape to the police. That night, on her return to the house, she found that a screen had been removed from a window of the room containing the phone and the tape was missing. In the context of all of the evidence, including the lack of reference to the removal of anything but the tape, on the balance of probabilities I infer that the defendant was responsible.

[253] I am not of the opinion that the defendant on this occasion (or the occasion to which I will refer (para [276]) seriously held any intention of harming the plaintiff physically, although the threat made her fearful for her safety. Rather, I consider he was expressing his anger at what he took to be disloyal conduct on the part of the plaintiff in preferring the company of other men.

[254] **In or around November/December 1999, the defendant was driving past the residence at 69 Point Cartwright Drive repeatedly.**

[255] The plaintiff gave evidence that at this time the defendant used repeatedly to drive up and down the road outside her house. One night she pursued him in her car back to his residence. She phoned him from her mobile phone from his driveway and he said that he had been

home all night watching football on television. She felt the bonnet of his car, which was hot and she could hear the “tick tick” of the engine cooling.

[256] I accept that evidence. The defendant had been patrolling the plaintiff’s street for no known good reason. It is highly likely he was looking for evidence of her having male company.

[257] **In November/December 1999 the defendant was outside the plaintiff’s bedroom window looking in. He also followed her at about this time.**

[258] The plaintiff’s evidence was that she went to the theatre with a male companion and next day received a phone call from the defendant recounting to her all of her movements and activities. He said that “other people” had passed the information on to him. I accept this as another occasion on which he had spied on her but sought to pass it off as the actions of others. He was aware, I am sure, of the unsettling effect the alleged participation of unknown other people would undoubtedly have on her.

[259] **In November/December 1999 the defendant was loitering in the plaintiff’s mother’s back yard watching her activities at night-time. The duration of loitering is unknown as Mr Purvis ran away once noticed.**

[260] The plaintiff gave evidence, which I accept, that at bedtime she was in the lavatory and heard the sounds of someone walking outside. She looked out a bedroom window and saw the face of the defendant. He was wearing a beanie. He ran off. This evidence is materially corroborated by Mr Wilkinson who said that the defendant told him of two occasions on which he looked in through a bedroom window of that house.

[261] **In or around early 2000 at lunchtime, the plaintiff was having lunch with Nick Clatworthy inside the Big Top Shopping Centre at a Café. The defendant hid behind a pillar near the café and watched her for an unknown duration of time.**

[262] This incident was described by Mr Clatworthy (para [70]) and by Mr Wilkinson (para [115]). The plaintiff gave similar evidence and I am quite satisfied that it occurred.

[263] **On 24 February 2000 during the evening, the defendant attempted to break into the garage of Nick Clatworthy’s unit at “Surfcomber on the Beach”, 6 Beach Parade, Cotton Tree where the plaintiff’s car was parked in order to take it.**

[264] The plaintiff's evidence was that at this time the defendant frequently harassed her about her relationship to Mr Clatworthy and the fact that she was using her SCRGAL car. He threatened to "take it back". She took to putting her car in Clatworthy's lockable carport to conceal it when she visited him. On one such occasion she found that the door to the carport had been damaged, as if someone had tried to break in. Mr Clatworthy gave evidence confirmatory of this. Although the evidence as a whole makes this event suspicious, the attempted forced entry of a locked garage is a relatively common event and I do not draw any inference contrary to the defendant.

[265] **In or about February 2000 at approximately 8.00 pm, Mr Clatworthy and the plaintiff were eating at Gauchos Mexican Restaurant, Sixth Avenue, Maroochydore. The defendant drove past the location repeatedly to observe her and called her and Clatworthy on each of their mobile phones.**

[266] The plaintiff's evidence was that at the restaurant she saw the defendant driving repeatedly up and down outside the restaurant. It made her feel "creepy crawly". Mr Clatworthy's evidence was that he saw a silver car driven up and down. He recalled that she received two or three phone calls, which provoked a response, which he interpreted, from experience, as identifying the caller as the defendant. I accept that the defendant drove the car up and down and that the defendant made phone calls to the plaintiff.

[267] **In or around February 2000 at approximately 6.30 pm, the plaintiff was on the verandah of Nick Clatworthy's unit located at "Surf Comber on the Beach", 6 Beach Parade, Cotton Tree. The defendant loitered outside the residence observing Clatworthy and the plaintiff for an unknown duration of time until he appeared and said to Clatworthy and the plaintiff words to the effect of "caught you! – at it again!".**

[268] The plaintiff's evidence was that they were on a low deck of the building, having drinks and talking for half an hour. At one stage Mr Clatworthy gave the plaintiff a companionable kiss at which the defendant leapt out of the bushes in the garden calling "*caught you again; you're disgusting*". He was physically aggressive to Mr Clatworthy who remained calm and placated him. The evidence of Mr Clatworthy, which corroborates this, is at para [70]. I have not been informed of any reason which might justify this episode of spying and harassment.

[269] **On 20 March 2000, the defendant attended the “Meet the Mayoral Candidates” function at Yandina held at the Yandina Community Hall and said to Noosa Mayor Bob Abbott words to the effect that he was the plaintiff’s campaign manager and lover.**

[270] Contrary to the view I expressed during the trial I consider the plaintiff’s evidence on this to be hearsay and to be ignored accordingly.

[271] **On the evening of 23 March 2000 through to approximately 12.30 am (on 24 March 2000), the defendant was loitering outside the plaintiff’s bedroom window and John Jones’ bedroom window whilst the plaintiff was in her bedroom. The defendant shouted “*John, she’s fucking Clatworthy*” or words to that effect.**

[272] Mr Jones’ evidence of this is at para [91] and is in accordance with those particulars. The plaintiff’s evidence was consistent. I accept them both and accordingly find that at that very late hour (after midnight) the defendant was loitering outside the plaintiff’s house for the purpose of spying on her.

[273] **On or about 26 March 2000 during the evening, the plaintiff went to O’Malley’s Bar at The Esplanade, Mooloolaba with family members. The defendant went to the bar and observed her.**

[274] The plaintiff’s evidence was that at about 6.30 pm, soon after she and her family arrived at O’Malley’s Bar, the defendant arrived. His presence was annoying and an altercation arose between him and the plaintiff’s son in law. I place no particular weight on this.

[275] **On 26 March 2000 during the evening, the defendant repeatedly was driving past the residence at 19 Cootamundra Drive, Buderim to observe the plaintiff and her family. During a telephone conversation the defendant said to her “*you’re dead woman, you’re dead*” or words to that effect.**

[276] After the incident at O’Malley’s the plaintiff returned to Cootamundra Drive with members of her family and Mr Clatworthy. During the evening family members told the plaintiff that the defendant was driving up and down the road. That was hearsay but it caused the plaintiff to go to her car, and sit in the front with the window down. There was then a phone discussion between the defendant and her. Her telephone was in hands free mode and both her daughters were standing next to her, outside the car, listening to the call. The plaintiff

told him she was going to the police. In response to that the defendant said in a very aggressive voice “*you’re dead woman, you’re dead*”. Miss Kerr’s evidence corroborated the plaintiff’s evidence (para [126]).

[277] The phone records do not bear out the evidence of the plaintiff and Miss Kerr that the plaintiff initiated the call. However the defendant’s records show that he phoned the plaintiff very frequently that evening and I conclude that one of them was this call. I do not accept that the plaintiff and Miss Kerr lied. They are mistaken on what, after all, is a relatively minor detail of a very upsetting event.

[278] Miss Kerr became quite hysterical and demanded that the plaintiff go to the police. The plaintiff agreed and she and Miss Kerr drove to the police station. Miss Kerr gave the police the number plate of the car that the defendant had been seen driving, it not being his usual car. The police identified it as a SCRGAL car. Miss Kerr demanded that they go and apprehend the defendant. I observe that this behaviour by Miss Kerr was consistent with the reaction of someone who has heard her mother made the subject of an apparent death threat.

[279] After having made her complaint to the police, and after some hours at the police station the plaintiff returned home. She then received a telephone call from the police at about midnight informing her that they had arrested the defendant and asking whether she wished to come down to the police station to make a formal complaint.

[280] The defendant contacted Mr Wilkinson by phone from the police station and explained the situation. According to Mr Wilkinson the defendant asked him to contact the plaintiff to ask her to withdraw whatever allegations there were. He was angered by his arrest. Mr Wilkinson phoned the plaintiff, at one stage having the defendant on one telephone line and the plaintiff on another. His evidence in these events is a para[99].

[281] The plaintiff said she received a telephone call from Mr Wilkinson in which he “begged” her not to press charges, saying that to do so would create a lot of trouble for SCRGAL and would put a young company in jeopardy. The plaintiff succumbed to that pressure. Mr Wilkinson said in evidence that he now looks back with regret on his decision to make such a plea on that night. The plaintiff then reluctantly agreed not to press charges against the defendant and expressed that reluctance in writing in her statement to the police.

[282] When she returned home she was troubled by another phone call from the defendant at 1.38 am.

[283] **In or about March 2000 late in the evening, the defendant was outside the plaintiff's bedroom at the residence at Unit 21, 20 Village Green, Buderim Boulevard, North Buderim whilst she was in her bedroom conversing on the telephone with Mr Clatworthy.**

[284] I do not recall that the plaintiff gave evidence of any specific incident of this nature for that date.

[285] **In or about March 2000 the defendant was leaving the residence of Unit 21, 20 Village Green, Buderim Boulevard, North Buderim late at night. The defendant jumped out of the bushes saying "*caught you again you slut*" or words to that effect.**

[286] The plaintiff's evidence was that late one night in March 2000 she received a phone call from Mr Clatworthy who mentioned a personal problem. She decided to visit him and as she left her residence the defendant emerged from the dark saying things such as "*sneaking out again Ali*" and addressing her in terms, which were "*the sort of sleazy slut stuff*". I accept her evidence. I regard the use of the expression "sneaking out" to a mature woman leaving her own residence at any time of day or night to be revealing. The same expression appears in paragraph 4 of the defence.

[287] **On 22 April 2000 at approximately 6.00-6.30 pm the defendant was loitering outside the plaintiff's bedroom window.**

[288] The evidence of Mr Jones on this episode, which I accept, is at para [92]. The plaintiff's evidence was materially the same. I consider it is another example of loitering to spy.

[289] **Exhibit 11 was discovered by the plaintiff on her desk at Maroochy Shire Council offices, Bury Street, Nambour on or around 30 April 2000.**

[290] It was undoubtedly offensive for the plaintiff to find on her desk a document about an unpleasant and serious psychiatric illness with the clear hint that it applied to her. Mr Hulett is now prepared to take sole responsibility for sending it to her although I accept the plaintiff's evidence that at the time he said he had simply helped the defendant to get the

information. She said that when she confronted the defendant he denied knowledge of it but, interestingly, said he agreed with it. According to the plaintiff, and I believe her, he said that it showed that “others”, not just he, recognised her disorder. He said, “*Have a good look at yourself Ali*”.

[291] It is possible the defendant believed that the plaintiff suffered from the illness, although the expert evidence is that she does not. But he would surely have realised that he was not in any position to diagnose a psychiatric illness. It is more likely that he was at least content that she had received exhibit 11 because it gave him another opportunity to refer to the active interest of “others” to her, and to stress that she needed his care, advice and protection.

[292] **In or about April or May 2000 the plaintiff attended the Master Builders Association Public Meeting in Maroochydore. The defendant attended this public function and stared at her for an unknown duration of time.**

[293] The plaintiff said that at this function (actually a Housing Industry Association meeting) the defendant stared at her to the extent that she felt obliged to leave. I accept that she genuinely felt this threat and understandably so, given the history of his conduct. But I am not able to find that his conduct on this occasion was untoward.

[294] **On 5 May 2000 at approximately 4.30 pm, the plaintiff was out for a walk near Unit 21, 20 Village Green, Buderim Boulevard, North Buderim residence. The defendant drove his motor vehicle alongside of her whilst he observed her walking.**

[295] The plaintiff’s evidence, which I accept, was that while she was walking the defendant drove up beside her and, opening the driver’s side door and spoke to her. Despite her statement that she did not want to talk to him, he continued to drive beside her, the door still open, until she abandoned her walk and went home. While this was a minor event, it was another example of the defendant trying to impose his presence on the plaintiff.

[296] **On 6 May 2000 – the defendant was seen standing next to the window looking into the lounge room of the Cootamundra Drive residence during the daytime. The duration of loitering is unknown as the defendant ran away once noticed.**

[297] The plaintiff’s evidence was that at about 11.00 am she and her daughter Miss Kerr were together when the defendant was seen beside the house inside the fence of the property. He

then ran off. The evidence of Miss Kerr (para [127]) corroborates the plaintiff's evidence. I accept that the incident occurred.

[298] **On or about 13 May 2000 late in the evening, the defendant deflated all four tyres on a four wheel drive vehicle parked outside the residence at Unit 21, 20 Village Green, Buderim Boulevard, North Buderim. The vehicle's owner, Mr Clatworthy, was inside the residence with the plaintiff and Mr Jones.**

[299] Mr Clatworthy's evidence on this is set out in para [70]. The plaintiff's evidence corroborates his. There was also evidence of multiple phone calls on 13 May from the defendant to Mr Clatworthy (see exhibit 1) as well as a mysterious one in which the caller simply laughed in a "cartoon" style – "hee hee". Again, bearing in mind the care that must be taken in the drawing of inferences, on the balance of probabilities I conclude that the defendant was responsible for the deflation of the tyres. In drawing that conclusion I take into account the fact that it seems that whoever was responsible for the letting down of the tyres was probably also responsible for the phone call and also did not like Mr Clatworthy (or at least his being at the plaintiff's house). I also take into account the complete cessation of any harassment of Mr Clatworthy since he ceased to have contact with the plaintiff.

[300] **30 May 2000 – at approximately 7.30 pm, the defendant was loitering outside the plaintiff's bedroom window and listening to her telephone call with Helen McGregor.**

[301] The plaintiff gave evidence that she had such a conversation. Mr Wilkinson said that the defendant recounted details of it to him and he repeated them to the plaintiff who found it to be accurate. See para [116]. Subsequently, according to Mr Wilkinson, the defendant showed him where he had stood to eavesdrop. I accept his evidence.

[302] **On or about 9 June 2000 the defendant sent the plaintiff an offensive card by sending it to the Crest Hotel in Brisbane, where she was to be staying. The defendant obtained details of her proposed stay at the Crest Hotel by telephoning and pretending to be a member of her staff needing to send something to her. Although the plaintiff ultimately did not attend the conference and stay at the hotel, after she became aware that the defendant knew she was intending to go there, she contacted the hotel and had them forward to her the card that the defendant had sent. The plaintiff subsequently told the**

**defendant that she had obtained the card and would be having it investigated. The card went missing from her possession shortly afterwards.**

[303] The plaintiff gave evidence that she had been intending to come to Brisbane in June of 2000 to attend a conference. She was booked to stay at the Carlton Crest Hotel. At this time she ordinarily either made her own accommodation bookings or made them through her secretary. The bookings had been made a few weeks before. She then came to believe from something she had been told that there was going to be an unpleasant sleazy card sent to her while she was staying at the hotel on this occasion.

[304] On the evidence of Mrs Herbert, para [66] I find that the defendant contacted her at the Carlton Crest in Brisbane and demanded to know details of when the plaintiff was staying and her room number under the ruse of being the plaintiff's secretary. For security reasons, the hotel staff would only forward a confirmation (to the SCRGAL number, the number given by the caller). The hotel sent the fax, ex 13, to SCRGAL confirming the plaintiff's booking. The defendant was agitated that the hotel would not provide the room number. The defendant admitted to Mr Wilkinson that he found out this information by the described ruse.

[305] The plaintiff then contacted the Carlton Crest Hotel and advised that that she believed a card was going to be sent to her there. She asked that if such a card turned up to forward it to her. As requested the Carlton Crest did so. She found it to be offensive and showed or described the card to Mr Wilkinson. She also confronted the defendant with the fact that she had the card in her possession and was intending to get it fingerprinted, and further, that she was aware that he had pretended to be her secretary to get her accommodation details from the Crest Hotel. She had in her possession a copy of the facsimile transmission that had been sent to the SCRGAL offices. The card disappeared from the plaintiff's satchel about two weeks later.

[306] The defendant's phone records show five calls to Carlton Crest Hotel on 12 May 2000 and one on 9 June 2000. It is impossible to conclude otherwise than that the defendant tracked down the plaintiff for the purpose of sending the card, and that he was responsible for the disappearance of the card.

[307] **On 22 June 2000 the plaintiff was in the Buderim Library from 7.00 pm until approximately 8.45 pm. The defendant was in his car parked outside the entrance to the library waiting to observe her exit the library.**

[308] This event is described in the evidence of Mrs Cansdell para [65]. It gives rise to the inference that the defendant was spying on the plaintiff's movements for reasons which, on the evidence, were not innocently explicable. The plaintiff's evidence was that when she saw the defendant she attracted his attention, at which he sped away. I accept the evidence of the plaintiff and Mrs Cansdell.

[309] **In or about June 2000 at approximately mid-evening the defendant loitered in the street opposite the driveway of Ms Grosse's residence in his vehicle.**

[310] The evidence of this was given by Mr Kerr (para [73]) and I accept it as evidence of the defendant spying on the plaintiff.

[311] **In or around early June 2000 the house at Cootamundra Drive was vacated and the plaintiff was inside the residence for the purpose of cleaning inside and/or painting the walls during the daytime for approximately 3-4 hours. The defendant lurked in the yard for approximately 30 minutes before coming to the front door.**

[312] The evidence did not substantiate this particular.

[313] **In or about July 2000, the plaintiff was present at 12 Karloo Court, Mooloolaba visiting Mr Clatworthy. Her silver Holden Caprice was parked in the garage and locked. Her mobile telephone was removed from the car whilst she was inside the premises with Mr Clatworthy.**

[314] On this occasion the plaintiff visited Mr Clatworthy and left her mobile phone in her car. When she returned she found the phone had been "barred" and believed (as is likely) that someone had attempted to use it but had put in the wrong security code. It is a clear inference that someone had been attempting to access phone numbers on the plaintiff's phone. The next day the defendant gave her a detailed account of what she had done that evening. He described accurately her movements, the fabric on the curtains "*and then scoffed about the dog not being a real watch dog, that even licked the people that were watching [her] and investigating [her]*". On the balance of probabilities I infer that the

defendant was responsible for the interference with the phone. If it had been a thief, I think it highly likely the phone would have been taken.

[315] A related incident was of the plaintiff's phone being discovered by her to be missing from her car. It was returned to her by the defendant who gave to her and also to Mr Wilkinson differing versions of how he came by it. This leads to the drawing of an inference unfavourable to the defendant.

[316] **In early August 2000 at approximately mid-evening, the defendant loitered outside the laundry door at the rear of the Lindsay Road, Buderim residence. The duration of loitering is unknown as the defendant ran away once noticed by Rene Grosse.**

[317] This episode is described in the evidence of Mr Grosse at para [96]. I am satisfied that the intruder was the defendant and the evidence suggests no explanation for his presence and flight, other than that he (and another) were spying on the plaintiff.

[318] **On 30 August 2000, the defendant telephoned the plaintiff on her mobile phone (approximately 12 times) and in the hotel room at the Mercure Hotel Broadbeach (approximately 4 times) while she stayed there with her new husband, Rene Grosse.**

[319] I have summarised, and accepted, the evidence of Mr Grosse on these events in para [96]. The plaintiff gave similar evidence. She said that turning off her mobile phone did not help her. Somehow the defendant knew where they were and phoned through the hotel switchboard. The calls were aggressive and defamatory of Mr Grosse. The phone records show eleven calls made by the defendant to the plaintiff's mobile phone that night, and four to the hotel the latest being at 1.17 a.m. Another mobile call was made at 7.46 the next morning. The obvious conclusion to be drawn is that the defendant was pestering the plaintiff and Mr Grosse.

[320] **In or about August/September 2000, the defendant loitered in the yard of the residence at 79 Blackall Terrace during the night-time, for at least ten or fifteen minutes.**

[321] The evidence of this was given by Mr McGrady, para [62] and Mr Wilkinson, para [122]. Interestingly it demonstrates the defendant's proprietorial attitude to the plaintiff's property and his aggression to meet any challenge.

[322] **Exhibit 17 is a document that was discovered by the plaintiff's niece, Elise Barry, in or around September 2000 at 207-209 Lindsay Road, Buderim. This message was written inside the pencil case.**

[323] The evidence of this is suspicious but establishes nothing on the necessary standard of proof.

[324] **On 29 September 2000, exhibit 12 was discovered by the plaintiff at her residence, 79 Blackall Terrace under the windscreen wiper of her car. The original document has liquid paper covering a fax transmission line that can clearly be read as follows "11 September 2000 09:01 Tom and Carmel Hulett 07 5448 5028".**

[325] As I have said in para [57] – [60], the subject of this document is a scurrilous form of gossip and on the sworn evidence, false gossip. It had its origins with Mr Hulett and I strongly suspect that the defendant was, at least, content to give it currency

[326] **On 17 October 2000, in her capacity as Mayor, the plaintiff attended the Sunshine Coast Arts Council awards night to officiate and present 65 art awards. The defendant donated or caused SCRGAL to donate money for a "Rob Purvis drawing prize" on the condition that the defendant be allowed to stand on the podium with her to give the prize.**

[327] The evidence of Mr Grosse was that he saw the defendant staring at the plaintiff. This usually doubtful evidence has some significance in the context of this case.

[328] The plaintiff's evidence was that she refused to have the defendant on the stage with her, despite her information that it was a condition of the defendant's donation. Mr Wilkinson said that next day the defendant was angry and said he had wanted to be photographed in the plaintiff's presence, it being potential evidence to be used by him in the event of a stalking allegation by her against him. I accept the evidence I have summarised.

[329] **In or about October 2000 at approximately 6.30 am to 8.30 am, the defendant loitered outside the Blackall Terrace residence, across the road near the Dentist Surgery.**

[330] The plaintiff gave evidence that the defendant told her that she disgusted "everybody" by the way she kissed her husband in the morning. When asked how he knew, he said he had friends who worked for the dentist over the road who watched her all the time and reported back to

him. I accept her evidence and reject the notion that dental assistants observed the plaintiff and her husband. It is obvious that the defendant either observed them, or he simply made it up.

[331] **On or about 28 February 2001, late morning, the plaintiff and Mr Grosse, were present in the office of Wilkinson within the SCRGAL offices, Big Top Shopping Centre, Maroochydore. The defendant, on becoming aware of their presence, made repeated phone calls to Wilkinson and eventually came to the office door. The defendant assaulted Mr Grosse and said words to the effect of “*you big fat good for nothing pot smoker*”, “*holding onto Mummy’s little handy*”.**

[332] The plaintiff’s evidence was that she and Mr Grosse went to see Mr Wilkinson to have him look at a document. The phone rang. She could hear the defendant’s voice saying “*Get that smell out of my office*”. Shortly afterwards, Mr Wilkinson having left the room, the defendant entered and confronted Mr Grosse physically in the manner described by him in para [55], using phrases of the type particularised. Mr Wilkinson observed this on re-entry and brought the confrontation to a close (para [122]).

[333] **On 21 December 2001 at approximately 3.00 pm, the plaintiff was driving from Evans Street into Plaza Parade. The defendant’s vehicle was ahead of hers, and he had his arm out the window waving up and down. He stopped at traffic lights and got out of his vehicle, stood beside her vehicle and waved his arms and body at her.**

[334] The plaintiff’s evidence, which I accept, describes the defendant behaving as particularised. I accept he did those things and that it was an exhibition designed to upset her.

[335] **On 25 January 2002 at approximately 3.10 pm, the plaintiff was purchasing petrol from BP Service Station, Maroochydore. The defendant came over and said words to the effect of “*I have taken all the stuff on your houses and I’ve got it at home*” and “*I have to talk to you Ali so that I can help you, you need my help*”.**

[336] The plaintiff’s evidence was that the presence of the defendant made her anxious. She told him she did not want to talk to him, that he had been “*terrible to me*” and drove off. It is unclear to me if his attitude was intended to be controlling, threatening or placatory, so I draw no inference adverse to him.

[337] **On 20 September 2002 at 2.00 pm, Mr Jones and the plaintiff attended a memorial service held at Buderim Cemetery for Geoff and Merilyn Adamson (former CEO of Maroochy Shire and his wife.) The defendant had no known contact with Mr and Mrs Adamson, yet he attended the funeral. He stared at the plaintiff for an unknown duration of time.**

[338] On the evidence it is unlikely that either the plaintiff or Mr Jones were able to see where the defendant was looking or if he was staring during the ceremony, although in the light of their past experiences one can understand their belief that he stared at the plaintiff. I put no weight on this allegation.

### **Conclusions on Allegations of Stalking**

[339] I have said [para 155] that, approaching the plaintiff's evidence with caution, I would look, where possible, for corroboration. In the foregoing 70 particulars, on some 35 occasions I have found actual corroboration by another witness or other witnesses of her evidence either fully or materially. In some cases, evidence proving the particular was given not by the plaintiff but by another credible witness. Thus the mass of the evidence generally supports her credibility and generally undermines the defendant's. It has persuaded me to accept her as a truthful and generally accurate witness. And of course I have expressed in paras [170] to [176] other reasons why I have been unable to accept the defendant's evidence.

[340] In my opinion the defendant developed an obsession towards the plaintiff which, for years, he was unable to resist and which led him to do many things which were probably quite out of character. That is not an unheard of thing in instances of the formation and later the breakdown of close personal relationships. Given the passage of time, the stimulus of litigation and the intense interest in the outcome, some people will swear that black is white and believe that to be true. Lawyers and other professional people who investigate these events which are so close to the hearts of the participants understand this phenomenon. That is why in such cases the support of independent facts and witnesses is relied on so heavily by judges.

[341] That having been said, I am satisfied on the balance of probabilities that, commencing in early 1994 the defendant developed an extraordinary infatuation with the plaintiff. It was by

no means a passive infatuation but a very active one. Even though their intimate relationship was a relatively fleeting one, he refused to accept that and actively led others to believe it continued much longer. Furthermore this infatuation demanded that he be the primary focus of her attention to the exclusion of any other man. Any interest, which she took in men, even perfectly social, made him hostile to that relationship and led him to believe that the relationship was necessarily sexual. That led him to behave in a way calculated, first, to frighten her so as to return to him and second, to deter the challenging men. Ultimately in about late 1998 and subsequently, circumstances allowed him to ally himself with political opponents of the plaintiff and those who for good reasons or bad disapproved of her business or personal activities.

### **Psychological/Psychiatric Evidence**

[342] In July 1999 the plaintiff consulted solicitors who wrote to the defendant on 11 July alleging stalking, harassment and intrusion into her private life “over a period of many years”. After alleging that in the past she had been reluctant to pursue police or court action, the letter states that the situation had been reached where that action would be taken if the stalking and harassment did not cease immediately.

[343] The defendant responded on 22 July 1999 by a letter in which he said that since 1994 he had maintained a very close, intimate, personal and business relationship with the plaintiff and was concerned for her physical and mental welfare. He alleged various things in relation to her personal life and, relevantly, said:

*“Alison misinterprets my activities and attentions as something else when, in reality, they are inspired only by a desire to preserve her life and its quality”.*

and

*“... I never really know what is required – in one second , she wants me nowhere near her and in the next, I am sought out for company, support and assistance.”*

and

*“At my instigation, so that there would be no opportunity for misunderstanding on the part of either party, on Wednesday the 14<sup>th</sup> July 1999, an agreement was made that we would not contact each other for the foreseeable future”.*

- [344] As to the first quoted paragraph, it could not be the fact that the plaintiff misinterpreted the acts of stalking and harassment which I have found proved. The second paragraph sets up something of importance, the alleged giving of conflicting signals. As to the third paragraph, while there was such an agreement the plaintiff obviously had little faith in it as is exemplified by her visit to the solicitors.
- [345] On 19 August 1999, the plaintiff consulted Mr. Warren, a certified professional counsellor with lengthy experience in that field who produced a report dated 20 January 2003, exhibit 20. She complained to him of the defendant stalking and harassing her for the past five years, of his intimidation and physical assault of men who took a personal interest in her. She was emotionally distressed and frustrated by his behaviour, this being exacerbated by the fact that they were required to work together at SCRGAL. She said he was unwilling to desist from his behaviour and feared his defaming her if she took legal action.
- [346] They explored strategies such as confrontation, her retirement from SCRGAL and legal action. Her plan for the immediate future was to give him clear messages that he should cease his offensive behaviour, to have clear boundaries with him and to look after herself. She authorised Mr. Warren to pass on to the defendant her wants and concerns.
- [347] Mr. Warren's opinion was that the plaintiff's concerns were genuine. He did not see any signs of clinical depression or anxiety, although she was very distressed. He recommended follow-up counselling, or a medical assessment if required. This was not taken up.
- [348] Mr. Warren also saw the defendant on five occasions in July and August 1999. His oral evidence before me was that the defendant's expressed goal was to let go of the plaintiff, but felt entangled with her personally and professionally. He was still having mixed feelings about the achievability of a love relationship with the plaintiff but was waiting for her to commit herself to this. Later he said he had chosen to let go of her and explore new avenues of interest. He reported some success in this but at that point discontinued counselling.
- [349] In cross-examination Mr. Warren agreed that he told the plaintiff the importance of giving very clear signals to the defendant and that requests for help could be misinterpreted. He warned her against discussing physical concerns and displaying affection to him.

- [350] Mr. Warren assessed the defendant as a high achiever with a need to feel in control and needs for power, and for freedom.
- [351] The plaintiff was assessed for medico-legal purposes by three psychiatrists, Dr. Cantor, Dr. Pathe and Dr. Gold, each of whom prepared reports. Doctors Pathe and Gold also gave oral evidence. She was also assessed by two psychologists, Ms. Nolan and Dr. Douglas, who also gave evidence. Their evidence was primarily related to the question whether the plaintiff had the psychiatric illness called Post Traumatic Stress Disorder (“PTSD”). In my opinion that is a matter on which expert evidence is admissible, it being within a field of specialised knowledge. See *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at 359 where Spigelman CJ cited the judgement of Heydon JA in *Makita (Australia) Pty. Ltd. v Sprowles*, (2001) 52 NSWLR 705 at 743.
- [352] Each of these professional witnesses set out in their reports a summary of the history given by the plaintiff. Unsurprisingly there were some variations between them and some differences from the evidence given by her at the trial, but nothing that I thought of any real significance. In broad terms each history was consistent with the evidence she gave before me. This is important in laying the proper foundation for the reception of expert evidence. See *TCN Channel Nine*, ibid.
- [353] Dr. Cantor’s first report dated 21 February 2002 (Exhibit 23) records symptoms of hypervigilance (“*if she hears voices she thinks of him*”), distress if she thinks of him, a preference of avoiding him, sleep disturbances, impaired concentration, lack of motivation and capacity to work, and while not suicidal, having accepting feelings about the prospect of death, irritability, major problems with concentration and excessive startle reaction. She feared for her safety, including the possibility that she could be killed. He noted as curious that well after such behaviours were underway she used to entertain the defendant at her home. He thought that latter feature could be associated with ambivalence. He considered that her histrionic personality traits associated with blurred boundaries of relationships were relevant to this curious feature of the case.
- [354] Applying diagnostic test criteria, he came to the conclusion that the plaintiff suffered from PTSD. Because of the relatively modest extent of her avoidance behaviours he was guardedly optimistic about her prognosis which depended largely on her success in ending contact with the defendant. He thought it likely that, if she ceased contact with the

defendant, she would benefit greatly from one to two years psychiatric treatment (10-20 sessions at about \$200 each). There was the possibility of her having to spend about \$400 in anti-depressants.

[355] Dr. Cantor recognised that the extent of the plaintiff's avoidance behaviours fell short of the technical requirements for a diagnosis of PTSD. He said however that this did not negate the diagnosis provided the rest of the criteria are met. He excluded any other psychiatric or personality disorders.

[356] Dr. Cantor was not required for cross-examination which, of course, renders it difficult (but not impossible) to reject his opinion.

[357] Dr. Pathe's report, dated 5 June 2002, is exhibit 9. She saw the plaintiff on 14 April 2002. As the plaintiff was specifically seeing her for advice in overcoming stalking (Dr. Pathe having particular expertise in that field), a formal psychiatric evaluation was not attempted by her.

[358] Dr. Pathe was unable to comment on the potential contribution of earlier life experiences to the plaintiff's current symptoms but she said that her presentation was entirely consistent with Dr. Cantor's diagnosis of PTSD and with his prognosis. Indeed, she thought the plaintiff's treatment might need to be continued for the foreseeable future and that she could experience long term emotional and interpersonal difficulties as a consequence of her ordeal.

[359] It is pertinent to set out in full the opinion of Dr. Pathe on the connection between the PTSD and the stalking:-

*“Although I did not conduct a thorough psychiatric examination and am therefore unable to comment on the potential contribution of earlier life experience to Ms Grosse's current symptoms her presentation is entirely consistent with the trauma she describes. Victims of persistent, repeated trauma such as stalking experience fear, hypervigilance and distrust. Such reactions frequently have a damaging impact on personal relationships and support structures. Victims typically experience feelings of abandonment and loss of control over their situation, sentiments clearly articulated by Ms Grosse. Regrettably, these feelings have been reinforced in this instance by ineffectual and at times unsympathetic responses from the justice system and helping agencies. Such responses have been fuelled by a media campaign waged against Ms Grosse and instigated by her stalker, which could be regarded as 'stalking by proxy'. The post-traumatic stress symptoms Ms Grosse manifests are a common development in stalking victims, arising in over 80% of cases. Moreover, suicidal thoughts and behaviours are reported*

*by at least 25% of stalking victims, for reasons similar to those given by Ms Grosse.”*

[360] I also set out in full comments made by Dr Pathe in her report in relation to the continued contact of the plaintiff with the defendant:

*“In his report, Dr Cantor has highlighted some apparent discrepancies in Ms Grosse’s behaviour, particularly her continuing contact with the perpetrator after the onset of the stalking. He postulates this may stem from “ambivalence” on her part. While I concur generally with Dr. Cantor’s assessment and conclusions I do not feel this is an adequate explanation. In fact, in our interview Ms Grosse did not convey any ambivalence towards this man: she expressed understandable anger towards him and she desperately wanted him out of her life. Nothing she has done to date has achieved that, including her dramatic overdose in 1999 or her marriage to her current husband, who she regards more as a bodyguard. In my experience, some stalking victims continue contact with their stalker not by choice but in the vain, albeit misguided, hope that acceding to the stalker’s demands will appease them. While this may not seem a particularly logical strategy, victims of stalking employ whatever measure they can to bring an end to conduct that the rest of the community seems powerless to prevent.*

*Dr. Cantor makes the very valid point in his assessment of Ms Grosse’s personality structure that this should not mitigate the perpetrator’s responsibility for his harassment. There are a number of groups in society that may be more prone to attract the attentions of a stalker (e.g. public figures and others of elevated social status, or individuals who come into contact with disordered or lonely people, usually in the role of helper or sympathiser). While some people have a heightened vulnerability to being stalked few would wittingly encourage the behaviour, and I do not believe Ms Grosse is any exception in this regard. If Ms Grosse’s responses have appeared at times to encourage her stalker’s pursuit these should be viewed in the context of her fear and desperation and the failure of the system to recognise and adequately respond to her predicament.”*

[361] In oral evidence she expanded on this:

*“That’s – it’s not unusual, in my experience, for stalking victims to continue to either approach their stalkers or involve them in their lives in some way in the hope that they’re the only ones that will be able to convince them since very often everybody else they’ve gone to for help hasn’t been able to help them. So what appears, you know, to be somewhat illogical in some cases is in fact their attempt in desperate – a desperate sort of situation like this to – to eventually discourage the stalker. It seldom works, of course.*

*Of course, but from what you said, is there an element of logic in what the victim is doing?-- Well, I think the victims come to think that there are no other alternatives open to them; that they hope that eventually with a seemingly intelligent person they’ll get the message.*

*All right. And----?-- So in that sense, yes, it seems to be a logical and perhaps the only solution they can see at that stage."*

[362] Cross-examination did not produce any weakening of her opinion. Indeed if it is a matter on which a layman can reach a conclusion (and it is my view that it probably is), it seems to me to be quite an understandable conclusion to reach by anyone who has had the opportunity to observe or study the human reactions of different people to stress of this nature.

[363] Dr. Cantor was asked to comment on Dr. Pathe's opinion and he did so in his report of 17 July 2003, exhibit 24. In that, in the light of research he had done in the intervening year on the subject, he accepted Dr. Pathe's correction of his earlier "ambivalence" theory, and agreed with her view of the matter.

[364] The psychologist, Dr. Douglas, gave this interesting evaluation of the plaintiff:

*"This is an individual who is highly vulnerable to being manipulated by others and who perceives the world as being an extremely hostile and persecutory place at this time. She is emotionally labile, likely to be quite intense in her expression of affect, and frequently impulsive."*

She has no special expertise in the field of assessment of stalking victims and she expressly declined to comment on a PTSD diagnosis.

[365] Ms. Nolan, a clinical psychologist treated the plaintiff on six occasions between 23 March and 2 September 2002. Her report is exhibit 44 and was, it is clear, prepared on 17 January 2003.

[366] She said that the plaintiff presented in a very distressed state, crying and feeling as if she could not cope. She stated stalking by the defendant as the cause. She complained of hypervigilance, hyperarousal, disturbed sleep, chest pain, poor concentration, depressed mood, an attempt at suicide and inability to function adequately. The report expands on these complaints, giving examples which were repeated in her oral evidence before me.

[367] Ms Nolan considered that the symptoms were consistent with a diagnosis of PTSD. Her treatment of the plaintiff was designed to educate her about her condition, to manage it and to relieve the symptoms. However the plaintiff's busy life interfered with the treatment and it is recorded that at most sessions she again became visibly upset and tearful, reporting further attempts to destabilise her life and the effects of publicity on her reputation and career. She

consulted a doctor and was put on anti-depressant medication. Cross examination of her, which was very brief, did not deal with the question of PTSD at all.

[368] The psychiatrist Dr. Gold's report dated 20 December 2002 is exhibit 80. She considered that the plaintiff does not suffer from PTSD because she does not present with sufficient numbers of the criteria for that diagnosis which the psychiatric tests require. Her report does not descend into the detail of what criteria are present and what are absent.

[369] Strangely, Dr. Gold's report does not say why she disagreed with the diagnosis of Dr Cantor and the comments of Dr Pathe, both of whose reports she had read. Nor did she explain why she failed to comment on the important differences between their opinion and hers. During her oral evidence she did not seek to say why their opinions should be rejected, for example, that their diagnostic tests were inappropriate or mistakenly interpreted.

[370] Her two expressed reasons for rejecting PTSD as a diagnosis were the plaintiff's failure to avoid the defendant (having been told she still had business connections with him) and lack of evidence of increased arousal. However, during cross-examination she conceded that good reason could exist for a PTSD sufferer to continue to have some contact with the focus of the trauma (for example if the focus is something she cannot reasonably avoid, such as her work, her home or the phone). And she also conceded that the medication the plaintiff was taking at the time of their consultation could be an explanation for the lack of evidence of increased arousal.

[371] I prefer the evidence of Dr Cantor, Dr Pathe and Ms Nolan and accept that the plaintiff suffers from PTSD, first diagnosed by Dr Cantor in February 2002.

[372] As I understand the expert evidence the triggering stressors were said to be the death threat of March 2000, the violence she saw offered by the defendant to "competing" men (for example Mr Clatworthy, Mr Lewis, Mr Pike and even Mr Jones), the fear generated by the defendant's frequent and regular abusive phone calls and his physical intrusion into or unreasonable proximity to her living space (that is, her house, her yard, the premises of people she visited, and areas such as hotels, restaurants and meetings she attended), in a word, the stalking.

### **Consequences of The Stalking**

- [373] The effects on the plaintiff of the PTSD are set out in the complaints she made to the expert witnesses. As I have said, similar complaints were made by her in her evidence. Evidence tending to confirm the experiencing of those symptoms by her was given by a number of witnesses. As a background, I refer to the evidence of her vitality, enthusiasm and drive as she exhibited it before her close involvement with the defendant began. See paras [3] – [6].
- [374] Mr. Spiller at para [75] and Miss Flux at para [74] gave evidence of the plaintiff, described by Mr Spiller as an enthusiastic and diligent mayor, being reduced to tears, and exhibiting an apparent inability to function properly, even to the stage of physical collapse, consequent on phone contact from the defendant. According to Ms. Flux this continued until February or March 2002.
- [375] Mr. Kerr, the plaintiff's first husband, described the plaintiff as having changed from a confident person to an anxious, insecure person who was very concerned that she was being watched and stalked. In context he appeared to be speaking of her in late 1998.
- [376] Miss Kerr, the plaintiff's daughter, described the plaintiff as at ten years ago as very confident, very able to support and embrace people and family members, very positive, happy, excited by family contact. Now, she describes the plaintiff as a shattered woman, an emotional wreck, lacking in confidence (particularly in the evenings), a poor sleeper, nervous, unable to relax, without her sense of humour, with reduced interest in her grandchildren, "jumpy" when the phone rings. This has developed predominantly from mid 1998 onwards, and especially since March 2000.
- [377] The plaintiff gave evidence of a number of respects in which her enjoyment of life has been diminished. She said:
- "I think the fact that you can't live your life at all. The decisions you make have to be about protecting yourself, about what Purvis is going to do to me next, either directly or indirectly. It makes you anxious, jumpy. You can't concentrate, you can't develop friendships and you become very inward ... It just gets worse."*
- [378] She gave evidence that she and her husband do not go out socially "*anywhere in the Maroochy Shire now....so we don't have that kind of invasion*". She does not holiday or entertain. She obviously regards her husband as a bodyguard who patrols their property. She said she is frightened of the defendant:

*“I wake up every night and nearly every noise I think ‘oh he’s fallen out of the tree. He’s going to ...’ particularly towards the trial. I thought that this might upset him ... and I thought he might lose it and it has been a stressful time. I do get frightened. I crawl around the floor to see, when I hear a noise outside, if it’s Purvis and I’m just very frightened.”*

[379] She said that past interference from the defendant has caused her to stop going to Council conferences and during the last three years of her SCRGAL relationship, those conferences also. She said:

*“After the first – every conference that I had... for council [my attendance] has been grossly interfered with by Mr Purvis. I went on three and I chose never to go on anymore. If Mr Purvis is with me, it is a different story, but if Mr Purvis is not with me it’s – it’s impossible. He rings or interferes and then starts saying that I am up to something.”*

and

*“And with SCRGAL, I didn’t ever go because...if I wanted to go on my own as chair, Purvis would say he was coming. I said “no, we are not both going, I’ll go or you go”, and he said he won’t go if I don’t go. So we ended up having to, in the last three years, send Ken Peters and others to conferences.”*

She believes the defendant has turned her political opponents into active enemies, all of them creating bad publicity for her. Phone calls from the defendant at her mayoral office have left her “devastated and shaken”.

[380] She said that all that has happened makes her feel “dirty and unworthy”. The intrusion of the defendant and her pre-occupation with it, has nipped in the bud her attempts at meeting new friends or the possibility of romantic attachments.

[381] I accept the plaintiff’s evidence on these matters. I accept that she genuinely feels these emotions and that her experiencing of them is a natural consequence of the stalking of the defendant.

[382] It is important to attempt to identify those symptoms which fall within the strict purview of PTSD, that is, the re-experiencing of the phenomenon, of avoidance behaviours and of over-arousal symptoms. See Dr Cantor’s report, exhibit 23.

[383] Re-experiencing. Dr Cantor recorded, and I find, that she experiences intrusive recollections of the defendant several times a day. That qualifies as a criterion under this head. A further

qualifying symptom is that she acts as if the stalking event were recurring in that her life is dominated by thoughts of him. For example, if the phone rings, or if she hears a strange noise, her fear is that it is the defendant. A further qualifying symptom is a feeling of distress in being reminded of the defendant's stalking, and it is clear that she responds by feeling helpless, teary and frustrated. I have no doubt that this criterion of PTSD forms a large part of her current symptomology.

[384] Avoidance behaviours. Dr Cantor relies on the fact that she avoids activities, places and people reminding her of the stalking. That is clear from her avoidance of occasions (e.g., conferences, restaurants) where he is likely to be present, or even may be present. Dr Cantor was unable to find evidence of a feeling of detachment from others, noting her ability to socialise with friends and family. That, however, was not the evidence of the plaintiff or Miss Kerr. In my opinion it is present. Like Dr Cantor, I agree that the domination of her life by the defendant has removed her interest in activities. Dr Cantor did not consider that she had lost her loving feelings but the evidence of Miss Kerr suggests otherwise. All in all I accept Dr Cantor's opinion that this criterion of PTSD has been established and in fact it seems to me more clearly than Dr Cantor thought.

[385] Over-arousal. This, as Dr Cantor found, is clearly established by the evidence of sleep problems, irritability, lack of concentration, hypervigilance (looking for the defendant) and exaggerated startle response and I agree that his opinion is well founded. Thus, I am of the view that virtually all of the plaintiff's current disabling symptoms fall within the purview of PTSD.

### **Statute of Limitations**

[386] It is now necessary to decide when she contracted the illness because the defence sets up the *Limitations of Actions Act 1974*, it being submitted that the plaintiff's claim is within s.11:

*"11. Notwithstanding any other Act or law or rule of law, an action for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of a contract or such provision) in which damages claimed by the plaintiff consist of or include damages in respect of personal injury to any person or damages in respect of injury resulting from the death of any person shall not be brought after the expiration of 3 years from the date on which the cause of action arose."*

- [387] This action was commenced on 8 April 2002 so if the action is within the section damages are restricted to those in respect of personal injury suffered after 8 April 1999. PTSD is a psychiatric illness and therefore falls within the definition of “personal injury” set out in s.5 of the *Limitations Act*.
- [388] A plea of the Statute of Limitations is a defence and the onus of proving that it operates to bar a claim therefore lies on the defendant. See *Pullen v. Gutteridge Haskins & Davey Pty Ltd* (1993) 1 VR 27 at 71-76; *Cigna Insurance Asia Pacific Ltd v. Packer* (2000) 23 WAR 159.
- [389] Time does not run until the cause of action arises: *Board of Trade v. Cayzer, Irvine & Co Ltd* (1927) AC 610. A cause of action arises when all the facts which must be proved are in existence: *Cooke v. Gill* (1873) LR 8 CP 107 at 116. One fact that must be proved is the injury which has been sustained so the immediate fact to be found is the date on which the injury, that is, the PTSD, was suffered.
- [390] None of the expert witnesses was specifically asked that question. All that can be said is that its existence was first diagnosed by Dr Cantor in January 2002. There is no evidence that it, as a psychiatric illness, was suffered by the plaintiff at any time earlier than 8 April 1999, so, the onus of proof being on the defence, so far as damages referable to the PTSD are concerned, the defence has not been made out.
- [391] If, contrary to what I say in para [388] the plaintiff bears the onus of proof once the defendant pleads the statute, the question is more complicated. I would have to make a finding, on the balance of probabilities, when the PTSD, as a recognisable psychiatric illness, was first suffered by the plaintiff.
- [392] The report (exhibit 44) of Ms Nolan quotes from a standard text “*the essential feature of (PTSD) is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity ... The person’s response to the event must involve intense fear, helplessness or horror*”.
- [393] The disagreement between the psychiatrists related to the presence of PTSD, not to its specific cause or date of onset. There having been no cross examination on these matters of

the experts who diagnosed PTSD, the only relevant discussion was in cross-examination of Dr Gold when she said that it had to amount to an attack on physical integrity, which could come from hearing noises in the dark or an abusive phone call “*if the abuse included threats to your life or functioning*”.

[394] On the evidence before me three events stand out as events which most critically physically threatened the plaintiff. The first was the extreme telephone abuse on 9 April 1999 which precipitated such a feeling of helplessness that the plaintiff took the overdose; the second was the death threat on about 16 October 1999; the third was the death threat of 26 March 2000. Each of those was less than three years before the issue of these proceedings.

[395] The plaintiff’s own evidence on the point at which her attitude to the defendant changed dramatically, which might provide a clue to the date of the onset, is not at all clear. I should bear in mind, in any event, that I would need a psychiatrist’s opinion whether a PTSD sufferer might herself be expected to be able to identify the critical stressor. The evidence as a whole suggested to me that her ability to cope with the defendant’s attentions took a decided turn for the worse in late 1999 at the earliest and I think it probable that the events of 26 March 2000 could have been the straw that broke the camel’s back. Doing the best I can somewhat arbitrarily I take 8 April 2000 as the date of the onset of PTSD. Thus it manifested itself after 8 April 1999 so that damages attributable to that illness are not barred by the *Limitation Act* even if she bears the onus of proof.

[396] It is clear that before the condition of PTSD manifested itself the conduct of the defendant to the plaintiff was such as caused her annoyance and upset which unreasonably interfered with her enjoyment of her privacy, indeed her enjoyment of life. This began in 1994 when his interference in her massage business caused her to feel, uneasily, that he and perhaps others, were spying on her. If this general intrusion into one’s privacy causing a diminution in sense of well-being sounds in damages, are they are damages for personal injury? If they are, to the extent they were experienced before 8 April 1999, s.11 of the *Limitation Act* dictates that they are not recoverable.

[397] As I have said, PTSD is a psychiatric illness and thus falls within the definition of “personal injury” in s 5 of the *Limitation Act*. But it does not follow that her upset, worry, anger, embarrassment and annoyance caused by the defendant’s stalking prior to the onset of it

PTSD amounted to personal injury. These, as Muir J said in *Bayliss v Cassidy & Ors* (unreported, 18/9/98) are the:

*“normal responses of a person with an unimpaired mental condition. They do not constitute, or evidence, an impaired physical or mental condition. The law has not tended to regard such matters as falling within the scope of physical injury or personal injuries.”*

and he referred to authorities for his conclusion. I respectfully agree with His Honour and decide that damages referable to the matters summarised above are not caught by s 11 of the Act but, pursuant to s 10 the applicable limitation period is six years. So, the assessment period in respect of them will commence on 8 April 1996.

### **Justification of Defendant’s Conduct**

[398] It was not formally pleaded but it was clearly part of the defendant’s case that he was obsessed with her and that this was the cause of his objectionable conduct. The obsession was expressly put forward in Mr Curran’s submissions.

[399] The defendant’s obsession was clearly established by the evidence although I did not take the defendant himself clearly to admit it. However, the thrust of Mr Curran’s written submissions was that “long after (the plaintiff) knew the defendant was obsessed with him she deliberately continued to involve him in her personal and business life.”

The submission continued:

- (a) the plaintiff encouraged, consented to or at least deliberately elected to tolerate the conduct of the defendant which she now complains of;
- (b) the benefits the plaintiff derived from the personal friendship and business association would explain such consent or tolerance;
- (c) the plaintiff has only recently decided to pursue a claim against the defendant following a complete breakdown in their relationship in or about November 2001 even though she had both legal and personal advice as to how to deal with the defendant from in at least 1999.

[400] It would defy logic and any understanding of the plaintiff (or virtually anyone) to accept that the events particularised and discussed in paras [178] to [338] would actually be consented to by her. The plaintiff’s evidence was that she did not and that she tried frequently to make

that clear to the defendant. Evidence, for example from Mr Jones, Mr. Wilkinson and Mr Clatworthy, corroborates her and I accept that.

[401] At first blush it could be said that her continued contact with the defendant looks decidedly odd. However, putting myself in her shoes, I can begin to understand her reasons for trying to placate the defendant as she said she did. It was better to have him in view because his most offensive behaviour (spying, loitering, phoning abusively) would not occur then. She also said that his friendship had been of value to her and it is not hard to understand her attempts to resurrect that in lieu of the abusive behaviour.

[402] The defendant's friendship had been manifested in frequent acts of material assistance given over the years, for example in her political campaigns, the doing of odd jobs and helping her move house. I consider that most of this was done to make himself indispensable to her and in that sense was integral to his stalking but no doubt she appreciated these acts and possibly it gave her hope that her appeasement of him was working. But I reject the submission that she so valued these acts that she accepted and willingly tolerated his stalking.

[403] In my opinion the plaintiff "tolerated" the stalking conduct only in the sense that, until July 1999, she put up with it without taking any "official" or "formal" action to bring it to a halt. Thus she declined to proceed against the defendant with two complaints of criminal stalking and she did not take civil legal action. She expressed her reasons for this in the witness box. She did not want to expose him, his family and SCRGAL to publicity of that nature. The law's remedies were so draconian that she rejected them. In that sense, as Dr Pathe said, the responses of the Justice system were unsympathetic. Even her approach to solicitors in July 1999 seems to have been rather tentative because it took until 8 April 2002 for her to issue proceedings.

[404] I have referred to the evidence of Dr Pathe and Dr Cantor (and set out the view which I think is open to me independently of the expert evidence) to explain the reasons for her failure to take decisive action. She was trying to appease her stalker and to bring the stalking to an end by methods which, with hindsight, she now regrets, but which she persevered with even in the face of advice to the contrary.

[405] What was clearly raised by the defendant (indeed, as early as the letter to the plaintiff's solicitors, excerpts of which I have cited in para [343]) was that his close attention to the

plaintiff continued because she gave him mixed signals. The argument is that although she often complained of his conduct and told him to leave her alone she also, virtually simultaneously, encouraged his attentions by keeping company with him, phoning him, sending him affectionate cards and like actions. I took this to be a defence rather like a plea of mistake of fact caused by the plaintiff's apparent acceptance as apposed to actual acceptance of his conduct.

[406] The plaintiff clearly did, on many occasions, do these "tolerant" things. She cooked meals for him which she left outside the house for him to take away (the "roast on the post"). On that point I accept her evidence that feeling sorry for his single status, she often cooked an extra helping for him when she cooked for herself and Mr Jones. I also accept her evidence that this occurred only when she lived at Karawatha Drive, that is, up to August 1996. Mr Jones, who said it continued afterwards, is apparently mistaken on that although I suppose it is possible that the plaintiff has forgotten isolated later instances. Incidentally, if her relationship with the defendant was as close as he maintained, why would she not invite him inside to dinner rather than leaving his food outside? On the evidence the physical presence of Mr Jones would not have been a disincentive. The defendant seemed to treat their house as his and Mr Jones as of no consequence. For that reason I cannot accept the defendant's evidence that she left signals for him to come inside when an occasion was propitious for a romantic interlude.

[407] The plaintiff and the defendant often had cups of coffee or luncheon snacks together. The view I take of that is that this was part of the working day at SCRGAL. It must be remembered that the plaintiff was a founding member of SCRGAL and I consider the evidence makes it clear that she persevered with her SCRGAL-related contact with the defendant for two reasons. First, he was an integral part of the business and could not be avoided when she engaged in the operation which was so close to her. Second, she really has made no complaint about his SCRGAL involvement with her, at least before late 2000. As I have said in para [150] almost all of her phone calls to him were made in ordinary business hours. I assume some out of hours calls would also have been business ones. It is worthy of note that once the plaintiff's phone records became available Mr Curran did not apply to recall her for further cross-examination although that option had been expressly made available.

- [408] A number of greeting cards from the plaintiff to the defendant were tendered. The dates of some of them are not clearly established but in general those that contain expressions of real affection were given earlier rather than later in the period between 1994 and 2000. The later ones are decidedly more formal. One, which on her evidence she sent at Christmas 1997, contains sexually oriented drawings but is really more silly than sleazy.
- [409] She went on some business trips with him and shared a room. I accept that these occasions were not occasions of intimacy and that the sharing of the room was partly for reasons of economy but probably more for reasons relating to appeasement.
- [410] The physical contact she permitted the defendant was, I accept, limited to things like massaging her legs which were sometimes painful. This used to give her some relief from the pain and him, presumably, some pleasure. However it stopped short of sexual contact, which had ended in late 1994.
- [411] This permitted contact continued, I understand from her evidence, with some regularity until 1998/1999. Even after the critical events of April 1999 there were instances of it but it seems they were rather isolated and did not occur other than superficially after early 2000. Of course, during the entire period there were also regular and frequent occurrences of her berating him over his intrusive behaviour and pleas to him to desist.
- [412] I do not consider that her continued contact with the defendant indicates any willing acceptance of the stalking behaviour. Nor is it possible to believe that the defendant really considered that to be the case. Only if he ignored her complaints and wilfully blinded himself to reason could he have failed to appreciate the effect on her of his stalking conduct. Obsessed though he might have been I cannot accept that he did not know what he was doing, that it was unreasonable, hurtful to the plaintiff, and greatly so. His perseverance with it, I can only conclude, was because he believed that she would ultimately knuckle under, admit the necessity to be controlled by him, and to reject the company of all other men.
- [413] I also took it to be part of the defence case that the defendant's objectionable acts were done only with the intention of protecting her from her own weaknesses and not only for that purpose but also the protection of SCRGAL. I reject that.

[414] Finally I reject the notion that the plaintiff's bringing this action was in some way an act of revenge or retaliation for the breakdown of a previously happy relationship or for his refusing to help her in obtaining improper SCRGAL expense payments

### **Action for Invasion of Privacy**

[415] Despite the many and varied claims which the plaintiff has made (see para [ 1]) it is clear that the emphasis in these proceedings has been on the conduct of the defendant which has been generally described in the evidence, the submissions and these reasons, as stalking. That conduct is said by Mr Dunning to fall within an actionable civil claim for invasion of privacy.

[416] Surprisingly, "*to stalk*" and its derivatives in this sense is not yet dealt with by the Oxford English Dictionary (at least, as currently published on the Internet) but the Encarta Dictionary gives it as meaning "*to harass*" which in turn is defined as "*to persistently annoy, attack or bother somebody*". In my opinion, that is the common usage in our community of the word "stalking".

[417] Unlawful stalking is an offence in Queensland and is punishable, (potentially) by imprisonment (Criminal Code s.359E). It may be helpful to set out material provisions of the Code which deal with the offence.

[418] 359 B "*Unlawful stalking*" is conduct –

- (a) *Intentionally directed at a person (the "stalked person"); and*
- (b) *Engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion; and*
- (c) *Consisting of 1 or more acts of the following, or a similar, type –*
  - (i) *Following, loitering near, watching or approaching a person;*
  - (ii) *Contacting a person in any way, including, for example, by telephone, mail, fax, e-mail or through the use of any technology;*
  - (iii) *Loitering near, watching, approaching or entering a place where a person lives, works or visits;*
  - (iv) *Leaving offensive material where it will be found by, given to or brought to the attention of, a person;*
  - (v) *Giving offensive material to a person, directly or indirectly;*

- (vi) *An intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence;*
- (vii) *An act of violence, or a threat of violence, against, or against property of, anyone, including the defendant; and*
- (d) *That –*
  - (i) *Would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against property of, the stalked person or another person; or*
  - (ii) *Causes detriment, reasonably arising in all the circumstances, to the stalked person or another person.*

[419] Section 359A includes the following definition:

*“‘detriment’ includes the following –*

- (a) *apprehension or fear of violence to, or against property of, the stalked person or another person;*
- (b) *serious mental, psychological or emotional harm;*
- (c) *prevention or hindrance from doing an act a person is lawfully entitled to do.”*

[420] Thus the offence in Queensland of unlawful stalking involves an invasion of the privacy of the victim. The conduct of the defendant, as I have found it, from 1994 onward has included very many acts committed by him (or acts which he obviously counselled or procured), which fall within s.359B of the Code. It may be relevant to note that in perhaps all of the offences contained in the Code in which an individual person would be named in the indictment as the complainant (or victim) an actionable tort is encompassed so that the victim would have the right to sue in the civil court for damages. One might ask why would that not also apply to a new offence like stalking in which the victim suffers personal injury or other detriment?

[421] Counsel have told me that, according to their research, there has been no case in Australia which has expressly given recognition to a right of action for invasion of privacy.

[422] The starting point for an analysis of the relevant elements of a possible tort of invasion of privacy is the decision of the High Court in *Australian Broadcasting Corporation v Lenah Game Meat Pty Ltd*, (2002) 208 CLR 199. References to the judgment will be to the relevant paragraphs as they appear in the report.

- [423] The judgment is a lengthy one which deals with a variety of issues, a number of which are not relevant. However in my view within the individual judgments certain critical propositions can be identified with sufficient clarity to found the existence of a common law cause of action for invasion of privacy. Statements of principle are to be found in those judgments which provide guidance in the formulation of such a cause of action. Academic writings are referred to which also contain statements of relevance.
- [424] The Justices who made up the Court in *Lenah* noted that it has been assumed in Australia, that the High Court decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 was authority for the proposition that there was no common law right to privacy which could be enforced by action.
- [425] Gummow and Hayne JJ, with whose reasons Gaudron J agreed (at para 78) rejected the suggestion that the High Court's decision in *Victoria Park* in fact stood for such a proposition. See generally paras 106–108, 111, 132. Their Honours stated the matter bluntly:-
- “Victoria Park does not stand in the path of the development of such a cause of action [of invasion of privacy].”* See para 107.
- [426] Kirby J said of the decision in *Victoria Park* that “[i]t may be that more was read into the decision in *Victoria Park* than the actual holding required.” See para 187. His Honour declined to declare the existence of an actionable right of invasion of privacy, describing it as a difficult question, para 189, but he did not reject the possibility of its existence.
- [427] Callinan J did not consider that the decision in *Victoria Park* ought to continue as authority for the proposition that there is no tort of invasion of privacy in Australia. His Honour arrived at that conclusion on the basis that, at the very least, the case would have been decided differently in 2001 from the way it was in 1937. Indeed His Honour's reasons probably go so far as to suggest that the case was not correctly decided even by 1937 standards, being “decided by a narrow majority”, and that the reasoning of the minority, especially Rich J, should be preferred. See paras 314-316 and 318-319.
- [428] I see nothing in the reasons for judgment of Gleeson CJ to suggest that he in any way differed from the view of the other members of the Court that the decision in *Victoria Park* presented no bar to the existence of a common law right to privacy in Australia.

[429] As I understand the reasoning of Gummow and Hayne JJ (and therefore Gaudron J) they did not decide that as from the date of their judgment there should be scope for the existence of such a cause of action, which, until a moment before there had not been. Rather, they held that there had been a misunderstanding on this issue since 1937. I consider that Kirby J probably was of a like view and Callinan J decided that, at the least, the matter would be decided differently today.

[430] While neither determinative nor declaratory of the position in Australia, the Court recognised, as a useful starting point, the elucidation of the tort of invasion of privacy as propounded by Professor William Prosser as early as 1960.

Professor Prosser in a paper quoted by Callinan J at para 323 stated it thus:-

*“It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, “to be let alone”. Without any attempt to exact definition, these four torts may be described as follows:*

1. *Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.*
2. *Public disclosure of embarrassing private facts about the plaintiff.*
3. *Publicity which places the plaintiff in a false light in the public eye.*
4. *Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.”*

[431] That categorisation by Professor Prosser was adopted in the treatment of the topic “Privacy” in the *Restatement of the Law Second, Torts, 1977*, cited by Gummow and Hayne JJ at para 120. Relevant for the purpose of this case are the first three of Professor Prosser’s categories. It is useful to record what is said of them in the *Restatement*.

The general principle is:-

*“One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.”*

The tort “Intrusion upon Seclusion” is described as:-

*“One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another person or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”*

Conduct identified as “Publicity Given to Private Life” is described as:-

*“One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicised is of a kind that*

- (a) would be highly offensive to a reasonable person, and*
- (b) is not of legitimate concern to the public”*

The actionable conduct described as “Publicity Placing Person in False Light”, is described as:-

*“One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if*

- (a) the false light in which the other was placed would be highly offensive to a reasonable person, and*
- (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicised matter and the false light in which the other would be placed.”*

[432] Gleeson CJ at paras 41 *et seq* also saw the four categories as useful for comparison as to how privacy might develop in the Australian context.

[433] The development by courts in other common law jurisdictions of a common law claim for invasion of privacy was considered useful in forming the development of this area of law in Australia by Gummow and Hayne JJ, (and thus Gaudron J) at paras 112-119 and Callinan J at para 325-327.

[434] In particular each of those Justices referred to the judgment of the English Court of Appeal in *Douglas v Hello! Ltd* (2001) QB 967 in which each of the three Justices of Appeal strongly suggested that in England the right of an individual person to privacy was a right protected by the civil law.

[435] The Court made clear that the time was now right for consideration as to how and to what extent privacy should be protected at common law in Australia. See the judgments of the Gleeson CJ at para 40 (*“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”*), of Gummow and Hayne JJ (and Gaudron J) at para 132, and of Callinan J at para 335.

[436] At para 332 Callinan J said *“...principles for an Australian tort of privacy...need to be worked out on a case by case basis in a distinctly Australian context.”* See also Gummow and Hayne JJ at para 124.

[437] Finally, some members of the Court elucidated certain matters that would constitute an unacceptable invasion of privacy, which are useful to mould the formulation of this common law right. For example Gleeson CJ stated it this way:-

*“Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct which would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.”* (para 42), (my emphasis).

*“However, the foundation of much of what is protected, where rights of privacy, as distinct from rights of property, are acknowledged, is human dignity.”* (para 43)

*“A film of a man in his underpants in his bedroom would ordinarily have the necessary quality of privacy to warrant the application of the law of breach of confidence. Indeed, the reference to the gratuitously humiliating nature of the film [being considered in *Donnelly v Amalgamated Television Services Pty Ltd*] (1998) 45 NSWLR 590] ties in with the first of the four categories of privacy adopted in United States law, and the requirement that the intrusion upon seclusion be highly offensive to a reasonable person.”* (para 54), (my emphasis)

[438] Gummow and Hayne JJ, (and Gaudron J) at para 125 offered the following useful guidance:-

*“The remaining categories, 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”, the words of Sedley LJ in *Douglas v Hello! Ltd*”*

[439] More than 15 years ago, Young J in *Bathurst City Council v Saban* (1985) 2 NSWLR 704 at 708 recognised conduct which would apply by analogy to the instant case as being actionable notwithstanding the decision in *Victoria Park*.

[440] A helpful statement of principle concerning the development of the common law in this area is to be found in the decision of Jeffries J in *Tucker v News Media Ownership Ltd*, unreported, High Court, Wellington, CP 477/86 20 October 1986 the text of which is reproduced by McGechan J in a subsequent reported decision bearing the same name, [1986] 2 NZLR 716 at 732. Jeffries J had said:-

*“In my view the right to privacy in the circumstances before the Court may provide the plaintiff with a valid cause of action in this country. It seems a natural progression of the tort of intentional infliction of emotional distress*

*and in accordance with the renowned ability of the common law to provide a remedy for a wrong.”*

- [441] The robustness and vigour of the common law to develop to meet changing circumstances and provide a remedy for wrong is usefully traced, in respect of other aspects of the common law, in particular the development generally of the common law torts from trespass into actions in negligence, and the development of the historic common law right of habeas corpus, by Plucknett (*A Concise History of the Common Law*, Butterworths, 5<sup>th</sup> Ed, 1956 pp57-58 (habeas corpus) and 459-462 (development of tort). I refer to my remarks concerning the relationship between a new criminal offence and a civil right of action at para 420.
- [442] It is a bold step to take, as it seems, the first step in this country to hold that there can be a civil action for damages based on the actionable right of an individual person to privacy. But I see it as a logical and desirable step. In my view there is such an actionable right.
- [443] Mr Curran rightly pointed out the difficulties in taking the step. What are the essential elements of the cause of action? Are there any special defences which should be allowed?
- [444] It is not my task nor my intent to state the limits of the cause of action nor any special defences other than is necessary for the purposes of this case. In my view the essential elements would 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.
- [445] Clearly acts of the type specified in s.359B(c) of the Code (see para [418]) would be actionable behaviour. I have found the defendant to have committed many of such acts, beginning in 1994. The suffering of embarrassment, hurt, distress and, *a fortiori*, PTSD would be actionable detriment as would enforced changes of lifestyle caused by the intrusion. I have found that the plaintiff has suffered such detriment.

[446] It is unnecessary for me in the circumstances of this case to decide whether a defendant would be liable for negligent acts as opposed to willed acts. The conduct of the defendant which I have found to be proved consisted of willed acts.

[447] It seems to me that a defence of public interest should be available (see Lenah at para 34). No such concept was involved in this case. It is unnecessary for me to decide whether a defence of actual intention to protect, or cause a benefit to, the plaintiff should be a defence, as was argued by the defence in this case because I have expressly found that such an intention did not motivate the defendant. In any event, it could lie uneasily with the element set out in para [444(c)] above.

### **Action for Harassment**

[448] All of what I have said in relation to the tort of invasion of privacy applies, I consider, if the breach amounts to harassment (or stalking) as it has in this case. Indeed, Gummow and Hayne JJ, (and Gaudron J) without dissent from the any other member of the Court, recognised harassment as a possible developing tort, separate and distinct from invasion of privacy. See para 123.

[449] Gummow and Hayne JJ (and Gaudron JJ) saw as useful the discussion on this separate and discreet cause of action for harassment by Todd in his chapter entitled Protection of Privacy in *Torts in the Nineties* (1977) 174 at 200-204. Todd himself expressly identifies stalking being "...an especially sinister activity" as conduct that would be caught by this cause of action.

[450] Todd formulated the possible cause of action thus:-

*"The courts will require evidence of 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."*

[451] In this case the cause of action in invasion of privacy has been presented as a case of stalking, with which I regard harassment as synonymous (para [416]). The essentials suggested by Todd are clearly made out but I see no need to decide whether "harassment" is a separate cause of action. I would prefer to regard it as a case of invasion of privacy which

is characterised by protracted and persistent conduct on the part of the defendant. Thus, I would consider it to be merely an aggravated form of invasion of privacy.

### **Action for Intentional Infliction of Harm**

[452] The essence of this tort is the wilful act or statement of a person, calculated to cause physical harm to another and in fact causing physical harm to him or her, Fleming, *The Law of Torts*, 8<sup>th</sup> Ed. LBC, 1992 pp 32-34. The principle was established by Wright J in *Wilkinson v. Downton* [1897] 2 QB 57. The English Court of Appeal upheld that decision. in *Jenvier v Sweeney* [1919] 2 KB 316. Both of these were subsequently followed in the High Court in *Bunyan v Jordan* [1937] 57 CLR 1.

[453] The principle propounded in *Wilkinson* has been reaffirmed recently not only in the context of invasion of privacy (*Lenah* at 123 per Gummow and Hayne JJ) but more generally (*Carrier v Bonham* [2002] 1 Qd R 474 at 480-481 per McMurdo P; at 483 per McPherson JA). In *Carrier* the court held that “calculated” to cause physical harm meant objectively likely to cause it. On the facts as I have found them the defendant committed many such acts.

[454] It is accepted that mere distress is not sufficient to make out the cause of action. There has to be damage in the form of an injury to mental health that is capable of causing a recognisable physical condition, or to put it another way, a psychiatric illness. See generally Fleming, *op cit* at p34; Balkin and Davis, *Law of Torts*, 2<sup>nd</sup> Ed, Butterworths, 1996 p50.

[455] The PTSD the plaintiff now suffers from represents such physical harm.

### **Action for Negligent Infliction of Harm**

[456] This is matter for the application of first principles of the law of negligence. The law of negligence fixes a defendant with a duty requiring him to conform to certain standards of conduct, recognised by the law, for the purpose of protection of others against unreasonable risks, the duty of care.

[457] Mr Dunning submitted that there could no serious argument that the law would not recognise a duty to conduct oneself in a way that is not highly offensive to privacy and solitude of reasonable people. He referred to Fleming, *op cit* pp 102-103; Balkin and Davis, *op cit* p198.

He submitted that once it is accepted that such a duty exists again there can be no argument that a foreseeable consequence of a breach of that duty would be an infliction of physical (psychiatric) harm, certainly if the breach is on the scale that it is here.

[458] I have expressly left undecided the effect of negligent acts of such a type (para [446]). The facts of this case do not call for a decision on this alleged course of action.

### **Action for Trespass**

[459] *“The tort of trespass is committed whenever there is interference with possession of land without lawful authority, relevantly, the license or consent of the person in possession.”* (TCN Channel Nine Pty Ltd v Anning (2002) 54 NSWLR 333 [23] per Spigelman CJ (Mason P and Grove J agreeing).

[460] It is not in issue that the plaintiff was in possession of all of the properties in question. She was the owner or part owner of all except the property at 69 Point Cartwright Drive. However, even in respect of that property, she was there caring for her recuperating mother, so she plainly was in possession and in a position to determine who might be allowed or refused entry to the property.

[461] *“Every unauthorised entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right.”* (Coco v The Queen, (1994) 179 CLR 427 at 435 per Mason CJ, Brennan, Gaudron and McHugh JJ)

[462] On the facts I have found, since 8 April 1996 the defendant trespassed on the plaintiff’s land on thirteen occasions. See paras [234], [238], [240], [246], [249], [251], [259], [271], [285], [287], [296], [300] and [316]. These were occasions on which, on the balance of probabilities I find that he actually entered on the plaintiff’s premises without her authority or the authority of any person legally able to give it.

### **Action for nuisance**

- [463] Relevantly for the purposes of this case the essence of the cause of action for nuisance is unlawful interference with the enjoyment of the plaintiff's land, that is, where her various residences have been situate. See generally Balkin and Davis, *op cit* at pp 449-450.
- [464] What has occurred on the various properties of the plaintiff is properly characterised as "*inconvenience materially interfering with the ordinary comfort physically of human existence...according to plain and sober and simple notions among English people.*" (*Walter v Selfe* (1851) 4 DE G & Sm 315 at 322; 64 ER 849 at 852 per Knight-Bruce V-C; adopted in *Painter v Reed* [1930] SASR 295 at 301-2 per Richards J; *Don Brass Foundary Pty Ltd v Stead* (1948) 48 SR (NSW) 482 at 486 per Jordan CJ; *Munro v Southern Dairies Ltd* [1955] VLR 332 at 335 per Scholl J.
- [465] The occasions set out in para [462] above are instances of this type of conduct, to which can be added paras [207], [214], [232], [242], [254], [257], [275], [298], [309] and [329] where the evidence does not establish actual entry on the plaintiff's premises but conduct of the defendant elsewhere which affected her enjoyment of her premises.

### **Action for battery**

- [466] Battery is any act of a defendant which directly, either intentionally or negligently causes some physical contact with the plaintiff without the plaintiff's consent. (Balkin and Davis, *op cit* p 35.
- [467] Administering an unwanted kiss is a recognised actionable battery. (*Hughes v Callaghan* [1932] GLR 330; Todd, *Protection of Privacy*, 196).
- [468] This action was probably made out but in the overall event it is a matter of *de minimus*. Any damages to be awarded would be nominal. Unless there is some particular reason for awarding them (and I was referred to none) I see no point in it.

### **Action for Assault**

- [469] Assault is substantially the same conduct as battery except that it is the apprehension of contact, rather than contact itself which has to be established. Balkin and Davis, *op cit* p 45).

[470] I am not prepared to find that the plaintiff ever apprehended contact with her on the occasions when others (for example Mr Jones, Mr Clatworthy and Mr Lewis) were assaulted. She did not give evidence of any such apprehension. The cause of action is not made out.

### **Compensatory Damages for Breach of Right to Privacy**

[471] The most serious aspect of the plaintiff's detriment is the PTSD which the evidence has established. It has very seriously and adversely affected her enjoyment of life and ability to function as she once did, as I have set out in paras [373]-[385]. It has also reduced her capacity to function in her elected position. While the vagaries of political life are notorious and make it impossible to place much weight on it, I have no doubt that the PTSD will have some adverse influence on her desire and ability to stand for re-election as Mayor (or even councillor) and her likelihood of success. Whatever other career might attract her will to some considerable extent be adversely affected for some time to come, perhaps a long time, so in assessing compensatory damages I make a conservative allowance for future economic loss (\$10,000). By way of analogy damages for economic loss can form part of an award for defamation, a very similar type of action to this. See Halsbury's *Laws of Australia*, para [145-2700]. I also take into account the likely cost of treatment and medication in the sum of \$3,000 (para [354]). See *Halsbury*, *ibid*.

[472] Damages in this case are assessable for the PTSD which I have found to have been sustained on 8 April 2000 and therefore unaffected by the *Limitation Act*. This aspect of assessment is no different from what frequently arises in actions for damages for personal injury. I consider that the prospects are reasonable for the resolution of the PTSD at the end of treatment for, say, another two years, but of course that cannot be guaranteed and the condition may linger. See paras [354] and [358]. But she has suffered this very unpleasant illness now for over three years and in total will probably suffer it for up to five years and perhaps longer.

[473] However, compensatory damages here contain another component, that is, a sum to compensate the plaintiff for the "non PTSD" suffering. That comprises the range of unpleasant emotions such as upset, worry, anger, embarrassment and annoyance to which I refer to in paras [396] and [397], limited to the period commencing 8 April 1996. These emotions were and are experienced regularly and frequently. Their main period of importance was, I consider, between April 1996 and the onset of the PTSD, which I have set

at 8 April 2000. Since then I consider they have been largely subsumed within the PTSD. On the resolution of the PTSD I consider it likely that these experiences will be but a memory, albeit an unpleasant memory, of events extending over seven long years between 1996 and now. That memory is likely to linger and that will be unpleasant.

[474] Compensatory damages do not simply rest with these two components. As in actions for damages for trespass damages for breach of the right to privacy must contain a component for vindicating that right. See *TCN Channel Nine, op cit* at para 178 where Spigelman CJ accepted that this can be a substantial sum. Similar considerations apply in actions for defamation when compensatory damages are awarded for injured feelings to console the plaintiff and to vindicate her. See Halsbury's *Laws of Australia*, para [145-2655]

[475] I assess compensatory damages at \$108,000 made up of \$50,000 for the PTSD (the component to date being \$30,000), \$10,000 for future economic loss, \$3,000 for the likely future cost of treatment, \$20,000 for the non PTSD wounded feelings (the component to date being \$15,000) and \$25,000 by way of vindicatory damages (the component to date being \$20,000, divided into \$15,000 for the PTSD and \$5,000 for the wounded feelings).

### **Aggravated Compensatory Damages for Breach of Right to Privacy**

[476] This is an appropriate case for aggravated compensatory damages. The remarks of Spigelman CJ in *TCN Channel Nine, op cit* at para 179 relate to an action for trespass but are appropriate for consideration here – He said that aggravated damages recognise that:-

*“the hurt to the feelings, humiliation and affront to dignity experienced by the respondent was aggravated by the way the appellant acted in the course of its trespass”.*

[477] Over the relevant seven year period since 8 April 1996 (in this connection no distinction is drawn between the PTSD and the general affront) the defendant, at best, ignored the hurt to the plaintiff's dignity and at worst, belittled it. His acts were persistent, frequent, regular and often carried out in the presence of others. It has involved allegations of the most hurtful kind which have no doubt spread rumours or at least helped to maintain their currency.

[478] Of particular note is the fact that the defendant's pleadings maintained, and still maintain, allegations that the plaintiff was immoral in relation to sexual acts she is said to have committed as early as 1994 and in her maintenance of a series of wanton sexual liaisons

since. Although his counsel did not pursue that latter aspect other than very cursorily, that did not prevent the defendant himself, in the witness box, from doing so. An example is given in para [174E]. At another point he gratuitously introduced an allegation of a scandalous sexual act between the plaintiff and a well-known politician. All of that was done in the presence of large numbers of the public and the press and received wide publicity. The plaintiff must surely have been deeply offended by it and of course some of the mud will stick.

[479] This aspect of the defence raises by analogy, in actions for defamation, the aggravating nature of the maintenance of an unestablished plea of justification or unsuccessful attacks on the character or credit of the plaintiff. See Halsbury, *op cit*, para [145-2755].

[480] I take the view that the circumstances demand a very substantial award of aggravated compensatory damages. I assess them at \$50,000 with a component to date of \$30,000 which is divided between the PTSD component (\$20,000) and the non PTSD component \$10,000).

### **Exemplary Damages for Breach of Right to Privacy**

[481] Exemplary damages are awarded for “conscious wrongdoing in contumelious disregard of another’s rights” (*Whitfield v De Lauret & Co Ltd (1920)* 29 CLR 71 at 77). Other expressions used have included “high-handed, insolent, vindictive, or malicious” conduct (*Uren v John Fairfax & Sons Pty Ltd (1966)* 117 CLR 118 at 129, per Taylor J). They are punitive in nature and include the notion of marking the condemnation of the court for the defendant’s conduct (see *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985)* 155 CLR 448 at 471, per Brennan J). As a general rule it is available in those torts in which intention is an element (for example, trespass to the person or to land). See Balkin & Davis, *op cit*, (2<sup>nd</sup> ed) 778.

[482] In my view the nature of the defendant’s conduct, restricted to the period after 8 April 2000, attracts a substantial punitive, or exemplary sanction in this form of damages, and I assess them at \$20,000.

### **Total Damages for Breach of Right to Privacy**

[483] Thus the plaintiff's damages under this head are:

(a)	Compensatory damages	\$108,000
(b)	Aggravated compensatory damages	\$ 50,000
(c)	Exemplary damages	\$ 20,000
		<b>\$178,000</b>

[484] Interest on damages will not run on the components for future economic loss (\$10,000), future costs (\$3,000) or exemplary damages (\$20,000). I consider that the rate should be 2%, by analogy with the accepted rate for damages for past pain and suffering in personal injuries cases. So interest will run on the components which represent damage suffered to date.

- (a) on \$30,000 at 2% from 8 April 1996 to 8 April 2000;
- (b) on \$95,000 at 2% from 8 April 2000

#### **Damages for Intentional Infliction of harm**

[485] The damages (for the PTSD) are again assessed at \$50,000 with again \$30,000 as the component to date. Vindictory damages, aggravated damages, and exemplary damages are also called for but should be assessed at lower figures than in the action for breach of privacy because that action includes greater detriment. I assess \$15,000 for vindictory damages, (\$10,000 to date) \$25,000 for aggravated damages, (\$15,000 to date) and \$10,000 for exemplary damages. Of course all these sums partly duplicate the damages already assessed for breach of the right to privacy. Interest at 2% would run on \$55,000 from 8 April 2000.

#### **Damages for Trespass**

[486] The proper approach to the assessment of damages in trespass actions was comprehensively considered by the New South Wales Court of Appeal in *TCN Channel Nine, op cit* Spigelman CJ, who delivered the reasons of the Court, after considering the authorities on this area of the law, adopted the test for recoverable damages for trespass as being that damage which is the natural and probable consequence of the trespass. Reasonable foreseeability is not a part of the test (at para 100; see generally paras 85-155).

[487] Moreover, the court made clear that it was undesirable to limit or attempt to state the kinds of damages that may be recoverable for trespass and explicitly left open the possibility that

psychiatric harm might in certain circumstances be a natural and probable consequence of the trespass. The court, in terms, identified trespassing by a stalker as being trespass of a kind that could give rise to psychiatric harm (at para 106).

[488] General damages for trespass are for the purpose of vindicating the plaintiff's right to exclusive possession. This is a matter of importance and justifies a substantial award (*TCN Channel Nine* at para 178). Intrusion into a residence is a matter that justifies the awarding of exemplary damages, *ibid* at para [186].

[489] There is no evidence of any real damage (in dollar terms) other than emotional upset and annoyance to the plaintiff. In my view compensatory damages for trespass should be assessed at \$25,000 (\$20,000 to date). This includes vindicatory damages. However, the persistent, offensive and defiant nature of the trespass calls for a substantial increase in that award by a further sum of \$25,000 for aggravated damages (\$20,000 to date) making a total of \$50,000. Again, this is a duplication of part of the award for breach of the right to privacy. Interest would again be allowable at 2% on \$40,000 from 8 April 1996.

### **Damages for Nuisances**

[490] This cause of action is made out and the damage is of greater moment than for the trespass because it includes the trespass. I assess compensatory damages at \$30,000 (\$20,000 to date), this sum to include vindicatory damages and aggravated damages at \$30,000 (\$20,000 to date), a total of \$60,000. Again it is duplication of the larger award. Interest would run on \$40,000 at 2% from 8 April 1996.

### **Injunction**

[491] The plaintiff seeks to enjoin the defendant from personally dealing with the plaintiff from visiting her or entering on any dwelling at which she resides. The short answer to this request is that there is no evidence that he is now, or in the future, likely to do that. Indeed on the evidence he has had no real contact with her, other than in relation to these proceedings, since the action began. There is no basis for the making of an injunction. However, given the history of his conduct towards her I will give the plaintiff liberty to apply.

### **Conclusion**

[492] There will be judgment for the plaintiff for \$178,000 with interest as set out in para [484]. I grant liberty to the plaintiff to apply for injunctive relief.