BLACKBURN LECTURE
THE COURTS AND THE VULNERABLE
Justice Paul Finn
A Judge of the Federal Court of Australia

It is fair to say that tonight I walk in large footsteps. Those who have gone before me in the cause of honouring the memory of Sir Richard Blackburn have held offices and have had personal standing commensurate with those of the man they honoured. I speak from a different and less elevated vantage point. But I suppose my presence here tonight has a different explanation. Sir Richard, as is well known, was variously a professor of law and a judge. With the A.N.U. being one of the hosts of this year’s lecture - and Sir Richard had a significant association with the university: he was in the end its Chancellor - I am here I suspect as a distant embodiment of both facets of his legal life.

Whatever the explanation for the invitation to me I am humbled by it.

In reflecting upon Sir Richard’s circumstance of scholar turned jurist and on the A.N.U.‘s part here tonight it seemed to me appropriate in talking of the law and of the courts to attempt to work together the scholarship of academics and the decisions of judges. It also suggested that as one so recently an academic, I may have a little more licence in what I say than would ordinarily be allowable to a judge and a novice one at that. I should also say by way of preface that
I am conscious that the audience tonight may have more non-lawyers in it than may usually be the case. I have in consequence attempted to accommodate what I have to say to the possible diversity of interest and knowledge of the law that may be present here.

My subject is really about a legal commonplace. It has been a routine function of the courts within their province to protect from the untoward, persons who are in positions of vulnerability in their relations and dealings with others and with government. In some periods that function has been discharged with solicitude; in others with reticence. But it has always been there. And it is a function which we should from time to time openly proclaim for it embodies a significant part of the civilising role of the courts themselves.

It must, of course, be recognised that today it is Parliaments and not the courts which rightly have assumed primary responsibility for maintaining the conditions for civilised existence and for civil behaviour in our society. Statute, in consequence, provides the better measure of our collective sense of responsibility to the vulnerable in society. But many speak for Parliaments and their achievements. Tonight I will speak only of the courts and I will in the main confine my comments to the last 15 or so years.
But before I focus directly on the courts, let me turn first to the A.N.U. In 1985, Professor Robert Goodin published a book addressed primarily to moral philosophers. Its provenance lay in the Social Justice Project conducted in the Research School of Social Sciences. The book's title betrays its burden: *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities*. Because it bears directly on what I have to say I would like to say a little of Goodin's thesis.

His purpose was to unearth the moral foundations of the responsibilities we have towards others - family, friends, clients and the like. Our social responsibilities in short. He rejects the idea that these responsibilities stem from the voluntary commitments we make to others. Rather their cause lies in the vulnerability of those others to our actions and choices. From this he argues for a basic principle of individual responsibility. It is this:

"If A's interests are vulnerable to B's actions and choices, B has a special responsibility to protect A's interests; the strength of this responsibility depends strictly upon the degree to which B can affect A's interests." (p 118)

I am not going to suggest that Goodin's moral vision is replicated exactly in the law. It clearly is not. Recall for example Justice Deane's observation in the negligence -
nervous shock case of *Jaensch v Coffey* (1984) 155 CLR 549 at 578:

"the common law has neither recognised fault in the conduct of the feasting Dives nor embraced the embarrassing moral perception that he who has failed to feed the man dying from hunger has truly killed him."

What I do suggest, though, is that the theme of protecting the vulnerable is now a major one in contemporary law.

So let me turn to the courts. Two years before the publication of Goodin's book in 1983, the High Court in a somewhat unheralded flourish of activity began a process of reanalysis of our common law which, sustained over a decade and more, provides no little vindication of the vulnerability thesis.

That process began in such equity cases as *Commercial Bank of Australia v Amadio* (1983) 46 ALR 402 and *Taylor v Johnson* (1983) 45 ALR. In each relief was given to persons disadvantaged in a dealing. In the one case, the disadvantage stemmed from inadequate comprehension of the import of a guarantee being given, in the other, from a serious mistake as to the price to be paid for property. In each instance the person in the superior position was prevented from exploiting the other. The guarantee in one case, the contract in the
other, were set aside.

The evolution of an idea, though, was not confined to equity cases. No significant area of judge made law has escaped its touch. I won't labour the matter here. It has been remarked upon on many occasions. But I will in passing give examples enough to show what has occurred.

Tonight is not the occasion to describe the detail of what has been a transformation in our law. I wish rather simply to dwell in the main on the doubts and dilemmas that necessarily beset our attempts to give law so civilising, I hesitate to say so moral, a function.

I say doubts and dilemmas for this reason. There was a time in the law not so far removed from now when a more harsh - some would say a more robust - view was taken of one's legal responsibilities to others. The nineteenth century American writer Ralph Waldo Emmerson in an essay threateningly entitled "Self Reliance" was to comment: "you will always find those who think they know what is your duty better than you know it". The courts for their part were slow to attract this of all censures. Neither the courts nor the law can today enjoy this luxury. But as I look at some of the criticisms made of the High Court in the last few years, there clearly are some who wish it still was so.

Now let me turn to the substance of the matter.
I say nothing new or surprising in suggesting that many of the tensions in today's law are the products of one, or other, or both, of two antitheses. The first antithesis, which I will exemplify in practice in a moment, can be summed up biblically on the one side, by Cain's rhetorical question: "Am I my brother's keeper?" and on the other by Christ's injunction: "Love thy neighbour as thyself". The second antithesis expresses, variously, the utilitarian idea that "the interests of the few should be subordinated to the good of the many", and, contrarily, that "the few should be protected from the tyranny of the majority".

Let me illustrate each of these in relatively recent case law.

First Cain's question and, given our co-host tonight, I suppose it is appropriate to use an example involving litigation against a University. It's a 1971 decision from the United States: Hegel v Langsam 273 NE 2d 351 (1971). Its short judgment can be quoted in full:

"BETTMAN, JUDGE. This matter is before the Court on defendant's motion for judgment on the pleadings. The gravamen of plaintiff's position is that the defendants [i.e. the University] permitted the minor plaintiff, a seventeen year old female student from Chicago, Illinois, enrolled at the University, to become associated with criminals, to be seduced, to become a drug user and
further allowed her to be absent from her dormitory and failed to return her to her parents' custody on demand.

In our opinion plaintiffs completely misconstrue the duties and functions of a university. A university is an institution for the advancement of knowledge and learning. It is neither a nursery school, a boarding school nor a prison. No one is required to attend. Persons who meet the required qualifications and who abide by the university's rules and regulations are permitted to attend and must be presumed to have sufficient maturity to conduct their own personal affairs.

We know of no requirement of the law and none has been cited to us placing on a university or its employees any duty to regulate the private lives of their students, to control their comings and goings and to supervise their associations."

Judgment was given for the University.

The neighbour example comes from the recent majority decision of the New South Wales Court of Appeal in Lowns v Woods, unreported, 5 February 1996.

Put briefly it was held that a doctor who was requested by the sister of the plaintiff to attend on him at home - he was having a serious epileptic seizure - and who did not
respond to this request, was liable in negligence to the plaintiff for the damage suffered in consequence of this refusal. I should add that the plaintiff was not a patient of the doctor.

To say the least, this is an arresting decision. If such be a doctor's duty what answer is there to the question posed in Prosser's casebook on Torts (9th Ed, p405):

"Should an attorney be under a duty to take a case?"

I'll pass that by without comment.

Now to the second antithesis: the individual or the majority. There are many areas of the law driven, overtly or covertly, by considerations of a consequentialist character. For example, it remains the common law rule in this country, regrettably, that a highway authority is not liable for injury resulting from the non-repair of roads committed to its care. That rule - which has eighteenth century English origins - was founded on a concern for the burden which ratepayers and/or taxpayers would be forced to shoulder if highway authorities were to be held liable for non-repair of roads.

Likewise what is known as "the chill factor" in decision making is always an important consideration when the courts are called upon to intrude tort liability rules into the government's administration of statutory schemes designed to
promote public welfare in some respect. Recent examples of this are what have been called the "child abuse cases" brought against government officers and agencies in Australia and England for alleged inadequate investigation of particular allegations of abuse that have been brought to their attention: see e.g. *H v Black* (1995) ATR 81-340.

I mention these two examples to make the point that consequentialist considerations are of no little significance in the practical working out of this antithesis.

Now let me specifically illustrate the second antithesis itself. First, the triumph of the majority. I would venture to suggest that the 1995 decision of the High Court in *Northern Territory v Mengel* (1995) 129 ALR 1 is such a product of perceived utility.

Put shortly, the Northern Territory was held not liable for the loss suffered by pastoralists who were unable to move their stock for the purposes of sale because stock inspectors, acting in furtherance of a government-sponsored program to eradicate bovine brucellosis, caused in effect the quarantining of the pastoralists' stock, though in the circumstances they had, unknowingly, no lawful authority so to do. Significantly, but I would respectfully suggest quite contentiously, the Court held that "neither policy nor principle" supported the imposition of liability for the government's error of judgment. It is not unfair to comment
that the result in *Mengel* has not won uniform applause.

Finally, vindicating the individual. Here I use an easy example. I would merely quote observations of Justice McHugh in refusing in the Waanyi people case — *North Galanja Aboriginal Corporation v State of Queensland* (1996) 135 ALR 225 — to be importuned into deciding the question of the effect of pastoral leases on native title:

"To ignore the procedures of the Act and to determine the extinguishment issue before the Waanyi People had had an opportunity to utilise their rights under the Act would be both a breach of the Act and an injustice to the Waanyi People. To refuse to correct that breach because to do so would service the social or economic interest of other persons would be a step calculated to undermine the rule of law in our community. The community will quickly lose confidence in the courts of justice if a perception arises that the courts are ready to ignore the legal rights of individuals whenever intervening governments or litigants urge that public or private convenience requires such rights to be by-passed."

The two antithesis I have mentioned often interact. But the point that I wish to note is that the inexorable movement in the law over the last decade has been in favour of neighbourhood and of protecting the individual.
I should perhaps add of the neighbourhood idea by way of explanation that we are not, through it, having altruism enforced on us; we are not being turned generally into Good Samaritans. The law still remains resistant to imposing duties of rescue on people save possibly where they are in some special relationship with the person in peril. Our focus remains one of preventing harm not of ensuring help. It is this which makes the *Lowns v Woods* case so arresting.

What the law is asking of us increasingly is not that we positively assist others so much as that in our relationships and dealing with others - and I emphasise the limiting requirement of relationships and dealings - we are to have regard to the effects our decisions or actions have on the interests of those others. Those effects may require us to moderate our actions or, on occasion, even desist from them unless we first take precautionary steps for the other’s benefit. So if, for example, I am negotiating with you and I know you are labouring under a serious mistake which is significantly disadvantageous to you, I must alert you to your mistake if I am to ensure that my contract with you will be safe from attack by you. I remain silent at my peril even though I am not responsible for your mistake. Your mistake makes you vulnerable to me.

To put the matter this way reveals what, I suspect, is the major preoccupation of the law. To say that I am in a position of vulnerability vis-a-vis you is ordinarily to say
that you have the power or capacity adversely to affect my interests. To the extent that the law, with me in mind, regulates or contrives how you exercise your power or capacity, to that extent it protects my vulnerability.

Controlling the exercise of power is the crux of the matter. Relatedly the more the law enlarges the interests of mine that it deems worthy of protection, the more it enlarges my claims on its protection. I would note in passing that we have witnessed a significant expansion of recent times of the rights, interests and expectations that are so afforded recognition. I would simply indicate, for example, the rights to personal dignity and integrity, to the security of one's property and of one's reputation, and, most notably, the rights of our indigenous people. I will later illustrate this.

I won't here labour why in my view this protective function of the courts is an indispensable one. I would merely say that, however else we might wish to describe modern society, it is one in which we are becoming ever more vulnerable to others - a phenomenon which perhaps explains our levels of fear and distrust.

I mentioned that there has been an enlargement of the interests now deemed worthy of protection. This has occurred in the main - though by no means exclusively - in disputes between the citizen and the State.
Such today is the pervasiveness of State power that in the citizen-State relationship the vulnerability of the citizen exists often in a pronounced form. And it is in that relationship that the courts have played a growing - and from the standpoint of executive governments a not always welcome - role in protecting the individual. I would note, for example, the now heightened emphasis placed on those rules of statutory construction which require Parliament to speak with unmistakable clarity if it intends to authorise interference with fundamental rights, freedoms or immunities: see e.g. Coco v R (1994) 120 ALR 415. Beyond this, of course, we have the more extreme step of implying individual rights into the constitution. I refer particularly to the right to free political speech. While this particular right may well protect the vulnerability of our democratic system itself, whether it will always be found to be so protective of the individual is another matter. Again the common law requirement of natural justice or procedural fairness now, as a rule, applies generally to governmental executive decision-making": see e.g. Annetts v McCann (1990) 170 CLR 596. Perhaps the apogee of this development is to be found in the decision of the High Court in Minister for Immigration and Ethnic Affairs v Teoh (1995) 128 ALR where it was held in an immigration case that Australia's accession to the United Nations Convention on the Rights of the Child, while not subsequently incorporated by statute into domestic law, nonetheless gave rise to the legitimate expectation for procedural fairness purposes that administrative decision-
makers would act in conformity with the Convention. In turn the nadir of government's response to developments in this arena was, probably, the then Senator Evan's reaction to Tech. In seeking to deny that ratification of a convention could or should have the effect given it by the High Court he said:

"ratification is a statement to the international community to observe the treaty measures in question; it is not a statement to the national community - that is the job of the Legislature, not the Executive."

Sir Anthony Mason has recently and rightly described this statement as "breathtaking": see (1996) Public Law Review 20 at 23.

Separate again is our measured acceptance of the civilian engendered idea of proportionality: the efficacy of the means employed to give effect to powers can be tested, to put the matter crudely, by the extent of "collateral damage" done to values or interests that the common law regards as significant.

Distinctly we are seeing an accelerated erosion of the privileges enjoyed by the State which operate to advantage the State and disadvantage the citizen in their dealings and in litigation. There have been the occasional hiccups in this process. The level of protection given cabinet documents in Commonwealth v Northern Land Council (1992) 176 CLR 604 is, in
my respectful view, one such hiccup. I mention this case specifically because it does otherwise seem to me that one of the significant achievements of the High Court of recent times has been the steps it has taken to recognise and to combat the power and paternalism that thrives in an environment of untoward government secrecy. I would mention particularly in this Sir Anthony Mason's judgment in the Commonwealth of Australia v John Fairfax & Sons Ltd (1980) 147 CLR 39.

The impact that the fair trial principle recently has had in protecting accused persons in positions of disadvantage has been as marked as it has been contentious. The decisions in McKinney v R (1991) 171 CLR 468 - on the need to record uncorroborated confessional statements made while in police custody - and Dietrich v R (1992) 177 CLR 292 - on the need for legal representation for the trial of serious offences - are emblems of this. Such are the signposts. But I would not wish to create the impression that there is no caution or restraint being practised.

There has, for example, been a marked pause shown in controlling the actions of the state where the courts have been asked (a) to make what are in effect mandatory orders against government compelling it either to take or to adhere to a particular course of action: cf Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic (1990) 92 ALR 93; or (b) to make specific financial provision (whether in a negligence claim or otherwise) for an aggrieved
individual in novel situations. In these instances the types of consequentialist considerations to which I earlier referred - and others - can been seen in play: the chill factor, usurping executive discretion in resource allocation, burdening the taxpayer and so on. I would for example suggest that the decision of the High Court in *New South Wales v Canellis* (1994) 181 CLR 309 which refused to extend the principle of *Dietrich v R* to a particularly complex commission of inquiry is, perhaps, best explained on such consequentialist grounds. I have already referred to the grim fate of the pastoralists in *Mengel*.

The methodology in citizen-State cases is one which emphasises the protection of the rights of the individual from State affection - and this in large measure explains the expansion of rights and interests protected by the common law. However, the channels of protection often run differently when one turns to vulnerability in private, business and professional relations.

There are instances enough where the need to emphasise individual rights or interests makes any differentiation between the public and private sectors unnecessary. By way of illustration I would note the case of *R v L* (1991) 174 CLR 379 where the High Court disavowed in contemporary circumstances, any common law right in a husband to intercourse with his wife without her consent.
It is, though, much more common for the concern in private, professional and commercial dealings to be with the neighbourhood idea and this because, as a factual phenomenon, power and corresponding vulnerability are endemic features of our relationships and dealings with others. Likewise are the corresponding capacities to exploit, manipulate, influence and so on. I should say that the power I talk of here is primarily the power born on the one side of position, aptitude, or knowledge and on the other of trust, reliance or dependency. To give a stark example, in the 1992 Canadian case of Norberg v. Weinrib (1992) 92 DLR(4th) 449 a doctor exploited his capacity to provide drugs to a drug dependant woman patient, to exact sexual favours from her.

It was in this arena of practical power and vulnerability that the reappraisal of our law which commenced in 1983 had its first stirrings. I won’t again rehearse the many developments in doctrine, and particularly equitable doctrine, that have occurred in the intervening period. Here I need merely note that much in our case law is converging on the idea that we should be entitled to expect others to act fairly and in good faith towards us in our dealings with them. If I am in a position of special disadvantage in a contractual dealing, for example, you should not take advantage of me - whether my disadvantage results from my incapacity, my mistake, or my need to rely on you for information or from your representations, the economic or other pressure you apply, or whatever.
I should say that an old contractual formula, used here almost for social contract purposes, is employed increasingly to provide explanation for the conduct the vulnerable party can properly demand of the other. This is the formula of "reasonable expectations" - a formula which describes not only such actual expectations that one person entertains of another as are reasonable, but also such expectations that that person is reasonably entitled to entertain whether or not that person even in fact adverted to the matter. Secrecy obligations in private and professional relationships ordinarily are justified by the latter of these usages. It equally has for example been found of some use in resolving property disputes between parties in de facto relationships who have not actually considered and decided together their property entitlements inter se.

Now let me turn to the contentious dimensions of all of this. First, what the courts are involved in is, inevitably, with setting what are to be regarded as acceptable standards of conduct in relationships and dealings. It is the case that, though channelled by the particular dictates of individual legal doctrines - unconscionable dealing, negligence and so on - quite elementary and intuitive notions of fairness are at work. We should not shrink from acknowledging that. But it is the manner in which those notions are translated into standards of conduct for legal purposes which can be contentious. One refrain in contemporary case law has involved an appeal to "community
standards" or "community values". I have written elsewhere on this matter.

Suffice it to say here that invoking community standards or values to assist in justifying the standard or value set in a particular rule is, in my view, almost invariably a contrivance. It involves a judicial appeal to community support for the standard the law is imposing on the community. It does little to illuminate why the selected standard is the appropriate one. Indeed I would suggest standards of conduct are sometimes struck in the law because of the perception that the standard commonly adhered to in fact falls short of that considered appropriate for our community. One only has to look at the ethics industry more generally in government and commerce to see demonstrated our more general recognition of the need for standards which have aspirational qualities.

There are, I should add, those who consider that properly understood, "community standards" or "values" as opposed to mere "community attitudes" can and should play an informing role in the law. My former ANU colleague Professor John Braithwaite is a champion of this view. I suspect we each are somewhat sceptical of the other's views, but I would commend John's exposition to you: it is entitled "Community Values and Australian Jurisprudence" and it was published last year in volume 17 of the Sydney Law Review.

Secondly, it has I think been openly recognised that the
manner in which the vulnerable are protected may itself have some tendency to exaggerate the disadvantage in those the law is seeking to protect - and this for the reason some service providers may choose to withhold their services from the specially vulnerable rather than have their dealings and contracts with them put at risk in courts and tribunals. How far such a possibility should induce pause in developing protective principles is a matter on which opinions differ - the more so because it involves taking account of the unverifiable.

Less openly recognised, though, is that the manner in which the vulnerable are protected may itself create new vulnerabilities in others. This, for example, has been a charge levelled at the decision of the High Court in WPC Ltd v Gambotto (1995) 127 ALR 417. The Court there refused to sanction the alteration of a company's articles made by the holders of 99.7% of the issued capital, so as to allow the majority shareholders to compulsory acquire the remaining minority shareholders' interest at a price acknowledged to be fair. The challenge to the alteration was made by the holders of .01% of the shares. In the view of the majority of the court expropriation could not be justified where its purpose was merely to advance the commercial interests of the company and no better interest was advanced in this instance.

Whatever the merits of this decision the view has quickly gained currency that it could well arm small minority
shareholders with the power to commit "green mail" on a majority wishing to obtain full ownership of a company. Thus it is notable that the Legal Committee of the Companies and Securities Advisory Committee in its Compulsory Acquisitions Report (1996) has made recommendations designed to contain the infectious effects of Gambotto.

A different example involves, not a role reversal but rather a shifting of vulnerability. Guarantees given by family members for the debts of a spouse or child have proved somewhat vulnerable to challenge on grounds that their taking by a bank involved, in the circumstances, a taking advantage of a person in a position of special disadvantage. Family circumstances are often the cause of that disadvantage.

What we are now witnessing is lending institutions protecting their own position by, in effect, shifting the risk in the matter to third party solicitors. This is being achieved by making the grant of a loan or the taking of a guarantee conditional upon the furnishing of a certificate by a solicitor who has provided independent advice to the borrower or guarantor in the transaction. This practice, which will be familiar to some of you, is one of present concern to Law Societies and to the Law Council: see generally M. Sneddon, "Lenders and Independent Solicitors' Certificates for Guarantors and Borrowers" (1996) 24 Aust Bus Law Rev 5.
A third cause of contention comes from a different quarter. It can be simply illustrated through what the Australian Law Reform Commission had dubbed "sexually transmitted debt": see ALRC Report No 69, Part II Ch 13. This is the phenomenon of women who, to act as a guarantor for their spouse, partner or child, mortgage their share in the family home as security for their guarantee. The debt is said to be sexually transmitted in the event of the guarantee being called up because characteristically it is the personal relationship not an appreciation of the implications of the responsibility assumed, which is the predominant factor in the woman accepting liability as a guarantor.

Despite the range of legal doctrines available potentially to protect women from being taken advantage of, it is the view of the ALRC that we have here in practice an example of gender bias in the law in that "the relevant doctrines of law and the way in which they have been applied do not adequately respond to the injustices faced by women": ibid, 13.53; see also P Baron, "The Free Exercise of Her Will", (1995) 13 Law in Context 23.

This is not the occasion to enter on the contentious subject of gender bias in the law. I mention the example for the purpose merely of noting that the vulnerability that is there in a given instance may not necessarily be what is seen or looked for.
Having said this I do not wish to underestimate the difficulty of the judge who attempts conscientiously to address what he or she believes is a gendered issue. Let me give you a recent example involving the grant of custody of children. Amongst the factors the male trial judge took into account in denying the husband custody was his "lack of 'instinctive insight' into the needs of the children if they were separated" from their mother. On appeal to the Full Court of the Family Court, a male colleague in a dissenting judgment had this to say of the reference to "instinctive insight":

"This, in my view, is gender stereotypical thinking, suggestive of a concept that a father, as distinct from a mother, is likely to display a lack of instinctive empathy for the welfare of young children. It cannot, in my view, be treated simply as a comment attributable to this father or this case. The use of the word "instinctive" suggests the importation of a foreign and gender stereotypical notion related to all fathers." R v B (1996) FLC 92-658 at pp 82, 782-3.

I refrain from further comment on this.

Finally, and this brings me back to the Goodin thesis, there is the question for the lawyer, though not for the moral philosopher, as to where lies the point at which it can be said that if a person is in fact vulnerable in a given matter
that person should nonetheless bear the responsibility for
that state of affairs; that person should not be entitled to
complain if, perchance, advantage is taken of him or her.

Here, if I can so put it, Cain and Christ come into
conflict. That conflict is not one with which the courts, in
my view, have coped well beyond saying that if a person has
the practical capacity to protect his or her own interests and
fails to do so they cannot — well, sometimes cannot — complain
if the untoward occurs: cf Austotel Pty Ltd v Franklins Self
Serve Pty Ltd (1989) 16 NSWLR 582. Perhaps at the moment it
is too early in this phase of development of the law for the
courts to be providing strong indications of the limits to
their protective intentions. Or is it really the case that,
in answering the question of where in the law one person’s
neighbourhood responsibility ends and the other’s personal
responsibility begins, one can only say as Herman Melville did
in his novel, Mardi: "The question is more final than the
answer."

I have, rather cursorily I suppose, been attempting to
convey to you something of the temper of the courts today; of
the well-springs of their actions; and of the doubts and
dilemmas that must confront them. I equally, though perhaps
with less emphasis, have wished to create an appreciation that
while the law and morality are not synonymous, the law
nonetheless can evidence strong moral purposes. And so it
should. Its subject is human relations and social
organisation.

I hesitate finally to say there are discernible methods and techniques being employed by the courts. But I would suggest that legal doctrine is being deployed to produce either of two effects. The first is to reduce inequality where this can be done - hence the imposition of duties to disclose, to correct mistakes, and so on.

The second is to ensure regard for the rights and interests of the weaker party where the inequality cannot be reduced appropriately. *Dietrich* and its stay of trial unless legal representation is had is the symbol of this.

Before I finish I should mention there is another, quite distinctive, arena suggested by *Dietrich* in which vulnerability is so often revealed. This is in the courtroom itself. I suppose I bring an unusual perspective to this matter. I was not an habitue of courts before I became a judge. And I suspect I am not yet so inured to the courtroom as to be unable readily to appreciate the fears, the frustrations and, on occasion, the needless humiliation that parties and witnesses can experience in the trial process.

I was tempted to speak of such matters as also of that growing phenomenon with which we must deal and with no little sensitivity. I refer to the litigant in person.
But then I reminded myself that I have always taken the view that when one changes one's position, there should be a year's silence.

So vulnerability in the courtroom? Well, that story is for another day.