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Book review: *Remedies for Breach of Privacy*

Jason N.E. Varuhas and N.A. Moreham (eds.)
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The law of privacy has developed rapidly over the course of the last two decades as a result not only of technological developments, but also rapid social change. Simultaneously the courts have been asked with increasing frequency to determine the applicable civil remedies, raising profound issues of classification which implicate principles of private law, fundamental rights, and the rule of law.

The examples in this edited volume which are based on papers presented at the International Workshop on Remedies for Breach of Privacy held in Melbourne in December 2016 examine the remedial jurisprudence which has proliferated in response to these privacy actions in common law and equity in England and Wales, the United States, Australia and New Zealand.

The comparative element of the collection remains fragmented between the respective contributions making the collection more suited to a reader with an existing grounding in the law of the jurisdictions examined. Nevertheless, the collection provides a diverse range of views on the judicial classification, and remedial implications, of privacy actions which will prove useful to those wishing to refresh, or expand, their familiarity with remedial developments in privacy within the common law world.

A text examining remedial jurisprudence in privacy actions is overdue, and the area has been characterised by a paucity of substantive engagement with privacy remedies – a state of affairs the editors attribute to the novelty of such claims and the location of privacy at the intersection of public and private law. Indeed, it is notable that even this volume largely dispenses with public law considerations – an understandably necessary limitation given the single volume.

In the first substantive chapter, Sir Michael Tugendhat, a leading figure in the judicial development of the law of privacy in England and Wales, offers an analysis of the law and practice of privacy injunctions in that jurisdiction.

Tugendhat LJ focuses in particular on pre-publication injunctions through the lens of the decision in *PJS v News Group Newspapers Ltd*[1] and charts the emergence of super injunctions as well as the attendant misconceptions which have accompanied their development.

The chapter goes on to emphasises the Rule of Law as the fundamental consideration in granting injunctive relief, specifically focusing on the constitutional context in the UK, though the argument in this portion is dealt with summarily and bears further examination.

David Partlett's contribution which considers prior restraint in the United States sketches a landscape in stark contrast to that in England and Wales. The US has traditionally disfavoured prior restraints as a result of the primacy afforded to First Amendment jurisprudence. Examining Prosser's quadripartite division of privacy torts,[2] subsequently adopted by the *Restatement (Second) of Torts*, Partlett provides a succinct overview of the current US remedial approaches noting that the vitality of US privacy law, despite its apparent robustness, is fragile - qualified by tentative judicial approaches to remedies, highly specific protections and the dominance of free speech. It remains to be seen whether current calls for a federal US Privacy Act will strengthen or further compromise this landscape.

Examining the Canadian position, Jeff Berryman's chapter examines the challenges posed by cases in which plaintiffs seek injunctions removing information from the Internet including the extra-territorial potentials of court orders. Berryman traces Ontario's 2012 development of a tort of intrusion upon seclusion in *Jones v Tsige*[3] and the subsequent reception of privacy actions in

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1 [2016] UKSC 26.

2 See William L. Prosser, "Privacy" (1960) 48 *California Law Review* 383.

3 [2012] ONCA 32.

Canada's other provinces and territories through the lens of the continuing struggles on the part of the judiciary to assess the suitability of injunctive relief.

1 Damages

In their respective chapters both Varuhas and Moreham support the availability of compensatory awards absent factual loss. Varuhas argues compensatory damages are best conceptualised as normative damages as they do not respond to a factual loss but rather compensate a loss to give effect to the protective or vindicatory policies that underpin the creation of fundamental rights – including privacy.

Normative damages have long been available in the context of other basic rights including per se torts and Varuhas argues by analogy, and in light of the decision in *Gulati v MGN Ltd*[4] that such damages should also be available for breach of privacy.

In a chapter whose arguments are consistent with those of Varuhas, Moreham explores the conceptual nature of damages for loss of privacy and argues that the availability of compensatory damages is consistent with existing understandings of the nature of privacy in English law. Moreham argues compensatory damages should be understood as remedying the loss of dignity and autonomy interests inherent in all breaches of privacy, the protection of which acts as the justification for the right itself.

In contrast, Robert Stevens and Eric Descheemaeker in their contributions oppose the availability of compensatory awards for breach of privacy. Stevens, in a separate publication,[5] has argued that damages awarded in the absence of

4 [2015] EWHC 1482 (Ch).

5 Robert Stevens, *Torts and Rights* (Oxford University Press, 2007).

loss in tort are distinct from compensatory damages and are best explained as substitutive - a second-best for performance of the primary obligation. Drawing on this work, Stevens reflects sceptically on the incremental development of privacy actions in English law and critiques the courts' current articulation and approach to damages, though he does not definitively articulate whether privacy actions ought to endure as equitable or common law claims.

Descheemaeker is also critical of recent developments viewing it as incoherent within the emerging law of privacy to permit recovery of compensatory damages for both the violation of the right itself and the intangible consequential harms that follow the violation. Descheemaeker argues, as does Stevens, that these are alternative rather than cumulative bases for damages - a differentiation English courts have thus far failed to clarify.

Richardson, Neave and Rivette in their contribution adopt a more claimant friendly argument, contending that mental harm is, and ought to be, a recoverable head of loss in privacy actions (whether in equity or common law) in light of the close nexus between loss of privacy and the mental harm that a person may suffer as a result.

McDonald and Rolph in their contribution are ultimately sympathetic to this argument but focus specifically in their chapter on the remedial consequences of classifying wrongful misuse of private information as a tortious rather than equitable action. They argue that issues resulting from classification have been inadequately addressed, though the authors content themselves with drawing largely on issues which have been identified by the courts in previous decisions in their assessment.

PG Turner in his contribution contends equity is ill-equipped to protect against the personal harms, including mental distress, involved in infringements of privacy and views it as more rational and more coherent to house protection of privacy within the law of torts as, unlike other obligations for which equity

furnishes compensation, the interests at the heart of an entitlement to privacy are fully serviceable at common law. Thus, while equity could intervene in appropriate cases to grant relief in aid of a party's common law rights, through an injunction for example, damages at common law adequately remedy the wrongs litigated.

Katy Barnett's chapter considers the contentious question of what role gain-based remedies do and should play in English and Australian privacy actions. Barnett argues it is preferable for privacy to be protected as a standalone tort but that this should not bar gain-based relief, specifically an account of profits, despite the equitable origins of such remedies arguing that coherence and a concern for deterring profit driven breaches support the availability of a disgorgement remedy.

Rodger Haines in his chapter examines remedies under the 1993 New Zealand Privacy Act which has endured without review at a senior court level since its passage. The Act permits recovery of damages for pecuniary loss, loss of benefit, humiliation, loss of dignity and injury to feelings and, as Haines notes, it is not self-evident there is presently a need for a review of the Act. Indeed, Haines cautions that a new, over-prescriptive interpretation of the Act or an over-enthusiastic formulation of guidelines for awards could frustrate the intended flexibility of such statutory provisions.

Normann Witzleb, in the final contribution which considers damages, considers the remedies provided by law in Australia in the absence of a recognised right to privacy in that jurisdiction. In the absence of a general cause of action for the invasion of privacy Witzleb notes the complaints process under the Privacy Act remains an important avenue for the protection of informational privacy through conciliation as well as through determinations under section 52 of the Act.

The author examines the approach to remedies under s. 52 which he notes has been shaped by a small number of cases as well as the expansive jurisprudence of federal anti-discrimination laws in alignment with which the Commissioner has calculated quantum in privacy cases. In line with such awards, damages in Australia remain conservative, ranging between $1,500 - $20,000. The author notes that while this is not objectionable, many complainants remain unable to establish to the satisfaction of the Commissioner that a reduction in income or profit following an interference with privacy has occurred. In conclusion Witzleb calls for an approach which appreciates the difficulty of establishing such losses and their causal link to the privacy interference.

2 Apologies and Corrections

The consideration of apologies and corrections is largely limited to Robyn Carroll's contribution to the volume, which focuses on two of the proposals contained in the Australian Law Reform Commission's '*Serious Invasions of Privacy in the Digital Era Final Report*.' The first proposal is for the creation of a method by which courts might take account of apologies and corrections as factors in the assessment of damages, an uncontroversial proposal, consistent with the mechanisms available in comparable torts such as defamation.

The second proposal suggests courts be conferred with the power to order a defendant to apologise or order the publication of a correction where false private information has been published. Carroll draws support from the fact that apologies and corrections have a well-recognised role in the settlement of defamation claims and assessments of damages at common law.

3 Cross-Border Aspects of Privacy Disputes

Although touched on by other contributors, the chapter by Richard Garnett is the sole contribution to focus specifically and exclusively on the procedural and cross border implications of privacy actions. Interestingly, Garnett notes that there is no evidence as yet of a phenomenon comparable to libel tourism, though there exists potential for such a development noting, for example, that while the status of privacy as a tort in domestic law is most uncertain in Australia, this is also the jurisdiction whose jurisdictional rules are the most expansive in allowing privacy suits to be adjudicated.

Garnett provides a useful summary of the choice of law rules as well as the recognition and enforcement of foreign judgments rules applicable to privacy actions. The choice of law rules for all four jurisdictions are similar with a general trend in favour of the law of the place of the wrong- the place of seclusion in an intrusion case and of publication in a misuse of private information action. This leads Garnett to conclude that while rules governing the recognition and enforcement of foreign judgments may restrict the availability of non-money judgments, they ultimately permit a broad recognition of privacy judgments across borders.

4 Conclusion

Privacy is the site of a significant amount of common law development, an area which demonstrates both the adaptive capacity as well as the bottom-up nature of the development of the common law as the contributions to this volume illustrate. The collection provides a useful and relatively comprehensive overview of remedial approaches in common law jurisdictions as well as their respective strengths and shortcomings.