REMEDIES FOR NOVEL TORTS: INVASION OF PRIVACY

*PENELOPE WATSON**

I. INTRODUCTION

Novel developments in tort law pose interesting challenges for the law of remedies. Common law, and other countries around the globe, are demonstrating strong interest in protecting rights,[1] the invasion of which often results in intangible, non-physical, non-economic loss or injury. Privacy is one such right. Invasion of privacy has developed recently, or is developing, as a tort in a number of jurisdictions, by a variety of means. In the United Kingdom, this has occurred through the transformation of the equitable action for breach of confidence, whereas New Zealand courts have recognised a stand-alone tort of invasion of privacy. Australia seems almost certain to introduce such a tort by statute rather than developing the common law. Four Canadian provinces also have statutory privacy torts, whilst some rely on the common law. In the United States of America, where privacy is guaranteed constitutionally, common law development of privacy can be traced back to the turn of the 20th century. The US now recognises four distinct privacy torts, incorporated into the *Restatement of the Law, Second, Torts*[2].

This paper considers the implications for the law of remedies of these novel developments in tort, starting with a discussion of the existing law on damages for non-economic loss. The new torts raise interesting broad questions about the elasticity and flexibility of the common law of remedies. Jurisdictions protecting privacy by statutory means are of course free to craft new remedies and/or adapt old ones as desired, free of constraint, and may be instrumental in driving common law change.

The standard chicken-and-egg question that we ask our students — whether *ubi ius ibi remedium* correctly expresses the relationship between rights[3] and remedies, or whether it should be *ubi remedium ibi ius*[4] instead — is more than just semantics. The traditional 'monist' view that sees rights and remedies as 'congruent', so that in the absence of a recognised remedy there can be no right, reflects the latter version of the maxim. In contrast, a 'dualist' view 'asserts that there is a valid distinction, in theory and practice, between an independent antecedent right and the remedy a court may order for a breach of that right.'[5]

Brown v Board of Education[6] could be considered the 'paradigm' case of a sharply dualist perspective.[7] There the US Supreme Court held that racial segregation was

* Associate Dean (Learning and Teaching), School of Law, Macquarie University, Sydney. Email: penelope.watson@mq.edu.au.

1 See, eg, *Universal Declaration of Human Rights*, GA Res 217(III), UN GAOR, 3rd sess, Supp No 13, UN Doc A/10 (1948); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 June 1952); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Human Rights Act 1998* (UK); *New Zealand Bill of Rights Act 1990* (NZ); *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11.

2 *Restatement of the Law, Second, Torts*, American Law Institute (1977).

3 In Australia, it may be more correct to enquire about the relationship between interests and remedies, since there is no formal recognition of rights, except where 'right' is used in the Austinian sense of a procedural or secondary right to a remedy for invasion of a primary right (read protected interest). See John Austin, 'Lecture XLV', in Robert Campbell (ed), *Lectures on Jurisprudence* (5th ed, 1885). See also *Photo Productions Ltd v Securicor Transport Ltd* [1980] AC 827, 828-9 (Lord Diplock) in the context of contract law. See, eg, '[One reason against recognising privacy] is the tension that exists between interests in privacy and interests in free speech. I say 'interests' because talk of 'rights' may be question-begging, especially in a legal system which has no counterpart to the First Amendment … or to the *Human Rights Act 1998* of the United Kingdom': *Australian Broadcast Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 226 (Gleeson CJ) ('*Lenah*').

4 For discussion and criticism of the maxim, see Michael J Tilbury, *Civil Remedies, Volume 1* (1990) 2-3.

5 Grant Hammond, 'The Place of Damages in the Scheme of Remedies' in Paul Finn (ed), *Essays on Damages* (1987) 192. See also Grant Hammond, 'Rethinking Remedies: The Changing Conception of the Relationship between Legal and Equitable Remedies' in Jeffery Berryman (ed), *Remedies: Issues and Perspectives* (1991).

6 (1954) 347 US 483: substantive decision. See also *Brown v Board of Education* (1955) 349 US 294: remedy.

constitutionally impermissible, but because of the severe social dislocation that would inevitably result from immediate desegregation, ordered desegregation (in *Brown No 2*) 'with all deliberate speed'. Grant Hammond comments that 'court undertaking the remedial task, on this view, is "fashioning" a remedy.' This has implications for judicial discretion and law-making in novel contexts because it suggests that theoretically new 'rights', such as a right to privacy, could be recognised at common law even in the absence of a suitable remedy. This would then provide the impetus for crafting, adapting or 'fashioning' suitable remedies. According to Michael Tilbury et al,[8] a dualist view means that once liability has been determined, 'the court grants a remedy after a context-specific evaluation of what is most appropriate in the circumstances … the court could, theoretically, order the defendant to undergo an educational training programme'. This recognises a broad and flexible scope for courts in making the remedy fit the right, rather than allowing the absence or unsuitability of a traditional remedy to deny a right which is compelling on normative grounds.

As in other areas of injury, compensation for invasion of interests in personality or dignity is likely to be the principal remedial goal, and the existing law on damages for non-economic loss is a useful starting point for considering how privacy invasions might be remedied. Damages for non-economic loss are well entrenched in the common law, in torts such as defamation, assault and false imprisonment, and in the form of general damages for personal injury. At the heart of compensation for non-economic loss lies the conundrum of incommensurability, reflected in the remedial goal of 'fair' rather than 'full' compensation. This problem has led many commentators to argue for a reduced or nil role for non-economic loss in damages awards, especially for personal injury. This paper argues that, in view of the upswing in interest in protecting rights and dignitary interests, the law of remedies needs to move in exactly the opposite direction, refining its approach to redressing non-economic loss as well as availing itself of the 'rich smorgasbord' of remedies potentially open to it. Flexibility and openness in regard to remedy is both essential and possible.

II. DAMAGES FOR NON-ECONOMIC LOSS

A. Personal Injury

The fundamental objective of compensation is restitutio in integrum.[9] At least since the late 19th century, English law has recognised the need to give plaintiffs 'fair compensation for the pain, inconvenience and loss of enjoyment' associated with bodily injury.[10] Various other torts, notably defamation, assault and false imprisonment, are specifically aimed at redressing non-physical invasion. Implicit in all such awards is compensation for injury to feelings and emotions, and intangibles such as dignity and health.

Notwithstanding that non-economic losses are 'incommensurable with money'[11] or 'not susceptible of *measurement* in money' (emphasis in original),[12] it is clear that damages for non-economic loss are well entrenched in Western legal systems, albeit now widely subject to legislative caps and thresholds[13] and other limiting devices. As noted by Harold Luntz, 'with non-pecuniary loss, since *restitutio in integrum* is impossible, no award of damages

7 Hammond, 'The Place of Damages in the Scheme of Remedies', above n 5, 200.
8 Michael Tilbury, Michael Noone and Bruce Kercher, *Remedies, Commentary and Materials* (4th ed, 2004) 12-13.
9 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn).
10 *Phillips v London & South Western Railway Co* (1879) 5 QBD 78, 80 (Field J) (Court of Appeal). See generally, Harold Luntz, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002), 211.
11 *Thatcher v Charles* (1961) 104 CLR 57, 72 (Windeyer J), cited in Luntz, above n 10, 212.
12 *Wright v British Railways Board* [1983] 2 AC 773, 777 (Lord Diplock). See also Luntz, above n 10, 212.
13 See, eg, *Civil Liability Act 2002* (NSW) s 16; *Defamation Act 2005* (NSW) s 35. The general intent of such legislation is to narrow the scope of liability and reduce quantum of damages, based upon views about personal responsibility. It may turn out to be the case that privacy damages awards would require comparability with negligence and personal injury awards, in line with the requirement in defamation since *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44.

can ever be "perfect"; yet "fairness" to the defendant does not require an amount that is less than "full" or "adequate"'.[14]

B. Defamation

Defamation, a long-established tort with a well-developed jurisprudence of remedies for dignitary injury, has significant areas of overlap with privacy, and some common ground with other dignitary torts. Defamation damages are 'at large', meaning that a global figure is awarded, rather than the approach used in personal injury of compartmentalising loss into separate defined categories. Plaintiffs are not required to prove damage, which is presumed. The purposes of an award of damages are: a) consolation for the personal distress and hurt to the plaintiff; b) reparation for harm done to the plaintiff's personal or professional reputation; and c) vindication of the plaintiff's reputation.[15] Consolation and reparation include factors such as hurt, anxiety, loss of self-esteem, sense of indignity and outrage.[16] Vindication refers to restoring the plaintiff's standing in the community. In *Uren v John Fairfax & Sons Pty Ltd*,[17] Windeyer J acknowledged that vindication, solatium and consolation are not strictly compensatory, and contain an element of punitive damages. That such damages go beyond restitutio in integrum is plain, since factors such as the defendant's malice, provocation on the part of the plaintiff, the plaintiff's prior reputation, and existence of an apology can all be taken into account. Like general damages for other forms of non-economic loss, 'what is awarded is thus a figure that cannot be arrived at by any purely objective computation'[18] and is 'essentially a matter of impression'.[19]

Defamation has recently become the subject of uniform legislation in Australia[20], which operates in conjunction with the common law. In addition to damages, the uniform legislation provides for resolution of civil disputes without litigation, by way of offers of amends and apologies.[21] Injuries such as hurt, anxiety, loss of self-esteem, sense of indignity and outrage, included in the notion of consolation and reparation for defamation, frequently apply in relation to privacy and other dignitary invasions, making defamation a useful comparison in the search for appropriate remedies.

C. Intentional Torts

Intentional torts are actionable per se, meaning that they protect dignitary interests such as liberty, personal autonomy and emotional wellbeing independently of any requirement to prove harm. Assault addresses apprehension of imminent contact rather than contact itself, going to emotional wellbeing, and battery involving minor contact falling well short of physical harm protects the individual's right to autonomy. Cases like *Collins v Wilcock*[22] and *Plenty v Dillon*[23] also serve to define the boundaries of appropriate conduct between state and citizen, acting as a watchdog on civil liberties. The remoteness limitation on damages in torts such as negligence and nuisance may not apply to intentional torts. Certainly this is so for deceit and cases involving fraud.[24] Tilbury[25] argues that similar reasoning based on motive and intent will justify the exclusion of the remoteness limitation

14 Luntz, above n 10, 7, citing *Victorian Railways Commissioners v Hale* [1953] VLR 477, 494-6 (Federal Court); *Proctor v Shum* [1962] SR (NSW) 511, 516 (Federal Court).
15 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 60-1 (Mason CJ, Deane, Dawson and Gaudron JJ) ('*Carson*').
16 Ibid 71 (Brennan J). See also *Random House P/L v Abbott* (1999) 94 FCR 296, 318-320 (Miles J).
17 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.
18 *Rookes v Barnard* (1964) AC 1129.
19 *Broome v Cassell & Co Ltd* [1972] AC 1027.
20 See, eg, *Defamation Act 2005* (NSW).
21 *Defamation Act 2005* (NSW) pt 3 div 1, div 2.
22 [1984] 1 WLR 172: police officer liable in battery for holding suspected prostitute by the arm.
23 (1991) 171 CLR 635: process server attempting to serve summons liable in trespass to land where consent expressly denied.
24 *Doyle v Olby (Ironmongers) Ltd* [1989] 2 QB 158; *South Australia v Johnson* (1982) 42 ALR 161, 169-170; *Gould v Vaggelas* (1985) 157 CLR 215, 266 (Dawson J).
25 Tilbury, above n 4, 87.

in many cases of intentional tortious conduct, including battery.[26] The damages in an action for false imprisonment are generally awarded not for a pecuniary loss, but for a loss of dignity, and for mental suffering, disgrace and humiliation.[27]

III. PROTECTING PRIVACY: JUDICIAL OR STATUTORY DEVELOPMENT OF A NEW TORT?

A. Judicial Development: Adapt Existing Concepts or Recognise a New Tort?

Privacy,[28] and how and whether to protect it, has attracted a great deal of attention in recent years in the common law world. The 'lack of precision of the concept of privacy'[29] means that it encompasses a wide variety of interests, although there is clear support in Australia for the view that 'the foundation of much of what is protected … is human dignity.'[30] Concerns exist about the interface between citizen and state, the drawing of appropriate boundaries between public and private in a mass media society, national security and democratic rights, human rights, and sometimes also about commercial exploitation of attributes, likenesses or spectacles associated with celebrities and public figures. Autonomy, or the right to be self-determining, is a strongly protected value in the common law. Intrusions on privacy impact on autonomy, particularly the 'Big Brother' style of intrusion, whether it be in the form of surveillance in the workplace, drug-testing of athletes, open access to personal data, destruction of civil liberties in the name of anti-terrorist legislation, or governmental initiatives such as the Australia Card or proposed Access Card. Technological progress, computerisation, the internet and mass media threaten privacy on all fronts.

Privacy is at the heart of many actions brought under other torts, especially by public figures.[31] Tort protection of personal privacy has been recognised in recent decisions at the highest levels in the United Kingdom[32] and New Zealand[33]. The Australian High Court has taken some tentative steps in that direction in *Lenah*.[34]. In its recent report, *For Your Information: Australian Privacy Law and Practice*[35], the Australian Law Reform Commission (ALRC) recommended the creation of a statutory right to sue (as opposed to a tort) for serious invasions of privacy. Approaches vary, but adaptation of the equitable notion of breach of confidence as a privacy tort has gathered most support at common law.

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26 *Betel v Yim* (1978) 88 DLR (3rd) 543, as explained in *Mayfair Ltd v Pears* [1987] 1 NZLR 459, 464.

27 *Myer Stores Ltd v Soo* [1991] 2 VR 597, 603 (Murphy J).

28 Parts of this section were originally published as Penelope Watson, '"A Man Without Privacy is a Man Without Dignity": It's Time for a Tort of Invasion of Privacy' (2007) 78 *Precedent* 4.

29 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [40] (Gleeson CJ).

30 Ibid [42].

31 See, eg, *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443; *Chappell v TCN Channel 9 Pty Ltd* (1988) 14 NSWLR 153 (defamation); *Bernstein v Skyviews & General Ltd* [1978] QB 479 (trespass to land); *Kaye v Robertson* (1991) 19 IPR 147 (libel, malicious falsehood, trespass to person, passing off). Defamation, trespass to land and person, breach of confidence, breach of trust, nuisance, passing off, conspiracy, malicious or injurious falsehood, and *Wilkinson v Downton* [1897] 2 QB 57 all offer tangential protection for privacy. The author is not aware of any privacy action brought as negligence, but any such attempt might be expected to fall foul of the views expressed in *Sattin v Nationwide News Pty Ltd* (1996) 39 NSWLR 32 (damages for injury to reputation not available in an action for negligence). See discussion in Barbara Ann Hocking, *Liability for Negligent Words* (1999) 11.

32 *Attorney-General (UK) v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109; *Hellewell v Chief Constable* [1995] 1 WLR 804, 807 (Laws J); *Douglas v Hello!* [2001] QB 967; *Wainwright v Home Office* [2004] 2 AC 406 ('*Wainwright*'); *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457 ('*Campbell*'); *Murray v Big Pictures* [2008] EWCA Civ 446. See also *Human Rights Act* 1998 (UK).

33 *Bradley v Wingnut Films* [1993] 1 NZLR 415; *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *Hosking v Runting* [2005] 1 NZLR 1. See also *Brown v The Attorney-General of New Zealand* [2006] DCR 630.

34 Above n 3. Injunction sought to restrain televising of unauthorised film obtained by trespassers of possums being slaughtered in meat works. There was no recognition of a privacy tort but acknowledgment that *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 need no longer be interpreted as precluding recognition.

35 Australian Law Reform Commission (ALRC), *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008).

Attempts to reinvigorate *Wilkinson v Downton*[36] to the same end have met with some success, although not in the United Kingdom. It is argued that the alternative of creating a new tort of invasion of privacy, as New Zealand has, is to be preferred, either through normal common law processes of judicial crafting or the creation of a statutory tort. Given the very long lead time between recommendations of the ALRC on uniform defamation laws[37] and actual implementation, it may be prudent for Australia not to write off common law avenues just yet.[38]

Despite the lack of recognition of a privacy tort by the Australian High Court, there have been two interesting lower court decisions in support: *Grosse v Purvis* ('*Grosse*')[39] and *Jane Doe v Australian Broadcasting Corporation* ('*Jane Doe*').[40] *Grosse* built substantially upon *Lenah*[41], taking the 'bold step' of recognising a tort of invasion of privacy for what amounted to stalking by a former lover and colleague. The plaintiff, a well-known local government figure, sued for invasion of privacy, harassment, intentional infliction of physical harm, nuisance, trespass, assault, battery and negligence. She sought compensatory, aggravated and exemplary damages, as well as a permanent injunction. Skoien J noted that 'within the individual judgments [in *Lenah*] certain critical propositions can be identified … to found the existence of a common-law cause of action for invasion of privacy,' and concluded, 'it is a bold step to take … 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 … In my view there is such an actionable right.' [42] This parallels the United States 'intrusion upon seclusion' privacy tort.

The essential elements of any such tort, according to Skoien J, would include a 'willed act by the defendant' and 'such a degree of seriousness that the ordinary person should not reasonably be expected to endure it'.[43] Further, a defence of public interest should be available, although it was not open on these facts. Skoien J agreed with Jeffries J in *Tucker v News Media Ownership Ltd ('Tucker')*[44] that the 'right to privacy … seems a natural progression of the tort of intentional infliction of emotional distressand in accordance with the renowned ability of the common law to provide a remedy for a wrong'.[45] The plaintiff was awarded compensatory, aggravated and exemplary damages for breach of privacy totalling $178,000. The compensatory component, most of which was for non-economic loss, was $108,000, consisting of $50,000 for post-traumatic stress disorder (PTSD), $20,000 for 'unpleasant emotions such as upset, worry, anger, embarrassment and annoyance ("non-PTSD wounded feelings")'[46] and, interestingly, $25,000 for vindication. This last is clearly drawn from defamation principles, being very unusual outside that context, and reflects the close affinity between privacy and defamation. Some allowance was made for modest economic loss and, lastly, $50,000 was awarded as aggravated damages for 'the hurt to feelings, humiliation, and dignity' because of the nature of the defendant's conduct, and $20,000 for exemplary damages. Exemplary but not aggravated damages have fallen out of favour for defamation in many jurisdictions, and have been

36 [1897] 2 QB 57 (Wright J): plaintiff told, as a practical joke, that her husband was injured, leading to expense and physical and emotional injury. Expenses were recovered under tort of deceit; illness also compensated as the defendant had 'wilfully done an act calculated to cause physical harm to the plaintiff … and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act'.

37 First recommended in ALRC, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979). Uniform legislation took effect 1 January 2006.

38 See, eg, comments by Special Minister John Faulkner about ALRC, above n 35, that a right to sue was 'not a priority': Jonathan Pearlman, 'No Such Thing as Privacy: Top Judge', *Sydney Morning Herald* (Sydney). 21 August 2008, News 4.

39 [2003] QDC 151 ('*Grosse*'). Settled on appeal.

40 [2007] VCC 281 ('*Jane Doe*').

41 Above n 3.

42 *Grosse* [2003] QDC 151, [422] (Skoien J).

43 Ibid [444].

44 [1986] 2 NZLR 716 ('*Tucker*').

45 First recognised in *Wilkinson v Downton* [1897] 2 QB 57. See comments above n 35.

46 *Grosse* [2003] QDC 151, [475] (Skoien J).

precluded in Australia under uniform defamation legislation since 2006.[47] Similar provisions exist under civil liability legislation.

Jane Doe,[48] decided in the County Court of Victoria, took the privacy debate in Australia a step further. This case, representing another 'bold step', might be seen in conjunction with *Grosse* as an unusual example of lower courts signalling their dissatisfaction with the High Court's cautious pace on privacy. *Jane Doe* concerned a rape victim who sued the Australian Broadcasting Commission, a reporter, and a subeditor, for naming and/or identifying her in three separate broadcasts in 2002. The publication seriously worsened the plaintiff's emotional condition dating from the rapes, and she developed PTSD. The journalist and subeditor subsequently pleaded guilty under the *Judicial Proceedings Reports Act 1958* (Vic), and both signed a written apology to the victim.

The plaintiff sought damages, including aggravated and exemplary damages, for breach of statutory duty,[49] negligence and breach of privacy, and equitable compensation including exemplary damages for breach of confidence. Hampel J upheld the claim on all four grounds, finding first that the legislation conferred a right on the plaintiff to sue for compensation and, secondly, that there had also been a breach of a common law duty of care. The breach of confidence claim had to overcome the impediment imposed by the decision in *Giller v Procopets* ('*Giller*').[50] Hampel J declined to follow *Giller*, basing her decision on the recent expansion of breach of confidence claims in the common law, particularly in the United Kingdom. Her Honour noted the impact of the *Human Rights Act 1998* (UK) and the *European Convention on Human Rights*[51] in the UK, but considered that the UK decisions she relied on 'all concern the common law development of breach of confidence and breach of privacy causes of action.' She went on to hold that the English approach also represented the common law development of breach of confidence in Australia, based on comments by Gleeson CJ in *Lenah*. This may be somewhat optimistic.

Applying this to the facts in *Jane Doe*, the plaintiff had a 'reasonable expectation of privacy' because the disclosure related to a sexual matter, and even more so because it was non-consensual sex. Hampel J recognised that in Australia, which has jealously guarded the separation between law and equity despite legislative fusion, merging tortious and equitable doctrines to reshape breach of confidence is problematic, not least at the remedial level, and went on to recognise a new tort relating to disclosure of private facts as an alternative ground for allowing compensation. This would apply in relation to unjustified (rather than wilful) publication of personal information which the plaintiff reasonably expected would remain private.

Unlike Skoien J in *Grosse*, Hampel J engaged in considerable discussion of her approach to the task of assessing damages. Her Honour bemoaned the absence of any like cases for comparison, but on the basis that 'assessment of damages is a question of fact, judgment and degree', assessed damages at $234,190, including general damages of $85,000 for the PTSD symptoms caused by the broadcasts under the tortious cause of action.[52] Further sums were awarded for special damages, totalling $118,332 for loss of

47 See, eg, *Defamation Act 2005* (NSW), ss 37 (abolish exemplary damages), 35(1) (cap on non-economic loss), 35(2) (aggravated damages retained).

48 [2007] VCC 281. This section draws in part on Des Butler, 'Jane Doe v ABC and Media Liability for Disclosing Personal Information: Four More Bold Steps … In Four Different Directions' (Paper presented at the Australasian Law Teachers Association 62nd Annual Conference, Perth, 23-26 September 2007).

49 Duty pursuant to s 4[1A] of the *Judicial Proceedings Reports Act 1958* (Vic).

50 [2004] VSC 113 ('*Giller*'): unsuccessful action for breach of confidence, intentional infliction of mental harm, and breach of privacy, for distress and humiliation over threatened distribution of video of plaintiff engaging in consensual sex. Held: common law remedies of general damages for physical or mental injury, distress or upset not available in equitable action. The decision was subsequently overturned in *Giller v Procopets* [2008] VSCA 236. The Court of Appeal upheld Ms Giller's three claims for damages: breach of confidence (following the English decision of *Campbell*), assault, and an adjustment of the property interests of the parties, respectively. The court determined that because the case was based on breach of the confidential relationship between sexual partners, the court did not have to decide whether Australian law recognised an independent right to recover damages for breach of privacy.

51 Above n 1.

52 *Jane Doe* [2007] VCC 281, [176].

earnings and $5,858 for medical and like expenses. It was noted that reimbursement of sums received by way of criminal injuries compensation was likely to be required. Hampel J stated that separate assessment for the breach of confidence necessarily involved a degree of artificiality as 'the appropriate measure of compensation is by reference to common law principles', but went on to award $85,000 for psychiatric injury caused by the breach of confidence. The 'hurt, distress, embarrassment, humiliation, shame and guilt' experienced by the plaintiff was assessed at $25,000.

Finally, on the question of aggravated and exemplary damages, Her Honour was scathing about the 'oppressive, unfair and inappropriate' manner in which the ABC had conducted the litigation and other matters, all of which 'made the apology … meaningless'.[53] Despite this, she declined to award exemplary damages because the concerns were about the conduct of the litigation, not the original wrong of publication. This case makes an important contribution to the development of privacy protection in Australia.

The United Kingdom has led the development of a tort of privacy as an extension of breach of confidence, which is well established in equity, where it is restrained as unconscionable conduct akin to breach of trust. Breach of confidence is disclosure 'in circumstances importing an obligation of confidence'.[54] The extension of the concept began with *Argyll v Argyll*,[55] which recognised an implied obligation of confidence in marriage, and developed to encompass not only information supplied by the plaintiff, but also information about the plaintiff.[56] Since *Attorney-General (UK) v Guardian Newspapers Ltd (No 2)*,[57] the requirement of an initial confidential relationship between the parties has disappeared, and the law now imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential.[58] In *Hellewell v Chief Constable* ('*Hellewell*'),[59] Laws J, hypothesising disclosure of an unauthorised photograph of another engaged in some private act, said that this would amount to a breach of confidence and 'in such a case the law would protect what might reasonably be called a right of privacy, although the … cause of action would be breach of confidence'. John Fleming[60] said of *Hellewell* that 'in effect a new tort was born, though disguised by a more familiar name'.

The passage of the *Human Rights Act 1998* (UK) gave further impetus to privacy, requiring English courts to take the *European Convention on Human Rights* into account in their decision making, including art 8 which mandates 'respect for … private and family life … home and … correspondence.' By 2001, Sedley LJ in *Douglas v Hello!*[61] considered that '[t]he law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.'

The House of Lords again considered privacy in *Wainwright v Home Office*,[62] this time based on Britain's international obligations and *Wilkinson v Downton*,[63] rather than breach of confidence. The plaintiffs argued that, because of Britain's international obligations under the *European Convention,* a tort of privacy had always existed. Alternatively, in the absence of a general tort of privacy, the House should comply with the *Convention* by

53 Ibid [190].
54 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 (Megarry J). See especially [47]–[48].
55 [1967] Ch 302. See also *Prince Albert v Le Strange* (1849) 32 De G & Sm 652, 64 ER 295.
56 For example, disclosure of hospital records identifying a person as suffering from AIDS, as in *X v Y* [1988] 2 All ER 646; or identifying a person as an informer, as in *G v Day* [1984] 1 NSWLR 24.
57 [1990] 1 AC 109.
58 *Campbell* [2004] 2 AC 457, [14] (Lord Nicholls): discussing *Coco v A N Clark (Engineers) Ltd*, [1969] RPC 41. See also *A v B plc* [2003] QB 195.
59 [1995] 1 WLR 804, 807 (Laws J).
60 John G Fleming, *The Law of Torts* (9th ed, 1998) ch 26, 672.
61 [2001] QB 967.
62 [2004] 2 AC 406.
63 [1897] 2 QB 57.

extending *Wilkinson v Downton*.[64] Lord Hoffman, delivering the main judgment, confirmed that the UK still does not recognise a general tort of invasion of privacy, and expressed views on *Wilkinson v Downton* that cut off that avenue of development, at least for the UK.

Breach of confidence was also the preferred approach in *Campbell v Mirror Group Newspapers* ('*Campbell*').[65] The plaintiff, supermodel Naomi Campbell, sued for breach of confidence and compensation under the *Data Protection Act 1998* (UK) over publication of two newspaper articles. She won at trial a 'modest' £2,500 plus £1,000 in aggravated damages. Lord Nichols reaffirmed that there was 'no overarching, all-embracing cause of action for breach of privacy in the UK' but continued: 'protection of various aspects of privacy is a fast-developing area of the law', instancing the New Zealand decision in *Hosking v Runting* ('*Hosking*'),[66] and pointing to the effect of the *Human Rights Act 1998* (UK). *Campbell* concerns only the wrongful disclosure of private information. According to Lord Nicholls, 'confidential' is an awkward term, the 'more natural description is … private. The essence of the tort [of breach of confidence] is better encapsulated now as misuse of private information.'[67] Further, 'the values enshrined in arts 8 and 10 [of the *European Convention*] are now part of the cause of action for breach of confidence'. In the most recent UK case, *Murray v Big Pictures*,[68] the celebrity author J K Rowling successfully sued in relation to publication of photographs of her children taken in a public place. The Court of Appeal held that the children had an arguable claim to privacy pursuant to art 8 of the *UN Convention on the Rights of the Child*[69], reversing the lower court decision based on *Campbell.*

Bradley v Wingnut Films ('*Bradley*')[70] and *Tucker*[71] were the first two New Zealand decisions to consider privacy in tort. The plaintiff in *Bradley* sued for intentional infliction of emotional harm under *Wilkinson v Downton*, breach of privacy and defamation. He lost on the facts, but the High Court held that a tort of invasion of privacy did form part of the common law of New Zealand. Its essential elements included public disclosure of private facts, and that the disclosure must be highly offensive and objectionable to a reasonable person of ordinary sensibility.

Two recent cases, *Hosking*[72] and *Brown v The Attorney-General of New Zealand* ('*Brown*')[73] took the law further. The male plaintiff in *Hosking* was a television celebrity. He and his wife sought an injunction to restrain publication of pictures of their babies taken in a public shopping centre, on facts similar to those in the JK Rowling case. The New Zealand Court of Appeal rejected the application for injunction unanimously, but recognised a new tort of invasion of privacy by a majority of 3:2.[74] The *New Zealand Bill of Rights Act 1990* (NZ) does not recognise a right to privacy, although it affirms New Zealand's commitment to the *International Covenant on Civil and Political Rights* (ICCPR), which includes protection of privacy in art 17. In view of this, and other New Zealand legislation protecting privacy,[75] the majority concluded that the courts should act alongside Parliament to protect privacy and give a civil remedy for its invasion. The central elements of a privacy tort were identified as the presence of facts where a reasonable expectation of privacy existed, and publicity given to private facts that would be highly offensive to the objective reasonable person.

64 Ibid.
65 *Campbell* [2004] UKHL 22, [2004] 2 AC 457.
66 [2005] 1 NZLR 1 ('*Hosking*').
67 Ibid [14].
68 [2008] EWCA Civ 446.
69 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
70 [1993] 1 NZLR 415 ('*Bradley*').
71 [1986] 2 NZLR 716 .
72 *Hosking* [2005] 1 NZLR 1.
73 [2006] DCR 630 ('*Brown*').
74 *Hosking* [2005] 1 NZLR 1 (Gault P and Blanchard J) (Tipping J concurring).
75 See, eg, *Privacy Act 1993* (NZ); *Harassment Act 1997* (NZ); *Broadcasting Act 1989* (NZ).

Thus the New Zealand Court of Appeal restricted the new tort to wrongful publicity given to private lives, arriving 'although by a different route … [at a result] not substantially different' from that adopted in the UK in *Campbell*. The requirement of 'harm' contained in the second limb does not depend upon proof of personal injury or economic loss, since the harm is 'in the nature of humiliation and distress'. It was accepted that public figures have less reasonable expectation of privacy than others, and that a defence of 'legitimate public concern' would be needed to balance individual privacy and freedom of speech. The main remedy envisaged was damages, with injunctions being rarely granted, as in defamation.

In *Brown*, a convicted paedophile successfully relied on *Hosking* to obtain damages against the police for violating his privacy upon his release from prison on parole. The police had publicised his name, criminal background and photograph in a leaflet drop titled 'Convicted Paedophile Living in Your Area'. The Wellington District Court in *Brown* awarded the plaintiff $25,000 for breach of privacy and breach of confidence. What constitutes private information was seen as ultimately a 'matter of degree and circumstance … to be assessed on an individual case basis', within the *Hosking* test of 'reasonable expectation' of privacy, as determined by an 'objective observer' standard. In *Tucker*, a 20-year-old criminal record was private in the circumstances, but in *Brown*, the criminal history was clearly public information as the five-year sentence was still ongoing at the time of parole.

The crux of the decision for the plaintiff was that the police had gone further than simply releasing information already available in the public domain. The public use of the plaintiff's photograph and street address constituted breach of confidence, since although he had consented to being photographed for 'legitimate police business', he was not informed that it was to be used in a leaflet drop to the public, and such use fitted the 'highly offensive' second limb of the *Hosking* test.

B. Statutory Models: USA, Canada and Ireland

In 1960, Prosser reviewed over 300 US cases, claiming that four separate judicially developed privacy torts could be identified, 'tied together by the common name but otherwise hav[ing] almost nothing in common except … an interference with the right … to be let alone'.[76] These are now incorporated into the *Restatement of the Law, Second, Torts*.[77] Privacy is specifically protected under the 14th Amendment to the *United States Constitution*, which has been broadly interpreted.[78] The four torts concern intrusion upon seclusion or into private affairs; appropriation of the plaintiff's name or likeness for the defendant's advantage; publicity given to private life; and publicity placing a person in a false light.[79] The separation into different torts overcomes many of the definitional issues which bedevil privacy, and allows for autonomy and human rights based approaches to coexist with protection of commercial interests. Whilst the *Restatement* is not legislative, the US approach gives some idea of how a statutory tort of privacy might look, and might operate in practice.

Additional protection for public figures has been conferred in California through the enactment of a cause of action for physical invasion of privacy, including technological invasions (constructive invasion).[80] Under the legislation, damages including punitive damages may be obtained and these are reinforced by stringent penalties, including up to

76 Dean Prosser, 'Privacy' (1960) 48 *California Law Review* 383.

77 Section 652A provides that 'one who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other'. The Restatement (1977) found the right to privacy invaded by acts that constitute:
Unreasonable intrusion upon the seclusion of others
Appropriation of the other's name or likeness
Unreasonable publicity given to the other's private life
Publicity that unreasonably places the other in false light before the public.

78 See, eg, *Griswold v Connecticut* 381 US 479 (1965); *Roe v Wade* 104 US 113 (1973).

79 *Restatement of the Law, Second, Torts* (1977) § 652A-652E.

80 *Civil Code of the State of California* (1872), s 1708.8 (a).

three times the amount of general or special damages awarded ('treble damages'), and possible forfeiture of any proceeds or consideration obtained.[81]

The US is not directly comparable to Australia, because of the constitutional guarantee of privacy contained in the 14th Amendment, which has been interpreted very broadly.[82] Commentators have frequently pointed out the tension between the First Amendment, guaranteeing freedom of speech, and the 14th Amendment,[83] and the strength of the 'newsworthy' defence. David Anderson [84] claims that when competing interests such as freedom of the press collide, 'privacy almost always loses … The sweeping language of privacy law serves largely to mask the fact that the law provides almost no protection.'

The *Canadian Charter of Rights and Freedoms 1982* does not specifically protect privacy. However, the Supreme Court has recognised a general 'right to be let alone by other people' in *Hunter v Southam.*[85] Section 8 of the *Charter* has been interpreted as guaranteeing freedom from unreasonable search and seizure, including a reasonable expectation of privacy in relation to governmental acts.[86] The province of Quebec guarantees 'a right to respect for … personal life' in the Quebec *Charter of Human Rights and Freedoms.*[87] Canadian privacy law is a mixture of common law, statutory torts or, in some provinces, a combination of both. British Columbia was the first province to introduce a statutory tort, in 1968. The BC Law Institute[88] recently recommended the addition of a third privacy tort, stalking,[89] to the existing torts of wilful violation of privacy, and unauthorised use of name or portrait.[90] Saskatchewan, British Columbia, Manitoba, and Newfoundland and Labrador also protect an individual's right to privacy by statutory torts.[91] A typical formulation is that of Saskatchewan, which provides that 'it is a tort, actionable without proof of damage, for a person willfully and without claim of right, to violate the privacy of another person.'[92] Remedies include damages, injunction, account of profits and an order for delivery up of material.[93] Interestingly, there has been little litigation in Canada and no pattern of privacy being used as a tool for celebrities or the wealthy. Damages have typically been very moderate.

Ireland[94] introduced a Privacy Bill in 2006, proposing a tort actionable without proof of damage, but limited to deliberate and intentional conduct, without lawful authority.[95] The Bill stated that a person is entitled to privacy that is 'reasonable in all the circumstances having regard to the rights of others and to the requirements of public order, public

81 *Civil Code of the State of California* (1872)*,* s 1708.8 (d).
82 See, eg, *Griswold v Connecticut* 381 US 479 (1965); *Roe v Wade* 410 US 113 (1973).
83 Note that a similar tension exists between arts 8 (privacy) and 10 (freedom of speech and the press) of the *European Convention on Human Rights,* a tension which has been explicitly incorporated into the common law cause of action for breach of confidence (invasion of privacy) in the United Kingdom in *Campbell*, [2004] 2 AC 457, [14] (Lord Nicholls).
84 David A Anderson, 'The Failure of American Privacy Law', in Basil Markensis (ed), Protecting Privacy, (1999) 139, 140, cited in *Lenah* (2001) 208 CLR 199. [119] (Gummow and Hayne JJ).
85 [1984] 2 SCR 145 (SCC).
86 *R v Dyment* [1988] 2 SCR 417, 426. See also *Godbout v Longueuil (City)* [1997] 3 SCR 844, 913. Section 8 of the *Canadian Charter of Rights and Freedoms* guarantees a sphere of individual autonomy for all decisions relating to 'choices that are of a fundamentally private or inherently personal nature': *Canadian Charter of Rights and Freedoms,* s 8, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) 1982, c 11**.** See discussion in ALRC, above n 35, s 74.23.
87 *Charter of Human Rights and Freedoms* (1975) (Quebec) RSQ c–12, s 5. Generally, see the discussion of privacy law in Canada in *Hosking v Runting* [2005] 1 NZLR 1, [60]–[65].
88 British Columbia Law Institute, *Report on the Privacy Act of British Columbia*, Report No. 49 (2008).
89 Note the parallels with the Australian case of *Grosse* [2003] QDC 151, in which stalking was recognised as an invasion of privacy at common law.
90 *Privacy Act* RSBC 1996, c 373, s 3.
91 *Privacy Act* RSBC 1996 (British Columbia); *Privacy Act* CCSM s P125 (Manitoba); *Privacy Act* RSS 1978, c P–24 (Saskatchewan); *Privacy Act* RSNL 1990, c P–22 (Newfoundland and Labrador). The British Columbia legislation differs somewhat from the statutes in force in the other provinces.
92 *Privacy Act* RSS 1978, c P–24, s 2 (Saskatchewan). See also *Privacy Act* RSBC 1996, c 373, s 1(1) (British Columbia); *Privacy Act* CCSM, s P125, s 2(1) (Manitoba); *Privacy Act* RSNL 1990, c P–22, s 3(1) (Newfoundland and Labrador).
93 See, eg, *Privacy Act* RSS 1978, c P–24, s 7 (Saskatchewan).
94 ALRC, above n 35, s 74.25.
95 Privacy Bill 2006 (Ireland), cl 2(1), 2(2).

morality and the common good.' The Bill was dropped in response to stringent criticism by the media concerning freedom of speech and freedom of the press.

IV. CONCLUSION

The time is right for Australia to recognise a tort of invasion of privacy. The UK, New Zealand, Canada and the US have all arrived at this conclusion by different paths. Many of the possible options have been explored and tested through the courts, the dominant preferred approach being the development and metamorphosis of existing torts, in particular breach of confidence and *Wilkinson v Downton*. Creation of a separate stand-alone tort of invasion of privacy would avoid many of the problems that flow from stretching and distorting existing causes of action. However, as the preceding survey demonstrates, the traditional manner of common-law development is to 'grope forward cautiously along the grooves of established legal concepts … rather than make a bold commitment to an entirely new head of liability.' [96] In part, this caution stems from concerns about the legitimacy of non-elected judicial officers undertaking major law reform without direct accountability to the people.

Australia and the High Court have shown little sympathy for 'judicial creativity' or activism since the Mason years, as evidenced by the very cautious and incremental approach adopted in *Lenah*. It is too early to predict where the High Court led by Justice French will stand. Law Reform Commissions in Australia have played a very active role in the privacy debate,[97] the ALRC having recently recommended recognition of a right to sue for serious invasions of personal privacy, where the individual; a) had a reasonable expectation of privacy; and b) the conduct complained of would be regarded as highly offensive to a reasonable person. In addition, the plaintiff would need to satisfy the Court that c) the public interest in privacy outweighs other matters of public interest, such as freedom of the press.[98]

Creation of a statutory cause of action as favoured by both the NSW Law Reform Commission (NSWLRC)[99] and the ALRC[100] would speed up and unify the protection of privacy, avoid fragmented and piecemeal protection across jurisdictions, and provide a firm foundation for subsequent judicial development, 'filling in the gaps' in the present legislative protection.[101] Although most of the cases to date have dealt with celebrities and media intrusions upon their privacy, there is no reason in principle to regard privacy as excluded from the realm of ordinary citizens. This is amply demonstrated in *Wainwright v Home Office, Brown, Bradley* and *Jane Doe*. The potential for further extensions into the civil liberties arena is strong, as recognised in Canada.[102] The NSWLRC has considered the question of remedies in detail,[103] identifying the principal remedies as injunctions and damages. The NSWLRC proposes the inclusion of damages, including aggravated damages, but not exemplary damages; account of profits; injunction; orders requiring apologies; correction orders; orders for the delivery up and destruction of material;

96 Fleming, above n 59, 664.

97 See eg, ALRC, above n 35; ALRC, *Review of Australian Privacy Law - An Overview*, Discussion Paper No 72 (2007); ALRC, *Privacy*, Report No 22 (1979); ALRC, above n 37; New South Wales Law Reform Commission (NSWLRC), *Privacy Legislation in New South Wales,* Consultation Paper No 3 (2008); NSWLRC, *Invasion of Privacy*, Consultation Paper No 1 (2007); Victorian Law Reform Commission, *Workplace Privacy: Final Report* (2005).

98 ALRC, above n 35.

99 NSWLRC, *Invasion of Privacy*. No conclusion was reached on this point in NSWLRC, *Privacy Legislation in New South Wales,* above n 93.

100 Recommended in ALRC, above n 35. See also ALRC, *Review of Australian Privacy Law*; ALRC, above n 35, c 74.

101 See, eg, *Privacy and Personal Information Protection Act 1998* (NSW); *Health Records and Information Privacy Act 2002* (NSW); *Privacy Act 1988* (Cth); *Privacy (Amendment) Private Sector Act 2000* (Cth); *Listening Devices Act 1984* (NSW); *Broadcasting and Television Act 1956* (Cth); *Telecommunications (Interceptions) Act 1979* (Cth); and *Freedom of Information Act 1982* (Cth).

102 Reasonable expectation of privacy in relation to governmental acts is recognised in the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) 1982, c 11.

103 NSWLRC, *Invasion of Privacy*, above n 93, c.8.

declarations; and other remedies or orders that the Court thinks appropriate in the circumstances.[104]

A statutory tort, built on extensive and comparative investigation and recommendation by many law reform bodies past and present, which takes into account common-law developments over the last two decades, seems a fruitful and probably inevitable way forward for Australia, if there is sufficient political will. Whether this is best done by the Commonwealth[105] or at State level will need to be worked out. Any such tort is sure to be founded on principles of personal autonomy and protection of dignitary interests, excluding corporations and the commercial interests that are also protected in the US. It is clear that both at common law, and under the formulations suggested by the NSWLRC and ALRC, there is ample power in the law of remedies to respond to novel developments in tort by creating a raft of options for courts to choose from in protecting privacy rights. Where the preferred remedy is general damages, Australian courts have already demonstrated that they are prepared to take rights seriously, awarding sizeable sums for invasions of privacy.

104 Ibid 202.

105 For example, pursuant to the modern doctrine as to the scope of the external affairs espoused by Dawson J in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 632, on the basis of Australia's ratification of international human rights instruments. See also *Polyukhovich* (1991) 172 CLR 501, 528-531 (Mason J), 599-603 (Deane J), 695-696 (Gaudron J), 695-696 (McHugh J).