

Remedies for Breach of Privacy

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Remedies for Breach of Privacy

JASON NE VARUHAS AND NA MOREHAM

Since the turn of the century, privacy actions have been recognised at common law and in equity across the common law world, while statutory privacy protections have simultaneously proliferated. With the emergence of these actions courts are being called upon to determine which civil remedies are available for breaches of privacy and to enunciate the rules and principles that govern their award, often in the context of high-profile litigation concerning phone hacking, revenge porn, covert filming or the disclosure of sensitive medical, relationship or financial information. The remedial questions thrown up by these cases are among the most important and complex facing common law jurisdictions today. They raise profound issues of principle and classification, which have ramifications that extend well beyond the field of privacy and which implicate fundamental principles such as *ubi ius, ibi remedium*, freedom of expression and the rule of law. The law of remedies is also of great practical importance for plaintiff and defendant alike, for practitioners advising clients, and for courts which are increasingly being called upon to grant relief for serious invasions of privacy.

This book comprehensively analyses the emerging remedial jurisprudence and provides solutions to the doctrinal and theoretical problems that are coming to light as higher courts forge the new law of privacy remedies. Importantly, the essays herein not only make significant headway towards resolving the most challenging questions in the law of privacy remedies, they also provide deep insights into both the law of remedies more generally and the nature and normative underpinnings of the substantive law of privacy.

Three preliminary points can be made about the book's contributors and our aims in bringing them together. First, we have brought together scholars from common law jurisdictions that all face similar questions about the way in which privacy should be protected through remedies. Examination of the differences between these various jurisdictions deepens our understanding of each of those systems. A comparative understanding of privacy developments is also necessary because these developments are inherently interconnected; it is simply not possible fully to understand developments in one system without understanding the comparative context in which they have occurred. Second, we have solicited chapters from academics, practitioners and judges, the last of these having been

involved in some of the leading privacy decisions in common law jurisdictions. All legal analysis can be enriched by the different perspectives brought to bear by these groups of legal thinkers. However, nowhere is such an exchange of ideas more valuable than in a field such as the law of remedies, a highly practical field that also raises fundamental issues of principle, coherence and theory. Third, privacy is not an island: the field lies at the intersection of several areas of law, including torts, equity and human rights. We have therefore brought together leading legal thinkers with specialisms in these different fields. As a result the chapters provide rich and varied insights into the core questions at the heart of the emergent law of privacy remedies, debates about privacy remedies are situated within the wider legal landscape, and the implications of these debates for other areas of law are brought squarely into focus.

In this introductory chapter we discuss the emergence of the privacy actions, the importance of addressing the law of remedies, and a core theme that connects the chapters herein: the connection between right and remedy. The chapter then explains our motivations for examining the law of remedies in comparative perspective; in so doing we provide background to the legal developments in each jurisdiction under consideration. In the final section we sketch the core issues in the law of privacy remedies which are the focus of this collection, and introduce the chapters.

I. Beginnings

Just over 20 years ago, the late Professor Peter Birks convened a seminar at All Souls College to examine the topics of privacy and loyalty, which at that time were of emerging practical significance and scholarly interest. The papers presented were ultimately published in a collection edited by Birks, entitled *Privacy and Loyalty*.¹ In his editor's preface, Birks observed that the law's protection of privacy had developed too timidly, contending that privacy needed a fresh start.² Whereas privacy had been protected obliquely via pre-existing torts and the equitable action for breach of confidence, there were increasing signs of a judicial willingness to make a 'more honest and direct beginning'.³ Birks's call for change was echoed by many other scholars, law reformers and judges across the common law world.

Twenty years on the legal landscape has changed fundamentally. The formerly timorous approach to the direct judicial protection of privacy has been superseded by a new boldness of spirit. A wave of judicial activity has swept the common law world. In many jurisdictions judicial innovation over the last 10 to 15 years has resulted in recognition of dedicated actions either at common law or in equity,

¹ P Birks (ed), *Privacy and Loyalty* (Oxford, Clarendon Press, 1997).

² P Birks, 'Preface', *ibid* vii.

³ *ibid* vi.

which afford direct protection to privacy. Privacy has therefore been a core site of common law development. It provides this century's best example yet of the common law's capacity to adapt to changed technological, social and economic conditions, and to new societal understandings of fundamental human interests. It is also a paradigmatic modern example of the bottom-up nature of legal development in common law systems. Although lawyers typically focus on apex courts' articulation of the nature and requirements of these new actions, such decisions are often the end-point of incremental legal development at lower court level, as trial judges respond to facts which cry out for a legal remedy. It is these streams of jurisprudence that crystallise into the fully-formed actions we now know so well. The privacy actions are new; the path of the law familiar.

Given the emergence of dedicated privacy actions in most jurisdictions, the focus of scholarly and judicial attention has shifted away from the question of whether privacy ought to be afforded direct judicial protection. While that question remains of theoretical interest, in most jurisdictions the courts have given their answer. Privacy has been given the fresh start that Birks and many others argued for. It is no longer a question of whether to protect the privacy interest but how.

II. Why Remedies Matter

This collection is concerned with the principles that govern relief in these new privacy actions. The essays examine which remedies should be available, their nature, and the legal principles governing their grant and terms. The remedial principles in the new field of privacy are not well-established and in general have not been the subject of extended treatment either in intermediate or apex courts or in scholarly work. The relative paucity of deep thinking about privacy remedies is obviously a function of the novelty of such claims. But the gap also reflects a general propensity of both judges and commentators to focus on substantive law at the expense of remedies (though as we shall see, the extent to which substantive and remedial law can sensibly be considered in isolation is highly questionable).

The amount of attention paid to privacy remedies is, however, inversely proportional to the importance of remedies principles. The legal principles governing remedies for breach of privacy are of acute practical significance. For example, whether a plaintiff can obtain an injunction to prevent a breach of his or her privacy can have a fundamental impact on that plaintiff's wellbeing; consider, for example, an application for interim relief to restrain publication of a news story that, if published, could destroy the plaintiff's home life and seriously affect his or her family, or an application for a prohibitory injunction to restrain ongoing repeated intrusions upon the plaintiff's solitude, which are causing serious distress, anxiety and upset. Damages rules, governing recovery and quantum, have a significant impact on the life of a plaintiff who is facing the cost of psychological counselling

or days off work because of stress caused by a privacy intrusion. Remedies make rights real in practice for plaintiffs. They can provide redress and solace, punish and condemn outrageous violations, potentially deter future harmful conduct, and vindicate interests that are of importance to individuals and society as a whole. On the flipside, they can impose heavy burdens on defendants, including heavy financial loss, reputational damage and potentially serious incursions upon liberty.

Remedies also raise core questions of principle, most prominently the balance to be struck between free expression and open justice on the one hand, and protection of privacy and vindication of the rule of law on the other, especially in the context of specific relief. Privacy is a core location – if not *the* core location – of current debates over cutting-edge issues of principle within the field of remedies. As the restitution debates of the 1990s showed, new fields often stimulate new thinking. This in turn has ramifications for established legal principle and modes of analysis. Privacy remedies raise numerous fundamental questions that have the potential to have this kind of impact. Can breach of a privacy right in itself constitute a compensable harm, and when should such ‘normative’ damages be available? Are heads such as mental harm or loss of dignity recoverable in equity? Ought an account of profits to be available exceptionally for breach of a common law privacy right? Are Lord Cairns’ Act damages recoverable where the privacy action is an equitable one? Should the novel head of vindictory damages be adopted in the field of privacy? Should court-ordered apologies form part of the arsenal of judicial remedies? How do remedial principles at common law or in equity interrelate with remedial principles developed in the context of statutory privacy protections? What are the conflict-of-laws implications of legal classification of privacy actions as equitable or common law, and in what forum does one sue for breaches of privacy that transcend national borders?

The recent establishment of privacy actions, the growing incidence of claims, the importance of remedial issues as a matter of practice and principle, and the relative paucity of serious thinking about remedial issues in the field of privacy, provide the prompt, and illustrate the pressing need for this collection. Importantly, while the immediate focus of these essays is privacy, the significance of the insights they offer extends well beyond this immediate field.

III. The Connection Between Right and Remedy

Consideration of remedial principles is important in itself. But it is also important because it sheds light upon core questions about the nature and proper categorisation of the emergent privacy actions, including – in jurisdictions where the issue is in doubt – whether the action is or ought to be properly categorised as a creature of equity or tort (and which type of tort). Indeed, the essays in this book – often working from questions about remedies to questions about rights – provide some

of the most striking insights into the nature of the substantive law of privacy. This is because remedial issues cannot be properly understood and resolved in principled fashion without a sound appreciation of the nature of the primary obligations (and protected interests), breach of which gives rise to remedial liabilities. That the common law has been marked by an unbreakable bond between right and remedy flows from the historical nature of the common law as a law of *remedies*: primary norms and substantive law were secreted in the interstices of remedial forms.⁴ The law worked from remedies to rights. Whilst the forms of action may be dead, they continue (as Maitland observed⁵) to influence both scholarly thinking and judicial adjudication from the grave.

But the importance of linking primary norm and remedy is not simply a matter of history, and it would be an error to dismiss such modes of thinking and analysis as anachronistic – though this has not stopped some from maintaining this perspective. The common law continues to observe the connection between right and remedy for fundamental reasons of principle and pragmatism. If remedies were informed by policies with no connection to the normative concerns underpinning the creation of primary rights, the law would be incoherent. Practically speaking, if remedies were untethered from the primary norms to which they relate, there would be a significant risk of remedies cutting across and undermining the motivations underpinning recognition of a law of privacy in the first place; the law's goals would be frustrated. More generally, if remedies are analysed in isolation of rights, it is not apparent why a given remedy ought to issue for breach of a given right; there would be no necessary or logical connection between right and remedy. Furthermore, to cast off the normative framework provided by the nature of primary rights in considering remedies would leave scholars, practitioners and judges mid-ocean, bereft of the equipment needed for navigation;⁶ we would have no framework by reference to which we could resolve issues relating to remedies in a principled fashion, or at least it would not be clear why we should choose one framework over any other.

All this reinforces the fundamental importance of considering the substantive law of any cause of action alongside remedies, and vice versa. Exploration of the bond between right and remedy therefore forms a core theme of this collection.

IV. Comparison and Context

This collection, in common with the *International Workshop on Remedies for Breach of Privacy* from which the collection derives, considers remedial questions

⁴ Paraphrasing HS Maine, *Dissertations on Early Law and Custom* (London, J Murray, 1891) 389.

⁵ FW Maitland, *Equity; also, The Forms of Action at Common Law* (Cambridge, Cambridge UP, 1909) 1.

⁶ Paraphrasing P Birks, 'Preface' in P Birks (ed), *The Classification of Obligations* (Oxford, Clarendon Press, 1997) vi.

both within different jurisdictions and from a cross-jurisdictional perspective. There are at least three reasons for considering this range of perspectives: commonality, interconnectedness, difference.

First, the jurisdictions considered herein – Australia, New Zealand, Canada, the United States and England – share a bedrock of commonality that makes comparison feasible. As common law systems they have a common legal heritage. Each jurisdiction has also had to grapple with a common set of questions about whether and how to afford direct legal protection to privacy and, now that dedicated privacy actions have been recognised, how to approach judicial remedies for breach. These commonalities mean that these jurisdictions can usefully learn from each other, regardless of whether the solutions they devise for given remedial problems are different or the same. Comparative experiences may suggest a range of potential solutions to given questions, reveal unexpected practical difficulties with certain approaches, or stimulate new thinking and novel solutions.

Second, apart from the United States, each of these jurisdictions has witnessed significant legal development in the field of privacy over the same 15-year period, with most recognising new dedicated privacy actions during this time. In fashioning this new field the courts of each jurisdiction have considered comparative common law developments. The phenomenon of transnational judicial ‘conversations’ has therefore been pronounced in this field:⁷ privacy has been a core site of rich and fruitful cross-jurisdictional discourse and learning. The longer experience of the United States, with its privacy torts, has heavily influenced legal change across other common law jurisdictions, either explicitly or obliquely; the American model thus provides a useful common frame of reference for considering privacy developments across the different jurisdictions examined in this collection. The developments are thus interconnected; comparative legal development provides a fundamental aspect of the wider context of legal change in single jurisdictions. It is likely that courts will continue to look abroad when fashioning the law of remedies, in turn reinforcing the importance of a comparative understanding of remedial principles.

If the first reason for a comparative understanding of remedial privacy principles is commonality, the third is difference. Different jurisdictions have developed different types of action to protect privacy. Also, the law of each jurisdiction has been shaped by local conditions and contextual features, meaning that, for example, common labels, such as ‘loss’ or ‘vindication’, may upon closer examination refer to quite distinct concepts or operate differently from one jurisdiction to the next. Comparative analysis can bring these variables and their influence sharply into focus, and thus deepen our understanding of given legal principles and the forces that have shaped them, and therefore shed light on the reasons for similarities and differences in remedial responses across jurisdictions. Importantly, in considering normative questions over what principles ought to govern remedies,

⁷ Borrowing the phrase from C McCrudden, ‘Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights’ (2000) 20 *OJLS* 499.

one must understand the overarching model of privacy protection that prevails in a given jurisdiction – as remedies must cohere with that model – as well as wider contextual features. This helps to ensure that remedial principles ‘fit’ within local conditions and properly serve local needs. Understanding such phenomena is critical in gauging the appropriateness of cross-jurisdictional transplants and the borrowing of ideas.⁸ The ‘right’ answer to a given remedial question will depend on the context in which the question arises.

It is important, then, that this introductory chapter sketches some of the key variations among the jurisdictions considered in this book – Australia, New Zealand, Canada, the United States, England.

A. Different Models

Different models of privacy protection prevail in different jurisdictions. In Australia, the High Court has left open the possibility of developing a privacy tort.⁹ A number of lower courts have supported such a development, but there is as yet no explicit endorsement by a higher court. In the absence of a recognised action at common law, and in light of the Commonwealth Government’s lack of action on the Law Reform Commission’s recommendation of creation of a statutory privacy tort,¹⁰ lower courts have used the breach of confidence action to afford privacy protection where possible (without reorienting the substantive law to the degree that English courts have). The two most important cases – *Giller v Procopets*¹¹ and *Wilson v Ferguson*¹² – both concerned what is known colloquially as ‘revenge porn’, where the defendant discloses intimate videos or images of the plaintiff, a former partner, to third parties. The deployment of breach of confidence in these types of cases has led to some controversy, however. The action’s two key requirements – that the information have the necessary quality of confidence about it and that it was imparted in circumstances importing an obligation of confidence – are flexible enough. But courts, concerned to give a remedy in cases that clearly demand one, have stretched the remedial parameters of the confidence action by suggesting awards may be available for mental distress and pain and suffering, and that damages may be awarded under the local equivalent of the Lord Cairns’ Act jurisdiction where the action is in equity as opposed to common law. There may, at some point, be a limit to how much further these extensions can continue.

⁸ See further on this point, C Saunders, ‘Transplants in Public Law’ in M Elliott, JNE Varuhas and SW Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Oxford, Hart Publishing, 2018).

⁹ See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

¹⁰ See Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era: Final Report*, Report No 123 (2014).

¹¹ *Giller v Procopets* [2008] VSCA 236.

¹² *Wilson v Ferguson* [2015] WASC 15.

In the United States, dedicated privacy torts have long been recognised in the common law of individual States. According to the prevailing description of the torts in the *Restatement (Second) of Torts*¹³ (for which William Prosser was Chief Reporter, and which draws heavily on his seminal 1960 article on privacy),¹⁴ there are four such privacy actions: intrusion upon the plaintiff's seclusion or solitude into his or her private affairs; public disclosure of embarrassing private facts about the plaintiff; publicity which places the plaintiff in a false light in the public eye; and appropriation, for the defendant's advantage, of the plaintiff's name or likeness. The first two of these torts have heavily influenced the development of privacy protection across common law jurisdictions.

Courts in New Zealand and Ontario have, following the United States model, recognised both the intrusion and disclosure privacy torts. Unlike in England, there was little contention in these jurisdictions about recognising these new actions and situating them in the law of torts. Breach of confidence, which as discussed below was the vehicle for developing privacy rights in English law, was expressly dismissed by the New Zealand Court of Appeal in *Hosking v Runting* as unfit for purpose.¹⁵ The uncoupling of privacy protection from breach of confidence in these jurisdictions has made extending privacy protection to cases of intrusion upon seclusion, such as spying by government or phone hacking absent any disclosure of the obtained information, much easier. For example, the Judge in New Zealand's leading intrusion case had little hesitation in treating the tort of intrusion into seclusion as 'a logical adjunct to [the] tort of wrongful publication of private facts'.¹⁶ Indeed in Ontario the intrusion tort was recognised first, with the disclosure tort developing subsequently.¹⁷ In contrast, it is difficult to see how breach of confidence can do the business in cases that do not involve disclosure without fundamentally changing the action beyond recognition. Breach of confidence may, however, continue to play a role in protecting privacy in disclosure-type cases even where tortious liability exists (though the touchstone of that action remains conscience rather than protection of privacy).

In England, the classification of the action for misuse of private information has evolved over time. Breach of confidence was originally the vehicle for developing the privacy action. Courts, including the House of Lords in the leading decision of *Campbell*, held that the horizontal effect of the Human Rights Act 1998 meant that they were obliged to develop that action consistently with the right to respect for private life in Article 8 of the European Convention on Human Rights (ECHR) (although even in *Campbell*, Lord Nicholls referred to the action as a 'tort').¹⁸ Strategically, development of breach of confidence provided a more incremental

¹³ American Law Institute, *Restatement (Second) of Torts* (Philadelphia, PA, ALI, 1977) §§652A–652E.

¹⁴ WL Prosser, 'Privacy' (1960) 48 *California Law Review* 383.

¹⁵ *Hosking v Runting* [2005] 1 NZLR 1, [23]–[53].

¹⁶ *C v Holland* [2012] 3 NZLR 672, [75].

¹⁷ *Jones v Tsige* 2012 ONCA 32 (intrusion tort); *Jane Doe 464533* 2016 ONSC 541 (disclosure tort).

¹⁸ *Campbell v MGN Ltd* [2004] 2 AC 457.

and less radical way to introduce the privacy action than creating a novel action in tort, and enabled the House of Lords to draw support from prior authority. As Sir Robert Megarry V-C observed in a much earlier privacy case, '[t]he extension of the existing laws and principles is one thing, the creation of an altogether new right is another'.¹⁹ Further, confining legal development to the confidence action enabled the House to dodge the contentious issue of whether a general privacy action should be developed, the confidence action being narrowly focused on cases of disclosure of confidential – or now private – information. Subsequent case law indicated that even though the action of misuse of private information was of the confidence genus, it ought to be considered distinct from the 'traditional' confidence action.²⁰ Indeed, in the 2015 case of *Vidal-Hall*, the English Court of Appeal held that the misuse of private information action was properly classified as a tort for the purposes of conflict of laws doctrine.²¹ Since the Supreme Court has not yet expressly ruled on this question, classification of the action could still be said to be open to debate, but there is a strong argument that the action has cast off its equitable origins (not least as the Supreme Court declined leave to appeal in *Vidal-Hall*). Further, Article 8 of the ECHR demands horizontal protection not just of informational privacy, but also of the bundle of privacy interests protected by that Article, including physical privacy, and an 'intrusion' variant of the privacy action has been recognised at lower court level in England.²² Although such developments can be reconciled with precedent, they cannot be housed within breach of confidence without doing violence to the coherence of that action.²³ All that said, the courts have stressed the need for breach of confidence and privacy to develop consistently where possible, and it is clear that the former will continue to be relied on in cases where the parties are in a traditional relationship of trust and confidence.

These jurisdictional differences are important, because variation in an action's history and in the model of protection ultimately adopted will affect decisions about remedies. Most importantly, different ramifications will follow, and different remedial issues will arise, depending on whether the action is one in equity or at common law. For example, the availability of damages for mental distress would be relatively uncontroversial in the context of a privacy tort that was actionable per se and conceptualised as protecting interests which were dignitary in character. However, the availability of awards for mental distress is more controversial in the context of the equitable action of breach of confidence in light of, for example, the traditional focus on proprietary as opposed to personal interests in the field of equity; indeed, compensation is itself an emergent remedy in equity.²⁴ On the

¹⁹ *Malone v Metropolitan Commissioner of Police* [1979] Ch 344, 372.

²⁰ See *Imerman v Tchenguiz* [2011] 2 WLR 592.

²¹ *Vidal-Hall v Google Inc* [2015] 3 WLR 409.

²² *Goodwin v News Groups Newspapers* [2011] EMLR 27.

²³ NA Moreham, 'Beyond Information: Physical Privacy in English Law' (2014) 73 *CLJ* 350.

²⁴ See further, S Degeling and JNE Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Oxford, Hart Publishing, 2017).

other hand, the availability of an account of profits for a profit-driven disclosure of private information would be relatively uncontroversial in the field of equity, whereas the availability of such awards in the field of torts, outside of intellectual property torts, is highly controversial given the traditional focus upon compensation and the historical separation of law and equity. If the action is a tort, the type of tort might also affect the approach to damages. For example, in torts for which loss is the gist of the action, such as negligence, damages are generally limited to ‘factual’ losses, such as physical injury, mental harm or economic loss. For torts for which breach of a basic right is the gist of the action, such as battery or defamation, on the other hand, damages have included damages for the interference with the right itself, irrespective of whether factual loss is suffered.²⁵ New Zealand is a curious example in this regard, as the lead judgment in *Hosking* made clear that the action for disclosure of private facts is analogous to other rights-based torts, and is actionable per se, but on the other hand included several statements²⁶ suggesting a focus on recovery of factual losses such as distress, though the matter remains to be worked out in future case law. The types of privacy action recognised may also affect the development of remedies. For example, it might be plausibly argued that if protection is limited to disclosure cases, adequate protection is provided by the availability of injunctive relief to prevent disclosure and delivery up of the private information so that it can no longer be distributed, coupled with the availability of an account of profits to deter profit-making disclosures. However, in intrusion upon seclusion cases, one might consider the remedial arsenal incomplete if there is no provision for compensation for distress caused by such intrusions, especially as monetary remedies such as an account will be of less relevance given there may be no disclosure.

B. Different Contexts

Beyond the model of privacy protection, wider contextual features may also affect both the operation of the legal rules in a given system and normative questions concerning remedies. Such contextual features have clearly shaped, and explain core differences between, the privacy actions in different jurisdictions, and are likely also to affect – explicitly or obliquely – the development of the law of remedies in each jurisdiction. For example in the United States the First Amendment has had an extraordinary effect on the development (or more accurately, retardation) of the protection of privacy. Any consideration of privacy protection and remedies in that jurisdiction would therefore be incomplete without consideration of the extraordinary weight placed on free expression.

²⁵ See JNE Varuhas, *Damages and Human Rights* (Oxford, Hart Publishing, 2016) ch 2.

²⁶ *Hosking* (n 15) [126], [128], [138].

In England, Article 8 of the ECHR has been a central driver of legal development and operated as a counterbalance to the pull of freedom of expression; in contrast to the United States, under the European Convention, and hence under English law, privacy and freedom of expression are, *ceteris paribus*, of equal weight. This difference plays out in different ways, including in a much more liberal approach to the grant of prior restraint in England, and more restrictive liability rules in the United States. Further, in England there has been persistent public concern about press conduct²⁷ and political inaction in its wake, leaving the courts to ‘sort out the mess’.²⁸ It is notable in this regard that the most significant damages judgment²⁹ in England resulted from endemic phone-hacking practices by tabloid newspapers, and that many major cases, including the landmark decision in *Campbell*, concerned press intrusion.

In both Canada and New Zealand the courts, in developing privacy actions, have drawn inspiration from the respective sections of the Canadian Charter and New Zealand Bill of Rights that protect against search and seizure, and the inclusion of privacy as a fundamental human right in multilateral international treaties such as the International Convention on Civil and Political Rights and the United Nations Convention on the Rights of the Child. This is despite the lack of an enumerated right to privacy – and explicit recognition of a right to free expression – in each country’s domestic rights instrument. Canadian and New Zealand courts have also been influenced by the evolving statutory protection of privacy in their respective jurisdictions, which has been interpreted as evidence of the importance placed on privacy by contemporary society. The privacy actions recognised in the United States have also been highly influential, though the Canadian and New Zealand jurisprudence has been largely shorn of the sort of free speech fundamentalism that characterises the United States jurisprudence, meaning that the influence of United States doctrine is largely confined to the formulation of the elements and general structure of the actions. What appear at first sight to be the same actions may therefore operate quite differently in different jurisdictions because of varying background assumptions about the relative importance of given values. Though in New Zealand certain of the judgments in *Hosking* suggest that free expression may yet cast a shadow over the development of privacy law,³⁰ not least in the light of a human rights tradition that favours proceduralism over substantive entitlements³¹ (albeit the lead judgment³² did stress that in developing the disclosure tort it would be necessary to consider the differences in the

²⁷ See, eg, *An Inquiry into the Culture, Practices and Ethics of the Press: Report*, HC 780-I (2012).

²⁸ D Feldman, ‘Privacy-related Rights and their Social Value’ in Birks (ed) (n 1) 50.

²⁹ *Gulati v MGN Ltd* [2016] FSR 12 (Ch), affirmed [2016] 2 WLR 1217 (CA).

³⁰ Note in particular the strong emphasis on free expression in the dissenting judgments of Keith and Anderson JJ.

³¹ As observed in *Hosking* (n 15) [92]. The proceduralist underpinnings of the New Zealand Bill of Rights Act 1990 reflect in particular the intellectual influence at the time of drafting of JH Ely, *Democracy and Distrust* (Cambridge, MA, Harvard UP, 1980).

³² *Hosking* (n 15) [76].

constitutional frameworks of New Zealand and the United States). The differing relative weight given to privacy versus free expression in New Zealand compared to, say, England may help to explain why the New Zealand Court of Appeal did not, when importing the disclosure tort from the United States, eschew the high threshold for breach while English courts rejected it: in New Zealand, for liability to be established, the plaintiff must show both that he or she had a reasonable expectation of privacy and that disclosure would be highly offensive to a reasonable person, whereas in England the courts simply ask whether the claimant had a reasonable expectation of privacy which, if breached, establishes *prima facie* liability.³³ These differences may feed through to remedies: for example in *Hosking*, Tipping J indicated that, in general, there would be very limited scope for interim relief that impinged upon free expression.³⁴ Further, in contrast to English jurisprudence,³⁵ the judgments in *Hosking* do not seem to contemplate damages for the infringement in itself (though the issue of damages was not examined in great detail).³⁶ It is worth noting in this regard that jurisdictions such as New Zealand and Canada have not experienced many of the intrusive media practices that prevail in England, at least not with the same prevalence.

In respect of Australia, regard must be had to, *inter alia*, the implied freedom of political communication under the Constitution (and the lack of any right to privacy or rights against search and seizure therein), the Federal Government's lack of action on recent Law Reform Commission recommendations to enact a statutory privacy action,³⁷ greater opposition to any fusion of law and equity than in other common law jurisdictions (especially in New South Wales) and, more generally, the lack of any federal bill of rights and the comparatively narrow conception of the judicial role under the Australian separation of powers. All of these factors could militate against bold judicial steps towards recognition of a free-standing privacy action and the muscular approach to remedies that has been taken in other jurisdictions.³⁸

V. Core Issues

The chapters in this collection interrogate core issues in the emergent law of remedies for breach of privacy. This section will outline each issue in turn and introduce the chapters.

³³ Tipping J explicitly referred to protection of free speech in formulating the relevant legal tests: *ibid* [255]–[256].

³⁴ *ibid* [258].

³⁵ See *Gulati* (n 29).

³⁶ *Hosking* (n 15) [126], [128], [138] (indicating a focus on factual harms).

³⁷ Australian Law Reform Commission (n 10).

³⁸ Albeit note that various of the judgments in *Lenah Game Meats* (n 9) indicate openness to further legal development (see, eg, [132], [328]–[336]).

A. Injunctions

The decision whether to grant an injunction to protect privacy implicates a complex web of interests and requires courts to strike a sometimes difficult balance between competing interests. The question of how to strike this balance is perhaps most difficult where plaintiffs seek to restrain the publication of information which they allege violates their privacy rights, especially where a so-called super-injunction is claimed; that is an injunction, a term of which is that the existence of the injunction and proceedings cannot be disclosed. Courts must, in making decisions about whether to grant such relief, consider not only the importance of protecting privacy, but also other fundamental interests including freedom of expression and open justice. Sir Michael Tugendhat's chapter squarely addresses these issues, his analysis being informed by his long experience at the coalface, Sir Michael being one of the leading judges who forged the English law of privacy. His chapter offers a careful analysis of the law and practice of privacy injunctions in England, in particular pre-publication interim non-disclosure orders – including consideration of the leading case of *PJS*³⁹ – examining the circumstances in which such orders may be necessary and justified. The chapter explores the origins of super-injunctions, the evolution of the law and practice of such relief over time, and the controversy that has sometimes attended grant of such orders; Sir Michael discusses and responds to misreporting and misinformed criticism of the use of such injunctions to protect privacy rights. Importantly, in addition to those interests already mentioned, he places emphasis on the maintenance of the rule of law as a fundamental value that ought to inform consideration of injunctive relief, specifically in the context of the relationship between the courts and Parliament.

The issue of injunctions, and particularly prior restraint, is one that demonstrates the importance of local factors in shaping the law. In this regard the law as it has developed in England and other common law jurisdictions such as Australia, discussed in Sir Michael's chapter, and Canada, discussed in Jeff Berryman's chapter, stands in contrast to the approach in the United States. As David Partlett elaborates in his chapter on the approach to privacy remedies in the United States, prior restraint is frowned upon and rarely granted because of the privileged position of the First Amendment within the legal system. Injunctive relief is available, but only in a narrow band of cases where property rights and harm to dignity combine with minimal impingement upon free speech.

Particular challenges in respect of compliance with, and thus the efficacy of, injunctions can arise within the field of privacy. A number of these challenges are considered in the chapters. For example, Sir Michael considers the use that has been made of parliamentary privilege by Members of Parliament to defy non-disclosure orders, and the case of *PJS*, in which an order was maintained despite the wide availability of the relevant information on the Internet. Jeff Berryman, in

³⁹ *PJS v News Group Newspapers Ltd* [2016] AC 1081.

considering the Canadian position, examines the challenges posed in cases where the plaintiff seeks removal of information from the Internet, including the extra-territorial reach of court orders.

Other chapters consider important questions of general principle as they apply in the field of privacy. The chapter by Barbara McDonald and David Rolph and that by Peter Turner set out the various ways in which the law governing injunctions is affected by whether the privacy action is classified as breach of confidence, for which injunctions have historically been a core remedy in equity's exclusive jurisdiction, or a tort, in which case injunctions will be granted in equity's auxiliary jurisdiction. Those two chapters, as well as that by Megan Richardson, Hon Marcia Neave and Michael Rivette, consider the potential for so-called Lord Cairns' Act damages to be awarded for a past breach of confidence in cases where the court would have had jurisdiction to entertain an application for an injunction to prevent disclosure. They focus on the important Victoria Court of Appeal decision in *Giller* – in which Neave delivered the lead judgment and Rivette was counsel.⁴⁰ The chapters reach different views on the acceptability in principle of such awards. In the context of English law, the chapter by Jason Varuhas considers in detail when, if the privacy action is classified as a tort, damages in lieu of an injunction ought to be awarded and how such damages should be assessed. The chapter by Robert Stevens also discusses such damages.

In addition to analysis of injunctions, the chapter by Turner examines the availability and role of a range of other forms of specific relief in equity, such as delivery up and the cancellation or destruction of documents or chattels, while the chapters by Rodger Haines QC and Normann Witzleb consider various orders available under data protection statutes.

B. Money Remedies

The question of what principles should govern money remedies for breach of privacy, including rules of quantification, is perhaps the most pressing issue in the emerging law of privacy across common law jurisdictions. Many questions of basic principle remain unresolved, including the types of available damages, the nature of compensatory awards and the heads of recoverable loss that ought to be recognised. Deeper scholarly work on the theoretical underpinnings of damages for breach of privacy has also been in short supply.

This section will set out the various aspects of money remedies discussed in this collection. It should be noted that in addition to the chapters discussed in this section, which focus on specific issues relating to money awards, the chapters by Berryman and Partlett (discussed in section V.E below) provide a general analysis of the law and practice of damages for breach of privacy in each of Canada and the

⁴⁰ *Giller* (n 11).

United States, while the chapters by Witzleb and Haines (discussed in section V.F) consider the law and practice of money awards under privacy statutes.

i. Loss

One of the core issues, which forms the key focus of four chapters in this collection, is the availability of damages for breach of privacy in the absence of consequential or factual losses such as negative physical, emotional or economic effects. Consideration of this issue is spurred by contemporary academic writing, which has argued that damages for breach of a right in itself are and ought to be available in certain tort contexts. In the field of privacy, consideration of the issue is prompted by the seminal English judgment of Mann J, upheld by the Court of Appeal, in the phone-hacking case of *Gulati*, in which he held that substantial – ie more than nominal – compensatory damages could be awarded for the interference with privacy in itself and that such damages, while compensatory in nature, should be distinguished from damages for factual losses such as emotional distress.⁴¹ Such damages may be recovered for the wrong regardless of whether the claimant suffers any negative factual effects, such as physical or psychological harm, mental distress or economic loss.

There is much terminological and conceptual confusion that attends discussion of damages absent factual loss. For this reason it is important at this stage to distinguish the type of award in *Gulati* from two other types of awards. First, so-called ‘vindictory damages’ have been awarded in a number of Privy Council appeals from the Caribbean.⁴² These types of awards (discussed further below) are not compensatory, whereas the award in *Gulati* is. Second, as discussed in the chapter by Berryman on Canadian privacy remedies, in the important case of *Jones v Tsige* the Ontario Court of Appeal recognised a type of damages for intrusion upon seclusion that appears to be available absent factual loss, but the exact conceptual nature of which is not clear.⁴³ Later jurisprudence may well reveal that such awards are similar to those recognised in *Gulati*. But given the ‘functional’ conception of damages for non-pecuniary loss in Canada – which contrasts with the ‘conceptual’ approach in *Gulati* – it may be that such awards do not purport to restore through a money award the right that has been invaded but are rather a solatium designed to bring comfort or happiness to the plaintiff for the violation of his or her rights.⁴⁴

⁴¹ See *Gulati* (n 29).

⁴² See, eg, *Merson v Cartwright* [2005] UKPC 38; *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328.

⁴³ *Jones* (n 17).

⁴⁴ On the functional approach to non-pecuniary loss, and competing approaches more generally, see A Ogus, *The Law of Damages* (London, Butterworths, 1973) 194–96, 206–18. See also, on the Canadian functional tradition: J Berryman, ‘Non-Pecuniary Damages for Personal Injury: A Reflection on the Canadian Experience’ in E Quill and RJ Friel (eds), *Damages and Compensation Culture Comparative Perspectives* (Oxford, Hart Publishing, 2016).

Returning to the awards made in *Gulati*, many questions arise in respect of such damages, ranging from their conceptual nature and normative justification to more practical questions about how judges ought to quantify such losses. The chapters offer a plurality of perspectives on this issue. Jason Varuhas and Nicole Moreham support the availability of compensatory awards absent factual loss, while Robert Stevens and Eric Descheemaeker oppose their availability for breach of privacy, each on different grounds.

In his chapter, Varuhas argues that such damages are best conceptualised as ‘normative’ damages for the wrongful interference with the privacy interest in itself. They are normative in the sense that they do not respond to a factual loss but rather compensate for a loss constructed by the law so as to give effect to the protective and vindicatory policies that underpin the creation of fundamental rights. Such damages have long been available in the context of other actions that protect basic rights, principally torts actionable per se, such as trespass to land, false imprisonment and defamation. Varuhas argues that such damages ought also to be available for breach of privacy, as the privacy action in English law shares all of the fundamental features of torts actionable per se, is underpinned by similar protective and vindicatory policies, and protects an interest which is similarly basic. Put simply, such damages give effect at the remedial stage to those policies that underpin creation of the primary rights. The chapter goes on to explain in detail how such awards can be quantified in a principled fashion, which is distinct from the method by which compensatory damages for consequential factual losses such as distress are quantified, and distinguishes such damages from exemplary damages, restitutionary damages, vindicatory damages and damages in lieu of an injunction. For good measure, Varuhas also argues that the English Court of Appeal was, with respect, right to reject an argument that damages for breach of privacy should follow the remedial practices of the European Court of Human Rights.

Consistently with these ideas, Moreham’s chapter explores the conceptual nature of damages for the loss of privacy in itself. She argues that the availability of such damages is consistent both with widely held philosophical, sociological and psychological understandings of the nature of privacy harms and, as a result, with the reasons why English courts developed the misuse of private information action in the first place. Indeed, the availability of such damages follows from the action being per se actionable, that is actionable absent any proof of actual harm such as distress. She contends such damages should be understood as compensating for the loss of dignity and autonomy inherent in all breaches of privacy, and connects right and remedy by explaining that the need to protect these interests also provides the justification for the legal right to privacy itself. Damages for distress and other harms are distinct from damages for loss of autonomy and dignity, and should also be recoverable.

Stevens and Descheemaeker are more sceptical about recent developments. Stevens’ important book, *Torts and Rights*, was among the first pieces of scholarship to recognise and systematically analyse the availability of damages absent

loss in the law of torts.⁴⁵ He has argued that such damages are best explained as substitutive; that is, they are a second-best substitute for performance of a primary obligation, and are distinct from compensatory damages. However, in his chapter in this collection he argues such damages should not be available for breach of privacy. He offers sceptical reflections on the development of a privacy action in English law, questioning the justifications for affording legal protection to privacy through the imposition of liability. He argues that the justification for the rights that we have in the law of torts is that those rights maintain equal freedom; rights ought not to be recognised simply to secure virtuous behaviour, or to protect people from misery or distress. However, he argues that protection of privacy cannot be justified on the basis of equal freedom, and considers other alternative rationales such as autonomy and human rights to be similarly unconvincing. Given his conclusion that the normative underpinnings of the privacy action are questionable and that privacy is not of the same order as other basic rights protected by the common law, he argues that if such an action is to be recognised then damages should only be available for consequential factual harm and substitutive damages should be ruled out.

Descheemaeker argues against recent privacy developments for a different reason. In his view, it is incoherent, within the emerging law of privacy, to allow recovery of compensatory damages for both the violation of the right in itself and the intangible consequential harms that flow from the wrong, such as mental distress. He argues these are alternative, not cumulative, bases for damages; in other words, the law can either select a model in which the interference is a loss in itself or it can elect a model in which recoverable losses are those consequential upon the interference, but not both. The availability of both types of damages within the emergent law of privacy therefore melds what Descheemaeker considers to be two distinct analytical models of conceptualising loss. This, he says, leads to incoherence and double recovery. He argues that this melding of analytical frameworks is at variance with what he considers to be tort 'orthodoxy', and that a clear justification is therefore required if damages for breach of privacy are to diverge from the approach within the rest of tort.

While the foregoing chapters focus on damages for a breach of privacy in itself, the chapter by Richardson, Neave and Rivette focuses on money awards for the consequences of a breach of privacy, specifically mental distress. The authors argue that mental harm is and ought to be a recoverable head of loss in privacy actions, whether those actions are in equity or common law, since a large part of the point of such actions is the avoidance or alleviation of such harms. The chapter begins with a valuable exegesis of recent and older English and Australian cases, which the authors argue recognise either implicitly or explicitly that mental distress is a recoverable head of loss in cases of breach of privacy, whether the action is in equity or at common law. The chapter then reinforces the conclusions derived from

⁴⁵ R Stevens, *Torts and Rights* (Oxford, Oxford UP, 2007) ch 4.

doctrinal analysis by arguing that awards for mental distress ought to be available for reasons of policy and logic, focusing on the contentious question of whether such awards should be available if protection is situated within the equitable action for breach of confidence. It should be noted that the authors, in their conclusion, make clear that their support for awards for mental harm should not be taken to rule out awards for the breach of the right in itself; indeed they consider that the two types of award are both of importance and should be understood as conceptually distinct.

The specific issue of whether compensation for mental distress is recoverable for breach of confidence in cases concerning privacy is also addressed in the chapter by McDonald and Rolph, who are sympathetic to arguments that compensation should be available, and by Turner, who – in an extended treatment of the issue – considers equity to be ill-equipped to protect against the kinds of personal harms, like distress, that infringement of privacy tends to involve. In Turner's view, it would be more rational and coherent to house protection of privacy within the law of torts.

It is pertinent to note at this stage that damages for breach of privacy under data protection statutes have tended to focus on compensation for mental harm. Such awards under statute are a focus of the chapters by Haines and Witzleb (see section V.E). As Berryman's chapter shows, focusing on the British Columbia Privacy Act 1996, where the statute creates a freestanding privacy tort, damages beyond mental distress may be recognised (depending, of course, on the terms of the particular Act).

ii. Gain

Moving from money remedies that compensate for loss to those which reverse wrongful gains, Katy Barnett's chapter considers the contentious question of what role gain-based remedies do and should play within the developing privacy actions, focusing on Australian and English law. The question ties into wider debates over the fusion of law and equity, and over the proper classification of certain types of damages as loss- or gain-based. Barnett argues that whether gain-based relief ought to be available for breach of privacy should depend not so much upon the historical division between equity and common law but more upon the normative reasons for recognising a privacy action. She argues that it is preferable for privacy to be protected as a standalone tort rather than via breach of confidence, but that this should not bar the availability of gain-based relief, specifically an account of profits, which has its origin in equity. Coherence and a concern for deterring profit-driven breaches support the availability of a disgorgement remedy for privacy torts, although such awards should only be available where an injunction is unavailable, compensatory damages are inadequate, and the defendant has acted in conscious and advertent disregard of the claimant's rights with a view to making a profit. In contrast, reasonable fee damages, which Barnett would classify as restitutionary in nature, should not be available in privacy cases as they are at

odds with the fundamental nature of privacy. The Lord Cairns' Act jurisdiction should not be used as a mechanism for awarding gain-based relief, as this is to obscure what is really happening and avoids consideration of the normative basis of the cause of action.

Varuhas propounds a different set of views. He argues that the remedy of an account of profits should not be available in the context of the English privacy action, or at least that it should only be available exceptionally. Having argued that the action is closely analogous to vindicatory actions in tort, he highlights a number of crucial ways in which the tort context differs from the equitable context in which disgorgement awards have traditionally been made, and which in turn render it inappropriate as a matter of principle to read the remedy across from equity to tort. He also argues that exemplary damages have many advantages over an account of profits as a response to profit-driven wrongs, a view which Barnett debates in her chapter. He maintains that user or reasonable fee damages are not restitutionary in nature, contrary to the claims of restitution theorists, and further argues that such a market measure would be inappropriate in the privacy context as it would treat a basic dignitary interest as a tradeable commodity.

Turner similarly contends that if a tortious privacy action is recognised, an account should not in general be available, such remedies being associated with voluntary, facilitative relationships which protect proprietary entitlements, a paradigm removed from an obligation imposed by law to protect an interest that is not conceptualised as proprietary in nature. Similarly, when it comes to the potential for waiving a tort and seeking money had and received in a claim for breach of privacy, he considers that much depends on whether the privacy interest is properly conceptualised as proprietary in nature. In Turner's view, so much uncertainty surrounds the concept of restitutionary damages that it is difficult to reach a conclusion as to what role, if any, such awards ought to play in privacy cases.

iii. Exemplary and Vindictory Damages

Several chapters consider the availability of other types of awards. In his chapter, Varuhas argues that, by analogy with other actions that protect basic rights, exemplary damages should be available for the English privacy tort, and he responds to arguments that such awards are impermissible as contrary to the practice of the European Court of Human Rights. Such awards could play a crucial role in response to profit-driven privacy invasions by the media. The chapters by Turner and McDonald and Rolph both observe that the availability of exemplary damages has depended and is likely to depend on whether privacy is protected by the development of a privacy tort or through breach of confidence, as punishment as a goal is traditionally unknown in equity, though the extent to which equity and punishment are strangers varies across jurisdictions. The chapters by Berryman and Partlett discuss the availability of exemplary damages for breach of privacy in Canada and the United States respectively. As they record, significant awards have been made in both countries, including in the Gawker sex tape case in the

United States and the ‘revenge porn’ case of *Jane Doe* in Canada. Such awards have not in general been recognised under statutory privacy protections, as discussed by Witzleb and Haines in their respective chapters, marking a potential area of divergence between common law and statutory protection. However, the nature of statutory protection may vary, and this may in turn affect the approach to remedies: as Berryman discusses in his chapter, the British Columbia Privacy Act 1996 creates a tortious action for breach of privacy – in contrast to the New Zealand and Australian statutes, which are in the nature of data protection statutes – and exemplary damages are available.

Important questions arise over the availability of the novel head of ‘vindictory damages’, especially since the idea of vindication is often invoked in the privacy context. Such damages have been recognised in several Privy Council appeals from the Caribbean concerning constitutional violations,⁴⁶ and considered – and rejected – by the UK Supreme Court in the *Lumba* case in the context of the tort of false imprisonment.⁴⁷ In his chapter, Varuhas argues such damages should not be available for breach of privacy principally because they are unnecessary, given that other orthodox remedies can provide sufficient protection and vindication of privacy, a position Moreham agrees with in her chapter. Importantly, Varuhas maintains that such damages should not be confused with normative damages, which compensate for an interference with privacy interests. The vindictory damages recognised in Caribbean appeals are *not compensatory* but either perform a function akin to exemplary damages or operate as an enhanced form of nominal damages. Stevens also considers it important to maintain this distinction, lest different types of award with different aims become confused. Descheemaeker also considers vindictory damages, albeit his definition is wider than those awards made in the Caribbean cases, examining their coherence in the light of the availability of nominal damages and compensatory damages for factual harm. Witzleb considers the potential for the award of vindictory damages under Australian privacy legislation, observing that their availability may depend on whether the primary obligations under statute are conceptualised as rights. This analysis dovetails with Berryman’s analysis of the British Columbia Privacy Act 1996, which does create a statutory tort, and for which damages absent loss do seem to be available.

C. Apologies

Apologies and corrections have emerged both as potentially important considerations in a court’s assessment of damages awards and as freestanding, novel remedies in common law jurisdictions, adding new strings to the courts’ remedial

⁴⁶ See, eg, those cases cited in n 42.

⁴⁷ *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245.

bow and supplementing existing remedies. Robyn Carroll's chapter explores the role and effectiveness of apologies and corrections in privacy cases. She takes as her starting point the Australian Law Reform Commission's unimplemented proposal for the enactment of a statutory tort of serious invasion of privacy and recommendations for incorporating apologies and corrections within the proposed legislation.⁴⁸ Two key elements of the Commission's proposal are assessed: the requirement that courts consider apologies and corrections when quantifying damages, and provision for court-ordered apologies and corrections. The chapter explores the place of apologies and corrections in the legal context, appreciating the inherent subjectivity of both their purpose and effect. In so doing, the author argues that any legislative incorporation of either remedy must allow sufficient scope for the courts to take account of individual circumstances. For example, when assessing how an apology or correction may affect damages, consideration of individual circumstances is vital, as factors such as the timing and fullness of an apology may affect the degree of emotional distress suffered by a plaintiff. In terms of a court-ordered apology or correction, the remedy remains rare and will only be appropriate in limited circumstances. However, if legislated for, courts must still account for specific factors in deciding whether such order is appropriate. Ultimately, Carroll argues that apologies and corrections have a valid place as remedies for serious invasions of privacy.

Although his predominant focus is money awards, Witzleb considers apologies as a means of providing relief for breaches of the Australian Privacy Act 1988. In that context, the remedy has been regularly ordered by the Privacy Commissioner. Apologies voluntarily given may be considered in assessing compensation under the Act – which is also the case in respect of awards under the New Zealand Privacy Act 1993, as discussed by Haines in his chapter.

D. Classification: Equity and Torts

The issue of legal classification is a golden thread that runs through all of the chapters in this collection. However, two chapters have this topic as their focus, specifically the remedial ramifications of classifying the privacy action as equitable or tortious. Both focus on England and Australia. These jurisdictions have both protected privacy via the equitable action of breach of confidence, at least initially in the case of England. The protection of a dignitary interest, which one might typically associate with the functions of tort, via an equitable action in turn raises questions of classification and coherence. The issue does not arise in the same way in jurisdictions such as New Zealand and Canada, which have explicitly recognised the new forms of privacy action as torts rather than variants of breach of confidence.

⁴⁸ Australian Law Reform Commission (n 10).

The chapter by Barbara McDonald and David Rolph considers a number of legal ramifications that flow from the classification of the English action for misuse of private information as a claim in tort by Tugendhat J in *Vidal Hall v Google Inc*, a decision upheld by the Court of Appeal.⁴⁹ Such a classification had been hinted at in previous decisions but only in obiter dicta, and it raises, without a clear answer, the question of when and how this tort was created by the courts. While the classification was for the purposes of the Civil Procedure Rules, the Court of Appeal seemed to accept that the classification would apply more broadly and recognised that the ramifications for issues of vicarious liability and remedies would need to be worked through in future cases. The chapter contrasts principles of remedies applicable to claims based in equity and those based in tort, looking particularly at money remedies and injunctions, also considering the implications of the Human Rights Act 1998 for the latter. The chapter considers several further issues of great practical significance that have so far been underexplored in the literature: the implications of classifying the action as equitable or tortious for choice of law – a matter which is the focus of Richard Garnett’s chapter (see section V.G) – and cutting-edge issues of attribution of conduct and vicarious liability.

In his chapter, Turner considers the remedial implications of protecting privacy through breach of confidence or through development of a dedicated action in tort. He considers the implications for injunctions, compensation, account of profits, restitution, aggravated awards, exemplary awards and proprietary relief. He concludes that the law of remedies would differ fundamentally depending on whether a legal entitlement to privacy was established in equity or at common law. He argues that equity is ill-equipped to develop an equitable law of torts, so that liability for invasions of privacy should be developed at common law; outside of cases of voluntarily assumed obligations of confidentiality, and except where equity may act in aid of common law rights, interests protected by a privacy entitlement make no call on equity to correct the conscience of the defendant who violates the plaintiff’s privacy. However, if privacy is protected via tort, equity could still intervene in appropriate cases in its auxiliary jurisdiction. For example, injunctions, delivery up and destruction of chattels would be commonly available, although equitable accounting and proprietary relief would most likely be unavailable.

Several other chapters squarely address the topic of classification. Richardson, Neave and Rivette consider how classification of the action would affect availability of compensation for mental distress. Similarly, Barnett considers how classification would affect the availability of gain-based relief. Moreham’s analysis is predicated on the view that privacy is a tort, and Varuhas mounts a sustained argument that the English privacy action is and ought to be properly classified as a vindicatory action, alongside other such tortious actions, including trespass, false imprisonment and defamation. Varuhas’s argument proceeds by demonstrating

⁴⁹ *Vidal-Hall v Google Inc* [2014] 1 WLR 4155 (QB), affirmed *Vidal-Hall* (n 21).

that the privacy action and other vindicatory actions protect similar interests, perform similar functions and share nearly identical internal legal structures. The law of remedies in privacy has gradually come into line with the law of remedies that prevails within vindicatory actions, and so, Varuhas argues, it ought to. The ramifications are that compensatory damages ought to be available for the infringement of the privacy right in itself as well as for proven consequential losses; that exemplary damages ought to be available; that gain-based remedies should not in general be available; and that damages should rarely if ever be awarded in lieu of an injunction for an ongoing infringement of privacy – an injunction should in general be granted. It also follows from classification of the action as analogous to vindicatory torts that the approach to damages should not follow the European Court of Human Rights' approach to 'just satisfaction' under Article 41 of the ECHR.⁵⁰

E. Comparison

As already discussed, one of the core themes of the collection is the importance of considering remedial questions in their jurisdictional context. The majority of the chapters in the collection, introduced in the preceding and following sections, focus on English and/or Australian law, while also integrating comparative insights, while Richard Garnett's chapter (see section V.G) considers the legal principles governing cross-border litigation in Australia, Canada, England and New Zealand.

Two chapters seek to provide a systematic analysis of the law of privacy remedies as they have developed in single jurisdictions, reflecting not only on legal doctrine but also the context in which doctrine has evolved. These chapters perhaps more than any others bring into focus the importance of local context in shaping remedial law, including national and subnational – Province or State – context. Jeff Berryman's chapter considers the laws of Canada, with a particular focus on Ontario, the common law jurisdiction among those considered herein which has most recently developed common law protection of privacy. David Partlett's chapter considers remedies for privacy actions in the United States, the jurisdiction whose laws have most strongly influenced the development of privacy actions across the common law world (since the United States was the first, among those countries considered herein, to develop a worked out set of common law privacy actions).

Berryman considers the emergence of privacy actions in the laws of several Canadian Provinces, in particular the emergence of common law privacy torts in Ontario, the approach to damages for these actions, the law and practice of class actions, and issues relating to injunctions. He charts the emergence, first,

⁵⁰ See further Varuhas (n 25) especially chs 2–3.

of an intrusion upon seclusion tort in *Jones* and then of a disclosure of private facts tort in *Jane Doe*, including the role played by the wider statutory context in Canada.⁵¹ He examines the approach to damages in regard to each, observing that only modest conventional awards were contemplated in *Jones*, while an approach akin to damages for sexual assault was adopted in *Jane Doe* resulting in awards far exceeding the range indicated in *Jones*. These decisions and their progeny are compared with the approach to damages under the British Columbia Privacy Act 1996, which creates a statutory privacy tort, courts in that Province notably adopting a higher level of awards. Berryman also notes wider contextual differences between England and Canada, which may account for the relative underdevelopment of the public disclosure tort and remedial principles in Canada and help to place the trajectory of Canadian legal development in perspective. He goes on to consider the law and practice of class actions in the privacy context (which have played a particularly important role in cases concerning accessing and disclosure of bank and health records). Given the modest range of damages indicated in *Jones*, such actions may be necessary to render litigation viable but there may be doubts over whether such claims are the most effective and efficient way to encourage good data management within defendant organisations, especially given the disruptive potential of damages litigation. Lastly, Berryman considers injunctions, discussing inter alia the challenges posed by ordering the removal of information from the Internet and the balance between protecting privacy and other important rights and principles.

Partlett's chapter examines the law of remedies in relation to the privacy torts recognised by the common law of the individual American States. The heart of the chapter is a detailed doctrinal exegesis of the law of remedies in the context of each of the four privacy actions recognised in State laws, with different issues arising in relation to each as well as common themes. One important theme, among several, is that courts subscribe to the American realist tradition of loosely tying remedy to primary right, the law reflecting a 'dualist' position, and that a wide range of remedies is available to perform a variety of functions. Another core theme that is brought out squarely by Partlett's discussion of the American context is the way in which the common law of torts is rooted in the local and national community of a jurisdiction. A fundamental aspect of the American context is the tension between the private privacy rights of individuals and the public imperative of free speech; the First Amendment 'juggernaut' has fundamentally shaped and enfeebled both liability rules within the privacy actions and the courts' approach to remedies, and led to adoption of prescriptive rules to constrain juries. The effect of the free speech imperative varies across the four torts and the different remedies awarded, its effect on the latter being most pronounced in (but by no means limited to) prior restraint. Thus despite its early acceptance and influential endorsement by Prosser, privacy law remains fragile, with no sign of change of direction in respect

⁵¹ *Jones* (n 17); *Jane Doe* (n 17).

of the First Amendment on the horizon. Other important contextual factors are discussed, including a relatively greater distrust of government action compared to other common law jurisdictions – with the grant of judicial remedies to constrain free speech viewed as government action – and a deep suspicion of local (State) norms on which protection of privacy rests. Thus, while the American model will always be of interest abroad, has shaped the development of privacy law in other common law jurisdictions and is elegant in its own way, it should be recognised as an unreliable model to be applied elsewhere. Context matters.

F. Statute

While many of the chapters in this collection focus on developments at common law or in equity, statute is of fundamental importance in any consideration of the protection of privacy through the imposition of civil liability. There are several reasons for this. First, over the last few decades common law jurisdictions have witnessed not only the recognition of judicially-created privacy actions, but also the passing of statutes dedicated to the protection of privacy. These protections may take different forms, but the two most important types are considered herein: data protection statutes and statutes that create privacy torts. No consideration of the remedies available for breach of privacy would be complete without discussion of the remedies available to victims of privacy violations under these statutes. Furthermore, consideration of statutory remedies would be incomplete without consideration of common law/equitable remedies and vice versa, as each provides the context in which the other operates and develops. Second, statute not only creates direct privacy protections and associated remedial powers, it may also directly or indirectly alter common law or equitable doctrine. For example, statutes, originally the Lord Cairns' Act and now its modern equivalents, provide jurisdiction for equitable damages to be awarded, for example in lieu of an injunction. The power to award such damages in a privacy claim is a core issue discussed in many of the chapters in this collection. We have also seen how rights protected in constitutions or under statutory rights charters may fundamentally shape the trajectory of legal development at common law or in equity. For example, the First Amendment has radically shaped common law privacy protection in the United States; Article 8 was a core driver of the development of the privacy action in English law, while the Article 10 right to freedom of expression affects defences and remedies; and the proliferation of statutory privacy protections was held to reinforce the need to develop privacy torts at common law in both New Zealand and Canada.

Two chapters consider the approach to remedies under what may loosely be described as data protection statutes. These statutes seek to regulate the collection, use and disclosure of personal data and information relating to individuals by public and private sector organisations, requiring relevant organisations to comply

with an enumerated set of privacy principles and/or privacy codes, and providing for remedies in cases of non-compliance. Claims for remedies under such statutes are typically to a privacy commissioner and/or tribunal in the first instance. The chapter by Rodger Haines QC considers the remedial jurisprudence under the New Zealand Privacy Act 1993, and the chapter by Normann Witzleb considers remedies under the Australian Privacy Act 1988. The chapters are path breaking. As far as the editors are aware, these are the first two detailed scholarly treatments of remedial law and practice under these statutes. Given the proliferation of similar statutes across the common law world, they will be of great interest not only in New Zealand and Australia, but in other jurisdictions as well.

Haines's chapter provides an overview of the New Zealand Privacy Act 1993, setting out its objectives, scope of application, the relevant privacy principles, criteria for actionability and the procedure governing claims. He makes the important preliminary point that while the statute has a human rights dimension, one of its purposes is the facilitation of data flows to enhance government and private sector efficiency. In the first instance, claims are to the Privacy Commissioner and then to the Human Rights Review Tribunal, of which Haines is Chairperson. There is a right of appeal to the High Court, though as Haines observes, the ordinary courts have played a limited role in shaping the remedial jurisprudence. A core criterion of actionability, which distinguishes the statutory claim from the privacy action at common law, is that the plaintiff must show a breach of a privacy principle *and* that this has caused an enumerated type of harm or negative consequence (albeit in certain instances causation of harm is deemed upon proof of breach). Interestingly the harms relevant to actionability do not exactly overlap with the types of harm for which damages may be awarded. The bulk of Haines's chapter is dedicated to doctrinal exegesis of the Tribunal's burgeoning jurisprudence and the High Court's smaller body of case law. He considers each available remedy in turn, including declarations, restraining and remedial orders and damages, with a particular focus on damages. In contrast to the orthodox position at common law, damages are not available as of right. Haines explains how the damages jurisprudence has developed over time and the respective roles of the Tribunal and the High Court in doctrinal development, how the defendant's conduct may affect damages, and the Tribunal's capacity to award damages greater in quantum than those sought by the plaintiff. He provides a valuable account of the heads of loss which are recoverable, the heads including pecuniary loss, loss of a benefit, and humiliation, loss of dignity and injury to feelings. In terms of quantum, significant awards have increasingly been made, and the Tribunal has articulated damages guidance, adopting bands, to facilitate consistency in assessment of damages for emotional harm – whilst also emphasising that each case must be assessed on its own facts.

In the absence of a common law right to privacy in Australia, other private law actions and regulatory mechanisms have been relied upon to provide relief for invasions of privacy. Witzleb's chapter examines one regulatory mechanism that

is of growing practical importance. The Australian Privacy Commissioner has the power, pursuant to the Privacy Act 1988, to investigate individual complaints of breach of informational privacy principles by organisations and to issue determinations. Although successive Privacy Commissioners have made sparing use of their powers, the current Commissioner has adopted a more pro-active approach so that there are now over 30 published determinations. The chapter begins by outlining the core substantive and procedural features of the Privacy Act and the determinations that can be made under it. Notably, determinations by the Privacy Commissioner, including those declaring that compensation should be paid, are not binding, although the Commissioner or applicant can seek court enforcement. Determinations are subject to merits review in the Administrative Appeals Tribunal, and a small number of Tribunal decisions have set the parameters of the Commissioner's remedial approach. The chapter goes on to provide detailed analysis of this emergent body of determinations and case law. It reviews the range and quantum of monetary awards made under the determinations power. A particular focus is assessment practices in relation to non-economic losses, which include aggravated damages. The chapter explores the standards that guide the making of awards, including quantum – which has generally been modest – and interrogates the relationship between such awards and common law damages. It establishes that the principles governing statutory redress are aligned with those from related areas such as anti-discrimination law, and that the principles applying to equivalent remedies in the ordinary law of torts have been highly influential. Witzleb observes that whether awards are or ought to be conceptualised as vindictory in nature is a complex matter, especially as the norms under the Privacy Act are not rights as such, though he notes the idea of vindication is evident in a number of determinations. The chapter goes on to discuss the Commissioner's approach to the availability of non-compensatory remedies, such as apologies and orders to review or change existing privacy practices.

Berryman's chapter also warrants mention in relation to the role of statute in the law of privacy remedies. In the course of his chapter on Canadian privacy law he considers remedial practice under statutes creating torts of privacy in several provinces, and compares the approach to damages under these statutes to remedial Practice in Ontario, where privacy torts have been recognised at common law. He also examines how the approach to remedies under privacy statutes in other Provinces, in particular the Manitoba Privacy Act 1987, influenced the development of common law remedies principles in Ontario.

G. Cross-border Issues

The collection ends on a high with Richard Garnett's comprehensive analysis of the cross-border issues that arise in connection with breaches of privacy. The rules of private international law are of crucial importance in considering remedies

for breach of privacy, as they will affect, inter alia, access to remedies and which country's laws will be applied to a given claim. Technological advances, as well as other phenomena such as the increased mobility of natural and legal persons, have increased the scope for infringements of privacy that transcend national borders, including the capacity for simultaneous and multi-territorial infringements, and for breaches which result from acts in different countries. As such, conflict-of-laws doctrine will be of increasing importance in claims for remedies for breach of privacy. Garnett examines the law of Australia, Canada, England (and by association the EU) and New Zealand. In respect of each jurisdiction he considers three key matters. First, the laws governing whether the court of a given country has jurisdiction to hear a claim, including consideration of common law and statutory jurisdiction, and will exercise that jurisdiction. Second, the rules governing what law – local or foreign – the court will apply to the merits of the case, including liability rules and remedial law. Third, the circumstances in which a court will recognise and enforce the judgment of a court in another jurisdiction, including the grounds on which a foreign judgment may be impeached. McDonald and Rolph also consider cross-border issues in their chapter, focusing on the implications of classification of a privacy action as a tort or variant of breach of confidence, a matter also examined in detail by Garnett.