EVOLVING PERSONAL TORTS

An Introduction

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1 The law of torts is more dynamic than ever. This is a consequence of an increasingly interdependent, ever-busier, and rapidly changing world, in which the civil law has an important continuing role to play in ensuring minimum standards of interaction between persons and in compensating for wrongs committed. Typically, courts must make their decisions in the absence of comprehensive legislative guidance. The genius of the common law of torts is its ability to respond to cases as they arise, while principles are worked up iteratively over time. Courts are assisted in their task by the ability to compare developments across different jurisdictions and in their partnership with the academic community.

2 This journal takes its place alongside a number of significant collections on tort law, typically organised by theme. Several of these collections of essays have sprung from conferences organised by Andrew Robertson. Volumes on *The Goals of Private Law*[1] and on *Rights and Private Law*,[2] for example, contain important essays that attempt to distil what tort law, and component actions, are fundamentally concerned with. They seek to analyse pervasive concepts and to answer the question whether tort law should be seen in instrumentalist terms, or should be taken to have as its concern fundamental personal rights or protected interests. Other recent collections consider tort law more generally from a "philosophical" point of view,[3] debating such matters as

1 *The Goals of Private Law* (Andrew Robertson & Tang Hang Wu eds) (Hart Publishing, 2009).

2 *Rights and Private Law* (Donal Nolan & Andrew Robertson eds) (Hart Publishing, 2012).

3 *Eg, Philosophical Foundations of The Law of Torts* (John Oberdiak ed) (Oxford University Press, 2014); *Philosophy and the Law of Torts* (Gerald J Postema ed)

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whether there is a basic corrective structure to tort law and whether tort obligations can be grounded in moral notions of justice and desert.[4]

3 This journal opens with an article by Allan Beever, which is a bridge connecting those significant collections just described with the other articles in this collection. However, in common with those other articles, Beever applies his theory of rights to tort doctrine. This journal is a contribution to various debates about the doctrine itself. It focuses upon "evolving personal torts". Leading writers on tort law from Singapore and other Commonwealth jurisdictions have chosen what they consider to be important recent developments closely affecting individuals (rather than those which are predominant in commerce). The articles consider issues regarding the trespass torts, what constitutes damage in tort law, derivation of the standard of care in negligence and rapidly evolving torts in defamation and privacy. Two articles consider important doctrines for extending liability in favour of individual plaintiffs, these relating to vicarious liability and to secondary liability more generally. It is the authors' hope that the articles in this journal will prove stimulating to fellow academics and of use in the task of the common law judges as they respond to the challenges facing tort law in a rapidly changing world.

I. Rights

4 Honoré famously suggested that states and courts make conduct tortious so as to "define and give content to people's rights by providing them with a mechanism for protecting them and securing compensation if their rights are infringed".[5] However, until recently, tort law has been understood as a law of wrongs – that is to say, as a law that identifies just when tortfeasors have committed recognised legal wrongs against victims. This conception might be argued to ignore the rights that tort law implicitly recognises within its catalogue of actions. Although in *Ashley v Chief Constable of Sussex*[6] Lords Neuberger and Carswell thought that the function of tort law is compensatory and not vindicatory in nature, the majority view was that tort law vindicates victims' rights. This seems to represent the modern thinking. Indeed, an

(Cambridge University Press, 2001); and *Philosophical Foundations of Tort Law* (David G Owen ed) (Oxford University Press, 1995).

4 Other collections include *Tort Law: Challenging Orthodoxy* (Stephen G A Pitel, Jason W Neyers & Erika Chamberlain eds) (Hart Publishing, 2013); *Emerging Issues in Tort Law* (Jason W Neyers, Erika Chamberlain & Stephen G A Pitel eds) (Hart Publishing, 2007); and *Exploring Tort Law* (M Stuart Madden ed) (Cambridge University Press, 2005).

5 Anthony M Honoré, "The Morality of Tort Law" in *Philosophical Foundations of Tort Law* (David Owen ed) (Clarendon Press, 1995) at p 75.

6 [2008] 1 AC 962.

important recent trend in tort scholarship has been to focus on the rights largely neglected by the focus on the compensatory role of tort law. For example, Robert Stevens in his book *Torts and Rights* conceives a tort to be a wrong, which in turn is a breach of duty – and that breach is the infringement of a right. Stevens argues that a rights model provides a better understanding of tort law and is also "superior, at least within the system of adjudication which exists in the common law world".[7]

5 In his article, Beever continues this important conversation on rights within tort law by making two main points. First, Beever argues that, while the new emphasis on rights has led to the general defeat of the "loss model", the dismantling of that model has not been completed.[8] Indeed, a vestigial influence of the loss model inappropriately leads to the new identification of rights that are closely connected with loss.[9] Secondly, Beever provides some possible answers to the question of what tort law is primarily concerned with, if it is not about loss without recourse to the rights implicitly protected. He believes that a more morally attractive picture of tort law is available than that suggested by the loss model.[10]

6 Beever discusses these two main points with reference to the torts of defamation and the law of trespass to the person. He attempts to show first, through the law of defamation, that the loss model wrongly focuses existing analysis on the notion that the tort protects a right to reputation.[11] Similarly, he suggests that the loss model wrongly leads one to think that the law of battery protects a right to bodily integrity. This appears to be contrary to a long history of courts permitting redress for batteries where there is no loss and no substantial violation of the integrity of the body.[12] Through his detailed analysis of the other trespasses to the person, Beever does well to show that tort law "is not merely society's response to loss but is rather a primary legal mechanism for the recognition and protection of some of the most fundamental human rights".[13] Indeed, he forcefully makes the point that the "rights that tort law protects are not the products of political compromise in a society governed by principles of distributive justice", but that tort law:[14]

> … deals with 'natural duties' that 'apply to us without regard to our voluntary acts', that 'have no necessary connection with institutions or

7 Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) at p 306.
8 See Allan Beever, "What Does Tort Law Protect?" (2015) 27 SAcLJ 626 at 627.
9 See Allan Beever, "What Does Tort Law Protect?" (2015) 27 SAcLJ 626 at 627–628.
10 See Allan Beever, "What Does Tort Law Protect?" (2015) 27 SAcLJ 626 at 628.
11 See Allan Beever, "What Does Tort Law Protect?" (2015) 27 SAcLJ 626 at 628–631.
12 See Allan Beever, "What Does Tort Law Protect?" (2015) 27 SAcLJ 626 at 631–634.
13 See Allan Beever, "What Does Tort Law Protect?" (2015) 27 SAcLJ 626 at 638.
14 See Allan Beever, "What Does Tort Law Protect?" (2015) 27 SAcLJ 626 at 639.

> social practices; their content is not, in general, defined by the rules of these arrangements'.

By this view, for example, a claim for battery is an "assertion that an individual has failed to respect one's moral personality and a demand that this failure be recognised, acknowledged and remedied by the court",[15] rather than a request for compensation for injury. Ultimately, Beever sees tort law as the "chief mechanism through which the moral personality of the individual is recognised, protected and enforced and it requires wrongdoers to fulfil their primary moral duty".[16]

II. Damage

7 It is trite law that the claimant must be able to prove that he suffered actual damage caused by the tortfeasor's tortious conduct in a majority of torts. In a small number of torts, however, proof of actual damage is not required and the mere violation of the victim's interest is enough to give rise to a tortious claim. The difference between torts that are actionable upon damage and those that are actionable *per se* is a historical one and some have questioned whether this distinction is necessary and principled today. For example, in *Watkins v Secretary of State for the Home Department*[17] Lord Carswell suggested that it might not:[18]

> … unreasonably be said that any civil wrong should carry damages and that those who deliberately flout the law and deprive others of their rights by abusing their position should be liable to the victims of such acts …

However, he did reserve the idea for further consideration by the Law Commission of England and Wales.

8 Quite apart from the distinction between torts actionable upon damage and torts actionable *per se*, a further issue arises within torts actionable upon damage: just what counts as actionable damage? In recent years, scholars have begun to focus on this often-neglected question. For example, Donal Nolan has pointed out that, while actionable damage completes the tort of negligence, "it seems strange … that this essential component of negligence liability should be so widely ignored".[19] The reason for this, he suggests, might lie in Ibbetson's explanation that it was only in the late 20th century that lawyers began

15 See Allan Beever, "What Does Tort Law Protect?" (2015) 27 SAcLJ 626 at 639.
16 See Allan Beever, "What Does Tort Law Protect?" (2015) 27 SAcLJ 626 at 641.
17 [2006] 2 AC 395.
18 *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395 at [80].
19 Donal Nolan, "New Forms of Damage in Negligence" (2007) 70 MLR 59.

to look to the type of loss suffered in negligence. This is in contrast to their predecessors who, influenced by the way the tort of negligence evolved from the action on the case, were more concerned about how the loss had come about.[20] This new focus on the type of actionable damage has therefore given rise to a new conversation both by judges and academics as to the scope of such damage.

9 Margaret Fordham in her article makes an important contribution to that conversation. She explores the extent to which courts in various jurisdictions have, in recent years, widened the scope of recoverable damage in negligence involving the invasion of personal interests. She also considers the policy factors behind the expansionary approach adopted by the courts – in particular, the rights-based analysis under which tort law is said to offer a cause of action for wrongs suffered as well as tangible damage sustained, and the related policy that legal duties must not be hollow where personal interests are to be protected as legal rights.[21]

10 Fordham raises several examples of a more flexible approach to damage claims for pregnancy and childbirth following medical negligence. These are the award of conventional damages for an unplanned addition to one's family, non-disclosure of medical risks and negligently inflicted detention.[22] However, despite the fact that damage is now recognised as compensable in a number of new circumstances, Fordham does not think that this indicates a clear road ahead. Indeed, she points to actions with respect to emotional harm which is not consequential on physical damage, terror at the prospect of imminent death and anxiety that one might develop a life-threatening condition due to negligent exposure to a toxic substance and loss of chance claims as examples of the courts not recognising new types of compensable harm.[23] Thus, she points out that it is difficult to discern a distinct philosophy or guiding pattern from the cases. She concludes by posing the question whether an increasingly rights-based approach to negligence will lead in the decades ahead to a "substantially expanded definition of damage, or whether it" will lead merely "to greater innovation in the interpretation of the existing one".[24]

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20 David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) at pp 194–195.

21 See Margaret Fordham, "The Protection of Personal Interests: Evolving Forms of Damage in Negligence" (2015) 27 SAcLJ 643 at 644.

22 See Margaret Fordham, "The Protection of Personal Interests: Evolving Forms of Damage in Negligence" (2015) 27 SAcLJ 643 at 645–660.

23 See Margaret Fordham, "The Protection of Personal Interests: Evolving Forms of Damage in Negligence" (2015) 27 SAcLJ 643 at 660.

24 See Margaret Fordham, "The Protection of Personal Interests: Evolving Forms of Damage in Negligence" (2015) 27 SAcLJ 643 at 665.

III. Negligence

11 The tort of negligence, unlike most other torts, does not limit its protection to a particular interest but is imposed based on the tortfeasor's conduct. It is for that reason that negligence protects a wide range of interests and is relevant in a wide variety of fact situations. Jones has observed that it is now widely accepted that the number of medical negligence claims has increased tremendously over the last decade. The practical impact on the medical profession, such as the increase in insurance costs and the practice of so-called "defensive medicine", has been widely discussed in the light of increased medical negligence claims.[25]

12 However, commentators have questioned whether these concerns are really borne out in practice and whether there is a need to consider the extent of medical negligence in light of that. In so far as defensive medicine is concerned, Lawton LJ said in *Whitehouse v Jordan*[26] that it entails "adopting procedures which are not for the benefit of the patient but safeguards against the possibility of the patient making a claim for negligence".[27] However, Jones has suggested that, as a legal concept, it is difficult to make sense of defensive medicine since the standard of care required by the *Bolam* test is that of a reasonably competent medical practitioner exercising and professing to have that skill.[28] It is therefore hard to see how a doctor could claim to protect himself or herself by undertaking a test or procedure that was otherwise unnecessary. Indeed, there is very little empirical evidence of defensive medicine.[29]

13 Nonetheless, so long as defensive medicine is treated seriously, the courts and commentators will have to work out the acceptable parameters of medical negligence to ensure its defensibility. Kumaralingam Amirthalingam in his article discusses medical negligence and patient autonomy and the *Bolam* test in Singapore and Malaysia. He also discusses the recent UK Supreme Court decision of *Montgomery v Lanarkshire Health Board*,[30] which rejected the application of the *Bolam* test to the duty to inform because it violated patient autonomy. The new approach addresses much of the criticism against the *Bolam* test for perpetuating medical paternalism.[31] However,

25 Michael A Jones, *Medical Negligence* (Sweet & Maxwell, 2008) at p xi.
26 [1980] 1 All ER 650.
27 *Whitehouse v Jordan* [1980] 1 All ER 650 at 659.
28 Michael A Jones, *Medical Negligence* (Sweet & Maxwell, 2008) at p 20.
29 Michael A Jones, *Medical Negligence* (Sweet & Maxwell, 2008) at p 20.
30 [2015] 2 WLR 768.
31 See Kumaralingam Amirthalingam, "Medical Negligence and Patient Autonomy: *Bolam* Rules in Singapore and Malaysia – Revisited" (2015) 27 SAcLJ 666 at 667.

Amirthalingam notes that the *Bolam* test still applies to the duty to inform in Singapore and Malaysia. After examining recent developments in the UK, Singapore and Malaysia, he argues that the law in Singapore is now out of step with the rest of the common law world. It is therefore appropriate, he suggests, for the Court of Appeal to reconsider its position in this area, especially with regard to the doctor's duty to inform.[32]

14 More than the position in Singapore and Malaysia, however, Amirthalingam also identifies two models that have informed the courts' reformation of the duty to inform, namely, the patient's rights model and the common law adjudication model.[33] He suggests that the patient's rights model stresses patient autonomy and shifts focus away from the doctor's duty to inform.[34] This, he says, introduces unnecessary complications and risks conflating both medical trespass and medical negligence actions.[35] In his view, it also raises queries as to the nature of the compensable loss and encourages medical negligence claims based on failure to inform when the real issue is negligent diagnosis or treatment.[36]

IV. Defamation and privacy – Themes

15 The next four articles in this journal deal with torts relating to defamation and the protection of privacy. While the former is a more established cause of action in the Commonwealth than the latter, the two do share several features. First, they are protective of personal interests that have no immutable boundaries. Although, in the case of defamation, reputation is a well-established interest, it must inevitably be weighed against other important interests – the most obvious of which is freedom of speech. Privacy is a less easily ascertainable interest; its scope is the subject of genuine debate. However, again, any claim to privacy must inevitably be weighed against other important interests – including freedom of speech, freedom of action more generally, and social needs for truth and accountability.

32 See Kumaralingam Amirthalingam, "Medical Negligence and Patient Autonomy: *Bolam* Rules in Singapore and Malaysia – Revisited" (2015) 27 SAcLJ 666 at 668.

33 See Kumaralingam Amirthalingam, "Medical Negligence and Patient Autonomy: *Bolam* Rules in Singapore and Malaysia – Revisited" (2015) 27 SAcLJ 666 at 668.

34 See Kumaralingam Amirthalingam, "Medical Negligence and Patient Autonomy: *Bolam* Rules in Singapore and Malaysia – Revisited" (2015) 27 SAcLJ 666 at 668.

35 See Kumaralingam Amirthalingam, "Medical Negligence and Patient Autonomy: *Bolam* Rules in Singapore and Malaysia – Revisited" (2015) 27 SAcLJ 666 at 668.

36 See Kumaralingam Amirthalingam, "Medical Negligence and Patient Autonomy: *Bolam* Rules in Singapore and Malaysia – Revisited" (2015) 27 SAcLJ 666 at 668.

16 Second, it might be thought that the precise balance to be attained by the torts of defamation and protection of privacy with respect to these interests is a political one. Certainly, the issue has a political dimension to it, which courts do not necessarily find easy to grapple with. This political dimension arises because the torts impact so clearly upon the ability to act and to communicate that any ruling (especially in the developing area of privacy) is bound to have far-reaching consequences for communities as a whole. Yet the extent to which personal interests in reputation and privacy should be protected seems to have no "right" answer. Indeed, this might account for the fact that the law on defamation is very different in such jurisdictions as, on the one hand, the US (where, in accordance with the First Amendment to the United States Constitution, free speech reigns) and, on the other, Singapore (where reputation is highly protected). Whereas English law was formerly highly protective of reputation, under the influence of both the European Convention on Human Rights[37] ("European Convention") and UK media pressure, the UK legislature and courts have moved in recent times to give speech interests a greater play.[38]

17 Third, it appears that rapidly advancing technology is having an increasing impact upon the laws of defamation and privacy. Much recent development in the tort of defamation has been a response to the power of modern computing and the pervasiveness of the Internet in our daily lives. Together, these technologies enable quick communication and wide dissemination of opinions, information and other matters, which might be viewed by millions of persons around the world – all at the touch of a button. In various jurisdictions, legislatures and courts have been moved by free speech considerations to ensure that new methods of communication are not overly burdened by the laws of defamation. Thus, although Internet Service Providers and web content providers are *prima facie* liable for defamatory matter, at least beyond the point in time when they are informed of its presence and fail to remove it,[39] their position has been improved significantly by the English Defamation Act 2013.[40] Subject to exceptions, s 5 provides a defence where a website operator is able "to show that it was not the operator who posted the statement on the website". As will be seen, below,[41] the movement in the law of privacy has been in the opposite direction – towards a greater degree of protection. This reflects new

37 Convention for the Protection of Human Rights and Fundamental Freedoms (Eur TS No 5; 213 UNTS 221; 1953 UKTS No 7) (4 November 1950; entry into force 3 September 1953).

38 See, *eg*, the English Defamation Act 2013 (c 26).

39 *Tamiz v Google Inc* [2013] 1 WLR 2151.

40 c 26.

41 See paras 27–34 below.

vulnerabilities to invasions of privacy made possible by modern technologies.

18 The articles on defamation and privacy in turn will now be discussed.

A. Defamation

19 Given the ease with which it is possible for persons to publish on the Internet, argument has been made that amateur social commentators, home bloggers and the like propagating "low-level" speech should have greater protection from actions in defamation than has been available for the traditional media. Low-level speech is "often casual" in nature, being the result of little preparation and being part of continuing online conversations.[42] Rowbottom has expressed concern about this type of speech leading to costly litigation.[43] In his view, this is problematic when viewers understand the context in which it arises. They understand the difference between low-level speech and high-level speech, which features on television, on the radio, and in newspapers, and is the product of research, advice and quality production methods.[44] Liability in defamation for amateur communications has the potential to be oppressive because "[w]hen a person says whatever is on his mind, the gap between the thought and its expression to the outside world is minimal". Consequently, the imposition of large damages awards in defamation "for merely venting whatever they happen to be thinking about … comes close to an attack on one's thoughts".[45]

20 This is a theme taken up by Gary Chan, who focuses upon the issue of defamatory *meaning*. Chan explores the issue whether the medium used, and the circumstances of publication, might impact upon the meaning to be given to words published on the Internet. Consistently with Rowbottom, he notes that Internet and other media audiences today are generally more sophisticated and discriminating than they were in past times.[46] This impacts upon how the average,

42 Jacob Rowbottom, "To Rant, Vent and Converse: Protecting Low Level Digital Speech" (2012) 71 Camb LJ 355 at 371–372.

43 Jacob Rowbottom, "To Rant, Vent and Converse: Protecting Low Level Digital Speech" (2012) 71 Camb LJ 355 at 356.

44 Jacob Rowbottom, "To Rant, Vent and Converse: Protecting Low Level Digital Speech" (2012) 71 Camb LJ 355 at 373.

45 Jacob Rowbottom, "To Rant, Vent and Converse: Protecting Low Level Digital Speech" (2012) 71 Camb LJ 355 at 374.

46 See Gary Chan Kok Yew, "Reputation and Defamatory Meaning on the Internet: Communications, Contexts and Communities" (2015) 27 SAcLJ 694 at 698–699, quoting *Lennon v Scottish Daily Record and Sunday Mail* [2004] EMLR 18 at [39]–[40].

reasonable person interprets what he or she reads. Users understand that the rules of social engagement are different on the Internet. Chan thus observes that the "context can … give rise to social expectations that certain remarks on the Internet should not be treated too seriously, or at least not sufficiently seriously for commencing a defamation lawsuit".[47] He notes that Twitter, for example, is used as "a forum for ranting and venting personal frustrations" – a fact with which its users are familiar.[48] Meaning in that and other internet forums is influenced by such matters as language and expression, use of exaggeration, general tone, presence of spelling and other errors, and the use (or not) of anonymity.[49] Unless content is taken sufficiently seriously by users, there will be no real and substantial tort as required by UK, Singapore and other courts.[50]

21 Chan also engages in the related debate about whose perspective should be referred to in assessing the meaning of allegedly defamatory material. Here it is found that there is a debate between those who would prefer the use of a general societal perspective and those who would prefer the use, where appropriate, of a sectional (or segmental) community perspective. While meaning is ordinarily judged according to the former perspective,[51] there have been concerns that this underplays the extent to which certain sections of the community might find Internet and other communications to be defamatory in nature.[52] Chan argues for the use of a sectional community perspective in cases where various criteria are satisfied, namely:[53]

> … the size of the community is substantial and the views [of the group] are not anti-social; (b) the community in question is one that is reasonably anticipated or was targeted by the publisher of the alleged defamatory publication; and (c) the damages recoverable are limited to the reputational harm suffered in the eyes of that community.

Chan believes it especially important that courts consider the use of such a test in cases of internet publications, given that they "can be seen

47 See Gary Chan Kok Yew, "Reputation and Defamatory Meaning on the Internet: Communications, Contexts and Communities" (2015) 27 SAcLJ 694 at 703.

48 See Gary Chan Kok Yew, "Reputation and Defamatory Meaning on the Internet: Communications, Contexts and Communities" (2015) 27 SAcLJ 694 at 710.

49 See Gary Chan Kok Yew, "Reputation and Defamatory Meaning on the Internet: Communications, Contexts and Communities" (2015) 27 SAcLJ 694 at 709–722.

50 See s 1 of the English Defamation Act 2013 (c 26) and *Yan Jun v Attorney-General* [2014] 1 SLR 793.

51 According to *Sim v Stretch* [1936] 2 All ER 1237.

52 See, *eg*, Lawrence McNamara, *Reputation and Defamation* (Oxford University Press, 2007) chs 5 and 8 (arguing in favour of a pluralist approach).

53 See Gary Chan Kok Yew, "Reputation and Defamatory Meaning on the Internet: Communications, Contexts and Communities" (2015) 27 SAcLJ 694 at 724.

and read by a geographically dispersed audience comprising multiple communities" with differing perceptions of the material in question.[54]

B. Privacy

22 In a close and interdependent world, now ruled by high technology, privacy interests have become (as adumbrated) extremely vulnerable to compromise. The problem is how, if at all, tort law can be used so as to counter some of the worst abuses of technology without compromising other values that modern societies hold dear, including those of freedom of speech, accountability and truth.[55]

23 As is well understood, privacy has proven to be a difficult interest to protect through the use of tort law. The problems arise at a number of levels, including the difficulty already alluded to of how to strike the right balance between competing interests. Another, more basic, difficulty lies in determining what is meant by the term "privacy". At a level of generality, privacy might be said to entail freedom from unwanted oversight.[56] However, a rapidly growing literature reveals that there are a number of different aspects to privacy. In the Commonwealth, courts and commentators have (to this point) focused upon interests in private information and in solitude or seclusion. Other aspects of privacy might be more fully recognised in the future. If tort law is to assume a significant role in the protection of privacy, it will most likely be through the recognition and enforcement of a *family* of tort actions.

24 To this point in time, courts have developed causes of action that most satisfactorily protect interests in private *information*. A breakthrough was the English case of *Campbell v MGN Ltd*,[57] in which the House of Lords recognised the development of a new tort protective of personal information,[58] to which an expectation of privacy attaches in circumstances where this information is disclosed without there being a sufficient public interest to do so. Another significant case was the New Zealand Court of Appeal decision in *Hosking v Runting*,[59] which offered protection in similar circumstances, but with the proviso that

54 See Gary Chan Kok Yew, "Reputation and Defamatory Meaning on the Internet: Communications, Contexts and Communities" (2015) 27 SAcLJ 694 at 725.

55 See, *eg*, *Campbell v MGN Ltd* [2004] 2 AC 457 (actress misleading public about use of drugs).

56 Raymond Wacks, *Privacy and Media Freedom* (Oxford University Press, 2013) at p 21.

57 [2004] 2 AC 457.

58 Commercially exploitable information does not fall within the tort: *Douglas v Hello! Ltd (No 3)* [2008] 1 AC 1.

59 [2005] 1 NZLR 1.

the disclosure which occurred was such as to be considered highly offensive by the hypothetical, reasonable person.[60]

25 Three contributors to this volume have chosen to write articles which revolve around the extent to which statute and tort law protect "privacy", their focus being upon privacy-as-seclusion and data protection.

26 In his article, Stephen Todd examines the extent to which tort law protects privacy in its guise as "solitude" or "seclusion" – which refers to the ability of the individual to escape the attention of others in so far as it concerns his or her "private space or affairs".[61] In the ordinary case, individuals expect that their privacy-as-seclusion will be secure within such places as their homes, hotel rooms, sports club changing rooms, and so on. Privacy in this guise would include privacy for undertaking bodily functions, as well as resting, talking on the phone, and so on. As Todd notes, this interest can be compromised in a number of ways, including by being photographed or filmed, having communications intercepted, and being the subject of a search. There need be no publicity given to the private information for the harm to be done. To this point in time, Commonwealth tort law has not protected privacy-as-seclusion in any systematic way. This is to say, as Todd demonstrates, that the "protection" offered has been incidental to the protection of other interests, such as proprietary and possessory interests in land. Needless to say, this type of incidental protection has been unsatisfactory – awards of damages, where available, not being directed primarily at compensating loss of privacy.

27 However, there have been recent developments in the protection of privacy-as-seclusion, which point to the development of a specific tort doctrine. Two significant cases are the Canadian decision of *Jones v Tsige*[62] ("*Tsige*") and the New Zealand decision of *C v Holland*[63] ("*Holland*"). In the former case, the Ontario Court of Appeal accepted that a tort would be committed in circumstances of intentional conduct[64] invading personal privacy that would be viewed as highly offensive to a reasonable person and causing distress, humiliation, or anguish. In *Holland*, the New Zealand High Court outlined a similar principle, recognising a tort for intentional and unauthorised intrusions into seclusion where there is a reasonable expectation of privacy and

60 *Hosking v Runting* [2005] 1 NZLR 1 at [117].
61 See Stephen Todd, "Tortious Intrusions upon Solitude and Seclusion: A Report from New Zealand" (2015) 27 SAcLJ 731 at 744.
62 (2012) 108 OR (3d) 241.
63 [2012] 3 NZLR 672.
64 The court was prepared to equate recklessness with intention: *Jones v Tsige* (2012) 108 OR (3d) 241 at [71].

where the intrusion would be viewed as highly offensive to a reasonable person. Todd does not believe that the principle recognised in this case will be limited to actual physical seclusion. It will, rather, extend to all "sensory intrusions upon individual autonomy and dignity" including those into the private affairs of the individual.[65] His paper examines the likely application of the tort with respect to personal space, personal activities and personal affairs.

28 Both *Tsige* and *Holland* attempt to create a narrow form of liability, based upon deliberate intrusions and reflecting the influence of US privacy law,[66] with the inclusion of an "offensiveness" requirement. They are seen as being products of ordinary, analogical, common law reasoning.[67]

29 By contrast, Paula Giliker sees the English law on privacy as an "outlier" in the way in which it has developed. Its development has been stimulated by Art 8 of the European Convention which provides for a right to a private life. However, the European Convention also incorporates, in Art 10, a right to freedom of expression that has equal importance. The English courts, in developing and applying a privacy tort (or torts), must balance the two fundamental rights against each other. More than that, they must take into account the jurisprudence of the European Court of Human Rights ("ECtHR"). Giliker sees the task of pinning down the ECtHR's views on privacy as difficult to achieve, given that the European Convention is a "living instrument", that the balance between the competing rights is a fluid one, and that the ECtHR's own methodology is very much dispute-based, so that it provides little guidance about general principles.[68] In addition to these challenges, the English courts must also attempt to weave the resulting principles on the protection of privacy within the existing set of nominate torts – which might bring to mind the analogy of square pegs and round holes.

30 So far as the English law is concerned, Giliker notes (in conformity with Todd) that different principles are required to deal with the different ways in which privacy might be compromised:[69]

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65 See Stephen Todd, "Tortious Intrusions upon Solitude and Seclusion: A Report from New Zealand" (2015) 27 SAcLJ 731 at 749.

66 See, especially American Law Institute, *Restatement (Second) of Torts* (American Law Institute Publishers, 1977) § 652B.

67 See Paula Giliker, "A Common Law Tort of Privacy?: The Challenges of Developing a Human Rights Tort" (2015) 27 SAcLJ 761 at 768–772.

68 See Paula Giliker, "A Common Law Tort of Privacy?: The Challenges of Developing a Human Rights Tort" (2015) 27 SAcLJ 761 at 777–778.

69 See Paula Giliker, "A Common Law Tort of Privacy?: The Challenges of Developing a Human Rights Tort" (2015) 27 SAcLJ 761 at 781.

> … a tort of misuse of private information could only extend to situations where information was accessed and could not therefore amount to a full 'intrusion upon seclusion' tort.

She notes that the extent to which each tort will develop is uncertain, given the need to accommodate freedom of expression. The result is that the current English law "rests in a no man's land in which neither the courts nor the [Legislature] are prepared to take decisive action to ensure the coherent development of the tort" or torts[70] – if this is possible at all. As a result, Giliker recommends that the matter be referred to the Law Commission of England and Wales for review. Perhaps this would be a wise step, given that it would permit more extensive consideration of all the legal and political factors that impact upon issues of privacy. However, any such review could not be expected to resolve the issues once and for all – given the continually changing privacy landscape.

31 Hannah Lim Yee Fen analyses a different aspect of privacy – so-called "big data". The phenomenon of "big data" encompasses "the collection and analysis of unusually large datasets".[71] By definition, the data are collected from a number of sources, such as computer transactions, mobile phone usage and social media traffic. Lim observes that:[72]

> … computer hardware and software technologies and computer networks, and the increasing power and speed of all of these, have given unprecedented opportunities for data to be combined, matched, analysed, used and disclosed …

The aggregated information compiled about groups and individual persons, in turn, can be (and is being) used in ways that individual data subjects might not appreciate and which compromise expectations of privacy. This might be by way of commercial sale of information or, even more worryingly, intentional abuse. While this is a distressing thought in itself, a greater problem arises from the simple fact that data is not physical in nature and cannot necessarily be recovered in a way that excludes future abuse.

32 The question is whether the present law can offer protection to those whose data is misused. In her article, Lim notes inevitable deficiencies in the various branches of the common law, including torts

70 See Paula Giliker, "A Common Law Tort of Privacy?: The Challenges of Developing a Human Rights Tort" (2015) 27 SAcLJ 761 at 784.

71 See Hannah Lim Yee Fen, "The Data Protection Paradigm for the Tort of Privacy in the Age of Big Data" (2015) 27 SAcLJ 789 at 790.

72 See Hannah Lim Yee Fen, "The Data Protection Paradigm for the Tort of Privacy in the Age of Big Data" (2015) 27 SAcLJ 789 at 790.

protective of privacy-as-seclusion.[73] By contrast, she believes the European Union's ("EU") Data Protection Directive 1995[74] ("the Directive") to be a powerful weapon in the protection of privacy, which transcends one's preconceptions of its scope and operation. Under the Directive, wide definitions are given to the concepts of "personal data" and "processing". Moreover, "processing ordinary personal data is presumed illegal, unless the processing has been explicitly consented to or is 'necessary' for any of" a limited number of purposes.[75] Given the wide definitions and broad prohibition against processing, Lim argues that "much of the privacy discourse at common law is replicating what is already protected under the Directive".[76] The Directive is argued to be applicable "regardless of whether technology or equipment is used, and whether the information is in electronic form. It applies to written, Internet, and even oral communications".[77] Lim believes that the Directive itself makes unlawful the actions of the defendants in the *Tsige* (accessing banking information) and *Holland* (filming a woman in a shower) cases, alluded to above.[78] By contrast to the Directive, Lim sees Singapore's Personal Data Protection Act 2012[79] as relatively toothless because of the wide exceptions that apply to the unlawful processing of personal data.[80]

33 It should be noted that the protection offered by the Directive extends beyond prohibitions against unlawful data processing to include the facilitation of remedies. From the tort perspective, the important provision to this effect is Art 23(1), which provides that:

> Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation … is entitled to receive compensation from the controller for the damage suffered.

73 See Hannah Lim Yee Fen, "The Data Protection Paradigm for the Tort of Privacy in the Age of Big Data" (2015) 27 SAcLJ 789 at 796–798.

74 Directive 95/46/EC of the European Parliament and of the Council (24 October 1995) (protection of individuals with regard to the processing of personal data and on the free movement of such data).

75 See Hannah Lim Yee Fen, "The Data Protection Paradigm for the Tort of Privacy in the Age of Big Data" (2015) 27 SAcLJ 789 at 810.

76 See Hannah Lim Yee Fen, "The Data Protection Paradigm for the Tort of Privacy in the Age of Big Data" (2015) 27 SAcLJ 789 at 808.

77 See Hannah Lim Yee Fen, "The Data Protection Paradigm for the Tort of Privacy in the Age of Big Data" (2015) 27 SAcLJ 789 at 808.

78 See Hannah Lim Yee Fen, "The Data Protection Paradigm for the Tort of Privacy in the Age of Big Data" (2015) 27 SAcLJ 789 at 813.

79 Act 26 of 2012.

80 See Hannah Lim Yee Fen, "The Data Protection Paradigm for the Tort of Privacy in the Age of Big Data" (2015) 27 SAcLJ 789 at 816–820.

In the UK, this provision is reflected in s 13 of the Data Protection Act 1998.[81]

34 It should also be noted that EU institutions have agreed to legislate for a new General Data Protection Regulation ("the Regulation"), which will replace the current Directive. The aim is to ensure that the EU's data protection rules – ensuring strengthened, uniform privacy rights – will remain "the gold standard".[82] Two protections of significance will be "a right to erasure of personal data and 'to be forgotten'"[83] and "limits to the use of 'profiling', *ie* automated processing of personal data to assess personal" matters. The Regulation will also affirm rights of data subjects to "seek judicial remedies where data protection rules are not respected".[84] The legislation, the text of which had not been fully agreed at the time of writing, should be more efficacious than the Directive because it will have direct effect in each of the EU's 28 member states.

V. Vicarious and secondary liability

35 It is of course well understood that a person is liable not only for torts committed by himself or herself but also for those torts authorised or subsequently ratified. Over the past decade or so, the highest courts in the Commonwealth have had to deal with the imposition of tortious liability on educational institutions and religious organisations for the sexual assaults perpetrated by individuals engaged by them. David Tan argues that the law of vicarious liability should evolve to match new circumstances. These new circumstances include the multiplicity of modern work arrangements beyond the traditional employment contract. There is a pressing need, for example, to deter the sexual assault of young and vulnerable persons by those placed in positions of power, and to ensure that victims receive just and adequate compensation.[85]

36 Tan asserts that courts have drifted towards an overarching rationale of "enterprise risk" over the past decade when imposing

81 c 29.

82 European Commission, "Data Protection Day 2015: Concluding the EU Data Protection Reform Essential for the Digital Single Market" (MEMO/15/3802) (28 January 2015), quoting Vice President Andrus Ansip and Commissioner Věra Jourová.

83 See *Google Spain SL and Google Inc v Agencia Española de Protección de Datos (Case C-131/12)* [2014] QB 1022.

84 Council of the European Union, "Data Protection: Council Agrees on a General Approach" (Press Release 450/15) (15 June 2015).

85 See David Tan, "Internalising Externalities: An Enterprise Risk Approach to Vicarious Liability in the 21st Century" (2015) 27 SAcLJ 822 at 825.

vicarious liability for intentional torts. He therefore suggests that a more explicit acceptance of a new paradigm of "internalising externalities" can assist courts in deciding the appropriate legal responsibility to be assigned to entities that benefit from carrying on an enterprise that introduces risks to others.[86] Indeed, he suggests that whether an institution is for- or non-profit, the enterprise is in a position to decide on the level of precaution it undertakes in the conduct of its activities and should bear the costs of its decisions.[87] Tan notes that, if there is a real possibility of a finding of vicarious liability, and that the taking of certain precautions might mitigate the likelihood of paying compensation, this can be viewed as a "benefit" that the enterprise can properly take into account. If it is recognised that the overriding rationale of the law of vicarious liability is to internalise the externalities, it incentivises a socially optimal level of precaution, that is, where the sum of the cost of precaution and the expected accident cost is the same as the social cost of an accident.[88]

37 Tan concludes that recent decisions of the Supreme Courts of the UK and Canada, as well as the Singapore Court of Appeal, on the law of vicarious liability are developing in the right direction. More nuanced approaches adopted by these courts will better strike a balance between public concern over protection of young and vulnerable children, the just imposition of a financial burden on enterprises which impose such risks, and the need for legal certainty and consistency.[89]

38 The final article goes beyond vicarious liability in dealing with three-party relationships. It is well known that in both civil and criminal law, a person can be liable for participating in the wrong of another person. While a unified doctrine of accessory liability exists for all crimes, the same does not apply in private law. Thus, whereas accessory liability in tort law is analysed under "joint tortfeasance" (which includes vicarious liability), equity on the other hand sees a person who induces, procures or assists with a breach of trust or fiduciary obligation as an accessory. This dichotomy has led Lee Pey Woan to consider how participatory liability differs in tort and equity and to evaluate the case for their assimilation.[90]

86 See David Tan, "Internalising Externalities: An Enterprise Risk Approach to Vicarious Liability in the 21st Century" (2015) 27 SAcLJ 822 at 825–826.
87 See David Tan, "Internalising Externalities: An Enterprise Risk Approach to Vicarious Liability in the 21st Century" (2015) 27 SAcLJ 822 at 846.
88 See David Tan, "Internalising Externalities: An Enterprise Risk Approach to Vicarious Liability in the 21st Century" (2015) 27 SAcLJ 822 at 846.
89 See David Tan, "Internalising Externalities: An Enterprise Risk Approach to Vicarious Liability in the 21st Century" (2015) 27 SAcLJ 822 at 848–849.
90 See Lee Pey Woan, "Accessory Liability in Tort and Equity" (2015) 27 SAcLJ 853 at 855.

39 Lee makes the case that, contrary to common perception, the scope of participatory liability in both spheres does not differ in material ways.[91] Both sets of rules are ultimately unified by the aim of limiting liability to minimise interference with liberty of action. Consequently, liability under both regimes is constrained by different but equally narrow concepts of mental fault. In neither context is mere knowledge thought to be sufficient.[92] Even though this results in the use of varying concepts in different contexts, the law is unified by the overriding concern of optimising the participant's right to engage in lawful activities.[93] Lee concludes that the case for assimilation is not made out if the overarching principle for civil accessory liability is defined principally by reference to criminal concepts of complicity. Such an approach overlooks the fundamental distinctions between civil and criminal processes and threatens to overextend civil liability.[94] Indeed, Lee suggests that, while a standard approach that applies uniformly may appear simpler and more rational, it might also reduce the law's ability to deal with conflicting rights and interests.[95]

VI. The development of Singapore tort law

40 This collection of articles has been commissioned during the 50th anniversary of Singapore's independence. The collection of articles from commentators from different countries reflects the increasing impact that globalisation is having upon tort law as it is developing in Singapore.

41 In a recent study of all reported Singapore tort cases from 1965 to 2013, some interesting conclusions were reached. First, the length of Singapore tort judgments has increased over time. The most obvious reason is that, as with other areas of law, courts have seen the need to explain their reasoning in greater detail, especially where the aim is to depart from long entrenched positions. This readily explains the longer Court of Appeal judgments. In recent times, Singapore courts have seen fit also to depart from established English cases where social reasons, or principle itself, dictate this move. Thus, for example, in *Spandeck Engineering (S) Pte Ltd v Defence Science and Technology Agency*,[96] the Court of Appeal took 45 pages to explain the reasons for adopting a new test to determine the existence of a duty of care in the tort of negligence.

91 See Lee Pey Woan, "Accessory Liability in Tort and Equity" (2015) 27 SAcLJ 853 at 855.
92 See Lee Pey Woan, "Accessory Liability in Tort and Equity" (2015) 27 SAcLJ 853 at 868.
93 See Lee Pey Woan, "Accessory Liability in Tort and Equity" (2015) 27 SAcLJ 853 at 870.
94 See Lee Pey Woan, "Accessory Liability in Tort and Equity" (2015) 27 SAcLJ 853 at 871–872.
95 See Lee Pey Woan, "Accessory Liability in Tort and Equity" (2015) 27 SAcLJ 853 at 878.
96 [2007] 4 SLR(R) 100.

More recently, in *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd*,[97] the same court took 55 pages to explain why it was assimilating the tort of occupiers' liability into the tort of negligence. The willingness of the Singapore courts to consider sophisticated conceptual arguments in tort may mean that some of the broader conceptual suggestions canvassed in various articles in this volume will be relevant in shaping Singapore tort law in the future.

42 As the Singapore courts develop an autochthonous law of torts, it is little wonder that the total number of local judgments cited *per* year has also increased. The mere reference to local judgments shows that there is a body of local case law to refer to. This may be explained by the passage of the Application of English Law Act[98] in 1993, which freed the Singapore courts from both legal and factual ties to English precedents. The growth of Singapore tort law can be seen from the detailed examination of Singapore cases by some of the articles here.

43 It is also clear, however, that the Singapore courts have shown an increasing tendency to cite a variety of foreign judgments in tort cases. That general trend can be explained by an increasing tendency of the local courts to engage in comparative studies of other jurisdictions in arriving at the best approach for Singapore. Moreover, whereas English law was the clear leader in this regard for a long time, the Singapore courts have now shown a willingness to consider other jurisdictions. For example, in *RSP Architects Planners & Engineers v Ocean Front Pte Ltd*,[99] the Court of Appeal, in departing from the English position in relation to the imposition of a duty of care in the tort of negligence for a claim for pure economic loss, referred to Australian and New Zealand cases before deciding on the proper approach to take in Singapore. Also, from 1991 onwards, the Court of Appeal has shown a greater willingness to either distinguish or depart from English cases outright. This shows both the strong influence that English law had over Singapore law in the past, and the gradual waning of that influence. The practice is not to depart from English law for its own sake; indeed, such departures were only made after a thorough examination of the law and social conditions. This is also reflected by some of the cross-jurisdictional references made by articles in this collection. Together, this collection of articles on evolving personal torts also reflects to some extent the growth and development of Singapore tort law on the 50th anniversary of Singapore's national independence.

97 [2013] 3 SLR 284.
98 Cap 7A, 1994 Rev Ed.
99 [1995] 3 SLR(R) 653.