

GAIN-BASED RELIEF FOR INVASION OF PRIVACY

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In many common law jurisdictions, some or all instances of invasion of privacy constitute a privacy-specific wrong either at common law (including equity) or under statute. A remedy invariably available for such a wrong is compensation for loss. However, the plaintiff may instead seek to claim the profit the defendant has made from the invasion. This article examines when a plaintiff is, and should be, entitled to claim that profit, provided that invasion of privacy is actionable as such. After a brief overview of the relevant law in major common law jurisdictions, the article investigates how invasion of privacy fits into a general concept of what is called 'restitution for wrongs'. It will be argued that the right to privacy is a right against the whole world and as such forms a proper basis of awarding gain-based relief for the unauthorised use of that right.

I INTRODUCTION

A person's interest in privacy can be disrespected in different ways, for example by unauthorised intrusion into the physical private sphere of that person, by unauthorised public disclosure of details of the person's private life, or by unauthorised use of the person's image or name. All these instances shall be called invasions of privacy. An invasion of privacy may fall into the scope of a civil wrong that is not specifically designed to address invasions of privacy, such as breach of contract, breach of confidence (in its traditional meaning), breach of fiduciary duty, copyright infringement, defamation or trespass to land. Moreover, in many common law jurisdictions, some or all instances of invasion of privacy are covered by a privacy-specific civil wrong either at common law (including equity) or under statute. A remedy invariably available for such a wrong is compensation for loss, financial and otherwise.

It may happen that the profit that the defendant has made from invading the plaintiff's privacy exceeds the plaintiff's loss, even including non-pecuniary loss. A prime example is increased sales of a newspaper issue due to a front-page story about a celebrity's private life. This article examines when a plaintiff is and should be entitled to claim the defendant's profit, provided that invasion of privacy is actionable as such. Whether it ought to be actionable will not be considered.¹ After a brief overview of the relevant law in major

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¹ When invasion of privacy ought to be actionable as such in Australia is discussed, for example, by Des Butler, 'A Tort of Invasion of Privacy in Australia?' (2005) 29 *Melbourne University Law Review* 339.

common law jurisdictions, this article will discuss whether gain-based relief should in principle be available for invasion of privacy. Instead of considering invasion of privacy in isolation from other wrongs, it will investigate how invasion of privacy fits into a general concept of what is called ‘restitution for wrongs’. It will be argued that the right to privacy is a right against the whole world and as such forms a proper basis of awarding gain-based relief for the unauthorised use of that right. The precise calculation of the gain to be given up will not be discussed.

II OVERVIEW OF THE CURRENT LAW IN MAJOR COMMON LAW JURISDICTIONS

A *Australia*

Traditionally, no common law tort of invasion of privacy existed in Australia.² In 2001, several judges in the High Court of Australia observed that there is no barrier to the creation of such a tort,³ but none of the judges went so far as to find that the tort exists.⁴ ‘Essentially, therefore, the High Court of Australia has not ruled out the possibility of a common law tort of privacy, nor has it embraced it with open arms.’⁵ Two first-instance decisions have since recognised a cause of action based upon a right to privacy (without discussion of gain-based relief),⁶ but the Victorian Court of Appeal has left the issue open.⁷ Australian common law remains unsettled in this respect and it seems that the Australian courts prefer a privacy-specific wrong to be created through legislation rather than at common law.⁸

Limited protection of privacy is already achieved by the *Privacy Act 1988* (Cth), which regulates the collection, storage and use of personal information by large private organisations unless it is in the course of journalism⁹ (and by government agencies).¹⁰

² *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 495–6, 517, 521, 523; Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* Report No 11 (1979) [223]; Australian Law Reform Commission, *Privacy* Report No 22 (1983), vol 2, [1076].

³ *Australia Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 248, 258 (Gummow J and Hayne J), 328 (Callinan J). Gaudron J agreed with Gummow J and Hayne J.

⁴ *Ibid* 225–6 (Gleeson CJ), 258 (Gummow J and Hayne J), 278–9 (Kirby J), 328 (Callinan J).

⁵ *Hosking v Runting* [2005] 1 NZLR 1, 18 (Gault P).

⁶ *Grosse v Purvis* [2003] Aust Torts Reports 81–706; *Doe v Australian Broadcasting Corporation* [2007] VCC 281 (3 April 2007).

⁷ *Giller v Procopets* (2008) 24 VR 1, 35–6, 106, 107.

⁸ This conclusion is drawn after a detailed review of the relevant cases by Peter Bartlett, ‘Privacy Down Under’ (2010) 3(1) *Journal of International Media and Entertainment Law* 145, 162–3.

⁹ *Privacy Act 1988* (Cth) s 7B(4).

¹⁰ An overview of the Act is given by the Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* Report No 108, 2008 [5.9]–[5.48]. Most Australian states and territories have similar legislation for the public sector and some also for parts of the private sector. A right

Complaints can be made to the Australian Information Commissioner, and the Federal Court can enforce the Commissioner's non-binding determinations,¹¹ which may include an order of compensation for pecuniary and non-pecuniary loss,¹² but not gain-based relief.

Three law reform bodies in Australia recently recommended the creation of a statutory cause of action for invasion of privacy. In 2008, the Australian Law Reform Commission recommended the enactment of federal legislation that creates a cause of action for a serious invasion of privacy and provides for various remedies including damages, an account of profits and an injunction, but not exemplary damages.¹³ In 2009, the New South Wales Law Reform Commission recommended an amendment of the *Civil Liability Act 2002* (NSW) to provide a cause of action for invasion of privacy,¹⁴ and to empower the court to grant certain enumerated remedies and 'such other relief as the court considers necessary in the circumstances',¹⁵ excluding exemplary damages¹⁶ but including an account of profits as an 'exceptional remedy'.¹⁷ In 2010, the Victorian Law Reform Commission recommended the creation of statutory causes of action for serious invasions of privacy by misuse of private information or by intrusion upon seclusion,¹⁸ the possible remedies being compensatory damages, injunctions and declarations but not exemplary damages or gain-based relief.¹⁹

B Canada

Neither the Supreme Court of Canada nor a provincial appellate court has recognised a common law tort of invasion of privacy.²⁰ Lower courts have traditionally used established torts to address invasions of privacy.²¹ In 2006, however, Stinson J in the Ontario Supreme Court pronounced that 'the time has come to recognize invasion of privacy as a tort in its

not to have one's 'privacy, family, home or correspondence unlawfully or arbitrarily interfered with' by public authorities is enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a).

¹¹ *Privacy Act 1988* (Cth) s 55A.

¹² *Privacy Act 1988* (Cth) s 52(1)(b)(iii), (1A).

¹³ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* Report No 108 (2008) ch 74, esp Recommendations 74-1 and 74-5.

¹⁴ New South Wales Law Reform Commission, *Invasion of Privacy* Report No 120 (2009) [4.14], [4.16].

¹⁵ *Ibid* [7.7].

¹⁶ *Ibid* Schedule 1: Amendment of *Civil Liability Act 2002*, No 22, s 78.

¹⁷ *Ibid* [7.24].

¹⁸ Victorian Law Reform Commission, *Surveillance in Public Places* Final Report 18 (2010) [7.126].

¹⁹ *Ibid* [7.217].

²⁰ A statement that comes close to such recognition was made by Carruthers CJPEI speaking for the Appeal Division of the Prince Edward Island Supreme Court in *Dyne Holdings Ltd v Royal Insurance Co Canada* (1996) 135 DLR (4th) 142, 160: 'It would seem to me the courts in Canada are not far from recognizing a common law right of privacy if they have not already done so'.

²¹ See the cases discussed by Alex Cameron and Mimi Palmer, 'Invasion of Privacy as a Common Law Tort in Canada' (2009) 6 (11) *Canadian Privacy Law Review* 105, 107-8.

own right'.²² Similar ideas have since been expressed in other first-instance decisions.²³ Canada may be moving towards the recognition of a common law tort of invasion of privacy. There seems to have been no judicial discussion on whether such a tort would attract gain-based relief.

Four of Canada's common law provinces have a statutory tort of privacy. The Privacy Acts of British Columbia, Newfoundland and Labrador, and Saskatchewan contain the following identical provision: 'It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.'²⁴ Similarly, section 2(1) of Manitoba's *Privacy Act 1987* provides: 'A person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person.' While British Columbia's *Privacy Act* makes no provision as to remedies,²⁵ the Privacy Acts of Manitoba, Newfoundland and Labrador, and Saskatchewan list possible remedies including an account of profits.²⁶

C England and Wales

Traditionally, no common law tort of privacy existed in England and Wales.²⁷ However, to give effect to the right to private and family life enshrined in Article 8 of the *European Convention on Human Rights*, implemented into UK domestic law by the *Human Rights Act 1998*, the courts have expanded the equitable²⁸ doctrine of breach of confidence to protect privacy.²⁹ In applying the action for breach of confidence to the unauthorised publication of private information *not* obtained from the plaintiff, the courts have dropped the traditional requirement of a pre-existing relationship of confidentiality between the

²² *Somwar v McDonald's Restaurants of Canada Ltd* (2006) 263 DLR (4th) 752, 763.

²³ See the cases discussed by Alex Cameron and Mimi Palmer, 'Invasion of Privacy as a Common Law Tort in Canada' (2009) 6 *Canadian Privacy Law Review* 105, 111–13. The view that a common law tort of invasion of privacy does not exist in Ontario was taken, however, in *Jones v Tsige* [2011] ONSC 1475 (23 March 2011) [28]–[57].

²⁴ *Privacy Act*, RSBC 1996, c 373, s 1(1); *Privacy Act*, RSNL 1990, c P–22, s 3; *Privacy Act*, RSS 1978, c P–24, s 2.

²⁵ Only damages have so far been awarded in cases brought under the Act: British Columbia Law Institute, *Report on the Privacy Act of British Columbia*, Report No 49, 2008, 41, where an amendment of the Act so as to list possible remedies including an account of profits is recommended.

²⁶ *Privacy Act*, RSM 1987, c P125, s 4(1)(c); *Privacy Act*, RSNL 1990, c P–22, s 6(1)(c); *Privacy Act*, RSS 1978, c P–24, s 7(c).

²⁷ *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 372–3; *Kaye v Robertson* [1991] FSR 62; *Wainwright v Home Office* [2004] 2 AC 406, 423; *Campbell v MGN Ltd* [2004] 2 AC 457, 464, 471, 495; *McKennitt v Ash* [2008] QB 73, 80; Percy H Winfield, 'Privacy' (1931) 47 *Law Quarterly Review* 23.

²⁸ For the equitable nature of the traditional action for breach of confidence, see *Seager v Copydex Ltd* [1967] 1 WLR 923, 931 (Lord Denning MR); *Attorney-General v Observer Ltd*, sub nom *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 255, 268, 281; *Kitechnology BV v Unicor GmbH Plastmaschinen* [1995] FSR 765, 777–8.

²⁹ This approach is criticised by Des Butler, 'A Tort of Invasion of Privacy in Australia?' (2005) 29 *Melbourne University Law Review* 339, 352.

parties,³⁰ and ask instead whether the defendant knew or ought to have known that the plaintiff had a reasonable expectation of privacy, and whether that interest in privacy is outweighed by a competing interest,³¹ in particular freedom of expression enshrined in Article 10 of the *Convention*.³²

The new branch of breach of confidence, which may be called ‘breach of privacy’³³ or ‘misuse of private information’,³⁴ has been judicially described as a ‘tort’,³⁵ and is now covered in books on tort law.³⁶ McGregor suggests that its classification as a tort ‘must come to be accepted’.³⁷ However, when its classification was considered decisive, breach of privacy was treated as an equitable wrong rather than a tort. In *Douglas v Hello! Ltd (No 3)*,³⁸ the Court of Appeal refused to apply to breach of privacy section 9 of the *Private International Law (Miscellaneous Provisions) Act 1995*, which governs choice of law in ‘tort’. Furthermore, in *Mosley v News Group Newspapers Ltd*, the availability of exemplary damages for breach of privacy was denied on the ground that they are unavailable in equity and that breach of privacy must still be classified as an equitable wrong rather than as a tort.³⁹ For the time being therefore, breach of privacy must be classified as an equitable wrong.

This classification ought to make gain-based relief available for breach of privacy as a matter of course since gain-based relief is generally available for equitable wrongs. An

³⁰ For that requirement see eg. *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415, 419; [1969] RPC 41, 47.

³¹ *Campbell v MGN Ltd* [2004] 2 AC 457, 466, 480, 496; *Douglas v Hello! Ltd (No 3)* [2006] QB 125, 156–7; *McKennitt v Ash* [2008] QB 73, 81; *Mosley v News Group Newspapers Ltd* [2008] EMLR 679, 687–8.

³² The principles applied by the European Court of Human Rights in balancing Arts. 8 and 10 are reviewed by Eric Barendt, ‘Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court’ (2009) 1 *Journal of Media Law* 49.

³³ *Campbell v MGN Ltd* [2003] QB 633, 663 (Lord Phillips MR speaking for the Court of Appeal).

³⁴ *Campbell v MGN Ltd* [2004] 2 AC 457, 465 (Lord Nicholls); Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 18th ed, 2009) [42–002]. The term ‘misuse of *personal* information’ is used by Mark Warby, Adam Speker and David Hirst, ‘Misuse of Personal Information’ in Mark Warby, Nicole Moreham and Iain Christie, *Tugendhat and Christie: The Law of Privacy and the Media* (Oxford University Press, 2nd ed, 2011) ch 5.

³⁵ *Campbell v MGN Ltd* [2003] QB 633, 661–2, 663 (Lord Phillips MR speaking for the Court of Appeal); [2004] 2 AC 457 (HL) 465 (Lord Nicholls); *McKennitt v Ash* [2008] QB 73, 80, 81 (Buxton LJ, with whom Latham LJ and Longmore LJ agreed); *Lord Browne of Madingley v Associated Newspapers* [2008] QB 103, 111 (Sir Anthony Clarke MR speaking for the Court of Appeal); *Murray v Express Newspapers* [2009] Ch 481, 499, 500 (Sir Anthony Clarke MR speaking for the Court of Appeal).

³⁶ See eg. Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin’s Tort Law* (Clarendon Press, 6th ed, 2008) ch 22; W V H Rogers, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 18th ed, 2010) [12.82]–[12.87].

³⁷ Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 18th ed, 2009) [42–017].

³⁸ [2006] QB 125, 160.

³⁹ [2008] EMLR 679, 725–8. In *Douglas v Hello! Ltd (No 3)* [2003] 3 All ER 996, 1073, Lindsay J was ‘content to assume, without deciding, that exemplary damages (or equity’s equivalent) are available in respect of breach of confidence’.

account of profits is available for breach of fiduciary duty,⁴⁰ and for breach of confidence in its traditional meaning,⁴¹ although it may be confined to conscious breaches of confidence.⁴² Irrespective of the defendant's culpability, damages for breach of confidence in its traditional meaning may be assessed by reference to the cost that the defendant would have incurred in either obtaining a licence from the plaintiff or developing the knowledge (in particular commercial know-how) independently.⁴³ However, whenever gain-based relief was awarded for breach of confidence in its traditional meaning, the breach concerned trade secrets or other commercially valuable information but not purely private information.⁴⁴

In *Douglas v Hello! Ltd (No 3)*, the Court of Appeal effectively recognised the availability of gain-based relief for breach of privacy, even though the court denied gain-based relief *in casu*. The magazine *Hello!* published photos surreptitiously taken at the wedding of actors Michael Douglas and Catherine Zeta-Jones, who had sold the exclusive right to publish photos of their wedding to the magazine *OK!* and had taken elaborate measures to prevent the unauthorised taking of photos at their wedding. In the Douglasses' claim against *Hello!* for breach of privacy, the Court of Appeal made clear that it 'would have had no hesitation' to award an account of profits had *Hello!* made a profit from the publication.⁴⁵ The court did reject an award of damages calculated by reference to a hypothetical licence fee, on the ground that the Douglasses would never have permitted *Hello!* to publish the unauthorised photographs and had indeed been prevented from giving such permission by the exclusive licence granted to *OK!*, which also made it difficult to assess the hypothetical licence fee.⁴⁶ *Douglas v Hello! Ltd (No 3)* thus recognised the availability of an account of profits, and did not rule out a hypothetical-fee award where the plaintiff, if asked in advance, would have permitted the invasive act in question.

⁴⁰ *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378, [1967] 2 AC 134; *Boardman v Phipps* [1967] 2 AC 46; *Imageview Management Ltd v Jack* [2009] 2 All ER 666, 680.

⁴¹ *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1964] 1 WLR 96; *Attorney-General v Observer Ltd*, sub nom *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.

⁴² *Seager v Copydex Ltd (No 1)* [1967] 1 WLR 923, 932 (Lord Denning MR). Further limitations were applied in *Vercoe v Rutland Fund Management Ltd* [2010] Bus LR D141, 142-5.

⁴³ *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809; *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840, 858-9. Hypothetical-fee awards ought to be classified as gain-based rather than compensatory: James Edelman, 'Breach of Confidence' in John McGhee (ed), *Snell's Equity* (Sweet & Maxwell, 32nd ed, 2010) [9-018]; Sirko Harder, *Measuring Damages in the Law of Obligations: The Search for Harmonised Principles* (Hart, 2010) 180-1, 186.

⁴⁴ Normann Witzleb, 'Justifying Gain-Based Remedies for Invasions of Privacy' (2009) 29 (2) *Oxford Journal of Legal Studies* 325, 332.

⁴⁵ [2006] QB 125, 200 (Lord Phillips MR speaking for the court).

⁴⁶ *Ibid.* The court's reasons are criticised by Gareth Jones, *Goff & Jones: The Law of Restitution* (Sweet & Maxwell, 7th ed, 2007) [34-023].

D New Zealand

New Zealand legislation protects certain aspects of privacy.⁴⁷ In *Hosking v Runting*,⁴⁸ decided in 2004, a majority in the New Zealand Court of Appeal recognised in principle a common law tort of invasion of privacy. While the court unanimously rejected a cause of action for the unauthorised representation of one's image,⁴⁹ Gault P, with whom Blanchard J agreed, pronounced that 'wrongful publicity given to private lives' constitutes a tort.⁵⁰ He left open whether tortious remedies ought to be available for 'unreasonable intrusion into a person's solitude or seclusion',⁵¹ saying that '[t]he scope of a cause, or causes, of action protecting privacy should be left to incremental development by future courts'.⁵² Tipping J, who agreed with Gault P in a separate judgment, described the new tort in this way:

'It is actionable as a tort to publish information or material in respect of which the plaintiff has a reasonable expectation of privacy, unless that information or material constitutes a matter of legitimate public concern justifying publication in the public interest.'⁵³

The new tort has since been applied in a first-instance decision (where the requirements of liability were held to have not been established),⁵⁴ but the Supreme Court of New Zealand has left the existence of the tort open.⁵⁵ With regard to remedies for the new tort, both Gault P and Tipping J in *Hosking v Runting* said that the primary remedy is an award of damages and that an injunction is available in appropriate circumstances.⁵⁶ It is unclear whether the listing of damages and an injunction was meant to be exhaustive, excluding gain-based relief.

E United States

Even though the prominent protection of freedom of speech in the United States Constitution places heavy restrictions on the protection of privacy,⁵⁷ courts in the United

⁴⁷ *Broadcasting Act 1989* (NZ); *Privacy Act 1993* (NZ); *Harassment Act 1997* (NZ). A brief overview of these Acts is given in *Hosking v Runting* [2005] 1 NZLR 1, 27–30 (Gault P).

⁴⁸ [2005] 1 NZLR 1.

⁴⁹ *Ibid* 42, 55.

⁵⁰ *Ibid* 32.

⁵¹ *Ibid*.

⁵² *Ibid*.

⁵³ *Ibid* 62. Keith J and Anderson J dissented.

⁵⁴ *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220. In *Birkenfeld v Yachting New Zealand Inc* [2009] 1 NZLR 499, 512, Baragwanath J in the New Zealand Court of Appeal made a passing reference to 'the evolving cause of action for breach of privacy'.

⁵⁵ *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277, 289–90, 308, 318.

⁵⁶ [2005] 1 NZLR 1, 38 (Gault P), 62 (Tipping J).

⁵⁷ *Time Inc v Hill* 385 US 374 (1967) (knowing or reckless falsity in publication is required for liability); *Bartnicki v Vopper* 532 US 514 (2001) (no liability for broadcast of private conversation illegally intercepted by third party). It is unclear to which extent the Constitution protects privacy. An opportunity to settle that issue was missed in *National Aeronautics and Space Administration v Nelson* 131 S Ct 746 (2011).

States have long recognised the actionability at common law of invasion of privacy. In 1960, Prosser divided the existing jurisprudence into the following four categories:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.⁵⁸

Prosser's classification was adopted in the *Restatement (Second) of Torts*.⁵⁹ Restitution of profits may be available at least in cases where the plaintiff's name or likeness has been appropriated.⁶⁰

Many states of the United States have legislation protecting certain aspects of privacy. A prominent example is § 1708.8 of the California Civil Code, which imposes liability for capturing, in a manner that is offensive to a reasonable person, a visual image, sound recording or other physical impression of a person engaging in a personal or familial activity. Section 1708.8(d) provides for the availability of treble damages and further provides:

If the plaintiff proves that the invasion of privacy was committed for a commercial purpose, the defendant shall also be subject to disgorgement to the plaintiff of any proceeds or other consideration obtained as a result of the violation of this section.⁶¹

III A PRINCIPLED APPROACH

Should gain-based relief be available for invasion of privacy where invasion of privacy is actionable as such? Answers to that question can be developed in two different ways. One way is to look at invasion of privacy in isolation from other wrongs and to invoke policy considerations specifically relating to privacy. Under this approach, it could be argued, for example, that gain-based relief is needed as a deterrent against invasions of privacy since the loss caused by such invasions is often non-pecuniary and compensation for non-pecuniary loss cannot adequately restore the plaintiff to the *status quo ante*.⁶² To the opposite end, it could be argued, for example, that freedom of speech would be unduly

⁵⁸ William L Prosser, 'Privacy' (1960) 48(3) *California Law Review* 383, 389.

⁵⁹ American Law Institute, *Restatement (Second) of Torts* (1977) ss 652A–652E.

⁶⁰ *Shepard's Pharmacy Inc v Stop & Shop Companies Inc* 37 Mass App Ct 516, 524; 640 NE 2d 1112, 1117 (Ct App, 1994), where restitution was denied only because the defendant had made no profit from the use of the plaintiff's photograph.

⁶¹ This provision has been considered in *Turnbull v American Broadcasting Companies* 32 Media L Rep 2442 (CD Cal, 2004); David A Browde, 'Warning: Wearing Eyeglasses May Subject You to Additional Liability and Other Foibles of Post-Diana Newsgathering – An Analysis of California's Civil Code Section 1708.8' (2000) 10 *Fordham Intellectual Property, Media and Entertainment Law Journal* 697, 710–16.

⁶² This argument is discussed by Normann Witzleb, 'Justifying Gain-Based Remedies for Invasions of Privacy' (2009) 29(2) *Oxford Journal of Legal Studies* 325, 352–6.

inhibited were gain-based relief available where the media wrongfully publishes information about a well-known person's private life.⁶³

The other way of arguing for or against gain-based relief in cases of invasion of privacy is to develop criteria for when 'restitution for wrongs' should generally be available or unavailable, and to apply those criteria to the specific case of invasion of privacy. This article adopts that approach. Some commentators support the availability of gain-based relief for all wrongs⁶⁴ or at least all torts.⁶⁵ But most commentators present more differentiated theories on when 'restitution for wrongs' ought to be available. This part starts by outlining the theories of major participants in the debate, and examines the consequences of each theory for invasion of privacy. Wrongs that happen to cover certain forms of invasion of privacy but are not privacy-specific, such as breach of contract or trespass to land, are not considered in detail. Subsequently, this part develops an argument in favour of gain-based relief in cases of (culpable) invasion of privacy, based on a general concept of unjust enrichment through unauthorised use of another person's exclusive entitlement.

A Birks

In the view of Birks, 'restitution for wrongs' ought to be available in three (overlapping) categories: where the defendant has deliberately set out to enrich himself by committing the wrong; where the duty broken aims to prevent the enrichment in question; and where the availability of restitution is a prophylactic measure to prevent certain enrichment or harm.⁶⁶ The third category (prophylaxis) is irrelevant in the present context since it comprises only certain types of breach of fiduciary duty.

The first category is relevant because it encompasses invasion of privacy if the defendant 'has deliberately set out to enrich himself by committing' the invasion.⁶⁷ This category is potentially wide since it could encompass every wrongful publication of private information in a commercial newspaper by virtue of the newspaper being sold for profit. However, the category is more likely to be confined to the situation where the newspaper's publisher intended to make extra profit through the story in question. It is probably also required that the defendant knew of the wrongfulness of the conduct in question or knew at least the facts constituting the wrong. This can be derived from Birks' example of the sale

⁶³ See *ibid* 357-9 for discussion of this argument.

⁶⁴ Kit Barker, 'The Nature of Responsibility for Gain: Gain, Harm, and Keeping the Lid on Pandora's Box' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) 158.

⁶⁵ Gareth Jones, *Goff & Jones: The Law of Restitution* (Sweet & Maxwell, 7th ed, 2007) [36-006]; Harry Street, *Principles of the Law of Damages* (Sweet & Maxwell, 1962) 254.

⁶⁶ Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, revised ed, 1989) 326-46.

⁶⁷ *Ibid* 326.

of a defamatory story *in the knowledge that it is untrue* for the purpose of making profit.⁶⁸ It follows that Birks' first category does not cover all invasions of privacy.

The second category (anti-enrichment wrongs) does so if, and only if, the duty to respect another person's privacy aims to prevent enrichment. One aim of this duty is the prevention of emotional or financial harm. But a duty can have more than one aim. Birks himself emphasises this and explains that a wrong falls into the second category if the prevention of the defendant's enrichment was 'a main purpose' of the duty breached.⁶⁹ He uses breach of confidence as an example.⁷⁰ It is clear from the cases cited and the context, that Birks discusses breach of confidence in its traditional meaning, which is the disclosure of secret information imparted by the confider to the confidant, and not the disclosure of sensitive information in general. He observes that people seek the law's protection of confidential information for two reasons. Firstly, they seek 'to defend their own privacy, as where the personal details of some celebrity's life are about to be revealed or governmental secrets are about to leak out'.⁷¹ While the defendant attempts to make profit, the plaintiff does not regard the information as wealth. Secondly, people seek to defend wealth where the information at issue is a 'money-making' trade secret.⁷² It follows that the key question for Birks is whether the plaintiff is more interested in protecting privacy or wealth.

This test does not lead to all invasions of privacy falling into the second category. The invasion in *Douglas v Hello! Ltd*⁷³ does fall into it because the Douglasses' aim was not to keep the occurrence of the wedding or photos of it secret. On the contrary, they had already sold photos to the magazine *OK!*. They aimed to protect the wealth inherent in the exclusivity of their agreement with *OK!*. The unauthorised publication of wedding photos by the magazine *Hello!* was thus an anti-enrichment wrong. But the invasions of privacy in *Campbell v MGN Ltd*⁷⁴ and *Mosley v News Group Newspapers Ltd*⁷⁵ were not. Naomi Campbell was not interested in exploiting any wealth inherent in information about her attendance of Narcotics Anonymous meetings, and Max Mosley was not interested in exploiting any wealth inherent in information about his sexual conduct. Both simply sought to keep the information at issue secret.

In conclusion, Birks' three categories of 'restitution for wrongs' cover some but not all invasions of privacy.

⁶⁸ Ibid.

⁶⁹ Ibid 329.

⁷⁰ Ibid 329, 343.

⁷¹ Ibid 343.

⁷² Ibid.

⁷³ [2006] QB 125.

⁷⁴ [2004] 2 AC 457.

⁷⁵ [2008] EMLR 679.

B *Edelman*

Edelman distinguishes two types of gain-based damages for civil wrongs, which he calls ‘restitutionary damages’ and ‘disgorgement damages’.⁷⁶ Restitutionary damages reverse a wrongful transfer of value from the plaintiff to the defendant. They are based on Aristotelian corrective justice and ought to be available for every civil wrong. In the case of unauthorised use of a secret drink recipe, restitutionary damages can be measured by reference to the cost of a consultant to develop the drink without using the secret recipe.⁷⁷ Such an award reverses the transfer from the plaintiff to the defendant of the market value of the protected information. Disgorgement damages do not require a transfer of value from the plaintiff to the defendant. They strip the defendant of profits made as a result of the wrong, irrespective of the source of the profit. They aim to provide deterrence where a compensatory award fails to do so sufficiently. This is the case for breach of fiduciary duty and for wrongs committed with a view to make profit exceeding the victim’s loss. An example is the deliberate exploitation of confidential information for financial gain.⁷⁸

Edelman says nothing expressly on invasion of privacy. It seems clear though that an award of the full profit made by an invader of privacy is an award of disgorgement damages in Edelman’s taxonomy and thus only available where the private information was deliberately exploited for financial gain. In the case of the unauthorised publication of private information in a newspaper, this probably requires an intention to make extra profit through that particular story. It probably also requires awareness of the wrongfulness of the publication since Edelman expressly refers to *Seager v Copydex Ltd (No 1)*,⁷⁹ which involved the unauthorised use of a secret idea for a design, and saw Lord Denning MR’s remark that it ‘may not be a case for ... an account’⁸⁰ as being based on the fact that the use of the idea was inadvertent.⁸¹

Restitutionary damages in Edelman’s taxonomy are available for every wrong and thus for every invasion of privacy that constitutes a wrong. Their measure is the market value of the protected information. Where the plaintiff would have been willing to sell the information and the defendant would have been willing to pay for it, the market value of

⁷⁶ James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart, 2002) 2–3, 65–93; James Edelman, ‘Gain-Based Damages and Compensation’ in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, 2006) 141, 147–52.

⁷⁷ James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart, 2002) 209–10, referring to *Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 SCR 142.

⁷⁸ James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart, 2002) 213–14, referring to *Attorney-General v Observer Ltd* sub nom *Attorney-General v Guardian Newspapers Ltd* (No 2) [1990] 1 AC 109; *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1964] 1 WLR 96.

⁷⁹ [1967] 1 WLR 923.

⁸⁰ Ibid 932.

⁸¹ James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart, 2002) 214–15. The same reason for Lord Denning’s remark is seen by Andrew Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd ed, 2004) 624.

the information can be determined by reference to the price on which the parties would have agreed. But it is difficult to ascertain a market value where there was no market for the information at issue, in particular where the plaintiff would never have consented to a disclosure of the information. Under Edelman's theory, therefore, every invasion of privacy that constitutes a wrong attracts gain-based recovery but the measure of recovery is not always clear.

C Friedmann

Friedmann⁸² recognises two categories of gain-based relief in the context of wrongs. One is the commission of a wrong in circumstances where considerations of deterrence and punishment call for gain-based relief. A prime example of such a wrong is breach of fiduciary duty. Invasions of privacy do not seem to fall into this category. The other, and more common, category of gain-based relief in the context of wrongs is the 'appropriation' of a property or quasi-property interest. 'Property' for this purpose comprises not only tangible and intangible property in its actual sense but also other exclusive rights such as the rights to reputation and to bodily integrity. Any 'appropriation' of such 'property' triggers gain-based relief, whether or not the appropriation amounts to a tort. Quasi-property rights are protected interests in ideas, information, trade secrets and opportunity. Since they lack the element of exclusiveness, gain-based relief is not triggered by every appropriation. Additional factors are required, such as the wrongfulness of the appropriation.

In the context of privacy, Friedmann clearly classifies as a form of 'property' the exclusive right to authorise commercial use of one's name or likeness ('right of publicity').⁸³ He therefore favours the availability of gain-based relief for such invasions of privacy as the one occurring in *Douglas v Hello! Ltd.*⁸⁴ Friedmann's view is unclear with regard to other privacy interests. In a recent article, he pointed out that the right of privacy comprises diverse interests, and emphasised the need to determine the availability of gain-based relief individually for each interest.⁸⁵ In that context, he observed that the 'right of publicity' is assignable whereas the right to prevent public disclosure of private facts is probably not. It is unclear whether he meant to make the availability of gain-based relief for invasion of privacy dependent upon the alienability of the violated interest. In the original exposition of his theory on gain-based relief in the context of wrongs, Friedmann had expressly rejected alienability as a prerequisite of gain-based relief, arguing that the

⁸² Daniel Friedmann, 'Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong' (1980) 80(3) *Columbia Law Review* 504.

⁸³ Ibid 510–11; D Friedmann, 'The Protection of Entitlements via the Law of Restitution – Expectancies and Privacy' (2005) 121 *Law Quarterly Review* 400, 418–19.

⁸⁴ [2006] QB 125.

⁸⁵ Daniel Friedmann, 'The Protection of Entitlements via the Law of Restitution – Expectancies and Privacy' (2005) 121 *Law Quarterly Review* 400, 417–418.

wrongful appropriation of an inalienable interest in effect makes it a marketable interest.⁸⁶ One situation he mentioned in that context is the public disclosure of private facts. Friedmann may thus favour the availability of gain-based relief for all invasions of privacy.

D *Jackman*

In Jackman's view, an award of gain-based damages for proprietary torts, breach of a restrictive covenant, breach of fiduciary duty and breach of confidence (in its traditional meaning) protects the 'facilitative institutions' of property and relationships of trust and confidence.⁸⁷ Gain-based damages redress harm to the facilitative institution where this cannot be done by compensatory damages because the individual victim has suffered no loss. With regard to breach of contract other than breach of a restrictive covenant, Jackman argues that compensatory damages are normally sufficient to protect the institution of contract but that additional protection in the form of an account of profits might be required where a contract is deliberately broken for the sake of making a gain. Privacy is not mentioned by Jackman and thus apparently not regarded as a 'facilitative institution' in need of protection through gain-based damages.

E *Jaffey*

Like Edelman, Jaffey makes a sharp distinction between hypothetical-fee awards, which Jaffey calls the 'use claim', and disgorgement of profits.⁸⁸ Unlike Edelman, however, Jaffey is not of the view that the use claim always reverses a transfer of value. Jaffey differs from Edelman further in respect of the scope of the two forms of gain-based relief. For Jaffey, the use claim arises not from a wrong but from an imputed contract that effects an exchange of payment for a benefit. A contract is imputed where the defendant infringed the claimant's exclusive right to exploit an asset. Instances of this are the use of tangible and intellectual property, breach of a restrictive covenant and forced labour, but not defamation, trespass to the person, deceit or (ordinary) breach of contract. Invasions of privacy also seem to fall outside the scope of the use claim. But they fall into the scope of disgorgement of profits which, according to Jaffey,⁸⁹ ought to be available for all wrongs (which in Jaffey's taxonomy excludes most breaches of contract) even though it constitutes a form of civil punishment for wrongs.

⁸⁶ Ibid 511–12.

⁸⁷ I M Jackman, 'Restitution for Wrongs' [1989] 48(2) *Cambridge Law Journal* 302.

⁸⁸ Peter Jaffey, *The Nature and Scope of Restitution: Vitiating Transfers, Imputed Contracts and Disgorgement* (Hart, 2000) especially chs 1, 2, 4, 11, 12 and 13.

⁸⁹ Ibid ch 11.

F Tettenborn

Tettenborn favours the availability of gain-based relief for two types of wrongs.⁹⁰ One is the breach of an obligation of loyalty, which is irrelevant in the present context. The other is the infringement of a property right or another right that exists at least partly for the purpose of being traded or turned into money. Gain-based relief is appropriate in this situation as the defendant should not be able to escape the bargaining process. An example of a right that does not exist to be bought or sold is the right not to be assaulted or injured. Gain-based relief is therefore inappropriate where a third party paid the defendant to beat up the plaintiff. In the context of privacy, Tettenborn's theory leads to a distinction between rights that are 'tradeable' and rights that are not. The right to the exclusive use of one's name or likeness is tradeable and thus attracts gain-based relief under Tettenborn's theory. But the right to prevent intrusion into the private sphere and the right to prevent public disclosure of private information may not be tradeable and therefore may not attract gain-based relief under Tettenborn's theory.

G Weinrib

In Weinrib's view, the proper framework for understanding private law is the idea of corrective justice: 'The two parties are correlatively situated as the doer and sufferer of an injustice that is itself undone by the corresponding remedy.'⁹¹ Weinrib uses this idea to explain why gain-based damages are not available for every wrong. The mere fact that the gain results from a wrong is insufficient to justify gain-based damages, in the same way in which factual causation alone is insufficient to justify compensatory damages. What matters is not the historical connection of gain to wrong, but whether the gain partakes of the wrong's normative quality. Gain-based damages are justified where the defendant's gain is of something that lies within the right of the plaintiff, for then the gain stands as the present embodiment of the wrong rather than just a sequel to it.

A prime example is the misappropriation of a proprietary right, which Weinrib defines as a right that can be asserted against the whole world and is morally capable of being acquired and alienated.⁹² In addition, the relationship between the parties can give rise to an interest that is sufficiently property-like to allow gain-based damages. There are two categories: one is a pre-existing (in particular, fiduciary) relationship between the parties, which is irrelevant in the present context; the other is an 'action of the defendant that implicitly or explicitly treats the plaintiff's right as an asset whose value the defendant can appropriate'.⁹³ Where D is hired to beat up P and does so, says Weinrib, D treats P's bodily

⁹⁰ Andrew Tettenborn, *Law of Restitution in England and Ireland* (Cavendish, 2002) [11–7]–[11–10], [11–21].

⁹¹ Ernest J Weinrib, 'Restitutionary Damages as Corrective Justice' (2000) 1 *Theoretical Inquiries in Law* 1, 5. See also Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995) especially ch 3.

⁹² Ibid 32.

⁹³ Ibid 34.

integrity as a commodity and P can claim the money that D was paid. An invasion of privacy may equally be said to involve the treatment of the victim's private information as a commodity. It must not be overlooked though that this category requires that 'the defendant acted with knowledge of the plaintiff's right and with the intent to appropriate its value'.⁹⁴ Weinrib's theory thus allows gain-based relief for invasion of privacy only if the invader knew of the wrongfulness of his conduct.

H *Worthington*

Worthington recognises two different types of gain-based relief in the context of wrongs, with different fields of application.⁹⁵ One is the disgorgement of all ill-gotten profits, which is only available where an equitable obligation of good faith or loyalty has been broken. This category, which Worthington places outside the law of unjust enrichment, is irrelevant in the present context. The other type of restitution for wrongs is the claim for the 'use value' of misappropriated property, which Worthington regards as a claim in autonomous or subtractive unjust enrichment. The unauthorised use of property, says Worthington, entitles the owner to claim the 'use value' of the property but not disgorgement of all profits made from the use. She applies this concept to land, chattels, money and intangible property, and predicts the future recognition of 'information rights' as some kind of property, which development 'would liberate the protection of information from the confines of breach of confidence requirements (where it is the relationship of confidence, not the information *per se*, which is all important)'.⁹⁶ It follows that once private information is recognised as some kind of property, Worthington's theory will support a claim for the 'use value' of the information in cases of invasion of privacy.

I *The significance of exclusive entitlements*

The existing theories on the proper scope of 'restitution for wrongs' come to very different conclusions in the context of privacy. Some theories support gain-based relief for all invasions of privacy; some theories deny gain-based relief for all invasions of privacy; and some theories support gain-based relief for certain invasions of privacy and deny it for others. This disparity in the context of privacy flows from the disparity of the theories in general. While no theme is common to all of them, a theme that is common to most is the availability of gain-based relief for the misappropriation of 'property', at least in its actual sense. That is convincing. The crucial feature of ownership in tangible or intangible property is the owner's exclusive right to decide whether, when and how to use the asset. Any use of the asset should be for the owner's benefit unless the owner or the law has

⁹⁴ Ibid.

⁹⁵ Sarah Worthington, 'Reconsidering Disgorgement for Wrongs' (1999) 62(2) *Modern Law Review* 218.

⁹⁶ Ibid 234.

decided otherwise. Where another person has used the asset without the owner's consent and without any other legal justification, the owner can claim that use or, since the use cannot be given up in kind, the monetary value of the use to the usurper. Gain-based relief is the natural consequence of recognising an exclusive entitlement to the asset.⁹⁷

Once this principle is recognised, it must logically apply beyond tangible and intangible property to all exclusive entitlements. It should be irrelevant whether the exclusive entitlement is alienable or whether the plaintiff intended to exploit it commercially because the defendant, by using the plaintiff's exclusive entitlement without authorisation, has in fact treated the entitlement as a commodity.⁹⁸

The right to privacy, insofar as it is recognised, constitutes an exclusive entitlement, the unauthorised use of which ought to trigger gain-based relief. This shall be explained by reference to the unauthorised public disclosure of private information but applies equally to other forms of invasion of privacy. Where the disclosure of certain private information can be prevented through an injunction, the holder of the information has an exclusive right to decide whether, when and how to use the information. Whether the information can properly be described as 'property' is not relevant here.⁹⁹ It might be argued that the right to keep private information private is not an exclusive entitlement since it can be overridden by a public interest in disclosure. But such an argument would be misconceived. Exclusive entitlements are rarely absolute. In certain circumstances—necessity, for example—even the owner of tangible property must endure the use of the asset by others without the owner's consent. But the owner's entitlement is exclusive in general, that is, in the absence of countervailing factors that exceptionally override the owner's right. Likewise, the right to keep private information private is exclusive in general, that is, in the absence of countervailing factors (in particular a public interest in disclosure) that exceptionally override the information holder's right.

Since gain-based relief is the natural consequence of recognising an exclusive entitlement to an asset (in a wide sense), the unauthorised use of an exclusive entitlement should in principle be a sufficient basis for awarding gain-based relief. There is no reason why gain-based relief should additionally require that the use of the exclusive entitlement is a wrong in the sense that it attracts compensatory relief (if loss has been suffered). There is no reason why factors excluding compensatory relief, such as immunity or innocence, should necessarily exclude gain-based relief too. Conversely, there may be good reasons for excluding gain-based relief where compensatory relief is available. Compensatory and

⁹⁷ This argument is elaborated further in Sirko Harder, *Measuring Damages in the Law of Obligations: The Search for Harmonised Principles* (Hart, 2010) 215–18.

⁹⁸ Ernest J Weinrib, 'Restitutionary Damages as Corrective Justice' (2000) 1 *Theoretical Inquiries in Law* 1, 34. See also Normann Witzleb, 'Justifying Gain-Based Remedies for Invasions of Privacy' (2009) 29(2) *Oxford Journal of Legal Studies* 325, 356–67.

⁹⁹ On that question see Megan Richardson, 'Owning Secrets: "Property" in Confidential Information?' in Andrew Robertson (ed), *The Law of Obligations: Connections and Boundaries* (UCL Press, 2004) 145; Arnold S Weinrib, 'Information and Property' (1988) 38 *University of Toronto Law Journal* 117.

gain-based remedies ought to be capable of having different requirements as to culpability etc, depending upon specific policy considerations for the remedy in question. Under the intellectual property law of England and Wales, for example, certain remedies for certain intellectual property wrongs require culpability while others do not.¹⁰⁰

Gain-based relief for the unauthorised use of an exclusive entitlement should thus be classified as an instance of autonomous unjust enrichment rather than dependent (parasitic) unjust enrichment or restitution for wrongs. But this issue may have little relevance to the public disclosure of private information, at least with regard to the requirement of culpability. Considering the high significance of freedom of speech, culpability should be required for both compensatory and gain-based relief in those cases. There should be no liability where the defendant was not, and could not reasonably have been, aware that the information in question was protected private information. Furthermore, ignorance of the private nature of information may rarely occur in practice.

Since the concept of exclusive entitlements provides a sufficient basis of gain-based relief for (culpable) invasion of privacy, it is not necessary to discuss whether the unauthorised use of exclusive entitlements is the only basis of 'restitution for wrongs'. In particular, it is not necessary to discuss whether gain-based relief ought to be available for all wrongs or at least all wrongs committed with a view to make profit.

IV CONCLUSION

At least some forms of invasion of privacy are actionable as such in most common law jurisdictions, and in some of those jurisdictions, the plaintiff cannot only claim compensation for loss suffered but can alternatively claim the profit the defendant has made from invading the plaintiff's privacy. In Australia, where the existence of a common law wrong of invasion of privacy is uncertain and statutory protection of privacy is limited, the creation of a full-blown statutory cause of action for invasion of privacy has been recommended by three law reform bodies, two of which have recommended the availability of an account of profits as one possible remedy.

Insofar as a right to privacy is recognised, gain-based relief should in principle be available for its invasion. The right to privacy constitutes a right to exclude others from one's private sphere and thus an exclusive entitlement against the whole world. It is an inherent feature of an exclusive entitlement that any use of it ought to be for the benefit of the right-holder unless the law or the right-holder says otherwise. Gain-based relief is the natural consequence of the unauthorised use of an exclusive entitlement. It should be irrelevant whether the exclusive entitlement is alienable or whether the plaintiff intended to exploit it commercially, since the defendant's unauthorised use of the plaintiff's entitlement has in fact commercialised it.

¹⁰⁰ The law is outlined in Sirko Harder, *Measuring Damages in the Law of Obligations: The Search for Harmonised Principles* (Hart, Oxford, 2010) 196–7.

