Private Law in the C21st

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All Abstracts

Alphabetically by Author(s))

TT Arvind, Newcastle University, UK & Joanna Gray, Birmingham University, UK
The Limits of Technocracy: Private Law's Future in the Regulatory State.

This paper takes up the question of private law's role in a state and legal system dominated by technocratic, administrative, and regulatory institutions. Recent years have seen private law come to be displaced by these institutions and to itself take on a more technocratic face, as seen in the disappearance of the Clapham Omnibus, the centrality of risk management, and the growing role of procedure and case management. Some theorists have responded to these trends by arguing for private law to disengage from systemic concerns and to focus on interpersonal justice, whilst others see systemic matters playing an ever-growing role. This paper argues that whilst private law cannot avoid engaging with systemic issues, its proper role should be to move away from a focus on *systemic* dimensions, to concerning itself primarily with the *human* dimension of systemic issues.

We use the example of the financial sector to illustrate and develop this approach. In the post-crisis world, legal developments in finance have been characterised by two trends: at the public level, a move to system-oriented macroprudential regulation; and at the private level, a move to remove financial transactions from the control of the courts through the creation of an institutionalised system of private arbitration in the form of the PRIME finance initiative. Critically, both these trends share in common the fact that they are focused on the needs and perspectives of technocratic experts and institutional market players, and are insulated from the needs and perspectives of end-users and of the broader polity.

We argue that such a system is fundamentally flawed. Drawing on the literature on resilience and regulation, we show that such a regulatory framework will tend to ignore the socio-cultural dimensions of resilience, which are of central importance to a resilient financial system. We argue that the direction in which macroprudential regulation is evolving bears this concern out. Drawing on the history of responses to crises, as well as the German experience with the Kapitalanlegermusterverfahrensgesetz, we demonstrate that the resulting gap is one that a revitalised and open system of private law can and should fill. This, we argue, will require a fundamental reconsideration of the direction of recent changes to the civil justice system, and a renewed emphasis on its socially embedded character.

Professor Susanne Augenhofer, Humboldt University, Berlin.
"Self-Regulation and the Interface of Consumer Protection and Corporate Governance."

This paper uses corporate social responsibility (CSR) as an example of self-regulation and analyses the impact self-regulation has on consumers as well as on enterprises. While CSR is used by almost every business as an effective marketing tool to influence consumers´ choice covering areas from environment protection to ethical working conditions, the legal boundaries and consequences have not yet been fully explored. One of the reasons might be that CSR comes in many shapes and forms: e.g.

labels created or statements issued by businesses themselves on the one hand, codes of conduct issued by third parties such as NGOs or business associations on the other hand. Another aspect to be discussed is the transnational setting in which CSR policies are being used. The paper will show that if consumers' interests have to be taken into account, CSR can never be a form of pure self-regulation. The reason for this is that regulators should always ensure compliance with some publicly provided minimum standards.

For instance, information given in the context of CSR statements must be accurate and it has to be monitored whether a business actually follows through with its promises. The paper will therefore address questions of the public / private law debate with regard to enforcement. In this regard, the limits of each enforcement model in transnational commerce will be highlighted in order to reason whether and under which conditions a consumer governance code might help to reduce complexity in transnational settings.

Dr Francesca Bartlett, University of Queensland

Making Lawyers 'litigate like adults' – the Expansion of Costs Awards against Lawyers.

In *Aon Risk Services Aust Ltd v ANU* (2009) 239 CLR 175, Justice Heydon famously commented on the 'strange alliance' in Australian civil courts of poor litigators and cautious justices where the 'torpid languor of one hand washes the drowsy procrastination of the other'. Since this clarion call, courts across Australia have been increasingly implementing case management strategies in order to provide cost effective justice. This paper considers one aspect of judicial procedural activism by tracing the recent imposition of costs orders against lawyers. In particular, the paper considers the use of powers provided to Victorian and federal courts under the *Civil Procedure Act 2010* (Vic) and *Federal Court of Australia Act 1976* (Cth). Arguably unparalleled in corresponding lawyers' ethics codes and traditional common law approaches to wasted costs, these courts now impose responsibility for efficient and proportionate litigation strategy as a proactive ethical duty of lawyers. The paper speculates on whether this lawyer focused approach is likely to achieve efficiency objectives and whether it has a potentially chilling effect on the sorts of cases brought.

Dr Justine Bell and Professor Kit Barker, University of Queensland.

Public Authority Liability for Negligence in the post-Ipp Era: Sceptical Reflections on the "Policy Defence"

Public authority liability for negligence has long been a vexed question in tort law. Following the Ipp Review of 2002, it has been further complicated by the introduction in most Australian states of a form of 'policy defence', designed to reduce authorities' exposure to liability through lowered standards of care modelled on the public law concept of *Wednesbury* unreasonableness. Here, we analyse the complicated world of liability that now exists in Australia, examining the various manifestations of the 'policy defence' introduced, highlighting the problems and uncertainties they create, their wide variation in form and their infidelity to the proposals on which they purport to be based. We suggest the only solution to the current mess is a return to the drawing board and canvas two potential solutions that now merit more detailed consideration – either a wholesale reversion to the common law; or the enactment in Uniform Legislation of a single, cautiously deferential approach to liability for discretionary public body decisions, which mimics the approach to other types of specialised, expert decision in private law. Explicit in this discussion are the difficulties of properly managing the relationship between both public and private law; and between judicial and legislative development of complex fields of the private law.

Professor Andrew Burrows* QC *FBA, DCL, University of Oxford
Challenges for Private Law in the 21st Century

After briefly looking at one aspect of the challenge posed for private law by ever-increasing legislation, this paper considers two of the main challenges for private law in the 21st century. First, in the face of signs of decline, how does one keep private law alive and thriving in the universities? One central suggestion made is that it is important to re-emphasise the merits of doctrinal/practical analytical research. Secondly, how might one address the non-accessibility of private common law? Here the paper discusses the ongoing project to produce Restatements of the English Law of Obligations.

Wendy Bonython, Assistant Professor, School of Law and Justice, Faculty of Business Government and Law, University of Canberra
Power Failure? The Distracting Effect of Legislation on Common Law Torts.

"One of the changes making the work of modern judges different from that of their predecessors is that most of the law to be applied is now to be found in Acts of Parliament rather than judge-made principles of common law "- Gleeson CJ, 'The meaning of Legislation: Context, purpose, and respect for fundamental rights'

In his oration to the Victorian Law Foundation, Gleeson CJ alluded not only to the proliferation of legislation in recent decades, but also the broad scope of activities legislatures now feel obliged to regulate. He also noted that "Only a very small part of Australian legislation takes the form of codification. Most of it is intended to supplement, or modify, judge-made law, rather than to replace it." Many jurisdictions have now legislated to reform civil law, and that legislation has typically received significant academic attention. Less well-studied is the interpretation of legislation governing specific activities subsequently the subject of litigation in tort. This paper examines that interaction in three separate contexts: negligence claims arising in the context of harm caused by people with mental illness, and statutory powers; nuisance claims involving genetically modified crops; and defamation claims arising in the context of anti-discrimination and vilification legislation. It finds that the mere existence of legislation – regardless of its applicability to the factual circumstances – can be a distraction, potentially distorting the outcome of claims in a way not intended by the legislature.

Professor Robyn Carroll (University of Western Australia, Australia) and Professor Jeff Berryman (University of Windsor, Canada)
Offers to Make Amends for Defamatory Publications – Comparison and Critique.

Prompt and suitable corrections and apologies can be effective to avoid protracted and costly defamation suits. Recognising this fact and in keeping with sweeping changes to civil procedure to encourage private settlement of disputes in recent decades, legislatures in many common law countries have enacted offer to make amends provisions to facilitate prompt and effective resolution of defamation claims. An offer to make amends, when accepted or if unreasonably rejected, provides a defence to the publisher of a defamatory statement. The provisions have been described variously as 'draconian', as 'stymying' a plaintiff's claim and as infringing a plaintiff's right to a vindicatory judgment. This paper examines the offer to make amends provisions in the UK, Australia, Canada and elsewhere and evaluates this legislative mechanism against its intended purposes and criticisms.

Professor Erika Chamberlain, Faculty of Law, Western University, Canada
Snooping: How Should Damages be Assessed for Harmless Breaches of Privacy?

In recent years, several common law jurisdictions have recognized "intrusion on seclusion," or some variation thereof, as a new tort. Based on the American model, this tort is actionable where a defendant intentionally intrudes on the private affairs of the plaintiff, in circumstances that a reasonable person would regard as highly offensive, causing distress, humiliation or anguish.

While the courts have gone to some lengths to show why privacy interests should be protected by tort law, they have been less helpful about providing guidance for the assessment of damages in these cases. The principles governing damages are particularly unclear in cases where the plaintiff has suffered no tangible harm, and where the defendant has done nothing nefarious with the relevant information. How should the courts assess damages for cases involving mere "snooping"?

The Ontario Court of Appeal has found that damages in such cases are "symbolic," with the range fixed at up to $20,000. It is hard to imagine many plaintiffs (or their lawyers) pursuing litigation for such a modest award. More recently, however, the Court of Appeal refused to strike out a class action for intrusion on seclusion in the healthcare context. This holds the potential for a much larger aggregate award. The Court found that a remedy in tort was not precluded by the existence of a statutory cause of action under the *Personal Health Information Protection Act*: since the statutory action requires proof of actual harm and is capped at $10,000 in damages, tort law could fill a remedial gap. The Court's decision thus contemplates substantial liability for some defendants, even in situations where no harm was caused.

This paper will examine the potential bases on which courts might assess damages for "harmless" breaches of privacy, including the consideration of vindication, dignity, autonomy, and distress, as well as tort law's interaction with the complex statutory regimes that govern privacy and personal data protection. While the primary examples will be drawn from Canadian cases and statutes, the general principles are relevant to other common law jurisdictions. Given the heightened public interest in privacy, the unprecedented collection and storage of personal data, and the opportunities for unauthorized review of these data, it will be crucial for 21st-century private law to determine appropriate remedial principles in this area.

Professor Hugh Collins, Vinerian Professor of English Law, All Souls College Oxford
The Challenge Presented by Fundamental Rights to Private Law. (Keynote)

Fundamental rights contained in constitutions and international conventions are increasingly used to challenge the rules and principles of private law even in horizontal relationships between private parties. In some instances the fundamental right may give birth to a new private law principle, but more commonly fundamental rights are used to modify existing principles, steer the application of general clauses and open textured standards, and to reinforce some principles at the expense of others. Looking in particular at the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, the paper critically assesses the impact of appeals to fundamental rights on private law. In particular, the paper examines the extent to which private law should mirror the jurisprudence of fundamental rights.

Tatiana Cutts, University of Birmingham
Money in the Age of Ubiquitous Computing.

Classical monetary theory impressed upon lay person and lawyer alike the centrality of the metal coin to conceptions of value and currency. This model, which plays to what psychologists consider to be an idiosyncratically human tendency to equate of lustre with lucre, has proved extremely adhesive in private law theory and practice. We have accordingly fashioned our tracing rules around principles

identical to those applicable to homogenous mixtures of physical things. This has not only left us with a body of rules that is extremely difficult to locate within our framework of reasons and responses, but has also created a substantial divide between judicial and economic practice, making it almost impossible to conceive of an appropriate response to new money media.

Bitcoin is the poster child for a payment technology revolution, in which "coins" not only lack a tangible presence, but also retain no immutable data form through the steps of a transaction. Precisely how, if at all, such media can and should be incorporated within existing causes of action are matters that remain altogether uncertain. Conversion remains heavily circumscribed by the House of Lords' decision in *OBG v Allan*, [2008] 1 AC 1, whilst attempts to develop the law to provide some kind of remedy for the misappropriation of unique digital assets have largely passed unnoticed. This paper will argue that a private property framework will in fact hamper rather than support emerging digital monetary economies, and that the best methods for affording the confidence necessary to fuel fluid currency are cryptographic, not legal.

Professor Hanoch Dagan, University of Tel-Aviv
The Challenges of Private Law. (Keynote)

Properly understood, private law establishes ideal frameworks for respectful interaction between self-determining individuals, who are indispensable for a society where all recognize one another as genuinely free and equal agents. Only private law can form and sustain the variety of frameworks necessary for our ability to lead our chosen conception of life. And only private law can cast them as interactions between free and equal individuals who respect one another as the persons they actually are, thus vindicating the demands of relational justice. Hence the two animating principles of liberal (that is, autonomy-enhancing) private law—structural pluralism and interpersonal accommodation.

Building on this account of private law, which I have developed in recent years, this Essay will provide a preliminary survey of three important challenges to private law in a liberal society. One challenge, prompted by the injunction of structural pluralism, is that of "optimal" plurality, namely, the number of alternative frameworks a liberal state is required to provide and the degree of variance among the given alternatives. Another type of challenge emerges whenever the constitutive good(s) of the social practice that the parties engage in are in tension with the injunction of interpersonal accommodation. These cases require private law to either allow these goods to override the injunction of interpersonal accommodation or else discard or reform the pertinent legal (and social) practice. Finally, because the intrinsic value of private law does not require treating private law and public law as mutually exclusive categories, private law must be careful not to undermine the liberal state's commitments to both distributive justice and democratic citizenship. This Essay will thus conclude with a consideration of the ways in which private law can, when this concern arises, adapt its doctrinal framework so that it properly addresses these commitments while still meeting the demands of relational justice.

Professor Joachim Dietrich (Bond) and Professor Pauline Ridge (ANU)
Taxonomy and Making Sense of Complexity: Is There a Need for A 'Law of Accessory Liability'?

The liability of accessories is an often neglected, but important, topic across private law. Although concepts and ideas concerned with accessory liability appear to be at work across different private law wrongs and share many similarities, nonetheless the specific and often detailed rules discernible within each body of case law do not 'talk' to each other. That phenomenon is not, of course, an unfamiliar one. Few attempts have been made to organise and analyse the law on accessories as a whole. This is not to suggest that this is an easy task; indeed, even within discrete subject areas, it is questionable whether the law on accessories is coherent.

Nonetheless, even if uniformity or coherence are unattainable goals, this does not mean that analysing the law of accessory liability across different subject areas is not useful. In this paper, we identify common themes and problems that arise in the law and propose a principled analytical structure for the law of accessory liability. The paper identifies an organising principle of accessory liability and explains the fundamental concepts that are used to impose liability on accessories, particularly the conduct and mental elements of liability: 'involvement' in the primary wrong and (generally) knowledge. Comparing the liability rules across different common law jurisdictions, as well as criminal law, assists in shedding new light on what is accessory liability, when it arises, and how it compares to similar concepts and liability rules at work in the law.

It is not argued, however, that a common analytical structure means that there exists, or that we should 'discover' or invent, a single cause of action of accessory liability. Instead, the specific accessory rules reflect the purposes and values promoted by the law of the particular wrong committed. That said, understanding accessory liability and setting its scope in relation to different wrongs is made much easier if the analytical approach we suggest were to be adopted throughout private law.

This paper also considers an important issue of more general significance, namely how different taxonomical approaches can be used to seek to organise and explain the law. Should a taxonomy seek to impose uniform or even rigid structures or dictate specific legal outcomes? Or should we merely identify more generic, and flexible, organising principles, such principles operating in different ways in various contexts? Such questions are critical in a world of ever increasing legal complexity and information overload. Different taxonomical approaches may reflect differences in judicial method, underlying starting assumptions, or competing views about discretion versus certainty and predictability. As part of a consideration of these issues and in particular, we compare our conclusions as to how accessory liability ought to be understood and organised with those of Paul Davies in his book, "Accessory Liability".

Justice James Edelman, Federal Court of Australia
Vindicatory Damages. (Keynote)

Over four days in November 2010, nine judges of the United Kingdom Supreme Court sat to hear argument in a case where one of the key issues was whether substantial damages could be awarded, for reasons independent of publishment of deterrence, for a wrongful detention that had caused no loss. Such damages had previously been described as "vindicatory damages". The court divided on the answer. The High Court of Australia has recently granted special leave in a case that raises the same issue. To an observer who is not educated in the law it might seem very surprising indeed that after hundreds of years of development the answer to such a basic proposition is so heavily contested. Damages are probably the most common remedy in private law. They are claimed every day in courts around the world. Perhaps the reason why such a fundamental question as this can still be the subject of so much debate in the 21st century is that, like much of the common law, the law of damages has been developed slowly and incrementally and generally without any express reference to a deep underlying theory. My paper this morning considers the debate surrounding "vindicatory damages" and how the approach taken to this question might reveal deep norms that could govern the development of the law of damages in the 21st century.

Associate Professor Neil Foster, Newcastle Law School, NSW.
'Reforming the Action for Breach of Statutory Duty in the 21st century: Reconsidering the "section of the public" Rule.'

The common law action for breach of statutory duty allows an intersection between private law and systems of public regulation, by allowing an individual to sue where rights created by statute have been infringed. One of the most controversial elements of the action, however, is the requirement that the relevant legislation protect a "section of the public", and not the public at large. This paper explores the origins and nature of this rule, and suggests that, in an age of increasing legislation burdening private common law rights, it may be time to abolish this requirement as a part of the tort action.

Professor Joshua Getzler, University of Oxford.

Common Law and the Making of Financial Markets: Credit Ratings Agencies as a Test Case

This paper investigates how basic problems of legal definition make investor protection tricky in common law systems. After outlining some general problems in common law protection of investors, the legal control of credit ratings agencies is examined as a test case. This case is interesting for two reasons: first, because the ratings agencies have caused great loss to individual investors and serious harm to the entire financial system and economy; and secondly, because it has proved very difficult to make ratings agencies liable for poor work; indeed until very recently they seemed to operate with an almost complete immunity to legal sanctions. The "Legal Origins" school suggested that the common law was particularly good at investor protection and so promoted capital formation and strong economic growth. In contrast to that School, this paper deploys the traditional techniques of close legal and institutional analysis rather than aggregated empirical testing and model building. Observation of three common law systems grappling with problems of serious and destructive market misconduct throws doubt on the hypothesis that the common law is intrinsically good at promoting healthy finance. The story of failed or lagging legal regulation of the ratings agencies, who contributed so much to the post-2008 destruction of value and output in the Western economies, suggests that the common law should receive a mixed report card when it comes to success at protecting investors. Recent litigation breakthroughs in Australia and the United States show that the common law can make a difference and contribute to improved financial conduct; however recent legislation my impede rather than help in the tasks ahead.

Carlo Vittorio Giabardo, University of Turin

Private Law in the Age of the 'Vanishing Trial.'

Over the last twelve years, the topic of the privatisation of civil justice and the 'vanishing' of trials in common law jurisdictions has preoccupied many jurists. Roughly put, this phenomenon can be described as the 'shift' from a State-based, public system of adjudication to a system almost entirely dominated by private (and secret) means of resolving disputes - especially settlement-oriented ones. Albeit this 'procedural' trend has been widely examined and debated from various perspectives, not much has been said about its relationship with substantial law. How, and in what sense, does the decline of trials affect private law? To answer this question, I undertook a sort of 'thought experiment', and I wondered what would happen to private law if civil trial disappeared *completely.*

In attempting to tackle this problem – or at least part of it – I will develop two fairly simple ideas.

The first is that courts play an essential and unique role in determining the ways in which private law changes and evolves - and this, I argue, is true not only in judge-made law jurisdictions (where this claim sounds even obvious), but also in code-based legal systems. Indeed, private law can never be conceived as a static, perfectly coherent body of rules, but rather as a set of practices that has to constantly develop to 'match' the changing needs of society. Since this evolution cannot occur

haphazardly, only judges can provide a coherent legal framework in which the different areas of private law could develop in accordance with its most well-established principles.

The second idea, strongly related to the first one, is that if there is no 'public' judicial decision about legal rights and obligations, then no legal certainty is possible, and private law, therefore, cannot carry out its most basic task, namely to regulate and to orient human conduct. This is for the simple reason that the purpose of 'a.d.r'. mechanisms – all of which operate in secrecy - is not to state authoritatively the law (*juris-dictio* in Latin) nor to clarify its meaning, but simply to terminate disputes, and in doing so they often just mirror the power imbalances existing between parties.

I argue, then, that these two problems – the one concerning the evolution, the other concerning the certainty and foreseeability of rules - are closely related. Indeed, they both arise from the fact that private law has an 'open-texture' language, rich in legal standards (such as 'good faith', 'due care', 'reasonableness') and its core concepts (such as 'responsibility', 'wrongfulness', 'causation', and so forth) are all inherently vague. Things being so, only a public - and accessible - system of courts can properly balance between the opposing needs for flexibility and predictability of legal rules.

In conclusion, what I want to draw attention to is what I propose to call the 'public' side of private law, namely the importance of courts (and adjudication) in the functioning of private law institutions, and therefore their role in fostering the rule of law.

Imogen Goold, Associate Professor, Faculty of Law, University of Oxford and Simon Douglas, Associate Professor, Faculty of Law, University of Oxford

A Public Property Approach to Human Tissues (draft title).

With the proliferation of biobanks, and the emergence of commercial tissue supply banks, the law relating to the use of human tissues is an area that is likely to attract greater judicial and legislative attention in the near future. Indeed, we have already seen the beginnings of this trend, with Anglo-Australian courts increasingly being asked to adjudicate disputes over the use of such materials. A number of approaches have emerged over the past twenty years, with some decisions following the *Doodeward v Spence* approach of according a right to possession over tissue that has been transformed via 'work and skill'. In other decisions, such as that of the English Court of Appeal in *Yearworth*, an attempt has been made to justify recognizing that individuals hold a range of rights generally associated with ownership over their own tissue, or at least over sperm. Various Australian state courts have also granted women the right to obtain and use sperm from a deceased partner to become pregnant. These rulings, however, sit uneasily with legislation governing human tissue use in both Australia and the UK. Consequently, the nature and scope of entitlements to tissue (including gametes) is not clear.

This is particularly true of the Australian legislation, much of which was passed in the early 1980s. As a result of far-reaching developments in medicine and the biological sciences, the simple consent models established by legislation in both Australia and the UK are insufficient and focus only on a limited set of tissue uses, particularly research and medical uses. Their relationship to the developing common law principles is also uncertain. New or updated statutory regimes, regulating the control, use and transfer of human tissue, are likely to find their way onto the legislative agenda.

Given the likely developments in this area of law, it is important that scholars consider what forms of regulation are best suited for human tissues. If not general consensus, there is certainly strong support for a property law approach to this issue. In this paper, we aim to consider what *type* of property law should govern human tissues: should they be the subject of private personal property rights, or should they be regulated by a non-private property system? A number of scholars have voiced their support for a 'common property', or 'public property' approach to human tissues, arguing that biobanks are analogous to other 'public goods' like charitable assets, state institutions and national resources.

In this paper we aim to show that a 'public property' approach to human tissues is problematic both in practice and as a matter of doctrine. So far as judges and legislatures wish to regulate human tissues, we will argue in this paper that private property remains the soundest and most efficient method.

Dr Genevieve Grant (Monash University); Dr Kylie Burns, Dr Ros Harrington, Professor Elizabeth Kendall, Dr Annick Maujean (Griffith University); Professor Prue Vines (UNSW)

When Lump Sums run out: Disputes at the Borderline of Tort law, Injury Compensation and Social Security.

The private law of tort aims to compensate injured plaintiffs for life by placing them in the position they would have occupied if uninjured (as far as money can). In practice, lump sums often "run out" or are prematurely dissipated. This problem can be particularly significant for the catastrophically injured who may be left destitute, with consequent effects on mental and physical health. Where plaintiffs' funds have been dissipated, social security plays an important role in providing support. Despite the importance of understanding the interface of the tort and social security systems, there has been little empirical investigation of why lumps sums are prematurely dissipated, or the experiences of tort plaintiffs who seek early access to social security after their receipt of lump sum damages.

This paper presents the findings of our studies of *special circumstances* review decisions of the Administrative Appeals Tribunal. To prevent 'double dipping', a compensated tort plaintiff will typically be subject to a social security preclusion period. Under the *Social Security Act 1991* (Cth), Centrelink may treat a compensation payment as not having been made, if appropriate in the *special circumstances* of the case. A finding of *special circumstances* can have the effect of reducing or waiving the preclusion period, thereby speeding up access to social security. These assessments can be appealed, paving the way for disputes at the border of social security and injury compensation. Such disputes provide a rare window on the interface between these key sources of financial support for people who sustain personal injury, and the reasons for dissipation of lump sum compensation. Through content analysis of these decisions, we shed light on the characteristics and experiences of claimants who argue for early access to social security after they have received damages. The analysis also highlights the reality of the way carefully-calculated damages payments play out in practice, and the relevance of claimants' post-settlement welfare and wellbeing for our assessment of tort law and injury compensation schemes.

Martin A. Hogg, Professor of the Law of Obligations, University of Edinburgh

Codification of Private law: Scots Law at the Crossroads of Common and Civil Law."

This paper will assess the merits and practicalities of a codification of Scottish private law. The paper will begin by setting the idea of codification within its historical context (including a discussion of the Scottish Institutional Writings tradition, and previous codification plans) as well as the current political position of Scotland within the United Kingdom and Europe. An assessment will be made of whether the argument for codification in Scotland takes on any peculiar characteristics on account of its position as a mixed legal system, having both a Roman law tradition as well as a Common law doctrine of precedent. The possible content of any Civil Code will be discussed, and an examination will be undertaken of arguments for and against codification; consideration will be given to what would happen to the doctrine of precedent following the promulgation of any Code; and an examination will be made of the assistance that could be drawn from specific comparative instruments in drafting the provisions of any Code. Conclusions will be drawn, with an attempt to reflect not only on the ramifications of a codification project for Scotland but for the Common law world.

Darryn Jensen Senior Lecturer, School of Law, University of the South Pacific

Constructive Trusteeship –The perils of Statutory Formulae.

Trying to capture multi-faceted concepts such as 'breach of trust' and 'constructive trusteeship' in statutory formulae involves a risk of blurring distinctions which are relevant to the justification of the form and quantification of relief. Article 126 of Title 50 of the Marshall Islands Revised Code will be used to illustrate the problem. Article 126 provides that a person who 'makes or receives any profit, gain or advantage from a breach of trust shall be deemed to be a trustee of that profit, gain or advantage'. Since the definition of 'breach of trust' in Title 50 covers any breach of a duty owed by a trustee and refers to 'any person', it appears to merge several different types of claim, i.e. true proprietary claims, claims for fiduciary gains and knowing receipt claims, within an unjust enrichment paradigm. The provision entrenches the theoretical definition of constructive trust offered by Cardozo J in *Beatty v Guggenheim Exploration Co* (1919) 225 NY 360 at the expense of a pluralistic understanding of constructive trusteeship that see a number of distinct justificatory structures at work in different situations. Provisions such as Article 126 would seem to offer very little in terms of greater certainty at the risk of a loss of subtlety.

Professor Tsachi Keren-Paz. Keele Law School.
Compensating Injury to Autonomy: A Conceptual and Normative Analysis.

The purpose of this article is to critically examine injury to autonomy ('ITA') as actionable damage, mainly in the tort of negligence, but also through consumer protection and contract law. I will focus on scenarios in which the consumer, contrary to reasonable expectation, consumes food which they prefer to avoid due to ethical or religious preferences.

My goals are both conceptual and normative. I first distinguish between three types of injury to autonomy and highlight that the test to be used in order to examine whether injury to autonomy (ITA) exists has to be subjective. The distinction between these three types often eludes courts with the result of much confusion and inconsistency.
I then highlight the constitutive elements of type 2 ITA which is the centre of this article's attention: cases in which the claimant is brought to an inferior state of affairs without his consent and where the ITA is not consequent on violation of an already protected interest. These elements are: meaningful choice; reliance (as opposed to expectation) interest; and irreversibility. I further examine how ITA is different from mere distress which is traditionally not protected by negligence and only partially protected in contract.

The constitutive elements are necessary but insufficient in order to protect the interest in autonomy in negligence or in contract. Central to the normative analysis is the question whether the interest is sufficiently important to justify the recognition of a new type of substantive private interest, and if so, whether doing so through existing causes of action is desirable. Accordingly I defend remedying ITA in circumstances invoking bodily integrity and freedom of conscience which are both central to one's autonomy. This shifts the focus from protection of choices (or preferences) per se to a thicker notion of autonomy – protecting choices that are informed by one's personal beliefs, ethics, values, attitudes and world view. Finally, I examine two quantum related questions: whether damages should be awarded according to a subjective or objective test, and secondly, the relevant criteria for awarding damages.

Professor Barbara McDonald, University of Sydney
Law Reform, Legislation and the Common Law.

This paper will build on a paper to be given at a conference to mark the 50th anniversary of the UK law Commission in London in July 2015. It deals with the various ways in which statutes interact with the common law in private law. It questions whether legislation is always the better way to bring

about change in the law, particularly by reformulations or re-statements of fundamental principles or issues. A central example will be the reformulation of the tests for breach of duty and causation in negligence in Civil Liability statutes in Australia and the impact they have had on litigation, the resolution of disputes and the development of the law. The paper will highlight the relative limitations inherent in both legislation and the common law as a means for reform and also to act as a single source of law.

Kathryn McMillan QC and Janice Crawford, Barrister at Law
Is 'Access to Justice' Political Puffery, or Does it Mean Anything in the real world?

"Access to Justice" means many things to many people. It is an ideal. It is not a single idea – in fact it is a hybrid of component parts which in combination equate to what we generally think of as "access to justice." A few of the component parts have been previously identified as, access to lawyers, access to courts, litigation processes which produce just outcomes and just laws. This paper will explore what Access to Justice actually means in Queensland in 2015. Who is accessing justice, when and how? Why access to lawyers is a vital component of 'access to justice' that ought not to be diluted further. Barriers to an individual's access to lawyers will be explored. Litigation funding, speculative costs agreements and legal aid resourcing will be briefly explored. Probono work will also be discussed.

Dr Eliza Mik, Singapore Management University School of Law
Persuasive Technologies – From Loss of Privacy to Loss of Autonomy.

The transacting behavior of online consumers is being increasingly steered by means of a range of technologies designed to determine *what* information is displayed and *how and when* it is displayed ("persuasive technologies"). Relying on the commercial surveillance of online activity and the resulting availability of vast amounts of consumer information, persuasive technologies enable those who deploy them to forecast and to change consumer behavior. Examples range from predictive analytics, website morphing to search engine bias. To date, the use of technology to affect human behavior has been discussed under the label of "normative technologies," predominantly in the area of public regulation. Even when technology is used to monitor compliance with or to enforce laws advancing social welfare, concerns are expressed with regards to the degree of choice left to human actors. Any technological limitation of choice – speak: any technological limitation of human behavior - is perceived as generally undesirable. This paper describes the use of persuasive technologies in a commercial context. It attempts to establish whether such use warrants legal attention, whether the resulting problems, if any, can be addressed by existing rules or whether regulatory assistance is required. As persuasive technologies aim to affect the decision-making process of online consumers and steer them towards particular transactions that result in *prima facie* legally enforceable agreements, it seems logical to address them from the perspective of contract law. Objectively, the contract looks valid. The transaction itself may even be beneficial to the consumer. Yet, the process leading to its conclusion defies the basic assumptions of contract formation. The unprecedented transactional advantages enjoyed by Internet companies translate into the erosion of autonomy of the online consumer. The problem does not lie in technologically *forcing* consumers to enter into particular transactions but in reducing their available options and directing them towards specific vendors or products. Autonomy, however, requires not only the ability to do what one wants but also an awareness of the available options. The paper does not engage with the popular privacy debate but, somewhat pessimistically, assumes that the battle for personal information has been lost. Instead, it focuses on the legal implications of how consumer data is used to affect their transacting behavior. A clear distinction is drawn between the *substance* of the transaction (which is regarded as largely irrelevant) and the *process* of transacting. While it is acknowledged that the traditional bargaining process is inherently adversarial and that a certain level of "advantage taking" is tolerated, it is claimed that the use of persuasive technologies in online commerce creates an unprecedented

inequality of bargaining power. The problem lies in identifying the point at which not only the autonomy of the consumer but the entire transacting process must be regarded as compromised and the consumer must be granted some form of relief.

Annette Morris, Reader, Cardiff University
Tort and Economic Liberalisation.

It is well established that there is a distinction between what tort law offers in principle and what it delivers in practice. Tortious legal principles are mediated through a complex institutional framework involving insurance, legal services and the civil justice system. That framework is contingent upon the wider political environment, which has changed significantly in recent years, as governments of different persuasions have increasingly pursued policies of economic liberalisation. Responsibility for much legal funding has shifted from the public purse to the market. The legal profession has steadily been deregulated, re-regulated and exposed to competition. Civil justice has become a further site for privatisation where cost and efficiency considerations prevail over 'loftier ideals of justice'. These policies have changed the relationship between the state and the tort system and encouraged the commoditisation of legal services and the commodification of claims. Focusing on the development and operation of the personal injury claims market in the UK, this paper will examine the way in which policies of economic liberalisation have changed the shape, nature and perceived legitimacy of the tort system and consider the opportunities and threats posed for the future.

Associate Professor David Rolph, University of Sydney.
The Interaction of Defamation and Privacy.

The Common law has long protected the dignitary interest of reputation through the tort of defamation. Recently, countries, such as New Zealand, the United Kingdom and Australia, have begun, in various ways and to varying degrees, to protect the dignitary interest of privacy. This recent recognition of privacy as a legal interest warranting direct legal protection has the potential to challenge or even to subvert the well-established balance struck in defamation law between the protection of reputation and freedom of expression. This paper identifies and analyses a number of areas in which defamation and privacy complement each other, overlap and conflict with each other. It considers how the issues raised by the interaction of defamation and privacy have been addressed, to the extent that they have, by judges, law reform bodies and academics, and it explores how they might be resolved in principled and practical ways.

Zoë Sinel and Anne Schuurman, University of Western Ontario
Matter Over Mind: Tort Law's Treatment of Emotional Injury.

Emotion has taken centre stage in the fields of cognitive science and philosophy of mind in recent years. This surge in interest corrects the twentieth-century neglect of emotion in philosophy and returns to a deep tradition of thinking about "the passions" that stretches from Plato to Hume; it has also yielded major changes in the way that neuroscience understands the nature and physiology of emotion. Following the insights of William James and recent neuroscientific work of Antonio Damasio, a growing consensus among scientists and philosophers posits emotions as assessments of physiological reactions to external stimuli, in a causal chain that goes something like this: I see a bear in the woods; I feel my heart pound and my knees shake; I know I am afraid.

In private law, on the other hand, emotions are generally assumed to lie within our cognitive control, at least in part: I see a bear in the woods; I deem the bear a threat to my life; I fear death; *and so* my heart pounds and my knees shake. Because my feeling of fear is the result of a series of cognitive assessments and rational judgements, I can, in theory, exercise a significant degree of control over my emotional reactions. Likewise, my emotional reactions can be evaluated as right or wrong, justified or

unjustified. If the bear is locked inside a zoo enclosure, then my assessment of a threat to my life would be faulty and my fear unjustified.

It is perhaps for this reason that the law often treats emotional harm differently from physical harm. To take one salient example from the law of torts, while thin-skulled plaintiffs are awarded full compensation for the extent of their injuries, thin-skinned plaintiffs are not. In claims for emotional or psychological harm, "[t]he law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals." (*White v Chief Constable of South Yorkshire Police*, [1998] 3 WLR 1509 (HL) at 1512). This differential treatment seems in tension with the law's position that emotional and physical harm are equivalent (*Page v Smith*, [1996] 1 AC 155 (HL) at 188).

This paper explores the implications that 21st century advances in emotion science might bear for the law's conception and treatment of emotional harm. In light of these advances, the law can no longer assume individual responsibility for emotional reactions. Through a comparison of tort law's non-controversial treatment of non-physical injuries in assault, false imprisonment, and nuisance, we show that the mere causing of emotional distress is not in and of itself a legally cognizable wrong. We argue that the law has treated and should continue to treat emotional harm differently from physical harm, not because emotions are more under our control, easier to fake, or harder to ascertain, but because of their relatively more complex and contingent nature.

Professor Henry E. Smith, Harvard University
Fusing the Equitable Function in Private Law(keynote)

Whether and to what extent we should desire the fusion of law and equity depends on the function it serves. This paper draws on systems theory to show how equity is a second-order check on the workings of the law, when complex problems such as party opportunism call for such targeted intervention. Seen from this standpoint, the substantive distinctiveness of equity is potentially valuable even if it is administered in a unified court system. Because this function has not been sufficiently recognized, fusion has been carried too far, especially in the United States. Symptoms of an undertheorized excessive fusion of law and equity include multi-factor balancing tests, a polarization of formalism and contextualism, and a flattening of the law's approach to remedies.
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Professor Warren Swain, University of Auckland.
'*The Steaming Lungs of a Pigeon', Predicting the Direction of Australian Contract Law in the C21st.*

During the 1980s and 1990s a series of new contractual doctrines in the High Court of Australia, many of which were based on equitable reasoning, began to emerge. This is quite right and proper: *tempora mutantur, nos et mutamur in illis*. The relationship between the old and the new is rarely straight forward. Old ideas, used inventively can even be used to promote reform and push the law in new directions. On other occasions new ideas appear in a more strident form. This paper will explore some key tensions between the old and the new. An overarching theme is the relationship between Australian law and English law. There are some in Australia who would like to see this historical thread weakened or even snapped. These arguments will be examined through the prism of some contemporary contract issues which are likely to be resolved one way or another in the next few decades. Topics such as fairness in contracting, contractual codification and contextualisation of decision making will be examined in a critical way with an eye towards the future. Are such notions serious tools for reform or just ill-considered spasms of legal nationalism? These themes will be drawn together with a consideration of the intellectual climate within which contract law is formed, taught and thought about within Australia.

Professor Andrew Tettenborn, Swansea University.
"I'll Perform if and when you do": The Suspension of Contractual Duties.

Suppose that you and I agree to co-operate in some project whose success requires active participation from both of us. If I find that you are not doing your bit, what can I do? One possibility is for me to withdraw from the exercise entirely. But this step, while possibly necessary *in extremis*, is drastic. It might well be entirely disproportionate to your failure; it means I will never get what you agreed to give me; and it will necessarily throw away all the advantages of the original collaboration. A more constructive course of action, at least for a non-lawyer, would be for me remind you that it takes two to tango, and then say that I am withholding my own contribution, not on a permanent basis, but unless and until you regularise your own position. What does the law of contract have to say about this?

This paper provides a comparative examination of the circumstances in which parties are permitted to suspend their contractual performance, without termination, in both civilian and common law systems.

Professor Prue Vines, University of New South Wales

Apologies as "Canaries" -Tortious Liability in Negligence and Insurance in the 21st Century.

The relationship between tort liability in negligence and insurance is profound, although for most of the twentieth century insurance was ignored in determining liability, despite the massive rise in insurance. Although the determination of liability in negligence typically ignores the existence of insurance, it is there in the background (sometimes driving tort reform) and if it fails it can be catastrophic for the defendant. Insurance contracts typically regulate the relationship between the insured and tortious liability. In most jurisdictions liability insurance contracts contain a provision which makes the contract void if the insured makes an admission against interest. This is traditionally taken to include an apology, hence the commonly repeated advice not to apologise after an accident. The question of whether an apology is an admission is not necessarily clear in the absence of apology-protective legislation. Cases have decided this differently both across and within jurisdictions, although in my opinion the better view in Australia and the UK is that an apology is not an admission in negligence. This paper investigates the relationship between apologies and admissions and how they impact on liability in negligence in the situation where there is apology protecting legislation and where there is not. The differences across jurisdictions with apology-protecting legislation makes determining the relationship between apologies and insurance challenging as well. This paper attempts to map out the law on apologies and insurance and argues that what is vital is that the liability regime and the insurance regime have some congruence and that the apology may serve as a 'canary' in the mine of liability – to show whether there is proper congruence or not.