

**A response to Peter Turner,
“Equitable Compensation for Breach of Confidence”**

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Ross Parsons Centre of Commercial, Corporate and Taxation Law

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May I make six comments in response to Peter Turner’s excellent, not to mention timely and provocative, paper.

First, on the point well made by Peter Turner as to the notable Australian contribution to the efflorescence of the remedy, may I add a reference to an Australian journal article, written some 35 years ago in the *Melbourne University Law Review*: “The Equitable Remedy of Compensation”.¹ The title may seem a little unimaginative, but it was and is important to emphasise the equitable nature of the remedy. The author introduced his theme as follows:

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¹ (1982) 13 *Melb Uni L Rev* 349.

“This remedy is generally believed to be defunct except as an ill defined possibility where certain fiduciary obligations are breached. The general misconception that an award of monetary compensation is beyond the pale of Equity has led to confusion in many cases. The writer hopes to lessen that misconception and contribute to an increased understanding of the potential use of this remedy.”

A lot has changed since then. A little surprisingly, the article was picked up by the Supreme Court of Canada in *Canson Enterprises Ltd v Boughton & Co*,² in a way which anticipated some of the themes of Peter Turner’s presentation today, focussing on restitution in the non-technical sense used by Street J in *Re Dawson (decd)*: “the obligation is of a defaulting trustee is essentially one of effecting a restitution to the estate”.³ A quarter of a century ago, one of the most junior members of the Supreme Court of Canada said:

“As Professor Davidson states in his very useful article “The Equitable Remedy of Compensation” (1982) 13 *Melb UL Rev* 349 at 351, ‘the method of computation (of compensation) will be that which makes restitution for the value of the loss suffered from the breach’.”

The present Chief Justice of Canada, as she now is, was correct to describe the article as very useful, and correct to pick up the prescient and non-technical language of restitution. Her Ladyship was of course incorrect to refer to the author

² [1991] 3 SCR 534 at 547-548.

³ [1966] 2 NSW 211 at 214.

as a professor; Ian Davidson, now of course senior counsel practising in this building, and sitting in the front row of the audience today, was then a newly admitted solicitor. This is not the first time that there has been an important Australian influence upon international developments in common law legal systems in relation to equitable compensation.

Secondly, I share Peter Turner's opinion that there is no reason to think that all cases of equitable compensation for breach of confidence should fit in the same procrustean bed. For one thing, as Peter observes, and as Sir Frederick Jordan might have said,⁴ there are confidences and confidences. One example may be seen in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, where a unanimous High Court said that:⁵

“Certain types of confidential information share characteristics with standard instances of property. Thus trade secrets may be transferred, held in trust and charged. However, the information involved in this case is not a trade secret.”

The High Court held that if the third parties who were sued, Mrs Margaret Elias and her daughters, Sarah and Jade, had received information which was confidential, it would still not have been property which was knowingly received by them for the purposes of the first limb of *Barnes v Addy*.⁶ At the same time, the High Court appears to have acknowledged that there were some species of confidential information which were sufficiently proprietary to sustain such a claim to relief.

⁴ Cf *Ex parte Hebburn; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420.

⁵ (2007) 230 CLR 89; [2007] HCA 22 at [118].

⁶ (2007) 230 CLR 89; [2007] HCA 22 at [118].

Thus it may be seen that there can be no all-embracing theory applicable to all types of confidential information. That leads to the third point, which is a more general one. The nature of the legal system is that it is replete with overlapping causes of action and remedies.⁷ That is true of confidential information just as much as other areas of the law, including in what may be the most common circumstance where such a claim arises, namely, between parties who are in contractual relations. If the parties expressly or impliedly promise to keep information confidential (expressly in, for example, a non-disclosure agreement or employment contract, or impliedly in, for example, a solicitor's or accountant's retainer) then there may be a question whether there is any room for an equitable duty which sounds in equitable compensation. The remedy for breach of a contractual promise to keep information confidential will be damages, not equitable compensation – perhaps, even if absent the contract an obligation of confidence would have been recognised by the parties in respect of the same information. This is in substance the converse of the proposition made by Deane J in *Moorgate Tobacco* with which Peter Turner commenced.⁸

But that is not to say that there may not be scope to contend that the parties' promise did not exclude reliance on their rights in equity; after all, we have no difficulty recognising that directors and employees may subject themselves to overlapping fiduciary and contractual duties, nor that contract is often the source of a fiduciary obligation (consider a partnership deed or a trust deed).

⁷ See for recent examples *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732; [2016] NSWCA 81 at [48]-[51] and *Perera v Genworth Financial Mortgage Insurance Pty Ltd* [2017] NSWCA 19 at [44].

⁸ *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414 at 437-8.

There are at least two ways in which this overlap may play out in cases of confidential information. If the contractual confidence is tersely drafted (a single clause in an employment contract) or implied, then there may be ample scope to contend that it does not displace rights in equity. Alternatively, if the parties have gone so far as to elaborately define and protect their confidential information in a formal contract, then that may sustain an argument that it is all the more unlikely that their objective intention should be taken to be to have denied to themselves such additional protection as equity accords.⁹ In recent years, divergent views have been expressed in such cases.¹⁰

The points to note for present purposes is that it will be essential in a claim for equitable compensation to identify clearly the equitable (and non-contractual) confidence sought to be vindicated, and that in turn may require a closer attention to be given to the underlying rights, to the extent they have contractual force.

Otherwise the difficulties to which Peter Turner has referred may arise.

⁹ In Australia, that includes the possibility of an account of profits, a remedy unavailable in Australia for breach of contract: *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157 at [158]-[159]. Although in England an account of profits is available “when, exceptionally, a just response to a breach of contract so requires”: *Attorney General v Blake* [2001] 1 AC 268; [2000] UKHL 45 at 284, the consequence may be a lessening of the occasions in which it is ordered even in cases where there are breaches of contractual and equitable confidences: see for examples *Vercoe v Rutland Management Ltd* [2010] EWHC 424 (Ch) and perhaps also *One Step (Support) Ltd v Morris-Garner* [2017] QB 1; [2016] EWCA Civ 180 at [49]-[51].

¹⁰ Without seeking to be exhaustive, see *Optus Networks Pty Ltd v Telstra Corporation Ltd* [2010] FCAFC 21; (2010) 265 ALR 281 at [29]-[38] and *Del Casale v Artedomus (Aust) Pty Ltd* [2007] NSWCA 172; (2007) 73 IPR 326 at [118].

Fourthly, I turn to the elephant in the room, which is, as Neil Williams SC and Surya Palaniappan recently observed,¹¹ statute. Statute provides rich opportunities, as well as pitfalls, in relation to the content and application of the principles underlying equitable compensation.

I will focus largely, but not exclusively, on Victorian statutes. Some statutes deal in terms with remedies. The Victorian equivalent of Lord Cairns' Act has been amended to include claims based in equity,¹² and one view – perhaps a controversial one – is that the reasoning in *Giller v Procopets* for a pecuniary award to a plaintiff whose confidential information was vindictively abused by her former partner – is best regarded as being justified under that statute.¹³ There is a fine analysis by Professors Katy Barnett and Michael Bryant on this statute, whose title is self-explanatory: “Lord Cairns' Act: A case study in the unintended consequences of legislation”.¹⁴ In any event, while Victorian litigants will in future cases understandably be inclined to rely upon that decision in framing their case, a narrower approach may be required by s 68 of the *Supreme Court Act 1970* (NSW), which preserve the original language of Lord Cairns.

More importantly, there are many statutes which either recognise and are to be construed in light of equitable confidential information (s 183 of the *Corporations Act* is the most obvious example) or else create new rights to confidentiality and privacy.

¹¹ N Williams and S Palaniappan, “Statutory Construction for Advocates”, paper present to NSW Bar Association, 28 February 2017.

¹² *Supreme Court Act 1986* (Vic), s 38.

¹³ (2008) 24 VR 1; [2008] VSCA 236.

¹⁴ (2015) 9 *Journal of Equity* 150.

Of the latter, some speak in terms to pecuniary claims. For example, s 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) creates a right against arbitrary interference with a person's "privacy, family, home or correspondence", but s 39(3) provides that "A person is not entitled to be awarded any damages because of a breach of this Charter", although s 39(4) ensures that the section does not affect any right a person may otherwise have to damages.

Such a provision is apt to stand in the way of the creation of a statutory tort sounding in damages. But there are many other statutes which are less squarely directed against pecuniary remedies. There is a useful paper by Professor Neil Foster and Ann Apps "The neglected tort – Breach of statutory duty and workplace injuries under the Model Work Health and Safety Law"¹⁵ touching upon the opportunities for combining statutory norms with a tortious cause of action.

My fifth point is to say something about the statutory backdrop, and in particular, the *Civil Liability Act*. Importantly, I do so not because I necessarily endorse the suggestion that tort is the best natural analogy for much of the claims in this area (although I do agree with the congruence to which Peter Turner has pointed). I do so because it may be quite short-sighted to think that that Act is inapplicable to equitable claims.

Section 5A of the *Civil Liability Act* provides that Part 1A – which is headed "Negligence" – applies "to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or

¹⁵ (2015) 28 *Australian Journal of Labour Law* 57.

otherwise”. Not only is that language (“any”, “regardless of whether” and “or otherwise”) broad, but many of those terms are defined, and defined in counterintuitive ways. In particular, “Negligence” does not mean negligence; it means “failure to exercise reasonable care and skill”.¹⁶ It would be wrong to think that Part 1A applies only to actions for negligence, or for that matter only to actions at common law. Although the statutory label “negligence” is suggestive, even if regard may be had to the defined term,¹⁷ the words “under statute or otherwise” dictate that “negligence” is not confined to common law.¹⁸

Harm is defined circularly but broadly to mean harm of any kind, including personal injury or death, damage to property and economic loss, and personal injury includes pre-natal injury, impairment of a person’s physical or mental condition and disease.

At the very least it seems arguable that a publication of confidential information which occurs because of a failure to take reasonable steps to, say, prevent personal information like credit card details or health records from being stored securely, would fall within those definitions.

There is a similar broad definition in s 28 which is in Part 3 titled “Mental harm”:

“This Part (except section 29) applies to any claim for damages for mental harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.”

¹⁶ Section 5.

¹⁷ See *Owners of “Shin Kobe Maru” v Empire Shipping Co Inc* (1994) 181 CLR 404 at 419.

¹⁸ See *Paul v Cooke* (2013) 85 NSWLR 167; [2013] NSWCA 311 at [39]-[41].

The same reasoning applies to the effect of that definition upon this Part, noting that negligence is re-defined – in identical terms – in s 27. Most particularly, s 31 within that Part provides:

“There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.”

That statutory intervention may have significant consequences. Let me illustrate one, once again by reference to *Procopets*, where it was stated that:

“the term ‘nervous shock’ - and its modern synonym ‘recognised psychiatric illness’ - should also be discarded, based as they are on the unsustainable assumption that a clear line separates ‘psychiatric illness’ from other (lesser) types of mental distress”.¹⁹

In cases to which the *Civil Liability Act* applies, that cannot be so. Of course, *Procopets* was a case of *intentional* dissemination of confidential information, to which the provisions of the *Civil Liability Act* referred to above would not respond, but nevertheless it remains a good example of the need to rationalise the reformulation of principle with the statutory landscape.²⁰

Sixthly and finally, the upshot is that it may be convenient – for practical, as opposed to theoretical purposes – to delineate three broad classes of case of breaches of

¹⁹ (2008) 24 VR 1; [2008] VSCA 236 at [31].

²⁰ See for example *CAL No 14 Pty Ltd (t/as Tandara Motor Inn) v Motor Accidents Insurance Board* (2009) 239 CLR 390; [2009] HCA 47 at [39]-[41] and M Leeming, “Theories and Principles Underlying the Development of the Common Law” (2013) 36 *UNSWLJ* 1002.

confidence. The first is cases involving a recognised proprietary confidence; in such cases, a plaintiff is apt to have a range of well-established property-based rights against wrong-doers and third parties in addition to personal rights. The second is intentional cases involving the use or dissemination of confidential information. These will fall outside the *Civil Liability Act* but may overlap with, or be analogous to, tortious claims in trespass, defamation, injurious falsehood and perhaps even malicious prosecution (to which, once again, statute may apply). The third is non-intentional cases, where the provisions of the *Civil Liability Act* may have an important role.

It may be helpful to have regard to those analogies when framing and evaluating submissions as to equitable compensation; this may be seen as one aspect of coherence. The point is not to look at the quantum of pecuniary relief which issues,²¹ but the underlying values and principles vindicated by this relief. There may be a very large question as to the extent to which equity's concern for conscience, which is central to its protection of confidential information, overlaps with or is opposed to the principles underlying these similar common law rights. Perhaps the most interesting and valuable aspect of Peter Turner's paper is provoking thought about this, which may be seen as an aspect of coherence. Whether or not that be so, there seems to be no reason to think that the next four decades of Australian equitable compensation will be lacking in interest or complexity.

²¹ Cf *Gulati v MGN Ltd* [2017] QB 149; [2015] EWCA Civ 1291 at [50]-[74] (comparison between damages for misuse of private information and personal injury damages).