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Greg Bowley*

A Matter of Motive: Malice in the Law of Torts in the Age of Connectivity

To meet the challenges posed by the novel modes of interpersonal relationships of contemporary society, Canadian tort law must develop a general principle of liability for the intentional infliction of harm. This principle would recognize the normatively-significant common thread of the wrongdoer's intention to cause harm to another person in phenomena as varied as doxing, swatting, revenge porn, cyberstalking, impersonation, trolling, and harassment. The recent development of discrete, context-specific torts in response to problematic social media conduct is an inherently limited approach to novel interpersonal conduct. However, it also offers an opportunity for the enunciation of a general principle of liability for the intentional infliction of harm. Doing so would allow courts to do justice in novel factual circumstances through the coherent, principled, and consistent imposition of liability. The alternative, ad hoc responses to novel harms, will inevitably be narrow, incoherent, and unsustainable.

Pour relever les défis posés par les nouveaux modes de relations interpersonnelles de la société contemporaine, le droit canadien de la responsabilité civile doit élaborer un principe général de responsabilité pour l'infliction intentionnelle d'un préjudice. Ce principe reconnaîtrait le point commun, significatif sur le plan normatif, de l'intention de l'auteur du délit de causer un préjudice à une autre personne dans des phénomènes aussi variés que la pornographie de vengeance, l'usurpation d'identité et les différentes formes de harcèlement, dont le cyberharcèlement. Le développement récent de délits civils discrets et spécifiques au contexte en réponse aux comportements problématiques sur les médias sociaux est une approche intrinsèquement limitée aux nouveaux comportements interpersonnels. Cependant, il offre également l'occasion d'énoncer un principe général de responsabilité pour l'infliction intentionnelle d'un préjudice. Cela permettrait aux tribunaux de rendre justice dans des circonstances factuelles inédites en imposant une responsabilité cohérente, fondée sur des principes et constante. L'autre option, à savoir des réponses ad hoc aux nouveaux préjudices, sera inévitablement étroite, incohérente et insoutenable.

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Introduction

One of the enduring features of the common law is its capacity to adapt to changing social circumstances by extending existing legal principles to regulate novel forms of interpersonal interaction. The development of a general principle of liability for negligently inflicted harm in response to the advent of mass-produced consumer goods offers a significant example. In *Donoghue v Stevenson*, the House of Lords confronted a novel instance of interpersonal harm, in which a manufacturer's carelessness caused an end-user of their product to fall violently ill.[1] What set *Donoghue* apart, however, was that several intermediate purchasers of the product rendered the manufacturer immune to the contractual liability that had previously governed harm caused by defective products to their end-users.[2] The novel social context characterized by mass production of consumer goods and distribution through intermediaries was beyond the scope of interpersonal liability as it had previously been understood. Determining the appeal in *Donoghue*, Lord Atkin concluded that proximate foreseeability underpinned all relationships where a duty to take care had been recognized.[3] This principled approach to negligence liability recognized that manufacturers owed a duty of care in the manufacture of their products to all potential

1. [1932] UKHL 100, [1932] AC 562 [*Donoghue*].
2. *Winterbottom v Wright* (1842), 10 M&W 109, 152 ER 402 [*Winterbottom*].
3. *Donoghue, supra* note 1 at 580-581.

end-users, rather than only initial purchasers.[4] More significantly, it also established a principled basis for the future recognition of novel duties of care, an approach to liability in tort the impact of which would be difficult to overstate. While this development obviously benefitted consumers who might be harmed by mass-produced products, it was not universally accepted as positive. From the perspective of manufacturers, it raised the spectre of what Lord Buckmaster characterized, in his dissent, as unlimited and unforeseeable liability.[5]

The doctrinal shift in negligence liability brought about by *Donoghue* reflects a situation in which the common law could either adapt to a novel social context or become irrelevant in the identification and regulation of novel forms of interpersonal wrongdoing. Failure to adapt would have meant leaving the field either entirely ungoverned or subject to the uncertain dynamics of legislative interventions. The digital revolution places contemporary Canadian society at a similar inflection point. As a result of the wholesale reshaping of interpersonal interaction over the last two decades, the common law must either adapt its existing principles of private liability to encompass novel wrongdoings facilitated by novel technologies, or become irrelevant as a source of normative guidance for future interpersonal interactions. I argue that the common law of torts must recognize that: a) novel forms of interpersonal interaction facilitate novel forms of interpersonal wrongdoing by inflicting novel forms of harm, and b) all such wrongdoing shares the common normatively significant content of intentional infliction of harm. Failure to recognize the former point would see the common law of torts abandon the field of novel human interactions entirely, while failure on the latter would seriously hinder its response to the novel forms of intentional wrongdoing that will characterize interpersonal interactions of the future.

This argument is advanced in three parts. The first section highlights that, through the novel forms of human interaction facilitated by the digital revolution, it is now possible to cause harms not captured by traditionally protected private law interests.[6] That development is placed within the broader context of a century of similar developments. The second

4. *Ibid* at 599.
5. *Ibid* at 577-578.
6. One formulation of the "protected interests" with which private law is concerned is described by Benson as comprising "three distinct and logically exhaustive elementary modes […]: bodily integrity, property, and contract." On this account, no private liability could flow from conduct which does not constitute an interference with one of these kinds of interest. See Peter Benson, "Misfeasance as an Organizing Normative Idea in Private Law" (2010) 60 UTLJ 731 at 754, online (pdf): <www.tspace.library.utoronto.ca> [perma.cc/L3AJ-B8SH].

section reviews and critiques the patchwork of Canadian jurisprudential responses to this phenomenon, illustrating the failure of Canadian tort law to recognize the shared normative content of these novel wrongdoings.[7] The third and final section sets out a basis upon which the common law of torts could recognize a general principle of liability for the intentional infliction of harm—a structural parallel to the principle recognized by Lord Atkin in *Donoghue*—as a means of maintaining its relevance in an already changed, and constantly changing, social context.

I. *Novel harms, old concerns*

The challenge posed by the digital revolution and the advent of the age of connectivity is, in a way, not a new challenge at all. Indeed, the particulars of the technology that has reshaped interpersonal relationships over the last two decades are relatively insignificant—what matters is the fact of the reshaped relationships itself. As Fridman noted over six decades ago at a different inflection point, novel social structures and modes of interpersonal interaction at that time had produced relationships featuring substantial "scope for causing harm by acts which, in themselves, would not fall within the boundaries of earlier torts based upon committing physical assaults upon the person or property of others."[8] Fridman was not, of course, referring to the novel harms facilitated by social media; rather, his analysis concerned the harms facilitated by organized labour and the expanding scope of the administrative state.[9] Nonetheless, Fridman's observations on the necessity for jurisprudential adaptation of the scope of civil liability in the context of social change are a conceptually apt companion for the argument I advance here. Society had, at the time Fridman wrote, changed in such a way as to place what he considered to be serious harms beyond the scope of existing tort liability. Referring to

7. While there have been some legislative efforts to respond to particular aspects of the phenomenon in issue, statutory interventions are, in my view, irrelevant to an inquiry into the justifiable scope of common law liability in tort. See generally *Intimate Images Protection Act*, RSNL 2018, c I-22; *Intimate Images and Cyber-protection Act*, SNS 2017, c 7; *Intimate Images Protection Act*, RSPEI 1988, c I-9; *Intimate Images Unlawful Distribution Act*, SNB 2022, c 1; *Intimate Images Protection Act*, CCSM c 187; *The Protection from Human Trafficking Act*, SS 2021, c 23; *The Privacy (Intimate Images—Additional Remedies) Amendment Act*, 2022, RSS 2022, c 29; and *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, RSA 2017, c P-26.9). See also *Uniform Non-consensual Disclosure of Intimate Images Act (2021)* adopted by the Uniform Law Conference of Canada, online (pdf): <www.ulcc-chlc.ca> [perma.cc/X9NW-TG9A]. The ULCC Act advocates for the standardization of provincial statutory enactments in this area.

8. GHL Fridman, "Malice in the Law of Torts" (1958) 21 Mod L Rev 484 at 500, DOI: <10.1111/j.1468-2230.1958.tb00488.x>.

9. Not to mention the statutory immunity from civil liability their activities attracted in most liberal democracies in the first half of the twentieth century. See e.g. *Trade Disputes Act* 1906 (UK), 6 Edw 7, c 47; *The Trade Unions Act*, RSC 1927, c 202; *Collective Bargaining Act*, SO 1943, c 4, s3(2).

the essentially unrestricted powers of trade unions over their own internal governance, and the vast authority that had by then been delegated to administrative actors, Fridman observed:

> Much more harm in these days can be caused by words of persuasion or encouragement, by speeches which end in resolutions and induce courses of action not in themselves amounting to trespasses, by using far-reaching statutory powers for perverted and undesigned ends.[10]

In "Malice in the Law of Torts," Fridman argued that the common law had been moving toward a general principle of liability for intentionally inflicted harm for some time. He considered such a development necessary and justifiable in light of then-novel social structures and their capacity as harmful instruments in the hands of those guided by "improper motive."[11]

The specific iteration of the problem confronted by Fridman six decades ago is, if anything, somewhat diminished today. However, contemporary social structures, and specifically the sort of interpersonal relations facilitated by social media, challenge the justifiability of the present scope of tort liability as much as organized labour ever did.[12] The launch and widespread adoption of social media platforms such as Facebook, Twitter, and Instagram, combined with the broad availability of powerful handheld telecommunications technology used to access these platforms, has produced a world in which any single individual is capable of anonymous, direct, instantaneous, and bidirectional communication with as much as half of the planet's human population.[13] No single person has ever, in fact, engaged in such breathtakingly broad communications. Nonetheless, the average social media user is, by a substantial margin,

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10. Fridman, *supra* note 8 at 500.

11. *Supra* note 8.

12. A broad literature has developed over the last several decades addressing the challenge posed by new technology to the justifiability of the scope of tort liability. See e.g. Emily Laidlaw, "Re-Imagining Resolution of Online Defamation Disputes" (2018) 56:1 Osgoode Hall LJ 162, online (pdf): <digitalcommons.osgoode.yorku.ca/ohlj/vol56/iss1/8/> [perma.cc/6XPG-TS2S]; David Mangan, "Perplexing Platforms for Tort" (2019) 93 SCLR (2d) 175; Dan Priel, "'That Is Not How the Common Law Works:' Paths to Tort Liability for Harassment" (2021) 52:1 Ottawa L Rev 87, online (pdf): <rdo-olr.org/that-is-not-how-the-common-law-works-paths-to-tort-liability-for-harassment/> [perma.cc/9JDR-C4GU].

13. Simon Kemp, "Digital 2022 Global Overview Report" (26 January 2022) online: *DataReportal* <datareportal.com/reports/digital-2022-global-overview-report> [perma.cc/C9C7-YJTQ]: 58.4% of the global population are active social media users. While this figure might not be accurate as a measure of unique users (as some users may manage multiple accounts, and some users may be non-human entities such as businesses, bots, or bands), it is corroborated by a recent UN Report: "Global Connectivity Report 2022" (2022) at 20, 42 online (pdf): *International Telecommunication Union* <www.itu.int/dms_pub/itu-d/opb/ind/d-ind-global.01-2022-pdf-e.pdf> [perma.cc/N4QL-9U9F]. The UN Report indicated that 63% of the population aged 15 and above are Internet users, and that social network use is uniquely and consistently high across income and education levels.

more broadly connected and, as a result, a participant in a far greater number of interpersonal relationships than the average individual could have been at any earlier time in human history.

Of course, the significance of this unprecedented interpersonal connectivity is not grounded exclusively in the simple communicative reach and relational scale available to the average social media user. It also matters how this unprecedented interpersonal connectivity is actually used. Scholars have noted a meaningful connection between circumstances of anonymity, a core structural feature of many social media platforms, and the likelihood of anonymous actors causing intentional harm to others.[14] The advent of social media, and the novel modes and scope of interpersonal connectivity that it has brought, has facilitated some entirely novel forms of interpersonal conduct, such as doxing,[15] swatting,[16] and revenge porn,[17] and has made other forms of interpersonal conduct, such as stalking,[18] impersonation,[19] intimidation,[20] and harassment,[21] possible in an entirely new context. In the same way that Fridman could not map the harmful effects of "perverted and undesigned" abuses of statutory powers and protections granted to organized labour and state actors onto any existing head of tort liability, the harms that can be inflicted through novel twenty-first-century interactions have generally not been captured by existing tort doctrines.[22] To the extent that such conduct is not presently identified by the common law of torts as wrongful, and therefore as a basis upon which to assign private liability, we are left in the uncomfortable position of accepting this conduct as rightful, in a private sense, regardless of its impact on those who suffer it. This is not a new predicament. Almost a century ago, Gutteridge argued that the common law's normative indifference to

14. See John Suler, "The Online Disinhibition Effect" (2005) 2:2 Intl J Applied Psychoanalytic Studies 184 at 185, DOI: <10.1002/aps.42>.

15. Publishing identifying private information about an individual on the Internet. See e.g. *R v BLA*, 2015 BCPC 203.

16. The practice of making hoax 911 calls to send emergency response teams to another's address. See e.g. CBC News "Teen from Sask. facing multiple charges in U.S. and Canada related to alleged 'swatting' hoaxes," *CBC News* (25 March 2021) online: <www.cbc.ca/news/canada/saskatchewan/teen-multiple-charges-us-canada-swatting-hoaxes-1.5964603> [perma.cc/8K8G-YMRE].

17. Sharing intimate images of another without their consent. See e.g. *R v Walsh*, 2021 ONCA 43.

18. Using the Internet to monitor and harass another person. See e.g. *R v Barnes*, [2006] AJ No 965 (Prov Ct) (QL), aff'd, 2006 ABCA 295.

19. Pretending to be a person or using a person's identity online. See e.g. *R v Wowk*, 2020 ABCA 119.

20. Often referred to as cyberbullying; using the Internet to scare, anger, or shame a targeted individual or group of individuals. See e.g. *AP v Bragg Communications Inc*, 2012 SCC 46.

21. *Caplan v Atas*, 2021 ONSC 670 [Caplan] ("systematic campaigns of malicious falsehood to cause emotional and psychological harm to persons against whom [one] has grievances" at para 7).

22. *Supra* note 8 at 500.

the intentional infliction of harm constituted an endorsement of the worst aspects of humanity.[23]

Where extant tort doctrines have been made to fit these novel interpersonal interactions, this outcome has been achieved through an unprincipled, ad hoc, and contextually constrained approach. As I argue in Part II, Canadian tort law's ad hoc patchwork approach is problematic in multiple dimensions. It recreates the same sort of narrow, unprincipled body of law confronted by Lord Atkin in *Donoghue*, and builds on conceptually limited tort doctrines in doing so. This is not, in my view, a viable path for tort liability.

Both Fridman and Gutteridge identified intentionally harmful interpersonal conduct as requiring adaptation to put an end to "forms of spiteful malevolence and repulsive chicanery."[24] There has been, however, no systemic response to this phenomenon. Gutteridge called for statutory intervention of a general sort along the lines of the German Civil Code, which effectively bars the exercise of any civil right for improper purposes.[25] Fridman, on the other hand, advanced a less ambitious proposal, calling for a jurisprudential development similar to Lord Atkin's principled basis of liability for negligently inflicted harm. Either approach would provide a sound basis for a systemic private law response to both existing and future novel forms of wrongdoing facilitated by the age of connectivity. Without such a systemic response, Canadian courts will be left flat-footed as technology outpaces the narrow, heterogenous, context-specific, and theoretically problematic jurisprudential responses that have thus far been adopted in response to the novel harms of the twenty-first century. As Part II illustrates, Canadian jurisprudence has to date made precious little progress toward such a systemic and principled approach to the intentional infliction of harm.

II. *Canada's piecemeal jurisprudential response*

Canadian judges are increasingly alive to the problems posed by the age of connectivity and have begun to develop discrete jurisprudential responses to examples of novel wrongful interpersonal conduct over the last decade. Much of the jurisprudential activity during that period has sought to adapt the causes of action described by Prosser as comprising "[t]he law of

23. HC Gutteridge, "Abuse of Rights" (1933–35) 5 Cambridge LJ 22 ("[i]n other words our law has not hesitated to place the seal of its approval upon a theory of the extent of individual rights which can only be described as the consecration of the spirit of unrestricted egoism" at 22).
24. *Ibid* at 44.
25. Art 226 Civil Code (Germany): "[t]he exercise of a right is not permitted if its only possible purpose consists in causing damage to another."

privacy," a structure grounded in an account developed by Warren and Brandeis in 1890.[26] Three causes of action identified by Prosser have been instrumental to the Canadian response to the challenge posed by social media: intrusion upon seclusion, public disclosure of embarrassing private facts, and false light publicity.[27] These doctrines were—as Prosser noted—both doctrinally and theoretically problematic from the outset,[28] and have proven to be an uncomfortable fit for the new uses to which they have been put in the Canadian context.[29] In addition to these three causes of action, a new tort of internet harassment was recently recognized by the Ontario Superior Court of Justice.[30] As I argue below, several of these causes of action, like the novel torts described by Fridman as well as older torts such as the defamation torts, malicious falsehood, and conspiracy to harm, address a single facet of a broader normative phenomenon, the intentional infliction of harm.[31] Unfortunately, this piecemeal approach to novel harms cannot meet the challenge of comprehensively identifying this new mode of interpersonal wrongdoing and addressing it in a coherent and justifiable manner.

Leaving aside those torts which make express use of an indication of intent as an element in the assignment of liability, such as the defamation

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26. William L Prosser, "Privacy" (1960) 48 Cal L Rev 383 at 389, online: <lawcat.berkeley.edu/record/1109651?ln=en> [perma.cc/PR9W-4DYH], citing Samuel D Warren and Louis D Brandeis, "The Right to Privacy," (1890) 4 Harv L Rev 193, online (pdf): <www.cs.cornell.edu/~shmat/courses/cs5436/warren-brandeis.pdf> [perma.cc/5PXW-MD3W].

27. Prosser, *supra* note 26 at 389.

28. Concluding his study of the evolution of the "law of privacy," Prosser noted that "[s]o far as appears from the decisions, the process has gone on without any plan, without much realization of what is happening or its significance, and without any consideration of its dangers. They are nonetheless sufficiently obvious, and not to be overlooked": *ibid* at 422. Prosser's main concern was that the privacy torts' uncomfortable and ill-defined overlap with the substance of other bases of tort liability while omitting most of the defences available under those other doctrines: *ibid* at 422-423.

29. It is not obvious, for example, that a tort putatively directed at wrongdoing characterizable as public disclosure of embarrassing private facts truly engages with wrongful conduct involved in the unauthorized publication of sexually explicit recordings or images—what, exactly, is the nature of the "private fact" that is disclosed by such publication? If it is simply the fact that the plaintiff has engaged in the sexual act depicted, would the defendant's written or verbal description of the same conduct attract liability? Additional complications could arise in circumstances in which the plaintiff had previously disclosed the fact of the sexual activity themselves (in a memoir, for example). Could subsequent publication of recordings or images of the sexual activity in issue by another person still be thought of as a disclosure of the "private fact"? If the defendant were to publicize recordings or images of the plaintiff engaging in non-sexual activity in an unclothed state, what "private fact" would be publicized as a result? Surely disclosure of the fact that the person had been unclothed at some time in the past could not, without more, constitute tortious conduct. Nonetheless, as Prosser notes, American jurisprudence has, without much analysis, long held photographs taken in private circumstances to constitute "private facts" for the purpose of this tort: *ibid* at 395.

30. *Caplan, supra* note 21 at para 171.

31. Such as "wrongful expulsion from a trade union" and "abuse of statutory powers." See Fridman, *supra* note 8 at 494-495.

torts, malicious falsehood, conspiracy to harm, and the novel torts discussed by Fridman, this section will first offer a brief overview of the structure of the four new torts adopted over the last decade. This review will be followed by an analysis of the common structural components shared by these torts.

1. *Intrusion upon seclusion*

Canada's jurisprudential engagement with the novel harms made possible by the digital revolution began with the Court of Appeal for Ontario's decision in *Jones v Tsige.*[32] In *Jones*, the defendant had engaged in a course of "deliberate, prolonged and shocking" conduct, prying into the plaintiff's confidential banking information over a period of approximately four years.[33] Sharpe JA noted the difficulties posed by the rapid technological changes and concluded that the common law needed to respond. According to Sharpe JA, *Jones* involved "facts that cry out for a remedy," so much so that "the law of [Ontario] would be sadly deficient if we were required to send [the plaintiff] away without a remedy."[34]

Ontario's cause of action for intrusion upon seclusion, according to Sharpe JA, was essentially identical to that described by Prosser and subsequently adopted by the authors of the *Restatement (Second) of Torts:* "One who intentionally intrudes, physically or otherwise, upon the seclusion of another or [their] private affairs or concerns, is subject to liability for invasion of [their] privacy, if the invasion would be highly offensive to a reasonable person."[35] Three elements of this cause of action are significant for the purposes of the analysis advanced here. First, as to the nature of the invasion in issue, Sharpe JA noted that the conduct must be an intentional (or reckless) invasion, without lawful justification, of the plaintiff's private affairs or concerns. Second, liability pursuant to this cause of action would arise only in relation to conduct "that a reasonable person would regard…as highly offensive causing distress, humiliation or anguish."[36] Third, Sharpe JA stated that "proof of harm to a recognized economic interest is not an element of the cause of action," and described the cause of action as protecting an interest of an "intangible nature."[37]

32. 2012 ONCA 32 [*Jones*].
33. *Ibid* at paras 69, 4.
34. *Ibid* at para 69.
35. *Ibid* at para 70, citing American Law Institute, *Restatement (Second) of Torts*, vol 3 (St Paul, MN: American Law Institute, 1977), § 652B.
36. *Ibid* at para 71.
37. *Ibid.*

This was an important factor in his decision to limit potential damages arising from this novel cause of action.[38]

Unlike the other new torts considered in this section, intrusion upon seclusion does not seem to require the defendant to have acted with any particular animus. It may, as such, be the one tort of those reviewed here actually concerned with the protection of something like a "privacy" interest. Nonetheless, as will be seen, Sharpe JA's reasons in *Jones* have been very influential in the more doubtful "privacy" cases that have followed.

2. *Public disclosure of private facts*

The next of these new torts, public disclosure of private facts, was described by Prosser as imposing liability in circumstances involving the public disclosure[39] of private facts[40] which would be "offensive and objectionable to a reasonable [person] of ordinary sensibilities."[41] This tort was recognized as applicable in a digital context by Stinson J in *Jane Doe 464533 v ND,* Gomery J in *Jane Doe 72511 v NM,* and Inglis J in *ES v Shillington.*[42] The claims in these decisions related to the defendants' non-consensual internet publication of sexually explicit recordings or images of the plaintiff. Each decision endorsed, to some extent, the structure identified by Prosser, with minor modifications.[43] Significantly, each decision identified the impugned conduct as both malicious and extending well beyond interference with the plaintiff's right to privacy. In the *Jane*

38. Sharpe JA also declined to award punitive damages in this case, noting that "predictability and consistency are paramount values in an area where symbolic or moral damages are awarded and absent truly exceptional circumstances, plaintiffs should be held to [a maximum damages award of $20,000]": *ibid* at para 88.

39. In terms of what constitutes publication, Prosser noted that "it is no invasion to communicate [the fact in issue] to the plaintiff's employer, or to any other individual, or even to a small group, unless there is some breach of contract, trust, or confidential relation which will afford an independent basis for relief": *supra* note 26 at 393-394.

40. Including, as noted *supra* note 29, photographs taken in private circumstances: *ibid* at 395.

41. *Ibid* at 396.

42. 2016 ONSC 541 [*Jane Doe 2016*]; 2018 ONSC 6607 [*Jane Doe 2018*]; 2021 ABQB 739 [*Shillington*].

43. For example, the *Jane Doe* decisions and *Shillington* adopted identical descriptions of the public disclosure tort, determining that liability would arise in circumstances in which the defendant gave publicity to some aspect of the plaintiff's private life without the plaintiff's consent, and in which the matter publicized would be highly offensive to a reasonable person and not a matter of legitimate public concern, as Prosser had. However, all three decisions held that it would be sufficient if the fact of the publication, rather than its subject matter, would be considered "highly offensive to a reasonable person": see *Jane Doe 2016, supra* note 42 at para 46; see also *Jane Doe 2018, supra* note 42 at para 97. The court in Shillington went further in particularizing the "highly offensive" component of this tort, imposing liability in circumstances in which "the matter publicized or its publication would be highly offensive to a reasonable person *in the position of the plaintiff*": *supra* note 42 at para 67 [emphasis added].

Doe decisions, general damages of $50,000 were awarded, with Stinson J noting that, although the Court of Appeal had urged caution on this front in Jones, "this case involves much more than an invasion of a right to informational privacy; as I have observed, in many ways it is analogous to a sexual assault."[44] Gomery J agreed with this approach, indicating that:

> The internet never forgets. [Jane's] dignity and personal autonomy have been, and will continue to be, compromised by [the defendant's] actions. As stated by Justice Cromwell, the damages award must "demonstrate, both to the victim and the wider community, the vindication of these fundamental, although intangible, rights which have been violated by the wrongdoer."[45]

Each *Jane Doe* decision was determined to be an appropriate context for the award of both aggravated and punitive damages.[46] In *Jane Doe 2016*, justifying aggravated damages, Stinson J concluded that "the posting of the video amounted to a breach of the trust reposed by the plaintiff in the defendant that he would not reveal it to anyone else."[47] He also imposed punitive damages based on the defendant's reckless disregard for the impact of his intentional conduct.[48] In *Jane Doe 2018*, Gomery J grounded her awards of aggravated and punitive damages on the fact that the defendant "was motivated by actual malice."[49]

In awarding general damages in the amount of $80,000, Inglis J noted in *Shillington* that the "continued availability of [the plaintiff's] images has extended [the plaintiff's pain and suffering] more than either plaintiff in the Jane Doe and Racki cases."[50] Inglis J awarded $50,000 in punitive damages, noting that conduct of the sort engaged in by the defendant constituted an abuse of trust and "is notably now criminal in nature in Canada, and regardless of when the actions occurred, they are worthy of

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44. *Jane Doe 2016, supra* note 42 at para 58. This characterization is difficult to square with the tort's supposed focus on the disclosure of private facts, as discussed *supra* note 29.
45. *Jane Doe 2018, supra* note 42 at para 132, citing Cromwell JA (as he then was) in *G(BM) v Nova Scotia (AG)*, 2007 NSCA 120 at para 130. In *Shillington*, Inglis J also drew on Cromwell JA's reasons, noting that "given the sexual nature of the privacy infringement […] [t]he Plaintiff's privacy *and* dignity have been attacked": *supra* note 42 at para 89 [emphasis in original]. Inglis J went on to characterize the defendant's conduct as an attack on "the personal and sexual integrity of the Plaintiff in a grossly public way with disregard for her dignity and the potential and real consequences she experienced," indicating that "[t]he torts [in issue] are not just breaches of privacy or confidence": *supra* note 42 at para 93.
46. *Jane Doe 2016, supra* note 42 at paras 59, 63; *Jane Doe 2018, supra* note 43 at paras 139, 143.
47. *Jane Doe 2016, supra* note 42 at para 59.
48. *Ibid* at para 60.
49. *Jane Doe 2018, supra* note 42 at paras 138, 141.
50. *Supra* note 42 at para 97, citing *Racki v Racki*, 2021 NSSC 46.

punitive measures from this court."[51] In awarding aggravated damages, Inglis J concluded that the defendant "was motivated by malice."[52]

3. *False light publicity*

Liability was imposed in *Yenovkian v Gulian* on the basis of false light publicity, the last of Prosser's four privacy torts to be recognized in Canada.[53] In *Yenovkian*, the defendant by crossclaim was found to have made "serious allegations online about [the plaintiff by crossclaim] and her family, including that she is a kidnapper, abuses [her] children, drugs [her] children, forges documents, and defrauds governments."[54] On these facts, Kristjanson J concluded that the tort of false light publicity, as set out in the *Restatement (Second) of Torts*, had been made out.[55] This formulation imposes liability on a person:

> who gives publicity to a matter concerning another that places the other before the public in a false light […] if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."[56]

The conduct identified as the basis for the claim in false light publicity seems to fall within the scope of conduct for which liability in defamation would ordinarily have been assigned, and several of the allegations advanced by the defendant appeared truthful.[57] However, Kristjanson J nonetheless determined that "a reasonable person would find it highly offensive that the dispute had become the subject of a website and an online petition."[58] Kristjanson J also concluded that the defendant's conduct had been "intentional; flagrant and outrageous; calculated to produce the harm that

51. *Ibid* at para 98, referring to *Criminal Code*, RSC 1985, c C-46, s 162.1. Section 162.1 was added to the *Criminal Code* through the enactment of *Protecting Canadians from Online Crime Act*, SC 2014, c 31.

52. *Ibid* at para 101. In fairness, the propriety of imposing aggravated damages for malicious conduct is debateable. As Hawley noted, "[a]ggravated damages are intended to measure harm or to provide compensation for a wrong committed by an act of high-handed or other reprehensible conduct": Donna Lee Hawley, "Punitive and Aggravated Damages in Canada" (1980) 18:3 Alta L Rev 485 at 486, DOI: <10.29173/alr2200>.

53. 2019 ONSC 7279 [*Yenovkian*]. The other of Prosser's four "privacy torts," appropriation of name or likeness, was, at the latest, recognized as part of Canadian tort law in *Athans v Canadian Adventure Camps Ltd* (1977), 17 OR (2d) 425, 80 DLR (3d) 583 (HCJ).

54. *Yenovkian*, *supra* note 53 at para 175.

55. *Supra* note 35 at § 652E.

56. *Yenovkian, supra* note 53 at para 170, citing American Law Institute, supra note 35 at § 652E.

57. An instance of substantive overlap common to the privacy torts, as Prosser noted: *supra* note 26 at 422-423.

58. *Yenovkian*, *supra* note 53 at para 183.

it has; highly offensive, causing distress and humiliation," and awarded the plaintiff general damages for invasion of privacy on the basis of both false light publicity and public disclosure.[59] In this context, Kristjanson J indicated that the defendant's conduct had been "egregious, involving criminal acts by [the plaintiff] against her children" and that the defendant "has not apologized, nor has he retracted the outrageous comments despite court orders."[60] In awarding punitive damages, Kristjanson J noted that the defendant had engaged in a course of "outrageous and egregious conduct at the extreme of reprehensibility."[61]

4. *Internet harassment*

The final jurisprudential response to the novel harms of the age of connectivity considered here is the decision in *Caplan v Atas*. This case involved "extraordinary campaigns of malicious harassment and defamation carried out unchecked, for many years, as unlawful acts of reprisal."[62] Corbett J of the Ontario Superior Court of Justice found that this conduct by the defendant had been undertaken with an intent "to go beyond character assassination […] to harass, harry and molest by repeated and serial publications of defamatory material, not only of primary victims, but to cause those victims further distress by targeting persons they care about, so as to cause fear anxiety and misery."[63] Corbett J, once again citing "facts that cry out for a remedy," adopted the test of liability for the American tort of harassment in internet communications as the law of Ontario.[64] This cause of action assigns liability in circumstances in which "the defendant maliciously or recklessly engages in communications conduct so outrageous in character, duration, and extreme in degree, so as to go beyond all possible bounds of decency and tolerance, with the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff, and the plaintiff suffers such harm."[65] The defendant in *Caplan* was indigent, such that no award in damages was sought against her.[66] That said, it seems likely that damages for a tort such as the one outlined by Corbett J would be awarded upon principles similar to other non-pecuniary or dignity-based awards similar to those granted in the context of the torts mentioned above.

59. *Ibid* at para 184.
60. *Ibid* at para 191.
61. *Ibid* at para 197.
62. *Supra* note 21 at para 1.
63. *Ibid* at para 168.
64. *Ibid* at paras 174, 171.
65. *Ibid* at para 171.
66. *Ibid* at para 214.

5. *Common content*

Actions in intrusion upon seclusion, public disclosure, false light publicity, and internet harassment share a number of common features. In each of the three causes of action founded on the "right to privacy" identified by Prosser, liability requires conduct which would be considered "highly offensive by a reasonable person." As for the tort of internet harassment, the necessity to demonstrate conduct so "outrageous" as to be "beyond all possible bounds of decency" calls for a similar assessment. Such thresholds require judges themselves to engage in an inescapably subjective assessment as to where the boundary of "highly offensive" conduct lies. As I have noted elsewhere in a narrower compass, the injection of unavoidably subjective standards into private causes of action seems to be a largely unreasoned response to clear cases.[67] It seems unlikely that standards such as "highly offensive to the reasonable person" will be of any use at all in the context of cases even slightly more marginal than these; cases in which the facts merely whimper for a remedy, rather than cry out for one.

Furthermore, the privacy torts themselves seem poorly conceived even for their original purposes, not to mention the purposes to which they have been put in the contemporary moment. Although not all will agree with an understanding of tort liability as flowing exclusively from wrongful interference with private rights, the scope and contours of a purported "right to privacy" have never been explored in any meaningful way.[68] While this theoretical emptiness makes the privacy torts easy to adapt to novel circumstances, the unavoidable reality is that, with each adaptation, their normative hollowness will become even more pronounced. Such a

67. It has been suggested that the standard of "highly offensive to a reasonable person" and the standards like it shared by the new torts discussed in this section may be no more an invitation for subjective determinations by judges than the standard of reasonableness that has featured prominently in the law of negligence. I must admit that I had taken the concept of "offensiveness" (not to mention "high offensiveness") to be so thoroughly entwined with substantially varied and deeply held personal understandings of social propriety and morality as to be incapable of objective determination. I am willing to be corrected on this point, but, to my knowledge, no decision employing this sort of standard has treated it as a subject of *legal* reasoning or analysis; rather, the standard is postulated, and the determination of the issue is pronounced. If a satisfactory objective test to determine whether particular conduct is or is not "highly offensive to a reasonable person" has been developed, I would obviously concede this point. It should be noted, in this context, that the limitations of a "highly offensive to a reasonable person" standard have been canvassed elsewhere at length. See Greg Bowley, "Waiting for *Donoghue*: Malice in the Law of Torts, Six Decades On" (2019) 93 SCLR (2d) 203 at 222. See also Karen Eltis, "Can the Reasonable Person Still be "Highly Offended"? An Invitation to Consider the Civil Law Tradition's Personality Rights-Based Approach to Tort Privacy" (2008) 5:1&2 UOLTJ 199, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2034533> [perma.cc/2EP7-VNEU].

68. *Whiten v Pilot Insurance Co*, 2002 SCC 18 (the deterrence rationale, for instance, identifies tort liability as responding to a need to "deter the defendant and others from similar misconduct in the future…, and to mark the community's collective condemnation (denunciation) of what has happened" at para 94).

continued expansion of unprincipled liability based on an untheorized understanding of "privacy," limited only by the dubious threshold of "high offensiveness," must eventually collapse under its own unsupported weight.[69]

In sum, the continued imposition of liability for novel harms facilitated by recent technological changes, based on interference with a supposed "right to privacy," is both practically unsustainable and theoretically unjustifiable. That said, the decisions described above provide valuable insight into the underlying normative content of the kind of conduct understood by judges to be wrongful, on an interpersonal basis, in this novel social context. A broader approach, founded more on principle than on the subjective revulsion of individual judges in response to egregious cases, offers a better basis upon which this sort of problematic conduct can be addressed by the common law of torts.[70]

III. *A (not so new) proposal*

As noted above, in 1958 Fridman argued that the common law in relation to tort liability for harm maliciously inflicted had, at that time, begun to coalesce. Fridman considered this trend to be not only justifiable, but desirable and necessary in light of the scope of harmful interpersonal conduct beyond the reach of the traditional nominate torts.[71] There has been little further progress toward such a doctrinal coalescence over the intervening years.[72] However, as Fridman argued, it is clear that the common law of torts has the tools necessary to systematically address conduct of the sort that has been found to justify the imposition of liability in the cases referenced in Part II.[73] Such a development must

69. This would be, as I have argued elsewhere, a repetition of a phenomenon described by Fridman, in which the legal standard of malice was adopted to support imposing liability for defamation, which had previously been imposed almost entirely at the discretion of the finder of fact. See Bowley, *supra* note 66 at 222.

70. By "address," I do not mean to suggest that it is in any way the role of tort liability to "solve" problematic interpersonal conduct, much less prevent it. Rather, inasmuch as I agree with the Supreme Court of Canada's statement in *Clements v Clements,* 2012 SCC 32 at para 7 that the purpose of tort law is to identify and, through the imposition of liability, correct instances of interpersonal wrongdoing, the only proper manner in which tort law can address the novel sorts of interpersonal wrongdoing facilitated by modern technology is by reliably and justifiably identifying it in all of its various manifestations.

71. Fridman, *supra* note 8 at 500.

72. See the text accompanying note 25.

73. It should be noted that tort liability already exists in relation to the intentional infliction of mental distress. The relevance of the tort in *Wilkinson v Downton*, [1897] 2 QB 57, 45 WR 525 [*Wilkinson*], to the discussion in issue is limited, however, by the highly circumscribed circumstances under which liability for such harm could be imposed. The tort in *Wilkinson* is not so much a general principle of liability for intentional harm as a narrow doctrine designed to impose liability for a very particular kind of harm in very particular circumstances. More than anything, the tort in *Wilkinson* is an early

be undertaken in order for the common law to address those harms that would go unremedied in the absence of such a systematic and principled approach. This jurisprudential evolution should recognize, as outlined below, that express malice, a subjective animus in the nature of spite or ill-will motivating the defendant's harmful conduct, is a common and essential feature of the varied acts which most of these new causes of action assign liability in respect of.

As a starting point, it is worth recalling the state of the law of liability for negligently inflicted harm immediately prior to the decision of the House of Lords in *Donoghue*. Recovery for negligently inflicted harm was contingent upon the existence between the parties of a relationship of a particular class or kind in which a duty to take care not to cause harm had been previously established. No general organizing principle was thought to lie beneath the fact that these relationships, but not others, gave rise to a duty not to carelessly cause harm to the other person. As such, the scope for recovery of harm carelessly inflicted was, compared to its present extent, extraordinarily narrow. So narrow was the traditional scope of liability for negligent harm before *Donoghue* that the question of whether a soft-drink manufacturer might owe a duty of care to *any* end-user of their product, rather than only those who had *purchased* it, was a point of significant controversy. Of the ten judges who considered the dispute in *Donoghue*, between the trial in the Outer House of the Court of Session, the appeal in the Inner House, and at the House of Lords, only half considered a duty of care in favour of any final consumer to be the correct principle.[74]

The objections to the adoption of Lord Atkin's formulation of a general principle of liability for unintentionally inflicted harm were of a lengthy pedigree and were vigorously advanced by Lord Buckmaster in his dissent in *Donoghue*. The old cases were clear: to go a step beyond requiring a manufacturer to take care not to cause harm to the immediate purchaser would expose manufacturers to potentially unlimited, and certainly unforeseeable, liability. "The only safe rule," Lord Buckmaster quoted

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prototype of the new torts discussed in Part II of this paper, and suffers from the same conceptual limitations. For an excellent discussion of *Wilkinson* and the role of malice in the assignment of tort liability, see Denise G Réaume, "Indignities: Making a Place for Dignity in Modern Legal Thought" (2002) 28 Queen's LJ 61, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=1182822> [perma.cc/3VE7-UVXK].

74. Lord Moncrieff, at the Outer House of the Court of Session, [1930] SN 117 (Ct Sess Scot), found there to be a duty of care. However, when the case was appealed to the Inner House of the Court of Session, [1930] SN 138 (Ct Sess Scot), the Lord Justice Clerk (Lord Alness), Lord Ormidale, and Lord Anderson reversed that decision, with only Lord Hunter dissenting in favour of Donoghue. Finally, on appeal at the House of Lords, a cause of action was ultimately found to exist, in the now-famous 3-2 decision (Lords Atkin, Thankerton, and Macmillan concurring; Lords Buckmaster and Tomlin dissenting): *Donoghue, supra* note 1.

Alderson B as stating in *Winterbottom v Wright*, "is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty."[75] To be clear, the rationale for rejecting the notion that manufacturers of any products might bear a responsibility to take care that their products not cause harm to their ultimate user went neither further nor deeper than this slippery-slope argument. To reiterate the point made by Alderson B, Lord Buckmaster endorsed the following statement by Lord Anderson, a judge of the Inner House, in *Mullen v Barr & Co*, a case similar to *Donoghue* both in tenor and substance:

> In a case like the present, where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works. It is obvious that, if such responsibility attached to the defenders, they might be called on to meet claims of damages which they could not possibly investigate or answer.[76]

Lord Atkin swept away the apparent outrageousness of such a prospect, proposing that "in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances."[77] The "general conception" underpinning all relationships in which a duty of care arose was, in essence, a core moral imperative. "The rule that you are to love your neighbour," Lord Atkin noted, "becomes in law, you must not injure your neighbour."[78] Any concerns about unforeseeable or unlimited liability that could flow from such a broad principle would, on Lord Atkin's analysis, be overcome by the necessity, "in a practical world," to limit those who might be entitled to relief as a result of another's harmful conduct.[79] This limit, now well-known as the "neighbour principle," holds that a person owes a duty to take care not to cause foreseeable harm to only those "so closely and directly affected by [their] act that [they] ought reasonably to have them in contemplation as being so affected when [they are] directing [their] mind to the acts or omissions which are called in question."[80]

The recognition of the neighbour principle as the normative core of liability for negligently inflicted harm was, obviously, a landmark moment

75. *Donoghue, supra* note 1 at 577, citing *Winterbottom, supra* note 2 at 115.
76. 1929 SC 461 (Ct Sess) at 479.
77. *Donoghue*, *supra* note 1 at 580.
78. *Ibid.*
79. *Ibid*.
80. *Ibid at* 580-581.

in the common law of tort, extending the duty to take care not to cause harm and, with it, the possibility of private liability, to many relationships not previously considered to be of sufficient proximity to justify such an obligation. Considering the present disjointed state of tort liability for intentionally inflicted harm, it is noteworthy that the principled reasoning upon which Lord Atkin recognized a general basis of liability for harm inflicted unintentionally is in no way necessarily limited to that context. Lord Atkin's core moral assertion was not taken beyond a general principle of liability for negligently inflicted harm in *Donoghue* simply, one may infer, because doing so was not necessary to resolve the dispute in issue in that case. This maxim's capacity to support additional normative principles is, in my view, not reasonably contestable. In the context of unintentional conduct causing harm, or intentional conduct not intended to cause harm, the extension of this precept is clearly, as Lord Atkin noted, "[y]ou must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."[81] However, in the context of conduct *intended* to cause harm, the extension becomes a far-less revolutionary "you must avoid acts which you intend to injure your neighbour."

Not all will agree that intentional harm is inherently more problematic than unintentional harm, but that is not the burden my argument must discharge.[82] Rather, it need only demonstrate that intentional harm is, in a general sense, at least as wrongful as unintentional harm. There is no obvious complexity in this task; how could we understand foreseeable harm carelessly inflicted upon a foreseeable victim as wrongful without also understanding *intentionally* caused harm to a person *selected* to suffer that very harm as at least equally wrongful? Such a position is unsustainable—if we understand as wrongful a failure to recognize in each other a reason to be careful not to cause foreseeable harm, we must implicitly also understand as wrongful a failure to recognize in each other a reason not to cause wanton harm. Without necessarily resorting to such thin rhetorical argumentation, the law would presumably be 'sadly deficient' if it were to incorporate the first principle without recognizing the logical necessity of also incorporating the second.

On this basis, the extraction of a common, principled underpinning from the new torts outlined in Part II (as well as several other, older torts)

81. *Ibid.*

82. Consider, for example, Arthur Ripstein, *Private Wrongs* (Cambridge, MA: Harvard University Press, 2016) at 165: "how puzzling the idea that it is wrong to intend harm actually is, even though it is familiar."

seems at once possible, desirable, and inevitable.[83] As Lord Atkin drew on principles developed by Lord Esher MR in *Heaven v Pender* and *Le Lievre v Gould* in formulating the general principle of liability for unintentional harm, a similar task could be undertaken in developing a general principle of liability for intentional harm.[84] For such a principle we may refer to Lord Esher's colleague, Bowen LJ, who provided the germ of a general principle of liability for intentionally inflicted harm in his reasons in *Mogul Steamship Co, Ltd v McGregor, Gow, & Co.*[85] That case was decided by Bowen LJ on the basis of the following principle:

> Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse.[86]

Bowen LJ's reasons in *Mogul Steamship* were well received, being expressly endorsed and adopted by a number of members of the House of Lords, which affirmed the Court of Appeal's decision.[87] Although *Mogul Steamship* is primarily noteworthy in Commonwealth jurisprudence as the foundational decision in relation to the tort of conspiracy to harm, Bowen LJ's dictum in Mogul Steamship has lived an interesting life in American law, forming the basis of the so-called "prima facie tort," which has been described as a tort doctrine that "acknowledges a general right not to be intentionally harmed."[88]

The assignment of liability pursuant to most of the novel torts discussed in Part II can be explained by a general principle along the lines of Bowen LJ's formulation, along with a number of other torts, such as Fridman's proto-torts of wrongful expulsion from a trade union and abuse of statutory powers, as well as conspiracy to harm, malicious falsehood, and the defamation torts. In each of the cases discussed in Part II other than *Jones* in relation to intrusion upon seclusion, the conduct in issue is

83. While such a novel principle might spring from the normative content identified as underlying extant tort doctrines (including the novel causes of action discussed herein), there is no reason to think that a general principle of liability for the intentional infliction of harm would or should replace those extant tort doctrines. The primary utility of a general principle is the justifiable and coherent identification of *novel* circumstances of interpersonal wrongdoing, as illustrated by the fact that Lord Atkin's neighbour principle applies only in the context of relationships to which no previously recognized duty to take care attaches. See e.g. *Cooper v Hobart*, 2001 SCC 79 at para 21.

84. [1883] 11 QBD 503 (CA); [1893] 1 QB 491 (CA).

85. [1889] 23 QB 598 (CA).

86. *Ibid* at 613.

87. [1892] AC 25 [*Mogul Steamship 1892*].

88. Geri Shapiro, "The Prima Facie Tort Doctrine: Acknowledging the Need for Judicial Scrutiny of Malice" (1983) 63 BUL Rev 1101 at 1114.

not only intentional, but actually intended to cause the harm which, in each instance, it was found to have inflicted upon the plaintiff. On this analysis, it is not coincidental that the conduct in issue in each of these decisions was determined to have been not only an intentional infliction of harm, but harmful action motivated by malice, justifying the award of either aggravated[89] or punitive[90] damages, or both.[91] Rather than a coincidence, in these cases judges confronted intentional conduct intended to harm the plaintiff, and, in my view, would have had difficulty formulating a circumstance in which liability would be justifiably imposed in the absence of that intention—it would be much more difficult to rely on "facts that cry out for a remedy" as a justification for imposing liability in the absence of obviously malevolent conduct. As the old common law judges might have said, malice seems to be the gist of all of these actions.

Rather than requiring plaintiffs to prove a subjective state of mind, however, the principle set out by Bowen LJ simply identifies harm imposed as a result of another's intentional conduct. This puts the party inflicting that harm to the test of proving a "just cause or excuse" for their harmful conduct, thereby disproving any supposition that it was undertaken for the impermissible purpose of causing harm to another. This structure is mimicked in a number of the torts involving liability for the intentional infliction of harm, such as conspiracy to harm,[92] malicious falsehood,[93] and the defamation torts.[94] In these torts, proof of intentional conduct causing harm requires the defendant to prove a just cause or excuse for their conduct which, if made out, has the effect of demonstrating that the infliction of harm in those circumstances was rightful. This repeating pattern is not, I argue, happenstance—rather, it is a manifestation of the phenomenon described by Lord Atkin in the context of liability for harm unintentionally inflicted: "all the cases where liability can be established must logically be based upon some element common to the cases where it is found to exist."[95] In my view, such a defence should also prevent the assignment of liability in each of the torts of publication of private facts, false light publicity, and internet harassment.

89. See Hawley, *supra* note 52.
90. *Yenovkian, supra* note 53 (punitive damages (also called exemplary damages) are intended to punish and deter tortious conduct at para 194).
91. *Jane Doe 2016, supra* note 42; *Jane Doe 2018, supra* note 42; *Shillington, supra* note 42.
92. *Mogul Steamship 1892, supra* note 86 at 36-37, Lord Halsbury LC; at 43, Lord Watson; at 48-49, Lord Bramwell; at 50, Lord Morris; at 52, Lord Field; at 59, Lord Hannen.
93. *White v Mellin*, [1895] AC 154 at 160-161.
94. *Adam v Ward*, [1917] AC 309 at 318, Lord Finlay LC; at 328, Lord Dunedin; at 334 Lord Atkinson.
95. *Donoghue, supra* note 1 at 580.

Much of the conduct captured by the new torts described in Part II (not to mention the defamation torts and malicious falsehood) treads uncomfortably close to conduct arguably falling within the protection of a constitutional entitlement to free expression. However, many existing defences to defamation liability seem to operate to prevent conflicts between the demands of private justice and liberal democratic citizenship, and similar defences could serve a similar function in the context of a general principle of liability for intentional harm of the sort described here. For example, expression communicated for a political purpose, or as a component of participation in adjudicative or parliamentary processes, ought not to attract private liability. This is not because it is incapable of imposing harm of a sort cognizable in private law, but rather because such expression, to the extent that it forms a core component of liberal democratic citizenship, is justifiably beyond the reach of private liability, regardless of how wrongful it may be in a private law sense.[96] Conversely, defences of the sort which constitute qualified privilege in defamation (or the defence of justification in conspiracy to harm, for that matter), should operate in the context of a general tort for intentional harm in much the same way as they do in their present doctrinal "homes." If this were the case, proof by the defendant of the existence of circumstances comprising just cause or excuse would rebut any inference that their conduct was wrongful, thereby requiring the plaintiff to prove that, nonetheless, the defendant's purpose in acting was to cause harm to the plaintiff.[97]

As noted above, the exception to this analysis is the decision in *Jones* and the tort of intrusion upon seclusion it recognized. Sharpe JA, in declining to award aggravated or punitive damages, determined the facts in issue to be such as to "cry out for a remedy" and to have "caused distress, humiliation or anguish."[98] The only question raised by *Jones* is whether the harm suffered by the plaintiff, being the distress, humiliation,

96. This is the skeleton of an argument to be developed further in "A Limit for Liability: Free Expression and Defamation Liability in a Liberal Democratic Context" (working paper on file with author).

97. It is noteworthy, in this context, that the defence of justification in conspiracy to harm has, from the outset, recognized a profit motive as just cause or excuse for the intentional infliction of harm by concerted rightful conduct. A limitation of the approach outlined above is that, given the profit motive's high standing in the pantheon of capitalist virtues, a defendant might well evade liability for the publication of revenge porn if the publication could be proven to have been profit-seeking. Whatever else we might think about the oppressiveness or highhandedness of such conduct, we could not identify it, on this analysis, as intended to cause harm to the person depicted, and could not impose liability based on the general principle proposed herein. We may, as a society, be forced to grapple with our problematic reverence for profit-seeking if we are to recognize the normative significance of the intentional infliction of harm.

98. *Supra* note 32 at paras 69, 71.

or anguish described by Sharpe JA is, in fact, a harm that the defendant intended to cause. This connection is difficult to make as, presumably, the defendant did not intend for the plaintiff (or anyone else, for that matter) to discover her intrusive conduct in the first place. So long as an intrusion upon seclusion remains a mere intrusion (that is, without any consequent publication of the private facts thereby discovered, to the plaintiff or anyone else), it would be difficult to identify an impact on the plaintiff of any sort at all. As such, in cases of intrusion upon seclusion, it seems that it is not the intrusion itself which inflicts harm, so much as the discovery of it by the plaintiff or publication of it by the defendant. This is to say, while intrusion upon seclusion may be, of all of the torts identified by Prosser, the one true "privacy" tort, it does not seem to fit the pattern of a general principle that would assign liability for intentionally inflicted harm patterned on Bowen LJ's dicta in *Mogul Steamship*. That said, Sharpe JA's reasons in *Jones*, particularly his adoption of the "highly offensive" standard and reliance on facts that cry out for remedies, have had a significant influence on the subsequent decisions in the *Jane Doe* decisions, *Shillington, Yenovkian*, and *Caplan.*

There would, of course, be objections to the adoption of a general principle of liability for intentional harm. The first, and most obvious, is the fact that, in Bowen LJ's formulation, there can be no liability in the absence of tangible, quantifiable harm to the plaintiff's person or property. Traditionally, actions on the case have been made out only in circumstances in which damages are proven, unlike cases in trespass, which were actionable per se.[99] This restriction has persisted to the present day in the limited scope of damages recoverable on the basis of the prima facie tort in the American context.[100] However, in light of the recent treatment of conduct giving rise to liability in the context of the new torts described in Part II, it is clear that, though intangible, the harms caused by the conduct considered in each of those torts are nonetheless cognizable to the law and capable of assessment as the basis of damages. A critique arguing that the legally cognizable harm caused by wrongful conduct of this sort is insufficient to support private liability would be, at best, a contemporary counterpart to Lord Buckmaster's slippery-slope concern in *Donoghue*: an inherently unprincipled response to a principled position. At worst, that argument would be incoherent in the context of contemporary jurisprudence recognizing such conduct as tortious. While at this point it is not clear what the exact contours of the protected interest

99. "Prima Facie Tort Doctrine, The" (1952) 52 Colum L Rev 503 at 508.
100. *Ibid* at 508-509.

in issue in the new torts discussed in Part II would be, those decisions are clear that such an interest exists, and that one of its core characteristics is that it can only be interfered with, in a legally significant way, through malicious conduct.[101] Precisely defining the scope and nature of this protected interest is beyond the remit of this brief paper.[102]

Regarding Lord Buckmaster's reasons in *Donoghue*, it may also be argued that liability of the sort proposed here would expose defendants to potentially unlimited or uncertain liability of the same sort that the dissent in *Donoghue* expressed apprehension about. Again, however, there seems to be little substantial basis for this concern, particularly considering the much narrower scope of a general principle of liability for intentional harm relative to the doctrine set out in *Donoghue*. A principle of liability for the intentional infliction of harm must, by definition, be limited in its availability to those who have been targeted for the infliction of harm by the defendant's conduct. Anyone unintentionally harmed by another's conduct (intentional or otherwise) would, if anything, obtain their remedy in negligence, rather than because of the wrongdoer's intention. Similarly, only those harms intended by the defendant to be suffered by the plaintiff because of their conduct could be captured by the proposed general principle. Again, any harm suffered by the plaintiff other than those intended by the defendant would only be recoverable in negligence as harm unintentionally inflicted upon the plaintiff by the defendant. As such, rather than indefinite liability, a general principle of liability for intentionally inflicted harm would almost always be definitely bounded by liability already available in negligence.[103] However, to the extent that a principle of the sort proposed would produce liability for harms not presently compensable in negligence, such as the sort of intangible harms underpinning the new torts described above, the scope of potential liability is limited. Only those specifically targeted by the defendant to suffer harm of the sort that they did, in fact, suffer could obtain judgment on this basis. If the sort of liability presently available through the doctrine set out in

101. I take as a given that "privacy" cannot easily be understood as constituting a protected private interest akin to one's property, civil rights, and person, posing many of the same theoretical problems as the equally dubious "reputation." This position will be developed further in "A Purpose for Privilege: Motive, Purpose, and the Private Limits of Liability for Defamation" (working paper on file with author).

102. For one conception of a protected interest underlying torts attaching exclusively to malicious conduct, see Réaume, *supra* note 72.

103. One would also expect a general principle of liability for harm intentionally inflicted to develop its own principled limitations in relation to particular kinds of harm in much the same way that negligence liability has in relation to negligently caused reputational harm, negligent invasions of privacy, and negligent pure economic loss.

Donoghue is not too indefinite to be tolerated by the common law, it seems inconceivable that liability based on the principle proposed herein could be considered so—it would, quite literally, be limited to damages caused by harmful conduct undertaken by defendants having no right or entitlement to cause such harm.[104]

Conclusion

The future of interpersonal relationships will almost assuredly be characterized primarily by the novel modes of interactions facilitated by new technology, both existing and as-yet unimagined. Those insisting that the private law has no role in regulating these new kinds of relationships beyond the scope of existing tort doctrines (such as the defamation torts), because novel harms do not map easily onto pre-existing understandings of harm, have already been left behind by the jurisprudence discussed in Part II. Recognition that wanton and unjustifiable infliction of humiliation and harassment in decisions such as *Jane Doe 2016*, *Jane Doe 2018*, and *Caplan* imposes harm of a sort cognizable to law has, laid the foundation for a Canadian tort law unwilling to cede future oversight of interpersonal relationships to unpredictable statutory interventions.

The advent of the printing press once created an entirely new form of interpersonal interaction, justifying a differential approach to tort liability.[105] In much the same way, the age of connectivity has already required the adoption of new conceptions of harm for the Canadian common law of torts to remain relevant as a source of normative guidance for interpersonal conduct. Having done so, two paths are now available in light of the ever-changing contexts within which interpersonal relationships will exist. The first is a constantly expanding constellation of discrete novel bases of tort liability, each responding to only the most egregious examples of interpersonal conduct and of doubtful utility in the even slightly more marginal case. The second is a general principle

104. There are obviously many circumstances in modern society in which a person is, in a private law sense, entitled to cause harm to others, even intentionally. This is recognized by the defences of justification in conspiracy to harm, qualified privilege in the defamation torts, and honest competition in malicious falsehood.

105. To succeed in an action for defamation by printed or written communication (i.e. an action in libel), a plaintiff need not prove they suffered actual damage, but need only demonstrate on a balance of probabilities that a statement was made that would tend to lower them in the estimation of right-thinking members of society (*Sim v Stretch*, [1936] 2 All ER 1237, 52 TLR 669 (UK HL)), which refers to the plaintiff (*Knuppfer v London Express Newspapers Ltd*, [1942] 2 All ER 555, [1943] KB 80 (UK CA)), and which has been published, or shared, with at least one other person who understands it (*Crookes v Newton*, 2011 SCC 47). Proof of having suffered an actual loss caused by the defamatory communication is unnecessary, unlike an action for defamation by verbal communication (i.e. an action in slander), where consequential damages must be proven: see *Hill v Church of Scientology*, [1995] 2 SCR 1130, 126 DLR (4th) 129.

of liability for the intentional infliction of harm capable of assigning liability on a consistent and predictable basis across the entire spectrum of interpersonal conduct. As discussed, a general principle would have the salutary capacity to remain sensitive to the possibility that many harms are justifiable on the basis of extant defences to tort liability and are therefore rightfully imposed.

The first of these paths leads, inevitably, to an incoherent jurisprudence not easily reconciled with itself or adaptable to future changes in interpersonal relationships. The latter, on the other hand, provides a basis of liability as flexible and robust as the general principle of liability for negligent harms has been. Notwithstanding the objections of those who would follow in the footsteps of Lord Buckmaster today, clinging to a myopic and obsolete understanding of the scope of human experience, Canadian tort law can, should, and must fit itself for the future. The first step in doing so is a recognition that, in assessing the legal significance of interpersonal conduct, motive matters.