The Protection of Privacy and Private Information in the Digital Age: A Comparative Study of English and Thai law Applying to Individual Media Users

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Abstract

In the digital age, the media paradigm is changing. New technology and social media have become essential tools for individual media users to gather and disseminate information. Users' content without the filter of traditional media outlets and editing processes may cause more harm to another's privacy than traditional media. Despite the vast research on privacy invasions in the traditional media context, there is little analysis of whether privacy torts can offer an appropriate response to privacy concerns in light of the individual media users. This thesis therefore employs comparative law and doctrinal analysis to explore the suitability and sufficiency of English and Thai torts in protecting privacy and private information in this case. The multiple case study is constructed and categorised by a typology approach. Six categories of cases are subsequently established; privacy in a public place, the protection of private information and the nature of information, privacy and a public figure, social media as a medium of dissemination, privacy on social media and modern newsgathering and intrusions.

By using this mixed approach, the strengths and weaknesses of English and Thai law are identified. The key findings suggest that the English tort of misuse of private information (MOPI) has advantages for safeguarding privacy and private information over the Thai tort. Furthermore, it is feasible to solve repetitive problems of the Thai tort in privacy cases, such as the unclear scope of privacy rights and difficulties of the actual damage. Consequently, the tort of MOPI is proposed as a possible new legal model for Thailand. Recommendations for implementation by legislators are given. In this regard, some drawbacks of the English tort are also addressed. This new legal model could possibly enhance privacy protection while maintaining a proportionate balance with freedom of expression. Underlining the differences between freedom of expression and media freedom, the balance between an individual's privacy and freedom of expression across new media is illustrated. The thesis provides an original comparative analysis of the English and Thai torts, contributing to law reform for Thailand. Moreover, it bridges privacy perceptions from the English and Thai jurisdictions, increasing the theoretical understanding of privacy.

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UK	- The Data Protection Act 1998 - The Data Protection Act 2018 - The Human Rights Act 1998
EU	- Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1
Thailand	- The Civil and Commercial Code - Thai Criminal Code - Thailand's Constitution of 2017 - The Organic Act on Procedures of the Constitutional Court 2018 - The Personal Data Protection Act 2019

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Author's declaration

"I declare that, except where explicit reference is made to the contribution of others, that this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution."

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Abbreviations

BGB	Bürgerliches Gesetzbuch (the German Civil Code)
CCC	The Civil and Commercial Code (Thailand)
CCTV	Closed-circuit television
ECHR	The European Convention on Human Rights
ECtHR	The European Court of Human Rights
GDPR	General Data Protection Regulation
HRA	The Human Right Act 1998 (United Kingdom)
ID	Identification
MOPI	misuse of private information
NA	Narcotics Anonymous
NHRC	The National Human Rights Commission (Thailand)
NSW	New South Wales
PDPA	The Personal Data Protection Act B.E. 2562 (2019) (Thailand)
UK	United Kingdom
US	United States of America

Chapter 1: Introduction

1.1 Thesis Background

Privacy invasions have become a global concern as privacy-invading technologies, such as high-quality cameras, smartphones, drones, or other surveillance devices have become omnipresent. By using those technologies, an individual can easily record, photograph, or collect information about another. Then, they can create content or immediately share that collected information with the public through the new media.[1] However, unlike traditional media[2] such as television, radio and newspapers, there is no editor to check, review or be directly responsible for an individual media user's content.[3] In this sense, the risks of harm to privacy rights arising from the content of individual media users may be higher than those of traditional media. Therefore, the thesis wishes to examine the protection of privacy and private information in the digital age, focusing on the case study of individual media users and privacy disputes between private parties.

Consequently, tort law was selected as the subject field of the study since it is related to relationships among private individuals. Moreover, it aims to protect an individual's rights and interests from another,[4] shape an individual's behaviour and resolve private disputes.[5] Thus, it can be one of the legal tools to protect privacy

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[1] See, for example, Thanya Juntrong and Kullatip Satararuji, 'Citizen Reporter and the Use of Online Media in Mobilising on Human Rights Issues in Thai Society' (2014) 2 FEU Academic Review., Farida Vis, 'Twitter as a Reporting Tool For Breaking News Journalists Tweeting the 2011 UK Riots' (2013) 1 Digital journalism 27., Eddy Borges-Rey, 'News Images on Instagram: The Paradox of Authenticity in Hyperreal Photo Reportage' (2015) 3 Digital Journalism 571., Luke Goode, 'Social News, Citizen Journalism and Democracy' (2009) 11 New Media & Society 1287., Karen McIntyre, 'How Current Law Might Apply to Drone Journalism' (2015) 36 Newspaper Research Journal 158., Roy S Gutterman and Angela M Rulffes, 'The Heat Is On: Thermal Sensing and Newsgathering - A Look at the Legal Implications of Modern Newsgathering' (2018) 23 Communication Law and Policy 21.

[2] Traditional media or the old media refers to media institutions that had dominated the media before the digital age, such as television, radio, newspaper. Traditional media is generally a one-way communication intended to reach a mass audience. Mass media is concerned with mass communication. Thus, traditional media will be interchangeable called mass media in the thesis.

[3] The term individual media users will be further explained in section 1.2

[4] See, for example, Susom Supanit, *The Explanation of Tort Law* (nitibannagarn 2007). 1 Peng Pengniti, *Description of the Civil Code of Thailand: The Act of Tort, Tort Liability by Officer and Other Related Laws* (9th edn, Jiraratkarnpim 2015). 2, Christian A Witting and Harry Street, *Street on Torts* (15th edn, Oxford University Press 2018)., Mark Lunney, Donal Nolan and Ken Oliphant, *Tort Law: Text and Materials* (6th edn, Oxford University Press 2017)

[5] Pengniti (n 4). Peter Cane, *The Anatomy of Tort Law* (Hart Publishing 1997)

interests and solve privacy disputes. In England, the tort of misuse of private information (MOPI) was established to protect privacy interests and guard against unwanted disclosure of private information. On this basis, it seems suitable to respond to privacy concerns in the new media context. Nonetheless, most of the English landmark cases were engaged with the traditional media.[6] Therefore, the thesis aims to warrant closer scrutiny of the application of the tort of MOPI in the case of individual media users. Meanwhile, in Thailand, several reports and researches have suggested that the existing Thai tort is insufficient to protect privacy and private information in the digital age.[7] Accordingly, the primary purpose of the thesis is to compare the existing Thai tort with the English tort of MOPI to understand the similarities and differences between them and to study how different torts have dealt with the same problems in order to accommodate the better legal model for Thailand.

1.2 The Term of Individual Media Users

The term 'individual media users' used in this thesis means any 'individual users' of 'new media'. Thus, it does not include media entities or professional media operating in digital media or online platforms. The new media here refers to 'digital media that are interactive, incorporate two-way communication, and involve some form of computing as opposed to "old media" such as the telephone,

[6] See the landmark cases, for example, *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22. The claimant (a celebrated fashion model) sought damages for breach of confidence in relation to their private information and photographs covertly taken in a public place and published by the defendant (newspaper)., *Murray v Express Newspapers Plc* [2008] EWCA Civ 446. The claimant (a famous writer) brought an action against a newspaper for breach or privacy/confidence. The defendant covertly took a photograph of a family group walking on a street., *Douglas v Hello Ltd* [2007] UKHL 21. The claimant (well-known actors) sought damages for the unauthorised publication of their wedding photographs, published by the defendant (a magazine)., *Max Mosley v News Group Newspapers Limited* [2008] QB EWHC 1777. The claimant sued the defendant (a press) for breach of confidence and unauthorised disclosure of information and images related to the claimant at a sex party., *Ferdinand v MGN Ltd* [2011] WL 4085117. The claimant (the well-known footballer) claimed that the article concerning their affair published by the defendant (the press) infringed their right to privacy and misused their private information.

[7] See, for example, 'Supporting Document for a Personal Data Protection Act:General Meeting Session' (The Secretariat of the House of Representatives 2013) ๐.๒. 6/2556., Jantajira Iammayura, 'Laws Related to Personal Data in Thailand' (Thammasat University Research and Consultancy Institute 2004)., Kanathip Thongraweewong, 'Legal Measures for Protecting the Right to Privacy: A Study of Invasion of Privacy through the Use of Social Network Websites' (2012) 18(2) APHEIT Journal 47., Kanathip Thongraweewong, 'Privacy Tort in the Case of Disclosure Private Information to the Public and the Adjustment for Privacy Protection in the Case of Disclosure of Private Information on Social Media Website' [2013] Bot Bundit.

radio, and TV.'[8] Consequently, it is not limited to social media but includes other kinds of new media articulations such as games and locative media.[9]

Accordingly, in the new media context, the 'individual media users' could be passive recipients of information or active users who generate 'user-generated content'[10] through any kind of new media articulations. The users' contents are diverse, ranging from informal conversations, gossip, artistic expression, political expression to professional news reports. Hence, the individual media users could be ordinary users who usually use the new media for social interactions or the users who produce media content or act as the media. The individual users who play roles as the media participating in journalistic activities, including creating, collecting, analysing, and disseminating news and journalism, can be interchangeably called 'citizen journalists.'[11] The differentiation between the two kinds of users may affect the application of privacy torts, which will be profoundly discussed later in the thesis.

1.3 Legal Background and the Justifications for the Selection of a Comparator Jurisdiction

The Thai legal system is predominantly based on civil law.[12] The Civil and Commercial Code (CCC) was drafted by adopting codes from several foreign civil law countries, such as Germany, France, Switzerland, and Japan.[13] In particular, the Code of 1925, composed of the book I and II of the present CCC, was copied from the Japanese Civil Code in the belief that it was established by copying the German Civil Code (BGB) 1900.[14] The book II of the CCC was enacted in 1925[15] and

[8] Robert K Logan, *Understanding New Media: Extending Marshall McLuhan*, vol 2.;2; (2nd edn, Peter Lang 2016) 4
[9] Eugenia Siapera, *Understanding New Media* (2nd edn, SAGE Publications 2017). Preface 10-11
[10] Peggy Valcke and Marieke Lenaerts, 'Who's Author, Editor and Publisher in User-Generated Content? Applying Traditional Media Concepts to UGC Providers' (2010) 24 International review of law, computers & technology 119.
[11] Goode (n 1). See also Dan Gillmor, *We the Media: Grassroots Journalism by the People, for the People* (Pbk, O'Reilly 2006).
[12] However, some scholars may consider the Thai legal system as a mixed legal system as it has been shaped and influenced by several countries. The idea of the mixed legal system will be shown later in this section.
[13] Supanit (n 4). 10
[14] Munin Pongsapan, 'The Reception of Foreign Private Law in Thailand in 1925: A Case Study of Specific Performance' (PhD, The University of Edinburgh 2013).
[15] ibid.

has never been revised or amended, including the laws of obligations. In former continental codes, all obligations were classified as *ex contractu*, *quasi ex contractu*, *ex delicto*, and *quasi ex delicto*. However, this classification has been denied by the CCC.[16] In the Thai legal system, the law of obligations or civil liabilities are divided into obligations arising from the juristic act and other legal causes such as an unlawful act or tortious act.[17] Section 420 of the CCC provides a general clause that can impose liability on a person who commits any wrongful act and cause damages unlawfully to another.[18] This general clause of liability is considered a tort or wrongful act in the Thai legal system.[19] Thus, section 420 of the CCC will be interchangeably called 'the general tort' in this thesis.

Notwithstanding some previous disagreements,[20] the Thai Supreme Court now confirmed that section 420 is applicable to protect privacy rights.[21] Nevertheless, numerous researches argued that this section is insufficient or ineffective to protect privacy rights and private information. For example, it was argued that the requirement of the actual damage under section 420 puts too a heavy burden of proof on the claimant.[22] Moreover, Thai scholars contended that the actual damages are difficult to be proven in privacy cases.[23] Since the actual damage is the essential element of the general tort, the general tort cannot be established without proof of the actual damage. As a result, several privacy cases were unsuccessful because this requirement could not be met.[24] Consequently, it is

[16] Alessan Stasi, *General Principles of Thai Private Law* (Springer Science and Business Media 2016). 76

[17] Pengniti (n 4). 1 , Supanit (n 4). 10

[18] The Civil and Commercial Code. Section 420 provides that 'a person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to compensate them for any damage arising therefrom.'

[19] See, for example, Pengniti (n 4)., Supanit (n 4)., Jidti Tingsaphati, *Explanation of Civil and Commercial Code: Agency without Specific Authorisation, Undue Enrichment and Tort* (Professor Jidti Tingsaphati Foundation, Faculty of Law, Thammasat University 2018).Phaijit Poonyapan, *The Explanation of Civil and Commercial Code: Tort* (nitibannagarn 2008).

[20] The arguments in this regard will be discussed in chapter 3.

[21] Supreme Court Decision 4893/2558. In this case, the claimant (a Thai politician) claimed that the publication of their sexual life by the defendant (the press) infringed their privacy rights under section 420.

[22] 'Supporting Document for a Personal Data Protection Act: General Meeting Session' (n 7). ก.

[23] See, for example, Iammayura, 'Laws Related to Personal Data in Thailand' (n 7)., Rattanawadee Nakwanit, 'A Star- a Public Figure: The Thin Line between "News" and "Trespasses" by the Mass Media in the Entertainment Business' (2011) 31 University of the Thai Chamber of Commerce Journal 50., Thongraweewong, 'Legal Measures for Protecting the Right to Privacy: A Study of Invasion of Privacy through the Use of Social Network Websites' (n 7)., 'Supporting Document for a Personal Data Protection Act:General Meeting Session' (n 7).

[24] Nakwanit (n 23).

questionable whether the general tort is suitable and sufficient to protect privacy rights and private information in the digital age. Furthermore, under the current statutory framework, there is a lack of a balancing approach between privacy rights and freedom of expression or other competing rights.[25] In this sense, it is debatable whether the general tort is appropriate for resolving private disputes, particularly when an individual's privacy right conflicts with freedom of expression of another.

Since the general tort is a highly abstract clause, its success is likely to depend on several factors such as judicial styles or traditions, interpretation and application by the courts, a national legal framework, and the relationships between the Constitution law and private laws. Thus, while the general clause of civil liability seems unsuccessful in Thailand, a similar clause might thrive in other civil law jurisdictions. For instance, section 823 (1) of the BGB[26] has effectively protected personality rights[27] in Germany because of the development of the judicial methodology.[28] Moreover, the German judicial style and reasonings are known for being unique, highly abstract, philosophically sophisticated, and well-reasoned.[29] Since privacy rights and freedom of expression were recognised by the German Constitution or the Basic Law, the German courts have been encouraged to seek an ad hoc resolution of the competing fundamental rights.[30] Consequently, the German courts have not hesitated to institute additional rules concerning section 823 to comply with the German Constitution or Basic law in privacy cases.[31] In Japan, the success of a similar clause in the Civil Code appears to result from the recognition of privacy rights in the Japanese Constitution, interpretation of the Civil Code by the courts, and case law development.[32]

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[25] This problem will be illustrated later in the thesis.

[26]The German Civil Code (Bürgerliches Gesetzbuch) (BGB). Section 823 (1) provides that 'a person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to compensate the other party for the damage arising from this.'

[27] In Germany, the right to privacy is treated as part of the right to personality.

[28] PM Schwartz and KN Peifer, 'Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?' (2010) 98 California Law Review 1925., CC van Dam, *European Tort Law* (Oxford University Press 2006).

[29] Basil Markesinis, 'Judicial Style and Judicial Reasoning in England and Germany' (2000) 59 Cambridge law journal 294.

[30] Schwartz and Peifer (n 28)., Dam (n 28).

[31] Schwartz and Peifer (n 28)., Dam (n 28).

[32] Takahisa Sugano, 'Privacy in Japan' (1970) 3 The Comparative and international law journal of southern Africa 225., GW Greenleaf, *Asian Data Privacy Laws: Trade & Human Rights Perspectives* (Oxford University Press 2014) 230

However, in the Thai legal system, the Constitution has little impact on private laws dimension. Although privacy rights are now recognised by the Constitution,[33] Thai courts have not been encouraged to create additional rules to balance competing constitutional rights in private disputes. For example, in the landmark privacy case, while the court acknowledged the guarantee of private rights in the Constitution, it emphasised that the Constitution aims to control public authority's power and safeguard fundamental rights. For deciding civil liabilities or resolving private disputes, the court must follow the provisions in the CCC.[34] The impact of the Thai Constitution on private laws will be further illuminated in Chapter 3. Furthermore, in Thailand, judges are generally required to establish the fact of the case and apply section 420 of the CCC to that fact. Developing new rules or additional rules that are not expressly codified in the CCC is a rare procedure in Thai adjudication. Thus, unlike in the German jurisdiction, Thai judges have always hesitated to create an additional methodology to supplement the application of section 420. These differentiations may be the reasons why the similar approach led to substantively different results in Thailand. In this sense, it is unconvincing to study the similar approach in other civil law legal systems and expect a new result. Therefore, the thesis intends to examine how a common law with differing approach has dealt with the same problems.

Unlike the civil law system, there are various specific types of torts with particular elements in the common law system, aiming to protect particular individual interests from specific invasion.[35] For example, in the English common law system, the tort of misuse of private information (MOPI) was designed with specific elements to protect private information and privacy interests. A comparison of the civil law general clause and a common law specific tort captivates the present author's interests for several reasons. Firstly, it is attractive to explore how different laws perform the same function in different legal systems. Secondly, the present author observes that the different tradition is not a barrier to study the legal ideas or models, but it rather strengthens the value of the comparison by

[33] Section 32 of Thailand's Constitution of 2017 recognises that 'a person shall enjoy the rights to private life'.
[34] Supreme Court Decision 4893/2558 (n 21).
[35] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn, Oxford University Press 1998). 605

allowing a more in-depth evaluation of different laws. As a result, the strengths and weaknesses drawn from this comparison may help identify a better law. Thirdly, the comparison of common law and civil law may generate a better understanding of privacy by bridging distinct privacy concepts and laws from different legal systems. In this regard, the English common law tort was selected to study for the following grounds:

Firstly, the development of the English tort of MOPI is one of the best examples of how common law action has evolved to respond to privacy concerns and guard against media intrusions in the modern age. This cause of action has significantly influenced other common law jurisdictions such as Australia, New Zealand, and Hongkong.[36] Before the tort of MOPI was developed, the English jurisdiction faced similar problems as the Thai jurisdiction since the English laws at that time were inadequate to protect privacy and private information. Therefore, the tort of MOPI has been substantially developed by the English courts to protect private information and privacy rights.[37] In particular, misuse of private information was extended from breach of confidence before being firmly established as the new tort[38] to fulfil the gaps in privacy protection in the English jurisdiction. This development of the tort of misuse of private information will be profoundly studied in Chapter 3. Despite different legal traditions, Thailand may learn from the English experience to enhance privacy protection. Furthermore, there is rich and adequate English literature in this area, which could provide substantial information and a valuable source for privacy study. Consequently, it is beneficial for choosing the English tort as a comparator justification. To be precise, it should be noted that the thesis will mainly focus on the English and Welsh jurisdiction, since privacy law in Scotland is slightly different. There are no torts, rather delicts in the Scottish legal system. Nonetheless, to date, no reported case has explicitly confirmed misuse of private information as a delict and clarified a distinction between breach of confidence and misuse of private information. Although it is

[36] 'Invasion of Privacy' (New South Wales Law Reform Commission 2009) Report 120., 'Serious Invasions of Privacy in the Digital Era (Final Report)' (Australian Law Reform Commission 2014) ALRC Report 123., Yun Ching Jojo Mo and AKC Koo, 'A Bolder Step towards Privacy Protection in Hong Kong: A Statutory Cause of Action' (2014) 9 Asian journal of comparative law 345., Paula Giliker, 'A Common Law Tort of Privacy?' (2015) 27 Singapor Academy of Law Journal 761.
[37] *Campbell v Mirror Group Newspapers Ltd* (n 6).
[38] *Vidal-Hall v Google Inc* [2015] EWCA Civ 311. The claimants commenced proceedings against the defendant, a corporation registered in the US for misuse of private information. The claims were 'made in tort' to serve out the jurisdiction.

argued that the Scottish courts are likely to follow the English courts and that it is simple to affirm the recognition of misuse of private information as a delict,[39] the Scottish law in this area remains indistinct.

Secondly, since the tort of MOPI was purposely developed to safeguard privacy and protect private information from unwanted disclosure of private information and media invasions, it may be more appropriate to protect privacy in the media context than the Thai general tort. Thus, the comparative study between the English and Thai torts may help Thailand develop a better law or alternative solution to resolve privacy problems in the media context. Nonetheless, despite the fact that there is a wealth of English literature on the subject, there is still room to learn about the tort of MOPI in the case study of individual media users. As mentioned, it is well known that the tort of MOPI has been fashioned by mass media, not individual media users.[40] The sharp focus on the mass media raises the question of whether the tort of MOPI is appropriate and adequate in the case of individual media users. Therefore, the thesis could learn not only how the tort of MOPI was developed to protect privacy but also how it could adapt to the new circumstances. The comparison of how the English tort of MOPI and the Thai general tort have dealt with privacy problems in the case study would facilitate researchers to assess and evaluate the strengths and weaknesses of both torts. As a result, the better law may be identified.

Thirdly, due to the long legal history and heritage, the comparative study between English and Thai laws has been favourable in Thailand. Before codification, English laws greatly influenced the initial stage of the modernisation of Thai laws for more than three decades.[41] The English principles of civil wrongs and specific torts also appeared in the first Thai legal textbook, written by Prince Raphi,[42] the key figure in Thai legal modernisation. Some English rules and principles were adopted in numerous ancient court decisions and have become Thai rules even after

[39] Elspeth Reid, The Law of Delict in Scotland (Edinburgh University Press Ltd 2022) 738-739
[40] See for example, the landmark cases of *Douglas v Hello Ltd* (n 6)., *Max Mosley v News Group Newspapers Limited* (n 6)., *Ferdinand v MGN Ltd* (n 6)., *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Murray v Express Newspapers Plc* (n 6).
[41] Munin Pongsapan, *The Civil Law Systems: From the Twelve Tables to the Thai Civil and Commercial Code* (Faculty of Law, Thammasat University 2019). See also Pongsapan, 'The Reception of Foreign Private Law in Thailand in 1925: A Case Study of Specific Performance' (n 14).
[42] Raphi Phatthanasak, *Lecture* (Bunnakarn 1925).

codification.[43] For example, Thailand received the English principle of Volenti non-fit injuria (that to which a man consents cannot be considered an injury) during the King Rama V era (1853-1910). This principle was further developed in accordance with Thai tortious structure without codification.[44] Furthermore, Reekie and Reekie argued that some English laws were incidentally adopted in the CCC because the key draftsmen were mostly educated in England.[45] For example, they contended that employer liability in tort law, which is codified in section 425 of the CCC, was unintentionally adapted from the English principles.[46] In this sense, it can be seen that English laws and principles have long influenced Thai tort laws.

Fourthly, the present author asserts that there has been no barrier to learn from the common law legal system and adopt common law principles in Thailand. On this matter, Ratanakorn, a former President of the Supreme Court of Thailand, argued that the Thai legal system seems to have grown closer to the common law system and have become a mix-legal system.[47] Ratanakorn pointed out that the English laws and principles were transplanted into the Thai legal system, and some of them have continually been applied in Thailand.[48] Moreover, at present, numerous Thai jurists and judges are predominately educated in the UK and US, more than in Germany and France. Accordingly, we now tend to use common laws in the English language as models for legislation than other languages.[49] Hence, despite different legal systems, the present author contends that the English common law tort or its principles could be used as the legal model for legislation or be implemented in Thailand.

For the above reasons, the English tort of MOPI is justifiable to be studied and be compared with the Thai general tort.

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[43] Supatcharin Asvathitanonta, 'Development of the Principle of Volenti Non Fit Injuria: A Study of Its Transplantation in Thailand' (LLM thesis, Chulalongkorn University 2008).
[44] ibid.
[45] Adam Reekie and Surutchada Reekie, 'The Long Reach of English Law: A Case of Incidental Transplantation of the English Law Concept of Vicarious Liability into Thailand's Civil and Commercial Code' (2018) 6 Comparative Legal History 207.
[46] ibid.
[47] Sophon Ratanakorn, 'Thai Legal System: Civil Law or Common Law?' (2015) Dulapaha. 9
[48] ibid. 9
[49] ibid. 11

1.4 The Gaps of the literature, the Scope of the Study, Primary Thesis Objectives and Contributions

In recent years, Thai researchers have become progressively interested in privacy laws. However, the vast majority of the work in this area has mainly focused on data protection law or other specific legislation,[50] since they are new laws or were not enacted in Thailand at that time.[51] Although there are some overlaps between tort and data protection jurisprudence, tort laws are chosen as the area of the study because it functions in shaping individuals' behaviours and the thesis mainly focuses on the liabilities of individuals. Nevertheless, data protection initially intends to control tech companies, not individual activities.[52] Thus, a purely personal or household activity is outside the scope of the data protection regime.[53] Some activities of an individual user may fall outside the scope of data protection law, but the user might be liable for their personal activity according to tort laws. For instance, an individual user uses domestic CCTV systems for video or sound recordings in their property boundary or takes pictures purely for their personal purpose or their own enjoyment.

Moreover, privacy torts have largely dealt with media intrusions and developed in the media context, which will be seen later in the thesis. However, journalistic activity is exempt from the data protection regime.[54] In the UK, since processing for journalistic purposes 'alone' is not required under the current data protection

[50] See, for example, Thongraweewong, 'Legal Measures for Protecting the Right to Privacy: A Study of Invasion of Privacy through the Use of Social Network Websites' (n 7)., Malee Watcharachanchai, 'Legal Measure in Privacy Right Protection Case Study on Disturbance of Privacy Right by Electronic Means' (LLM thesis, Sripathum University 2012)., Thitirat Thipsamritkul, 'The Protection of Personal Information and Privacy in the Digital World' (2017) Dulapaha., Jantajira Iammayura, 'Data Protection in Thailand' (2004) 4 Thammasat Law Journal 627., Kittipong Kamolthamwong, 'The Protection of Personal Information in Thai Legal System: Problem and Solution' (LLM thesis, Thammasat University 2006).

[51] Thailand's Personal Data Protection Act (PDPA) was enacted in 2019, but its enforcement has been postponed several times. The PDPA finally came into force on 1 June 2022.

[52] Recital 6, The EU's General Data Protection Regulation (GDPR) The GDPR has a great influence on the UK and Thai Data Protection Act.

[53] Section 21, The UK Data Protection Act 2018., Section 4(1), Thailand's Personal Data Protection Act 2019 However, in some cases, the activities of the users may fall within the scope of data protection law. For instance, the household exemption might not be applicable when the user shares picture or information about other individuals on their social media, which could be accessed by the public at large.

[54] Schedule 2, Part 5, Paragraph 26, The UK Data Protection Act 2018, Section 4(3), Thailand's Personal Data Protection Act 2019

act (the UK Data Protection Act 2018),[55] non-journalists' activities are more likely to fall within the scope of the exemption, in other words, outside the scope of the data protection act.[56] Nonetheless, the thesis intends to examine the liabilities of individual media users or non-journalists in the media context. In this sense, tort laws seem to be a more appropriate approach. More importantly, data protection law aims at regulating processing, collection, and use of personal data, it does not intend to protect individuals from unwanted privacy intrusion as such. For example, data protection cannot protect individuals against unwanted watching or listening in itself. Hence, while the tort of MOPI could cover damages for mere loss of privacy or loss of control without proof of damages, data protection may need to prove that contravention had led to the concerned damages or distress.[57] Consequently, in some circumstances, the tort of MOPI might be more favourable than data protection.

In Thailand, the above activities are exempt from the data protection act since the legislators believe that those activities could be covered by the existing laws.[58] However, as argued earlier, the existing tort seems unsuccessful in protecting privacy and private information in the digital age. Although some studies evaluated the effectiveness of the torts in protecting privacy and private information and pointed out some limitations of the existing torts, they intended to support and introduce data protection law or specific legislation.[59] Accordingly, those studies have failed to examine whether and how tort laws should be amended. However, to offer the most effective privacy protection, the thesis believes that tort laws could be used alongside data protection law. Therefore, as stated in section 1.1, the thesis proposes to compare the Thai general tort with the English tort of MOPI to see how the different torts have resolved the same

[55] Data processing for solely journalistic purposes was required under the previous data protection regime (The UK Data Protection Act 1998).
[56] Fiona Brimblecombe and Helen Fenwick, 'Protecting Private Information in the Digital Era: Making the Most Effective Use of the Availability of the Actions under the GDPR/DPA and the Tort of Misuse of Private Information' (2022) 73 Northern Ireland legal quarterly 26. 60-61
[57] Lloyd v Google LLC [2021] UKSC 50 The respondent alleged that Google had secretly tracked the users' online activities and sold the collection of information without their consent or knowledge. The respondent issued proceedings on their own behalf and on behalf of others, claiming compensation under section 13 of the UK Data Protection Act 1998.
[58] 'Supporting Document for a Personal Data Protection Act:General Meeting Session' (n 7)
[59] See, for example, Iammayura, 'Laws Related to Personal Data in Thailand' (n 7)., 'Supporting Document for a Personal Data Protection Act:General Meeting Session' (n 7). Thongraweewong, 'Legal Measures for Protecting the Right to Privacy: A Study of Invasion of Privacy through the Use of Social Network Websites' (n 7)

problems in the case study of individual media users in order to develop a better legal model for Thailand.

In the past, a few attempts were made to explore the role of torts in other jurisdictions to improve Thai laws. However, the tort of MOPI has never been profoundly examined. For instance, Thongraweewong investigated the US privacy torts to adjust privacy protection in Thailand, particularly in the case of social media communication.[60] Nonetheless, this research was limited to public disclosure of private facts on social media. Thus, it cannot provide comprehensive privacy protection in the new media context, specifically when individual media users intrude physically or informationally on another's private life without further public disclosure. Likewise, Pindhasiri studied the role of torts in privacy protection by comparing Thai tort law with the German and US tort laws.[61] Nevertheless, Pindhasiri's analysis was based upon the context of privacy invasions from over 35 years ago. Hence, it is debatable whether the general tort is still valid and effective to protect privacy and private information in the digital age. Furthermore, most privacy studies in Thailand have concentrated predominantly on tensions between traditional media and individuals' privacy.[62] There is a surprising lack of research on privacy protection in the case of individual media users. Consequently, the thesis will offer the first profound comparative analysis between the Thai general tort and the English tort of MOPI in the digital age, particularly in the case study of individual media users. This comparison may then provide a fresh insight into privacy protection in this case.

To the best of the present author's knowledge, no research has critically reviewed and compared the Thai general tort with the English tort of MOPI. Even though a

[60] Thongraweewong, 'Privacy Tort in the Case of Disclosure Private Information to the Public and the Adjustment for Privacy Protection in the Case of Disclosure of Private Information on Social Media Website' (n 7).
[61] Chucheep Pindhasiri, 'An Invasion of Privacy Rights' (LLM thesis, Thammasat University 1983).
[62] See, for example, Pubodint Phusuwan, 'The Invasion of Actors and Singers Privacy in Entertainment Newspaper' (Master of Journalism and Mass Communication Thesis, Thammasat University 2005)., Thirawan Klangnarong, 'The Protection of Freedom of Expression of Mass Media and the Protection of the Right of Person' (LLM thesis, Ramkhamhaeng University 2007)., Tipaporn Namatra, 'Right to Privacy: Studied of Public Figure' (LLM thesis, Dhurakij Pundit University 2008)., Nakwanit (n 23)., Bunjapa Norathee, 'Freedom of the Media and an Infringement of Privacy Right Under the Constitution Section 35 Paragraph 2' (LLM in Public law thesis, Thammasat University)., Nitiwat Tantipatsiry, 'Liberty of Mass Media: A Case Study on Actors/Actresses News Presentation' (LLM thesis, Chulalongkorn University 2016).

few researchers studied how English common laws protect confidential and private information, they explored the breach of confidence and other common law actions.[63] However, as explored in the previous section, the tort of MOPI was extended from breach of confidence to fulfill the gaps of privacy protection. In other words, the breach of confidence provides inadequate privacy protection. Nevertheless, a few Thai scholars have known about the incremental development of the tort of MOPI in the past decade. Therefore, the thesis intends to study this development. Since the tort of MOPI is more successful in protecting privacy and private information than the breach of confidence, this comparison has a better chance of identifying a better legal model than the previous comparisons. As a result, it feasibly contributes to the development of a new privacy tort with better elements, or at least offers an alternative solution for resolving privacy problems for Thailand. Furthermore, as the comparative study seeks to evaluate and compare the strengths and weaknesses between the English and Thai torts, it may also help enhance privacy knowledge for England or address the weaknesses of the English tort of MOPI. Another objective of the thesis is to understand the similarities and differences of privacy from Thai and English perspectives. This comparison could bridge distant privacy concepts from different jurisdictions. Hence, the lesson learned from this comparative analysis may then generate a better understanding of privacy in general.

Additionally, as argued, the tort of MOPI has been shaped by traditional media.[64] Notwithstanding the rich literature in the tort of MOPI, few studies[65] have studied how the tort deal with individual speech and its dissemination across the new media. Therefore, even though the assessment of the English tort of MOPI is not new, the thesis offers an in-depth analysis of how the tort of MOPI applies in the

[63] Cheun-arie Maleesriprasert, 'The Protection of Right to Privacy and the Communication of Informations' (LLM thesis, Chulalongkorn University 1998)., Boonyarat Chokebandanchai, 'The Protection and Disclosure of Medical Confidentiality in Court Proceedings in Thailand' (PhD thesis, Durham University 2010)., Boonyarat Chokebandanchai, 'The Protection of Personal Information of England under the Common Law Duty of Confidence' (July-Decemeber 2018) Naresuan University Law Journal.131-148

[64] See for example, the landmark cases of *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Murray v Express Newspapers Plc* (n 6)., *Douglas v Hello Ltd* (n 6)., *Max Mosley v News Group Newspapers Limited* (n 6)., *Ferdinand v MGN Ltd* (n 6).

[65] See, for example, Jacob Rowbottom, 'To Rant, Vent and Converse: Protecing Low Level Digital Speech' (2012) 71 Cambridge law journal 355., Jacob Rowbottom, 'In the Shadow of the Big Media: Freedom of Expression, Participation and the Production of Knowledge Online' (2014) Public Law 491., Jacob Rowbottom, 'A Landmark at a Turning Point: Campbell and the Use of Privacy Law to Constrain Media Power' (2015) 7 Journal of Media Law 170.

case study of individual media users. Moreover, it will consider if the tort of MOPI is sufficiently adaptable to the new media context. By focusing on the case study of individual media users instead of traditional media, the thesis stimulates the debate on the appropriate balancing test[66] between an individual's privacy and freedom of expression. Besides, the study of relationships between privacy and competing rights across the new media and online platforms is useful for the legislators who seek to balance those rights or interests in any jurisdiction.

1.5 The Research Questions, The Hypothesis and Methodology

In order to serve the thesis objectives above, the key research question was set as follows:

Whether the general tort (section 420 of the Thai Civil and Commercial Code) is suitable and sufficient to protect privacy and private information in the digital age, particularly in the case study of individual media users, and if not, should the English tort of MOPI be introduced as the new legal model for Thailand?

Based on the primary study in section 1.3, the hypothesis for the research question is that the Thai general tort is unsuitable and insufficient to protect privacy and private information in the digital age and the case study. However, this primary study is not abundant to support the conclusive recommendation for new legislation. Further study is needed to confirm this hypothesis.

Furthermore, before the key research question can be answered, the tort of MOPI must be proven satisfactory in its country of origin. Therefore, the sub-research question asks:

Is the tort of MOPI suitable and sufficient to protect privacy and private information in the digital age, particularly in the case study of individual media users?

In order to answer the above questions, the thesis will be predominantly conducted by comparative law methodology. The goal of comparative law is to gain an insight into different rules and institutions in different jurisdictions that

[66] The balancing test between privacy and freedom of expression is one of the essential elements of the tort of MOPI.

are compared.[67] Since comparative law involves concurrently studying the law in several legal systems, it can offer rich and various solutions or models for resolving social conflicts rather than devoted to a single legal system.[68] Therefore, the thesis believes that comparative law could provide more opportunities to resolve privacy problems for Thailand than only relying on its local doctrinal analysis. Moreover, by applying comparative law, the strengths and weaknesses drawn from both Thai and English jurisdictions would be evaluated. Thus, it could help identify the limitations of laws in both jurisdictions. In this sense, comparative law would not only contribute to the Thai jurisdiction but also enhance knowledge of privacy and sharpen analysis of the English tort of MOPI. Consequently, comparative law was selected as the methodology of the thesis. In particular, the thesis will primarily focus on micro-comparison, comparing certain rules, legal problems and specific conflicts of interests.[69]

In this regard, the thesis will employ the functional equivalence method[70] to compare different rules that perform an equivalent function in Thailand and England. More particularly, it will compare the tort of misuse of private information with the Thai general tort as they perform the same function. At the micro-comparison, the true spirit of the functional equivalence method is to compare the rules created to solve human problems.[71] Hence, this method focuses not only on rules, but also on their results or judicial decisions in response to the real problems.[72] Thus, at the end of comparative study, the evaluation of the effects of the different torts could be given.[73] As a result, the functional method could help determine which law could fulfill its function better than another. Therefore, this method can serve the evaluation purpose and help identify the better law,[74] which are the primary objectives of the thesis. Furthermore, the functional method is suitable for this thesis since it pays attention to a specific

[67] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39 The American Journal of Comparative Law 1. 6
[68] Zweigert and Kötz (n 35). 15
[69] ibid. 5
[70] ibid. 34
[71] Esin Orucu, 'Developing Comparative Law'' in Esin Orucu and David Nelken (eds), *Comparative Law'* (Hart Publishing 2007). 50-51
[72] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019).
[73] Uwe Kischel, *Comparative Law* (1st edn, Oxford University Press 2019). 89
[74] Michaels (n 72). 4

factual problem and solutions without referring to a different doctrine system.[75] Accordingly, it allows the researcher to compare different rules or institutions that belong to different legal systems and distant traditions. On this basis, Michaels argued that the functional method makes a comparison of common law and civil law systems promising for two reasons. Firstly, it looks beyond the epistemic or doctrinal difference between common law and civil law systems. Secondly, the organic development of common law is appropriate for functional understanding.[76] Consequently, the functional method was selected to conduct the thesis.

In order to facilitate the comparison of the effects of the Thai and English torts, the case study of individual media users was constructed. The multi-case study was gathered from real events in both jurisdictions and categorised by a typology approach.[77] Each category focuses on different privacy problems and concerns. The typology approach will be explained in detail in the subsequent paragraph. In each category, questions will be formulated from the real problems to investigate how the English and Thai torts function in protecting privacy interests or responding to those problems. To answer the formulated questions, the thesis will critically analyse, examine and interpret the laws, legal texts, scholar opinions, and previous judicial decisions in each legal system. In other words, the doctrinal analysis[78] will be applied for analysing how the rules could apply in specific situations in the case study or predicting how the courts would decide in those situations. Thus, it could be said that the comparison in this thesis is not purely posed in functional terms, but the doctrinal analysis will be used alongside. After that, the results of the torts, or how well the torts function in the case study will be evaluated. The key strengths and weaknesses of both torts drawing from the case study will then be assessed and compared. The rules and other reasons for different results will be analysed. Consequently, the better rule will be identified. Next, when evaluating the suitability of adopting the English rules in Thailand, the historical, cultural, and social context differences will also be considered.

[75] Kischel (n 73). 88-89
[76] Michaels (n 72). 356-358
[77] Gary Thomas, 'A Typology for the Case Study in Social Science Following a Review of Definition, Discourse, and Structure' (2011) 17 Qualitative Inquiry 511.
[78] Mark van Hoecke a, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?*, vol 9 (Hart Piblishing 2011). 4-11

The typology approach[79] has been often conducted in the social sciences to frame a structure and typology for the case study. It organises and intertwines threads and layers of classificatory principles in the case study. Thus, it could help the thesis categorise multiple case study systematically. The layers incorporated in the typology approach include subject and object, purpose, approach or methods, and process[80] as illustrated in Figure 1 below.

Figure 1. A Typology of Case Study

a) Subject and Object of the Study

By using the typology approach, first, the subject and object of the study must be decided. The subject of the study is an example of the phenomenon or the case itself.[81] The case may be selected by a local knowledge, outlier case or representative or typical case.[82] In this regard, there are two groups of subjects of the study in this thesis. The first group (Chapter 5) was chosen from real scenarios that have typically occurred in the context of mass media and are concurrently happening in the case of individual media users. The second group (Chapter 6) was selected from the typical phenomena found particularly in the individual media users' cases.

The object of the study in social sciences is the analytical frame that the case explains.[83] However, the object of this study does not wish to explicate or understand the phenomenon, but rather to illustrate how the torts function in that phenomenon.

[79] Thomas (n 77).
[80] ibid.
[81] ibid. 513
[82] ibid. 514
[83] ibid.

b) Purpose

The second layer, which is connected with the object, is the purpose of the study. There are various purposes such as intrinsic, instrumental and evaluative purposes.[84] As stated, the purpose of this case study is the evaluation of laws. This purpose then shaped the methods and process of the study.

c) Approach and Methods

In the next step, the approach and methods must be defined. This layer depends on the kind of case study, reflecting the object and purpose of the case.[85] The thesis is based on desk-based analysis. Thus, document review was employed as the method for data collection. The secondary documents were reviewed and collected from news, reports, research and lawsuits in England and Thailand. Then, thematic analysis[86] was constructed for data analysis. After the themes are set, comparative laws, functional methods, and doctrinal analysis will be conducted for legal analysis. These methods led to the process of the case study, as explained below.

d) Process

The last layer concerns the operational process of the study. The first consideration is whether there is a comparative element and if it should be a signal or multiple case study.[87] Since the thesis is a comparative study, multiple case study was selected. For multiple case selection, the additional feature of the case was suggested to be used for comparison.[88] Thus, in the processes of data collection and data analysis, the thesis looked for factors of the case that might be relevant in one legal system but irrelevant in another. During the process, it emerged that some factors in the landmark English cases seem irrelevant to the application of the Thai general tort. Subsequently, three factors were chosen to

[84] ibid. 515
[85] ibid. 516
[86] Jane Ritchie, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (2nd edn, SAGE Publications 2013). 282
[87] Thomas (n 77). 516-517
[88] ibid.

generate the core themes of the study: firstly 'the place at which it (intrusion) was happening',[89] secondly, the nature of the activity or the information,[90] and thirdly, the attributes of the claimant who claims damages for privacy invasions.[91] By integrating all the layers, three categories or themes of the study of the first group were created: firstly, privacy in a public place; secondly, the protection of private information and the nature of information and thirdly, privacy and a public figure, as presented in the table below.

Furthermore, to gain insight into the individual media user cases, another group of categories or themes of the study was created. During the document review process, the thesis sought for the typical experiences from the individual media user cases. It appears that in the new media context, individuals have used modern technologies, such as smartphones, thermal sensing, and drones, to acquire private information, while the Internet and social media has facilitated the dissemination of that acquired information.[92] The cycle of information in this regard is like those of mass media, which can be separated into two main stages, newsgathering or collecting information and publication or dissemination of information. However, the medium of dissemination of information in the case of individual media users has been changed from traditional media to social media.[93] By applying the thematic analysis and combining all the layers, three key themes of the second group were set: firstly, the effects of social media as a medium of dissemination of information, secondly, privacy on social media, thirdly, modern newsgathering and intrusions as seen in the table below. The situations in each category or theme will be explained in detail in Chapters 5 and 6.

[89] *Murray v Express Newspapers Plc* (n 6). At [36]
[90] ibid. At [36]
[91] ibid. At [36]
[92] See, for example, Juntrong and Satararuji (n 1), Vis (n 1)., Borges-Rey (n 1)., Goode (n 1)., McIntyre (n 1)., Gutterman and Rulffes (n 1).
[93] Juntrong and Satararuji (n 1).

Table 1. The Categories of Cases

The First Group (The cases that happen in both traditional media and individual media users' cases)		The Second Group (The cases that particularly happen in the case of individual media users.)	
Category 1	privacy in a public place	**Category 4**	social media as a medium of dissemination
Category 2	the protection of private information and the nature of information	**Category 5**	privacy on social media
Category 3	privacy and a public figure	**Category 6**	modern newsgathering and intrusions

1.6 the Structure of the Thesis

In order to address the key research question, first, it is crucial to understand *what privacy is and why it needs to be protected*. Thus, Chapter 2 will study the core conceptions of privacy and privacy values to emphasise why privacy is essential and why it should be protected. Understanding privacy concepts and values are significant for the further analysing of privacy torts and identifying a better legal model. In this chapter, differences and similarities in perceptions of privacy between England and Thailand will also be compared and bridged.

Next, when comparing foreign laws with domestic laws, it is essential to study how certain laws are established and developed to resolve specific problems. Moreover, the objective of the thesis is to study how the English common law has evolved. The English experience in this regard may be helpful for developing better rules for Thailand. Therefore, Chapter 3 will explore *how the English tort of MOPI was developed*. This chapter will also examine and compare *how the Thai general tort has been interpreted and applied to protect privacy rights*. Furthermore, it will review essential elements of the English and Thai torts to understand how it functions in protecting privacy rights and interests. The overview of doctrines and legal developments is fundamental and necessary for further evaluation and comparative analysis of those torts.

Then, Chapter 4 will analyse the balancing test between privacy and freedom of expression, which is part of the tort of MOPI. As mentioned, the tort of MOPI has been shaped by mass media. Hence, the balancing test in the landmark cases has been mostly involved with privacy and media freedom, not freedom of expression. Therefore, this chapter wishes to find the differences and relationships between media freedom and freedom of expression. More importantly, it will decide whether and how the balancing test between privacy and freedom of expression in the cases of individual media users differs from those of mass media. Consequently, this chapter would help assess the suitability of the tort of MOPI in the case study of individual media users.

After that, to confirm the hypothesis and answer the research questions, six categories of cases will be explored in Chapters 5 and 6. In other words, Chapters 5 and 6 will examine how satisfactory the English and Thai torts respond to real case scenarios. In these chapters, the applications and effects of those torts in the case study of individual media users will be analysed and compared. In Chapter 5, although the case study could be seen in the case of traditional media, the application of both torts will be observed through the eyes of individual media users. Moreover, the factors that have been overlooked in the Thai legal system will be scrutinised. In Chapter 6, the flexibility or adaptability of both torts to the new environment will be illustrated. The accounts and findings from these chapters are helpful for further evaluating how satisfactory the English and Thai torts function in protecting privacy and private information. Hence, these chapters will lead to the answer to the key research question in the next chapter.

Finally, Chapter 7 will conclude the accounts and findings from previous chapters. More importantly, the strengths and weaknesses of both torts drawing from the multiple case study will be evaluated and compared. The suitability and sufficiency of both torts in protecting privacy and private information will be assessed. Furthermore, this chapter will critically analyse the strengths and weaknesses of the key elements of the English tort of MOPI and the Thai general tort in a broader term. The ability of the English tort of MOPI to address the concerned problems and limitations of the general tort will also be discussed. Consequently, the advantages and disadvantages of developing the tort of MOPI in the Thai legal system will be weighed up. As a result, this chapter will be able

to identify better laws and determine if the tort of MOPI should be introduced as the new legal model for Thailand. Hence, by the end of this chapter, the hypothesis will be confirmed. The sub-research question and the key research question will be answered. Subsequently, recommendations for legislators or lawmakers will be given. Additionally, this chapter will reflect on the thesis, state its contributions and limitations, and discuss the potential for further research.

Chapter 2: The Reasons for Privacy Protection and Privacy from the English and Thai Legal Perspectives

2.1 Introduction

Although privacy is recognised as a universal valued condition, there is no consensus on its definition.[94] The difficulty in reaching a consensus on the definition of privacy may result from the inherent flexibility of privacy concepts and diverse views among legal scholars.[95] Moreover, it is argued that the expectation of privacy could be changed between cultures and times.[96] Hence, this chapter does not intend to define or redefine an accurate definition of privacy, but aims to conceive a core conception of privacy from an English legal perspective and examine the Thai perception of privacy. However, while the conceptions of privacy are elusive and controversial, there is more consensus on why privacy is important.[97] An understanding of privacy and its values is essential for further discussions and evaluation of privacy torts in the following chapters. It is impossible to assess how well the torts function in protecting privacy if we do not understand *what privacy is* and *why it needs to be protected*. As stated in Chapter 1, to address the key research question, these questions must be replied to first.

Accordingly, the first part of this chapter will study the reasons for privacy protection and locate the values underpinning privacy to comprehend why privacy is necessary for individuals and society. Then, the second part will explore and compare the concepts of privacy from the English and Thai perspectives. As mentioned in Chapter 1, although the thesis mainly applies the functional equivalence method to compare rules and their effects in different legal systems, cultural and social differences should not be disregarded. This chapter will argue

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[94] NA Moreham, 'The Nature of the Privacy Interest' in NA Moreham and Mark Warby (eds), *The Law of Privacy and the Media* (3rd edn, Oxford University Press 2016). 42, Ian J Lloyd, *Legal Aspects of the Information Society* (Butterworths 2000). 41, Daniel J Solove, *Understanding Privacy* (First paperback, Harvard University Press 2009) 1, Patrick O'Callaghan, 'Refining Privacy in Tort Law' (Springer 2013)

[95] Demetrius Klitou, *Privacy-Invading Technologies and Privacy by Design: Safeguarding Privacy, Liberty and Security in the 21st Century* (Asser Press [u.a] 2014). 14, See also David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, Oxford University Press 2002).

[96] 'Serious Invasions of Privacy in the Digital Era (Final Report)' (n 36). 93

[97] Lloyd (n 94)., Moreham, 'The Nature of the Privacy Interest' (n 95).

that some of the privacy concepts from the English legal perspective could be found in traditional Thai and Buddhist society. Also, it will contend that privacy values are rooted in Thai traditional privacy. Moreover, Thai people's perception of privacy and legal perspective has changed and become more similar to the English concepts in the modern age. Therefore, by the end of this chapter, an understanding of privacy from two different legal systems could be bridged.

2.2 The Reasons for Privacy Protection

Before examining privacy concepts from the English and Thai legal perspectives, it is crucial to first comprehend why privacy is necessary and why laws must protect it. Moreover, recognising privacy values and related interests is substantial for further assessing whether the torts are sufficient to protect privacy interests and for exercising the balance test between privacy and competing rights or interests. Thus, this section will explore the reasons for privacy protection and the values underpinning privacy.

After World War II, the establishment of the United Nation paved the way for subsequent recognition of human rights, including privacy rights or the right to privacy. In 1948, the Universal Declaration of Human Rights (UDHR) proclaimed the right to the protection of privacy against interference in Article 12.[98] Before that, privacy rights were not recognised or acknowledged by any state constitution or domestic laws.[99] Following the UDHR, the International Convention on Civil and Political Rights (ICCPR) was promulgated. Several states who agreed to follow the ICCPR have treaty obligations to secure and protect privacy rights in their states, including England and Thailand. The European Convention of Human Rights (ECHR) was also influenced by the UDHR. In this sense, it could be argued that the treaty obligations are one of the main reasons why privacy needs to be protected by domestic laws. International law has then influenced on the development of domestic laws, such as the Thai constitution and the English domestic tort of misuse of private information, which will be further examined in Chapter 3.

[98] Universial Declaration of Human Rights, Article 12
[99] Oliver Diggelmann and Maria Nicole Cleis, 'How the Right to Privacy Became a Human Right' (2014) 14 Human rights law review 441.

Although it is internationally accepted that privacy is essential and worthy of being protected, in theory, it is debatable whether privacy is important as a fundamental right or an instrumental right.[100] On the one hand, privacy is viewed as a fundamental right, recognised by international human rights treaties and state laws, such as the Human Right Act 1998 (HRA)[101] and the Constitution of Thailand.[102] In this respect, privacy is worth protecting itself, for example, as an aspect of human dignity or human autonomy.[103] On the other hand, privacy is perceived as an instrumental right to protect or promote other fundamental rights or freedom.[104] Nonetheless, the question of whether privacy is a fundamental or instrumental right will not be discussed in this section. By accepting the idea that privacy could be both fundamental and instrumental rights and reviewing literature in various dimensions, the thesis categorised the values of privacy or the reasons why privacy needs to be protected into two main categories: first, the values of privacy to individuals and second, the values of privacy to society.

2.2.1 The Values of Privacy to Individuals

The first category of privacy values is based on individual values or interests of individuals. It is argued that privacy protects the inherent values of all human beings, such as human dignity, personality and human autonomy. Moreover, privacy can protect or promote other fundamental rights and freedoms, such as self-development, autonomy, liberty and freedom. Furthermore, it is asserted that privacy assists in maintaining human relations and could protect other related interests.

A. Human Dignity and Personality

The protection of human dignity and personality has broadly been acknowledged as a primary value underpinning privacy. For example, Emerson argued that privacy is grounded on the dignity of an individual. In Emerson's view, to protect

[100] Paul Bernal, *Internet Privacy Rights: Rights to Protect Autonomy*, vol 24. (Cambridge University Press 2014) 33
[101] The Human Rights Act 1998 incorporates key provisions of the European Convention on Human Rights (ECHR), including Article 8 'the right to private life'.
[102] Thailand's Constitution of 2017., section 32
[103] Bernal (n 100) 33
[104] ibid.

the worth and dignity of an individual, it is essential to shout out to the community or not participate in collective life.[105] Likewise, Bloustein emphasised that privacy protects human dignity, personality and individuality.[106] Accordingly, an intrusion or invasion of privacy is a demean to individuality, an affront to human dignity or an assault on human personality. Reiman also contended that an individual is the owner of themself, their body, and their thoughts. Hence, invasion of privacy would insult them by rejecting thier 'special dignity'.[107] In the *Campbell* case, Lord Hoffman identified that private information is worth protecting as an aspect of human dignity.[108] Moreham also observed that all privacy intrusions involve dignity. Furthermore, Moreham argued that the dignity claims would be stronger in a case where the defendant intrudes upon 'a particularly intimate aspect of private life', such as sexual activity, exercising bodily functions, or suffering severe grief or trauma.[109]

B. Autonomy

Autonomy is another value of privacy. The notion of privacy in terms of control is closely connected with autonomy, given that an individual is governed by their own. In England, protecting autonomy has been repeatedly declared as an objective of privacy law.[110] In other words, privacy law has been developed to protect human autonomy. For example, in the *Mosley* case, Eady J stated that the privacy law is concerned to 'prevent the violation of a citizen's autonomy, dignity and self-esteem.'[111]

On the one hand, it is observed that privacy is worthy of being protected as it supports autonomy. For instance, Gavison claimed that autonomy is one of the individual goals contributed by privacy. In Gavison's view, privacy protection fosters autonomy as it enables individuals to deliberate their decisions free from

[105] Thomas Emerson, *The System of Freedom of Expressions* (Random House 1970). 545-549
[106] 'Edward J. Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 NYU L. Rev. 962 (1964)' (2000) 75 New York University Law Review 1535. 962
[107] Jeffrey H Reiman, 'Privacy, Intimacy, and Personhood' (1976) 6 Philosophy & Public Affairs 26. 38-39
[108] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [12]
[109] Moreham, 'The Nature of the Privacy Interest' (n 95). 68
[110] Katja S Ziegler, *Human Rights and Private Law: Privacy as Autonomy* (Hart Pub 2007) 17
[111] *Max Mosley v News Group Newspapers Limited* (n 6). At [7]

external influences or social control.[112] In other words, privacy supports autonomy because it allows autonomous choice. Besides, Baker explained that measures to shield informational privacy by protecting the private sphere and guarding against disclosure of information could contribute to autonomy.[113] In this sense, privacy protection is viewed as instrumental support of autonomy. On the other hand, it is argued that privacy is worth protecting itself as an aspect of autonomy. For example, Benn argued that allowing a person privacy would not give them a better chance to be autonomous. It is rather that a person, anyone potentially autonomous, is worthy of respect on that account.[114] In the *Campbell* case, Lord Hoffman stated that 'what human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy... the new approach ... focuses upon the right to control the dissemination of information about one's private life.'[115] Moreover, in the same case, Baroness Hale referred to privacy as 'the protection of the individual's informational autonomy.'[116] In the *Douglas* case, Sedley LJ recognised privacy as 'a legal principle drawn from the fundamental value of personal autonomy'.[117]

C. Promoting Self-development

Apart from protecting human dignity and human autonomy, it is asserted that privacy promotes or protects self-development.

For example, Reiman argued that privacy enables individuals' developments by allowing them to create themselves.[118] Put differently, 'privacy is a condition of the original and continuing creation of "selves" or "persons."'[119] Reiman then highlighted that the right to privacy protects 'the individual's interest in becoming, being, and remaining a person.'[120] Gavinson also suggested that freedom from

[112] Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89 The Yale Law Journal 421.
[113] C Edwin Baker, 'Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment' (2004) 21 Social philosophy & policy 215. 243
[114] Stanley Benn, 'Privacy, Freedom, and Respect for Persons' in Ferdinand David Schoeman (ed), *Philosophical dimensions of privacy: an anthology* (Cambridge University Press 1984).
[115] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [12]
[116] ibid. At [134]
[117] *Douglas v Hello! Ltd* [2000] EWCA Civ 353. At [126]
[118] Reiman (n 107). 39
[119] ibid. 40
[120] ibid. 37, 44

distraction is significant for 'all human activities that require concentration, such as learning, writing and all forms of creativity.[121] From this perspective, it could be perceived that privacy as freedom from unwanted access is essential for artistic and intellectual development. Nissenbaum echoed Gavinson's view and speculated that people need freedom to experiment without interference and social pressure, or convention standards, to develop themselves.[122] Likewise, Cohen stated that 'privacy is shorthand for breathing room to engage in the processes of boundary management that enable and constitute self-development.'[123] Cohen further emphasised that privacy is necessary for the development of critical subjectivity. Similarly, in the *Campbell* case, Lord Nicholls explored that 'a proper degree of privacy is essential for … development of an individual.'[124]

D. Liberty or Freedom

Furthermore, privacy has a meaningful function in promoting liberty or freedom. Gavison contended that privacy prevents interference and promotes liberty of action by detaching the unpleasant reaction of unfavourable actions and then raising the liberty to perform them.[125]

According to Berlin, there are two concepts of liberty; negative and positive liberty.[126] First, negative liberty is the concept where an individual can act without interference from others. In other words, it is 'freedom *from*'. Secondly, positive liberty is the concept where the individual wishes to be conscious of themself or determine for themself. Put differently, positive liberty is perceived as 'freedom *to*.' Fried claimed that privacy in terms of control over information is a facet of 'personal liberty'. Thus, if a man could be observed by others, 'he is denied the freedom to do what he regards as an act of kindness.'[127] The thesis also

[121] Gavison (n 112). 447
[122] Helen Fay Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford Law Books 2010) 75
[123] Julie E Cohen, 'What Privacy is for' (2013) 126 Harvard Law Review 1904. 447
[124] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [12]
[125] Gavison (n 112). 448
[126] Isaiah Berlin Sir, *Two Concepts of Liberty* (Clarendon Press 1958)
[127] Charles Fried, 'Privacy [A Moral Analysis]' in Ferdinand David Schoeman (ed), *Philosophical dimensions of privacy: and anthology* (Cambridge University Press 1984). 210

considers that privacy as freedom from unwanted access fosters negative liberty. At the same time, privacy in terms of control promotes positive liberty or 'freedom *to*' control over the information. To conclude, privacy functions in promoting both negative and positive liberty.

E. Maintaining Human Relations

Whilst the above privacy values are related to the inner kernel of human beings, the value in this section rather concentrates on maintaining human relations.

For example, Rachels underlined that one of the essential values of privacy is that it 'allows us to maintain the variety of relationships with other people that we want to have' by enabling us to control the information.[128] In this view, there are different patterns of behaviour in different social relationships, for example, businessman to an employee, minister to the congregant, and husband to wife. Privacy is necessary for maintaining those social relationships by sharing or concealing private information in different degrees to different social relationships. Likewise, Gavinson argued that privacy could 'enhance the capacity of individuals to create and maintain human relations of different intensities' since privacy allows individuals to create 'a plurality of roles and presentations.'[129] Furthermore, Fried observed that privacy is required for 'the most fundamental sort: respect, love, friendship and trust', which is 'at the heart of the notion of ourselves as persons among persons.'[130]

F. Other Related Interests

On top of the privacy values above, privacy protection has other related individual interests such as protecting mental health or well-being and preventing financial loss. For instance, Gavison argued that to maintain people's mental health, they seem to need prospects to relax, linking to privacy.[131] In the *Campbell* case, Lord Nicholls also said that privacy is essential for the well-being of an individual.[132]

[128] James Rachels, 'Why Privacy Is Important' (1975) 4 Philosophy & Public Affairs 323. 329
[129] Gavison (n 112). 450
[130] Fried (n 127). 205
[131] Gavison (n 112). 447
[132] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [12]

Furthermore, it is widely asserted that the growing invasion of privacy may cause the infliction of mental distress to individuals.[133] Thus, privacy protection will protect against mental harms arising from that invasion. Additionally, preventing access to private information or controlling the accessibility of that information could prevent financial loss.

2.2.2 The Values of Privacy to Society

Moreover, some theories argue that protecting privacy not only brings benefits to individuals but also conveys to society as a whole. The values of privacy in the second category are related to society.

For example, Dorothy Lee argued that self-dependent values do not separate oneself from society but rather prepare one to be continuous with society.[134] Roessler and Mokrosinska also asserted that protecting individual privacy is not only protecting individuals' rights, but different forms of social interaction are also protected. Privacy, therefore, has an irreducibly social value.[135] In this sense, the value of privacy in promoting human relationships is no longer about individual interests but rather about the interests of society.[136] Moreover, Regan contended that there are three types of privacy values beyond the individual interests; a common value, a public value, and a collective value.[137]

More importantly, it has been argued that privacy is necessary for democratic societies. According to Westin, privacy is a functional necessity of democratic states since it limits surveillance from the public and ensures free societies.[138] With this regard, Nagel contended that privacy norms help secure that the political decision is processed peacefully.[139] Likewise, Gavison justified that

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[133] Megan Richardson, Marcia Neave and Rivette Michael, 'Invasion of Privacy and Recovery for Distress' in Jason Ed., Varuhas N E and Moreham N A (eds), *Remedies for Breach of Privacy* (Hart Publishing 2018).
[134] Dorothy Lee, *Freedom and Culture* (Englewood Cliffs 1959). 74-75
[135] B Roessler and D Mokrosinska, 'Privacy and Social Interaction' (2013) 39 Philosophy and Social Criticism 771.
[136] ibid.
[137] Priscilla Regan, *Legislating Privacy: Technology, Social Values and Public Policy* (University of North Carolina Press 1995). 211
[138] Alan Westin, *Privacy and Freedom* (Atheneum 1970). 67
[139] Thomas Nagel, 'Concealment and Exposure' (1998) 27 Philosophy & Public Affairs 3.

privacy is essential to democratic government. To an extent, some liberty must be allowed in democratic societies, and to exercise liberty to the fullest extent, liberty requires privacy for keeping privacy of individual's votes, of their political discussions, and their associations.[140] In the *Campbell* case, Lord Nicholls also observed that privacy 'lies at heart of liberty in a modern state'.[141] All in all, privacy is fundamental to society.

In conclusion, privacy is worth protecting because of its values to both individuals and society. First, privacy protects and promotes an individual's dignity or personality, self-development, autonomy, and liberty or freedom. It also has benefits in terms of maintaining human relations and protecting other related interests. Secondly, privacy contributes interests to society and is necessary for a democratic society.

2.3 The Core Conceptions of Privacy from the English Legal Perspective

In England, the courts have continually rejected establishing a general tort of privacy, given that the concept is too general and the definition of privacy is uncertain.[142] For example, in *Wainwright v Home Office*, Lord Hoffman expressed their doubt in the amenability of the useful legal definition of privacy, stating that

> '[t]he need in the United States to break down the concept of 'invasion of privacy' into a number of loosely-linked torts must cast doubt upon the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case.'[143]

Despite the lack of a unified definition of privacy, the right to privacy is recognised as a fundamental right in the English Human Right Act (HRA)[144] as a result of the European Convention on Human Rights (ECHR).[145] The impact of HRA on the

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[140] Gavison (n 112). 455-456
[141] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [12]
[142] Paula Giliker, *Europeanisation of English Tort Law*, vol 11. (Hart Publishing 2014)., Nicole Moreham and others, *The Law of Privacy and the Media* (3rd edn, Oxford University Press 2016) , Kirsty Horsey and Erika Rackley, 'Invasion of Privacy', *Tort Law* (6th edn, Oxford University Press 2019).
[143] *Wainwright v Home Office* [2003] UKHL 53, [2204] 2 AC 406. At [18] On a visit to a prison, the claimants were strip-searched for drugs. They sought damages for trespass and battery. In this case, the court found that 'there was no common law tort of invasion of privacy'.
[144] The Human Rights Act 1998.
[145] The European Convention on Human Rights (ECHR).

development of the English privacy laws will be later investigated in detail in the next chapter. Without a general tort of privacy, privacy has been mainly protected by breach of confidence and the specific tort of MOPI. The English privacy cases have evolved around media intrusions and publications. Therefore, the archetypal privacy claims are mostly related to unwanted disclosure of private facts and intrusion into the physical self or private space.[146] Moreover, the collection and use of personal data have become a focal point in contemporary privacy discussions.[147] Drawing on those privacy cases and scholars' views below, the core concept of privacy from the English legal perspective can be explained as 'freedom from unwanted access to oneself or information about the self'[148] and 'the right to control over'.[149]

2.3.1 The Freedom from Unwanted Access

First, privacy is viewed as freedom from unwanted access to oneself or information about the self. For example, Winfield, a professor of English law, observed privacy as freedom from an 'unwanted gaze' or 'unauthorised interference with a person's seclusion of themself.'[150] Similarly, Moreham, a leading privacy scholar, argued that privacy is 'freedom from unwanted access' or 'the state of desire in access', emphasised the desire of the individual.[151] Likewise, Wacks defined privacy as freedom from 'unwanted gape'[152] or 'unwanted

[146] See, for example, *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Douglas v Hello! Ltd* [2005] EWCA Civ 595., *McKennitt v Ash* [2006] EWCA Civ 1714. The claimant seeks for preventing further publication., *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Court of Appeal (Civil Division) 57. The claimant commenced proceedings against the defendant for breach of confidence. The defendant published information from the claimant's private journals., *Murray v Express Newspapers Plc* (n 6)., *Goodwin v News Group Newspapers Ltd* [2011] EWHC 1437 (QB)., *CTB v News Group Newspapers Limited* [2011] EWHC 1326 (QB). In this case, the court recognised that the law of privacy concerns information and intrusion., *Gulati v MGN* [2015] EWHC 1482 (Ch). This case was claimed based on infringements of privacy rights by phone hacking., *PJS v News Group papers* [2016] UKSC 26. In this case, the claimant seeks for an interim injunction to restrain the proposed publication. The court considered that the publication is likely to involve further intrusions. Hence, the court upheld an injunction although the information about the claimant had been widely published.

[147] Raymond Wacks, *Privacy and Media Freedom* (Oxford University Press 2013) 12

[148] NA Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 Law Quarterly Review 628.

[149] See, for example, *Campbell v Mirror Group Newspapers Ltd* (n 6)., *HRH Prince of Wales v Associated Newspapers Ltd* (n 146)., *Vidal-Hall v Google Inc* (n 38)., *Gulati v MGN* (n 146).

[150] Percy Henry Winfield, 'Privacy' (1931) 47 LQR 23.

[151] Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (n 148). 636

[152] Wacks (n 147). 21

oversight'.[153] Various English cases also suggest that the objectives of the tort of MOPI are to prevent unwanted disclosure of private information and evade unwanted attention[154], such as the *Murray*[155], *Mills*[156], *Weller*[157]cases. In those cases, unwanted access to private information, or unwanted disclosure of private information, is considered a breach of privacy. On this basis, the English perception of privacy is closely related to the famous and highly influential work by the American scholars, Warren and Brandeis, published in 1890. In Warren and Brandies' views, the right to privacy is 'the right to be let alone', stressing the need of individuals to exclude themselves or their private information from another.[158]

According to Moreham, 'unwanted access' can be divided into two groups: first, unwanted access to the physical self and, secondly, unwanted access to private information. Those concepts are called 'physical privacy' and 'informational privacy'. Physical privacy is an interference with the physical self. This type of privacy is principally about 'perceiving a person with one's sense' or 'sensory access'.[159] For example, an intruder interferes with physical privacy by watching, listening, or observing against one's wishes. Informational privacy is about discovering, retaining and disclosing private information against one's wishes.[160] Moreham's concepts of privacy as unwanted access to physical self or intrusion and information about the self were later approved by the English courts. For instance, in the *Goodwin* case, the court stated that 'the right to respect for private life embraces more than one concept. Moreham summarises what she calls the two core components of the rights to privacy: "unwanted access to private information and unwanted access to [or intrusion into] one's ... personal space."' [161] Subsequently, in *PJS* case, the court also cited the approval passage of Moreham written in the *Goodwin* case.[162] Accordingly, it can be seen that privacy as

[153] Witting and Street (n 4). 559
[154] David Mead, 'A Socialised Conceptualisation of Individual Privacy: A Theoretical and Empirical Study of the Notion of the "public" in UK MOPI Cases' (2017) 9 The journal of media law 100.
[155] *Murray v Express Newspapers Plc* (n 6).
[156] *Mills v News Group Newspapers Ltd* [2001] EMLR 41.
[157] *Weller and Ors v Associated Newspapers Limited* [2014] EWHC 1163 (QB). The defendant published an article showing the faces of the claimants (children of a famous musician). The claimants brought an action for damages for misuse of private information.
[158] Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 Harvard Law Review 193.
[159] Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (n 148). 640
[160] ibid., NA Moreham, 'Beyond Information: Physical Privacy in English Law' (2014) 73 Cambridge Law Journal 350., NA Moreham, 'Liability for Listening: Why Phone Hacking Is an Actionable Breach of Privacy' (2015) 7 Journal of Media Law 155.
[161] *Goodwin v News Group Newspapers Ltd* (n 146). At [85]
[162] *PJS v News Group papers* (n 146). At [58]

freedom from unwanted access, both informational privacy and physical privacy, is now well established and accepted by the English courts. Hence, the analysis in this thesis will be mainly based on these concepts.

Nonetheless, it is debatable if the English tort of MOPI could protect pure intrusion or physical privacy in itself, regardless of information.[163] This issue will be deeply analysed later in Chapters 6 and 7. Moreover, Wacks observed that two concerns occur when locating privacy at the level of personal (private) information. 'First, what is to be understood by 'personal' and, secondly, under what circumstances is a matter to be regarded as 'personal'?'[164] Could personal information be claimed by an individual or 'are certain matters intrinsically personal?'[165] Wacks further discussed that what is personal may be 'norm-dependent', which is culture-relative and dynamic. Thus, the 'conceptions of what is private will differ and change.'[166] In this sense, it is questionable whether private information is objective or subjective.

With this in mind, Moreham explored that 'conceptions of what is private differ from one individual to another.'[167] Accordingly, in Moreham's view, the question of what information is private is subjective. For instance, one individual might willingly share certain information with the world at large, while another might not. If the individual willingly discloses their information to another, that information might not be considered private.[168] Therefore, Moreham argued that desire as an element of privacy identifies that self-disclosure could only be a breach of privacy in a case where the person concerned does not desire this to happen.[169] The state of desire in this sense can be seen in several statements of the courts. For example, in the *Douglas* case, Lord Phillips stated that 'information will be confidential [private] if it is available to one person (or a group of people)

[163] See, for example, Moreham, 'Liability for Listening: Why Phone Hacking Is an Actionable Breach of Privacy' (n 160).Moreham, 'Beyond Information: Physical Privacy in English Law' (n 160)., NA Moreham, 'Intrusion into Physical Privacy' in NA Moreham and Mark Warby (eds), *The Law of Privacy and the Media* (3rd edn, Oxford University Press 2016)., Paul Wragg, 'Recognising a Privacy-Invasion Tort: The Conceptual Unity of Informational and Intrusion Claims' (2019) 78 The Cambridge Law Journal 409., Thomas DC Bennett, 'Triangulating Intrusion in Privacy Law' [2019] Oxford Journal of Legal Studies 1-28
[164] Wacks (n 147). 12
[165] ibid.
[166] ibid.
[167] Moreham, 'The Nature of the Privacy Interest' (n 95). 42
[168] Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (n 148).
[169] ibid. 636

and not generally available to others, provided that the person (or group) who possesses the information does not intend that it should become available to others.'[170] Likewise, in *A v B Plc*, Lord Woolf C.J. provided that in order to claim for privacy, 'there must be some interest of a private nature which the claimant wishes to protect.'[171] That is, the claimant must have a subjective desire to keep the information inaccessible or private.

Hughes agreed with Moreham's self-desire-based approach. In order to supplement Moreham's theory, Hughes further applied the behavioural mechanisms of Altman to identify the desire for privacy of individuals.[172] In Altman's analysis, the individual can use four behavioural mechanisms or barriers to obtain or maintain privacy: verbal content and structure, non-verbal behaviour, environmental mechanisms, and culturally based norms and customs.[173] Hughes then asserted that in social interactions, the individuals depend on those behavioural barriers to obtain privacy and 'privacy is experienced when those barriers are respected.'[174] Subsequently, it could be suggested that 'the right to privacy should be understood as a right to respect for these barriers, and that an invasion of privacy occurs when Y (the intruder) breaches a privacy barrier used by X (the privacy-seekers) to prevent Y from accessing X.'[175] In this respect, Hughes delivers two arguments to support the self-desire-based approach and behavioural barriers. First, under this approach, privacy could and should be protected in public places in some circumstances where it is desired. Secondly, this concept is not limited to informational privacy but includes physical privacy.[176]

Consequently, it could be concluded that the core concept of privacy is unwanted access to information about oneself and to the physical self. This concept can be separated into informational privacy and physical privacy. Furthermore, it asserts

[170] *Douglas v Hello! Ltd* [2006] QB 125. At [55]
[171] *A v B Plc* [2002] EWCA Civ 337. At [11] The claimant (a footballer) sought an injunction to prevent the publication concerning their sexual relationships outside marriage.
[172] Kirsty Hughes, 'A Behavioural Understanding of Privacy and Its Implications for Privacy Law: A Behavioural Understanding of Privacy' (2012) 75 The Modern Law Review 806.
[173] ibid, citing Irwin Altman, *The Environment and Social Behavior: Privacy, Personal Space, Territory and Crowding* (Brooks/Cole Publishing Company 1975).
[174] Hughes, 'A Behavioural Understanding of Privacy and Its Implications for Privacy Law: A Behavioural Understanding of Privacy' (n 172). 810
[175] ibid.
[176] ibid.

that privacy under this concept is based on a subjective basis, underlining the condition of desired inaccessibility.

2.3.2 The Right to Control Over

Secondly, privacy is perceived as the right to control over. This conception is linked to the concept of unwanted access, but it rather focuses on the ability to control over the accessibility to private information or to oneself. Under this concept, the individual will lose privacy when they lose the ability to control.

Privacy as the right to control is of US origin.[177] Therefore, to explore the right to control over, the thesis will trace back to where the notion started. For example, Fried claimed that 'privacy is not simply an absence of information about us in the minds of others; rather, it is the control we have over information about ourselves'.[178] Alan Westin, provided that 'the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.'[179] In this sense, Fried and Westin's perception of privacy is in terms of information control. Likewise, Miller argued that 'the basic attribute of an effective right of privacy is the individual's ability to control the circulation of information relating to him'.[180] However, Rachels viewed privacy as an 'ability to control who has access to us and to information about us.'[181] Similarly, Parker asserted that 'privacy is control over when and by whom the various parts of us can be sensed by others.'[182] From Rachels and Parkers' perspectives, privacy in the form of control covers informational privacy and physical privacy.

In England, back in 1972, Kenneth Younger, the Chairman of the Committee on Privacy, defined privacy as 'privacy of information, that is the right to determine for oneself how and to what extend information about oneself is communicated

[177] See, for example, Charles Fried, 'Privacy' (1968) 77 Yale Law Journal 475., Westin (n 138).
[178] Fried (n 177). 482-483
[179] Westin (n 138). 7-8
[180] Solove (n 94). 24, citing Arthur Miller, *The Assault on Privacy: Computers, Data Banks and Dossiers*, (University of Michigan Press 1971)
[181] Rachels (n 128). 326
[182] Solove (n 94). 25, citing Richard B Parker, 'A Definition of Privacy' (1974) 27 Rutgers Law Review 281.

to others.'[183] This privacy concept is similar to Westin's definition above. Later on, privacy as the right to control over has been widely accepted by the English courts. For example, in the *Campbell* case, Lord Hoffmann stated that privacy is 'the right to control the dissemination of information about one's private life.'[184] This statement was later cited in several subsequent cases, for example, the *Prince of Wales*,[185] *the Vidal-Hall*,[186] and the *Gulati*[187] cases. In the *Gulati* case, the court further declared that the loss of the right to control could be compensated in an appropriate case.[188] Consequently, notwithstanding the US origin, privacy as the right to control over has been accepted by the English courts.

2.4 Thai Perception of Privacy

As Wacks argued, privacy is culture-relative and dynamic.[189] Thus, the perception of privacy might differ between cultures and can change over time. Therefore, following the study of privacy from the English perspective, this section will examine the Thai perception of privacy and compare it with the English perception. Section 2.4.1 will first explore how the privacy concept was perceived in traditional Thai culture and investigate privacy values rooted in traditional Thai privacy. Then, section 2.4.2 will inspect how the Thai people's perception of privacy has been changed in the modern age. Moreover, in section 2.4.3, privacy from a legal perspective will be studied. In this section, the thesis will merge the English and Thai privacy concepts and assert that now Thai perception of privacy has become more similar to the English legal perspective.

2.4.1 Privacy in Traditional Thai Culture and Society

From the English perception, it could be seen that privacy concepts and privacy values are largely engaged with individuality, for example, individuals' unwanted access, individual's ability to control over information, human dignity, autonomy and self-development. Nevertheless, various Thai scholars observed that

[183] 'Committee on Privacy: Evidence and Papers' (Committe on Privacy 1972) Cmnd 5012. 10
[184] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [51]
[185] *HRH Prince of Wales v Associated Newspapers Ltd* (n 146).
[186] *Vidal-Hall v Google Inc* [2014] EWHC (QB) 13.
[187] *Gulati v MGN* (n 146).
[188] ibid.
[189] Wacks (n 147).

individual privacy was unfamiliar in traditional Thai culture and society.[190] In other words, they argued that the individual privacy concept is not fit within the traditional Thai culture and society. However, the thesis will argue that individual privacy could integrate into the Thai Buddhist tradition and society. Privacy value in promoting self-development is also found in Buddhist principles. Moreover, some privacy values to individuals have rooted in traditional Thai culture and society, such as human dignity and human relations.

According to Ramasoota, the principle of privacy, which is grounded on individualism, did not fit into traditional Thai culture because Thai culture and society were inherently collectivistic.[191] More particularly, Ramasoota explored that privacy in the traditional Thai culture was shared by intimate members of the same household, excluded from outsiders.[192] Similarly, Kitiyadisai observed that the right to let be alone or non-interference is equivalent to 'private affairs' or 'my business' in Thai culture. Concerning the concept of private affairs, Kitiyadisai further explained that outsiders could not interfere with private affairs such as quarrels and punishment within the family.[193] From those perspectives, it appears that the traditional Thai conception of privacy was not seen as unwanted access to oneself but rather unwanted access to a family. In this sense, the English privacy concept as unwanted access to oneself or information about oneself seems to be out of place in the traditional Thai culture and society. Furthermore, the thesis finds that privacy as the right to control over has no place in traditional Thai culture and society. Likewise, Mudler pointed out that individual privacy is unsuitable in traditional Thai society because Thai people's lives were developed in the public's eye.[194] Therefore, from Mudler's view, it appears that self-development, which is a value underpinning privacy, was not located in traditional Thai culture and society. To conclude, from an orthodox perspective, individual privacy was not fit into traditional Thai culture and society

[190] See, for example, Pirongrong Ramasoota, 'A Philosophical Sketch and a Search for a Thai Perception' (2001) 4 Manusya: Journal of Humanities 89., Krisana Kitiyadisai, 'Privacy Rights and Protection: Foreign Values in Modern Thai Context' [2005] Ethics and Information Technology 17., Patrapee Laotrakul, 'Thai Culture and the Perception of the Right of Privacy Principle and Privacy Right Violation' (Master of Arts Program in Communication Arts, Chulalongkorn University 2006)., Niels Mudler, *Inside Thai Society* (Silkworm Books 2000).
[191] Ramasoota (n 190).
[192] ibid.
[193] Kitiyadisai (n 190). 17-18
[194] Mudler (n 190).

Nevertheless, in contrast with the arguments above, the present author contends that privacy as freedom from unwanted access to an individual's self and privacy values in promoting self-development has profoundly engaged with the Buddhist principles and practices. In Thailand, it is noteworthy to explore the Buddhist perspective of privacy since Buddhism is deeply connected with Thai culture, society and laws. Despite the modernising of the Thai legal system, Buddhism continues to have a great impact on Thai laws. For example, Tonsakulrungruang observed that although the legal text has been transplanted from Western laws, the goal of the law and how it is applied are influenced by Buddhism.[195] Hence, Tonsakulrungruang argued that 'the Thai legal system is Western hardware with Buddhist software.'[196]

In respect of privacy, some authors suggested that Buddhist principles, which govern Thai conduct, may be incompatible with privacy and human rights concepts.[197] According to Buddhist principles, the rights of ownership are all illusory. Our bodies, for example, do not belong to us. For this reason, it was argued that human rights and privacy rights do not inherently belong to human beings.[198] However, from section 3.2.1, privacy is perceived as inherent value of human beings. On this basis, it seems that human rights and privacy rights are incompatible with Buddhist principles. Nevertheless, Kitiyadisai argued that the law of Karma and numerous spiritual and Buddhist rules have educated Thai people to be kind-hearted, thoughtful, compassionate and accommodating to other human beings. Thus, in Kitiyadisai's view, 'the Buddhist approach to human rights which includes privacy rights is more practical and spiritual at the same time'.[199]

The present author strongly agrees with Kitiyadisai that Buddhist practices and rules can protect human rights and privacy rights. She further asserts that Buddhist principles are not an obstruction of privacy, but they rather support

[195] Khemthong Tonsakulrungruang, 'Buddhist Influence on the Ancient Siamese Legal System, from Ayutthaya to the Twenty-First Century' in Andrew Harding and Munin Pongsapan (eds), *Thai Legal History From Traditional to Modern Law* (Cambridge University Press 2021).
[196] ibid. 73
[197] Ramasoota (n 190)., Kitiyadisai (n 190).
[198] Kitiyadisai (n 190)., Laotrakul (n 190).
[199] Kitiyadisai (n 190). 19

privacy. In particular, the present author argues that privacy as freedom from unwanted access is well established in Buddhist practice. It is well known that the core objective of Buddhist practice is self-enlightenment, which could be achieved by meditating. In order to practice meditation and pursue enlightenment, Buddhists are taught to insulate themselves from any distraction or free themselves from any delusion. In this sense, it could be argued that Buddhists need privacy as freedom from unwanted access to oneself to promote self-development and enlightenment. Consequently, it is positive to say that privacy as freedom from unwanted access has been long acknowledged in the Thai Buddhist tradition. Thus, the thesis contends that Thai people have been familiar with the individual privacy and the concept of unwanted access to self. Furthermore, it could be said that privacy value in promoting self-development is firmly embedded in Buddhist concepts.[200] In this sense, privacy has long been desired by some people in traditional Thai society.

In addition, Kitiyadisai explored that the notion of 'giving respect', 'showing honour', or 'saving face', has rooted in the cornerstones of the patronage system and Thai hierarchical society.[201] This notion leads to 'the right of non-interference', which in this view, is a traditional Thai privacy concept.[202] The present author considers that the terms of privacy in this sense are closely related to the concept of respecting ‘human dignity’. Interference with private matters or disrespect to private affairs is an affront to human dignity. Therefore, the right of non-interference could protect human dignity. Furthermore, the present author argues that avoiding interference with other private affairs could support maintaining human relationships. In Thai culture, there are different standards of manner towards different social strata, for example, the younger to the elder, students to teachers, subordinate to superiors and workers to employers. Non-interference with other private businesses could help save face and maintain those relationships. Consequently, the present author contends that some privacy values to individuals discussed in section 2.3.1, such as human dignity and human relations, could be protected by privacy in the traditional Thai concept. Privacy

[200] Methinee Suwannakit, ‘IP Reading Group: Thoughts on Theory’ (*CREATe Blog*, 16 December 2020) <https://www.create.ac.uk/blog/2020/12/16/ip-reading-group-thoughts-on-theory/> accessed 28 March 2021.
[201] Kitiyadisai (n 190). 19
[202] ibid.

is significant in traditional Thai society. Nonetheless, it seems that traditional Thai privacy does not belong to every individual equally, but rather a privilege right reserved for those in the upper social strata. This view, however, has been changed in the modern age. Now, the Constitution of Thailand guarantees privacy protection to every individual equally.[203] The legal perspective of privacy will be further explored in the next section.

To conclude, although some Thai scholars argued that individual privacy and some privacy values are not compatible with traditional Thai culture and society, the thesis disputes that some of those concepts have long been rooted in the Thai Buddhist tradition. In the Buddhist context, Thai people are familiar with the English perception of privacy as freedom from unwanted access to the physical self. In order to promote self-development, privacy as freedom from unwanted access to the physical self is needed. As Buddhism has influenced Thai society, the thesis contends that privacy has been recognised and needed in traditional Thai society. Moreover, the thesis argues that some privacy values are underpinning the traditional Thai concept of privacy, such as human dignity and human relations.

2.4.2 Privacy in the Modern Thai Context

After examining privacy in traditional Thai culture and society, this section will investigate whether and how the Thai perception of privacy has been changed in the modern context. Furthermore, it will explore privacy from a Thai legal perspective.

Due to the dynamic globalisation, Thai society and culture have progressively changed. The perceptions of Thai people on privacy, in particular, have been increasingly changed among the educated, new generation and Thai netizens in the Internet age. This change reflects the impact of Western culture and globalisation on modern Thai society. At present, many Thai people have more concern and desire for individual privacy protection and now tend to perceive privacy in the same way as the English perception.

[203] Thailand's Constitution of 2017. Section 32

For example, a quantitative study indicates a statistical relationship between cultural attitudes and the awareness of online privacy, showing that the respondents with a high rate of privacy awareness were likely predisposed by individualism, liberalism, and globalisation.[204] More importantly, according to this study, Thai people are aware of privacy in terms of intrusion or physical privacy and the right to let be alone.[205] These perceptions of privacy are closely related to freedom from unwanted access in the English legal perspective. Thus, it could be seen that privacy as freedom from unwanted access could be found in both traditional and modern Thai society. Furthermore, the study found that Thai people, especially the educated and the Internet users, have become more familiar with privacy in terms of the right to control or information privacy.[206] Information privacy in this quantitative study refers to 'the ability of an individual to control when, how, and to what extent information about them is communicated to others as well as the control of access to their private information.'[207] Therefore, although privacy as the right to control over the information was not found in the traditional Thai context, it is now widely accepted in Thailand. Additionally, in 2018, Electronic Transactions Development Agency's report shows that only 31 per cent of Thai people do not set their privacy on social media because they do not worry about it.[208] This finding could imply that Thai people tend to recognise informational privacy and want to control their information. Consequently, it could be said that Thai people have gradually perceived privacy in similar terms as the English perceptions, including physical privacy, informational privacy and the right to control. Nevertheless, these findings are limited by limited research and participants. Therefore, further empirical studies could help build the richness of evidence of the unity concept of privacy in the future.

[204] Pirongrong Ramasoota and Sopark Panichpapiboon, 'Online Privacy in Thailand: Public and Strategic Awareness' (2014) 23 Journal of Law, Information and Science 97.
[205] ibid.
[206] ibid.
[207] ibid. 102
[208] 'Thailand Internet User Profile 2018' (Electronic Transactions Development Agency (ETDA) 2018) <https://www.etda.or.th/publishing-detail/thailand-internet-user-profile-2018.html> accessed 23 December 2019.

2.4.3 Privacy from Thai Legal Perspective

Furthermore, during a series of meetings of the Constitution Drafting Committee in 1997, when some members of the committee attempted to combine the right to privacy with the right to a private family and violence within the family, Lertpaithoon, a well-known professor in public law, argued that the word 'privacy' in the Constitution came from an English word related to private activities, human dignity and reputation. Thus, in Lertpaithoon's view, privacy does not engage with violence within the family.[209] This argument suggests that privacy concept in the Constitution was actually adopted from Western countries, particularly from English-speaking countries. Although it is uncertain where the terms of privacy came from, it could be argued that privacy from a legal perspective is no longer limited to unwanted access to the family but to an individual. In other words, privacy in legal terms should be interpreted in light of individual privacy. After that, every Constitution of Thailand guaranteed the right to private life.[210] At present, the right to private life and the right to the private family are now distinctly and separately recognised in the Constitution.[211] More particularly, section 32 of Thailand's Constitution of 2017 guarantees that 'a person shall enjoy the rights to private life, dignity, reputation and family.'[212] Paragraph 2 of section 32 further states that 'any exploitation of private information in any manner whatsoever shall not be permitted.'[213] In this sense, it seems that physical and informational privacy are both acknowledged by the Constitution. Therefore, it could be said that privacy from a Thai legal perspective is not different from the English perspective. Besides, recognising the right to private life in the Constitution echoes the importance of privacy to individuals as a fundamental right. Under the Constitution, privacy rights belong to every individual. It also reflects privacy value to a democratic state. Hence, it appears that the Constitution of Thailand acknowledges privacy values to both individuals and society.

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[209] 'The 16th Meeting of the Constitution Drafting Committee' (The House of Representatives 1997). 13

[210] Thailand has 20 constitutions since a constitutional monarchy regime was established in 1932 (B.E.2475). The present one is the 20th Constitution or Thailand's Constitution of 2017.

[211] Thailand's Constitution of 2017, Section 32

[212] Thailand's Constitution of 2017, Section 32

[213] ibid.

Nonetheless, in the area of a tort, Thai scholars mostly explained privacy rights in terms of physical privacy or unwanted access to oneself or intrusions. Poonyapan, for example, argued that everyone should have the right to privacy. In this perspective, privacy rights shall be protected from interference by others, including an intrusion upon seclusions such as secret listening or covert recording.[214] Likewise, Tingsaphati observed that a person should have the right to self-development without interference and the right to private life without intrusions.[215] Moreover, the differences between informational privacy and physical privacy have never been profoundly discussed in this area. Since the tort has mainly involved physical privacy, it is arguable if it is appropriate to protect informational privacy in the digital age. This issue will be further discussed in this thesis.

To summarise, it seems that privacy from the Thai legal perspective is comparable to the English perspective. Although Thai traditional privacy perception might be somewhat different from the English perception, the thesis found some similarities. Moreover, the Thai perception of privacy has changed in the modern age and has become more similar to the English legal perspective. In this sense, it could be argued that privacy from different societies and legal systems could be correlated.

2.5 Conclusion

Privacy values, which are recognised as international values, can be divided into two categories: first, privacy values to individuals, such as human dignity and personality, self-development, autonomy, liberty and freedom, and maintaining human relations, and second, privacy values to society. Those values underpinning privacy reason why privacy needs to be protected. Understanding privacy and its values are crucial for further analysis in the thesis. From the English legal perspective, first, privacy is viewed as freedom from unwanted access. The unwanted access in this regard includes informational and physical access.

[214] Poonyapan (n 19). 35
[215] Tingsaphati (n 19). 136

Secondly, privacy as the right to control over information is recognised by the English courts.

In Thailand, Thai scholars in this field broadly argued that individual privacy was unsuitable in traditional Thai culture and society. In their views, privacy in traditional Thai culture is related to limited access to family, not to oneself. The thesis, nonetheless, asserted that privacy as freedom from unwanted access to the physical self could harmonise with the Thai Buddhist tradition and society. Furthermore, privacy values in promoting self-development are deeply engaged with Buddhist core practices and principles. The thesis further contended that the traditional Thai privacy concept is able to protect and promote some individual values such as human dignity and human relations. Consequently, despite cultural and social differences, the thesis contends that privacy and its values in the same sense as the English perspective could be seen in traditional Thai society. Moreover, it explored that Thai perception of privacy has been gradually changed in the modern age. At present, Thai people tend to perceive privacy in similar terms of privacy from the English perspective. More importantly, according to the Constitution of Thailand, privacy in legal terms is no longer exclusively limited to access to a family. The Constitution also recognises physical and informational privacy. Besides, the guarantee of privacy protection in the Constitution suggests that privacy is necessary for individuals and Thai democratic society. Hence, it could be argued that privacy concepts from different legal systems could be compatible. In this regard, privacy is essential for each individual and both English and Thai societies.

In conclusion, Thai perceptions and legal perspective of privacy are analogous to the English legal perspective. Thus, studying how the English common laws have evolved to protect privacy and its interests is useful for Thailand. In other words, Thailand may learn some lessons from the development of English laws. Subsequently, the next chapter will examine the development of the tort of MOPI and its key element. Then, the thesis will compare it with the development of Thai laws.

Chapter 3: The development of Privacy Action in Torts and Essential Elements of the Torts

3.1 Introduction

Following the study of privacy concepts and interests in the previous chapter, this chapter will explore the development of privacy action in torts and the elements of the English and Thai torts. The chapter is divided into two main parts. The first part will examine how the English tort of misuse of private information (MOPI) has been developed to safeguard privacy rights and those interests. Essential elements of the tort of MOPI will also be illustrated to comprehend how the tort functions in privacy cases. Then, the thesis will determine if misuse of private information is correctly labelled as a tort since some scholars questioned a tortious characteristic of misuse of private information.[216] After that, the second part will turn to examine privacy action in tort in Thailand. Unlike the development of the English tort, section 420 of the Civil and Commercial Code (CCC)[217], which is recognised as a tort or wrongful act in the Thai legal system, was adopted from foreign countries in 1925 and has never been amended or reformed.[218] Hence, unlike the English tort, there is no significant development of the new tort in Thailand. Thus, this part wishes to examine how the general tort has been interpreted and applied to protect privacy rights. Moreover, in the second part, the similarities and differences between the specific English tort and the general Thai tort will be compared.

As stated in Chapter 1, the thesis applies the functional equivalence method. Hence, it aims to evaluate and compare how successfully the English specific tort of MOPI and Thai general tort function in protecting privacy interests, particularly in the case study of individual media users. However, before both torts can be evaluated, it is crucial to understand the development of those torts and how different torts perform the same functions. Furthermore, studying how the English

[216] Roderick Bagshaw, 'Tort Design and Human Rights Thinking' in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press 2011)., Giliker, 'A Common Law Tort of Privacy?' (n 36)., JYC Mo, 'Misuse of Private Information as a Tort: The Implications of Google v Judith Vidal-Hall' (2017) 33 Computer Law & Security Review 87.
[217] The Civil and Commercial Code. Section 420
[218] Pongsapan, 'The Reception of Foreign Private Law in Thailand in 1925: A Case Study of Specific Performance' (n 14).

common laws been evolved to respond to the privacy problems may help resolve privacy problems in Thailand. Therefore, this chapter is foundational and necessary for further evaluation and analysis in the thesis.

3.2 The Incremental Development of the English Tort of Misuse of Private Information

As mentioned in the previous chapter, the English courts have repeatedly denied creating a general tort of privacy because the notion of privacy is too broad and the privacy definition is imprecise.[219] Before a tort of MOPI was developed, privacy in the English jurisdiction was protected by piecemeal traditional torts, such as trespass, nuisance, defamation as well as a breach of confidence. However, it was argued that those piecemeal torts and the breach of confidence were not sufficient to safeguard an individual's privacy rights[220], particularly from the invasions of mass media in the modern age. The limitation of piecemeal laws to guard privacy against media intrusions was shown in several cases. For example, in *Kaye v Robertson*,[221] while the claimant was admitted to a private hospital room, the defendant (the journalist) entered their room, conducted the interview and took photographs. Nonetheless, in this case, the claimant failed to receive remedy in torts of trespass[222] and libel.[223] More importantly, the court stated that there was no right of action for breach of privacy.[224] Therefore, the court pointed out that this case reflects 'the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens.' [225] In order to protect privacy rights and private information, a traditional breach of confidence was expanded and has become a separate cause

[219] See, for example, Giliker, *Europeanisation of English Tort Law* (n 142)., Moreham, 'The Nature of the Privacy Interest' (n 95)., Horsey and Rackley (n 142).
[220] See, for example, Alexandra Sims, '"A Shift in the Centre of Gravity": The Dangers of Protecting Privacy through Breach of Confidence' (2005) Intellectual Property Quarterly 27., Arye Schreiber, 'Confidence Crisis, Privacy Phobia: Why Invasion of Privacy Should Be Independently Recognised in English Law' (2006) Intellectual Property Quarterly 160., Moreham and others, *The Law of Privacy and the Media* (n 142).
[221] *Kaye v Robertson* [1991] 62 (FSR).
[222] Trespass to the person was unsuccessful since the use of flash photography alone did not constitute a battery.
[223] The court found that a jury would probably decide that Mr. Kaye was libelled, but it cannot say that this is an inevitable conclusion. Thus, the injunction based on libel was refused.
[224] *Kaye v. Robertson* (n 221). At [66]
[225] ibid. At [70]

of action, which is called misuse of private information.[226] This new cause of action was later recognised as a tort. This development has been viewed as a result of the Human Rights Act 1998 (HRA).[227] Hence, the following sections will explore the impact of the HRA on the English privacy laws and examine how a traditional breach of confidence was expanded and became a separate tort of MOPI.

3.2.1 The Impact of the Human Rights Act 1998 on the English Privacy Laws

As mentioned in Chapter 2, England has international treaty obligations to protect privacy rights. The international human rights law has influenced on the development of human rights protection in England. The HRA, in particular, has a great impact on English privacy laws. The HRA is enacted incorporating key provisions of the European Convention on Human Rights (ECHR), including Article 8 'the right to private life'[228] and Article 10 'the right to freedom of expression'.[229] Although the HRA does not directly establish a new cause of action between private parties, according to section 6 of the HRA,[230] the English court as a 'public authority' must 'act compatibly' with convention rights when determining disputes between private parties.[231] Thus, in the wake of the HRA, the English courts are obliged to protect an individual's privacy rights in balancing with other convention rights.

Nevertheless, when the HRA came into force, there were gaps in domestic privacy laws, as explained above. Consequently, the English courts needed to develop the existing common laws to fill in those gaps. As a result, in the *Campbell* case,[232] misuse of private information has been developed by extending a traditional breach of confidence to protect privacy and private information. In this case,[233] the balancing of the convention rights has become part of the new cause of action. Accordingly, several scholars argue that the enforcement of the Human Rights Act

[226] *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Douglas v Hello Ltd* (n 6).
[227] The Human Rights Act 1998.
[228] The European Convention on Human Rights (ECHR). Article 8
[229] ibid. Article 10
[230] The Human Rights Act. 1998, Section 6 provides that ''it is unlawful for a public authority to act in a way which is incompatible with a Convention right.'
[231] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [132]
[232] *Campbell v Mirror Group Newspapers Ltd* (n 6).
[233] ibid.

1998 (HRA) led to the establishment of misuse of private information.[234] While there is disagreement on whether the HRA has a direct or indirect horizontal effect on legal relations between private individuals,[235] it is mostly agreed that the HRA has a substantial impact on the development of English privacy laws.[236] Without the impact of the HRA, the English court might extend or develop the existing laws in a similar way to protect privacy rights as part of fundamental rights recognised by common law.[237] As explained earlier, although the general tort of privacy was denied, several aspects of privacy have been recognised and protected by common law such as breach of confidence, trespass, nuisance, and defamation. However, the development of a new distinct cause of action to protect privacy rights might be slower than taking the HRA as a shortcut.

3.2.2 From the Traditional Breach of Confidence to the New Tort of MOPI

As misuse of private information was extended from a breach of confidence, it is crucial to understand the traditional breach of confidence first. To establish the traditional breach of confidence, three essential elements are required:

1) the information must have the necessary quality of confidence;
2) that information must be imparted in the circumstances importing an obligation of confidence, and
3) there must be unauthorised use of that information to the detriment of the party communicating it.[238]

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[234] See for example, Adam Wolanski and Victoria Shore, 'Context and Background' in NA Moreham and Mark Warby (eds), *The Law of Privacy and the Media* (third, Oxford University Press 2016)., David Hoffman, *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press 2011)., Giliker, 'A Common Law Tort of Privacy?' (n 36).

[235] HWR Wade, 'Horizons of Horizontality' (2000) 116 Law Quarterly Review 217., Jonathan Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' (2003) 62 The Cambridge Law Journal 444., Thomas DC Bennett, 'Horizontality's New Horizons- Re-Examining Horizontal Effect: Privacy, Defamation and the Human Rights Act: Part 1' (2010) 21 Entertainment Law Review 96., Gavin Phillipson, 'Privacy: The Development of Breach of Confidence – the Clearest Case of Horizontal Effect?' in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press 2011).

[236] Hoffman (n 234)., Giliker, 'A Common Law Tort of Privacy?' (n 36)., Wolanski and Shore (n 234)., Jane Wright, *Tort Law and Human Rights*, vol 23;23.; (Second, Hart Publishing 2017)

[237] There are fundamental related-privacy rights in the English common law. See, for example, Morris v Beardmore [1981] A.C. 446 When considering whether the unlawful act of trespass by police officers affected the validity of the subsequent arrest, the court referred to 'invasion of fundamental private rights and liberties' and described 'the right to privacy as fundamental.' It also stated that 'the fundamental right of privacy in one's own home' has been long recognised by the common law.

[238] *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41., 47 The plaintiff sought an interlocutory injunction to prevent the defendants from misusing confidential information that had been given

Due to the above requirements, although the breach of confidence can protect privacy rights and private information, there are several limitations. Firstly, under the traditional breach of confidence, only private information with the necessary quality of confidence can be protected. The necessary quality of confidence was then relaxed in *AG v Guardian Newspaper*.[239] In this case, the court held that even though the information had already entered the public domain, the information might not lose its confidence if only a limited group of people acquired that information.[240] Secondly, to claim the traditional breach of confidence, an obligation of confidence has occurred mainly from a prior confidential relationship.[241] In this regard, Morgan observed that it is problematic to consider the act of paparazzi, which covertly takes photographs with a long-range lens, as 'information imparted in confidence.'[242]

In the *Douglases* case, Sedley L.J. suggested an extended form of breach of confidence, where a confidential relationship is not required. In particular, it is stated that '[t]he law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy as a legal principle drawn from the fundamental value of personal autonomy.'[243] From this case, it could be seen that the English court tried to evolve a form of breach of confidence to protect privacy, paving the way for the new cause of action of misuse of private information. Then, the most significant step in the development of misuse of private information is in the *Campbell* case.[244] In this case, the claimant commenced proceedings against the publisher who published their photographs and private information. Initially, the claimant sought damages for breach of confidence. Nonetheless, in *Campbell* case, Lord Hope held that a confidential relationship is not required to establish the breach of confidence. In this regard, an obligation of confidence will arise when a person knows, or ought

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only for the intention of a joint venture. The defendants denied that they received or used any confidential information.

[239] *AG v Guardian Newspaper Ltd (No 2)* [1990] 1 AC 109. A former British Security Service M.I.5 published a book containing activities during their period of service. The Attorney-General sought interlocutory injunctions against the newspaper based on breach of confidence.

[240] ibid.

[241] Justin Rushbrooke QC and Adam Speker, 'Breach of Confidence', *The Law of Privacy and the Media* (3rd edn, Oxford University Press). 157

[242] Jonathan Morgan, 'Privacy in the House of Lords, again' (2004) 120 Law Quarterly Review 563.

[243] *Douglas v Hello! Ltd* (n 117). At [126]

[244] *Campbell v Mirror Group Newspapers Ltd* (n 6).

to know, that there is 'a reasonable expectation of privacy'.[245] Hence, Lord Hoffmann further commented that 'the result of these developments has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of private information.'[246] In other words, the gist of the breach of confidence has shifted from the protection of confidential relationships to the protection of privacy and private information itself.[247] Besides, the Court of Appeal in the *Campbell* case contended that 'unjustifiable publication of [private] information would be better described as a breach of privacy rather than a breach of confidence'.[248]

Since the essence of the action in the *Campbell* case[249] significantly differs from the traditional breach of confidence, the English court felt uncomfortable using the term breach of confidence. Consequently, an extended form of breach of confidence was suggested to call misuse of private information. In this regard, Lord Nicholls stated that '[the] cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship ... The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private.'[250] Lord Nicholls, then, suggested that 'the essence of the tort is better encapsulated now as misuse of private information.'[251] As a result, the term misuse of private information emerged for the first time in the *Campbell* case. Subsequently, in the *Douglas* case[252], Lord Nicholls further clarified that there are now two causes of action, breach of confidence and misuse of private information, protecting two different interests: privacy and secret ("confidential") information.[253] Put differently, it is indicated that misuse of private information is now a separate cause of action from breach of confidence. Nevertheless, Lord Nicholls' introduction of the new tort was not commonly agreed upon in those cases.

[245] *ibid.* At [85]
[246] *ibid.* At [51]
[247] Sims (n 220)., Giliker, *Europeanisation of English Tort Law* (n 142).
[248] *Campbell v Mirror Group Newspapers Ltd* [2003] QB 633 (CA) At [663]
[249] *Campbell v Mirror Group Newspapers Ltd* (n 6).
[250] ibid. At [14]
[251] ibid.
[252] *Douglas v Hello Ltd* (n 6).
[253] ibid. At [255]

Therefore, at this stage, misuse of private information was still recognised as an extended version of breach of confidence.

In this regard, numerous scholars argued in favour of introducing a new distinct tort for several reasons. For example, it was argued that breach of confidence and breach of privacy is based upon different doctrinal principles and fundamental objectives. Schreiber contended that while the principle of confidentiality is based on the 'norm of trust' inside relationships, privacy is human rights guarding against the world, irrespective of any prior relationship. Hence, using a relationship-based action to protect human rights is inappropriate. [254] Furthermore, Sims claimed that the extension of the quality of confidence had harmed the internal coherence and integrity of the action for breach of confidence.[255] To avoid distorting principles of breach of confidence, recognition of the new tort was suggested. Likewise, since a breach of confidence and misuse of private information are sometimes overlapped, Aplin suggested that in order to provide more certainty, it is better to introduce a separate privacy tort. [256] Moreover, Aplin explored that recognising the new separate tort can offer more effective privacy protection, particularly from media intrusions.[257] It is argued that under breach of confidence, it is obvious that privacy intrusions by covertly photographing are not actionable *per se*. [258] In other words, the breach of confidence cannot protect privacy interests against intrusions if unwanted disclosure of the information is not involved. Hence, Aplin asserted that recognising a new tort would be more promising to protect privacy from media intrusions than a breach of confidence. The ability of the tort of MOPI in protecting privacy from intrusions or safeguarding physical privacy in itself will be profoundly discussed later in Chapters 6 and 7.

Later, Lord Nicholls' suggestion to recognise the misuse of private information as a tort was accepted in several subsequent cases. For instance, in *Mckennitt v*

[254] Schreiber (n 220).
[255] Sims (n 220).
[256] Tanya Aplin, 'The Future of Breach of Confidence and the Protection of Privacy' (2007) 7 Oxford University Commonwealth Law Journal 137.
[257] ibid., Tanya Aplin, 'The Relationship Between Breach of Confidence and the "Tort of Misuse of Private Information"' (2007) 18 King's Law Journal 329.
[258] Aplin (n 256).

Ash,[259] on the defendant's appeal, Buxton LJ referred to a breach of confidence as a tort.[260] Furthermore, in *Mosley v News Group Newspapers,*[261] Eady J mentioned to Lord Nicholls' statement in the *Campbell* case[262] and stated that 'it is reasonable to suppose that he used the word advisedly and that he may have intended to convey that infringements of privacy should now be regarded as an independent tort uncluttered by any limitations deriving from its equitable origins.'[263] Recently, in *Vidal-Hall v Google*, Tugendhat J cited Lord Nicholls' opinion and affirmed that a distinct tort of MOPI does exist.[264] Subsequently, in this case, the Court of Appeal considered that 'misuse of private information should now be recognised as a tort'[265] and asserted that misuse of private information is correctly labelled as a tort.[266] Consequently, misuse of private information is now recognised as a new distinct tort, separating from the breach of confidence.[267] However, since the new tort has been expanded from a breach of confidence, the application of the tort of MOPI has sometimes been viewed through the lens of the traditional breach of confidence. The decisions of the English courts reflecting the influence of breach of confidence will be seen later in the case study.

In conclusion, in order to bridge the gaps of privacy protection in the wake of the HRA, misuse of private information was extended from breach of confidence. At present, this new cause of action is firmly established as the new distinct tort with specific elements. The next section will therefore examine the essential elements of the new tort to understand how it can function in protecting privacy and private information.

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[259] *McKennitt v Ash* [2008] QB 73. The defendant, a close friend of the claimant (a renowned musician), published a book containing the personal and private information of the claimant. The claimant commenced proceedings on breaches of privacy or of obligations of confidence.
[260] ibid. At [80]
[261] *Max Mosley v News Group Newspapers Limited* (n 6).
[262] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [14]
[263] *Max Mosley v News Group Newspapers Limited* (n 6). At [726]
[264] *Vidal-Hall v Google Inc* (n 186). At [70]
[265] *Vidal-Hall v Google Inc* (n 38). At [51]
[266] ibid. At [51]
[267] See, for example, Horsey and Rackley (n 142), Vera Bermingham and Carol Brennan, *Tort Law Directions* (6th edn, Oxford University Press 2018)., Mark Lunney, Donal Nolan and Ken Oliphant, *Tort Law: Text and Materials* (Sixth, Oxford University Press 2017).Christian A Witting, 'Trespass to the Person and Related Torts', *Street on Torts* (15th edn, Oxford University Press 2018).

3.3 The Essential Elements of the Tort of Misuse of Private Information

As explored prior, in the *Campbell* case,[268] the new approach is fashioned to enhance privacy protection limited to a counterbalance with freedom of expression. In this case,[269] Lord Nicholls stated that 'time has come to recognise that the values enshrined in Articles 8 (privacy) and 10 (freedom of expression) are now part of the cause of action for breach of confidence (misuse of private information).'[270] In the *McKennitt* case, the court stressed that articles 8 and 10 are 'the very content of the domestic tort that the English court must enforce.'[271] In other words, those convention rights have become part of the domestic tort of MOPI.

Therefore, in order to establish the tort of MOPI, the two key elements must be met.

1) The claimant had a reasonable expectation of privacy in that particular case (the reasonable expectation of privacy test) and
2) in all circumstances, the privacy interests of the claimant prevail over freedom of expression or other competing rights of others (the balancing test).[272]

These key elements of the tort of MOPI are often called a two-stage test or the *Campbell* test.[273] Firstly, the reasonable expectation of privacy is a threshold test. If the court finds that the claimant had no reasonable expectation of privacy, the case will likely be discharged.[274] Secondly, in a case where both privacy rights and freedom of expression are conflicted, the court needs to conduct the balancing test to weigh whether the privacy interests of the claimant override freedom of

[268] *Campbell v Mirror Group Newspapers Ltd* (n 6).
[269] ibid.
[270] ibid. At [17]
[271] *McKennitt v Ash* (n 146). At [11]
[272] *Campbell v Mirror Group Newspapers Ltd* (n 6).
[273] ibid. See also Giliker, 'A Common Law Tort of Privacy?' (n 36)., Paul Wragg, 'Protecting Private Information of Public Interest: Campbell's Great Promise, Unfulfilled' (2015) 7 Journal of Media Law 225., Moreham, *The Law of Privacy and the Media* (n 89)., Horsey and Rackley (n 142).
[274] *McKennitt v Ash* (n 146). At [11]

expression of the defendant. If the privacy rights outweigh freedom of expression, the court will rule in favour of the claimant.

3.3.1 The Reasonable Expectation of Privacy Test

As argued, there is no unanimity on privacy definition. Besides, it is argued that an expectation of privacy is subjective, which may be changed overtimes and differ from one individual to another.[275] However, the gist of the tort is an infringement of rights.[276] Thus, it is essential to consider whether a touchstone of privacy rights was engaged. In this regard, the reasonable expectation of privacy test is applied to determine whether a person in question could have a reasonable expectation of privacy in a particular case.[277] Therefore, while the claimant generally has a subjective expectation of privacy, the reasonable test is employed as an 'objective test'.[278] To test if the expectation of privacy is reasonable, the court has to decide whether a 'person of ordinary sensibilities' would find that misuse of private information offends them if they were in the same situation.[279]

The reasonable expectation test is a broad question and a contextual enquiry. To answer the question, the English courts will take all circumstances and relevant factors into account. Those factors include, for example, the nature of the information, the form in which it is kept,[280] 'the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.'[281]

[275] Chapter 2, Section 2.1
[276] Robert Stevens, *Torts and Rights* (Oxford University Press 2007). 1-3
[277] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [21]
[278] Moreham and others, *The Law of Privacy and the Media* (n 89). 218, O'Callaghan (n 85).97
[279] Horsey and Rackley (n 142). 462
[280] *Douglas v Hello! Ltd* (n 146).
[281] *Murray v Express Newspapers Plc* (n 6). At [36]

3.3.2 The Balancing Test

As an impact of the HRA, the balancing test is designed to harmonise the competing convention rights in the ECHR.[282] Hence, if it is confirmed that the claimant could have a reasonable expectation of privacy in a particular case, when freedom of expression or other competing rights is engaged, the court must then consider whether the privacy rights of the claimant outweigh the freedom of expression or those rights of the defendant.

In the *Campbell* case, Baroness Hale illuminated that Articles 8 (privacy rights)[283] and 10 (freedom of expression)[284] are fundamental rights, which 'there is evidently a pressing social need' to protect.[285] In other words, both privacy rights and freedom of expression are equally important in a democratic society. However, in some circumstances, both rights may be interfered with or restricted.[286] Article 8(2) of the ECHR provides that the invasion of privacy rights might be necessary for 'the protection of the rights and freedoms of others.'[287] Article 10(2) of the ECHR stipulates that restriction of freedom of expression may be necessary for 'the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence.'[288] Consequently, when those two rights are in conflict, the court must exercise the balancing test or proportionality test to determine which right should override or restrict the other.[289] Furthermore, in the *Campbell* case, Lord Hoffmann remarked that when considering the relationship between freedom of expression and privacy, there is no question of automatic priority, 'nor is there a presumption in favour of one rather than the other'.[290] Put it differently, neither privacy nor freedom of expression is absolute. Thus, when these two rights are engaged, 'a difficult question of proportionality' may arise.[291]

[282] The European Convention on Human Rights (ECHR).
[283] ibid. Article 8
[284] ibid. Article 10
[285] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [140]
[286] ibid. at [139]
[287] The European Convention on Human Rights (ECHR). Article 8(2)
[288] ibid. Article 10(2)
[289] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [140]
[290] ibid. At [55]
[291] ibid. At [20]

Subsequently, in *S (A Child)* case, the court further clarified four propositions of the balancing test, which is called 'the ultimate balancing test', as follows.

'First, neither article has as such precedence over the other. Secondly, where the values under the two articles conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.'[292] This guideline has been followed by subsequent cases, for example, *McKennitt v Ash*.[293]

Moreover, there are various factors that the court may take into account when exercising the balancing test. In *Weller v Associated Newspapers Ltd*,[294]the court identified relevant factors that may affect the balancing scales as follows

'(i) how well known is the person concerned and what is the subject of the report; (ii) the prior conduct of the person concerned; (iii) the content, form and consequences of the publication and (iv) the circumstances in which the photographs were taken.'[295]

In addition, the balancing test may take other factors into accounts, such as other competing rights, the special position of children, and third parties' rights.[296]

Nevertheless, most English landmark cases were concerning traditional media.[297] Consequently, the balancing test between privacy and freedom of expression has been examined through the lens of the traditional media, not individual media users. In this regard, Phillipson argued that in most privacy cases, the courts have been struck between privacy and 'how strongly a particular publication engages the public interest.' [298] Furthermore, several scholars contended that public interest is often at stake when determining the outcome of the case.[299] Besides, Rowbottom explored that considering if the publication was in public interests is

[292] *S (A Child)* (Identification: Restrictions on Publication), Re, [2005] 1 A.C 593 (2004) At [17]
[293] *McKennitt v Ash* [2005] QB EWHC 3003. At [46]
[294] *Weller v Associated Newspapers Ltd* [2016] WLR 1541, 1.
[295] ibid. At [73]
[296] Moreham and others, *The Law of Privacy and the Media* (n 89). 265-267
[297] See, for example, the landmark cases of *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Murray v Express Newspapers Plc* (n 6)., *Douglas v Hello Ltd* (n 6)., *Max Mosley v News Group Newspapers Limited* (n 6)., *Ferdinand v MGN Ltd* (n 6).
[298] Gavin Phillipson, 'Press Freedom, the Public Interest and Privacy' in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press 2016). 136
[299] Wragg, 'Protecting Private Information of Public Interest: Campbell's Great Promise, Unfulfilled' (n 273). See also K Hughes, 'The Public Figure Doctrine and the Right to Privacy' (2019) 78 Cambridge Law Journal 70.

a way to check whether or not the media abused its power or performed its function.[300] However, unlike the traditional media, individual speakers do not have a duty to serve the public interest. More importantly, media freedom and freedom of expression are not equivalent. Thus, it is questionable whether the balancing approach oriented towards media freedom and public interests is suitable in the case of individual media users. Therefore, the balancing test in the context of individual media users will be critically analysed in the next chapter.

Defences or Justifications

Firstly, as seen in the balancing test, misuse of private information could be justified if freedom of expression or other competing rights prevails over privacy rights. Secondly, as stated above, consent is a related factor in the reasonable expectation of privacy test. Thus, if the claimant formerly gave their consent, they are unlikely to have a reasonable expectation of privacy. Nonetheless, the scope of the consent must take into account. For example, in the *Rocknroll* case, even if the claimant allowed the defendant to take photographs of them naked at the private party, they did not consent to post those photographs on Facebook.[301]

To conclude, the tort of MOPI is specifically designed to protect privacy rights and private information limited to a proportionate restriction of freedom of expression. The two tests above are the gist of the action. Hence, the tort could function in protecting privacy rights and private information in the English jurisdiction. Nonetheless, how successfully the English tort can protect privacy and private information in the case study is still questionable. Hence, the sub-research question is *whether the tort of MOPI is sufficient and suitable to protect privacy and private information in the digital age, particularly in the case of individual media users*. To answer this question, Chapters 5-6 will subsequently demonstrate how the tort of MOPI applies and responds to real problems or case scenarios in the case study. Then, Chapter 7 will evaluate the application of the tort of MOPI.

[300] Rowbottom, 'A Landmark at a Turning Point: Campbell and the Use of Privacy Law to Constrain Media Power' (n 65). 187
[301] *Mr Edward Rocknroll v News Group Newspaper Ltd* [2013] EWHC 24.

3.4 The Characteristic of Misuse of Private Information as a Tort

Although misuse of private information is recognised as a tort,[302] its tortious character has been arguable.[303] Hence, this section will briefly revisit the conceptions of the tort and determine if the new cause of action is compatible with those conceptions. Besides, it will inspect the functions of tort law to consider if misuse of private information could serve those functions.

3.4.1 The Theories of the Tort

A tort is a civil wrong or a breach of duties that affects an individual's interests to the degree that the law allows that individual to claim compensation.[304] In the English common law system, there are separate types of torts with specific elements. Those torts can be divided into two groups. The first group is implicated in liability for harm caused by fault, while the second group concentrates on infringements of specific rights.[305] According to Stevens, the first group is called the 'loss model'.[306] Under this model, the defendant shall be liable for causing the claimant loss. Thus, the causation of loss is essential; whether or not a wrong causing the claimant loss must be answered.[307] The second group is called the 'rights model'.[308] Under this model, torts are designed to protect certain rights and interests, for example, defamation protecting reputation, battery protecting bodily integrity and trespass protecting property rights to land.[309] A wrong is a breach of a duty owed to others. Therefore, before establishing a cause of action, the question of 'whether the claimant had a right against them' must be answered.[310] In other words, under the rights model, the infringement of rights is the gist of tort law.

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[302] *Vidal-Hall v Google Inc* (n 186).
[303] See, for example, Giliker, 'A Common Law Tort of Privacy?' (n 36)., Mo (n 216)., Bagshaw (n 216).
[304] See, for example, Peter Birks, 'The Concept of a Civil Wrong' in David G Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon 1997). 31-50, Zweigert and Kötz (n 35). 596, Witting and Street (n 4). 3-4, Carol Brennan, *Tort Law: Law Revision and Study Guide* (5th edn, Oxford University Press 2019). 1
[305] Donal Nolan and John davies, 'Torts and Equitable Wrongs' in Andrew Burrows (ed), *English Private Law* (Oxford University Press 2013). 932, See also Stevens (n 276). 1-3
[306] Stevens (n 276). 2
[307] ibid.
[308] ibid.
[309] Witting and Street (n 4). 9-13
[310] Stevens (n 276).

In this sense, it seems that misuse of private information is more suitable for the rights model. As explored in previous sections, at the first stage test, the reasonable expectation of privacy is designed to consider if the claimant has privacy rights in the particular case. Hence, the question of whether the claimant had privacy rights is essential. If the claimant has privacy rights in that situation, the defendant will have a duty to respect the claimant's privacy rights. The defendant shall be liable if they breach that duty by unjustifiable disclosure of other private information or unwarranted intrusion into others' private lives. Therefore, it could be said that infringement of privacy rights is the gist of misuse of private information. Accordingly, it appears that misuse of private information could be in line with the concept of tort under the rights model. In this regard, causation is insignificant to the cause of action.

Nevertheless, the balancing test as part of misuse of private information has been criticised for being incompatible with tort laws.[311] For instance, Jojo Y.C. Mo asked, 'is it correct to label misuse of private information as a tort if the action is fundamentally a balancing exercise?'[312] Mo observed that, in tort actions, the claimant is usually needed to prove specific elements, and the courts are not obligated to balance rights. Similarly, the Commission of New South Wales Law Reform (NSW) remarked that 'tortious causes of action do not generally require the courts to engage in an overt balancing of relevant interests…in order to determine whether or not the elements of the cause of action in question are satisfied.'[313] However, the Commission of Australia Law Reform disputed that the NSW's view tends to 'overlook' or 'downplay' the balancing exercise required in some existing tort actions. For example, in private nuisance, the courts must balance the plaintiff's and the defendant's interests in using their land.[314] Thus, the balancing exercise is not at odds with tort law.

The present author relatively agrees with the Australian Commission on this point. She explores that the balancing exercise can be found in other existing torts. For

[311] See, for example, Bagshaw (n 216)., Mo (n 216).
[312] Mo (n 216). 92
[313] 'Invasion of Privacy' (n 36). 42
[314] 'Serious Invasions of Privacy in the Digital Era (Final Report)' (n 36). 70-71

instance, balancing the claimant's reputation and the defendant's freedom of expression lies at the heart of the defamatory tort. Accordingly, the present author considers that the balancing exercise is not alien to the nature of torts. Nonetheless, specific elements of the tort may need to be further clarified, such as the degree of fault, defences and the burden of proof. These drawbacks of the English tort will be considered when answering the key research: *should the English tort of MOPI be introduced as the legal model for new legislation for Thailand?*

3.4.2 The Functions of the Tort

From the English common law perspective, tortious functions can be separated into the corrective justice and instrumentalist approach.[315] Firstly, for corrective justice, a goal of a tort is correcting private injustices, which a wronged party may claim compensation from a wrongdoer.[316] According to Weinrib, 'corrective justice is the idea that liability rectifies the injustice inflicted by one person on another.'[317] In this context, the tort is only concerned with the bilateral relationship between the parties or the interior structure of justification applying to the particular parties. Thus, the state, public interest or other external parties are irrelevant.[318] Secondly, under the instrumental approach, the functions of tort are beyond the correction of the injustice between the parties to achieve a broader goal such as achieving economic efficiency and deterring future wrongdoing.[319] Under this approach, the tort may perform the functions for society in general.

Moreover, in Cane's view,[320] the primary functions of torts are; 'to provide guidance to individuals about how they may and ought to behave in their interactions with others, to provide protection for certain interests of individuals, to express disapproval of and to sanction certain types of conduct, to provide a means of resolving disputes between individuals and in this way to maintain social

[315] Witting and Street (n 4). 14, Stephen Perry, 'Torts, Rights, and Risk' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014). 38-39
[316] Witting and Street (n 4).
[317] Ernest J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52(4) The University of Toronto Law Journal. 349
[318] ibid.
[319] Witting and Street (n 4)., Perry (n 315).
[320] Cane (n 5). 206

order and promote social cohesion'. Furthermore, concerning human rights, the function of tort has been seen in two ways. Firstly, the function of tort law is perceived 'as vehicles to secure the protection of human rights and they may in fact be shaped to ensure that human rights obligations are accommodated.'[321] Secondly, at the level of international human rights law, the function of tort law is to ensure that obligations to protect human rights are secured by states at the domestic level.[322]

From the theories of torts above, it could be concluded that tort law has four main functions; firstly, to protect individuals' rights and interests, secondly, to rectify the injustice caused by one person to another, thirdly to resolve disputes between individuals and fourthly, to regulate or shape individuals' behaviours and sanction types of conduct for collective purposes.

In this regard, the thesis views that misuse of private information can perform those functions. Firstly, it can protect individuals' rights and interests. In the *Douglas* case,[323] the court clearly stated that misuse of private information aims to protect privacy rights and related interests.[324] Furthermore, misuse of private information can safeguard several privacy-related interests such as human dignity,[325] autonomy,[326] and self-development.[327] Moreover, it is argued that the development of misuse of private information as the result of the HRA pays attention to protecting and vindicating an inherent part of rights and function in redressing losses.[328] In this sense, the function of the tort of MOPI is to guarantee that states fulfil their obligations to protect human rights. Without dependence on the HRA, the distinct tort of privacy might also be developed to protect human rights due to other treaty obligations and the recognition of privacy rights in common law as mentioned in section 3.2.1.

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[321] Wright (n 226). 17
[322] Ibid
[323] *Douglas v Hello Ltd* (n 6).
[324] ibid. At [255]
[325] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [12]
[326] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [12] See also, *Douglas v Hello! Ltd* (n 117). At [126], *Max Mosley v News Group Newspapers Limited* (n 6). At [7]
[327] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [12]
[328] Jenny Steele, *Tort Law: Text, Cases, and Materials* (4th edn, Oxford University Press 2017). 24

Secondly, the thesis observes that misuse of private information can perform a corrective justice function. For instance, in a privacy case, injustice occurs when the defendant infringes the claimant's privacy rights or misuse their private information that the defendant has a duty of non-interference. Granting compensation or damages for misuse of private information to the claimant can correct that injustice.

Thirdly, the tort of MOPI can function in resolving private disputes between private parties. In order to resolve private disputes to maintain social order, the present author views that the rights and interests of the claimant and the defendant are needed to be fair and reasonable balanced. In this sense, the balance test between privacy and freedom of expression could serve this purpose.

Fourthly, the present author explores that compensation and tortious liability can make individuals aware of their duties and avoid doing activities that might violate the other's rights. Consequently, misuse of private information could help deter undesirable conduct or regulate the behaviour of members of society to some extent. Nevertheless, Bagshaw questioned the capacity of the tort of MOPI in serving the fourth function. It was argued that an individual's behaviours could not be regulated or shaped by simply balancing competing rights. Furthermore, Bagshaw contended that it is difficult for an ordinary individual to decide a particular balance between their rights and the rights of another.[329]

Despite some criticisms, the thesis argues that misuse of private information is correctly called the tort because it can fit within the concept of tort and serves its purpose. Nevertheless, how satisfactory the tort of MOPI can function in protecting privacy rights and private information is still questionable. This question will be further critically assessed by conducting the case study in the subsequent chapters.

[329] Bagshaw (n 216). 134

3.5 The Application of the General Tort and Privacy Actions in Thailand

After examining the development of the English tort of MOPI, this section will compare it with the Thai general tort. As mentioned, unlike the English legal system, there is no incremental development of the new tort in Thailand. Moreover, dissimilar to the English common law, there is no specific tort like misuse of private information in the Thai legal system. Nonetheless, the general tort (section 420 of the CCC[330]) has been applied to protect privacy rights. In theory, a goal of the Thai tort is to safeguard an individual's rights against another individual.[331] Moreover, it purposes to resolve private disputes between parties, to compensate and remedy an injured person in order to let them return to their restitution.[332] Thus, the general tort can perform the same function as the tort of MOPI to protect privacy rights, corrective justice and resolve private disputes. Nonetheless, in the Thai civil law system, it is widely argued that the objectives of punishment, sanction or deterrence are not in the area of torts.[333] Concerning the damages calculation of the general tort, Thai courts would compensate to let the injured person return to their restitution.[334] Hence, punitive damages have not been generally given.[335] On this basis, it seems that the Thai general tort does not function as the instrumental approach.

Accepting that the Thai general tort can serve the same function as the English tort of MOPI, this section intends to examine how the general tort fulfils its functions. In other words, it will explore how the general tort has been interpreted and applied to protect privacy rights in Thailand. Thus, section 3.5.1. will first analyse the impact of the Constitution of Thailand on an interpretation of rights in section 420,[336] which affects privacy actions. Then, section 3.5.2. will study the essential elements of the general tort to understand how it can function in

[330] The Civil and Commercial Code., Section 420
[331] Pengniti (n 4).
[332] Poonyapan (n 19)., Pengniti (n 4)., Supanit (n 4).
[333] Jeed Settabut, *The Principle of Civil Law: Torts* (8th edn, Faculty of Law, Thammasat University 2013). 23-26, Pengniti (n 4). 2, Sanunkorn Sottipun, *The Explanation of Tort Law, Agency without Specific Authorisation, and Undue Enrichment* (5th edn, Winyuchon Publication House 2014). 37
[334] Poonyapan (n 19)., Pengniti (n 4)., Supanit (n 4).
[335] Sakda Thanitcul, 'Adoption of Punitive Damages into the Thai Law' (Chulalongkorn University 2012) Project Report.
[336] The Civil and Commercial Code., Section 420

protecting privacy rights. The comprehension of these elements is crucial for further assessing *whether the general tort is suitable and sufficient to protect privacy and private information in the digital age, particularly in the case study of individual media users*.

3.5.1 The Impact of the Constitution of Thailand on Privacy Actions

When the Civil Code was enacted, the right to privacy was not recognised in the Thai Constitution.[337] The right to privacy was later recognised by Thai Constitution due to obligations under international treaties and the influence of Western privacy concepts as mentioned in Chapter 2. As a matter of fact, 'the right to private life' was first introduced in Thailand's Constitution of 1991.[338] In the present Constitution (Thailand's Constitution of 2017), privacy rights are guaranteed in section 32.[339] Before privacy rights were recognised in the Constitution, there were controversial issues concerning the interpretation 'any rights' protected in section 420. In particular, section 420 provides that 'a person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to compensate them for any damage arising therefrom.'[340] In this regard, it was arguable if any rights could include privacy rights. On the one hand, some academics suggested that if a specific word is placed before general terms, the general terms must be interpreted in light of the specific word.[341] Thus, 'any rights' (the general terms) must be interpreted in relation to the property rights (the specific word). On the other hand, it is widely argued that 'any rights' in section 420 should include any rights recognised by laws.[342] Nonetheless, privacy rights were not recognised by any Thai law at that time. Thus, it was uncertain if section 420 could apply to protect privacy rights. Unlike common law tradition, the Thai judges do not have the power to develop new laws, but they have a duty to establish the fact of the case and apply or interpret the rules codified in the

[337] Thailand has 20 constitutions since a constitutional monarchy regime was established in 1932 (B.E.2475). The Civil Code was enacted in 1925.
[338] Thailand's Constitution of 1991. Section 44
[339] Thailand's Constitution of 2017. Section 32
[340] The Civil and Commercial Code.
[341] Rongphol Charoenphandhu, *Civil Law: General Principles* (Bangkok: Chareonvitaya Printing 1977)
[342] Pindhasiri (n 61)., Supanit (n 4)., Pengniti (n 4).

CCC to the case. Hence, the interpretation of provisions in the CCC and the recognition of rights are significant.

On this matter, the present author utterly agrees with the second opinion that any rights shall include any rights recognised by law. Similar to the English common law tort, the Thai general tort is based on 'breach of duty'.[343] Under this theory, a person shall have a duty to respect and avoid breaching the rights of another. For example, in the Supreme Court case number 124/2487, the court explained that rights are an interest of a person, which other persons have a duty to respect.[344] If that duty is breached, an injured person shall be compensated.[345] However, in the Supreme court decision 404/2555, the court held that 'any rights of another person' in section 420 means any rights which are recognised by laws.[346] In other words, a person has a duty only the rights recognized by Thai laws. The laws in this regard are not limited to provisions in the CCC but mean any laws such as criminal law and constitutions.[347] Consequently, before privacy right was guaranteed by the Constitution, the courts were hesitant to apply section 420 to protect privacy right because it was not explicitly recognised by any laws.

After the recognition of privacy rights in the Constitution, privacy action in tort was first decided by the Supreme court in 2015. In the Supreme Court decision 4893/2558, the court clearly stated that the rights protected by section 420 include privacy rights since it is now directly recognised and protected by the Constitution.[348] Accordingly, the debates among Thai scholars regarding interpreting any rights in section 420 are over. It is now commonly agreed that 'any rights' in section 420 include the rights to privacy. Therefore, the general tort can theoretically function in protecting privacy rights. A person shall have the duty to respect privacy rights of another. In this sense, it could be seen that the recognition of privacy rights in the Constitution impacts the interpretation of any rights in section 420 and privacy action in tort. Nevertheless, unlike the impact of

[343] Supanit (n 4)., Sottipun (n 333)., Poonyapan (n 19).
[344] Supreme Court Decision 124/2487 The claimant sought damages for defamation.
[345] Poonyapan (n 19).
[346] Supreme Court Decision 404/2555. (2012) The claimant sought damages arising from criminal proceedings.
[347] Cheewin Mallikamarl, 'The Protection of Celebrity's Identity Right', (LLM thesis, Chulalongkorn University 2007)
[348] Supreme Court Decision 4893/2558 (n 21).

the HRA on the English privacy laws, the impact of the Constitution on privacy action in Thailand does not lead to the development of the new law.

In the Thai legal system, the Constitution has little impact on Thai private law. Similar to the English legal system, private individuals cannot claim damages based upon an infringement of the constitutional rights in the Thai legal system. Although section 213 of the Constitution states that a person whose rights guaranteed by the Constitution are violated has the right to submit a petition to the Constitutional Court, they cannot submit the petition against another party.[349] On this basis, it could be argued that the Constitution law does not directly affect private matters. Despite the guarantee of privacy protection in the Constitution, a private individual cannot claim damages for breach of privacy rights against another private individual without referring to a specific provision in the CCC. For example, in the landmark privacy case, the Supreme Court decision 4893/2558, the court highlighted that 'the Constitution aims to limit or control the power of public authorities and protect fundamental rights, not to determine civil wrongs.'[350] Thus, in order to consider the defendant's civil liabilities or resolve private disputes, the court must apply the rules particularly enacted in the CCC.[351] In other words, the decisions of the court in a privacy case must depend on the rules explicitly provided in the CCC. Moreover, as mentioned in chapter 1, due to the civil law tradition and Thai judicial styles, Thai courts do not generally create new rules or law. Hence, without the explicit provision in the CCC, the Thai courts have always hesitated to create additional or new rules to protect privacy rights or other constitutional rights. On the contrary, in the English legal system, even though the private individual cannot claim damages based upon an infringement of the convention rights, when resolving the dispute between the parties, the English courts developed the new rules in accordance with those convention rights. This discrepancy reflects the differences in the reconstruction of a remedy and legal development between the English and Thai legal systems. While the tort

[349] Thailand's Constitution of 2017., Section 213. See also the Organic Act on Procedures of the Constitutional Court 2018. Section 46 and 47 state that a person can submit a petition to the Constitutional Court if their right or liberty has been directly infringed by a state agency, or state official in certain cases and conditions. For example, section 47(4) states that a person cannot submit a petition concerning matters that are being adjudicated by the Court of Justice or matters that have already reached a final judgment.
[350] Supreme Court Decision 4893/2558 (n 21).
[351] ibid.

of MOPI is a result of judicial development, the judge's role appears to be less important in developing Thai law. Legal development in Thailand has mainly relied on legislation.

In conclusion, after privacy rights were recognised by the Constitution, the Thai Supreme court affirmed that any rights in section 420 of the CCC could cover privacy rights. Hence, section 420 or the general tort can now protect privacy rights. Therefore, the next section will further examine how to establish the general tort by exploring the essential elements of section 420.[352]

3.5.2 The Essential Elements of the General Tort

Section 420 of the CCC provides that

'a person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any rights of another person is said to commit a wrongful act and is bound to compensate them for any damage arising therefrom.'[353]

As stated in Chapter 1, this general clause of civil liabilities is considered the general tort in the Thai legal system. Under section 420, there are four essential elements to establish a tortious liability:

1) an act of the defendant must be unlawful (unlawful act),
2) the act was committed by willfulness or negligence (willfulness or negligence),
3) the life, body, health, liberty, property or any rights of another person is injured (the actual damage),
4) the damage must arise from the act of the defendant (causation).

Therefore, a breach of privacy rights would be a wrongful act, for which the claimant will be entitled to be compensated if the four essential elements can be satisfied.

[352] The Civil and Commercial Code.
[353] ibid.

1) An Unlawful Act

An unlawful act or wrongful act means any act that causes damages. The unlawful act under this section is not necessary to be explicitly barred by laws but means the act committed without authority, rightfulness or other legal justifications.[354] Thus, even though laws do not explicitly prohibit the invasion of privacy, it could be an unlawful act. However, if a defendant has authority or rightfulness to do such act, he will not commit a wrongful act. For instance, in the Supreme Court decision 5372/2552, the court held that the defendant has the authority to reject a request for deleting the claimant's private information according to the Credit Information Business Act. Consequently, rejecting the request was not a wrongful act.[355]

Nonetheless, in the Supreme court case number 4893/2558, the court underlined that although the defendants were journalists with press freedom, they could not act by any means to invade or violate another person's right to privacy.[356] In other words, press freedom did not authorise the defendants to invade the claimant's privacy. As a result, in this case, the violation of privacy was an unlawful act according to section 420. In this context, the thesis observes that the mere fact that a person has press freedom or freedom of expression is insufficient to justify or authorise an invasion of privacy; otherwise, all actions would be lawful.

2) Willfulness or Negligence

To commit a wrongful act, the defendant must willfully or negligently commit or omit an act. In other words, a person will have tortious liability only if they wilfully or negligently injured someone else's rights.[357] Therefore, willfulness or negligence is a substantial essential of the tort. For willfulness, the defendant does not have to foresee or desire that specific consequences will occur, but they need to know or be aware that consequences or damages will arise from their

[354] Tingsaphati (n 19). 75 See also Pengniti (n 4)., Poonyapan (n 19).
[355] Supreme Court Decision 5372/2552. (2009)
[356] Supreme Court Decision 4893/2558 (n 21).
[357] Supanit (n 4)., Sottipun (n 333)., Poonyapan (n 19)., Pengniti (n 4).

action.[358] In terms of negligence, even though the defendant does not wilfully injure another person, the defendant may commit the wrongful act if they act without exercising reasonable care that might be expected from a person in the same conditions and circumstances.[359]

3) An Actual Damage

In the Thai legal system, the functions of tort law have been predominantly centred on the notion of reparation or restitution and compensation for a loss. As explained earlier, most Thai scholars have argued that the main purpose of tort law is to compensate or grant a remedy to an injured person in order to let them return to their restitution.[360] Since the purpose of the tort is to compensate an injured person, the actual damage is essentially required. Although the action is unlawful or unauthorised, there will be no tortious act if there is no arisen damage.[361] It should be noted that the actual damage differs from the amount of compensation. Under section 420, the damage can be either pecuniary or non-pecuniary damages, but it must actually arise, was arisen or will undoubtedly arise in the future.[362] Accordingly, the potential or uncertain damage is insufficiently to establish the tort under this section.

Moreover, according to section 420, the claimant must prove that there is specific damage to life, body, health, liberty, property or any rights.[363] Other damages, which are not specifically provided in this section, will not be compensated. [364] For instance, the damage to reputation must be claimed under defamation law (section 423)[365] because section 420 does not include a reputation right.[366] As discussed, after the Constitution recognises privacy rights, any rights in section 420 include privacy rights. Therefore, a defendant would commit a wrongful act if damage to the privacy rights of the claimant arises. Nevertheless, at trial, the

[358] Tingsaphati (n 19). 87-89 See also Pengniti (n 4). Poonyapan (n 19).
[359] Tingsaphati (n 19).90
[360] Poonyapan (n 19)., Pengniti (n 4)., Supanit (n 4).
[361] Pengniti (n 4). 91
[362] ibid. 93
[363] Supanit (n 4). 13
[364] Pengniti (n 4). 121 See also Tingsaphati (n 19). 110
[365] The Civil and Commercial Code., Section 423
[366] Pengniti (n 4). 121 See also Tingsaphati (n 19). 110

actual damage in privacy cases seems difficult to prove and puts a heavy burden on the claimant.[367] Thus, it is disputed if the general tort is sufficient to protect privacy rights. The problems of this element will be highlighted and critically analysed in the following chapters.

4) Causation

Furthermore, the arisen damages must have a causal link to an unlawful act committed by the defendant. In other words, the actual damage must be caused by an unlawful act.[368] In theory, most Thai jurists have argued that there are two doctrines of causation, the equivalence of conditions and adequate causality.[369] However, there is no consensus on which doctrine should be applied. Firstly, the doctrine of equivalence of conditions suggests that every condition should be weighed equally. Consequently, a wrongdoer shall be liable for damages if his action is one of the conditions that directly causes damages, even though several conditions lead to the damages in that case.[370] Secondly, the doctrine of adequate causality proposes that if several conditions cause the arisen damages, the wrongdoer shall be liable only for a natural or proportionate consequence arising from his action.[371]

In practice, it is uncertain which doctrine is applied by Thai courts. In an empirical study of Thai Supreme Court decisions, Wichitkraisorn found that neither of the doctrines was explicitly employed by Thai courts. The courts have instead applied a 'direct but not too remote' principle or a ‘proximate consequence’. Under this principle, the defendant’s act must, directly but not too remote, cause the damages.[372] Moreover, Wichikraisorn found that Thai courts have regularly failed to address causation in their decisions or have not clarified it in detail.[373]

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[367] Iammayura, ‘Laws Related to Personal Data in Thailand’ (n 7)., Nakwanit (n 23)., Thongraweewong, ‘Legal Measures for Protecting the Right to Privacy: A Study of Invasion of Privacy through the Use of Social Network Websites’ (n 7)., ‘Supporting Document for a Personal Data Protection Act:General Meeting Session’ (n 7).
[368] Pongsakorn Sookchuen, ‘Damage in Tort Law Under the Thai Civil and Commercial Code’ (LLM in Private Law, Thammasat University 2013).
[369] Tingsaphati (n 19)., Poonyapan (n 19)., Pengniti (n 4)., Supanit (n 4).
[370] Tingsaphati (n 19)., Poonyapan (n 19)., Pengniti (n 4). Supanit (n 4).
[371] Tingsaphati (n 19)., Poonyapan (n 19)., Pengniti (n 4)., Supanit (n 4).
[372] Rangsarid Wichikraisorn, ‘Causation in Tort Law: A Study on Thai Supreme Court Decisions’ (LLM in Private Law, Thammasat University 2014).
[373] ibid.

In Supreme court decision 4893/2558, a landmark privacy case, the court also failed to indicate the causal link between damages and the defendant's action.[374] Some scholars also argued that the element of causation is not indispensable in privacy cases.[375] Nonetheless, the present author contends that to avoid distorting the conception of the general tort, the claimant must demonstrate how the actual damage causally links to the defendant's action. Unlike the English common law tort, there are no specific types of torts with particular elements. Hence, the Thai tort cannot be separated into two groups like the English common law torts, the first group with the requirement of causation and the second group without causation. In the Thai legal system, to establish the general tort, all essential elements must be met. Since causation is one of the essential elements to establish the general tort, it is indispensable in privacy cases. However, the damages to privacy rights are normative. Therefore, the causation in some privacy cases is likely problematic. Thus, it is arguable whether the general tort is suitable for privacy cases. The problems of the actual damage and causation in privacy cases will be profoundly discussed later in the thesis.

Defences or Justifications

Although there is no explicit provision in the CCC, several defences or legal justifications can be applied. Firstly, if the action in question is lawful, the tortious act will not be committed. Therefore, if the defendant can prove that they have authority, rightfulness or acceptable justification in their action, they would not commit a wrongful act. For instance, it is argued that public interests could be an acceptable justification to invade privacy rights.[376] Nonetheless, it is questionable if a private individual can claim that they invaded other privacy rights for public interests without any explicit provision of exception. This question will be further addressed in the following chapters. Moreover, unlike the tort of MOPI, there is a lack of balancing test between privacy and freedom of expression in Thai tort law. The absence of the balancing test in the Thai tortious

[374] Supreme Court Decision 4893/2558 (n 21).
[375] Pindhasiri (n 61). 56
[376] Prajak Phutthisombat, *The Civil and Commercial Code: Torts, Agency without Specific Authorisation, Undue Enrichment* (Mee Sombat 2005). 65-67

framework will be further demonstrated in the case study. Secondly, if there are no damages, the wrongful act would not be committed. Hence, the proof of damage is significant in privacy cases. Thirdly, a given consent has been broadly applied to justify the action of the defendant in privacy cases. However, the scope and limitation of the consent should be limited. The limitations of consent will be further examined in the case study.

To sum up, the recognition of privacy rights in the Constitution influences the interpretation and application of any rights stipulated in section 420.[377] At present, it is commonly agreed that any rights in section 420 include privacy rights. Hence, the general tort could be applied to protect privacy rights. In theory, the general tort or section 420 can guard against any wrongful acts that damage privacy rights as long as four essential elements are met. Nevertheless, in practice, some elements are likely problematic in privacy cases, such as the actual damages and the causation.

3.6 Conclusion

Prior to the emergence of the HRA,[378] there were gaps in privacy protection in the English laws. Hence, when the HRA came into force, breach of confidence was extended to protect privacy rights and interests. The extended version of breach of confidence has then become the separate and distinct tort of MOPI. In this sense, it could be argued that the tort of MOPI was developed as the result of the HRA and in response to privacy needs. This development could be an example of how common law has adapted its existing laws to guard privacy rights against invasions of the media. In order to establish the tort of MOPI, first, the claimant must have a reasonable expectation of privacy. Secondly, the privacy rights of the claimant must outweigh freedom of expression of the defendant. However, since misuse of private information was an expanded form of the breach of confidence, the characteristic of the tort is questionable. On this matter, the thesis disputed that misuse of private information is correctly called a tort since it could be compatible with the tortious concepts and perform tortious functions.

[377] The Civil and Commercial Code. Section 420
[378] The Human Rights Act. 1998

Furthermore, as the tort of MOPI was developed in the shadow of mass media, its application has mainly concerned with how to balance privacy with media freedom, not freedom of expression. Therefore, it is debatable if the tort of MOPI is suitable in the case of individual media users. To answer this question, the next chapter will analyse the balancing test in the context of individual media users.

On the contrary, there is no specific tort in the Thai legal system. However, the general tort can perform the same function as the English tort of MOPI to protect privacy rights. Prior to the recognition of privacy rights in the Constitution, it was debatable whether 'any rights' in section 420 cover privacy rights. This problem was later addressed following the constitutional recognition of privacy rights. Now, it is commonly accepted that any rights in section 420 shall include privacy rights. In this sense, the Constitution appears to affect the interpretation and application of the general tort. Nonetheless, dissimilar to the English legal system, the Thai courts did not develop the new rules or expand the existing laws to respond to the new problems, but they relied on interpreting the Code and legal texts. Hence, it could be said that the legal development in Thailand has mainly depended on legislation, not judicial development. Under the general tort, four essential elements are fundamentally required. However, since the general tort is not intentionally designed to protect privacy rights and private information, some elements might be inappropriate or ineffective in privacy cases. Therefore, it is questionable if it is suitable and sufficient to protect privacy and private information in the digital age, particularly in the case study of individual media users. This question will be analysed and answered later in this thesis.

Chapter 4: The Balancing Test between Individual's Privacy and Freedom of Expression

4.1 Introduction

After examining the development of the tort of MOPI and the key elements of the tort, this chapter will particularly critically analyse the balancing test between privacy and freedom of expression in the case of individual media users. As argued, the tort of MOPI has been shaped by mass media or traditional media. The majority of the landmark privacy cases in England have involved mass media.[379] Hence, the balancing test in the landmark cases has been focused on the balancing between privacy and media freedom, not freedom of expression. Therefore, public interests have been at stake when weighing the balancing test in those cases.[380] Nevertheless, unlike mass media, individuals do not have a duty to serve the public interest. While an individual may establish public interest in disclosing private information, there may be other appropriate justifications. Besides, freedom of expression and media freedom are somewhat different. Thus, the current judicial method, which focuses on public interests, has been criticized by some scholars.[381] However, this chapter does not aim to develop and introduce a new method, but it intends to illustrate how the current method would likely apply to individual media users. It will also answer whether the balancing approach shaped by mass media is applicable and suitable for individual media users.

Accordingly, section 4.2. will first explore the relationships and the differences between freedom of expression and media freedom. This section will underline media function to indicate why the question of whether the public interest is involved is vital in the balancing test between privacy and media freedom. After that, section 4.3 will locate where the public interest lies in freedom of expression

[379] See, for example, the landmark cases of *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Murray v Express Newspapers Plc* (n 6)., *Douglas v Hello Ltd* (n 6)., *Max Mosley v News Group Newspapers Limited* (n 6)., *Ferdinand v MGN Ltd* (n 6).

[380] See, for example, Phillipson, 'Press Freedom, the Public Interest and Privacy' (n 298). 136, Wragg, 'Protecting Private Information of Public Interest: Campbell's Great Promise, Unfulfilled' (n 273)., Hughes, 'The Public Figure Doctrine and the Right to Privacy'(n 299).

[381] See, for example, Jelena Gligorijevic, 'A More Principled Approach to the Conflict between Privacy and Freedom of Expression in the Law of Misuse of Private Information' (PhD thesis, Trinity College, Cambridge 2019).

before arguing that an individual's publication or expression can produce public interest. Subsequently, section 4.4 will investigate the extent and quality of public interest in disclosure that could possibly override privacy rights. In this regard, the thesis will argue that the public interest should not be interpreted too broadly. Finally, section 4.5 will argue that while individual media users can establish public interest justification, they can rely on other justifications based on freedom of expression. Since case law concerning the balancing test in the case of individual media users is limited, the thesis will use 'the two continuums of value and of level intersect'[382] model to illustrate an appropriate balance between individual's privacy rights and freedom of expression in hypothetical cases. This model will also be applied in the case study in the following chapters. At the end of the chapter, the thesis will assert that although the tort of MOPI and the balancing test have been developed in the shadow of mass media, they can adapt to the context of individual media users. Nonetheless, due to a wide range of values and levels of individual expression, the balancing test in the case of individual media users may somewhat be different from those of mass media.

4.2 The Relationships and the Differences between Freedom of Expression[383] and Media Freedom[384]

While freedom of expression is concerned with freedom of individuals to express their opinions,[385] media freedom belongs to mass media or traditional media as an institution.[386] It is emphasised that individual freedom of expression is essential for an individual as a human being. Hence, although media freedom and freedom of expression share some theoretical arguments, they focus on different values

[382] Rowbottom , 'In the Shadow of the Big Media: Freedom of Expression, Participation and the Production of Knowledge Online' (n 65). See also Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (n 65).
[383] The terms 'freedom of expression' and 'freedom of speech or free speech' will be used interchangeably in this chapter.
[384] The terms 'media freedom' and 'free press or press freedom' will be used interchangeably in this chapter.
[385] Eric Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2007).
[386] Jacob Rowbottom, *Media Law* (Hart Publishing 2018)., Lord Justice Leveson, 'An Inquiry into the Culture, Practicesand Ethics of the Press' (HC 780, 2012)., J Lichtenberg, 'Foundations and Limits of Freedom of the Press' in J Lichtenberg (ed), *Democracy and the Mass Media* (Cambridge University Press 1990)., Damian Tambini, *Media Freedom* (Polity Press 2021).Jan Oster, *Media Freedom as a Fundamental Right*, vol 30.;30; (Cambridge University Press 2015). But, see, section 4.5.1, it is controversial if the concept of media freedom should be evolved in the digital age.

and interests. This section will examine the relationships and differences between media freedom and freedom of expression. More importantly, it will demonstrate why the English courts have concentrated on public interest when privacy conflicts with media freedom.

4.2.1 The Relationships between Media Freedom and Freedom of expression

The relationships between media freedom and freedom of expression are complex. Despite the fact that media freedom and freedom of expression are codified together in Article 10 of the ECHR, the ECtHR has recognised the special role of the media and accorded privileged protection to media.[387] In England, notwithstanding the absence of a codified constitution, freedom of expression and media freedom have different histories and degrees of protection.[388] In some countries, media freedom and freedom of expression are guaranteed separately and discretely in the Constitutions, for example, the US[389], Germany[390], Thailand.[391] In this sense, it could be said that even though media freedom and freedom of expression are related, they are not identical.

Concerning the relationships between media freedom and freedom of expression, Oster observed that 'media freedom is partly a derivative right from freedom of expression, and partly a self-standing right'.[392] On the one hand, it is asserted that media freedom is partly a derivative right to freedom of expression, relying on justifications underpinning freedom of expression. Nonetheless, the intensity of protection afforded to media entities and freedom of expression given to private individuals is not equal.[393] To perform its duties, the media is given a special media speech privilege. For example, media freedom protects both dissemination of the information or the ideas of the media itself and of a third

[387] See, for example, *Observer and Guardian v UK* [1992] 14 EHRR 153., *Jersild v. Denmark* (1995) 19 EHRR 1, *Bladet Tromso and Stensaas v Norway* (2000) 29 EHRR 125, *Bergens Tidende v Norway* (2001) 31 EHRR 16, *Busuioc v Moldova* (2006) 42 EHRR 14
[388] Geoffrey Marshall, 'Press Freedom and Free Speech Theory' [1992] Public Law 40., Rowbottom, *Media Law* (n 386).
[389] The First Amendment states that '[c]ongress shall make no law…abridging the freedom of speech, of the press…'
[390] Art 5(1) of the German Basic Law provides specific protection of freedom of the press and of reporting.
[391] Constitution of The Kingdom of Thailand 2017 protects freedom of expression and media freedom separately in section 34 and 35, respectively.
[392] Oster, *Media Freedom as a Fundamental Right* (n 386). 48
[393] ibid. 48-50

party.[394] On the other hand, Oster argued that media freedom is partly 'a self-stand fundamental right'.[395] In this respect, media freedom as an independent right provides a broader scope of protection than freedom of expression. For instance, media protection may not be directly related to the content of the publication but could include newsgathering and editorial processes.[396]

Likewise, in the eyes of numerous English scholars, media freedom and freedom of expression are not equivalent.[397] For example, Phillipson contended that special privileges are given to the media as it has vital roles for the public at large. Thus, if the court treats every individual self-expression equivalent to the media expression, it will risk 'over-privileging media speech'.[398] At the same time, if special media privileges are denied, it would impede media freedom.[399] Accordingly, Phillipson stressed that media freedom and freedom of expression should not be treated as equal. Furthermore, Barendt commented that the media or the press is not an individual who has human rights. Thus, moral and spiritual development is not a stake when an individual's publication is restricted. Although media freedom relates to some fundamental concepts of freedom of expression, it depends on the interests of audiences and the role to inform them. Therefore, in Barendt's view, media freedom and freedom of expression are not the same.[400] Consequently, Barendt emphasised that the differences between them should be borne in mind when considering the weight associated with that freedom when it clashes with privacy rights.[401]

[394] ibid.
[395] ibid. 51
[396] ibid.
[397] See, for example, Rowbottom, *Media Law* (n 386)., Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press 2006)., Lord Justice Leveson, 'An Inquiry into the Culture, Practicesand Ethics of the Press' (n 386).
[398] Gavin Phillipson, 'Leveson, the Public Interest and Press Freedom' (2013) 5 Journal of Media Law 220. 224-225
[399] ibid.
[400] Eric Barendt, 'Privacy and Freedom of Speech' in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press 2006). 23
[401] ibid.

4.2.2 The Differences between Media Freedom and Freedom of Expression

There are three common justifications of freedom of expression, the value of the truth, citizens participating in democracy and self-fulfilment.[402] Although media freedom shares some justifications with freedom of expression, some of them are inapplicable to media institutions. Moreover, media freedom and freedom of expression serve different purposes and have different degrees of communicative power. Three main differences between them could be seen as follows:

Firstly, unlike freedom of expression, media expression could not be supported by self-fulfilment, human autonomy and interests of the speaker because the media entity[403] is not a human being. Besides, unlike an individual speaker, media freedom could not depend on the speaker's interests. Instead, media protection relies on collective interest, public interests and the audience's sake. For example, in the Leveson report, Leveson observes that 'press organisations are not human beings with a personal need to be able to self-express.'[404] More recently, in the *Miranda* case, the court emphasised that freedom of expression 'belongs to every individual for his own sake', but media freedom is given to the media 'to serve the public at large'.[405] Accordingly, the media cannot enjoy protection for its own sake as it is given only for the sake of its readers or audience. This decision reflects the core difference between freedom of expression and media freedom. As the English landmark privacy cases have mostly engaged with mass media or media institution,[406] it is critical to evaluate whether the public interest is at stake when media freedom collides with privacy.[407]

Secondly, dissimilar to those individual speakers, an argument of participatory democracy could not justify media expression since the media institution is not

[402] Barendt, *Freedom of Speech* (385). 1-23
[403] A media entity is an institution or organization comprised of various individuals who perform different functions on a professional basis. Generally, the media entity is a mass communication with significant communicative power.
[404] Lord Justice Leveson, 'An Inquiry into the Culture, Practices and Ethics of the Press' (n 386). 62
[405] *R (Miranda) v Secretary of State* [2014] EWHC 255. At [46]
[406] See for example, the landmark cases of *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Murray v Express Newspapers Plc* (n 6)., *Douglas v Hello Ltd* (n 6)., *Max Mosley v News Group Newspapers Limited* (n 6).
[407] See for example *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Max Mosley v News Group Newspapers Limited* (n 6)., *McKennitt v Ash* (n 146).

considered as a citizen in a democratic state.[408] Media freedom, however, has a different essential role in supporting a democratic society. In this regard, it is rather perceived as an instrument to support citizens' participation in democracy by imparting ideas and information or functioning to alert the public.[409]

For example, in *McCartan Turkington Breen v. Times Newspapers*,[410] Lord Bingham explained that

'The majority [of citizens] can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But [they] cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom . . .'[411]

More particularly, in the English jurisdiction, media freedom is justified by the role of 'public watchdog'. The English courts have repeatedly declared the vital role of the media in a democracy as a 'public watchdog', functioning to inform and alert the public on matters of public interest.[412] Similarly, it is discussed that the media function is to generate 'public discourse'.[413] The concept of public discourse was built from the works of Jurgen Habermas and Robert Post. According to Habermas, the discourse is not equivalent to a speech, but it is a form of speech aiming to reach a 'rationally motivated consensus.'[414] Hence, the public discourse could be defined as 'an open, free and argumentative communicative process aimed at reaching an understanding and forming public opinion on matters of public concern.'[415] Consequently, when striking a balance between media freedom and privacy rights, the court will consider whether the media performs

[408] Rowbottom, *Media Law* (n 386). 8
[409] Lord Justice Leveson, 'An Inquiry into the Culture, Practicesand Ethics of the Press' (n 386)., Phillipson, 'Leveson, the Public Interest and Press Freedom' (n 398).
[410] *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 227.
[411] ibid. At [290]
[412] See for example, *Campbell v Mirror Group Newspapers Ltd* (n 6)., *ETK v News Group Newspapers Ltd* [2011] Court of Appeal (Civil Division) EWCA CIV 439., *Jonathan Spelman (by his Litigation Friends Mark Spelman and Caroline Spelman) v Express Newspapers* [2012] EWHC 355 (QB).
[413] Oster, *Media Freedom as a Fundamental Right* (n 386).
[414] ibid. 29 Footnote 25
[415] ibid.

its role as a public watchdog to impart information to the public on matters of public concern.[416] For example, in the *Campbell* case, when exercising the balancing test between media freedom and privacy, the court stated that one factor to be weighed is the duty of the media 'to impart information and ideas of public interest which the public has a right to receive'.[417] However, unlike the media, individual speakers do not have a duty to perform the public watchdog role or alert the public, but they can enjoy freedom of expression to participate in democracy and speak for their own sake.

Thirdly, it is explored that media as an institution generally come with a communicative power, which is much stronger than the power of individual speakers. The communicative power or media power in this regard is not just an ability to communicate to a mass audience but also its power to shape and influence public opinion.[418] Nevertheless, this exceptional power of media seems to be weakened in the Internet context, while some individual media users have gained more communicative power, for example, social media influencers. Hence, the consequences of individual users' publications might be at the same level as the traditional media in some circumstances, which will be seen later in the thesis. Besides, as seen in the last section, another difference is that institutional media has legal privileges beyond freedom of expression.[419] Since the media is accorded special privileges, it is subject to additional responsibilities and duties. For instance, the media must abide by the standards of conduct, ethics of journalism, the principles of 'responsible journalism'[420] and media regulation. In other words, the media must exercise media freedom within the rule of law, the principles regarding common law and statutory framework to entitle media protection.[421] In a privacy case, the influence of the Press Complaints Commission Code is one of

[416] See for example, *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Observer and Guardian v. UK* (n 387)., *Von Hannover v Germany* App no. 59320/00 (ECtHR, 24 June 2004), *McKennitt v Ash* (n 259).
[417] *Campbell v Mirror Group Newspapers Ltd* (n 6). at [116]
[418] Rowbottom, *Media law* (n 386). 11-12
[419] Jan Oster, 'Theory and Doctrine of "Media Freedom" as a Legal Concept' (2013) 5 Journal of Media Law 57. See also Eric Barendt, 'Bad News for Bloggers' (2009) 1 The journal of media law 141., Damian Carney, 'Theoretical Underpinnings of the Protection of Journalists' Confidential Sources: Why an Absolute Privilege Cannot Be Justified' (2009) 1 The journal of media law 97.
[420] *Reynolds v Times Newspapers* [2001] AC 127. The claimant, a former public figure, claimed against the defendants for defamation. The defendants pleaded qualified privileged at common law. See also, *Jameel v Wall Street Journal Europe Sprl* [2007] AC 459.
[421] Lord Justice Leveson, 'An Inquiry into the Culture, Practicesand Ethics of the Press' (n 375). 65-66

the reasons why the presence of public interest has become the key factor in the balancing test between media freedom and privacy.[422] In this sense, it seems that the media has an ethical duty to maintain its professional standards and respect individuals' privacy rights except for serving the public interest. Rowbottom commented that asking whether the public interest is involved in a privacy case is a way of checking whether the media performs its duty or abuses its power.[423] Accordingly, when media freedom conflicts with the individual's rights and interests, the court would consider whether the media performs its duties and responsibilities appropriately. Nonetheless, individual speakers generally do not have those responsibilities and duties.

To conclude, media freedom is different from freedom of expression for three main reasons. Firstly, media freedom could be justified by public interest or the audience's interests, not a speaker's interests. Self-fulfilment cannot justify media expression. Therefore, whenever privacy and media freedom conflict, the English courts have focused primarily on the degree to which public interest is generated by media freedom. Secondly, media freedom has the function of alerting the public and playing the role of the public watchdog. Nonetheless, individual speakers do not have to perform this function. Thirdly, media freedom usually comes with more communicative power and responsibilities than individual speakers. Due to those differences, the balancing test when an individual's expression conflicts with privacy rights of another might be different from the balancing in the case of traditional media or mass media. The balancing test in the case of individual speakers will be further demonstrated in section 4.5. The following section will first locate public interests in freedom of expression and argue that individual expression or disclosure of private information could generate public interests.

4.3 Locating Public Interest in Freedom of expression

As examined in the previous section, media freedom is mainly justified by the interests of the public and its functions to impart information and ideas to the

[422] Rebecca Moosavian, 'Deconstructing "Public Interest" in the Article 8 vs Article 10 Balancing Exercise' (2014) 6 Journal of Media Law 234.
[423] Rowbottom, 'A Landmark at a Turning Point: Campbell and the Use of Privacy Law to Constrain Media Power' (n 65).

public for generating public discourse. Although individuals do not have those duties and functions to serve the public interest or generate public discourse, the public interest lies in freedom of expression. Hence, when they exercise freedom of expression, the public interest could also be generated.

Firstly, it appears that public interest is engaged with the value of the truth. On this basis, the English courts ruled that correcting the false image of the public figures is one of the public interest justifications. For instance, in the *Campbell* case, the court held that the publicity concerning a claimant's drug addict was a 'matter of legitimate public comment'. It further stressed that 'where a public figure chooses to make untrue pronouncements about his or her private life, the press will normally be entitled to put the record straight.'[424] Similarly, in the *Ferdinand* case, the court explicitly declared that 'one facet of the public interest can be correcting a false image.'[425] Moreover, it explained that although the question of whether the information is private is irrelevant to the question of whether it is true or false, 'in the context of a defence of public interest based on correcting a false image, truth is important.'[426] This reflects the substantial value of the truth to the public. Although those landmark cases are concerned with mass media, correcting false information could justify an individual's expression since the value of the truth is rooted in freedom of expression. Freedom of expression is significant for discovering the truth for the public good.[427] The notion of the public figure and the extent of public interest will be further discussed in the next section.

Secondly, the public interest is located in the argument of participatory democracy supporting freedom of expression. Under this argument, all citizens are encouraged to exercise freedom of expression to participate effectively in democracy, which could then generate public discourse or public interests.[428] Therefore, freedom of expression in this sense not only benefits the speaker's interest but also advantages the utility of society, the audience, and the public as

[424] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [82]
[425] *Ferdinand v MGN Ltd* (n 6). At [65]
[426] ibid. at [68]
[427] Barendt, *Freedom of Speech* (n 385). 7-8
[428] ibid. 18-21

a whole. Consequently, individual speakers may institute public interest when exercising their freedom of expression to participate in democracy.

Even though the argument of democracy was built around political speech, it is argued that non-political speech should also be protected in a modern democratic state to some extent. For instance, in the *Campbell* case, Baroness Hale observed that other kinds of expression such as intellectual, educational and artistic speech and expression are also crucial in a democracy, in fostering individual's development, originality and creativity to play a full part in a democratic society. [429] Nevertheless, Baroness Hale remarked that different kinds of expression should be protected differently, and political speech is the top priority. The hierarchy of speech would affect the balancing test between privacy and freedom of expression, which will be demonstrated later in this chapter.

Thirdly, the public interest is connected with the notion of public discourse. As discussed earlier, contribution to public discourse is one of the justifications underpinning media freedom, given that media freedom is a vital instrument to generate public discourse. However, although mass media could contribute to public discourse on a large scale with sheer quantity and influence, it is argued that the participation of public discourse shall be open to individual speakers based on freedom of expression.[430] In this regard, Meiklejohn emphasises that 'what is essential is not that everyone shall speak, but the everything worth saying shall be said.'[431] From this argument, the individual speakers' expressions could be justified by the public interest if their expressions contribute to generating public discourse or public debate.

Consequently, it could be seen that public interests lie in freedom of expression itself. In other words, there is an inherent value of freedom of expression for the public interests. However, as explored in Chapter 2, there are also privacy values to society. Privacy could contribute to or generate interests for the public as a whole. Hence, when balancing privacy with freedom of expression, the individual speakers could not simply justify that public interest lies in freedom of expression to outweigh privacy rights. Nonetheless, they need to identify how strongly the

[429] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [148]
[430] Oster, *Media Freedom as a Fundamental Right* (n 386). 29-30
[431] Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper 1948). 389

public interest is specifically generated from their expression in particular circumstances. For example, in the *Hayden* case,[432] the claimant sought an injunction to restrain the postings on Twitter and Facebook by the defendant based on misuse of private information. In the aspect of the balancing test between privacy and freedom of expression, the court stated that 'freedom of expression has an inherent value, but it also has instrumental benefits which may be weak or strong according to the facts of the case.'[433] Thus, 'the nature and quality of the societal benefits to be gained in the individual case by the use of disclosure in question' is 'another aspect of the proportionality assessment.'[434] This case suggests that even if the individual speakers do not have a duty to serve public interest like the media, they could establish public interest in publication. However, they cannot argue that freedom of expression has an intrinsic value that overrides privacy rights; rather, they must demonstrate that freedom of expression has specific societal benefits. In the balancing test, the court will consider the nature and quality of public interest specifically generated from the publication in question to assess the proportionate balance with privacy rights. Therefore, the next section will inspect the notion of the public interest and the quality of public interest generated from the disclosure of private information.

4.4 The Notion of the Public Interest and Quality of Public Interest in the Disclosure of Private Information

Before examining the quality of public interest, it is essential to distinguish between 'the information which contributes to public interest' from 'the information which interests the public'.[435] In the *Jameel* case, Baroness Hale stressed that 'a real public interest in communicating and receiving the information' is 'very different from saying that it is information which interests the public.'[436] Likewise, in the *Von Hannover* case, the ECtHR cautioned that 'the sole purpose of which was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life cannot be deemed to contribute to any debate of general interest to society despite the applicant being

[432] *Hayden v Dickenson* [2020] EWHC 3291.
[433] ibid. At [49]
[434] ibid.
[435] Lord Justice Leveson, 'An Inquiry into the Culture, Practicesand Ethics of the Press' (n 386). 85
[436] *Jameel v Wall Street Journal Europe Sprl* (n 420). At [147]

known to the public.'[437] In several cases, the English courts held that sexual activities tend to interest the public but are not in the public interest. For instance, in *ETK v News Group Newspapers Ltd*, the court considered that sexual activities are of interest and 'satisfying public prurience'[438] but not matters of public interest. In *CC v AB*, Eady J stated that 'I have little doubt that sexual relationships involving those who are in the public eye, whether they merit the appellation "public figures" or not, are generally likely to be interesting to the public, but they will not necessarily be of genuine public interest.'[439] In this sense, it appears that the public interest depends on the nature and quality of the information, not the quantity or demand of the public. Furthermore, in *Wan-Bissaka* case,[440] the defendant (an Instagram user) posted about the claimant's private sexual information on his Instagram. The court found that 'there is not usually any public interest justification for disclosing purely private sexual encounters, or messages, even if they involve adultery.'[441] This case could imply that individual media users can produce public interest in the disclosure of information about another. Nonetheless, in this case, the court found no public interest in the disclosure of private sexual information.

When considering the quality of the public interest in the disclosure or publication, the value of speech seems to be substantially involved. In the *Campbell* case, Baroness Hale suggested that the hierarchy of the speech is significant in the balancing test between freedom of expression and privacy. Some types of speech are worth to be protected than others.[442] Although Barendt remarked that there are dangers in drawing distinctions between a high and low value of speech since all types of speech should be treated as an equal value, accepted that such distinctions are necessary when free speech and privacy rights

[437] *Von Hannover v Germany* (2005) 40 EHRR 1 At [65] The German Court considered that the applicant was a public figure who had to accept the publication of her images in the public. In this case, the ECHR court held that the public did not have a legitimate interest in knowing the details of the applicant's daily life even in the public place.
[438] *ETK v News Group Newspapers Ltd* (n 412). At [23]
[439] *CC v AB* [2006] EWHC 3083. At [37] The claimant had an adulterous relationship with the defendant's wife for a period of time and sought to prevent them from telling the story.
[440] *Aaron Wan-Bissaka & Anor v Rhianna Bentley* [2020] EWHC 3640.
[441] ibid. 23
[442] *Campbell v Mirror Group Newspapers Ltd* (n 6).

are implicated; otherwise, privacy right would be eviscerated in order to protect free speech.[443]

Concerning the hierarchy of the speech, Baroness Hale emphasised that political speech is the highest value of speech.[444] Thus, the public interest generated from the political speech would likely be considered the strongest justification in disclosing private information. While political speech is the highest value of the speech, trivial or unimportant expression, such as gossip and sexual activities, is located at the lowest. For example, in the *Mosley* case, the court underlined that 'political speech would be accorded greater value than gossip or "tittle-tattle"'.[445] Furthermore, as mentioned in the previous section, apart from political speech, the public interest could be found in other types of speech. In the *Campbell* case, Baroness Hale recognised that 'intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and our democratic life. Artistic speech and expression are important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value.'[446] However, although those types of speech generate some public interest, they are placed below the political speech. Accordingly, the value of those types of speech would be positioned in the middle of the edge between political speech and trivial speech.

The political speech sometimes includes information concerning the 'public figure'[447] those who have public functions, such as politicians and public officials. Nonetheless, the notion of the public figure has been expanded from those who have public functions to the person who is 'well-known to the public' and in the position of 'the role model', for example, lover of the politician,[448] sport players,[449] models[450] and celebrities. More particularly, in the *McClaren* case, the court reasoned that the claimants were role models whom 'the public could

[443] Barendt, 'Privacy and Freedom of Speech' (n 400). 18-20
[444] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [148]
[445] *Max Mosley v News Group Newspapers Limited* (n 6). At [15]
[446] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [148]
[447] ibid.
[448] *Trimingham v Associated Newspapers* [2012] EWHC 1296.
[449] *Jonathan Spelman (by his Litigation Friends Mark Spelman and Caroline Spelman) v Express Newspapers* (n 412).
[450] *Campbell v Mirror Group Newspapers Ltd* (n 6).

reasonably expect a higher standard of conduct.'[451] For instance, in the *Ferdinand* case, Nicol J emphasised that the captain as a role model carried an expectation of high standards and 'was expected to maintain those standards off, as well as on, the pitch.'[452] Nicol J further indicated that 'the court's objective assessment of whether there is a public interest in the publication must acknowledge that in a plural society there will be a range of views as to what matters or is of significance in particular in terms of a person's suitability for a high profile position.'[453] However, it is argued that the notion of the public figure and the extent of public interest in the balancing test should not be expanded too broadly.[454] Furthermore, it is disputed that this extension has blurred the distinction between the public interest and what interests the public.[455] For example, it is difficult to distinguish the private information of the celebrities in the public interest from those which interests the public. In some cases, the English courts considered that the disclosure of private information of the role models was both in the public interest and which interests the public, for example, in the *Terry*,[456] *Ferdinand*,[457] and *McClaren*[458] cases.

Moreover, as discussed, the disclosure of private information about the role model might be in public interests based on the value of the truth underpinning freedom of expression. Nevertheless, it is debatable whether the public really gains interest from correcting the false image of the public figure. It is questionable whether knowing of true private information of a person could actually contribute to the public interest. For example, Phillipson questioned 'why it mattered if the public had an incorrect impression about the private lives of such people (role model)?'[459] and 'why the public benefitted from knowing that someone who was likely to influence their own behaviour had been unfaithful in the past?'[460] In

[451] *McClaren v News Group Newspapers Limited* [2012] EWHC 2466. (QB), 2012 WL 3809365. At [34] The claimant, a professional football manager, sought for an interim order to restrain the publication concerning their sexual encounter published by the defendant.
[452] *Ferdinand v MGN Ltd* (n 6).At [89]
[453] ibid.At [64]
[454] Hughes, 'The Public Figure Doctrine and the Right to Privacy' (n 299).
[455] Phillipson, 'Press Freedom, the Public Interest and Privacy' (n 298).
[456] *LNS v Persons Unknown* [2010] EWHC (QB) 119. The applicant (a footballer) sought to prohibit the publication of their private information concerning their personal relationship. However, their application failed in any claim for breach of confidence or misuse of private information.
[457] *Ferdinand v MGN Ltd* (n 6).
[458] *McClaren v News Group Newspapers Limited* (n 451).
[459] Phillipson, 'Press Freedom, the Public Interest and Privacy' (n 298). 156
[460] ibid.

response to these questions, Wragg argued that the audience might 'modify their behaviour' toward the public figure, for example, ‘by not purchasing associate products or not providing support in some other way’, or, ‘privately, in their discussions with friends about that figure.’[461] Wragg then introduced the argument, called the ‘benefits to self’, to support the broader term of public interest, given that privacy-invading expression may contribute to the audience's self-development and benefit private decision-making. On this basis, the ‘benefit to self’ is similar to the argument from self-fulfilment, but it is oriented in the audience’s interest, not the speaker’s interest. Moreover, Wragg argued that the audience might learn some valuable things from knowing the immoral behaviour of others, particularly the public figure. Also, they might ‘gain a deeper insight of how to behave in society and what to expect of others.’[462]

Subsequently, the notion of public interest has been developed to the freedom to criticise immoral behaviours or conduct of a member of society, especially behaviours of those public figures and role models, which ought to be contrary to the social standards of other members. For example, in the *Terry* case, the court highlighted that ‘the freedom to criticise’ is a value of freedom of expression in a pluralistic society, providing that the public opinion is developed ‘as a result of public discussion and debate.’[463] In this case, the court observed that ‘the fact that conduct is private and lawful is not, of itself, conclusive of the question whether or not it is in the public interest that it be discourage.’ The court also commented that ‘freedom to live as one chooses is one of the most valuable freedoms. But so is the freedom to criticise (within the limits of the law) the conduct of other members of society as being socially harmful, or wrong.’[464] Furthermore, in the *Goodwin* case, Tugendhat J mentioned that there is the public interest in the question of ‘what should or should not be a standard in public life.’[465] Some scholars further argued that ‘the freedom to criticise' the public figures might be as crucial as criticising the government since they may sometimes influence individuals' lives and public opinion on the same level.[466] As a result, the

[461] Paul Wragg, ‘The Benefits of Privacy-Invading Expression’ (2013) 64 Northern Ireland legal quarterly 187. 196
[462] ibid.
[463] *LNS v Persons Unknown* (n 456). At [104]
[464] ibid.
[465] *Goodwin v News Group Newspapers Ltd* (n 146). At [133]
[466] Oster, *Media Freedom as a Fundamental Right* (n 386). 15-16

notion of public interest produced by freedom of expression has been extended broadly.

However, Phillipson contended that the doctrine of the freedom to criticise is a worrying development of English privacy law for three reasons. [467] Firstly, it is not actually the freedom to 'criticise', but rather a justified right to disclose private facts. Secondly, the right to criticise immoral or improper behaviour is incompatible with the reasons why we need to protect privacy in the first place. To some extent, we need privacy to develop our personality, promote self-development and autonomy, and make our decisions freely without external influences or social control. In this sense, Phillipson asserted that the freedom to criticise other behaviours is a fundamental problem as this doctrine uses the very reasons why privacy is necessary for denying it. Thirdly, the freedom to criticise the behaviour of the public member that might be reasonably immoral is problematic as 'it will nearly always be present' in every case. Nonetheless, the public interest is identified by a specific benefit that contributes to the public debate on a case-by-case basis.

The present author argues that the public interest justification should not be expanded too broadly. She strongly agrees with Phillipson that the notion of public interests should not be extended to cover any publication concerning immoral or improper conduct of the public member. In the present author's view, it is unconvincing whether the public would really learn or benefit from revealing that immoral conduct, particularly the details of sexual activities. The undesirable result might instead appear in certain situations; for example, children often imitate their role model's behaviours or admire their behaviours. More importantly, in order to protect privacy values, as examined in Chapter 2, individuals should have some private space to develop themselves without external influences or social control, even if the conduct might be unfavourable in society, as long as the conduct is legal. Besides, she observes that not all information about the public figure or role models would generate public interests that outweigh privacy rights. Although criticising other behaviours may generate

[467] Phillipson, 'Press Freedom, the Public Interest and Privacy' (n 298). 159-161

public discourse or some public interest, it should not be weighed as strong as political speech or criticising the conduct of those who have public functions.

To conclude, it should be borne in mind that the publication in the public interest differs from the publication that interests the public. The public interest is instituted by the quality or value of the publication, not the public demand for knowing certain information. In order to find a proportionate balance between privacy and freedom of expression, the quality of the public interest would be considered. The quality of the public interests is engaged with the values of speech or the hierarchy of speech. Notwithstanding the criticisms, the notion of public interest has been extended to correcting false information regarding the role model and the freedom to criticise immoral behaviour. However, to protect privacy values and interests, the thesis contends that the notion of public interest should not be expanded too broadly.

4.5 The Balancing Test between Privacy and Freedom of Expression in the Case of Individual Media Users

After exploring the differences between media freedom and freedom of expression and the notion of public interests, this section will scrutinise the balancing test between privacy and freedom of expression in the case of individual media users. Moreover, it will consider whether and how the balancing test shaped by mass media can be appropriately applied in the hypothesis cases. As mentioned in the first chapter, individual media users can be ordinary users who use the new media for social interaction and the users who play the role of the media. Hence, section 4.5.1 will first examine the two positions of individual speakers in the new media context. Then, section 4.5.2 will critically analyse and demonstrate the appropriate balancing approach in the case of individual media users. By the end of this section, the question of whether the tort of MOPI is suitable for applying to the individual media users will be primarily answered.

4.5.1 Two Positions of Individual Media Users

As stated in the first chapter, in the new media context, there is a variety of content put on the Internet by the individual media users, ranging from informal conversations, gossip, artistic expression, political expression to professional news reports. With the ability to communicate to a mass audience, some users have become more similar to mass media. As a result, the line between mass media and individual speakers has been blurred. Hence, this section aims to examine the relationships and differences between those two positions.

From the case study below, it could be seen that the media position, which is accorded media freedom with special protection, is open to all individuals if they perform media functions. In order to claim the media position, firstly, the individuals must communicate information to the public at large, and secondly, the published content must generate public debates or public interests or serve the public watchdog role. For example, in *Law Society (and others) v Rick Kordowski,* the English and Wales high court deliberated that

'today anyone with access to the Internet can engage in journalism at no cost. If what the defendant communicated to the public at large had the necessary public interest, he could invoke the protection for journalism and Art 10.'[468]

Likewise, in *R v Marin A*, *the Court of Appeal* considered *that*

'the right under article 10 is given to all but, as interpreted by the Strasbourg court, it is clear that those who inform public debate on matters of public interest as journalists (whether in the print, broadcasting or internet media) are accorded a special position, given the role of journalism in enabling proper and effective participation in a democratic society.'[469]

Consequently, individual media users could be accorded the media position if they communicate to the general public for the public interests or perform the media functions. Nevertheless, even if those conditions could not be met, those individuals' expressions are still protected by freedom of expression. As argued, unlike traditional media, individuals could enjoy freedom of expression for their own interests. Thus, even though the individuals' expressions cannot generate public interest, their expressions could be protected by freedom of expression.

[468] *Law Society (and others) v Rick Kordowski* [2011] EWHC 3185 (QB). At [99]
[469] *R v Marine A* [2013] EWCA Crim 2367. [2014] 1 WLR 3326 at [56]

Moreover, while the argument of self-fulfilment cannot justify the media's expression, it can justify the individual's expression. On this basis, it could be said that the individual media users generally hold two positions: individual speakers and the media. In the context of digital media, Rowbottom observed that 'digital communications are now more like a spectrum of different content producers rather than a rigid division between sectors.'[470] In other words, there is a wide range of user-generated content, ranging from high to low value of an expression and from a small audience to a mass audience. Thus, the rigid division between the media and individual speakers has been indistinct.

The present author highly agrees with Rowbottom in this regard. Furthermore, in the present author's view, a vivid line between those two positions may be necessary in some circumstances, for example, when claiming special privileges of the traditional media. However, for the purpose of the balancing test in the tort of MOPI, the clear distinction between the media and individual speakers seems unnecessary. Instead of distinguishing the two positions, we should rather focus on the real balance between an individual's freedom of expression and privacy. To find the appropriate balance, we should pay attention to the spectrum of the value and level of expression across the new media as different values and levels of expression will affect the scale of the balance differently. In this regard, 'the two continuums of value and of level intersect' model, created by Rowbottom,[471]was chosen to modify to illustrate how the English courts would or should balance privacy and freedom of expression in hypothetical situations below.

4.5.2 The Value and Level of Expression

'The two continuums of value and of level intersect' is the intersect of the value and level of individuals' expressions across the new media. As seen in the figure below, the first continuum is the high/low value of the expression, while the second continuum is concerned with the high/low level of expression.

[470] Rowbottom, *Media Law* (n 386). 28
[471] Rowbottom, 'In the Shadow of the Big Media: Freedom of Expression, Participation and the Production of Knowledge Online' (n 65). See also Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (n 65).

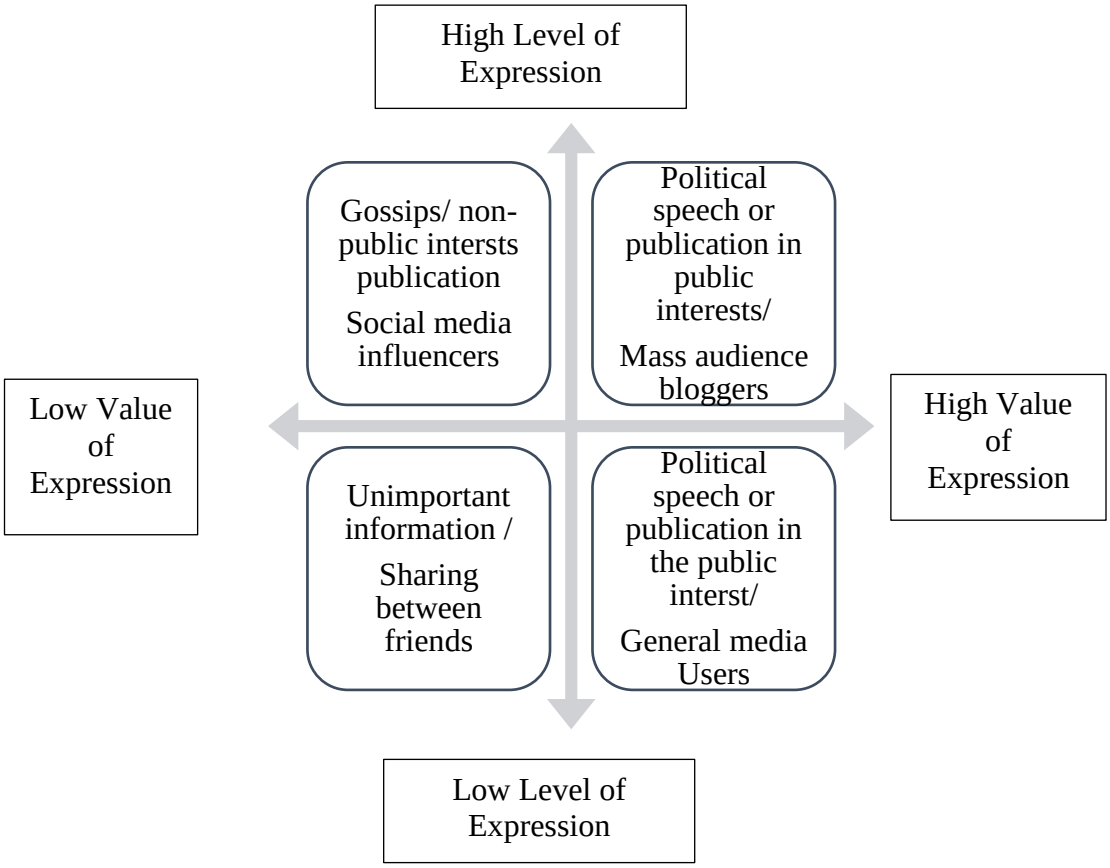

Figure 2. – The Intersection of the two continuums of value and level[472]

First, the high/low value of the expression is set by types of speech.[473] As examined earlier, the highest value of the expression is the political expression, while other types of speech, which are unimportant such as entertainment or gossips, are considered as the lowest value of the expression. The intellectual, educational and artistic speeches are situated at an intermediate level between those two edges. Nevertheless, as seen in the landmark privacy cases, the public interest has been significantly impacted by the scale of the balance. In other words, when balancing privacy and freedom of expression, the public interest is at stake. Hence, in this thesis, the political and other types of expression that can produce the high value of public interest will be positioned at the high value of the expression, whilst all non-public interest expressions will be placed at the low value of the expression.

Secondly, the high/low level of expression relates to the extent of publication and professionality of the user.[474] The high level of expression is an expression of the

[472] Modified from Figure 1 in Rowbottom, 'In the Shadow of the Big Media: Freedom of Expression, Participation and the Production of Knowledge Online' (n 65).
[473] Ibid.
[474] Ibid.

user who communicates to a mass audience or the public at large with the capability to influence other members of society. Still, in this thesis, they are not considered professional news reporters or mass media entities. On the contrary, the low level of expression is involved with communications between individuals, which usually reach a small audience, for example, sharing information between friends and acquaintances or online publication of a small audience blogger. The contents at a low level are usually inexpensive and less well-prepared than those at a high level.

A. High Value and High Level of Expression

As argued, individual media users could generate specific public interests in the disclosure of information. The individual media user with a high value and high level of expression is an individual media user who shares or discloses private information concerning political matters or any publication in public interests to the mass audience.

As explored, political speech is the highest value of speech. Thus, it is situated in this category. Other types of speech could also be placed here if they could generate a high quality of public interest, for example, a speech that can generate a significant public discourse. Comparable to the case of mass media, if the individual's publication is a matter of public interest, the weight of freedom of expression on the balance scale would likely be enhanced. For instance, in the *Ferdinand* case, the court stated that 'freedom of expression applies to banal and trivial expression as well as matters of public interest, but where that right has to be balanced against the rights of others to protect their privacy, the extent to which the content is of public interest or contributes to a debate of general interest assumes a much greater importance.'[475]

Furthermore, the thesis argues that the extent of online publication posted by individual speakers at a high level might be on the same level as the traditional media, such as, mass audience bloggers, social media influencers and celebrities with a large number of followers. For example, the number of newspaper copies,

[475] *Ferdinand v MGN Ltd* (n 6). At [62]

which the Guardian distributed on an average day in March 2019, is only 134,443 copies.[476] This number is analogous to the circulation of publications by a mass audience blogger or social media influencer. Also, those speakers at a high level may influence or shape the behaviour of other members in a democratic society similar to those in mass media or professional media. Consequently, the publication at a high level of expression may cause damages to the claimant to the same extent as the traditional media. The extent of online publication and the establishment of wide publication will be further explored in Chapter 6.

Hence, similar to those traditional media cases,[477] the wide publication and influencer position, on the one hand, will produce a strong effect on the claimant, adding a greater weight on privacy. The establishment of public interest, on the other hand, will enrich the weight on freedom of expression at the balance. Nonetheless, as argued in the last section, the thesis observes that freedom of expression should not trump privacy right only because the public interest is present, but the court should ask whether the public interest produced by the defendant sufficiently outweighs privacy rights. In this regard, the nature and quality of the public interests will be considered.

To sum up, the thesis considers that the balancing test concerning the high value and high level of expression is comparable to those of traditional or mass media cases. Therefore, the tort of MOPI fashioned by traditional media and public interest is suitable for applying in this context.

B. High Value and Low Level of Expression

The individual media user in this group refers to small audience bloggers or ordinary users who share or disclose private information regarding political or public interest matters to a small audience or limited group of people.

[476] Charlotte Tobitt, 'National Newsbrand ABCs: Full Figures for March 2019' *PressGazette* (18 April 2019) <https://www.pressgazette.co.uk/national-newsbrand-abcs-full-circulation-figures-for-march-2019/> accessed 20 January 2020.
[477] See, for example, *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Von Hannover v. Germany* (n 416)., *Ferdinand v MGN Ltd* (n 6)., *Max Mosley v News Group Newspapers Limited* (n 6).

Although the tort of MOPI has been predominantly concerned with a broad publication of mass media, it is also actionable at the low-level of expression. For example, in *Applause Store Production v Raphael*,[478] the tort of MOPI was found applicable in a dispute between two former friends on social media. In this case, the court decided that the claimant had a reasonable expectation of privacy in their private information, especially information concerning sexual preferences. The compensation was thus given to compensate the claimant for the hurt feelings and distress.

However, the effect or the consequence of the publication depending on the scale of circulation is a significant factor in the balancing test.[479] The publication that reaches a small audience would likely lessen the weight on privacy rights due to the reduced effect on the claimant. Accordingly, the thesis considers that the balancing test between freedom of expression and privacy, in this context, might be slightly different from the balancing test in the mass media cases. At the same time, if public interests can be generated, the publication in the public interest will enhance the weight on freedom of expression. Consequently, freedom of expression at a low level will have more chance to outweigh privacy right than those expressions at a high level.

Nevertheless, Rowbottom explored that in the low-level context, it is not easy to assess whether the publication is in the public interest or not.[480] To illustrate this point, Rowbottom gave an example, provided that the image of a minister on a dinner date at a secluded place posted by the first user may look intrusive and unimportant publication in the first place. Nonetheless, after it was posted, another user commented that the minister's date is a lobbyist for the project in his responsibility. This publication then appears important and contributes to the public debate on a matter of public interest. In Rowbottom's opinion, the value of low-level speech may depend on a collection of several contributions, which is in an ongoing process. However, we assess it by 'the standards expected for

[478] *Applause Store Productions Limited v Raphael* [2008] Queen's Bench Division EWHC 1781, WL 2872534.
[479] *Murray v Express Newspapers Plc* (n 6). See also *Von Hannover v. Germany* (n 416).
[480] Rowbottom, 'In the Shadow of the Big Media: Freedom of Expression, Participation and the Production of Knowledge Online' (n 65). 13-15

finished products.'[481] Rowbottom further argued that if the first user, who did not know that the image would be in the public interest, is protected, it would grant a licence to people to disclose any information on the Internet wishing that others might find it is in the public interest. In order to address those issues, the present author advocates that the court should take other factors, which could be found in the libel law, into its consideration, for example, the intention of the defendant, a reasonable belief that the publication is in public interests, the level of preparation and the consequence of the publication. Nonetheless, due to the limited time, this issue is unable to be pursued in this thesis.

To sum up, the balancing test shaped by mass media is applicable in this contest. The individual media users' publication at the low level may be able to produce the high quality of public interests. Nonetheless, the balancing test between privacy and freedom of expression, in this case, might be different from the balancing test in the case of mass media due to a different level of expression.

C. Low Value and High Level of Expression

This group aims at the low value of the expression or non-public interest expression, published at a high level of expression. Apart from gossip and trivial expressions, the intellectual, educational and artistic expression could be placed at the low-value expression if a high quality of public interest could not be generated.

As argued, unlike mass media, the individual expression could be justified by the speaker's interests and self-fulfilment underpinning freedom of expression. Under self-fulfilment justification, individual speakers shall have the right to express their ideas or opinions for self-development and self-fulfilment [482] or self-realisation. [483] Hence, their expressions deserve some protection as it is also critical to a democratic society. [484] Nevertheless, Barendt argued that it is difficult to explain how the disclosure of information, not disseminating ideas and opinions,

[481] ibid.
[482] Barendt, *Freedom of Speech* (n 385).
[483] Jonathan Gilmore, 'Expression as Realiztion: Speakers' Interests in Freedom of Speech' (2011) 30 Law and Philosophy 517.
[484] *Campbell v Mirror Group Newspapers Ltd* (n 6).

contributes to an individual's self-fulfilment.[485] In this respect, the present author observes that self-expression to convey the ideas, beliefs, and opinions to fulfil oneself could be generated from the disclosure of other private information in certain circumstances. For example, while street photography manifests the artist's beliefs, opinions, emotions, or attitudes for artistic and cultural purposes, it may disclose images of other people captured in that photography. In this case, the artist could justify their privacy-invading expression by claiming freedom of expression based on self-fulfilment. On the contrary, this justification cannot be applied in the case of mass media. Thus, the balancing approach in this regard seems to differ from those of mass media.

Nonetheless, the speaker's interests and self-fulfilment should weigh less heavily on the balance between privacy and freedom of expression than the disclosure of matters of the public interest. Although low-value expression should receive some protection, it seems challenging to reason why an individual's freedom of expression based on the speaker's interests or self-development should override another individual's privacy interests, especially in the case where the disclosed information is intimate or sensitive. From the case study, even though the English courts recognise the value of self-fulfilment.[486] or speaker's interest, it is not a strong justification when it harms other privacy interests.[487] For instance, in the *Wan-Bissaka* case, the court stated that an unhappy relationship on its own or adultery could not justify the disclosure of private sexual information.[488] Furthermore, in the *ETK* case, the court found that the intellectual, artistic or personal development of individuals was not prevented from developing by not knowing the sexual activities of the public figures.[489] In this regard, Gilmore suggested that in order to outweigh other individuals' privacy interests, the expression should be in 'certain contestable evaluative conceptions', in which the interests are most significant.[490] In other words, the defendant needs to establish a most significant rationale for why their freedom of expression should override other privacy rights.

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[485] Barendt, *Freedom of Speech* (n 385). 13-15
[486] See for example, *Campbell v Mirror Group Newspapers Ltd* (n 6). At [148], *R v Shayler* [2002] UKHL 11. At [21]-[22]
[487] Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (n 65).
[488] *Aaron Wan-Bissaka & Anor v Rhianna Bentley* (n 440).
[489] *ETK v News Group Newspapers Ltd*) (n. 412). At[21]
[490] Gilmore (n 483). 539

As a result, the weight on privacy rights is likely to outweigh freedom of expression if the overridden public interest cannot be generated. Besides, the wide publication will intensely impact the claimant at a high level of expression. The severe effect on the claimant will then heighten the weight on privacy rights at the balancing stage. For example, a gossip speech posted by a famous influencer on social media with millions of followers is likely to cause more severe damages to the claimant than the speech at a low level. Consequently, it appears more difficult to justify an individual's expression if that expression is widely disseminated. All in all, in the context of the low value and the high-level expression, the balancing test between privacy and freedom of expression may be different from the balancing test in the case of mass media since individuals can justify their expression by self-fulfilment and self-interest. Nonetheless, self-fulfilment seems difficult to justify the disclosure of private information.

By focusing on freedom of expression instead of media freedom, the thesis contends that the internal coherence and integrity of the balancing test are not changed, but it could rather promote the real balance between privacy and freedom of expression. Therefore, the thesis argues that the tort of MOPI is adaptable in this context. However, since the balancing test has been largely focuses on public interests, it is debatable how privacy and freedom of expression could proportionately be balanced, especially when specific public interests are absent. Hence, the proportionate balance between individual freedom of expression and privacy in this area is still open to debate. The English courts should reconsider how privacy and freedom of expression in terms of rights and interests themselves could be balanced, rather than relying on the weight of the public interests.

D. Low Value and Low-Level Expression

In reality, most individual users' expressions tend to fall into this category. Like the previous group, the low-value expression could be justified of the argument from self-fulfilment and the speaker's interests. Nevertheless, the extent of publication at a low level is much less than that at a high level. Therefore, it would cause less effect on the claimant. As a result, freedom of expression, in

this case, will have more chance to outweigh privacy right than those expressions at a high level. Nevertheless, as discussed above, it seems complicated to defend the low-value expression when it conflicts with other privacy rights. For example, it is hard to justify why gossip speech or unimportant publication should triumph over the claimant's privacy interests. In the *Applause Store* case, the court did not even weigh the defendant's freedom of expression with the claimant's privacy interests where the public interest was absent.[491]

To conclude, the above analysis shows that the balancing approach applied in the case of individual media users at the high value and high-level expression is similar to the balancing in the case of mass media. Nevertheless, the balancing test in high-value and low-level expressions is slightly different from mass media because of the reduced effect on the claimant. More importantly, the balancing approach in the case of low-value expression, both at high and low-level expression, is somewhat different from mass media or traditional media since the individuals' expression could be justified by self-fulfilment or the speaker-based centre. Notwithstanding some differences, the thesis contends that the tort of MOPI is sufficiently adaptable to the case of individual media users. Furthermore, it argues that the application of the tort in individual media user cases does not distort the value and reason underpinning the balancing test, but rather encourages striking the real balance between privacy and freedom of expression.

4.6 Conclusion

Media freedom and freedom of expression are different in their underlying values and fundamental interests. While mass media or traditional media publication relies on public interest or the audience's interests, the individual's publication could depend on the speaker's interests or self-interest. Therefore, the balancing test between freedom of expression and privacy in the case of individual speakers might be different from the balancing in the case of mass media in some circumstances. Although there is the public interest in freedom of expression itself, the thesis highlighted that the specific public interest must be generated

[491] *Applause Store Productions Limited v Raphael* (n 478).

to outweigh privacy rights. In this regard, the nature and quality of the public interest will be assessed.

Due to a wide range of user-generated content, the model of value and level of expression is applied to exemplify the balancing test between privacy and freedom of expression in the case of individual media users. By applying this model, it could be seen that the balancing test in the case of high value and high level of expression is analogous to the balancing test in the case of mass media. In this context, the high-value individual expression could generate a high value of public interest. Moreover, the impact of individual expression at a high level might not be different from the impact of mass media expression. As a result, the tort of MOPI shaped by mass media seems to fit in this situation without difficulty. In other words, the balancing test focusing on the public interest and mass communication is suitable to apply in this context. Nevertheless, in other circumstances, the balancing exercise in the case of individual media users might differ from those of mass media, depending on the value and level of expression. For instance, the balancing in the case of low-level expression appears somewhat different from the balancing in mass communication due to the different consequences of the expression. More importantly, individual media users could justify their low value of expressions by self-fulfilment, but this justification is inapplicable in the case of mass media. Therefore, the balancing test between privacy and freedom of expression, in this case, is relatively different from the case of mass media. Nonetheless, the thesis argued that the tort of MOPI is satisfactorily applicable in those circumstances. In the case of individual media users, the fundamental principles underpinning the balancing test are not distorted, but rather stimulate the English courts to find the real balance between privacy and freedom of expression, not the public interests.

Thus, it could be concluded that although the tort of MOPI has been fashioned by mass media or traditional media, it is applicable and adaptable to the case of individual media users. The next chapter will further explore how the tort of MOPI could perform its function in the case study compared to the application of the Thai general tort.

Chapter 5: Three Categories of Individual Media User Cases (Group 1): Privacy in a Public Place, the Protection of Private Information and the Nature of Information, and Privacy and a Public Figure

5.1 Introduction

In Chapter 3, the thesis explored how the English and Thai torts have been developed to protect privacy rights and studied the essential elements of both torts. Subsequently, Chapter 4 examined the balancing test between privacy and freedom of expression as the key element of the tort of MOPI. In Chapter 4, the thesis argued that the balancing test between privacy and freedom of expression in light of individual media users may differ from those of mass media in some circumstances. However, it contended that the tort of MOPI is adaptable and flexible to apply in those circumstances.

Following the initial doctrinal overview of the torts in Chapter 3 and analysis of the balancing test in Chapter 4, Chapters 5 and 6 will offer a synthesis of key themes drawn together from both Thai and English jurisdictions for legal analysis and evaluation purposes. A case study approach is utilised to examine how those torts could apply or respond to real situations or real problems. As stated in Chapter 1, a collective or multiple case study was designed and categorised into six categories by a typology approach.[492] Those categories of cases were divided into two groups by the subject of the study.[493] This chapter will critically analyse the applications of the torts in the first group. In this group, the subject of the study is the cases that happened in the case of mass media and still occur in the context of individual media users. Three core themes set in categories 1 to 3 are privacy in a public place, the protection of private information and nature of information, and privacy and a public figure, respectively.

In each category, the scenario will be explained in detail, and certain questions will be formulated from that scenario. In order to answer those questions, the doctrinal legal analysis will be conducted. At the same time, comparative analysis

[492] Thomas (n 77).
[493] The first group (categories 1-3) will be analysed in this chapter. The second group (categories 4-6) will be further analysed in the next chapter.

and functional method will be used to compare the answers to the questions or the results of the torts between the English and Thai jurisdictions. The order of legal analysis in each category will begin with the English tort of MOPI, followed by the Thai general tort. As discussed in Chapter 1, three themes in this chapter were constructed from the factors that are relevant to the application of the English tort of MOPI but look irrelevant to the Thai general tort, as seen in the table below. Accordingly, the factors that may be unobserved in the Thai jurisdiction will be examined. The analysis in this chapter will support the answers to the key and sub-research questions, which will be later answered in Chapter 7. The key research question asked:

whether the general tort (section 420 of the Thai Civil and Commercial Code) is suitable and sufficient to protect privacy and private information in the digital age, particularly in the case study of individual media users, and if not, should the English tort of MOPI be introduced as the legal model for new legislation for Thailand?

The sub-research question is *whether the tort of MOPI is suitable and sufficient to protect privacy and private information in the digital age, particularly in the case study of individual media users?*

Table 2. Case Study Analysis (Group 1)

Categories of Cases	The Tort of MOPI	The General Tort
1. Privacy in a Public Place	- Relate to the reasonable expectation of privacy test - Can expect some privacy in the public place, depending on the nature of information and all circumstances	- May relate to the actual damage - Uncertain if individuals can have privacy in the public - Unclear scope of privacy rights - A heavy burden of proof of the actual damage
2. The Protection of Private Information and the Nature of the Information	- The nature of the information is key factor in the	- The key factor of the general tort is the proof of the damage

	reasonable expectation of privacy test. - May also affect the balancing test between privacy and freedom of expression - The information, which is not obvious private, may be protected, depending on all the circumstances.	- The nature of the information may be relevant to the difficulty of proving the actual damage - The suitability of the general tort in protecting private information is questionable
3. Privacy and a Public Figure	- Less privacy protection than ordinary individuals - Public interest is at stake when determining the balancing test between privacy and freedom of expression - The balancing test in the case of individual media users may slightly differ from those of mass media	- The same degree of privacy protection as other individuals - The status of the public figure may be relevant to the actual damage - Unclear legal justification - Undeveloped balancing test between privacy and freedom of expression

5.2 Privacy in a Public Place (Category 1)

The first category will explore privacy in a public place. Since now people tend to take their cameras or smartphones with them everywhere they go, numerous photographs and visual recordings have been taken in public places on a regular basis. For example, in England, several pieces of research found that a growing number of active citizen reporters have often taken photos of crisis events in a public place and shared them on social media.[494] This scenario also appears in the

[494] See, for example, Stuart Allan, 'Witnessing in Crisis: Photo-Reportage of Terror Attacks in Boston and London' (2014) 7 Media, War & Conflict 133. , Borges-Rey (n 1)., and Louise Grayson, 'Citizen Photojournalism: How Photographic Practices of Amateur Photographers Affect Narrative Functions of Editorial Photographs' (2015) 9 Journalism Practice 568.

context of traditional media. Various landmark privacy cases involving traditional media were related to privacy in a public place.[495] Thus, exploring those cases could predict how the court will likely rule in similar situations concerning the individual media users. Likewise, in Thailand, a famous Thai teacher posted a picture of teenagers hugging in a public place on their Facebook page, in order to lecture about proper Thai standard manners.[496] Moreover, it was revealed that several pictures of Thai women were secretly taken in public places before being posted on the public Facebook page.[497] Those situations raise heated debates about privacy in public in Thailand. It has been disputed whether a private individual could have privacy in a public place.

Therefore, this category will determine if a private individual could have privacy rights in a public place. More particularly, it will illustrate whether and how satisfactory the torts can protect privacy rights in a public place. Under the English tort of MOPI, 'the place at which it (the invasion of privacy) was happening'[498] is a factor in the reasonable expectation test. However, this factor seems unrelated to the Thai general tort. Hence, the thesis will consider whether and how the location of an intrusion affects the application of the Thai general tort.

5.2.1 England

As explained in Chapter 3, in order to establish the tort of MOPI, the reasonable expectation of privacy test and the balancing test, must be satisfied.[499] These tests are sometimes called the two-stages test. At the first stage, the court will decide whether the claimant had a reasonable expectation of privacy in a particular case (the reasonable expectation of privacy test).[500] If there is no privacy engaged in that case, the case would likely be dismissed. Hence, the first and foremost question here is whether the claimant could reasonably expect

[495] See, for example, *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Murray v Express Newspapers Plc* (n 6).
[496] 'Kru Lilly Posted Pictures of a Lover on BTS Skytrain to Lecture an Appropriate Manner. Thai Netizen Asked "Was Right Violated?"' *Matichon* (10 June 2017) <https://www.matichon.co.th/news-monitor/news_578790> accessed 10 January 2020.
[497] 'Revealing a Facebook Page Secretly Taking Photos of Girls on the Train.' *Nation Weekend* (12 September 2019) <https://www.nationweekend.com/content/hotclip/997> accessed 1 May 2021.
[498] *Murray v Express Newspapers Plc* (n 6). at [36]
[499] *Campbell v Mirror Group Newspapers Ltd* (n 6).
[500] ibid.

privacy in a public place. If the court finds that the claimant could have privacy in public, then, at the second stage, the court must exercise the balancing test between privacy and freedom of expression or other competing rights.[501]

A. The Reasonable Expectation of Privacy Test

As stated, 'the place at which it was happening' is a relevant factor in the reasonable expectation of privacy test. In English cases, private places such as residential homes have been considered to carry a reasonable expectation of privacy. Besides, the information about the claimant's activities in a private place has been held as private.[502] In other words, the claimant can have a reasonable expectation of privacy in a private place. Moreover, in the *Douglas* case,[503] the court held that the photographs of the wedding were private due to the location of the event and the limited number of guests.[504] This case suggests that the claimant will likely have a reasonable expectation of privacy protection in a semi-public place where a limited group of people can see them.

However, in the *Campbell* case,[505] the court indicated that an activity is not private simply because it is not done in a public place or occurs in a private place.[506] Although the place where it happened is one factor, the court would take the nature of the activity into its consideration.[507] Thus, in the *Campbell* case, the court held that Naomi Campbell's pictures, taken while they were leaving a Narcotics Anonymous (NA) meeting on the public street, are private because of the nature of the activity.[508] Nonetheless, other pictures of their activities in a public place might not be considered private, such as daily activities.[509] In particular, Baroness Hale considered that there was nothing essentially private about a picture of the claimant in stunning clothing when they 'pop out to the shops for a bottle of milk'.[510] Thus, they cannot reasonably expect privacy in a

[501] ibid.
[502] See for example, *McKennitt v. Ash* (n 293)., *Mr Edward Rocknroll v News Group Newspaper Ltd* (n 301).
[503] *Douglas v Hello! Ltd* (n 117).
[504] ibid.
[505] *Campbell v Mirror Group Newspapers Ltd* (n 6).
[506] ibid. At [154]
[507] ibid.
[508] ibid.
[509] ibid.
[510] ibid. At [154]

public place under these circumstances. Furthermore, in the *Peck* case,[511] the court acknowledged that although the activities in the picture were in a public place, publishing the picture of someone in a situation of humiliation or severe embarrassment or in a state of some distress might violate his privacy rights.[512] From these cases, it seems that the nature of information or activity is more substantial to the reasonable expectation of privacy test than the place of the events. Subsequently, the nature of information will be further examined in the next category.

Moreover, other factors provided in Chapter 3 may be taken into account when considering the reasonable expectation of privacy test. For example, with regard to the form of disclosure, the claimant seems to have a more reasonable expectation of privacy in the photograph of them in public than a verbal description of the same events.[513] Besides, the focus of the photograph in a public place may be involved. For instance, in the *Campbell* case, Lord Hope pointed out that 'a person who just happens to be in the street when the photograph was taken and appears in it only incidentally cannot as a general rule object to the publication of the photograph…But the situation is different if the public nature of the place where a photograph is taken was simply used as background for one or more persons who constitute the true subject of the photograph.'[514]

Consequently, it could be argued that in the English legal system, the claimant can have some expectation of privacy in the public, depending on the nature of the information or the activity and all circumstances of the case.

B. The Balancing Test

Then, at the second stage, the claim for misuse of private information may succeed if the claimant's privacy interests override the defendant's freedom of expression or other competing rights. At this stage, other factors will be considered to proportionately grant privacy protection when it conflicts with freedom of expression. For example, in the *Campbell* case, Baroness Hale

[511] *Peck v The United Kingdom* (2003) 36 EHRR 41
[512] ibid.
[513] See, for example, *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Douglas v Hello! Ltd* (n 146)., *Theakston v MGN* [2002] EWHC 137, (QB)., *D v L* [2004] EMLR 1.
[514] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [122]

suggested that the publication of the picture involving the NA meeting 'might jeopardise the continued success of that treatment.'[515] Therefore, by taking this factor into account, Baroness Hale decided that the claimant's privacy interests in seeking medical therapy outweighed media freedom.[516] In the *Murray* case,[517] interests of the child in the pictures of family walking in the public street added weight on privacy rights in the balancing test between privacy and freedom of expression.

Hence, it could be concluded that, in the English legal system, a private individual can enjoy some privacy in a public place, based on the nature of information and other factors of the case. Furthermore, when privacy rights clash with other competing rights, the balancing test will be conducted to ensure that privacy in the public is proportionately protected.

5.2.2 Thailand

Following the analysis of privacy in the public place in the English legal system, this section will turn to examine the application of the general tort in the same setting. As explained in Chapter 3, to establish the general tort (section 420 of the Civil and Commercial Code),[518] four essential elements need to be met: unlawful act, willfulness or negligence, the actual damage to any rights of another person, and causation.[519]

At first glance, the question of whether private individuals could have privacy in public space seems irrelevant to those elements. However, after closer scrutiny, the thesis contends that the place where a violation of privacy occurred may be related to the actual damage. This section will illustrate how the location where the activity in question was happening links to the actual damage. Moreover, it will investigate if Thai people could have privacy rights in a public place. Additionally, the thesis will briefly explore the principles of consent since it has

[515] ibid. at [152]
[516] ibid.
[517] *Murray v Express Newspapers Plc* (n 6).
[518] The Civil and Commercial Code. Section 420
[519] ibid. Section 420 states that 'a person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any rights of another person is said to commit a wrongful act and is bound to compensate them for any damage arising therefrom.'

long been accepted as a justification for photographing in a public place in the Thai legal system.[520] Nonetheless, to protect privacy in a public place, the thesis will argue that consent in this context should be interpreted and applied limitedly.

A. The Actual Damage

In order to satisfy a requirement of damage under section 420, the actual damage to privacy rights must be proven. In this category, two main questions arise. First, whether a claimant could have privacy rights in a public place? Secondly, did damages actually arise from a defendant's action?

1) Could a claimant have privacy rights in a public place?

As discussed in Chapter 3, it is now commonly agreed that 'any rights' in section 420[521] include privacy rights.[522] However, Poonyapan argued that a person should not have privacy rights in every situation, but the court must consider when the person shall have privacy rights on a case-by-case basis.[523] This is comparable to the English legal system, where the court must assess whether the claimant has a reasonable expectation of privacy on a case-by-case basis. Hence, the main question here is whether the claimant could have privacy rights in a public place.

Nevertheless, unlike the English legal system, the answer to this question is still unsettled in the Thai legal system. More importantly, the scope of privacy rights under the Thai legal system is still undefined. To date, there has been no judicial decision concerning privacy in public. Although the previous judgments are not bound as legal precedents like the common law system, Thai courts have often referred to the previous judgements of the Supreme Court as a legal source or key reference to support their decisions. Since there is no judicial decision, the thesis will examine the opinion of the National Human Rights Commission (NHRC)[524] on

[520] Peng Pengniti, *Description of the Civil Code of Thailand: The Act of Tort, Tort Liability by Officer and Other Related Laws* (4th edn, Jiraratkarnpim 2006).
[521] The Civil and Commercial Code., Section 420
[522] Chapter 3, Section 3.5
[523] Poonyapan (n 19). 36
[524] The commission is appointed by the Constitution of Thailand to protect and promote human rights as well as provide advice to the government, parliament, or other relevant agencies on human rights issues.

this matter. According to the NHRC's opinion about privacy rights and CCTV,[525] it appears that the degree of privacy protection in Thailand varies in different places. In their opinion, installing CCTV in a private place would violate privacy rights. Nonetheless, CCTV can be installed in a semi-private place under certain conditions. However, the commission viewed that privacy rights would not be violated if CCTV is installed in public places. Besides, the images from the CCTV installed in the public place can be further disseminated for security and public interests.[526] In this context, it is uncertain if individuals cannot have privacy right in public places at all, or if they can have some privacy rights in public places limited to national security and public interests.

Even though it is uncertain if a person can have privacy rights in public, it seems that the place where the event occurred is a factor when deciding if the claimant had privacy rights. For instance, in Supreme court number 4893/2558, the court stated that the claimant in question had privacy rights in 'a complete private place'.[527] This case confirmed that Thai people could have privacy rights in a completely private place. Nonetheless, it did not suggest that the claimant cannot have privacy rights in other places. Yet, the Supreme Court did not take the opportunity to draw the scope of privacy rights or clarify whether and how the location of the activity would affect the application of the general tort. Consequently, it is still debatable if Thai people could expect privacy in public places.

To sum up, it appears that Thai people could expect a varying level of privacy protection in different places. The location of the incident will likely impact the court's decision on whether the claimant had privacy rights in that situation. However, due to the lack of cases and undefined scope of privacy rights, it is unclear whether and to what extent Thai people could have privacy rights in public places. This problem will be further addressed in the thesis.

[525] 'The Opinion of National Human Right Commission in a Case of CCTV' <http://www.nhrc.or.th/getattachment/9ff272bc-1871-4cee-97ce-2e83f8160b6a/ผลการพิจารณาการละเมิดสิทธิมนุษยชน-กรณีการติดตั้งกล.aspx> accessed 15 December 2019.
[526] ibid.
[527] Supreme Court Decision 4893/2558 (n 21).

2) Did damages actually arise from a defendant's action?

Even if it could be concluded that the claimant can have privacy rights in public, the proof of the actual damage is still problematic. As explained in Chapter 3, the damage under section 420[528] must be the damage that actually occurred or will undoubtedly occur in the future. Besides, there must be a causal link between the damage and the defendant's action (causation).[529] In other words, the claimant must prove that the actual damage was caused by the defendant's action. If these requirements cannot be met, the case will likely dismiss.

At trial, proving the actual damages in privacy cases has always been difficult.[530] Numerous privacy cases have been rejected because of a lack of solid evidence of the actual damage.[531] Moreover, Thongraweewong observed that the actual damage to privacy rights is difficult to prove because of its normative nature.[532] Furthermore, as argued in Chapter 3, it is elusive to establish causation of normative damage. In this regard, several Thai scholars commented that the claimant would have a very heavy burden of proof to demonstrate the actual damage arising from a violation of privacy rights.[533] In this sense, the general tort is unsatisfactory to protect privacy.

Nonetheless, in theory, Sottipan asserted that the damage to privacy rights could arise once the unlawful act is committed.[534] For instance, it is observed that the damage to A's privacy rights arises immediately when B secretly records a private conversation between A and C.[535] However, in this category, the present author explores that even if this theory is accepted, the requirement of the actual damage remains problematic. Since the scope of privacy rights is unclear, it is

[528] The Civil and Commercial Code. Section 420
[529] ibid.
[530] Iammayura, 'Laws Related to Personal Data in Thailand' (n 7)., Nakwanit (n 23)., Thongraweewong, 'Legal Measures for Protecting the Right to Privacy: A Study of Invasion of Privacy through the Use of Social Network Websites' (n 7)., 'Supporting Document for a Personal Data Protection Act:General Meeting Session' (n 7).
[531] Nakwanit (n 23). 59
[532] Thongraweewong, 'Legal Measures for Protecting the Right to Privacy: A Study of Invasion of Privacy through the Use of Social Network Websites' (n 7).
[533] Iammayura, 'Laws Related to Personal Data in Thailand' (n 7)., See also 'Supporting Document for a Personal Data Protection Act:General Meeting Session' (n 7).
[534] Sottipun (n 333). 92-93
[535] ibid. 92-93

uncertain if privacy rights are violated and whether the unlawful is committed. For example, it is debatable if photographing the claimant in a public place is unlawful because it is unclear whether they could have privacy rights under this circumstance. In addition, the present author views that Sottipan's argument has further flaws, which will be examined in Chapter 7.

B. Consent

Furthermore, in the Thai legal system, consent has long been applied broadly to justify a violation of privacy in a public place.[536] For example, Pengniti contended that consent of photographing in a public place is frequently given by silence or by any expression by which a reasonable person can understand that the consent is given.[537] Thus, in Pengniti's opinion, photographing in public would be a tortious act only when the claimant explicitly prohibited that action.[538] Likewise, Thai citizen reporters claimed that if a person willingly appears in a public place, it could be interpreted that they voluntarily gave their consent to be observed or photographed.[539]

However, the above arguments are likely flawed because they fail to recognise the following principles of consent. Under Thai tort law, consent can be given directly or tacitly.[540] Nonetheless, in principle, the person who gives tacit consent must be aware of the action.[541] Moreover, the person who gives any type of consent must understand and acknowledge the state or condition of the consent.[542] Consequently, it could not simply be assumed that the claimant willingly consented to be photographed in public if they were not aware of that action, for example, when the photograph was taken distantly or covertly in a public place. Furthermore, it should not be interpreted that the claimant willingly gave implied or tacit consent to be an object of observation or photograph merely

[536] Pengniti (n 520). See also Patcharaorn Intarasuwan, 'Comprehension and Practice of Citizen Reporters Concerning Privacy' (Master of Arts Program in Communication Arts, Chulalongkorn University 2015).
[537] Pengniti (n 520).This kind of consent is called tacit or implied consent.
[538] ibid. 176
[539] Intarasuwan (n 536). 148
[540] Tingsaphati (n 19)., Pengniti (n 4).
[541] Suthitinun Srirat, 'Consent in Data Protection Law' (Master of Laws International Trade Regulation), Thammasat University 2018). 14
[542] Tingsaphati (n 19). 82 (footnote)

because they willingly appeared in a public place. Besides, it is essential to note that consent has some limitations, depending on the purpose or extent of the consent.[543] Therefore, although the claimant willingly gave consent to be photographed in a public place, it should not be implied that they also gave the consent for further distribution of such photograph on the Internet to a broad audience. Accordingly, the present author disputes that consent of photographing in public should not be interpreted broadly.

To conclude, the thesis explores that the place where the intrusion was happening is likely relevant to the actual damage. Nevertheless, the element of the actual damage seems problematic. First, unlike the English legal system, it is uncertain if the claimant can have privacy rights in a public place. Secondly, at trial, the actual damage in a privacy case is hard to prove. The uncertain scope of privacy would aggravate the problems in proving the damage. In this sense, the general tort seems ineffective and insufficient to protect privacy rights in public. These drawbacks of the general tort will be further assessed in Chapter 7. Besides, consent has been widely applied as a justification for photographing in public. Nonetheless, the present author emphasises that the interpretation of the consent should be limited to provide sufficient privacy protection.

5.3 The Protection of Private Information and the Nature of Information (Category 2)

As seen in section 5.2.1, the nature of activity or information in question appears to be the key factor behind the reasonable expectation of privacy test. However, to the best of the present author's knowledge, this factor has never been deeply discussed in the area of the Thai general tort. Hence, the core theme in the second category was built on this factor.

In Thailand, Intrarasuwan found that social media users regularly disclose different types of information of other people for social sanctions and cyberbullying.[544] Moreover, according to a privacy report in 2013, Thai social media users often disclosed information about those who held opposite political

[543] Pengniti (n 4). 74
[544] Intarasuwan (n 536).

views or disrespected Thai traditional norms or beliefs for social sanctions.[545] For example, a Thai Facebook user posted an ID of a person who behaved disrespectfully to the memorial monument of Thao Suranari (Lady Mo)[546] on social media for social sanctions. Most recently, a Facebook user started a project called 'ending the future' to encourage others to collect information about young protesters before disseminating that information to jeopardise their future employment or other opportunities.[547] These situations raise privacy concerns regarding unwanted disclosure of private information online. Unwanted disclosure of private information on the Internet is a global phenomenon, which is also found in England. For instance, the research called 'online shaming and the right to privacy' demonstrates that social media users have often posted images and identities of others for public humiliation.[548] Likewise, as explored in Chapter 2, several English cases have involved unwanted disclosure of private information.

Thus, this category will study whether and how private information could be protected under the English tort of MOPI and the general tort. Furthermore, since various types of information are disclosed on the Internet, the thesis will examine the importance of the nature of information in the reasonable expectation of privacy test. Besides, it will identify if the nature of information is linked to any element of the Thai general tort.

5.3.1 England

Under the tort of MOPI, information about another will not automatically be protected. However, the reasonable expectation of the privacy test and the balancing test need to be satisfied. As argued, the nature of information appears to be a significant factor in the reasonable expectation of privacy test. Hence, section *A.* will first explore the significance of the nature of information and its effects on the tort of MOPI. Then, section *B.* will consider whether and how the information, which is not obvious private, could be protected.

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[545] Thai Netizen, 'Invasion of Privacy Online in Thai Society' (2013) <https://thainetizen.org/wp-content/uploads/2014/03/thainetizen-privacy-report-2013.pdf> accessed 24 October 2019.
[546] Thao Suranari or Lady Mo is praised as a heroine and well-loved by some Thai people.
[547] '"Doctor Golden Medal" Launched "End the Future Project", Sending Information about Youth to Private Companies.' *Manager Online* (27 July 2020) <https://mgronline.com/onlinesection/detail/9630000076912> accessed 1 April 2021.
[548] Emily Laidlaw, 'Online Shaming and the Right to Privacy' (2017) 6 Laws 3.

A. The Nature of Information

At the first stage test, the information will be protected if it is private information or can reasonably be expected to be private. For example, in the *Campbell* case, Baroness Hale stated that 'the activity photographed must be private'.[549] In *Catt v Commissioner of Police of the Metropolis*,[550] the court observed that the essential nature of the political activity is a public nature, given that 'its very object is to make others aware of his views and the causes to which he lends his support'.[551] Therefore, the court viewed that it seems unreasonable to expect the political activity to be private. In this sense, it could be seen that the nature of information is critical when determining whether the information is private or can expect to be private. Likewise, in the *Douglas* case, the court of appeal highlighted that 'the nature of the information…may suffice to make it plain that the information is private'.[552] Furthermore, as argued in section 5.2.1, the *Campbell*[553] and the *Peck* cases[554] cases suggest that the nature of information is crucial when deciding the reasonable expectation of privacy test.

Additionally, in the *Campbell* case, Lord Hope referred to the Australian case quoting that

'[c]ertain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private, as may certain kinds of activity which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved.'[555]

From this statement, it could be argued that some types of information might be easier to consider as private than others. From case law, sensitive information or information about health and sexual life would be more likely to have a reasonable expectation of privacy than other types of information due to its more intimate nature. For instance, in the *Mosley* case, the court stated numerous previous

[549] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [154]
[550] *Catt v Commissioner of Police of the Metropolis* [2012] Divisional court EWHC 1471.
[551] ibid. At [36] But see *HRH Prince of Wales v Associated Newspapers Ltd* (n 146). Political opinions that were expressed privately were protected.
[552] *Douglas v Hello! Ltd* (n 146). At [83]
[553] *Campbell v Mirror Group Newspapers Ltd* (n 6).
[554] *Peck v. The United Kingdom* (n 511).
[555] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [93]

cases, given that the people's sex lives are essentially private matters that concerned as 'a most intimate aspect of private life.'[556] In the *Campbell* case, the court also stated that 'it has always been accepted that information about a person's health and treatment for ill-health is both private and confidential.'[557]

Furthermore, at the second stage test, different types of private information may deserve different degrees of protection.[558] Therefore, the nature of information is also a factor in the balancing test. However, although the information is considered private, it may not be safeguarded if it is overridden by freedom of expression or other competing rights. As seen in the previous chapter, in several cases, freedom of expression involving the public figure outweighed privacy interests in private information.[559] Thus, the claimant's position as a public figure is another factor in the balancing test between privacy and freedom of expression that will be critically analysed in the next category.

To conclude, not all information about another would be protected under the tort of MOPI. The nature of information is an essential factor in both the reasonable expectation of privacy and the balancing tests. Some types of information might be easier to classify as private and may deserve more protection than others. Subsequently, it is arguable if the tort of MOPI is sufficient to protect informational privacy. The question is whether and how the information, which is not obvious private, could be protected under the tort of MOPI.

B. The information which is not obvious Private

Although the nature of the information is essential when considering the reasonable expectation of privacy test, there are other factors that the court will take into account, such as the form in which the information is kept.[560] For instance, in the *Prince of Wales* case,[561] the Prince's travel journals were

[556] *Max Mosley v News Group Newspapers Limited* (n 6). , 2008 WL 2872466 at [98-110]
[557] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [145]
[558] ibid. At [148]
[559] See for example, *LNS v Persons Unknown* (n 456)., *Ferdinand v MGN Ltd* (n 6)., *McClaren v News Group Newspapers Limited* (n 451).
[560] *Douglas v Hello! Ltd* (n 146).
[561] *HRH Prince of Wales v Associated Newspapers Ltd* (n 146).

protected as private despite the fact that they include political opinions.[562] Moreover, as explored, in the *Campbell* case, the court stated that a photograph 'might be a more vivid form of information than the written word.'[563]

Furthermore, in the *Murray* case,[564] the court decided that the claimant had a reasonable expectation of privacy in a photograph of a family walking in the street, even though such activity was not obvious private and not embarrassing or humiliating fact.[565] In this case, 'the attribute of the claimant' as an infant was taken into account.[566] Besides, in the *Murray* case, the pictures were 'taken deliberately, in secret and with a view to their subsequent publication. They were taken for the purpose of publication for profit, no doubt in the knowledge that the parents would have objected to them.'[567] Hence, 'nature and the purpose of the intrusion' is another factor added to the test.[568] As a result, the court held that the claimant can reasonably expect privacy in those pictures, although those activities are a kind of information, which is not obviously private. Consequently, it could be said that the information or activity which is not obvious private is possible to be protected under the tort of MOPI if, in all circumstances, the claimant could enjoy the reasonable expectation of privacy.

In conclusion, information about another will be protected if it can reasonably expect to be private, and privacy interests must outweigh freedom of expression or other competing rights. The nature of information is the key factor when considering if the information is private. Nonetheless, information that is not obvious private could also be protected if, by taking all factors into account, the claimant could have a reasonable expectation of privacy in that information. Hence, although information related to other individuals cannot automatically be protected under the tort of MOPI, it could be reasonably and proportionately safeguarded.

[562] However, see *Catt v Commissioner of Police of the Metropolis* (n 550)., political activity is of a public nature.
[563] *Campbell v Mirror Group Newspapers Ltd* (n 6). At [72]
[564] *Murray v Express Newspapers Plc* (n 6).
[565] ibid. At [36]
[566] ibid. At [36]
[567] ibid. At [36]
[568] ibid. At [36]

5.3.2 Thailand

As explored in Chapter 2, most explanations of privacy rights in tort law textbooks were related to physical privacy and intrusions.[569] Therefore, it is questionable whether and how the general tort can protect private information. More importantly, it is doubtful if the nature of information is related to any element of the general tort. Accordingly, section *A.* will first examine the protection of private information under the general tort (section 420).[570] Then, to compare with the tort of MOPI, section *B.* will consider if the nature of information affects any element of the general tort. This section will further examine whether the information, which is not obvious private, could be protected under section 420.[571]

A. The Protection of Private Information

In Chapter 2, the thesis explored that the Constitution of Thailand recognises both physical and informational privacy. Concerning informational privacy, paragraph 2 of section 32 of Thailand's Constitution of 2017[572] states that 'any exploitation of private information in any manner whatsoever shall not be permitted.'[573] As argued in Chapter 3, 'any rights' in section 420 of the CCC[574] include any rights that are recognised by laws. Therefore, 'any rights' in section 420[575] could comprise privacy rights in terms of informational privacy as it is now recognised by the Constitution. Moreover, recently, in the Supreme court case number 4893/2558,[576] the claimant commenced proceedings to claim damages for invasion of privacy rights under section 420 of the CCC. In this case, the Supreme court held that the dissemination of private photographs and information about the claimant violated the claimant's privacy rights.[577] This case implies that section 420 can guard against unwanted disclosure of private information or misuse of private information. Consequently, the present author asserts that the general tort is applicable to protect informational privacy.

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[569] Chapter 2, Section 2.4.3
[570] The Civil and Commercial Code. Section 420
[571] ibid.
[572] Thailand's Constitution of 2017. Section 32
[573] ibid.
[574] The Civil and Commercial Code. Section 420
[575] ibid.
[576] Supreme Court Decision 4893/2558 (n 21).
[577] ibid.

Nevertheless, Iammayura commented that although section 420 could be applied to protect private information, the essence or nature of this protection differs from the protection of property, body and health rights in section 420.[578] Therefore, Iammayura doubted the effectiveness and suitability of the general tort in protecting private information. Furthermore, from case law and literature reviews,[579] section 420 has mostly dealt with physical and property harms and economic loss, not a breach of private information or misuse of private information. Since the general tort was not specifically designed to protect private information and was enacted before informational privacy was acknowledged in the Thai legal system,[580] it is questionable whether the general tort is suitable and sufficient for protecting private information in the digital age. This research question will be answered later in Chapter 7.

B. The Nature of Information

While the nature of the information is the key factor in the reasonable expectation of privacy test, this factor has never been profoundly discussed in the area of the general tort. Hence, it is doubtful whether and how the nature of information is relevant to any element of the general tort. In the present author's view, the nature of the information may be related to the actual damage. As argued, in order to establish the actual damage under section 420,[581] first, the claimant must have privacy rights in that situation, and secondly, the actual damage must arise from an invasion of privacy by the defendant.

Therefore, first, the nature of the information may be related to the question of whether privacy right is engaged. If the information in question is of an obvious private nature, it would not be difficult to identify that the claimant had privacy rights in that information. For example, in the Supreme court case number 4893/2558, the court stated that the claimant had privacy rights in their sexual

[578] Iammayura, 'Laws Related to Personal Data in Thailand' (n 7). 6
[579] See for example, Pengniti (n 4)., Supanit (n 4)., Poonyapan (n 19)., Tingsaphati (n 19)., Wichian Direk Udomsakdi, *Comprehensive Civil Law: Book 1* (Jurisprudence Group 2020).
[580] See further in Chapters 2 and 3, section 420 of the Civil and Commercial Code was enacted in 1925 and has never been amended, while the informational privacy or the right to control over the information has recently been recognised.
[581] The Civil and Commercial Code. Section 420

activity in a private place.[582] In this case, sexual activity is an intimate part of a human's life that is obviously private. Moreover, the private activity that occurred in the private place should be considered as private information. Therefore, it is clear that the claimant in this case shall have privacy rights in this type of information. Nonetheless, apart from the sexual activity, it is uncertain what kinds of information would be protected by the general tort due to a lack of certain rules and judicial decisions.

Secondly, if the information is obviously private, it will be relatively easy to prove the actual damage arising from the disclosure of that information. On the contrary, it would be challenging to prove the actual damage if the information is not obviously private or trivial. For instance, it seems hard to prove the actual damage arising from disclosing trivial information about the claimant or photographs of their daily activities in a public place. Nonetheless, even if the information is not obviously private, the actual damage would not be difficult to prove if there is sufficient evidence of the damage from disclosure, such as serious harassment or physical harm. For example, although political activities in public places are not obviously private, disclosing that information may cause serious harassment, cyberbullying or social sanctions. Accordingly, the present author contends that the most critical factor under the general tort is the proof of damage, not the nature of the information. However, as mentioned in the previous category, the proof of the actual damage is likely problematic in privacy cases.

To conclude, the present author argues that section 420 can theoretically protect informational privacy. She further suggests that the nature of the information may link to the actual damage. Even though the information is not obvious private, the general tort is actionable if the claimant has sufficient evidence to prove the actual damage. Consequently, dissimilar to the English tort of MOPI, the thesis asserts that the proof of damage is more crucial to the general tort than the nature of the information. However, as previously argued, the actual damage seems difficult to prove in most privacy cases. More importantly, it is still questionable whether the general tort is suitable and sufficient to protect private information in the digital age. This question will be answered in Chapter 7.

[582] Supreme Court Decision 4893/2558 (n 21).

5.4 Privacy and a Public Figure (Category 3)

As mentioned earlier, 'the attributes of the claimant'[583] are one factor in the reasonable expectation of privacy test. Nonetheless, it is questionable if the position of the claimant is relevant to the elements of the Thai general tort.

In the traditional media context, numerous English landmark privacy cases have involved public figures.[584] Similarly, in Thailand, the landmark privacy-related tort case is also connected with the public figure.[585] This scenario tends to keep happening in the case of individual media users. For example, a Thai social media user disclosed photographs on the Internet of a Thai singer kissing their partner.[586] Likewise, a user posted a video on Snapchat of theirself and two English national footballers in a hotel room.[587]

Hence, this category will examine the privacy protections of a public figure under tort laws. The question here is whether a public figure is entitled to have the same degree of privacy protection as ordinary individuals. Moreover, it is questionable if the torts are satisfactory to protect privacy rights in this setting.

5.4.1 England

From an analysis of the English case law,[588] it appears that the claimant's status as the public figure is significantly concerned with both the reasonable expectation of privacy test and balancing test as follows.

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[583] *Murray v Express Newspapers Plc* (n 6).
[584] See, for example, *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Murray v Express Newspapers Plc* (n 6)., *Ferdinand v MGN Ltd* (n 6)., *Max Mosley v News Group Newspapers Limited* (n 6)., *HRH Prince of Wales v Associated Newspapers Ltd* (n 146).,*Douglas v Hello Ltd* (n 6).
[585] Supreme Court Decision 4893/2558 (n 21).
[586] TeeNee.com Team, 'Unknown User, Who Disclosed Pictures of Cake BNK48 Kissing a Guy, Is Condemned for Violation of Privacy' *Teenee.com* (Semptember 2019) <https://entertain.teenee.com/gossip/190934.html> accessed 10 January 2020.
[587] James Robinson, Jake Simmons and Sami Mokbel, 'I Shot the Video and It Was a Huge Mistake': Icelandic Beauty Queen's Cousin Admits She Posted Snapchat Clip from Shamed England Stars' Quarantined Hotel Room - as Mason Greenwood Apologises for "Embarrassment"' *Dailymail* (8 September 2020) <https://www.dailymail.co.uk/news/article-8708809/Icelandic-girl-admits-posted-video-revealed-meeting-Masoon-Greenwood-Phil-Foden.html> accessed 1 November 2020.
[588] See, for example, *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Max Mosley v News Group Newspapers Limited* (n 6)., *McKennitt v Ash* (n 146)., *Ferdinand v MGN Ltd* (n 6)., *Jonathan*

A. The Reasonable Expectation Test

At the first stage test, the public figure may have a less expectation of privacy than ordinary individuals. For example, in the *Spelman* case, the court stated that 'there is no, or at best a low, expectation of privacy' in the national rugby player's health information.[589] In the *Richard* case, the court indicated that 'public figure is not, by virtue of that quality, necessarily deprived of his or her legitimate expectations of privacy.'[590] However, a given public figure may waive 'at least a degree of privacy by courting publicity or adopting a public stance.'[591] In other words, although the public figure is entitled to a legitimate reasonable expectation of privacy, the degree of expectation may be less than an ordinary private individual because of their 'courting publicity or adopting a public stance'.[592]

B. The Balancing Test

As explored in the previous chapter, although individual media users do not have a duty to serve public interests, they can establish public interests' justification. When determining the balancing between privacy and freedom of expression, a publication in matters of public interests would likely increase the weight of freedom of expression. Since the publication about the public figure has frequently been considered the publication in public interests, the public figure's status has often impacted the balancing test.[593] For example, the English courts ruled that there were public interests in correcting the public figures' false image.[594] Furthermore, the English courts have suggested that the public figure is

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Spelman (by his Litigation Friends Mark Spelman and Caroline Spelman) v Express Newspapers (n 412)., *Sir Cliff Richard OBE v The British Broadcasting Corporation, The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch).

[589] *Jonathan Spelman (by his Litigation Friends Mark Spelman and Caroline Spelman) v Express Newspapers* (n 412). At [69]

[590] *Sir Cliff Richard OBE v The British Broadcasting Corporation, The Chief Constable of South Yorkshire Police* (n 588). At [256]

[591] ibid.

[592] ibid.

[593] See for example, *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Ferdinand v MGN Ltd* (n 6)., *Max Mosley v News Group Newspapers Limited* (n 6)., *LNS v Persons Unknown* (n 456)., *McClaren v News Group Newspapers Limited* (n 451).

[594] *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Ferdinand v MGN Ltd* (n 6).

'a role model'[595] or holds 'a high-profile position'[596] who usually bears a higher expectation of the standard of conduct than ordinary individuals. Therefore, the courts often held that a publication about the behaviours of those people in high-profile positions is in the public interest. For example, in the Ferdinand case,[597] although the court accepted that the claimant had a reasonable expectation of privacy in their information about sexual relationships, the defendant's freedom of expression and public interest in the publication prevailed the claimant's privacy.

However, not all publications involving the public figure will decisively be the publication in public interests. Moreover, as argued in the previous chapter, to outweigh privacy rights, individuals cannot justify their publication by claiming public interests as an inherent value underpinning freedom of expression. However, the nature and quality of the public interest would be taken into account in the balancing test between privacy and freedom of expression. For instance, in the *Mosley* case, the court found no public interest in the publication of Mosley's sexual life.[598] In this case, Eady J underlined that not all truth justification underpinning freedom of expression would simply trump privacy rights in any circumstances.[599] When exercising the balancing test, the court should ask 'was it necessary and proportionate for the intrusion to take place, for example, in order to expose illegal activity or to prevent the public from being significantly misled by public claims hitherto made by the individual concerned?'[600] Moreover, the thesis argued that the justification of public interests should not be expanded too broadly.

To sum up, it could be seen that the position of the public figure may produce public interests that would heighten the weight of freedom of expression on the scale of the balancing between privacy and freedom of expression. Also, the public figure tends to have a less expectation of privacy than ordinary individuals. As a result, it appears that the public figure would likely have less privacy protection

[595] See for example *Campbell v Mirror Group Newspapers Ltd* (n 6)., *A v B Plc* (n 171)., *Ferdinand v MGN Ltd* (n 6)., *McKennitt v Ash* (n 146).
[596] *Ferdinand v MGN Ltd* (n 6).
[597] ibid.
[598] *Max Mosley v News Group Newspapers Limited* (n 6).
[599] ibid. At [10]
[600] ibid. At [131]

than ordinary individuals in the English legal system. Nonetheless, not all information about the public figure would be in public interests. The nature and quality of the public interest should be considered to provide proportionate privacy protection to the public figure. More importantly, the thesis argues that the notion of the public figure and public interest should not be interpreted broadly. In this sense, privacy rights of the public figure could be proportionately protected.

5.4.2 Thailand

Unlike the English legal system, it seems that the public figures would likely have the same degree of privacy protection as other private individuals in the Thai legal system. Nevertheless, it should be clarified that the privacy protection of the public figures discussed in this thesis will exclude the Thai royal family. According to the Constitution,[601] section 112 of the Thai Criminal code[602] and Thai tradition, the Thai royal family have always had the highest degree of privacy protection in Thai jurisdiction.

Under section 420 of the CCC,[603] a claimant can be any person who was injured by the wrongful act. Therefore, it could be argued that everyone will be treated equally under the general tort. In the Supreme Court's decision number 4893/2558, the court stressed that 'although the claimant was a politician (the public figure), they shall not be deprived of privacy right.'[604] Accordingly, at first glance, public figures or the attributes of the claimant look irrelevant to any element of the Thai general tort. However, upon closer examination, the thesis observes that the public figures may cause a different level of difficulty in proving the actual damage. Moreover, similar to the English legal system, the protection of the public figure might be limited to public interests.

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[601] Section 6 of Thailand's Constitution of 2017 states that 'no person shall expose the king to any sort of accusation or action.'

[602] Section 112 of the Thai Criminal Code states that 'whoever defames, insults or threatens the King, the Queen, the Heir-apparent or the Regent, shall be punished…' This section has been broadly interpreted to protect the royal family. Moreover, this section is found in the class of offences relating to the security of the kingdom. Thus, the matters of the royal family have been often considered the security of the kingdom. Nonetheless, the heated discussion about section 112 is outside the scope of this thesis.

[603] The Civil and Commercial Code., section 420

[604] Supreme Court Decision 4893/2558 (n 21).

A. The Actual Damage

From the interview of the selected Thai judges, the status of the public figure may lead to more substantial damages than those of individuals.[605] In particular, the judges explained that different societal positions might produce different levels of damages, leading to a different compensation amount. [606] Likewise, the present author explores that public figures usually have more economic worth in their personalities or appearances than ordinary individuals. Hence, although the actual damage and the amount of compensation is a different issue, it might be easier to prove the actual damages or economic loss arising from disclosure of their private information or unwanted public publication of public figures' pictures than those of individuals. Therefore, the burden of proof of damages in the case of the public figure is likely less than those of individuals.

To sum up, in the Thai legal system, it appears that the public figures would have the same degree of privacy protection as ordinary Thai people. Nonetheless, the public figures may find it easier to prove the actual damage to their privacy rights than individuals.

B. Unclear Justifications of Public interests and Lack of the Balancing between Privacy and Freedom of Expression

However, Phutthisombat argued that public figures' privacy rights should be limited to public interests.[607] More importantly, section 32 of the Constitution states that a violation of privacy rights shall not be permitted, 'except by virtue of a provision of law enacted only to the extent of the necessity of public interest'.[608] Therefore, it looks like public interest could be used as a legal justification or an exception in a privacy-related tort. In case number 4893/2558, the supreme court stated that the publication of the sexual life of the claimant, who was a politician (a public figure), did not produce any public interest. Then,

[605] Nakwanit (n 23).
[606] ibid.
[607] Phutthisombat (n 376) 65-67
[608] Thailand's Constitution of 2017., section 32

the court concluded that the defendant (the press) committed the wrongful act.[609] According to this judgement, it is unclear how the court would decide if that publication in question generated public interests. It is questionable if a publication was in public interests could institute a lawful act or be an acceptable justification. In other words, it is questionable whether and how public interests could justify or defend a private party's wrongful act. More importantly, according to section 32 of the Constitution as seen above, privacy rights could only be limited by the virtue of a provision of law for the necessity of public interest. Without a provision of law, it is arguable whether and how an individual can justify that they invaded another privacy rights for public interests in private disputes. In this regard, after the Personal Data Protection Act B.E. 2562 (2019)[610] (PDPA) came into force, the thesis observes that the collection or disclosure of private information for public interests might be considered a lawful act due to the provisions of exception in this Act.[611] Under the PDPA, personal data may be lawfully collected and disclosed for public interests. This could then establish an acceptable justification for tortious action.

Nonetheless, several activities considered in this thesis tend to fall outside the scope of the PDPA. For example, the PDPA is applicable only when personal data is collected, used, or disclosed. Thus, it cannot apply in the case of physical invasions where personal data is not concerned. For instance, if an intruder merely observes the public figures or listens to their conversations or interferes with their physical selves without using any technology or devices, those activities will fall outside the scope of the PDPA. Furthermore, the new PDPA does not aim to regulate or control individuals' activities but was enacted to protect them.[612] Therefore, the PDPA does not apply to the collection, use, or disclosure of personal data by a person for their personal use or household activities.[613] Likewise, it is inapplicable to a person who uses or discloses personal data for

[609] Supreme Court Decision 4893/2558 (n 21).
[610] The Personal Data Protection Act 2019. The PDPA was enacted in 2019, but its enforcement has been postponed several times. The PDPA came into force on 1 June 2022.
[611] ibid. Section 24 (4) provides that 'the data controller shall not collect personal data without the consent of the data subject, unless it is necessary for the performance of a task carried out in the public interest by the data controller', and 27 states that 'the data controller shall not use or disclose personal data without the consent of the data subject, unless it is the personal data which is collected without requirement of consent under section 24.'
[612] ibid. Preface
[613] ibid. Section 4(1)

journalists' activities under professional ethics or for the public interests.[614] Consequently, some individual's activities would fall outside the scope of the PDPA. If the activity in question does not lie within the scope of the PDPA, the exception of public interests provided in this Act cannot be applied as a legal justification for tortious act. In other words, the defendant cannot claim that their action is a lawful act according to the PDPA if the PDPA does not apply to them. As privacy disputes between private parties are in the area of torts, it is arguable whether the provision of exception should be explicitly enacted in tort laws and whether the current statutory framework of the general tort is suitable in a privacy case. The unclear legal justification may lead to uncertainty and chilling effects. Thai people may be hesitant to disclose the information in public interests. Besides, as explored in the English legal system, the thesis argues that not all publications related to the public figure would generate public interest. Hence, it is doubtful what kinds of matters will be regarded as the public interest and in which case the public interest will triumph over privacy rights in the Thai legal system.

Furthermore, as argued in Chapter 3, in the Supreme Court case number 4893/2558, the court held that even though the defendant was a journalist with media freedom, they were not authorised to violate another person's privacy rights.[615] In this case, it appears that media freedom in itself cannot justify or authorise the defendant's act in question. This case also demonstrates a lack of the proportionality test or the balancing test between privacy and media freedom or freedom of expression in tort laws. Due to the current statutory regime, an unlawful act is decided by rules and exceptions, not a proportionate balance between rights. In this context, it could be argued that the rule requires an individual to respect privacy rights of another, and the exception is freedom of expression. Thus, it seems that privacy and freedom of expression are not treated equally in the Thai legal system. Nevertheless, the thesis will argue in Chapter 7 that privacy and freedom of expression are equally needed for public interests in

[614] ibid. Section 4(3)
[615] Supreme Court Decision 4893/2558 (n 21).

Thailand.[616] Therefore, a proportionate balance between those competing rights is required.

The lack of a balancing test between privacy and freedom of expression may cause a chilling effect. An individual media user may be reluctant to exercise their freedom of expression. Hence, it is debatable whether and how the balancing test between privacy and freedom of expression should be introduced in the tortious framework. The appropriate legal framework and the suitability of developing the balancing test in Thailand will be profoundly analysed in Chapter 7. Besides, in the media context, privacy rights and freedom of expression are often in conflict. Since the general tort cannot provide a proper balance between privacy and freedom of expression, it is questionable whether this tort is suitable for resolving private disputes in the media context. This question will be further addressed in Chapter 7.

To sum up, unlike the English legal system, the thesis explores that the public figure can theoretically have the same degree of privacy protection as an ordinary individual under Thai laws. In this sense, the general tort looks sufficient to protect privacy rights in this category. Nevertheless, the unclear public interest justification and undeveloped balancing test between privacy and freedom of expression may lead to a chilling effect or discourage the exercise of freedom of expression.

5.5 Conclusion

In the English legal system, all scenarios in three categories are associated with three factors behind the reasonable expectation of privacy test. Nonetheless, those factors seem irrelevant in the application of the Thai general tort. Moreover, they have rarely been discussed by Thai courts and scholars. Thus, by employing comparative analysis, the present author was required to consider how those factors affect the application of the general tort.

[616] The equal protection of privacy rights and freedom of expression under the Thai Constitution will be further examined in Chapter 7.

In the first category, in the English legal system, the place where the incident happened is relevant to the reasonable expectation of privacy test. It appears that individuals can reasonably expect some privacy in a public place, depending on the nature of information and other factors. In some cases, the nature of information seems to be more significant than the place where the intrusion occurred.

In the Thai legal system, the thesis remarked that the place at which the event happened might be related to the actual damage. However, it is still undefined if Thai people can expect privacy in public places. More importantly, this category demonstrates the restraints of the general tort due to the unclear scope of privacy rights and the difficulty in proving the actual damage. Besides, the thesis argued that consent to photograph or disclose photographs of individuals in public places should not be interpreted broadly.

In the second category, in the English legal system, it could be seen that not all information about the claimant will be protected under the tort of MOPI, but the two-stages test must be met. At the first stage test, the nature of information is the key factor when deciding of the information is private or reasonably expected to be private. Some types of information may be easier to consider as private. Nevertheless, information, which is not obviously private, could be properly protected by taking all factors and circumstances of the case into account. At the second stage test, the nature of information affects the balance between privacy and freedom of expression. Some types of information may deserve more protection than others. Although the information is not automatically protected under the tort of MOPI, private information could be reasonably and proportionately.

However, in the Thai legal system, the thesis observed that unlike the tort of MOPI, the proof of damage seems to be more critical to the general tort than the nature of the information. Nonetheless, the proof of damage is problematic in privacy cases. Therefore, while the thesis contended that the general tort is applicable to protect private information, the suitability and sufficiency of the tort privacy cases are still questionable.

In the third category, the case study illustrates that the public figures would likely have a less reasonable expectation of privacy than individuals in the English legal system. Moreover, their privacy interests must be balanced with freedom of expression and public interests. In numerous cases, publications about public figures could generate public interest, heightened weight on freedom of expression. Consequently, the public figures seem to have less privacy protection than individuals. Thus, it is debatable whether the tort of MOPI is sufficient to protect privacy rights in this context. On this matter, the thesis argued that the notion of public interests and the public figure should not be expanded broadly to enhance privacy protection.

On the contrary, in the Thai legal system, a public figure can expect the same level of privacy protection as an ordinary individual. Nonetheless, in some cases, the actual damages to the public figure might be easier to prove than the damages to an ordinary individual. In this sense, it seems that the general tort is adequate to safeguard privacy rights in this category. However, the balancing test between privacy rights and freedom of expression is absent in tort laws. Therefore, it is questionable whether the general tort is suitable to function in resolving private disputes in the media context where privacy rights and freedom of expression have often clashed. Furthermore, imprecise legal justifications of public interests may cause uncertainty and chilling effects.

To conclude, it could be seen that both torts are applicable and adaptable to protect privacy rights and private information in each category. Nonetheless, both have some shortcomings or limitations, as shown in the case study. In order to provide a richer analysis and look closer at the individual media user cases, the next chapter will further examine the application of the English and Thai torts in the second group of categories which focuses specifically on the individual media users' context.

Chapter 6: Three Categories of Individual Media User Cases (Group 2): Social Media as a Medium, Privacy on Social Media, and Modern Newsgathering

6.1 Introduction

In the previous chapter, the thesis investigated how the English tort of misuse of private information (MOPI) and the Thai general tort (section 420 of the Civil and Commercial Code[617]) apply or respond to the situations in the first group of categories of cases. This chapter will continuously analyse the application of both torts in the second group. While the scenarios in the first group could be seen in both traditional media and individual media user's cases, the scenarios in the second group were generated from the case of individual media users in particular.

As explained in Chapter 1, the categories of cases were classified by the typology approach.[618] During the process of classification, it was found that the cycle of information in the case of individual media users can be divided into two stages, newsgathering or collecting information and publication or dissemination of information. The medium of dissemination of information in individual media user cases is social media. Consequently, the three themes are set as seen in the below table. Firstly, at the publication stage, category 4 will explore the effects of social media as a medium of dissemination of information. Then, secondly, category 5 will examine privacy on social media. Thirdly, at the stage of the newsgathering process, category 6 will study how torts respond to privacy concerns in the modern newsgathering backdrop. As mentioned in Chapter 2, privacy can be separated into informational privacy and physical privacy. Whilst other categories of cases are mostly relevant to informational privacy, category 6 will be predominantly linked to physical privacy or intrusions.

Like the previous chapter, in each category, the legal analysis will start with the tort of MOPI, followed by the Thai general tort. The questions will be formulated from situations in each category to explore how the English and Thai torts respond

[617] The Civil and Commercial Code. Section 420
[618] Thomas (n 77).

or adjust to the problems in those situations. To answer the questions, the doctrinal legal method will be conducted. Then, the answers to the questions or the results of the torts will be compared. As a result, the sufficiency and suitability of both torts in each category will be demonstrated. Besides, the adaptability or flexibility of the torts to new circumstances will be shown. Subsequently, the analysis in this chapter will be used to support the evaluation of the torts and answer the key and sub-research questions in the next chapter.

Table 3. Case Study Analysis (Group 2)

Categories of Cases	The Tort of MOPI	The General Tort
4. Social media as the Medium of Dissemination	- Irrelevant to the cause of action - The extent of publication may affect the balancing test between privacy and freedom of expression.	- Irrelevant to the cause of action - The extent of publication may result in the difficulty of proving the actual damage.
5. Privacy on social media	- The reasonable expectation of privacy may be undermined on social media or when the information is already in the public domain - Arguing that individuals could have some expectation of privacy on social media	- The question of whether the information is already in the public domain is unrelated to the cause of action - Self-disclosure may be considered as a consent of publication, but the thesis argued that an interpretation of given consent should be limited.
6. Modern Newsgathering	- Mere acquisition of information without further publication is highly likely actionable.	- Both mere acquisition of information without publication and physical privacy itself is actionable under the general tort.

	- Physical privacy itself is likely actionable. (Unconfirmed by the court, yet) - The distinction between informational and physical privacy seems unnecessary in the context of modern newsgathering.	- The proof of the actual damage is the key factor.

6.2 Social Media as the medium of dissemination (Category 4)

As argued, in England and Thailand, most of the landmark privacy cases have been largely concerned with traditional media.[619] The tort of MOPI, in particular, was shaped by traditional media. However, in the case of individual media users, the medium of dissemination of information has been changed from traditional media to social media. For example, it is found that most Thai citizen reporters have published or distributed their content on social media.[620] In the UK, according to the Ofcom report 2019,[621] social media became the most-used platform for news, and 35% of Facebook users received news from their friends' social media pages. Therefore, it is questionable whether and how social media as the new medium of dissemination would affect the application of the torts.

6.2.1 England

It appears that whether the publication is published on the Internet or through social media has no effect on the application of the tort of MOPI.[622] The recent cases also suggest that the medium of publication is irrelevant to the cause of

[619] See, for example, *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Murray v Express Newspapers Plc* (n 6)., Supreme Court Decision 4893/2558 (n 21).
[620] Juntrong and Satararuji (n 1)
[621] Jigsaw Research, 'News Consumption in the UK:2019' (Ofcom 2019).
[622] Godwin Busuttil, Felicity McMahon and Gervase de Wilde, 'Privacy, the Internet, and Social Media' in NA Moreham and Mark Warby (eds), *The Law of Privacy and The Media* (third, Oxford University Press 2016). 762

action.[623] For instance, in the *Wan-Bissaka* case,[624] the defendant published private information about the claimant on social media. Irrespective of the medium of the dissemination of the information, the court held that the claimant was likely to have a reasonable expectation of privacy in that information.[625] Accordingly, it could be argued that the mere fact that private information is published on social media instead of traditional media does not result in the misuse of private information case. Nonetheless, as explored in Chapter 4, the extent of the publication would likely affect the balancing test between privacy and freedom of expression. Thus, in this category, the extent of the online publication will be examined in detail.

A. The Extent of the Publication and the Balancing test

In the case of mass media, the consequence of the publication or the effect on the claimant is substantial in the balancing test between privacy and freedom of expression.[626] For example, in the *Von Hannover (No 2)* case,[627] the court argued that a consequence of publication, depending on a large or a limited circulation, is a crucial criterion to the balancing test.[628] In the *Murray* case, the court also indicated that an effect on the claimant is one of the factors in the balancing test.[629] As seen in Chapter 4, on the one hand, a broad circulation would cause an advanced effect on the claimant, heightening a weight on privacy interests in the balancing test. On the other hand, a limited-circulation would lessen the effect on the claimants, which would decrease the weight on public interests. Hence, it could be said that the extent of the publication would affect the scale of the balancing test.

Although the medium of dissemination has shifted from traditional media to social media, those factors would still affect the balancing test between privacy and

[623] See for example, *Applause Store Productions Limited v Raphael* (n 478)., *Aaron Wan-Bissaka & Anor v Rhianna Bentley* (n 440)., *Hayden v Dickenson* (n 432).
[624] *Aaron Wan-Bissaka & Anor v Rhianna Bentley* (n 440).
[625] ibid. At [23]
[626] *Von Hannover v Germany (No 2)* (2012) 50 EHRR 15
[627] ibid. Although this case was decided by the European Court of Human Rights, it has influenced several subsequent domestic cases, for example, *Weller v Associated Newspapers Ltd* (n 294).
[628] ibid at [112]
[629] *Murray v Express Newspapers Plc* (n 6).

freedom of expression in a similar way. Nonetheless, due to the wide publication or mass communication of traditional media, the English court held that traditional media generally causes more damage or intrusion to the claimant than the publication on the Internet. For example, in the *CTB* case, the court stated that 'it is fairly obvious that wall-to-wall excoriation in national newspapers is likely to be significantly more intrusive and distressing for those concerned than the availability of information on the Internet.'[630] However, in Chapter 4, the thesis argued that in some cases, the publication on social media may generate a wide publication or could widely communicate to the public at the equivalent level as mass media. Therefore, it asserts that the consequence of the online publication by individual media users may not be different from that of mass media.

Moreover, from the case study,[631] it appears that the publication on social media could establish a wide publication. For example, in the *Weller* case,[632] the court held that the photograph published on a 'Facebook archive 16 pages in' and in 'Tumblr account' 'had not been widely published.'[633] This case could imply that the publication on Facebook can constitute a wide publication. Nonetheless, the court did not find a wide publication in the *Weller* case.[634] Thus, if the publication on social media can establish a wide publication, the consequence of the publication may not differ from that of mass media. Nevertheless, as seen in Chapter 4, there is a wide range of publications on social media, from large to small circulation. The further question is how the court would measure the extent of online publication or circulation of social media.

B. The Measurement of the Extent of the Publication on social media

From case law,[635] it seems that the extent of the online publication is measured by the size of audiences that actually accessed the information. For example, in

[630] *CTB v News Group Newspapers Limited* (n 146). At [24]
[631] *Weller and Ors v Associated Newspapers Limited* (n 157)., *Mr Edward Rocknroll v News Group Newspaper Ltd* (n 301).
[632] *Weller and Ors v Associated Newspapers Limited* (n 157).
[633] ibid. At [136]
[634] ibid.
[635] ibid., *Mr Edward Rocknroll v News Group Newspaper Ltd* (n 301)., *Applause Store Productions Limited v Raphael* (n 478).

the *Rocknroll* case,[636] although the Facebook account had been accessible to 1,500 Facebook friends for some time before changing the privacy settings to the public at large, the court found that there was no sufficient evidence that the Facebook pages had been wide publication.[637] In other words, even though the Facebook page was accessible to the public at large, a wide publication was not established due to a lack of evidence. In this sense, it can be argued that the extent of online publication is measured by the number of people who accessed the information, not its accessibility. Similarly, in the *Applause Store* case,[638] when assessing damages, the court observed that Facebook is a medium in which users could search for the claimant's name that led to the publication without difficulty. However, the court considered that 'a not insubstantial number of people is likely to have done so. By that, I have in mind a substantial two-figure, rather than a three-figure, number.'[639] Subsequently, the court concluded that the extent of publication in this case was 'very much less substantial' than those publications in mass media.[640] From those cases, the number of the audiences is likely essential to establish a wide publication. Yet, it is uncertain what number will constitute a wide publication.

To sum up, the medium of dissemination of information is unrelated to the cause of action. The tort of MOPI is applicable to the case where a publication is published on social media. On this basis, it could be argued that although the tort of MOPI has been shaped by traditional media, it is adaptable to the case of individual media users. However, the extent of the publication may affect the assessment of the balancing test between privacy and freedom of expression. In this regard, the thesis contends that social media publications may establish a wide publication at the same level as mass media. The extent of publication seems to be measured by the number of people who accessed the information.

[636] *Mr Edward Rocknroll v News Group Newspaper Ltd* (n 301).
[637] ibid. At [13]
[638] *Applause Store Productions Limited v Raphael* (n 478).
[639] ibid. At [78]
[640] ibid. At [81]

6.2.2 Thailand

Similar to the English tort of MOPI, the medium of dissemination is unlikely related to any element of the general tort. More importantly, under section 420, there is no requirement for publication.[641] Hence, even if one person received private information from a publication on social media, the general tort is actionable if four elements are satisfied. Thus, it can be argued that the fact that private information was published on social media instead of traditional media is irrelevant to the Thai general tort. However, it is questionable if the consequence or extent of the publication would impact the application of the tort.

A. The Extent of the Publication

The above question has never been answered by the Thai courts and never been deeply discussed by Thai tortious scholars. Also, the landmark privacy case regarding the general tort decided by the Supreme Court did not concern with this issue.[642]

In the Thai legal system, privacy actions have mainly involved defamation laws and tort laws.[643] In light of media publication, defamation law has long been applied to protect reputation rights, which are closely related to privacy rights. From the Constitution of Thailand, it could be seen that the rights to privacy and reputation are profoundly connected. According to section 32 of the Constitution of Thailand, the right to privacy is recognised together with the rights to dignity and reputation in the same clause.[644] Furthermore, as explored in Chapter 2, when drafting the Constitution in 1997, a committee explained that privacy is related to private activities, dignity and reputation.[645] Besides, the committee pointed out that the distribution of news by the media has frequently damaged both rights to private life and the reputation of the Thai people.[646] In early Thai privacy cases, privacy rights were protected by defamation laws. For example, in Supreme Court

[641] The Civil and Commercial Code., section 420
[642] Supreme Court Decision 4893/2558 (n 21).
[643] Boonyarat Chokebandanchai, *Media Laws: The Protection of Privacy and Reputation Rights* (Naresuan University Publishing House 2015).
[644] Thailand's Constitution of 2017. Section 32
[645] 'The 16th Meeting of the Constitution Drafting Committee' (n 209). 60
[646] ibid.

decision 4301/2541, the court held that the statement asserting the fact about the problems inside the plaintiff's family invaded his privacy rights. Thus, this statement was likely to impair the plaintiff's reputation or expose them to being hated or scorned.[647] Since defamation laws and privacy laws are closely related, examining defamation laws is helpful to predict how the court would likely decide about the extent of publication in a privacy case.

Concerning defamation cases, the extent of the publication, the size of the letter and the position of the news on the page may lead to different consequences to the claimant, producing a different amount of compensation.[648] By applying the same approach to privacy cases, the varying extent of the online publication would cause different effects on the claimant. A wide publication would likely cause more effect on the claimant than a limited publication. Thus, in this sense, the extent of the publication may be relevant to the burden of the proof of damage under the general tort. The actual damage arising from a wide publication may be easier to prove than the damage from a limited publication. For instance, the damage caused by unwanted disclosure of private information to the general public appears to be easier to prove than the damage from the disclosure to a limited group of close friends. Nonetheless, it is arguable how the Thai court would measure the extent of the publication on social media.

B. The Measurement of the Extent of the Publication on social media

To date, there have been no privacy cases concerning the publication on social media decided by the Supreme Court. However, recently, in a defamation case,[649] the Supreme Court held that sending a message to a limited group of people through line application is not considered a defamation by publication under section 328 of the Criminal Code.[650] The defamation by publication under section

[647] This case is concerned with criminal law, the offence of defamation, section 326 of the Criminal Code.
[648] Nakwanit (n 23). 58-59
[649] Supreme Court Decision 5275/2562. (2019)
[650] Thai Criminal Code. Section 328 states that 'if the offence of defamation is committed by means of publication of a document, drawing, painting, cinematography film, picture or letters made visible by any means, gramophone record or other recording instruments, recording picture or letters, or by broadcasting or spreading picture, or by propagation by any other means, the offender shall be punished with imprisonment…'

328 must be a dissemination of information to the public or wide publication.[651] Therefore, this case suggests that a disclosure of private information to a limited group of people would not establish wide publication. On the contrary, in the Supreme Court Decision 626/2563, the court ruled that publication on Facebook, which is publicly accessible, is considered defamation by publication or wide publication under section 328.[652] Thus, similar to mass media or traditional media, the publication on social media can institute wide publication. Moreover, they could imply that the extent of publication on social media is measured by the accessibility of the information, not the number of the audience who accessed the information. Although those cases are related to the offence of defamation under the Criminal Code, it can foresee or predict how the Thai courts would likely measure the extent of publication on social media in privacy cases.

To conclude, similar to the English tort of MOPI, the medium of dissemination is unrelated to the elements of the general tort. Hence, like the English tort, the general tort is applicable to protect privacy and private information although the information is published on social media instead of traditional media. Nonetheless, under the general tort, the extent of publication may affect the burden of the proof of damage. A wide publication would cause more damage to the claimant than a limited publication. Consequently, the damage from the wide publication would be easier to prove than the damage from the limited publication. The case study shows that the dissemination of information on social media could establish a wide publication like mass media. Unlike the English legal system, it is likely that the extent of the publication on social media in the Thai legal system is considered by the accessibility of the information, not the number of the audience who accessed the information.

6.3 Privacy on social media (Category 5)

Although breach of privacy is a global concern, sharing private information on social media has become a social trend. As explored in Chapter 1 and Chapter 4, not all individual media users would perform as the media. Ordinary users typically

[651] *Supreme Court Decision 5275/2562* (n 649).
[652] Supreme Court Decision 626/2563. (2020) The defendant posted a statement on Facebook that may damage the claimant's reputation.

use social media for social interactions. The theme in this category has often happened in the case of ordinary media users. In Britain, despite the fact that young people acknowledge the risks of sharing private information online, sharing on social media has become ingrained in their lives.[653] However, at the same time, a study found that individuals wish to privately share their information on social media.[654] Likewise, in Thailand, an Instagram user who shared their private information with close friends asked whether privacy was breached when their information was further distributed to the general public.[655] Consequently, it is arguable if there is privacy on social media. Moreover, it is questionable how the courts would likely decide if the claimant previously shared their information on social media, but the information was further disseminated beyond their expectation.

6.3.1 England

In the English legal system, the above questions are related to the reasonable expectation of privacy test. The question is whether an individual could reasonably expect privacy on social media. Moreover, could an individual reasonably expect privacy in their information if they previously disclosed that information on social media by themself?

A. The Reasonable Expectation of Privacy Test

As studied in Chapter 3, the tort of MOPI was extended from breach of confidence. Although the tort of MOPI is now a separate cause of action, in some situations, the notion of breach of confidence has still affected the decisions of the courts. In traditional breach of confidence cases, if the information is already available in the public domain, it will lose the quality of confidence.[656] Likewise, the case

[653] Grant Blank, Gillian Bolsover and Elizabeth Dubois, 'A New Privacy Paradox: Young People and Privacy on Social Network Sites' (2014) Oxford Internet Institute Working Paper <https://ssrn.com/abstract=2479938> accessed 1 May 2021.
[654] Max Mills, 'Sharing Privately: The Effect Publication on Social Media Has on Expectations of Privacy' (2017) 9 Journal of Media Law 45.
[655] '"Dao Pimthong" Prepares to Take Legal Action If the Person Who Reveal Her Information Does Not Come out and Confess.' *Sanook* (8 May 2021) <https://www.sanook.com/news/8378310/> accessed 9 May 2021.
[656] *Coco v AN Clark (Engineers) Ltd* (n 238)., 47

law suggests that if the information has already entered the public domain, the nature of private information and expectation of privacy will likely be undermined. For example, in the *ETK* case, Ward LJ stated that 'the protection (of privacy) may be lost if the information is in the public domain'.[657] In this sense, it seems that the line between private and public information is substantial when considering the reasonable expectation of privacy test.

Furthermore, social media has been often considered a public domain, even if it was set to a limited audience. Accordingly, Mills argued that the tort of MOPI seems ineffective to protect privacy rights of those who shared their information on social media since 'the threshold of when information is deemed to be in the public domain is too low.'[658] For example, in the *Trimingham* case,[659] the court found that it was unreasonable to expect privacy on social media although the claimant expected their Facebook page to be viewed only by their friends.[660] Similarly, in Northern Ireland, the court held that posting on Facebook 'was not made just to the defendant's friends but to the public at large', even if it was set only to their friends, since they 'did so in the sure knowledge that those "friends" were able to forward the posting on to whomsoever they wished'.[661]

Consequently, it seems that an individual cannot have a reasonable expectation of privacy in their information after sharing it on social media. Nonetheless, the thesis will argue that the claimant should have some expectation of privacy on social media and the tort of MOPI could protect privacy on social media in some circumstances, supported by the arguments below.

B. Supportive Arguments for Privacy Protection on Social Media

Firstly, since misuse of private information is now a separate and distinct cause of action, privacy protection should not be deprived automatically once the information enters the public domain. For instance, in the *Douglas* case,[662] Lord

[657] *ETK v News Group Newspapers Ltd* (n 412).At [10]
[658] Mills (n 654). 45
[659] *Trimingham v Associated Newspapers* (n 448).
[660] ibid. At [313]
[661] *Martin and Ors v Gabriele Giambrone P/A Giambrone & Law, Solicitors and European Lawyers* [2013] NIQB 48. At [10]
[662] *Douglas v Hello Ltd* (n 6). [2208] AC 1.

Nicholls argued that 'in some instances…information may be in the public domain, and not qualify for protection as confidential, and yet qualify for protection on the grounds of privacy.'[663] Most recently, in the *Hayden* case, the court stated that 'the fact that information sought to be protected may be accessible in the public domain is not necessarily determinative of whether a person can have a reasonable expectation of privacy in the information.'[664] Therefore, the thesis contends that even if social media is considered as the public domain, the information should not lose its private nature due to the mere fact that the information is already in the public domain.

Secondly, as seen in the previous chapter, in the *Douglas* case,[665] an individual can reasonably expect privacy in the semi-public place, where a limited number of people may see them. Furthermore, in the *Rocknroll* [666] and the *Browne*[667] cases, the court recognised that 'information which is made available to a person's circle of friends or work colleagues' and 'information which is widely published' are distinct.[668] Thus, by the same logic, the individual should have a reasonable expectation of privacy in their information if they disclosed that information on social media limited to a limited number of friends. Besides, in the previous chapter, the thesis asserted that the claimant can still have some reasonable expectation of privacy in the public place, depending on the nature of information and all factors. By taking the same factors into account, the claimant should have some expectation of privacy in their information when they posted that information on social media (the public domain).

Thirdly, even though the information is already in the public domain, the claimant would still have some expectation of privacy if there was privacy left to be protected. For example, in the *McKennitt* case, Eady J. stated that 'it does not necessarily follow that because personal [private] information has been revealed impermissibly to one set of newspapers, or readers within one jurisdiction, that there can be no further intrusion upon a claimant's privacy by further revelations. Fresh revelations to different groups of people can still cause distress and damage

[663] ibid., [2208] AC 1. At [255]
[664] *Hayden v Dickenson* (n 432). At [46]
[665] *Douglas v Hello! Ltd* (n 146). [2006] QB 125.
[666] *Mr Edward Rocknroll v News Group Newspaper Ltd* (n 301). At [5]
[667] *Lord Browne of Madingley v Associated Newspapers Limited* [2007] EWCA Civ 295.
[668] ibid. At [61]

to an individual's emotional or mental well-being'[669] Eady J. also stressed that 'the protection of the law will not be withdrawn unless and until it is clear that a stage has been reached where there is no longer anything left to be protected'.[670] Moreover, in the *CTB* case, Eady J said that nowadays, the law protects information where there is a reasonable expectation of privacy and 'for so long as that position remains.'[671] Recently, in the *Hayden* case, the court stated that the question is not whether the information was generally accessible, but rather whether an injunction would serve a useful purpose; whether the point has been reached where there is no longer anything left to be protected.'[672] From those cases, it can be argued that although an individual previously shared their information on social media by themself, they could still have some reasonable expectation of privacy in that information as long as there is privacy left to be protected.

Lastly, recognising the reasonable expectation test as an objective check, the English courts also took privacy-seeking behaviour and intention of the claimant into their considerations. For example, in the *Prince of Wales* case, the fact that the information was seen by a selected and limited group of people and an explicit statement saying that the information was 'private and confidential' satisfied confidential and private tests.[673] In the *Douglas* case, the court also stated that 'information will be confidential (private) if it is available to one person (or a group of people) and not generally available to others, provided that the person (or group) who possesses the information does not intend that it should become available to others.'[674] With the ability to protect the subjective desire for privacy, it could be argued that the tort of MOPI is suitable to protect the core concept of privacy.

As explored in Chapter 2, privacy is viewed as freedom from unwanted access to information, underlining the state of desire inaccessibility, and the right to control over the information. Moreover, there are various values underpinning privacy protection, such as autonomy and human relations. In order to protect the core

[669] *McKennitt v. Ash* (n 293). At [81]
[670] ibid. at [81]
[671] *CTB v News Group Newspapers Limited* (n 146). At [22-24]
[672] *Hayden v Dickenson* (n 432). At [46]
[673] *HRH Prince of Wales v Associated Newspapers Ltd* (n 146).
[674] *Douglas v Hello! Ltd* (n 170). At [55]

concept of privacy and maintain its intermediate values, the thesis advocates that the reasonable expectation of privacy test should rather focus on privacy-seeking behaviour or the desire for privacy than the accessibility of the information. By taking privacy-seeking behaviour or the desire for privacy into account, if an individual expresses a desire to share their information with a limited group of people or customise privacy settings on social media to a limited extent, they should have some reasonable expectation of privacy in that information. Under this approach, the core concept of privacy and its values could be appropriately protected.

To conclude, although the reasonable expectation of privacy in private information is likely undermined if an individual already posted that information on social media, the thesis explores that the individual could have some reasonable expectation of privacy on social media. In other words, the individual can reasonably expect privacy in their information even if they previously disclosed that information on social media by themself in some circumstances. Therefore, the thesis contends that the tort of MOPI can hypothetically and adaptable to protect privacy in this category.

6.3.2. Thailand

In the Thai legal system, the fact that private information was previously disclosed or already in the public domain seems irrelevant to the elements of the general tort. The key factor of the general tort is the proof of the actual damage. However, it is debatable if the claimant could claim damages if they willingly shared their private information on social media themself. This question is related to the consent.

A. The Actual Damage

As explored in the previous chapter, to meet the requirement of damage under section 420 of the CCC,[675] the claimant must first demonstrate that they had

[675] The Civil and Commercial Code. Section 420

privacy rights in that situation. Secondly, they must prove that the actual damage has actually arisen from the defendant's action.

In this category, it appears that the claimant could have privacy rights even if their private information was widely circulated. For example, in the Supreme Court decision 4893/2558, the court held that the distribution of the claimant's photographs and name by the defendant (newspaper) violated the claimant's privacy rights despite the fact that other newspapers previously disseminated those photographs.[676] This case implies that the claimant would still have privacy rights in their information even though that information was already entered into the public domain. The fact that the information is in the public domain is unrelated to the application of the general tort. Thus, unlike the tort of MOPI, the distinction between private and public information seems unimportant under the general tort. The claimant can expect privacy protection in their information, although that information was widely disseminated on social media.

Nevertheless, in the Supreme court decision 4893/2558,[677] it is obvious that the defendant's action caused further damage to the claimant since the previous dissemination did not reveal the claimant's name. Therefore, it is unclear whether the defendant's action would cause the actual damage if they disclosed information that others had already revealed or widely disseminated. In this hypothetical instance, the thesis considers that the requirement of the actual damage can still be satisfied if the claimant can show that the defendant's publication causes them additional damages. However, again, the actual damage might be difficult to prove in some circumstances. For example, it might be difficult to establish the actual damage from the disclosure of trivial information or the information which is widely known.

B. The Consent

Furthermore, it is questionable if self-disclosure on social media could establish a tacit or implied consent for further distribution. In the Thai legal system, there are two theories concerning consent in tort laws. On the one hand, it is argued

[676] Supreme Court Decision 4893/2558 (n 21).
[677] ibid.

that if consent was given for a particular act, the defendant who committed such act would not commit the unlawful act.[678] In other words, the permitted action constitutes a lawful act.[679] For instance, in the Supreme Court decision 2718/2552, the court decided that the action in question was lawful due to the claimant's consent. On the other hand, some scholars explored that consent is engaged with the actual damage. If the claimant gives consent to a particular action, there would be no damage to them.[680] In particular, Sottipun argued that if the claimant is aware that the defendant's action will cause damages to them, but they still gave consent to that action, they cannot claim that the defendant's action damages them.[681] On this basis, it is disputed whether the actual damages would arise if the claimant willingly shared their private information on social media.

In the previous chapter, the thesis contended that consent should not be interpreted broadly.[682] Besides, consent must be limited to its purposes.[683] In case number 4893/2558, the Supreme Court stated that the fact that the claimant voluntarily disclosed their name to the officials could not be deemed that they consented to further disclosure to the public at large.[684] This case could imply that although the claimant willingly disclosed their private information to a limited number of people on social media, it could not suppose that they voluntarily consented to further or wide publication. Therefore, further dissemination of that information may cause damage to the claimant and be a wrongful act.

In addition, as argued in the previous chapter, a person who gave direct or tacit consent must have the ability to understand or acknowledge the conditions and the consequences of their consent.[685] Nevertheless, from recent quantitative research, not all Thai people can understand how to customise privacy settings or control the information flow on social media, especially the elders.[686]

[678] Tingsaphati (n 19). See also Pengniti (n 4). 65
[679] Pengniti (n 4). 65
[680] Supanit (n 4). 46
[681] Sottipun (n 333). 154
[682] Chapter 5, Section 5.2.2
[683] Pengniti (n 4). 74
[684] Supreme Court Decision 4893/2558 (n 21).
[685] Tingsaphati (n 19). 82 (footnote), Srirat (n 541). 17
[686] 'Thailand Internet User Profile 2018' (n 208).

Consequently, the thesis contends that the mere fact that the claimant willingly shared their private information on social media without any privacy setting does not mean that they understood or acknowledged the conditions or consequences of his action. Hence, it cannot simply presume that the tacit or implied consent for further publication was given under this circumstance. As a result, the claimant still can claim damages to their privacy rights if they can prove the actual damages arising from further publication and other elements under section 420 of the CCC.

To summarise, in the Thai legal system, an individual can have some privacy on social media. The claimant still has privacy rights even if their information had already entered the public domain. Furthermore, the thesis asserts that consent should be interpreted narrowly. Although the claimant willingly shared their private information on social media, they may not give consent for further publication. Thus, the general tort is actionable in this category. Nonetheless, the actual damage might be not easy to prove in some cases. The difficulties of the actual damage will be further analysed in the next chapter.

6.4 Modern Newsgathering (Category 6)

As explored in Chapter 1, modern intrusive technologies have become more omnipresent and affordable to individuals, such as thermal sensing and drones.[687] Moreover, social media has become a data source for newsgathering.[688] Those intrusive technologies and social media have empowered individuals and been used for modern newsgathering, leading to privacy concerns, such as unwanted observation and unauthorised data collection. For example, according to the UK Civilian Drones report[689], drones have increasingly been used by civilians, which raises public concerns, with privacy issues being of the most concern.[690] Similarly,

[687] Avery E Holton, Sean Lawson and Cynthia Love, 'Unmanned Aerial Vehicles: Opportunities, Barriers, and the Future of "Drone Journalism"' (2015) 9 Journalism Practice 634. See also Karen McIntyre (n 1). and Gutterman and Rulffes (n 1).
[688] Arkaitz Zubiaga, 'Mining Social Media for Newsgathering: A Review' (2019) 13 Online social networks and media 100049.
[689] Andrew Haylen, 'Civilian Drones' (Parliament 2019) Briefing Paper CBP 7734.
[690] ibid. 5

in Thailand, as drones have been gradually used by individuals, protection of privacy in this context has become questionable.[691]

While other categories in the thesis predominantly involve unwanted publication or unauthorised disclosure of information, this category will focus on the newsgathering process. Accordingly, the first question here is whether and how the torts protect privacy rights and interests when private information is merely acquired without further publication. Furthermore, the newsgathering process is mainly engaged with physical privacy or intrusions. As explained in Chapter 2, physical privacy is unwanted access to the physical self, such as watching, listening or observing.[692] Thus, it concentrates on a person' sense or sensory access, not information. Hence, the second question is whether the torts can protect physical privacy or guard against intrusion into the physical self when information is not involved.

6.4.1 England

In the English legal system, several landmark privacy cases have largely involved unwanted disclosure of private information or unauthorised publication.[693] Since the tort of MOPI has been extended from breach of confidence, it was arguable if it could apply when the information is merely acquired without further disclosure. Moreover, although the English court recognises physical privacy,[694] it has long been debated whether the tort of MOPI can protect physical privacy in itself.[695] Therefore, this section will explore whether and how the tort of MOPI protects privacy in the cases of a mere acquisition of information and physical privacy.

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[691] Sirichanok Wiriyakaokul, 'Reculations and Laws Concerning the Uses of Drones to Protect Privacy Rights' (Academic Bureau, Secretariat of the House of Representatives 2018) Academic focus.
[692] Moreham, 'Beyond Information: Physical Privacy in English Law' (n 107)., Moreham, 'Liability for Listening: Why Phone Hacking Is an Actionable Breach of Privacy' (n 160).
[693] See for example, *Campbell v Mirror Group Newspapers Ltd* (n 6)., *Murray v Express Newspapers Plc* (n 6)., *Douglas v Hello! Ltd* (n 170)., *Max Mosley v News Group Newspapers Limited* (n 6).
[694] *Goodwin v News Group Newspapers Ltd* (n 146)., *PJS v News Group papers* (n 146).
[695] See for example, , Moreham, 'Intrusion into Physical Privacy' (n 163).,Moreham, 'Liability for Listening: Why Phone Hacking Is an Actionable Breach of Privacy' (n 160)., Moreham, 'Beyond Information: Physical Privacy in English Law' (n 107)., Wragg, 'Recognising a Privacy-Invasion Tort: the Conceptual Unity of Informational and Intrusion Claims' (n 163)., Thomas DC Bennett, 'Triangulating Intrusion in Privacy Law' (n 163)

A. A Mere Acquisition of Information

The first question seems to be settled in *Tchenguiz v Imerman*[696] as the court stated that

'…intentionally obtaining such information, secretly and knowing that the claimant reasonably expects it to be private, is itself a breach of confidence...'[697]

Even though this case is actually concerned with the breach of confidence, the court said that both privacy and 'old fashioned confidence' cases should be developed and applied consistently and coherently.[698] Moreham further argued that 'if the mere acquisition of private information can interfere with a claimant's reasonable expectations of privacy in breach of confidence, it will also breach the claimant's reasonable expectations in misuse of private information.' [699] Therefore, Moreham contended that the mere acquisition of information is highly likely actionable under the tort of MOPI, even if there is no further use or disclosure of that information. Later, in the *Gulati* case,[700] the court confirmed that the tort of MOPI is applicable in this context. The right to privacy is infringed when private information is acquired, even though there is no article published.[701] Consequently, it could be concluded that the tort of MOPI can apply to protect privacy in the case of mere acquisition of information without publication.

B. Intrusions or Physical Privacy

Moreover, it is now broadly accepted that the tort of MOPI can apply to protect physical privacy or guard against intrusion.[702] The remaining question is how far it extends. It is debatable if the tort of MOPI is applicable to protect physical privacy in itself where the information is not involved.

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[696] *Tchenguiz v Imerman* [2010] EWCA Civ 908. In this case, the wife's brothers obtained documents from the husband's computer server. Those documents were then forwarded to the wife's solicitors. The husband sought an order for preventing the wife from using the obtained information.
[697] ibid. At [68]
[698] ibid. At [67]
[699] Moreham, 'Beyond Information: Physical Privacy in English Law' (n 107). 374
[700] *Gulati v MGN* (n 146).
[701] ibid.
[702] Witting (n 267). 559, Wragg, 'Recognising a Privacy-Invasion Tort: The Conceptual Unity of Informational and Intrusion Claims' (n 163). Moreham, 'Intrusion into Physical Privacy' (n 163).

On this matter, Moreham asserted that the English court is willing to extend the tort of MOPI to protect physical privacy in itself by referring to the *Gulati* case.[703] In the *Gulati* case,[704] Mann J accepted that there are three separate areas of wrongful behaviour; 'wrongfully listening to private or confidential information left for or by the claimant, wrongfully obtaining private information via private investigators and the publication of stories based on that information.' [705] Therefore, Moreham argued that the tort of MOPI is actionable to safeguard physical privacy itself. [706] Nonetheless, as opposed to Moreham, Bennett contended that the *Gulati* case only concentrated on acquiring information; nothing, in this case, could further indicate that intrusion into the physical self, regardless of the obtained information, has become actionable.[707]

The present author agrees with the opinion that the tort of MOPI could protect privacy from intrusions or physical privacy where the information is not involved. Regardless of information, it appears that the English court is ready to apply the tort of MOPI to safeguard physical privacy in the right circumstances. For example, in the *CTB* and *PJS* case,[708] Eady J stressed that the modern law of privacy does not solely focus on information but is also concerned with the intrusion.[709] Most recently, in *Fearn v Tate Gallery*,[710] the court observed that the issue in cases of overlooking by a neighbour relates to invasion of privacy. Thus, privacy laws, including misuse of private information, are likely actionable in this case.[711] However, in this case, the claimant did not claim damages based on the tort of MOPI. Therefore, although the tort of MOPI can hypothetically protect physical privacy in itself, it has to wait for an appropriate case to confirm.

Additionally, Wragg disputed that informational and physical privacy is not only related but inseparable. In Wragg's view, sometimes physical privacy is

[703] Moreham, 'Beyond Information: Physical Privacy in English Law' (n 107).
[704] *Gulati v MGN* (n 146).
[705] ibid. At [13]
[706] Moreham, 'Beyond Information: Physical Privacy in English Law' (n 107).
[707] Bennett (n 163).
[708] *CTB v News Group Newspapers Limited* (n 146). See also *PJS v News Group papers* (n 146).
[709] *CTB v News Group Newspapers Limited* (n 146). At [22-24]
[710] *Fearn v Tate Gallery* [2020] EWCA Civ 104.
[711] ibid. at [84]

dominated, sometimes information is dominated, but both are always present.[712] Besides, Wragg explored that the English courts have not strictly rejected or separated the intrusion (physical privacy) from the information privacy claims.[713] For example, in the *Campbell*[714] and *Murray*[715] cases, intrusive means of acquiring information is a substantial factor in determining the claims. In the *CTB*[716]and *PJS*[717]cases, misuse of private information led to an intrusion, while in the *Richard* case,[718] the intrusion led to misuse of information. More importantly, Wragg argued that modern intrusions have blurred the boundaries between informational and physical privacy. [719] Therefore, the traditional distinction between informational privacy and intrusion is unnecessary in this context. Consequently, Wragg contended that the tort of MOPI has now evolved sufficiently to protect the intrusion or physical privacy.[720] The English courts only need to apply it in a suitable case.

The present author rather agrees with Wragg in the sense that the distinction between informational and physical privacy claims is likely inseparable in the digital age. Particularly, in the modern newsgathering context, when individual users use modern devices such as thermal sensing and drone to intrude into others' physical selves, at some point, they would obtain some information through those devices. Even though the main purpose of intrusion is to watch the claimant's behaviours, not to collect information about them, the information would be temporarily or permanently collected in those devices. Thus, it would violate both informational and physical privacy at the same time. In other words, informational and physical privacy is likely undividable in modern newsgathering. Nonetheless, physical privacy emphasises the state of unwanted access to the self, not

[712] Wragg, 'Recognising a Privacy-Invasion Tort: the Conceptual Unity of Informational and Intrusion Claims' (n 163).
[713] ibid. 427-429
[714] *Campbell v Mirror Group Newspapers Ltd* (n 6).
[715] *Murray v Express Newspapers Plc* (n 6).
[716] *CTB v News Group Newspapers Limited* (n 146).
[717] *PJS v News Group papers* (n 146).
[718] *Sir Cliff Richard OBE v The British Broadcasting Corporation, The Chief Constable of South Yorkshire Police* (n 588). By broadcasting the fact that Sir Cliff Richard was investigated, and their property was searched by the police, the BBC was liable for breach of privacy rights.
[719] Wragg, 'Recognising a Privacy-Invasion Tort: the Conceptual Unity of Informational and Intrusion Claims' (n 163).
[720] ibid.

information about the self. Therefore, the present author explores that the tort of MOPI is sufficient to protect privacy in the context of modern newsgathering.

All in all, the mere acquisition of information is highly likely actionable under the tort of MOPI. The thesis also observes that the tort of MOPI is likely applicable to protect physical privacy in itself. Nevertheless, it views that physical and informational privacy is inseparable in the modern newsgathering context. Thus, the tort of MOPI is adequate to protect privacy in this category.

6.4.2 Thailand

In contrast with the English tort of MOPI, the general tort has not revolved around informational privacy and unwanted publication. The vivid distinguishment between physical and information privacy seems unimportant under the general tort. As argued, in the Thai legal system, the key factor of privacy action is the proof of damage. Thus, the Thai general tort is theoretically actionable in both situations: the mere acquisition of information and intrusions or physical privacy. However, the actual damage to physical privacy might not be easy to prove in some circumstances.

A. A Mere Acquisition of Information

As explored, the publication is not required under the general tort. The general tort is applicable in the case of the mere acquisition of information without further use or publication of such information. Nevertheless, as argued in the previous chapter, the actual damage appears to be one of the most problematic elements of the general tort. In this context, the claimant may have a heavy burden of proof to show the actual damage arising from the mere acquisition of information without publication or further use. For example, it seems difficult to prove the actual damage if the acquired information, which is a single point of data or a piece of trivial information, is not further used.

B. Intrusions or Physical Privacy

Dissimilar to the English tort of MOPI, it is widely agreed that the general tort can hypothetically protect privacy from intrusion or physical privacy. As studied in Chapter 2, Thai scholars in tort law mostly view privacy rights in section 420 of the CCC[721] in terms of physical privacy or intrusions. For instance, Poonyapan explained that invasion of privacy in section 420 includes intrusion to seclusion by covertly listening, recording, or spying on others.[722] Thus, unwanted watching, listening, recording or spying per se is likely actionable under the general tort. Nonetheless, the claimant may have a heavy burden of proof of the actual damage in some situations. For example, it may not be easy for the claimant to find sufficient evidence showing that secretly overlooking or overhearing per se causes damage to them. In other words, it is disputed how to prove the actual damage in a non-confrontational intrusion or nonaggressive intrusion. Nonetheless, the actual damage seems to be easier to prove in a confrontational, offensive or aggressive intrusion.

More importantly, intrusions or physical privacy are predominantly related to sensory access, psychological state, and mental distress.[723] Hence, intrusions or physical privacy are mainly engaged with mental damage.[724] However, mental damage is unlikely compensated under Thai tort laws.[725] In particular, the damages of feelings, distress or mentality are not usually awarded by Thai courts. For example, in the Supreme Court cases number 1742/2499, 789/2502 and 1447/2523, the Supreme court decided that mental damage was unable to be compensated.[726] In this regard, Pengniti argued that the cost of mental damage is incalculable, but the damage in section 420 must be actual damage.[727] Thus, it is problematic to prove that the claimant is actually entitled to be compensated for mental damage. In other words, it is difficult to demonstrate that the actual damage has arisen. On this basis, the thesis noted in Chapter 3 that the actual

[721] The Civil and Commercial Code. Section 420
[722] Poonyapan (n 19). 35
[723] Moreham, 'Beyond Information: Physical Privacy in English Law' (n 107).
[724] Ibid.
[725] See the Supreme Court's decisions concerning the mental damage, for example, the Supreme Court Decision 273/2509, 1742/2499, 789/2502 and 1447/2523
[726] The awards of the mental damages will be further studied in Chapter 7
[727] Pengniti (n 4). 93

damage and the amount of compensation are different. The actual damage could be non-pecuniary damages. Nonetheless, privacy intrusions are often linked to mental damage, which is unlikely to be compensated by Thai courts. In this sense, it seems that the general tort is sufficient to protect privacy from intrusions only in a highly offensive case. For instance, the claimant can be compensated when privacy intrusion causes other kinds of damages, such as medical or hospital costs, or leads to physical harm. Since intrusions or physical privacy is mainly involved with mental damages, it is questionable if the general tort is suitable and sufficient to protect privacy in this category. The problems of the actual damage and the mental damage will be discussed in further detail in the following chapter.

In addition, some theses argued that any person who exercises their freedom merely to cause a nuisance, such as stalking or intrusion, would be liable for a wrongful act under section 421 of the CCC.[728] The present author disagrees with those theses for two main reasons. Firstly, section 421[729] is not a distinct tort but just a supplement clause to section 420. In particular, section 421 aims to annotate the terms of a wrongful act in section 420.[730] Therefore, in order to establish a wrongful act, other elements of section 420 must be met. Hence, it is erroneous to argue that the defendant commits a wrongful act under section 421. Secondly, most Thai well-known scholars stress that rights under section 421 must be absolute rights recognised by laws, not including freedom. For example, Supanit and Tingsaphati asserted that rights in section 421 could not be expanded to include freedom or liberty. [731] Thus, it is flawed to say that a person commits a wrongful act according to section 421 because they exercise their freedom, intended to cause a nuisance. Consequently, section 421 alone cannot apply to protect physical privacy or guard privacy against intrusions.

In conclusion, the mere acquisition of information without dissemination and physical privacy is hypothetically actionable under the general tort. Nevertheless, it appears that the requirement of the actual damage might be problematic in both cases.

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[728] Namatra (n 62).
[729] The Civil and Commercial Code. Section 421 states that 'the exercise of a right which only purposing to injure another person is unlawful.'
[730] Tingsaphati (n 19). 160-161
[731] ibid.161-162 See also Pengniti (n 4). 75

6.5 Conclusion

From the case study, it could be seen that both torts are adaptable and flexible to the new medium of dissemination and new technology. Moreover, an individual could expect some privacy on social media.

In category 4, the thesis argued that social media as a medium is unrelated to the elements of both the tort of MOPI and the general tort. In this sense, it could be argued that both torts are sufficiently flexible to apply in the case of individual media users. However, in the English legal system, the extent of the publication affects the balancing test between privacy and freedom of expression. Wide publication would cause more effect on the claimant than limited publication. Thus, it would then enhance the weight on privacy in the balancing test. Nonetheless, there is a wide range of individual media users' publication. In some cases, the extent of an individual's publication may be at the same level as that of mass media. The extent of the publication appears to be measured by the number of the audience who accessed the information. In the Thai legal system, the extent of online publication might be related to the burden of proof of the damage. Like the English legal system, the wide publication seems to produce more effect on the claimant than limited publication. Accordingly, the damage arising from wide publication may be easier to prove than from limited publication. Nevertheless, in Thailand, the extent of publication is considered by the accessibility of the information.

In category 5, in the English legal system, the private nature of the information may be undermined when entering the public domain. Hence, when considering the reasonable expectation of privacy test, it looks like an individual cannot reasonably expect privacy on social media. Nevertheless, the thesis asserted that even if social media is considered the public domain, individuals could have some expectation of privacy on social media for several reasons. For example, the mere fact that the information is already in the public domain is not necessarily deprived of privacy protection as long as there is privacy left to be protected. More importantly, in order to protect the core concept of privacy and values, the court should take privacy-seeking behaviour or the desire for privacy and the intention of the claimant into its consideration. Accordingly, the thesis argued

that the individual could have some privacy on social media in the English legal system. Therefore, in the present author's view, the tort of MOPI is sufficient and suitable to protect private information in this category. However, unlike the English tort of MOPI, the fact that the information is already in the public domain is irrelevant to the Thai general tort. Thus, although private information about the claimant has been widely published, they still has privacy rights in that information. Nonetheless, it is arguable if self-disclosure is considered a given consent for further dissemination, and whether in that case, the actual damage has arisen. The thesis contended that the given consent should not be interpreted broadly. Hence, like the English legal system, the thesis argued that Thai people could expect some privacy on social media. Yet, the actual damage might be difficult to prove in some circumstances.

Lastly, in category 6, the thesis explored that the tort of MOPI is adaptable to protect privacy at the newsgathering stage and can guard against modern intrusions. Even though the tort of MOPI has primarily involved unwanted publication, it is actionable in the case where the information is acquired without further publication. Moreover, it is likely able to protect physical privacy irrespective of information. Nevertheless, in the context of modern newsgathering, the thesis argued that informational and physical privacy is inseparable. Hence, it asserted that the tort of MOPI is sufficient to protect privacy and private information in this context. Unlike the tort of MOPI, the Thai general tort can hypothetically apply to protect privacy from unwanted mere acquisition of information and physical privacy or intrusions without scepticism. Nonetheless, it might not be easy to prove the actual damage in some circumstances, for example, in the case of mere acquisition of trivial information or covert intrusion. Most importantly, physical privacy or intrusions have often engaged with mental damage. However, mental damage has rarely been compensated under Thai laws. Therefore, the proof of actual damage is problematic in this context.

All in all, it could be seen that both torts are applicable or sufficiently flexible to protect privacy and private information in all categories in this chapter. In other words, they are adaptable to new environments. However, some drawbacks were shown. For example, although the tort of MOPI is distinct from breach of

confidence, the English courts may sometimes decide the case in the shadow of the traditional breach of confidence. In the Thai legal system, when applying the general tort to protect privacy and private information, the actual damage seems to be the most problematic element. In order to answer the key research question, the strengths and weaknesses of both torts will be further assessed and compared in the next chapter.

Chapter 7: Conclusive Evaluation of the English Tort of Misuse of Private Information (MOPI) and the Thai General Tort and Recommendations for Thailand

7.1 Introduction

As stated in Chapter 1, the primary objectives of the thesis are to study and compare how the existing Thai tort and the English tort of MOPI have dealt with the same privacy problems in order to adjust the better legal model for Thailand. In particular, the thesis aims to explore how both torts protect privacy and private information in the digital age in the case study of individual media users. To serve the thesis objectives, the key research question and hypothesis were set as follows:

whether the general tort (section 420 of the Thai Civil and Commercial Code) is suitable and sufficient to protect privacy and private information in the digital age, particularly in the case study of individual media users, if not, should the English tort of MOPI be introduced as the new legal model for Thailand?

Before the key research question can be reached, the sub-research question of *whether the tort of MOPI is suitable and sufficient to protect privacy and private information in the digital age, particularly in the case study of individual media users*, needs to be answered.

In order to answer the above questions and confirm the hypothesis, comparative law and the functional method as well as doctrinal analysis were applied. The thesis was divided into seven chapters. The concepts of privacy and its values were studied in chapter 2. The legal development, principles and essential elements of the English and Thai torts were examined in chapter 3. Subsequently, chapter 4 was specifically designed to explore an appropriate balance between privacy and freedom of expression as part of the tort of MOPI. Then, the typology approach was conducted to categorise multiple case studies in chapters 5 and 6 to examine how the English tort of MOPI and the Thai general tort respond to the same privacy problems in the case study.

This chapter will conclude the accounts and evaluate the strengths and weaknesses of both torts drawn from the case study. Moreover, the suitability and sufficiency of both torts in protecting privacy and private information will be assessed. In this regard, the thesis will take the key findings and analysis demonstrated in all chapters into account. Furthermore, the strengths and weaknesses of the key elements of the torts in a general context will be analysed. Consequently, the sub-research question will be answered, and the hypothesis will be confirmed. Next, the strengths and weaknesses of both torts will be compared. The ability of the English tort of MOPI to address the limitations or problems of the Thai general tort will be underlined. Besides, the advantages and disadvantages of adopting the English tort of MOPI in Thailand will be weighed. Therefore, finally, this chapter will answer the key research question. The thesis will then propose some recommendations for Thailand. Lastly, this chapter will highlight the substantial contributions of the thesis. In addition, it will reflect on the thesis and recognise its limitations, pointing to further research that could build on the thesis.

7.2 The Suitability and Sufficiency of the Tort of MOPI in the Case Study and the Key Strengths and Weaknesses of the Tort

Before answering the key research question, this section will first answer the sub-research question. Hence, it will analyse the suitability and sufficiency of the tort of MOPI, and the key strengths and weaknesses generated from the case study. Moreover, this section will assess the strengths and weaknesses of the key elements of the tort, firstly, the reasonable expectation of privacy test and, secondly, the balancing test, in a general context. The comprehensive assessment of those key elements is significant for further considering if the tort of MOPI should be introduced as a new legal model for Thailand. By so doing, the key strengths and weaknesses of the tort of MOPI are shown in the below table.

Table 4. The Strengths and Weaknesses of the Tort of MOPI

The Strengths	The Weaknesses
1) suitability, flexibility, adaptability to new media context and new technology	1) uncertainty, depending on factors and circumstances of the case
2) no requirement of the actual damage	2) requiring further clarification of the elements of the tort
3) the suitability of the reasonable expectation of privacy test to the nature of privacy	3) additional burden on the judiciary
4) the flexibility and adaptability of the reasonable expectation of privacy test	
5) the significance of the balancing test between privacy and freedom of expression	

7.2.1 The Strengths of the Tort of MOPI

1) Suitability, Flexibility and Adaptability

The six categories of cases in Chapters 5 and 6 show that the tort of MOPI is sufficiently flexible to cover all settings. Furthermore, it is suitable for the new media context, particularly in the circumstances of individual media users, and adaptable to new technology.

As argued, the cycle of information in the case of individual media users can be separated into two main stages, the newsgathering process and the publication or dissemination of information. Therefore, privacy invasions in this case have been frequently seen at these two stages. First, at the publication stage, it appears that the tort of MOPI is suitable and sufficient to protect privacy rights and private information from a wrongful publication, unwanted disclosure of information or misuse of private information. For example, in Chapter 5, category 1, the tort of MOPI can appropriately protect privacy rights and private information from the unwanted publication of the claimant's appearance in public. In category 2, although all private information is not automatically protected under the tort of MOPI, various types of private information could be reasonably guarded against unwanted disclosure. Besides, from case law, the tort of MOPI can efficiently safeguard privacy rights and related interests stated in Chapter 2, such as human

dignity, [732] autonomy, [733] self-development [734] and human relations. More importantly, in Chapter 6, category 5, the thesis argued that the reasonable expectation of privacy test is able to protect core concepts of privacy and its interests. As explored in Chapter 2, privacy is viewed as unwanted access to information and the right to control the information, underlining the desires of individuals. Therefore, by taking the privacy-seeking behaviour of the claimant or desire for privacy into account in the reasonable expectation of privacy test, the core concept of privacy can be satisfactorily protected.

Although the tort of MOPI was shaped by mass media, it is flexible and adaptable to apply to the case of individual media users. For instance, in Chapter 6, category 4, it could be seen that while the medium of dissemination has been changed from traditional media to social media, the tort of MOPI can apply in that context without difficulty. In other words, the tort is applicable regardless of the medium of dissemination of information. Although category 4 is concerning social media, the analysis can apply to any kind of new media articulations. Furthermore, in category 5, the tort of MOPI seems satisfactorily flexible to protect privacy in the online environment where the line between private and public information has been blurred. For several given reasons, an individual could reasonably expect some privacy in their private information on social media although that information has already entered the public domain. Accordingly, the thesis argues that although the tort of MOPI was extended from breach of confidence, a private and public dichotomy has become less critical to the tort of MOPI.

Besides, as demonstrated in Chapter 4, even though the balancing test between privacy and freedom of expression in the case of individual media users might be slightly different from those of traditional media, the tort of MOPI is adaptable to that case. The model of level and value of the expression in chapter 4 illustrated how the balancing test could modify to a wide range of users' content on the Internet. Moreover, the thesis contended that the balancing test between an individual's privacy and freedom of expression instead of media freedom does not distort the concept of the balancing test but helps promote the proportionate

[732] *Campbell v Mirror Group Newspapers Ltd* (n 6).
[733] ibid., *Douglas v Hello! Ltd* (n 170)., *Max Mosley v News Group Newspapers Limited* (n 6).
[734] *Campbell v Mirror Group Newspapers Ltd* (n 6).

balance between those competing rights. Consequently, the thesis asserts that although the tort of MOPI was fashioned by mass media or traditional media, it is suitable and sufficiently flexible to apply in the case of individual media users.

Secondly, at the newsgathering stage, in Chapter 6, category 6, the thesis observed that the English courts are willing to extend the tort of MOPI to protect physical privacy, although information is not involved. In other words, despite the fact that the tort of MOPI was extended from breach of confidence, it is flexible to protect physical privacy in itself. Moreover, the thesis explored that informational and physical privacy is likely inseparable in the context of modern newsgathering. Therefore, the tort of MOPI is satisfactory to protect privacy and private information from intrusions in the case of modern newsgathering. Furthermore, it could be seen that the tort of MOPI is adaptable to the new technology. In category 6, the tort of MOPI is sufficient to protect privacy and private information from any modern intrusive device because it is technology neutrality rules, which could apply to protect private information irrespective of the technology being used. For instance, in the reasonable expectation of privacy test, the judge would ask the same question for any modern intrusive device; could the claimant reasonably expect privacy in his information? The advantages of the reasonable expectation of privacy test will be further illustrated later in sub-sections 3) and 4).

Therefore, the thesis asserts that one of the strengths of the tort of MOPI is its suitability, flexibility and adaptability in the new media context and new environment. More particularly, the tort of MOPI is suitable, flexible and adaptable to the case study of individual media users.

2) No Requirement of the Actual Damage

The case study suggests that proof of actual damage is negligible in most privacy claims. In order to establish the tort of MOPI, it is unnecessary to demonstrate actual or special damage. Put it differently, the tort of MOPI is actionable *per se*.[735] Instead of the actual damage, the reasonable expectation of privacy test is

[735] Jason Ne Varuhas, 'Varieties of Damages for Breach of Privacy' in Jason Ne Varuhas and NA Moreham (eds), *Remedies for Breach of Privacy* (Hart Publishing 2018). 61

applied to prevent an unreasonable claim. In effect, the claimant has to illustrate that an invasion of privacy is likely to affect a person of ordinary sensibilities, not an actual effect. Then, the court would check whether the claimant's claim is reasonable. In other words, the court would consider 'the likely damage' to a person of ordinary sensibilities. For example, in the *Campbell* case,[736] the court had to find if the disclosure of private information was offensive to a person of ordinary sensibilities in the position of the claimant. In this case, the court considered that 'there is nothing essentially private about that information (the photography of the claimant in stunning designed clothing when she went out for a milk bottle) nor can it be expected to damage her private life.'[737] In contrast, the court held that the information about the Narcotics Anonymous meetings was private since 'the therapy is at risk of being damaged' if it was disclosed.[738] In this sense, it could be seen that the actual damage is not required to establish the cause of action. Furthermore, in the *Weller* case,[739] privacy claims were successful without any evidence of suffering distress or other actual damage. Additionally, as seen in Chapter 6, in the *Gulati* case,[740] phone hacking was actionable under the tort of MOPI, although the claimant did not know of that action and no further publication of the acquired information. Hence, it could be said that the actual damage is insignificant to the tort of MOPI.

In the present author's opinion, this is a focal strength of the tort of MOPI as the actual damage is always hard to prove in privacy cases, which has been shown in the application of the Thai general tort. Without the requirement of the actual damage, the tort of MOPI can be applied to a broader and more appropriate number of scenarios. On this basis, it could be argued that the elements of the tort of MOPI are more suitable for privacy cases than the Thai general tort.

[736] *Campbell v Mirror Group Newspapers Ltd* (n 6).
[737] ibid. At [154]
[738] ibid. At [95]
[739] *Weller and Ors v Associated Newspapers Limited* (n 157)., *Weller v Associated Newspapers Ltd* (n 294).
[740] *Gulati v MGN* (n 146).

3) The Suitability of the Reasonable Expectation of Privacy Test to the Nature of Privacy

Furthermore, the thesis observes that the reasonable expectation of privacy test is suitable to the nature of privacy rights. As mentioned in Chapter 2, there is no universal consensus on privacy definition. However, in the area of torts, it is essential to decide if privacy rights are engaged in a particular case to institute the cause of action. The reasonable expectation of privacy test therefore helps determine if the privacy rights are involved or if the information is private. As a result, this test could lessen the unclear situation arising from ill-defined privacy. For instance, the reasonable expectation of privacy test could assist in drawing the scope of privacy in a blurry area such as privacy in public places (category 1), in a case where the nature of information is not obvious private (category 2), and privacy on social media (category 5).

Moreover, some scholars advocate that the reasonable expectation test is advantageous because it can balance the objective expectation of privacy with the subjective one. For instance, Moreham contended that the reasonable expectation of privacy test is the most effective approach to strike an appropriate balance between objective and subjective assessment of privacy expectation. [741] In Moreham's view, the test exercises the objective check but does not reject the subjective desire for privacy.[742] Likewise, Hughes explored that the reasonable expectation of privacy test is a suitable approach to dealing with privacy as it provides both objective and subjective tests.[743]

The present author highly agrees with the above opinions. As studied in Chapter 2, privacy is perceived as 'freedom from unwanted access' or 'the state of desired inaccess' and the right to control over the information. Under those conceptions, privacy appears to have a subjective characteristic. Besides, individuals may have different views, expectations, or concerns about how to control their privacy and private information. Hence, the reasonable expectation of privacy test is suitable

[741] Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (n 148).
[742] ibid.
[743] Hughes, 'A Behavioural Understanding of Privacy and Its Implications for Privacy Law: A Behavioural Understanding of Privacy' (n 172).

to the nature of privacy as it takes an individual's subjective expectation into account. For example, in Chapter 6, category 5, the court took the privacy-seeking behaviour and desires of the claimant into its consideration when determining the reasonable expectation of privacy.[744] Nonetheless, bearing in mind that the nature of privacy is subjective, the objective test is necessary for checking if the subjective expectation of privacy is reasonable. Without the objective test, a person may unreasonably bring an action to the court. Thus, the reasonable expectation of privacy test sets an objective limit on which types of privacy claims can be reasonably brought to court. For these reasons, the thesis agrees with the above scholars that the reasonable expectation of privacy test could help balance an individual's subjective and objective expectations of privacy. Hence, this test is appropriate for the nature of privacy.

4) The Flexibility and Adaptability of the Reasonable Expectation of Privacy test

The flexibility is another advantage of the reasonable expectation test. In the digital age, the flexibility of rules to adapt to new technology or new circumstances is crucial. Otherwise, the rules will become obsolete as technology is continuously changing. Since the reasonable expectation of privacy test is a contextual question, its application is not limited to a specific context or technology. From the case study, the reasonable expectation of privacy test is able to adjust to the new circumstances or adapt to new technology. For example, it can respond to an expectation of privacy on social media (category 5). Moreover, it is applicable regardless of intrusive devices (category 6).

More importantly, the reasonable expectation of privacy test is adaptable to changing societal standards and flexible enough to accommodate privacy's dynamic nature. As argued in Chapter 2, people's perceptions and expectations of privacy may vary between cultures and be changed over time. In this regard, Rowbottom demonstrated how the scope of privacy rights had been evolved from changing social values toward information about sexual activity and the criminal

[744] Chapter 6, Section, 6.3.1

record.[745] Hughes contended that the reasonable expectation test could reflect 'an objectively recognised social norm that privacy should be respected'.[746] Similarly, Moreham argued that the reasonable expectation of privacy test could articulate the societal attitudes toward privacy.[747] In other words, the reasonable expectation of privacy test is an objective assessment of what society considers as reasonable privacy protection. Since the perception and expectation of privacy of people in society are changeable, the ability of reasonable expectation of privacy test to respond to changing social norms or attitudes is the strength of the tort of MOPI.

5) The Significance of the Balancing Test between Privacy and Freedom of Expression

In Chapter 2, the thesis explored why privacy is necessary to be protected. However, as explained in Chapters 3 and 4, freedom of expression is equally needed for a democratic society. Thus, neither privacy nor freedom of expression is absolute. Since privacy and freedom of expression have frequently conflicted in the media context, the balancing test between an individual's privacy right and freedom of expression is essential. If all publication or disclosure of private information is considered a wrongful act, private individuals would be discouraged from participating in democracy or exercising their freedom of expression. Furthermore, the balancing test could help avoid an unreasonable claim for invasion of privacy. Consequently, the thesis begins with the position that the balancing test between privacy and freedom of expression is not only beneficial but necessary.

Nevertheless, the balancing test has been criticised in various facets. For example, it was argued that if the balancing test between privacy and freedom of expression is considered as an element of the action, the claimant seems to bear a heavy burden of proof. However, Wragg disputed that the burdens of proof of

[745] Jacob Rowbottom, 'Reporting Police Investigations, Privacy Rights and Social Stigma: Richard v BBC' (2018) 10 Journal of Media Law 115.
[746] Hughes, 'A Behavioural Understanding of Privacy and Its Implications for Privacy Law: A Behavioural Understanding of Privacy' (n 172). 824
[747] NA Moreham, 'Unpacking the Reasonable Expectation of Privacy Test' (2018) 134 Law Quarterly Review 651.

the parties in privacy cases are neutral since two rights are treated equally.[748] Wragg explored that in a privacy case, the court's role is rather active, given that it must determine whether privacy is necessary and proportionate to restrict freedom of expression. In this sense, the court has to bear the onus to balance the competing rights, not the parties. Accordingly, the claimant does not have a too heavy burden of proof. Furthermore, as discussed in Chapter 3, since the balancing test is required to establish the cause of action, a characteristic of misuse of private information as a tort was questionable. Nonetheless, the present author argued that the balancing test is not at odds with tort laws. Moreover, the balancing test can serve the function of the tort in resolving private disputes. Hence, misuse of private information is correctly called a tort. Besides, it was debated that the notions of public figures and public interests are extended too broadly in favour of media in English jurisdiction.[749] The position of the public figure and public interests in publication added weight to freedom of expression in the balancing test. Therefore, as seen in Chapters 4 and 5, the public figure could expect less privacy protection than other individuals. On this matter, to enhance privacy protection, the thesis already disputed that the notions of public figures and public interest should not be interpreted too broadly. Moreover, it should consider further how to proportionately balance privacy with freedom of expression.

Consequently, overall, the thesis contends that the strengths and significance of the balancing test between privacy and freedom of expression overshadow its drawbacks. Moreover, some weaknesses of the balancing test could be addressed. The next section will further examine other weaknesses of the tort of MOPI.

[748] Paul Wragg, 'Enhancing Press Freedom through Greater Privacy Law : A UK Perspective on an Australian Privacy Tort' (2014) 36 The Sydney law review 619. 632
[749] See, for example, Hughes, 'The Public Figure Doctrine and the Right to Privacy' (n 299). Phillipson, 'Press Freedom, the Public Interest and Privacy' (n 298).

7.2.2 The Weaknesses of the Tort of MOPI

1) Uncertainty

Despite various strengths of the tort mentioned above, some weaknesses of it should be considered. From Chapters 3 to 6, it could be seen that the tort of MOPI highly depends on all circumstances of the case and the proportionality test between rights. As shown in the case study, several factors are relevant to the reasonable expectation of privacy test, such as the place where the event in question was happening, the nature of the information, and the claimant's status. Besides, as seen in Chapter 4, the balance test between privacy and freedom of expression is also based on the proportionality test between individual rights and interests. Thus, it varies from one case to another, depending on the value and level of individual expression. In this sense, it might be difficult to predict the result of the case. This contextual feature may lead to uncertainty, which is one of the main drawbacks of the tort of MOPI. Although flexibility is desirable, the rules or laws must be certain and predictable enough for the members of society to understand their duties and liabilities.

More particularly, as argued in Chapter 3, the reasonable expectation of privacy test is a contextual or broad question, which takes all factors into account. In this regard, Cheung observed that privacy protection on the Internet 'is highly dependent on the interpretation and application of what qualifies as a reasonable expectation of privacy.'[750] This may lead to uncertainty in this area. Moreover, Barendt remarked that the reasonable expectation of the privacy test is changeable. For instance, a situation that is currently an obvious infringement of privacy may be acceptable in the future.[751] However, the thesis considers that the ability of the reasonable expectation of privacy test to change toward social standards and context is rather beneficial and appropriate to the nature of privacy rights. Nonetheless, the test must be certain enough for members of society to comprehend when their privacy rights are breached. In other words, the thesis

[750] Anne SY Cheung, 'Rethinking Public Privacy in the Internet Era: A Study of Virtual Persecution by the Internet Crowd' (2009) 1 Journal of Media Law 191. 200

[751] Eric Barendt, 'A Reasonable Expectation of Privacy': A Coherent or Redundant Concept?' in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press 2016).

argues that the reasonable expectation of privacy should be contextual and changeable but not too uncertain. In this sense, the lists of factors and rich case law might be helpful. Furthermore, as explored in Chapter 6, category 5, the reasonable expectation of privacy test is occasionally assessed based on a traditional breach of confidence. This could also cause uncertainty and inconsistency. However, the thesis already argued that those two causes of action are now distinct and separate. Thus, the court should not decide on a privacy case in the shadow of a traditional breach of confidence. For example, the accessibility or availability of the information should not deprive the reasonable expectation of privacy of that information.

2) Requiring Further Clarification of the Elements of the Tort

Moreover, as explored in Chapter 3, it was argued that the elements of the tort of MOPI, consisting of the reasonable expectation of privacy test and the balancing test, are very different from other kinds of torts. Therefore, clearer elements of the tort need to be clarified to align with the existing tortious framework, such as the degree of fault, defences, and the onus of proof.[752] Furthermore, as seen in Chapter 3, some factors of the first and second stage tests are overlapped. Thus, Barendt observed that 'an unconscious double-counting of these factors' might happen.[753] Consequently, the two-stages test may weaken the claimant's privacy protection. Besides, it might require a double burden of proof. In order to avoid a redundant test and increase certainty, a clear list of factors for both reasonable expectation of privacy and the balancing tests should be given. Those factors should not be overlapped or double-counted. Furthermore, the clear burden of proof should be further clarified.

3) Additional Burden on the Judiciary

As argued above, in the balancing test, the judge's role is relatively active. On top of that, Barendt argued that under the reasonable expectation of privacy test, the judiciary is responsibly required to decide the reasonable expectation when

[752] See, for example, Giliker, 'A Common Law Tort of Privacy?' (n 36)., Giliker, *Europeanisation of English Tort Law* (n 142).
[753] Barendt, 'A Reasonable Expectation of Privacy': A Coherent or Redundant Concept?' (n 751).
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the situation has changed.[754] Hence, it would add a burden on the judiciary. Nonetheless, on this point, Justice Callinan disputed that the requirement of judicial decision is no more than 'the making of value judgements of the kinds that courts are regularly required to make in other fields of the law'.[755] The present author rather agrees with Callinan, given that a similar requirement is often seen in other areas, such as a defamatory tort. For example, when the judges decide whether the statement is defamatory, they need to consider whether the statement in question tends to 'lower the claimant in the estimation of right-thinking members of society in general.'[756] Consequently, 'the making of value judgements' is inevitably involved, and it could be changed toward the social standard. For this reason, the present author coincides with Callinan that a question of whether the claimant had a reasonable expectation is just 'a classic normative judicial question',[757] which does not put an additional onus on the judiciary.

7.2.3 Conclusion: *Is the Tort of MOPI Sufficient and Suitable to Protect Privacy and Private Information in the Case Study of Individual Media Users?*

To conclude, the case study suggests that the tort of MOPI is suitable and sufficient to protect privacy interests and private information. Although the tort of MOPI has been designed by the influence of traditional media, it is flexible and adaptable to the new media context and the case of individual media users. In the past, there were less privacy cases against individuals than against traditional media. This scenario might indicate that the conflicts between individuals and privacy intrusions in the individual case were lower than the tensions and threats to privacy caused by the media. Besides, the remedies or tort liability in the individual case may not be worth the costs and time associated with the legal or judicial process. Nonetheless, as argued in the thesis, individuals have been more powerful. In some cases, they can cause damages to another at the same level as traditional media. Therefore, the number of individual cases is likely to increase in the present and future. As demonstrated in the case study, the tort of MOPI has

[754] ibid.
[755] IDF Callinan Ac, 'Privacy, Confidence, Celebrity and Spectacle' (2007) 7 Oxford University Commonwealth Law Journal 1. 12 See also 'Invasion of Privacy' (n 36).
[756] Sim v Stretch [1936] 2 ALL ER 1237. At [1240]
[757] Callinan Ac (n 755). 12

been extended to cover various situations and apply to several actors. Thus, it is sufficient to protect privacy against individual media users. Moreover, to establish the tort of MOPI, the actual damage is not required. It could protect individual from loss of privacy as such. Consequently, the tort of MOPI could sufficiently protect privacy and private information in a non-trivial individual case.

Besides, the thesis argued that the reasonable expectation of privacy test is appropriate to the nature of privacy. It helps decide the scope of privacy and balance subjective and objective expectations of privacy. Also, the reasonable expectation of privacy test is flexible and adaptable to respond to advanced technologies and changing social needs. Furthermore, the thesis explored that the balancing test between privacy and freedom of expression is essential in a democratic country. The balancing test could also help proportionally limit privacy claims. Hence, the tort of MOPI is suitable to the media context where privacy often conflicts with freedom of expression. Additionally, it can serve the tort function in resolving privacy disputes. Although the tort of MOPI was shaped by mass media, it is flexible enough to apply in the case of individual media users without further development.

Nevertheless, the reasonable expectation of privacy test is too vague as it depends on all circumstances and could be changed over time. In the present author's opinion, the reasonable expectation of privacy test should be flexible enough for changing technology and social standards, but not uncertain. Moreover, the balancing test depends highly on factors and the proportionality test. These characteristics of the tort may lead to vagueness and effectiveness. Besides, other elements of the tort need to clarify in order to be consistent with the tortious framework. Those weaknesses will be considered when deciding if the tort of MOPI should be introduced as the new legal model for Thailand. Notwithstanding some weaknesses of the tort of MOPI, the thesis asserts that the strengths of the tort of MOPI outweigh those weaknesses. Moreover, some of the weaknesses are potentially to be addressed or have already been addressed in the thesis.

Consequently, the sub-research question could be answered that the tort of MOPI is suitable and sufficient to protect privacy and private information in the digital age, particularly in the case study of individual media users. After reviewing the

strengths and weaknesses of the tort of MOPI as a lesson learned from the English experience, the following sections will examine the strengths and weaknesses of the Thai general tort before confirming the hypothesis and answering the key research question of whether the tort of MOPI should be introduced as the new legal model for Thailand.

7.3 The Suitability and Sufficiency of the Thai General Tort in the Case Study and the Key Strengths and Weaknesses of the Tort

The hypothesis established in Chapter 1 is that the general tort is insufficient and unsuitable to protect privacy and private information. This section will check the hypothesis and answer *whether the general tort is sufficient and suitable to protect privacy and private information in the digital age, particularly in the case study of individual media users*. In order to confirm the hypothesis and answer this question, this section will conclude the outcomes of the case study and further evaluate the strengths and weaknesses of the general tort. Other findings drawn from other chapters will also be analysed. Consequently, the key strengths and weaknesses of the general tort are demonstrated, as seen in the table below.

Table 5. The Strengths and Weaknesses of the Thai General Tort

The Strengths	The Weaknesses
1) general concept, which can apply in most scenarios	1) the unclear scope of privacy
2) adaptability to new technology	2) unsuitability to the nature of privacy rights
	3) the actual damage is problematic
	4) the lack of the balancing test between privacy and freedom of expression

7.3.1 The Key Strengths of the General Tort

1) The General Concept

As seen in the case study, the strength of the general tort is its general concept, which can apply in any case. In theory, section 420 of the CCC[758] is applicable to protect any rights from any wrongful act if four main elements can be met.

At the publication stage, it appears that the general tort can hypothetically protect privacy and private information in most situations in the case study. In Chapter 5, the categories of cases were generated from factors that are relevant to the tort of MOPI but seemed irrelevant to the general tort. Thus, unlike the English legal system, some factors were unrelated to the case study. For instance, it is found that the status of the claimant is unrelated to the elements of the general tort. Thus, the public figure could theoretically expect the same level of privacy protection as ordinary individuals in the Thai legal system (category 3). However, the thesis found that some factors that were overlooked in the Thai jurisdiction may relate to the actual damage, such as privacy in public (category 1) and the nature of the information (category 2). Although the general tort is theoretically applicable in those categories, the requirement of the actual damage led to some problems and limitations of the general tort, which will be seen in the next section. Moreover, since the general tort was not specifically designed to protect informational privacy, it is questionable if it is suitable and sufficient to protect privacy and private information, particularly in the media context. This question will be answered later in section 7.3.3.

At the newsgathering process, in contrast with the tort of MOPI, the general tort has not revolved around informational privacy. Therefore, without scepticism, it can apply to protect physical privacy when information is not involved (category 6). Yet, the proof of actual damages seemed to be problematic in some circumstances in category 6.

[758] The Civil and Commercial Code.

2) Adaptability to New Technology

In Chapter 6, due to the general concept, the general tort can adapt to new technology or new environment in the case study. For example, the medium of publication is unrelated to the cause of action (category 4). Moreover, the general tort can adapt to the new environment, such as privacy on social media (category 5) and modern newsgathering (category 6).

In category 6, the general concept is adjustable to any new or modern device as long as four elements of tort can be met. Furthermore, in category 5, unlike the tort of MOPI, the general tort is not extended from breach of confidence. Thus, the private and public dichotomy is not critical in applying the general tort. The fact that private information was previously disclosed or already in the public domain appears irrelevant to the general tort. As a result, the general tort can protect privacy and private information on social media.

7.3.2 The Key Weaknesses of the General Tort

As argued, the general concept is the strength of the tort. However, it could lead to several drawbacks. In Chapter 5, since the thesis was forced to consider several factors related to the tort of MOPI, some weaknesses or limitations of the general tort were shown. The findings in Chapter 6 also echoed those limitations of the general tort. By combining the accounts from those chapters, the key weaknesses of the general tort could be seen as follows.

1) The Unclear Scope of Privacy Rights

Due to the nature of privacy rights, it is difficult to find a satisfactory definition and scope of the privacy rights for section 420.[759] Moreover, as investigated in Chapter 2, the perception of privacy could evolve through time. Different generations may also perceive privacy differently. For instance, as explored in Chapter 2, it was argued that Thai people's lives had been developed through the public eyes.[760] Thus, in traditional Thai society, it seemed that Thai people could

[759] ibid., Section 420
[760] Mudler (n 190).

not have privacy in public. Recently, a well-known Thai teacher used their Facebook page to educate about Thai manners by posting a photo of youngsters hugging in a public place.[761] This incident reflects the traditional or conservative view of Thai people that there is no privacy in public. Nevertheless, this case has generated a controversial debate among Thai netizens and social media users.[762] In the eyes of those netizens, they should have some privacy rights in public places. In this sense, it could be said that the expectation of privacy is subjective and changeable.

Because of the subjective and changeable nature of privacy rights, an accurate description and scope of privacy rights under section 420 are difficult to define. For example, in Chapter 5, category 1, it is unclear whether Thai people could have privacy rights in a public place. Furthermore, in category 2, it is undefined which types of information will be considered private. Without a certain definition and a clear scope of privacy rights, the tort's application depends on the discretion and interpretation of the judges in each case. In this regard, the wealthy case law might provide some valuable guidelines. As mentioned, although the previous judgement is not a binding rule in the Thai legal system, it has been frequently stated as a legal source or key reference. Nonetheless, there is a lack of case studies concerning the scope of privacy. This uncertainty leads to unpredictable results and insufficient privacy protection, particularly in a blurry area. In order to provide more certainty and sufficient privacy protection, the rules or laws must be clear enough for individuals to understand their rights and duties. In other words, a private individual should be able to know when they would have a duty to respect other privacy rights, when their action will be considered a wrongful act and when an individual's privacy rights are breached.

2) Unsuitability to the Nature of Privacy Rights

Furthermore, in Chapter 5, category 2, the thesis remarked that section 420 of the CCC[763] was not initially designed to protect privacy, especially informational

[761] 'Kru Lilly Posted Pictures of a Lover on BTS Skytrain to Lecture an Appropriate Manner. Thai Netizen Asked "Was Right Violated?"' (n 496).
[762] ibid.
[763] The Civil and Commercial Code. Section 420

privacy. In the Thai jurisdiction, the general tort has engaged predominantly with physical and property harms and economic loss.[764] Thus, the thesis questioned if the general tort is appropriate to protect privacy rights and private information in the digital age. Likewise, Iammayura contended that the general tort is inappropriate to protect private information. In this regard, it is argued that the essence of the protection of private information is relatively different from the protection of other rights in section 420, such as the rights of life, property, or body.[765] Although Iammayura's argument intended to support data protection law, her opinion is noteworthy and fundamental. Therefore, the thesis will further consider if the nature and essence of privacy rights are different from other rights in section 420 and whether the general tort is suitable for protecting privacy rights.

Under section 420 of the CCC, the rights to life, body, health, liberty, property or any rights are protected. [766] Any rights in this section are interpreted to include privacy rights. However, as explored in Chapter 2, the privacy concept is based on individualism and subjective desire to limit access to the self or information about themself and the right to control the information. Privacy rights are perceived as unwanted or limited access to information (informational privacy) and unwanted access to physical self (physical privacy).[767] Physical privacy in this regard is concerned with a person' sense or sensory such as unwanted watching, listening or observing, not physical harm. Although those privacy concepts are not originated from Thailand, the thesis observed that Thai people's perception of privacy and privacy from a legal perspective has evolved comparable to those concepts.

Under the above concepts, the essence and nature of privacy rights seem normative, undefinable, intangible, subjective and changeable. Nevertheless, the essence and nature of other rights in section 420 are more tangible, objective, definable, fixable or physical. For example, the rights to life, body and property are concerned with physical self and tangible things. Besides, liberty under section

[764] Chapter 5, Section 5.3.2
[765] Iammayura, 'Laws Related to Personal Data in Thailand' (n 7). See also Iammayura, 'Data Protection in Thailand' (n 50).
[766] The Civil and Commercial Code. Section 420
[767] Chapter 2

420 has mainly engaged with physical liberty such as imprisonment or physical restraint.[768] It was argued that the damages to liberty in section 420 do not include the liberty of speech or freedom of speech.[769] Although the definition of property in section 137 of the CCC includes tangible and intangible things, those things must have a value or can be possessed.[770] Nonetheless, the definition of privacy rights is unsettled. It is open to debate if privacy rights in light of personal data or private information are valuable or possessed. Hence, the scopes of those rights in section 420 are easier to draw than those of privacy rights. Moreover, it could be argued that the nature and essence of privacy rights are rather different from other rights in section 420.

Due to the more precise scope of rights, the damages to those rights in section 420 are more concrete, obvious, calculable and assessable than the damage to privacy rights. Nevertheless, as argued, the damages to privacy rights and causation are difficult to prove because of their normative nature. Furthermore, as seen in the case study, the imprecise scope of privacy rights and vague definition of privacy has exacerbated the difficulty in proving the actual damages. Besides, it is argued that all rights under section 420 could be tangible or intangible rights but must be absolute rights.[771] However, under the Constitution of Thailand, privacy rights are not absolute and must be balanced appropriately with other competing rights such as freedom of expression. This issue will be profoundly examined in the next section. Due to the different nature of privacy rights, the general tort seems unsuitable for applying in privacy cases.

In addition, as argued in Chapter 6, category 4, privacy rights are deeply related to reputation rights. Moreover, as seen in Chapter 2, privacy values are linked to human dignity. Reputation rights are also connected with human dignity.[772] In this sense, privacy and defamatory torts are closely connected. Since privacy and reputation rights are profoundly related, defamation law, which aims to protect

[768] Pengniti (n 4). 99
[769] Sookchuen (n 368).
[770] The Civil and Commercial Code. Section 137
[771] Poonyapan (n 19). 31
[772] Jan Oster, 'Chapter 4: Theories of Reputation' in Andraŕs Koltay and Paul Wragg (eds), *Comparative Privacy and Defamation* (Edward Elgar Publishing 2020).

the right to reputation, often overlaps with privacy tort.[773] Therefore, the thesis views that the nature of privacy rights is closer to reputation rights than the nature of other rights in section 420. While the defamatory tort (section 423 of the CCC)[774] is separate and distinct from the general tort (section 420 of the CCC),[775] it is arguable if a separate tort is more suitable for protecting privacy rights than the general tort.

3) The Actual Damage and Causation

From the case study, the actual damage was difficult to prove in various scenarios. However, the purpose of the tort is to compensate for the damages. Thus, if the actual damage cannot be proved, the compensation for the victim of privacy invasion would likely be denied. Hence, it has been argued that the claimant must bear a too weighty burden of proof in privacy cases.[776] As a result, the requirement of actual damage has become the main restraint of privacy protection. In this sense, the general tort seems unsatisfactory to protect privacy and private information in the digital age.

As argued in Chapters 5 and 6, the actual damage appears to be the key factor of the general tort in the case study. In other words, privacy protection relied on the proof of the damage. However, accepting that the actual damage and the amount of compensation are not the same, the damage to privacy is still difficult to prove in several situations. For example, in Chapter 5, category 2, it is difficult to show that disclosing information, which is not obvious private or trivial, actually causes damages to the claimant. In Chapter 6, category 6, it is arguable whether acquiring a piece of trivial information or a single point of data without further use would lead to the actual damage. Besides, it is hard to prove the actual

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[773] See, for example, Andraìs Koltay, Paul Wragg, and Edward Elgar Publishing, *Comparative Privacy and Defamation* (Edward Elgar Publishing 2020) , Andrew T Kenyon, *Comparative Defamation and Privacy Law*, vol 32;32.; (Cambridge University Press 2016)

[774] The Civil and Commercial Code. Section 423 states that 'a person who, contrary to the truth, states or circulates as a statement which endangers to the reputation or the credit of another or their earning of prosperity in any other manner, shall compensate the other for any damage arising therefrom…'

[775] ibid. Section 420

[776] Iammayura, 'Laws Related to Personal Data in Thailand' (n 7)., Nakwanit (n 23)., Thongraweewong, 'Legal Measures for Protecting the Right to Privacy: A Study of Invasion of Privacy through the Use of Social Network Websites' (n 7)., 'Supporting Document for a Personal Data Protection Act:General Meeting Session' (n 7).

damage if the defendant secretly observes the claimant's action without physical harm or offensive intrusion. Although the general tort can theoretically safeguard privacy from intrusions, in non-confrontational or nonaggressive intrusion cases, it is difficult to prove the actual damage. Unlike in the English jurisdiction, in the *Gulati* case,[777] the tort of MOPI was actionable even though the claimant did not know of invasive action since the actual damage is not required. Moreover, in Chapter 2, privacy is viewed as unwanted access or the right to control over the information. Nevertheless, the loss of the ability to control could sometimes be a risk of loss or normative loss, not the actual loss. Hence, it is questionable whether the general tort could protect privacy in terms of the right to control. As a result, the general tort cannot satisfactorily protect some of the privacy interests or values such as autonomy and cannot supports maintaining human relations.

More importantly, as argued in Chapter 6, category 6, privacy intrusions are often linked to mental damage or distress. Nonetheless, mental damage has been rarely compensated by Thai courts. Therefore, the general tort appears insufficient in this context. The thesis further explores that although section 446 of the Civil and Commercial Code[778] provides that the injured person may be compensated for non-pecuniary loss, Thai scholars mostly agree that non-pecuniary loss in this section must result from injury of the body or health or deprivation of liberty.[779] In other words, mental injury compensated by section 446 must cause by the injury of the body, health or loss of liberty. Accordingly, it can be argued that the general tort can protect privacy rights only in highly offensive cases when physical injury or pecuniary loss is engaged. The Supreme Court decision 4571/2556 was the only case which mental damage was awarded regardless of physical injury.[780] However, this case has been widely criticised by Thai jurists. [781] It is debatable if the decision of the court, in this case, was correct and whether mental injury at a distress level should be compensated, irrespective of bodily injury and psychiatric illness.

[777] *Gulati v MGN* (n 146).
[778] The Civil and Commercial Code., Section 446
[779] Poonyapan (n 19). 218 , See also Porntip Sudti-Autasilp 'Non-Pecuniary Loss: A Comparative Study of English, German and Thai Tort Law' (Judicial Training Institute Research Paper, 2014) <http://elib.coj.go.th/Ebook/data/judge_report/jrp2557_13_55.pdf> accessed 10 May 2019.
[780] The Supreme Court decision 4571/2556 (2013).
[781] Sudti-Autasilp (n 779).

Nevertheless, Sottipan contended that the damage to privacy rights could arise whenever a wrongful act is committed.[782] If Sottipan's opinion is accepted, it seems that the normative damage or the presumption of damage is inherent to the wrongful act. In other words, the tort can be actionable *per se*. This theory might be appropriate when the scope of rights is certainly such as property rights. However, in Chapter 5, category 1, the thesis argued that even if Sottipan's theory is accepted, the application of the general tort remains problematic because the scope of privacy rights is unclear. Thus, it is difficult to decide when privacy rights are infringed or when a wrongful act is committed. More importantly, the present author contends that if the tort is actionable *per se*, explicit conditions to establish the tort are needed. For example, in privacy cases, the rules to define the scope of privacy rights are essential and the precise definition of privacy is necessary. The undefined scope of privacy rights or unclear definition of privacy would lead to the uncertain extent of a wrongful act.

Moreover, suppose that the tort is actionable *per se*, causation looks irrelevant to the cause of action. However, as argued in Chapter 3, under section 420 of the CCC, the actual damage and causation are essentially required to establish the general tort. The actual damage is the actual consequences of the wrongful act committed by the defendant. Therefore, the present author asserts that those elements should not be ignored or discounted. Otherwise, the concept of the general tort will be distorted. For instance, it would be elusive to explain why the actual damage and causation are unessential for establishing the general tort in privacy cases, but they are essentially required in other cases. To support the concept of actionable *per se*, in the present author's opinion, a separate and specific tort of privacy with specific elements seems to be a more suitable approach than applying the general tort.

4) The Lack of the Balancing Test between Privacy and Freedom of Expression

As discussed, privacy rights and freedom of expression have been frequently implicated in the media context. Nonetheless, in Chapter 5, category 3, the thesis

[782] Sottipun (n 333). 92-93

found that there is a lack of the balancing test between privacy and freedom of expression in the Thai tort framework. Furthermore, the legal justifications or defence concerning public interest is unclear. Hence, it is questionable if the general tort is suitable in this context.

Under Thailand's Constitution, both privacy and freedom of expression are constitutional rights that must be safeguarded. As argued in Chapter 2, the recognition of privacy rights in the Constitution suggests that for the sake of democratic society or public interests, privacy should be protected. However, section 32 of the Constitution states that 'a person shall enjoy the right to privacy. An act violating privacy right or exploitation of personal information in any manner whatsoever shall not be permitted, except by virtue of the provision of law enacted only to the extent of the necessity of public interest.'[783] According to this section, a violation of privacy could be permitted to the extent of the necessity of public interest. As examined in Chapter 4, public interests also lie in freedom of expression. The justifications underpinning freedom of expression argued in Chapter 4 are universal concepts applicable in Thailand, such as the value of the truth and participatory democracy.[784] Thus, similar to the English legal system, the thesis asserts that freedom of expression has inherent values for public interests. In this sense, it could be argued that privacy rights could be limited to freedom of expression. Also, freedom of expression is guaranteed in section 34, which states that 'a person shall enjoy the freedom to express opinions, make speeches, write, print, publicise and express by other means. The restriction of such freedom shall not be imposed, except by virtue of the provisions of law specifically enacted for the purpose of protecting the rights of other persons.'[785] This section implies that a person could enjoy freedom of expression except by virtue of the provisions enacted for protecting privacy rights of another. In other words, freedom of expression is limited to privacy rights or other competing rights. Consequently, like the English legal system, it could be argued that neither privacy nor freedom of expression is an absolute right in the Thai legal system. Therefore, when those rights conflict, a balancing test should be constructed.

[783] Thailand's Constitution of 2017. Section 32
[784] Konthai Kuanhin, 'The Problems of Liberty of Expression of Opinion in Thai Legal' (LLM in Public law thesis, Thammasat University 2011). 33-34
[785] Thailand's Constitution of 2017. Section 34

However, the balancing test between those rights is underdeveloped under tort laws. As argued in Chapters 1 and 3, the constitutional laws do not apply directly to private parties. For instance, in decision number 4893/2558, the supreme court underlined that the question of whether and to which extent the defendant is liable in tort must be decided by the provision of the Civil and Commercial Code, not the Constitution.[786] Under the current statutory framework, the court will look at existing rules and exceptions to determine if the defendant commits the wrongful act. As discussed in Chapter 5, under this framework, it appears that there is no balance between privacy and freedom of expression. Although the current framework could possibly be adjusted to balance privacy with freedom of expression, due to civil law tradition and Thai judicial style, Thai judges have hesitated to establish additional or new rules to balance those competing constitutional rights. Besides, the Constitution itself requires specific provisions of laws to restrict privacy rights and freedom of expression.[787] Accordingly, the specific provision of tort laws concerning the balancing test between privacy and freedom of expression or other competing rights should be enacted.

Furthermore, as explored in Chapter 5, category 3, although the exception of public interests of the new Personal Data Protection Act B.E. 2019[788] (PDPA) might be applied in tort laws, the PDPA cannot apply in several cases concerned in this thesis. Therefore, it is debatable whether this exception should be specifically enacted in tort laws. Additionally, in the Thai legal system, private individuals cannot use the necessity of public interest[789] or the restriction of protecting privacy rights[790] in the Constitution to justify their actions unless and until the specific provision of law is enacted. Thus, the clear provision of public interest justification should be provided.

In addition, it should be considered whether section 421 of the CCC could be used as a legal tool to proportionately balance those rights. Section 421 of the CCC provides that 'the exercise of a right which only purposing to injure another person

[786] Supreme Court Decision 4893/2558 (n 21).
[787] Thailand's Constitution of 2017. Section 32, 34
[788] The Personal Data Protection Act 2019.
[789] Thailand's Constitution of 2017. Section 32
[790] ibid. Section 34

is unlawful.'[791] As argued in Chapter 6, category 6, section 421 is not a distinct clause, but it aims to explain the terms 'unlawful' in section 420 of the CCC. In order to establish a tortious act, other elements of section 420 must be satisfied.[792] For example, a person who exercises their freedom of expression intending to injure another could be considered an unlawful act according to sections 420 and 421. At the first glance, this section might be used to balance privacy rights and freedom of expression proportionately. However, after a scrutiny, the objective of section 421 is to prevent abuse of rights or exercise of rights in bad faith.[793] In other words, under section 421, a person must exercise their rights in good faith within the scope of the rights.[794] Thus, it cannot balance the exercise of freedom of expression in good faith with privacy rights. More importantly, Supanit and Tingsaphati emphasised that the rights in section 421 must be 'absolute rights'.[795] Nevertheless, as argued, privacy rights and freedom of expression are equally protected under the Thai Constitution. None of them is absolute. Therefore, the thesis considers that section 421 is inappropriate to use as a legal instrument to balance privacy rights with freedom of expression. Consequently, it could be concluded that the balancing approach is absent in the tortious framework.

Without a specific provision and clear legal framework, it is questionable whether and how the balancing test between privacy and freedom of expression could be applied. Moreover, it is arguable whether and how a private party can justify their action by public interest or overridden freedom of expression. As seen in the case study, the current legal framework cannot balance between privacy and freedom of expression proportionately. Under section 420 of the CCC,[796] any invaded-privacy action could be a wrongful act if it causes damages. On the positive side, the general tort could strongly protect privacy rights. For instance, in Chapter 5, category 3, public figures could have the same degree of privacy protection as other private individuals in the Thai legal system. Nevertheless, on the negative side, the broad protection of privacy could jeopardise freedom of expression,

[791] The Civil and Commercial Code., section 421
[792] Tingsaphati (n 19). 160-161
[793] Supanit (n 4). 61
[794] Tingsaphati (n 19). 161
[795] Supanit (n 4). 63 Tingsphati (n 19). 161
[796] The Civil and Commercial Code. Section 420

leading to a chilling effect. Besides, the unclear legal framework would also cause uncertainty in legal proceedings. Moreover, without the balancing test between competing rights, the general tort is likely unsuitable for resolving private disputes when their rights conflict. In this sense, it is inappropriate to apply in the media context, where privacy and freedom of expression often clash.

7.3.3 Conclusion: *Is the General Tort Sufficient and Suitable to Protect Privacy and Private Information in the Case Study of Individual Media Users?*

Subsequently, the present author argues that the weaknesses or limitations of the general tort overshadow the strengths. Although the general tort can hypothetically apply and adapt to most scenarios, it depends on interpretation and unclear legal framework. In practice, some elements general tort is difficult to be met such as the actual damage and causation. The unclear scope of privacy and the requirement of the actual damage have led to ineffective and insufficient privacy protection. Moreover, the burden of proof rests heavily on the claimant. Furthermore, the nature and essence of privacy rights are different from other rights under section 420. These differences result in the difficulty of proving the actual damage. On this basis, the general tort looks unsuitable for protecting privacy rights and private information. Besides, due to the lack of the balancing test between privacy and freedom of expression, the general tort is inappropriate to apply in the new media context where privacy often conflicts with freedom of expression. In other words, it could be argued that the general tort cannot perform its function in resolving private disputes effectively in this context.

As a result, the hypothesis can be confirmed and part of the key research question is answered that the general tort is insufficient and unsuitable to protect privacy and private information in the digital age, particularly in the case study of individual media users. The remaining key research question is *whether the English tort of MOPI should be introduced as the new legal medal for Thailand*. This question will be answered in the next section.

7.4 The Key Research Question- *should the English tort of MOPI be introduced as the new legal model for Thailand?*

In the previous sections, the thesis answered the sub-research question that the tort of MOPI is sufficient and suitable to protect privacy and private information in the digital age, particularly in the case study of individual media users. In contrast, it argued that the Thai general tort is unsuitable and insufficient to protect privacy and private information in the same settings. This section will further evaluate and compare the strengths and weaknesses of both torts. More importantly, the ability or potential of the tort of MOPI in solving the problems arising from the application of the general tort will be analysed. Besides, the suitability of adopting the tort of MOPI in the Thai legal system will be considered. In this regard, the cultural and social differences will also be taken into account. Therefore, at the end of this section, the thesis will answer the key research question if the tort of MOPI should be introduced as the new legal model for Thailand.

As seen in previous sections, the key strengths of the general tort and the tort of MOPI are similar. While the Thai general tort can theoretically apply in any case, the English tort of MOPI is also flexible to apply in most scenarios. Besides, both torts can adapt to new technology and new circumstances, for example, privacy on social media and modern newsgathering. However, at the same time, those strengths could lead to similar drawbacks. The highly abstract concept of the general tort and the flexible feature of the tort of MOPI may cause uncertainty. Whilst the general tort depends on the interpretations of the courts and the proof of the damages, the tort of MOPI relies on all factors and circumstances of the case.

Nonetheless, the present author considers that some of the weaknesses of the tort of MOPI could be addressed. For example, providing clear elements of the tort and lists of factors of the tests could enhance certainty. However, giving guidance or lists of factors is not sufficient to solve the problems of the general tort since they are related to the core elements of the tort. For instance, the complications of the actual damage and causation cannot be simply addressed as they are the key elements of the general tort. Moreover, due to the nature of privacy cases,

the actual damage has been always difficult to prove. Thus, the claimant will bear a substantial burden of proof. As a result, the general tort is ineffective and sufficient to protect privacy rights and interests. Furthermore, the thesis views that the tort of MOPI can protect privacy in its core concepts and interests better than the general tort, such as the right to control over the information and autonomy. Besides, the balancing test between privacy and freedom of expression is underdeveloped in the current statutory regime. In this regard, developing the new distinct tort seems to be a more suitable way to solve the problems for Thailand.

While the general tort is unsuitable to the nature of privacy rights, the present author explores that the two elements of tort of MOPI are more appropriate to the nature of privacy than those of the general tort. Firstly, as argued, the reasonable expectation of privacy test is a suitable approach to the nature of privacy rights. Also, this test could respond to the dynamic nature of privacy and protect privacy interests in a broad context. On the contrary, due to the requirement of the actual damage, the general tort is likely successful only in the highly offensive case. Secondly, the balancing test between privacy and freedom of expression could help proportionately limit the cause of action for invasion of privacy. Besides, it could resolve private disputes when privacy conflicts with freedom of expression more properly than the general tort. Consequently, although the tort of MOPI and the general tort can perform the same functions in protecting privacy interests and resolving private disputes, the thesis argues that the tort of MOPI can serve those functions better than the general tort.

More importantly, the present author asserts that the tort of MOPI is feasible to address some weaknesses or limitations of the general tort as presented in the table below. Therefore, it could be said that the most significant advantage of adopting the tort of MOPI is that it could resolve the weaknesses of the general tort or solve the problems that have frequently been found in privacy actions under the general tort.

Table 6. Limitations of the General tort and the Advantages of the Tort of MOPI

Limitations of the General Tort	The Advantages of the Tort of MOPI
1) the unclear scope of privacy	1) The reasonable expectation of privacy test could lessen the unclear scope of privacy
2) the requirement of the actual damage	2) no requirement of the actual damage
3) unsuitability to the nature of privacy rights	3) the reasonable expectation of privacy test is suitable to the nature of privacy
4) the lack of the balancing test between privacy and freedom of expression	4) The appropriate balancing test between privacy and freedom of expression

Firstly, from the case study, it could be seen that the ill-defined scope of privacy rights has been problematic when applying the general tort. Without a particular rule, the scope of privacy rights depends on the interpretation and discretion of the court. Although the reasonable expectation of privacy test is also dependent on several factors, it could provide a more certain reasonable rule to lessen the uncertainty arising from the unclear scope of privacy. For instance, in Chapters 5 and 6, the reasonable expectation of privacy test helps draw the scope of privacy right in a blurry area, such as privacy in public (category 1) and privacy on social media (category 5). Consequently, adopting the reasonable expectation of privacy test is beneficial for Thailand. Furthermore, since privacy is changeable, subjective and dynamic, providing a detailed definition of privacy rights and the explicit extent of the wrongful act might not be an appropriate solution. The precise definition of privacy might become outdated and not be applicable in the new environment or could not respond to a changing society. In this sense, the reasonable expectation of privacy test seems to be a better option to draw the scope of privacy rights and the extent of the wrongful act.

Secondly, the actual damage has been criticised as the main restraint of privacy claims. As seen in the case study, the actual damage is always difficult to be prove. Moreover, as argued, the requirement of the actual damage seems unsuitable to the nature of privacy rights. Furthermore, privacy intrusions are often engaged with mental damages. Nonetheless, the mental damages are unlikely to be compensated in Thailand. Hence, the element of the actual damage has become problematic in privacy cases. On the contrary, the actual damage is not required as an essential element to establish the tort of MOPI. Instead, the

reasonable expectation of privacy test is applied to consider whether a person of ordinary sensibility would find that the action in question offended them if they were in the same situation as the claimant. In this sense, the tort of MOPI requires 'the likely damage', not the actual damage. Therefore, it could be said the tort of MOPI is actionable *per se*. While the claimant still has a burden to demonstrate that they could reasonably expect their privacy or private information to be protected in that situation, the weight of proof in this regard tends to be less than the proof of the actual damage. Accordingly, introducing the specific tort of MOPI as a legal model could provide a more practical and suitable approach and potentially resolve the limitations of the general tort. In this regard, the new tort should be separate and distinct from the general tort and be actionable *per se*.

Thirdly, as examined, the nature and essence of privacy rights look differ from other rights in section 420. Since the nature of privacy is subjective, normative and changeable, it is harder to find a certain definition or precise scope of privacy rights than other kinds of rights in section 420. Consequently, the actual damage and causation are hard to prove. In contrast, the reasonable expectation of privacy test seems appropriate to the nature of privacy since it could reflect the subjective, normative and dynamic nature of privacy. Moreover, it could be changed towards social standards and new circumstances. Thus, the reasonable expectation of privacy test could help jurists and Thai courts draw a reasonable and acceptable scope of privacy, reflecting social standards. Besides, using the reasonable expectation of privacy to limit the cause of action is more suitable to the nature of privacy rights than the requirement of the actual damage. In this sense, the thesis asserts that the tort of MOPI is more suitable to the nature of privacy than the general tort.

Fourthly, the balancing test or proportionate test between privacy and freedom of expression is absent in the current framework of Thai tort law. The lack of the balancing test may lead to chilling effects. Private individuals may be reluctant to exercise their freedom of expression or disclose information in public interests. Also, the unclear legal framework in this regard may cause inadequate privacy protection as individuals would not understand their duties and the extent of the unlawful act. Besides, the current statutory framework seems unsuitable to resolve private disputes when privacy conflicts with freedom of expression.

Furthermore, as neither privacy nor freedom of expression is absolute under the Constitution of Thailand, the Thai courts are obligated to protect privacy limited to the proportionate balance between freedom of expression and public interests. Accordingly, studying how the balancing test has been developed and how the English courts have dealt with the conflicts between privacy rights and freedom of expression is advantageous for Thailand. Moreover, adopting the balancing test could provide appropriate privacy protection and encourage the exercise of freedom of expression. It could also help resolve private disputes more properly. Hence, the balancing test between privacy and freedom of expression should be introduced to the Thai legal system.

Consequently, the thesis argues that introducing the tort of MOPI as the new legal model could resolve the limitations of the general tort and provide sufficient and suitable protection of privacy and private information in the digital age for Thailand. Also, it can serve the function of protecting privacy interests and resolving private disputes better than the general tort. In this regard, the thesis contends that despite different traditions, the English tort of MOPI can be used as the legal model for developing the new tort for Thailand. As argued in Chapter 1, Thailand has no barrier to learning from the common law legal system or introducing common law principles to the Thai legal system. Besides, Thailand has been familiar with the English common laws. Furthermore, it is argued that the Thai legal system has become closer to the common law system.

In addition, in light of privacy concepts, Chapter 2 asserted that the English concept of privacy as freedom from unwanted access could be located in Buddhist practice and principles, which have influenced Thai traditions and laws. Furthermore, it argued that privacy concepts and some privacy values have long been rooted in traditional Thai society. More importantly, due to globalisation and the Internet, Thai people's understanding of privacy has become more similar to English perceptions. Although informational privacy was not found in the Thai traditional context, it is now recognised in the modern context. Additionally, Chapter 2 found that privacy from the Thai legal perspective is comparable to the English privacy concepts. On this basis, the thesis contends that the English tort of MOPI could be adopted to provide better privacy protection and respond to social needs in Thailand.

Moreover, as argued above, one of the strengths of the reasonable expectation of privacy test is its ability to respond to changing social standards towards privacy and to reflect societal attitudes towards privacy. Hence, the test could be changed between cultures and adapted to different social norms and standards. Thus, despite cultural and social differences, the reasonable expectation of privacy test could adapt and respond to Thai social standards and attitudes. Therefore, the thesis asserts that the reasonable expectation of privacy test is suitable for adopting in the Thai legal system. However, due to different social attitudes and legal traditions, the balancing test between privacy and freedom of expression might be interpreted and balanced differently in Thailand. For example, the matters in public interests under the Thai context may differ from the English jurisdiction. Moreover, the weight of freedom of expression on the balancing test in Thai traditions may be slightly less than in the English jurisdiction. For example, as seen in Chapter 5, category 3, the protection of freedom of expression when criticising the public figures in Thailand seems weaker than that protection in England. More importantly, according to the Constitution of Thailand, invasion of privacy shall be allowed only 'to the extent of the necessity of public interest.'[797] Therefore, although the thesis argued that freedom of expression has public interest in itself, privacy will most likely override freedom of expression if specific public interest cannot be particularly generated from freedom of expression. On this basis, individual Thai speakers will likely find it is difficult to justify their expressions by self-fulfilment or the speaker's interests to outweigh privacy interests.

To conclude, the thesis argues that even though the tort of MOPI and the general tort can serve the same functions, the specific tort of MOPI could resolve private disputes more suitably than the general tort. Moreover, while the general tort seems unsuitable and insufficient to protect privacy and private information, the tort of MOPI can provide more suitable and sufficient privacy protection. Besides, the thesis argues that the tort of MOPI can potentially solve the redundant problems of the general tort. By addressing those problems, the new tort will be more suitable and sufficient for protecting privacy and private information in the

[797] Thailand's Constitution of 2017. Section 32

digital age in the case of individual media users. Accordingly, the key research question could be answered that the tort of MOPI should be introduced as the new legal model for Thailand. Nevertheless, some weaknesses of the tort of MOPI should be addressed when developing the new tort. Subsequently, the next section will provide recommendations for legislators for Thailand.

7.5 Recommendations for Legislator

Arguing that the new tort should be introduced as the legal model for Thailand, this section will recommend the structure of the new tort for legislators. While the recommendations are based on the Thai legal system, these recommendations are adaptable to address some weaknesses or drawbacks of the tort of MOPI.

1) The legislator should introduce a new specific tort with particular elements separating from the general tort. By developing the new tort, the legislator can select appropriate elements of the specific tort. In this regard, the thesis suggests using the tort of MOPI as the legal model for legislation. The thesis observes that a specific tort is not alien to the Thai legal system. A defamatory tort (section 423 of the CCC), which is specifically designed to protect the right to reputation, is an example of a specific tort with distinct elements.

2) The legislator should establish one cause of action covering two types of privacy invasions, informational and physical privacy. The thesis considers that enacting a separate cause of action is necessary only if the actions are substantially different. However, as examined in Chapter 6, category 6, those two types of privacy often overlap, particularly in the digital age. Moreover, as found in Chapter 2, the values underpinning those two types of privacy are similar. However, there are controversial issues concerning physical privacy protection under the English tort of MOPI. Therefore, to prevent future disputes, invasion of physical privacy should be straightforwardly stated and clarified its elements in Thai statutory tort. Besides, to avoid confusion, the thesis recommends that the name of the new tort should not be oriented towards private information.

3) The reasonable expectation of privacy test should be imposed as one of the key elements of the new tort as it is the core element of the tort of MOPI. In this regard, the claimant will bear the burden of proof that they have a reasonable expectation of privacy in a particular case. To enhance certainty in the application and assist the general public and courts in assessing whether an individual's privacy expectation is reasonable or not, the legislator should provide guidelines or a list of factors that the court would take into account when determining this test. The list of factors should be stated as non-exclusive lists. Thus, it could be added in the future. The legislator may look at the English case law as a reference for the related factors, but it should be mainly based on Thai reasonable expectation of privacy.

4) Another key element of the new tort is the balancing test between privacy and freedom of expression or other competing rights. Underlining that privacy rights and freedom of expression are equal under the Constitution of Thailand, the balancing test should be an element of the tort. Consequently, the claimant would have an onus to show that their privacy rights outweigh freedom of expression or any countervailing rights in public interests. At the same time, overriding rights could be justification or defence. Thus, the defendant can justify their action by claiming that their freedom of expression or other competing rights overrides the claimant's privacy. As Wragg argued, since two rights are considered equally, the burden of proof for the party is neutral.[798] Then, it would be the duty of the court to balance those rights in question. In this sense, the Thai court is obligated to play an active role in the balancing test. When exercising the balance, the court should consider all factors and circumstances of the case.

   The legislator should further provide fair balancing guidelines to offer certainty and consistency. In this regard, the factors in the balancing test in the tort of MOPI can be used as an example. However, to avoid a double

[798] Wragg, 'Enhancing Press Freedom through Greater Privacy Law : A UK Perspective on an Australian Privacy Tort' (n 748). 632

burden of proof, the set of factors of the balancing test and the reasonable expectation of privacy test should not be overlapped. Additionally, an explicit process of the balancing test should be given. The model suggested in Chapter 4 could also be applied as guidance for the balancing test, particularly in the case of individual media users. Nevertheless, due to societal and traditional differences, the balancing test between privacy and freedom of expression and the matters of the public interest in Thailand may differ from the English tradition.

5) The actual damage should not be required as an element of the new tort. By adopting the reasonable expectation of privacy test, the court should instead consider 'the likely damage' to a person of ordinary sensibilities. If a person of ordinary sensibilities could reasonably expect privacy in that situation, they would be offended by an invasion of privacy. Without proof of the actual damage, it seems that the new tort is actionable *per se*.

6) On top of the two elements of the tort, the legislator should further specify other elements of tort to increase certainty and coherence in the Thai statutory tort. Leaving key elements to be defined by Thai courts would be considerably problematic and unsuitable for the Thai judicial styles. For example, the legislator should clarify what degree of fault is needed. Moreover, the availability of remedies should be considered and clearly stated.

7) Additional defences or legal justification should be explicitly enacted. According to section 32 of the Constitution, privacy invasion can be justified by the public interest if there is a provision of exception.[799] Accordingly, lists of public interest should be stipulated as defences, for example, public health and safety and national security. More importantly, it should be stated that those defences in public interests must outweigh the claimant's privacy rights. Furthermore, other defences should be enacted, such as consent. In this regard, it should be further considered which kind of consent could be applied in privacy cases.

[799] Thailand's Constitution of 2017, Section 32

7.6 The Thesis Summary, the Key Contributions and The Potential for Further Research

In conclusion, to answer the key research question and serve the thesis objectives, comparative law and legal doctrine analysis, as well as the functional method, were applied. The typology approach was employed to categorise multiple case studies. The thesis can be divided into two main parts. The first part examined privacy concepts, legal development and overview of doctrines and laws, comprising Chapters 2, 3 and 4. An overview of doctrines and laws in the first part is crucial for further assessing and evaluating how well both torts could function to protect privacy and private information in the second part. Then, in the second part, the case study of individual media users was set to critically analyse and evaluate the applications of the torts.

In Chapter 2, the thesis explored privacy concepts and values from the English and Thai perspective. This chapter delivered an understanding of privacy and its values, which is essential for further analysis and evaluation of the torts. Moreover, it presented an unorthodox view of Thai privacy. While several scholars contended that individual privacy from the Western perspective is not compatible with Thai culture and tradition, the thesis argued that that concept could fit within the Thai Buddhist tradition. As argued, the Buddhist principles and rules have been part of Thai culture and have a major influence on Thai laws. Furthermore, the thesis observed that privacy concepts and some privacy values have rooted in traditional Thai society. In the modern context, Thai people's understanding of privacy and privacy from a legal perspective has become more similar to the English perceptions. However, the findings of Thai perception of privacy in the digital age are limited to documents and relevant research at the time of conducting the thesis. Further empirical research in this area may offer a richness of information. As a result, this chapter connected distant privacy concepts from different jurisdictions, which could contribute to an understanding of privacy for those who are interested in privacy study.

As the English and Thai perceptions of privacy have become similar, studying how the English laws have evolved to protect privacy is useful. As stated in Chapter 1,

the thesis considers that comparative law can provide a better and more comprehensive solution or alternative model for resolving private disputes in Thailand than focusing on a single legal system. Nonetheless, there was very limited Thai research investigating the English tort of MOPI. To the best knowledge of the present author, no study specifically compared the tort of MOPI with Thai tort laws, particularly in the case study of individual media users. Thus, the thesis delivered a new comparative analysis of privacy torts in this area. When studying foreign laws, first, it is significant to understand how the laws have been developed to solve particular problems. Hence, Chapter 3 examined how the tort of MOPI has been established. Although this finding is not novel, the lessons learned from this development are significant for developing the new tort in Thailand. Moreover, this chapter addressed and clarified some critical issues of the tort of MOPI, for example, the characteristic of tort. Then, in order to compare the English laws with Thai laws, this chapter reviewed how the Thai general tort has been applied and interpreted to protect privacy rights. Also, the essential elements of both torts were studied in this chapter to examine how the torts could function in protecting privacy or apply in privacy cases. Furthermore, in this chapter, the similarities and differences between the tort concepts from different legal systems were demonstrated.

Subsequently, to gain insight into the balancing test as part of the tort of MOPI, Chapter 4 demonstrated how to balance privacy with freedom of expression in a wide range of values and the extent of individual expressions on the Internet. Although this chapter was based on the English laws and cases, the lesson learned from this chapter is also beneficial for Thailand. Moreover, it may be helpful for a legislator who seeks to balance competing rights in the new media context in any jurisdiction. As mentioned in Chapter 1, the vast majority of English literature has focused on mass media or traditional media and the conflicts between privacy and media freedom. Less attention has been paid to balancing an individual's privacy and freedom of expression across the new media context. Therefore, the findings in this chapter could supplement the English literature in this area. Furthermore, this chapter argued that the tort of MOPI can adapt to the context of individual media users. Despite some differences between media freedom and freedom of expression, the intrinsic logic of the balancing test is not different. The model in this chapter illustrated how the court should balance privacy with

freedom of expression in hypothesis cases. Nevertheless, due to limited time, some legal parts in this chapter were unable to be pursued. For example, the balance between individuals' rights and interests when the public interests are absent requires more rigorous treatment and supplementary study. The ability of the individual media users to produce public interests at the low-level expression is also open to debate. Hence, this chapter encourages further research on an appropriate balance between privacy and freedom of expression, especially in the context of a low level of expression. Moreover, rather than depending on the weight of public interests, future research may introduce a new method to strike a balance between privacy and freedom of expression in its own right.

In the second part, the case study was constructed by the typology approach to examine the applications of the torts. The doctrine and comparative analysis were applied to analyse and evaluate how satisfactory the torts respond to those categories. This part comprises Chapters 5 and 6. These chapters intend to test the suitability and sufficiency of the tort of MOPI and the general tort in the case study of individual media users. The findings in these chapters then supported the answer to the key research questions answered above.

Although the situations in Chapter 5 have often occurred in the case of mass media, this chapter warrants an analysis through the lens of individual media users. The multiple case study in this chapter was grounded on factors that related to the tort of MOPI but seemed irrelevant to the general tort. Hence, this chapter offers an alternative and better understanding of the Thai general tort that has been overlooked. By forcing to consider those factors, the limitations of the general tort could be seen, for example, the unclear scope of privacy and lack of the balancing test between privacy and freedom of expression. As a result, Chapter 5 contributes towards a better knowledge of the general tort and privacy actions for Thailand. Besides, from the case study, the strengths and weaknesses of both torts could be seen. Hence, the analysis in the case study contributes to both jurisdictions. Next, Chapter 6 provided closer scrutiny on the application of the torts in the new media environment, particularly in social media and modern newsgathering backdrop. Even though there is rich literature regarding the tort of MOPI, there is limited research investigating the effects of social media as the medium of dissemination and privacy on social media. In Chapter 6, the thesis

asserted that an individual could expect some privacy on social media in the English legal system. In this regard, it warrants various arguments in support of a reasonable expectation of privacy on social media. As a result, this chapter could sharpen and supplement an analysis of the MOPI tort in this area. Moreover, the findings in Chapter 6 could stress the strengths and weaknesses of both torts. Furthermore, both torts' flexibility and adaptability to the new environment and new technology were shown.

Then, the present chapter took the findings and accounts drawn from the case study and previous chapters to answer the key and sub-research questions. In this chapter, the key strengths and weaknesses of the general tort and the tort of MOPI were evaluated and compared. The suitability and sufficiency of both torts in fulfilling their functions were analysed and highlighted. Finally, the key and sub-research questions were answered, and the hypothesis setting in Chapter 1 was confirmed. In this regard, the thesis found that the Thai general tort is unsuitable and insufficient to protect privacy and private information in the case study. It asserted that although the tort of MOPI and the general tort can perform the same functions, the specific tort of MOPI is more suitable and sufficient to protect privacy and private information in the digital age, particularly in the case study of individual media users. Furthermore, the thesis argued that introducing the tort of MOPI to the Thai legal system has the ability or potential to address difficulties or limitations caused by general torts. Notwithstanding different legal systems, the thesis contended that the tort of MOPI could be used as the legal model for Thailand. Consequently, the key research question was answered that the general tort is unsuitable and insufficient to protect privacy and private information and the tort of MOPI should be introduced as the new legal model for Thailand. Subsequently, the thesis proposed a new possible legal model with some recommendations for Thai legislators. As a result, the thesis contributes a more suitable approach or alternative solution for protecting privacy and private information and solving private disputes for Thailand. The introduction of a new separate privacy tort offers more enhanced and effective protection of privacy limited to proportionate balance with freedom of expression or other competing rights. Besides, it could resolve repeated problems found in the application of the Thai general tort. Additionally, the thesis addressed some drawbacks of the tort of MOPI and pointed out some weaknesses that should be addressed further. To

conclude, it could be seen that the thesis can achieve its goals and contributes to better knowledge in the area of privacy torts for both Thai and English jurisdictions. The major contribution of the thesis is introducing the new legal model for legislation to solve privacy problems for Thailand.

Nevertheless, it is the nature of the comparative study that the outcome of the thesis depends on the selected jurisdictions and laws that are compared. Hence, the thesis might be criticised for not providing a rich comparative analysis as it relies on comparing laws between two jurisdictions. Moreover, the English legal system and traditions seem different from the Thai legal system. Nevertheless, as justified in Chapter 1, since the Thai civil law tort appears ineffective because of its general concept, the thesis aims to explore the specific common law tort with particular elements. The English tort of MOPI was chosen because it successfully protects privacy and private information and has influenced other common law jurisdictions. Besides, English laws have long been implanted in the Thai legal system. Nonetheless, although the selection of comparison can be justified, some limitations remain. For instance, to introduce the new laws, the opinions of the public, jurists and scholars in this field may need to be taken into account. However, the result of the thesis is based on primarily written sources and secondary documents or relevant information available at the time of studying. Furthermore, more research should be done before introducing the new tort. For instance, to enact the new statutory tort, lawmakers or legislators should clarify the elements of the new tort, the burden of proof, defences and remedies. Besides, they should provide non-exclusive lists of factors in the reasonable expectation of privacy and balancing tests. Also, the guidance on the balancing test and the matters in public interests should be given.

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