Dissecting the Evolution of Philippine Privacy Torts: Introducing a Three-Pronged Framework for Claiming Damages under the Data Privacy Act of 2012

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I. INTRODUCTION

With the complexities of technological advancements attendant upon our current generation, man — under the refining influence of culture — has become very sensitive to the public.[1] Although the heightened interest of the world with regard to news and public interest is non-threatening *per se*, especially when it comes to public figures who live off it, such is not the case for the great many people who did not voluntarily seek publicity.[2] Solitude and privacy have become essentials for many to enjoy a good life.[3] Ironically, however, modern enterprise and the liberated press have contributed little development, if not a regression, to these two freedoms.[4] Technology and the media have subjected man, especially the common man who wishes to live in peace, to mental pain and distress sometimes far greater than what could be inflicted by mere bodily injury.[5]

Because of these developments, the law has slowly evolved to protect these non-proprietary freedoms.[6] From protecting mere corporeal property, law has also evolved in such a way that it protects the incorporeal rights that have arisen from such corporeal property.[7] Protection of intangible property followed, and then, protection of intellectual property.[8] Soon after, emotions and sensations demanded legal recognition, and so did the protection for the person as a whole.[9] These developments gave birth to the right "to be let alone,"[10] as Judge Thomas M. Cooley called it, or the right of privacy, as it is called today.[11]

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1. Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 196 (1890).
2. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).
3. Warren & Brandeis, *supra* note 1, at 196 .
4. *Id.*
5. *Id.*
6. *Id.* at 193-95.
7. *Id.* at 194-95.
8. *Id.*
9. Warren & Brandeis, *supra* note 1, at 193.
10. *Id.* at 195 (citing THOMAS MCINTYRE COOLEY, A TREATISE ON THE LAW ON TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed. 1888)).
11. *Id.*

Victim-subjects then, public figures or not, of instantaneous photographs and newspaper enterprises that invade the sacred precincts of private and domestic life, and other mechanical devices that threaten related rights, finally have remedies for such invasions.[12] Victims of unwarranted defamation and libel,[13] perpetrated by "yellow journalism,"[14] who to their great prejudice belittled and perverted them,[15] were granted causes of action to enjoin culprit-publications and private persons.

Because of its nature, the right to privacy can be treated as an offshoot of the laws against slander and libel.[16] A great difference rests, however, in their causes of action. The law of defamation deals strictly with damage to one's reputation.[17] It does not consider the effects of the publication of such material to his or her estimate of himself or herself and upon his or her own feelings, the latter being the causes of action of the right to privacy.[18] In other words, in contrast to the rather material nature of slander and libel, the right to privacy takes on a more *spiritual* approach to claiming for damages.[19] It aims to provide an otherwise non-existent remedy for injuries to feelings and honor.[20]

That the right to privacy needs to be protected through legal means is of no contention. Section 2 of the Bill of Rights of the 1987 Constitution guarantees that

> [t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he [or she] may produce, and particularly describing the place to be searched and the persons or things to be seized.[21]

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12. Warren & Brandeis, *supra* note 1, at 193-95.
13. *Id.* at 197.
14. Prosser, *supra* note 2, at 383 (citing Warren & Brandeis, *supra* note 1, at 196).
15. *Id.*
16. Warren & Brandeis, *supra* note 1, at 197.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 196.
21. PHIL. CONST. art. III, § 2.

Section 3 (1) subsequently guarantees that "[t]he privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law."[22]

In the case of *Vivares v. St. Theresa's College*,[23] the Supreme Court recognized the existence of several kinds of privacy.[24] First, there is locational or situational privacy; second, there is informational privacy; and third, there is decisional privacy.[25] Of relevance to this Essay is the second type, or the "right of individuals to control information about themselves[.]"[26] The Court elucidated the importance of the protection of such right, as follows —

> With the availability of numerous avenues for information gathering and data sharing nowadays, not to mention each system's inherent vulnerability to attacks and intrusions, there is more reason that every individual's right to control said flow of information should be protected and that each individual should have at least a reasonable expectation of privacy in cyberspace. Several commentators regarding privacy and social networking sites, however, all agree that given the millions of [online social network] users, '[i]n this [Social Networking] environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking.'[27]

At issue, however, is how the protection of this right, especially as to its practical application to communication systems, clashes with the protection

22. PHIL. CONST. art. III, § 3 (1).

23. Vivares v. St. Theresa's College, 737 SCRA 92 (2014).

24. Rea Irish Michelle R. Pintor, Doxing: Free Speech or Privacy Intrusion?, at 42 (2019) (unpublished J.D. thesis, Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University) (citing *Vivares*, 737 SCRA at 111).

25. Pintor, *supra* note 24, at 42 (citing Reynato S. Puno, Retired Chief Justice of the Supreme Court, *The Common Right to Privacy*, Remarks at the Forum on The Writ of *Habeas Data* and Human Rights, Sponsored by the National Union of Peoples' Lawyers (Mar. 12, 2008) (transcript *available at* http://sc.judiciary.gov.ph/speech/03-12-08-speech.pdf (last accessed May 5, 2019)).

26. *Vivares*, 737 SCRA at 111 (citing *Puno*, *supra* note 25) (emphasis omitted).

27. *Vivares*, 737 SCRA at 111-12 (citing Romano v. Steelcase Inc., 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010) (U.S.)).

of other fundamental freedoms to some extent, especially in light of its evolution alongside the evolution of our digital age.

According to Section 10 of Article XVI of the 1987 Constitution —

> The State shall provide the policy environment for the full development of Filipino capability and the emergence of communication structures suitable to the needs and aspirations of the nation and the *balanced flow of information* into, out of, and across the country, *in accordance with a policy that respects the freedom of speech and of the press*.[28]

Proceeding from the premise that the right of privacy is one of the roots for developing more reliable communication structures, from Section 10 of Article XVI, two issues are apparent.

First, its protection has to strike a balance with the protection of the right to press freedom or the right to free speech.[29] This first issue, however, has already been heavily tackled by courts and will not be the subject of this Essay.

Second, the right to privacy of communication also needs to be exercised in a way that it would not stunt the "balanced flow of information into, out of, and across the country[,]"[30] or the "free flow of information for innovation, growth, and national development."[31] This Essay tackles this second issue. The Philippines sought to address this issue through the Data Privacy Act of 2012 (DPA), which guarantees rather specifically the protection of "the *privacy* of communication *while* ensuring *free flow of information* to promote innovation and growth."[32]

In a nutshell, the DPA "is a 21st century law [which seeks] to address 21st century crimes and concerns."[33] It:

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28. PHIL. CONST. art. XVI, § 10 (emphases supplied).

29. *See* Warren & Brandeis, *supra* note 1, at 214-16.

30. PHIL. CONST. art. XVI, § 10.

31. Rules and Regulations Implementing the Data Privacy Act of 2012, Republic Act No. 10173, rule I, § 1 (2016).

32. An Act Protecting Individual Personal Information in Information and Communications Systems in the Government and the Private Sector, Creating for this Purpose a National Privacy Commission, and for Other Purposes [Data Privacy Act of 2012], Republic Act No. 10173, § 2 (2012) (emphases supplied).

33. National Privacy Commission, The Data Privacy Act of 2012, *available at* https://www.privacy.gov.ph/data-privacy-act-primer (last accessed May 5, 2019).

(1) protects the *privacy* of individuals while ensuring free flow of information to promote innovation and growth;

(2) regulates the collection, recording, organization, storage, updating or modification, retrieval, consultation, use, consolidation, blocking, erasure or destruction of personal data; and

(3) ensures that the Philippines complies with international standards set for data protection through National Privacy Commission (NPC).[34]

Aside from penalties, among the DPA's remedies for aggrieved persons is the grant of civil damages. However, the DPA, including its Implementing Rules and Regulations, is bereft of the proper considerations in establishing such claim for damages in court, apart from enumerating its causes of action.

Hence, this Essay seeks to establish a three-pronged framework for claiming damages under the Data Privacy Act of 2012. To develop context, the first and second parts of this Essay will enter into a general discussion on the concept of privacy torts as enunciated in the landmark Article "The Right to Privacy," by Samuel D. Warren and Louis D. Brandeis, and "Privacy," an article by William Prosser. These will serve as the frameworks for the discussion on privacy torts in the United States (U.S.) jurisdiction. The third part of this Essay will delve into a discussion on the evolution and adaptation of privacy torts in the Philippines based on the New Civil Code. It will also dissect the doctrines on the leading cases of privacy torts in Philippine jurisprudence. These will provide the legal framework and basis for the three-pronged approach, to be introduced later, in claiming damages under the DPA whose provisions specifically mandate the use of Civil Code provisions on restitution.

After a brief introduction about the DPA and the rights of the data subjects therein, the fourth part of this Essay will discuss how the DPA provides basis for civil claims of damages, in such a way that it expands the Civil Code. The fifth part of the Essay will finally enumerate the essential elements to be established in a claim for damages in court arising from violations of a data subject's rights and freedoms enshrined in the DPA, stitching together its relevant provisions, construing them based on its privacy tort law and jurisprudence roots. The Essay finishes with a conclusion and summary.

34. *Id.* (emphasis supplied).

II. PRIVACY TORTS IN THE UNITED STATES

A. Brief History

Before, the right of privacy was an era of *yellow journalism*. This was a result of when press and media, for business survival, always resulted to excessive prying into the lives and homes of another in order to thrive on their embarrassments and personal lives.[35] Samuel Warren and Louis D. Brandeis's *Harvard Law Review* Article entitled "The Right to Privacy" came into being when Warren himself became "annoyed" with the unwarranted press coverage of his daughter's wedding.[36] This annoyance and, ultimately, the landmark Article that followed — which first laid down the foundations for the right to privacy — became an outstanding example of how legal periodicals can influence the evolution of American law.[37]

The Article first pieced together old decisions of the courts on violations of *privacy* where relief has been afforded through the laws on defamation, or the invasion of some property right, or the breach of confidence or implied contract.[38] The Article then expounded on the lapses and limitations of such legal bases, and held that, in reality, the causes of actions in these cases were based upon a broader principle which needed to be separately recognized.[39] The Article called this principle the right to privacy.[40] The Article, then, became the seed for a long line of law reviews which adopted this separate recognition of the right.[41]

At first, the Article had little immediate effect on American law.[42] In initial cases, such as the Court of Appeals of New York case of *Roberson v. The Rochester Folding Box Company*,[43] the court declared that the right of privacy was still inexistent in the eyes of the law and that no protection

35. Prosser, *supra* note 2, at 383 (citing Warren & Brandeis, *supra* note 1, at 196).

36. Prosser, *supra* note 2, at 383 (citing ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 70 (1946)).

37. Prosser, *supra* note 2, at 383-84.

38. *Id.* at 384.

39. *Id.*

40. *Id.*

41. *Id.* at 384-85.

42. *Id.* at 384.

43. Roberson v. The Rochester Folding Box Company, 64 N.E. 442 (N.Y. Ct. App. 1902) (U.S.).

whatsoever should be granted for such inexistent right.[44] The reasons given include: "the lack of precedent, the purely mental character of the injury, the 'vast amount of litigation' that might be expected to ensue, the difficulty of drawing any line between public and private figures, and the fear of undue restriction of the freedom of the press."[45]

The ruling of the court in the *Roberson* case gave rise to a storm of public disapproval.[46] In consequence, the New York legislature enacted a statute, which is now the New York Civil Rights Law, which expressly held that the use of the name, portrait, or picture of any person for advertising or trade purposes without the written consent of such person is both a misdemeanor and a tort.[47] This was one of the earliest forms of the right to privacy.[48] Although the next few years still sprouted clashing cases on the existence of the right, around the thirties, the laws finally swayed in favor of recognizing the right to privacy.[49]

At present, an overwhelming majority of American courts already recognize the right to privacy, including: Alabama, Alaska, Arizona, California, Connecticut, the District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, and West Virginia.[50]

B. Four Kinds of Private Torts

What emerged from jurisprudence and statutes on the nature of the right of privacy is not one of simple tort.[51] The right of privacy in the U.S. is in fact a combination of four tort-related concepts —

> The law of privacy comprises of four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each

44. Prosser, *supra* note 2, at 385 (citing *Roberson*, 64 N.E. 442).

45. Prosser, *supra* note 2, at 385.

46. *Id.*

47. *Id.*

48. *Id.* at 385-86.

49. *Id.* at 386.

50. *Id.* at 386-88.

51. *Roberson*, 171 N.Y. at 389.

> represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, 'to be let alone.'[52]
>
> These four torts include:
>
> (1) Intrusion upon the plaintiff's seclusion or solitude, or into his [or her] private affairs.
>
> (2) Public disclosure of embarrassing private facts about the plaintiff.
>
> (3) Publicity which places the plaintiff in a false light in the public eye.
>
> (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[53]

For *intrusion*, the intrusion must be something that is "offensive or objectionable to a reasonable man."[54] Hence, there is no intrusion when a landlord stops by to ask for rent.[55] The thing into which there is prying or intrusion must also be private.[56] There is no intrusion when pre-trial testimony is recorded,[57] when a suspect is photographed or inspected by the police, or when there is an inspection of public corporate records which the corporation is required to make available to public.[58] Intrusion cases include: eavesdropping upon private conversations by wiretapping,[59] peering into the windows of a home,[60] unauthorized prying into a bank account,[61] and an illegal compulsory blood test,[62] among others.

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52. Prosser, *supra* note 2, at 389 (citing COOLEY, *supra* note 10).

53. Prosser, *supra* note 2, at 389.

54. *Id.* at 391.

55. *Id.* (Horstman v. Newman, 291 S.W.2d 567 (Ky. Ct. App. 1956) (U.S.)).

56. Prosser, *supra* note 2, at 391.

57. *Id.* (citing Gotthelf v. Hillcrest Lumber Co., 116 N.Y.S.2d 873 (N.Y. App. Div. 1st Dep't 1952) (U.S.)).

58. Prosser, *supra* note 2, at 391 (citing Bowles v. Misle, 64 F. Supp. 835, 843 (D. Neb. 1946) (U.S.); United States v. Alabama Highway Express, 46 F. Supp. 450, 453 (D. Ala. 1942) (U.S.); & Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 (Al. 1944) (U.S.)).

59. Prosser, *supra* note 2, at 390 (citing Rhodes v. Graham, 238 Ky. 225 (Ky. Ct. App. 1935) (U.S.)).

60. Prosser, *supra* note 2, at 390 (citing Moore v. The New York Elevated Railroad Company, 130 N.Y. 523 (N.Y. Ct. App. 1892) (U.S.); Pritchett v. Board of Com'rs of Knox County, 42 Ind. App. 3 (Ind. App. Ct. 1908) (U.S.); & Souder v. Pendleton Detectives, 88 So.2d 716 (La. Ct. App. 1st Cir. 1956) (U.S.)).

For *public disclosure of private facts*, first, the disclosure must be public.[63] An example would be publishing in a newspaper someone's nonpayment of debts.[64] Written publication is not necessary.[65] Modern technology has rendered obsolete that past requirement, and there is little doubt now that writing is not required.[66] Second, the disclosure must be for private facts, not public ones.[67] One cannot complain for the appearance of his or her house, or his or her business.[68] Third, the facts made public must also be offensive and objectionable to a reasonable man of ordinary sensibilities.[69] Examples of this would be public exposure of sexual relations[70] or other intimate private characteristics or conduct of an individual.[71]

For *false light in the public eye,* such tort involves many forms.[72] First, it occasionally appears as "publicity falsely attributing to the plaintiff some opinion of utterance."[73] Examples would be using fictitious testimonials in

61. Prosser, *supra* note 2, at 390 (citing Brex v. Smith, 104 N.J. Eq. 386 (N.J. Ch. 1929) (U.S.) & Zimmerman v. Wilson, 81 F.2d 847 (3d Cir. 1936) (U.S.)).

62. Prosser, *supra* note 2, at 390 (citing Bednarik v. Bednarik, 18 N.J. Misc. 633 (N.J. Ch. 1940) (U.S.)).

63. Prosser, *supra* note 2, at 393.

64. *Id.* (citing Trammel v. Citizens News Co., 148 S.W.2d 708 (Ky. Ct. App. 1941) (U.S.)).

65. Prosser, *supra* note 2, at 394 (citing Bennett v. Norban, 396 Pa. 94 (1959) (U.S.); Biederman's of Springfield, Inc. v. Wright, 322 S.W.2d 892 (1949) (U.S.); & Linehan v. Linehan, 134 Cal.App.2d 250 (Ca. Dis. Ct. App. 1955) (U.S.)).

66. *Id.*

67. Prosser, *supra* note 2, at 394.

68. *Id.*

69. *Id.* at 396 (citing Reed v. Real Detective Pub. Co., 63 Ariz. 294, 305 (1945) (U.S.); Davis v. General Finance & Thrift Corporation, 80 Ga. App. 708, 711 (Ga. Ct. App. 1950) (U.S.); Gill v. Hearst Publishing Company, Inc., 40 Cal. 2d 224, 231 (1953) (U.S.); & Samuel v. Curtis Pub. Co., 122 F. Supp. 327, 329 (N.D. Cal. 1954) (U.S.)).

70. Prosser, *supra* note 2, at 397 (citing Garner v. Triangle Publications, 97 F. Supp. 546 (S.D.N.Y. 1951) (U.S.)).

71. Prosser, *supra* note 2, at 397 (citing Cason v. Baskin, 155 Fla. 198 (1944) (U.S.) & Cason v. Baskin, 159 Fla. 31 (1957) (U.S.)).

72. Prosser, *supra* note 2, at 398-400.

73. *Id.* at 398.

advertising[74] and forging of signatures of a state employee for government action.[75] Another form is using a person's picture to illustrate a book or article with which he or she has no reasonable connection.[76] Only public interest can justify this appropriation.[77] Another form is including a person's name, photograph and fingerprints in a public gallery of convicted criminals when he or she has not in fact been convicted.[78] This is false publicity.[79]

For *appropriation*, it consists of the appropriation of the another's name or likeness for one's benefit or advantage, without the other's consent.[80] It includes the use of the picture, name, or likeness of another to advertise one's product or to accompany an article sold,[81] or to add luster to the name of a corporation, for some other business purpose.[82] This has been referred to in some cases as the "right of publicity."[83]

74. *Id.*

75. *Id.*

76. *Id.* at 399.

77. *Id.*

78. Prosser, *supra* note 2, at 399 (citing Itzkovitch v. Whitaker, 115 La. 708 (1906) (U.S.)).

79. Prosser, *supra* note 2, at 400.

80. *Id.* at 401-02.

81. *Id.* at 402 (citing Neyland v. Home Pattern Co., 65 F.2d 363 (2d Cir. 1933) (U.S.); Lane v. Woolworth Co., 11 N.Y.S. 2d 119 (N.Y. Sup. Ct. 1939) (U.S.); McNulty v. Press Publishing Co., 241 N.Y.S. 29 (N.Y. Sup. Ct. 1930) (U.S.); Jansen v. Hilo Packing Co., Inc., 11811 Misc. 900 (N.Y. Sup. Ct. 1952) (U.S.); & Miller v. Madison Sq. Garden Corp., 176 MisHHilo Packing Co., Inc., 118 N.Y.S. 2d 162 (N.Y. Sup. Ct. 1941); & Miller v. Madison Square Garden Corporation, 28 N.Y.S. 2d 811 (N.Y. Sup. Ct. 1941) (U.S.)).

82. Prosser, *supra* note 2, at 402 (citing Von Thodorovich v. Franz Josef Beneficial Association, 154 F. 916 (E.D. Pa. 1907) (U.S.) & Edison v. Edison Polyform Mfg. Co., 73 N.J. Eq. 136 (N.J. Ch. 1907) (U.S.)).

83. Prosser, *supra* note 2, at 407 (citing Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204 (1954); Joseph R. Grodin, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123 (1953); & Donald A. Macksey, *Torts — A Person Has the Right to the Publicity of His Photograph, Independent of His Right of Privacy, Which May Be Transferred in Gross Vesting an Assignee with Sufficient Interest to Maintain a Suit Against Unauthorized Use by Third Parties*, 41 GEO. L.J. 583 (1953)).

Uncovering the roots of privacy torts and understanding the legal framework of such breed of torts in the U.S. is helpful in dissecting the current structure of privacy torts in the Philippines.

III. PRIVACY TORTS IN THE PHILIPPINES

A. The Civil Code

In the Philippines, the right to privacy is enshrined explicitly in the Civil Code. On the one hand, Article 2176 provides a general definition of a quasi-delict or tort in Philippine law, which generally grants damages to whoever is injured by torts. Art. 2176 provides —

> Art. 2176. Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called a quasi-delict and is governed by the provisions of this Chapter.[84]

Jurisprudence provides that in order to file for damages for a quasi-delict under Article 2176, the plaintiff must prove by preponderance of evidence the following elements:

> (1) the damages suffered by him [or her];
>
> (2) the fault or negligence of the defendant or some other person to whose act he [or she] must respond;
>
> (3) the connection of cause and effect between the fault or negligence and the damages incurred; and
>
> (4) that there must be no preexisting contractual relation between the parties.[85]

On the other hand, under Chapter 2 on Human Relations, which enumerates special torts, Article 26 states —

> Every person shall respect the dignity, personality, *privacy* and peace of mind of his [or her] neighbors and other persons. The following and similar acts, though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention[,] and other relief:

84. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 2176 (1950).

85. Gregorio v. Court of Appeals, 599 SCRA 594, 606 (2009) (citing Corinthian Gardens Association, Inc. v. Tanjangco, 556 SCRA 154, 168 (2008)).

(1) Prying into the privacy of another's residence;

(2) Meddling with or disturbing the private life or family relations of another;

(3) Intriguing to cause another to be alienated from his [or her] friends; and

(4) Vexing or humiliating another on account of his [or her] religious beliefs, lowly station in life, place of birth, physical defect, or other personal condition.[86]

Article 26, in relation to Article 2176 of the Civil Code, is the legal basis to grant a cause of action for civil damages, prevention, and other relief in cases of breach of the following rights:

(1) right to personal dignity;

(2) right to personal security;

(3) right to family relations;

(4) right to social intercourse;

(5) *right to privacy*; and

(6) right to peace of mind.[87]

Of relation thereto is Article 19 of the same Chapter which embodies the principle commonly known as "abuse of right,"[88] to wit: "Every person must, in the exercise of his [or her] rights and in the performance of his [or her] duties, act with justice, give everyone his [or her] due, and observe honesty and good faith."[89] Its elements include: "(1) there is a legal right or duty; (2) which is exercised in bad faith; (3) for the sole intent of prejudicing or injuring another."[90]

86. CIVIL CODE, art. 26.

87. *Gregorio*, 599 SCRA at 606 (citing 1 ARTHUR M. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES, at 96 (1985)) (emphasis supplied).

88. California Clothing Inc. v. Quiñones, 708 SCRA 420, 428 (2013) (citing Carpio v. Valmonte, 438 SCRA 38, 47 (2004)).

89. CIVIL CODE, art. 19.

90. *California Clothing Inc.*, 708 SCRA at 428 (citing Dart Philippines, Inc. v. Calogcog, 596 SCRA 614, 624 (2009) & *Carpio*, 438 SCRA at 47).

B. Libel, Slander, Cyberlibel, Identity Theft, and Copyright Infringement

As introduced in Part I, because of its nature, privacy torts are also related and practically often cited with libel, slander, cyberlibel, identity theft, and copyright infringement. Hence, it is noteworthy to differentiate them.

Libel and slander are embodied in Articles 353 to 359 of the Revised Penal Code, to wit —

> Art. 353. Definition of libel. — A libel is public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead.
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> ...
>
> Art. 355. Libel means by writings or similar means. — A libel committed by means of writing, printing, lithography, engraving, radio, phonograph, painting, theatrical exhibition, cinematographic exhibition, or any similar means, shall be punished by *prision correccional* in its minimum and medium periods or a fine ranging from [₱200-6,000], or both, in addition to the civil action which may be brought by the offended party.
>
> ...
>
> Art. 358. Slander. — Oral defamation shall be punished by *arresto mayor* in its maximum period to *prision correccional* in its minimum period if it is of a serious and insulting nature; otherwise the penalty shall be *arresto menor* or a fine not exceeding [₱200].[91]

Cyberlibel, on the other hand, was introduced by Republic Act No. 10175, otherwise known as the "Cybercrime Prevention Act of 2012." Section 4 (c) (4) states: "Libel. — The unlawful or prohibited acts of libel as defined in Article 355 of the Revised Penal Code, as amended, committed through a computer system or any other similar means which may be devised in the future."[92]

However, as explained above, a great difference rests in the causes of action between libel and privacy torts. The law of defamation deals strictly

91. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, arts. 353, 355, & 358 (1930).

92. An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties Therefor and for Other Purposes [Cybercrime Prevention Act of 2012], Republic Act No. 10175, § 4 (c) (4) (2012).

about damage to reputation.[93] It does not consider the effects of the publication of such material to his or her estimate of himself or herself, upon his or her own feelings, or upon his or her person; the latter being the causes of action for privacy torts.[94]

The same law penalizes identity theft. Section 4 (b) (3) states: "Computer-related Identity Theft. — The intentional acquisition, use, misuse, transfer, possession, alteration[,] or deletion of identifying information belonging to another, whether natural or juridical, without right: Provided, That if no damage has yet been caused, the penalty imposable shall be one (1) degree lower."[95]

Copyright is protected by the Intellectual Property Code (IP Code). Copyright infringement consists in infringing, directly or indirectly, any right secured or protected under the IP Code's provision on copyright.[96] It also consists in aiding or abetting such infringement.[97] Furthermore, the law also provides for the liability of

> any person who at the time when copyright subsists in a work, has in his [or her] possession an article which he [or she] knows, or ought to know, to be an infringing copy of the work for the purpose of:
>
> (1) Selling, letting for hire, or by way of trade offering or exposing for sale, or hire, the article;
>
> (2) Distributing the article for purpose of trade, or for any other purpose to an extent that will prejudice the rights of the copyright owner in the work; or
>
> (3) Trade exhibit of the article in public, shall be guilty of an offense and shall be liable on conviction to imprisonment and fine as above mentioned.[98]

93. Warren & Brandeis, *supra* note 1, at 197.

94. *Id.*

95. Cybercrime Prevention Act of 2012, § 4 (b) (3).

96. Intellectual Property Office of the Philippines, About Copyright, *available at* https://www.ipophil.gov.ph/services/copyright/ownership-and-rights (last accessed May 5, 2019).

97. *Id.*

98. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for its Powers and Functions and for Other Purposes [INTELL. PROP. CODE], Republic Act 8293, § 217.3 (1997).

Although acknowledging that the right of privacy could have stemmed — apart from other related existing laws discussed above — likewise from copyright, especially since the latter also deals with published writings and pictures relevantly attributable to a person, Warren and Brandeis also concluded that the right of privacy is independent therefrom.[99] According to them, the aim of copyright statutes is to secure to the author, composer, or artist, the entire profits arising from the publication of their works or compositions.[100] The common law privacy protection, however, enables one to control absolutely, the very act of the publication, whether there shall be any publication at all, with profit and attribution not being essential.[101]

Given the legal bases referred to in enumerating these laws, a plaintiff, in invoking possible privacy torts violations, must be wary in framing his or her complaint for privacy torts and anchoring his or her causes of action under the correct and more apt code or law.

Traditionally, privacy torts were anchored mainly on the Civil Code, although alongside other causes of action, which hinted on the aforementioned related concepts. With the advent of the Data Privacy Act of 2012 however, the Author posits that the scope of privacy torts has significantly expanded from its traditional Civil Code boundaries.

IV. THE DATA PRIVACY ACT

A. Overview of the Data Privacy Act

Last 2012, the Philippines passed Republic Act No. 10173, otherwise known as the Data Privacy Act of 2012 (DPA).[102] The DPA's main policy is "to protect the fundamental human right to privacy of communication while ensuring free flow of information to promote innovation and growth [and]

99. Warren & Brandeis, *supra* note 1, at 198-200.

100. *Id.* at 200 (citing EATON SYLVESTER DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES: EMBRACING COPYRIGHT IN WORKS OF LITERATURE AND ART, AND PLAYWRIGHT IN DRAMATIC AND MUSICAL COMPOSITIONS 102 & 104 (1879); Parton v. Prang, 3 Cliff. 537, 548 (Cir. Ct. D. Mass. 1872) (U.S.); & Jefferys v. Boosey, 4 H.L.C. 815, 867 & 962 (H.L. 1854) (U.K.)).

101. Warren & Brandeis, *supra* note 1, at 200 (citing DRONE, *supra* note 100; *Parton*, 3 Cliff. at 548; & *Jefferys*, 4 H.L.C. at 867 & 962).

102. Carmela Fonbuena, Aquino signs Data Privacy law, *available at* https://www.rappler.com/nation/11060-aquino-signs-data-privacy-law (last accessed May 5, 2019).

the [State's] inherent obligation to ensure that personal information in information and communications systems in government and in the private sector are secured and protected."[103]

The said law essentially regulates the use of personal information, which was defined by the law in this manner — "any information whether recorded in a material form or not, from which the identity of an individual is apparent or can be reasonably and directly ascertained by the entity holding the information, or when put together with other information would directly and certainly identify an individual."[104] A person's name, address, and cellphone number are examples of what falls under personal information.[105] The processing of this personal information is what triggers the application of the Act.[106] Specifically, DPA covers the

> processing of all types of personal information and to any natural and juridical person involved in personal information processing including those personal information controllers and processors who, although not found or established in the Philippines, use equipment that are located in the Philippines, or those who maintain an office, branch[,] or agency in the Philippines subject to the immediately succeeding paragraph: *Provided,* That the requirements of Section 5 are complied with.[107]

As an overview, the DPA *first*, "regulates the collection and processing of data that enables identification of individuals."[108] *Second*, it requires that the collection and processing of personal data must be based on lawful grounds or clear criteria for lawful processing such as consent.[109] *Third*, it requires that "general privacy principles of transparency, legitimate purpose, and proportionality" must be adhered to in the processing of personal information.[110] *Fourth*, it identifies the rights of data subjects to be observed

103. Rose Marie M. King-Dominguez, The challenges under the new Philippine data privacy regime at 1, *available at* https://www.syciplaw.com/documents/LegalResources/2017/King%20Dominguez%20-%20Philippines.pdf (last accessed May 5, 2019) (citing Data Privacy Act of 2012, § 2).

104. Data Privacy Act of 2012, § 3 (g).

105. Pintor, *supra* note 24, at 54.

106. *Id.*

107. Data Privacy Act of 2012, § 4.

108. King-Dominguez, *supra* note 103, at 1.

109. *Id.* & Data Privacy Act of 2012, § 12.

110. King-Dominguez, *supra* note 103, at 1 & Data Privacy Act of 2012, § 11.

by personal information controllers and processors.[111] *Fifth*, the DPA sets out certain steps and measures controllers and processors must comply with.[112] *Lastly*, and of more relevance to this Essay, the DPA provides legal sanctions, such as damages and restitution, for violations of its provisions.[113]

Under the DPA, the following rights of a data subject, who is the "individual whose personal information is processed,"[114] are guaranteed:

(1) The *right to be informed* that one's personal data is being, will be, or was, collected and processed.[115] This right requires personal information controllers (PICs) to notify all those who submitted their personal data that their data have been compromised, in a timely manner.[116]

(2) The *right to access* of the information obtained.[117] Under this right, a data subject has the right to obtain from an organization or entity a copy of any information or data relating to the data subject that they have on their databases or filing systems.[118] It should be in an "easy-to-access format, accompanied with a full explanation executed in plain language."[119]

(3) The *right to object* to the use of one's personal data, if the data processing involved is based on legitimate interest or consent.[120] Under this right, after revocation or withholding of one's consent, a PIC should no longer process the personal data of such objector, with a few exceptions such as court processes and legal obligations.[121]

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111. King-Dominguez, *supra* note 103, at 1 & Data Privacy Act of 2012, § 16.

112. King-Dominguez, *supra* note 103, at 1.

113. *Id.* & Data Privacy Act of 2012, §§ 25-37.

114. *Id.* § 3 (c).

115. National Privacy Commission, Know Your Data Privacy Rights, *available at* https://www.privacy.gov.ph/know-your-rights (last accessed May 5, 2019).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. National Privacy Commission, *supra* note 115.

(4) The *right to erasure or blocking* of one's personal information.[122] A data subject has the "right to suspend, withdraw[,] or order the blocking, removal[,] or destruction of [his or her] personal data"[123] for various reasons enumerated by law, such as when personal data "is incomplete, outdated, false, or unlawfully obtained."[124]

(5) The *right to damages*.[125] When a data subject is prejudiced "due to inaccurate, incomplete, outdated, false, unlawfully obtained or unauthorized use of personal data,"[126] he or she may claim compensation in the form of damages.[127] This right will be further expounded below.

(6) The *right to file a complaint with the National Privacy Commission* (NPC) for "misused, maliciously disclosed, or improperly disposed"[128] personal data, and other data privacy rights violations.[129]

(7) The *right to rectify* submitted information.[130] A data subject has the "right to dispute and correct any inaccuracy or error in the data"[131] he or she submitted to a PIC. In response, the PIC should act on it immediately and accordingly, unless the request was vexatious or unreasonable.[132]

(8) The *right to data portability*.[133] This right allows the data subject "to obtain and electronically move, copy[,] or transfer [his or her] data in a secure manner, for further use. It enables the free

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. National Privacy Commission, *supra* note 115.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. National Privacy Commission, *supra* note 115.

> flow of [his or her] personal information across the internet and organizations, according to [his or her] preference."[134]

The DPA is also penal in nature in that it imposes penalties for punishable acts.[135] The punishable acts include "unauthorized processing of personal information and sensitive personal information," [136] "accessing personal information and sensitive personal information due to negligence," [137] "improper disposal of personal information and sensitive personal information," [138] "processing for unauthorized purposes," [139] "unauthorized access or intentional breach," [140] "concealment," [141] and "malicious and unauthorized disclosure."[142]

B. Damages and Restitution Provisions of the Data Privacy Act

First, as to the foundation of the appropriate implementing body, according to Section 7 (b) of the DPA, it is the function of the National Privacy Commission (NPC) to award indemnity on matters pertaining to any personal information complaints, to wit —

> Receive complaints, institute investigations, facilitate[,] or enable settlement of complaints through the use of alternative dispute resolution processes, adjudicate, *award indemnity* on matters affecting any personal information, prepare reports on disposition of complaints and resolution of any investigation it initiates, and, in cases it deems appropriate, publicize any such report: Provided, That in resolving any complaint or investigation (except where amicable settlement is reached by the parties), the Commission shall act as a collegial body. For this purpose, the Commission may be given access to personal information that is subject of any complaint and to collect the information necessary to perform its functions under this Act[.][143]

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134. *Id.*

135. Pintor, *supra* note 24, at 104-05.

136. *Id.* at 58 (citing Data Privacy Act of 2012, § 25).

137. Pintor, *supra* note 24, at 58 (citing Data Privacy Act of 2012, § 26).

138. Pintor, *supra* note 24, at 58 (citing Data Privacy Act of 2012, § 27).

139. Pintor, *supra* note 24, at 59 (citing Data Privacy Act of 2012, § 28).

140. Pintor, *supra* note 24, at 59 (citing Data Privacy Act of 2012, § 29).

141. Pintor, *supra* note 24, at 59 (citing Data Privacy Act of 2012, § 30).

142. Pintor, *supra* note 24, at 59 (citing Data Privacy Act of 2012, §§ 30-31).

143. Data Privacy Act of 2012, § 7 (b) (emphasis supplied).

One may argue, as Judge Romeo J. Hibionada did in *C.T. Torres Enterprises, Inc. v. Hibionada*,[144] that Batas Pambansa Blg. 129 confers upon the Regional Trial Courts the exclusive original jurisdiction in cases that award "damages of whatever kind."[145] Hence, administrative bodies, like the NPC in the provision at bar, lacks jurisdiction in awarding indemnity.

However, the Supreme Court disagreed with the lower court and held —

> [The lower court] erred in supposing that only the regular courts can interpret and apply the provisions of the Civil Code, to the exclusion of the quasi-judicial bodies.
>
> ...
>
> The argument that only courts of justice can adjudicate claims resoluble under the provisions of the Civil Code is out of step with the fast-changing times. There are hundreds of administrative bodies now performing this function by virtue of a valid authorization from the legislature. This quasi-judicial function, as it is called, is exercised by them as an incident of the principal power entrusted to them of regulating certain activities falling under their particular expertise.
>
> In the *Solid Homes* case, for example, the Court affirmed the competence of the Housing and Land Use Regulatory Board to award damages although this is an essentially judicial power exercisable ordinarily only by the courts of justice. This departure from the traditional allocation of governmental powers is justified by expediency, or the need of the government to respond swiftly and competently to the pressing problems of the modem world.[146]

From the foregoing, Section 7 (b) of the DPA should be upheld. This provision empowers the NPC, an administrative body otherwise incapable of the judicial grant of damages and indemnity, to now be able to "award indemnity."[147] This is an example of an express grant of quasi-judicial power which our laws have slowly swayed on to for legal expediency.

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144. C.T. Torres Enterprises, Inc. v. Hibionada, 191 SCRA 268 (1990).

145. An Act Reorganizing the Judiciary, Appropriating Funds Therefor, and for Other Purposes [The Judiciary Reorganization Act of 1980], Batas Pambansa Blg. 129, § 19 (8) (1980).

146. *C.T. Torres Enterprises, Inc.*, 191 SCRA at 271-73 (citing Solid Homes, Inc. v. Payawal, 177 SCRA 72, 78-79 (1989)).

147. Data Privacy Act of 2012, § 7 (b).

After establishing the legal foundation of the implementing body, of greater substantive import is Section 16 (f) under Chapter IV on the Rights of a Data Subject. This provision awards as a right to every data subject the right to "[b]e *indemnified for any damages* sustained due to such inaccurate, incomplete, outdated, false, unlawfully obtained[,] or unauthorized use of personal information."[148]

Section 16 (f) provides the cause of action for damages to any data subject whose personal information was illegally used or obtained, which the NPC can grant. For the cause of action to arise, the personal information must be obtained (1) inaccurately; (2) incompletely; (3) outdatedly; (4) falsely and (5) unlawfully; or (6) used without authority.

A fatal issue that could be raised with regard to Section 16 (f) is that it fails to define concretely "inaccurate, incomplete, outdated, false, unlawfully obtained, or unauthorized use of personal information," so as to trigger the application of the grant of damages. Section 3 of the DPA on "Definition of Terms[,]" apart from defining "personal information[,]" is also bereft of any definition on such causes of action. Another issue that could be raised is that the DPA also lacks a definite procedure in the application of Section 16 (f).

The nearest provisions most helpful to address such issues, as supplements to the damages provisions of the DPA, are Sections 37 and 38 which provide —

> Section 37. Restitution. – Restitution for any aggrieved party shall be governed by the provisions of the New Civil Code.
>
> Section 38. Interpretation. – Any doubt in the interpretation of any provision of this Act shall be liberally interpreted in a manner mindful of the rights and interests of the individual about whom personal information is processed.[149]

Section 37 instructs that provisions on restitution under the New Civil Code should be applied in the award of indemnity under the DPA.[150] Hence, the analyses of the damages provisions of the New Civil Code in Part III of this Article should be consulted in construing the damages provision of the DPA. The elements and rules of privacy torts should be borne in mind in implementing Section 16 (f).

148. Data Privacy Act of 2012, § 16 (f) (emphasis supplied).

149. *Id.* §§ 37-38.

150. *Id.* § 37.

Section 38 then further instructs that as to the interpretation of the damages provisions of the DPA, authorities should liberally interpret them "in a manner mindful of the rights and interests of the individual about whom personal information is processed."[151] In other words, they should be construed liberally in favor of data subjects and against data processors in general.

The Implementing Rules and Regulations (IRR) of the DPA can also be construed to add another cause of action for damages. Section 34 (f) of the IRR states, "Right to damages. The data subject shall be indemnified for any damages sustained due to such inaccurate, incomplete, outdated, false, unlawfully obtained, or unauthorized use of personal data, *taking into account any violation of his or her rights and freedoms as data subject*."[152]

This provision seems to imply that damages can be granted, not just for inaccurate, incomplete, outdated, false, unlawfully obtained or unauthorized use of personal data but also for "any" violation of the data subject's rights and freedoms, which were heavily expounded above.

V. ELEMENTS TO A CLAIM FOR DAMAGES UNDER THE DATA PRIVACY ACT

Using the general requisites as a legal framework for claiming damages under a quasi-delict action, as elaborated in Part III of this Essay, and instructed by Section 37, the Author submits a three-pronged approach to successfully claim damages or indemnity under the DPA:

A. There Must be a Reasonable Expectation of Privacy

First, given that violation of privacy is at the heart of the plaintiff's cause of action, the plaintiff must prove that he or she has a reasonable expectation of privacy. According to the concurring and dissenting opinion of Justice Lucas P. Bersamin in *Pollo v. Constantino-David*,[153] "[w]hat a person knowingly exposes to the public, even in his [or her] own home or office, is not a subject of ... protection. But what he [or she] seeks to preserve as private, even in an area accessible to the public, may be constitutionally

151. *Id.* § 38.

152. Rules and Regulations Implementing the Data Privacy Act of 2012, rule VIII, Republic Act No. 10173, § 34 (f) (emphasis supplied).

153. Pollo v. Constantino-David, 659 SCRA 189, 231 (2011) (J. Bersamin, concurring and dissenting opinion).

protected."[154] In other words, in establishing an action for damages under the DPA, the data subject must first and foremost prove that he or she intended to reasonably keep or make his or her data private. Data which can be construed to be intended for public dissemination is not entitled to protection, following the laws and jurisprudence on privacy torts which we have discussed DPA to have evolved from.

In doing so, domestic jurisprudence has developed a two-part test in establishing whether or not a person's expectation of privacy is reasonable, to wit — "(1) whether by his [or her] conduct, the individual has exhibited an expectation of privacy; and (2) whether this expectation is one that society recognizes as reasonable."[155]

Ople v. Torres[156] further adds other factors to consider such as "[t]he factual circumstances of the case determine the reasonableness of the expectation. ... [O]ther factors, such as customs, physical surroundings[,] and practices of a particular activity, may serve to create or diminish this expectation."[157] But, ultimately, as *Hing v. Choachuy, Sr.*[158] concludes, "the reasonableness of a person's expectation of privacy must be determined on a case-to-case basis since it depends on the factual circumstances surrounding the case."[159]

With regard to the application of the test to technology, which is the main subject of DPA, jurisprudence has stressed that generally the reasonable expectation of privacy is low. Hence, it is hard to sustain in an action except where certain parameters are satisfied. In *Ople*, the Court ruled, to wit —

> The use of biometrics and computer technology in [Administrative Order] No. 308 does not assure the individual of a reasonable expectation of privacy. *As technology advances, the level of reasonably expected privacy decreases. The measure of protection granted by the reasonable expectation diminishes as relevant technology becomes more widely accepted.* The security of computer data

154. *Id.* at 242 (citing Katz v. United States, 389 U.S. 347, 351 (1967)).

155. Ople v. Torres, 293 SCRA 141, 164 (1998) (citing Rakas v. Illinois, 439 U.S. 128, 143-44 (1978)).

156. Ople v. Torres, 293 SCRA 141 (1998).

157. *Id.* at 164 (citing Stephen M. Kennedy, *Emasculating a State's Constitutional Right to Privacy: The California Supreme Court's Decision in Hill v. NCAA*, 68 TEMP. L. REV. 1497, 1517 (1995)).

158. Hing v. Choachuy, Sr., 699 SCRA 667 (2013).

159. *Id.* at 679 (citing *Ople*, 293 SCRA at 164).

> file depends not only on the physical inaccessibility of the file but also on the advances in hardware and software computer technology.[160]

The landmark case of *Vivares v. St. Theresa's College*[161] currently serves as the nearest guidepost to the application of the requirement of reasonable expectation of privacy in filing a claim for damages under the DPA, being a case with regard to cyberspace. In *Vivares*, the Supreme Court ruled that an expectation of privacy is not necessarily incompatible with engaging in cyberspace activities.[162] However, in the case, the Court held that because the students were not able to establish that the photos were posted on Facebook with Facebook's privacy settings to "only me," there was no reasonable expectation of privacy on their part, and ruled for the St. Theresa's College.[163] In other words, the Court hinged the presence of reasonable expectation of privacy to one's privacy in the Internet to one's privacy settings upon posting. The decision implied that "once something is posted on the internet, the subjective expectation of privacy comes into play depending on the viewers setting; and if this post was made available to the public, the person should [have] a low expectation of privacy."[164]

However, it is worthy to note that *Vivares* only confined itself to Facebook as the medium of processing data.[165] Although insightful with regard to establishing the reasonable expectation of privacy element in claiming for damages under the DPA, the aforementioned case does not set a binding precedent for the multitude of other venues for processing of data under the law.

B. The Act or Omission was Committed in Violation of the Data Privacy Act of 2012

Second, the act or omission that causes the damage must be in violation of the law. The law or specific provision of the matter is Section 16 (f) under Chapter IV on the Rights of a Data Subject, which guarantees as a right to

160. *Ople*, 293 SCRA at 164-65 (citing C. Dennis Southard IV, *Individual Privacy and Governmental Efficiency: Technology's Effect on Government's Ability to Gather, Store, and Distribute Information*, 9 COMPUTER L.J. 359, 369 (1989)) (emphasis supplied).

161. Vivares v. St. Theresa's College, 737 SCRA 92 (2014).

162. *Id.* at 112-13.

163. *Id.* at 120-22.

164. Pintor, *supra* note 24, at 43.

165. *Vivares*, 737 SCRA at 111-15.

every data subject the right to be "indemnified for any damages sustained *due to* such *inaccurate, incomplete, outdated, false, unlawfully obtained*[,] *or unauthorized use of personal information*."[166]

Section 16 (f) provides for a cause of action for damages to any data subject whose personal information was illegally used or obtained. For the cause of action to arise, the personal information must be obtained inaccurately, incompletely, outdatedly, falsely and unlawfully, or used without authority.[167] There must be actual identity fraud, for instance, or other similar harm.

As explained in Part IV, since the law does not define "inaccurate, incomplete, outdated, false, unlawfully obtained[,] or unauthorized use of personal information[,]" authorities should construe this based on the intent of the legislators, in relation to Section 38 of the law, which mandates a construction "in a manner mindful of the rights and interests of the individual about whom personal information is processed."[168] Furthermore, since the words themselves are not vague, it can be submitted that they be construed in their literal meaning, as mandated by the basic rules of statutory construction.[169]

The NPC, in illustrating such cause of action and subsequent award of damages, cited as an example a United Kingdom case, *viz* —

> In October 2013, the Home Office published quarterly statistics about the family returns process by which applicants who have children but who have no right to remain in the UK are returned to their country of origin.
>
> The Home Office uploaded anonymized statistics, but they also mistakenly uploaded a spreadsheet of raw data on which those statistics were based. This spreadsheet contained personal data and private information of approximately 1,600 individuals, including their names, ages, nationality, the fact of an asylum claim, the regional office which dealt with their case and their immigration removal status.
>
> This data remained online for nearly two weeks before it was removed but during that time the webpage had been visited by IP addresses across the UK and abroad. As a result, a small number of these individuals brought claims for misuse of private information and breaches of the Data Protection Act 1998 (DPA).

166. Data Privacy Act of 2012, § 16 (f) (emphases supplied).

167. *Id.*

168. *Id.* § 38.

169. Chavez v. Judicial Bar Council, 676 SCRA 579, 598 (2012).

> The defendant accepted that their accidental publication of personal data amounted to a misuse of private and confidential information and a breach of the DPA. It was not disputed that, subject to proof, damages were recoverable for distress at common law and section 13 of the DPA, unless *Google Inc*[.] *v Vidal-Hall* is overturned.
>
> The six individuals who brought the claims were awarded between £2,500 and £12,500 in damages for misuse of their private information and the distress suffered as a result of the data breach.[170]

Also, as explained in Part IV of this Essay, the IRR of the DPA can be construed to add another cause of action for damages. Section 34 (f) of the IRR, in addition to enumerating the causes already sustained by the DPA, adds, "taking into account any violation of his or her rights and freedoms as data subject."[171] This provision can be construed to mean that damages can be granted, not only for inaccurate, incomplete, outdated, false, unlawfully obtained, or unauthorized use of personal data but also for *any* violation of the data subject's rights and freedoms.

These rights are outlined in Chapter IV of the DPA and are heavily expounded in Part IV of this Essay.

C. Damage or Injury Must Have Been Sustained by the Plaintiff

Third, the plaintiff claiming for damages or indemnity must have sustained injury and he/she must establish that such injuries resulted from a breach of duty which the defendant owed to the plaintiff. Since the framework used in the legal analysis of a claim for damages under the DPA is the current framework of privacy torts claims in the Philippines, the elements of the latter must also be observed — such that the tortious act, or the use of inaccurate, incomplete, outdated, false, unlawfully obtained, or unauthorized use of personal information as provided under the DPA, must have resulted to damage to another.

Domestic jurisprudence, citing American jurisprudence on torts, has laid down the following requirement for claiming damages —

> In order that a plaintiff may maintain an action for the injuries of which he [or she] complains, he [or she] must establish that such injuries resulted from a breach of duty which the defendant owed to the plaintiff a

170. National Privacy Commission, *supra* note 116 (citing TLT and others v. Secretary of State for the Home Department, (2016) EWHC 2217 (QB) (U.K.)).

171. Rules and Regulations Implementing the Data Privacy Act of 2012, § 34 (f).

> concurrence of injury to the plaintiff and legal responsibility by the person causing it. The underlying basis for the award of tort damages is the premise that an individual was injured in contemplation of law. Thus, there must first be the breach of some duty and the imposition of liability for that breach before damages may be awarded; it is not sufficient to state that there should be tort liability merely because the plaintiff suffered some pain and suffering.
>
> ...
>
> In such cases, the consequences must be borne by the injured person alone. The law affords no remedy for damages resulting from an act which does not amount to a legal injury or wrong.
>
> In other words, in order that the law will give redress for an act causing damage, that act must be not only hurtful, but wrongful. There must be *damnum et injuria*.[172]

As applied in the DPA, however, because of its peculiar technological nature, the Author posits that the damage required herein can include, in addition to actual legal injury, the risk of future harm that is substantial enough to qualify as an injury in fact. This reasoning stems from the U.S. Court of Appeals case of *Attias v. Carefirst, Inc.*,[173] the principal question therein being, whether or not the plaintiffs have plausibly alleged a risk of future injury that is substantial enough to create legal standing.[174] In answering favorably, the court cited past jurisprudence which it has "found standing based on a 'substantial risk' that the harm will occur."[175] The court clarified that to qualify under this theory of substantial risk, the risk must be "certainly impending,"[176] be "fairly traceable to the challenged conduct of defendant,"[177] and be "likely to be redressed by a favorable judicial decision."[178]

This potential harm principle, if applied in the Philippine jurisdiction, can have various implications. If the same reasoning of the U.S. courts will be adopted, a data subject under the DPA can claim damages if his or her data is included in a data breach, even in the absence of actual identity fraud

172. Custodio v. Court of Appeals, 253 SCRA 483, 490-91 (1996).

173. Attias v. Carefirst, Inc., 865 F.3d 620 (D.C. Cir. 2017) (U.S.).

174. *Id.* at 622.

175. *Id.* at 626.

176. *Id.* at 627.

177. *Id.* at 629.

178. *Id.*

or similar harm. This would mean that in the infamous cases of breaches in Commission on Elections listings,[179] or breaches in Facebook data,[180] data subjects may theoretically claim for damages if their "risk of future harm is substantial enough to qualify as injury in fact."[181]

VI. CONCLUSION

As can be observed, the DPA was principally enacted in order to ensure that our laws, specifically our laws related to informational privacy, are abreast and adaptive of the current digitization of the modern world and the many legal complexities it layered to our rights. It seeks to balance the constitutional right to privacy of communications with the evolution of technology.

In line with this mandate, the DPA provides for several penalties for a host of violations of the Act. Apart from the penal provisions, it grants the NPC quasi-judicial powers to grant a civil award of damages "due to such inaccurate, incomplete, outdated, false, unlawfully obtained, or unauthorized use of personal information."[182] But, the DPA, including its Implementing Rules and Regulations, is bereft of the proper considerations in establishing such claim for damages in court, apart from enumerating its causes of action.

To say, however, that the DPA is incomplete and lacking of legal safeguards and essential procedures is to commit a fallacy of hasty generalization. The Data Privacy Act has yet to be put into the strict scrutiny of an unconstitutionality suit, and this Essay does not seek to tackle such possibility and its probable results. This Essay mainly attempts to interpret and clarify the given provisions of the law, by safely delineating a possible and legally-supported systematic approach in the claim for damages under the DPA that considers *first*, origins of the right to privacy of communications; *second*, the current legal frameworks of Privacy Torts in the Civil Code; and *third*, jurisprudence that has become greatly relevant in the

179. Eden Estopace, Massive data breach exposes all Philippines voters, *available at* https://www.telecomasia.net/content/massive-data-breach-exposes-all-philippines-voters (last accessed May 5, 2019).

180. Gelo Gonzales, Facebook breach affected 755,973 accounts in PH, *available at* https://www.rappler.com/technology/news/214586-number-of-affected-philippine-based-facebook-accounts-september-2018-breach (last accessed May 5, 2019).

181. *Attias*, 865 F.3d at 629.

182. Data Privacy Act of 2012, § 16 (f).

claim at hand due to their analysis of the evolution of information processing and the progress of technology.