

Comparative Defamation and Privacy Law

Edited by Andrew T Kenyon

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In the Preamble to Bunreacht na hÉireann, the People declare that they adopted the Constitution in 1937 so that ‘that the dignity and freedom of the individual may be assured’. The Supreme Court has regularly drawn on this rubric to give content to the fundamental rights protected by that document, eg *Re a Ward of Court* [1996] 2 IR 73, [1995] 2 ILRM 401, [1995] IESC 1 (27 July 1995) [351] (Denham J); *Fleming v Ireland* [2013] IESC 19 (29 April 2013) [110]–[114] (Denham CJ; Murray, Hardiman, Fennelly, O’Donnell, McKechnie, and Clarke JJ concurring); *NVH v Minister for Justice & Equality* [2017] IESC 35 (30 May 2017) [15] (O’Donnell J; Denham CJ, and Clarke, MacMenamin, Laffoy, Charleton and O’Malley JJ concurring); see, generally, Anne Hughes, *Human Dignity and Fundamental Rights in South Africa and Ireland* (Pretoria University Law Press 2014).

The rights to freedom of expression, good name, and privacy are crucial to the dignity and freedom of the individual; this important book explores these rights in a wide variety of contexts across a broad range of jurisdictions and its conclusions could guide the development of many aspects of Irish law. The editor, Andrew Kenyon, has assembled a superb and important collection of papers on defamation, on privacy, and on the overlap between the two. It has several important themes, the first of which relates to the dignity of the individual. As Catherine Dupré has remarked, ‘the twenty-first century definitely seems to be the century of human dignity’ (*The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart Publishing 2015) 1). For example, John Tasioulas argues that human dignity has an essential role to play in grounding human rights, and is central to explaining both why humans can possess rights and why these rights are resistant to trade-offs (Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 17). Several of the essays in this volume explore the foundations of the rights to privacy and good name in human dignity, especially Tanya Aplin and Jason Bosland, ‘The Uncertain Landscape of Article 8 of the ECHR: The Protection of Reputation as a Fundamental Human Right?’ ch 13, 265; Amy Gajda, ‘The Trouble with Dignity’ ch 12, 246; and Ursula Cheer, ‘Divining the Dignity Torts: A Possible Future for Defamation and Privacy’ ch 15, 309 (see, generally, Hughes §§4.4 and 8.1.1.1 (defamation); §§ 2.2.4.4, 5.3, and 7.8 (privacy)).

Perhaps the most important essay in this respect is Nicole Moreham and Yvette Tinsley, ‘Media Intrusion into Grief: Lessons from the Pike River Mining Disaster’ ch 7, 115. Media interest in a disaster or tragedy can be a vital source of information for affected families, but it can also be very distressing for them: the presence of the media can be oppressive, news-gathering techniques can be intrusive, and media reports can be sensationalist. Moreham and Tinsley show that all of this can undermine the families’ ‘sense of dignity, safety, security, and autonomy at a time of great vulnerability’ (135, see also 126–28). Their chapter analyses the media in the aftermath of the Pike River mining disaster in New Zealand in 2010. A methane

explosion at a coal mine killed 29 men, and their bodies have not been recovered. In 2012, a Royal Commission concluded that the tragedy was preventable, and it recommended 16 major administrative and regulatory reforms to reduce the likelihood of further tragedies (<http://pikeriver.royalcommission.govt.nz/>).

The disaster was a matter of great interest, and national and international media flocked to the mine. Had the disaster occurred in Ireland, many legal provisions could have protected the families' dignity. The print media would have been bound by Principles 3 and 5 of the *Press Council Code of Practice*, not to obtain information by subterfuge or harassment, and to show sympathy and discretion in seeking information in situations of personal grief or shock. As to the broadcast media, s 114(3)(a) of the Broadcasting Act 2009 requires Raidió Teilifís Éireann, the national public broadcaster, to respect human dignity in its programming; s 39 of that Act requires all broadcasters to ensure that the privacy of any individual is not unreasonably encroached upon in the making and broadcast of their programmes; and ss 42(2)(a) and 87(c) effectively require them to ensure that the gathering and broadcast of news is accurate and impartial. Furthermore, s 42 requires the Broadcasting Authority of Ireland to prepare broadcasting codes to be observed by broadcasters, which must provide that the privacy of any individual is not unreasonably encroached upon (s 42(2)(d)).

The New Zealand media are under similar obligations (Ursula Cheer, *Media Law in New Zealand* (Kluwer Law International 2016)), but the focus of the chapter by Moreham and Tinsley is empirical, examining the effect of the presence of the media in the days following the explosion on the families of dead miners. They conclude that the pervasive media presence intruded upon families who wished to deal with the tragedy in private: 'on a practical level, this interfered with the family members' ability to communicate with one another, to access practical and emotional support, and to engage with their communities. On an emotional level, it undermined their sense of dignity, safety, security, and autonomy at a time of great vulnerability' (135). From the perspective of the families, it shows that the media went too far; from the perspective of the media, it shows how difficult it is to respect dignity and privacy properly in the heat of a developing big story: eg Ursula Cheer and Sarah Rosanowski, 'The Impact of Law on Media Reporting of Earthquakes in Christchurch 2010–2011' (2013) 18(3) *Media & Arts Law Review* 220. Indeed, as Gadja observes, the 'trouble with an exclusive focus on dignity is that it is decidedly dangerous for journalism' (260). Nevertheless, over time, the interplay of legal rules and journalistic ethics will help to ensure that the media get the balance right.

Melissa de Zwart's essay on Julian Assange and Edward Snowden ('Privacy for the Weak, Transparency for the Powerful' ch 11, 224) poses the question whether those who reveal state secrets should be entitled to retain secrets of their own. Her answer is clearly tied to the dignity of the whistleblower: 'the clear message of Snowden and Assange is that privacy of the individual is paramount. ... Constant surveillance can operate as an impediment to self-expression and personal development and ultimately deter democratic participation in society. Conversely,

governments and institutions should be transparent and accountable to their members and citizens' (245).

The second theme of the collection is the impact of *New York Times v Sullivan* 376 US 254 (1964) and its US progeny, both on US law and further afield. In that case, the US Supreme Court held that the First and Fourteenth Amendments to the US Constitution require a rule 'that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not': 376 US 254, 279–80 (Brennan J). Brennan J described this rule as establishing a privilege (282–83). However, later cases have treated the rule not so much as a qualified privilege defence in the law of defamation, but as a standard of actual malice by which a public figure may hold a speaker liable for falsehood, eg *Hustler Magazine v Falwell* 485 US 46 (1988) 52 (Rehnquist CJ, for the Court).

On the one hand, Russell Weaver's elegant essay 'Defamation and Democracy' ch 5, 82, is a subtle approbation of *Sullivan* and its impact abroad. For him, this evolution of defamation standards was long overdue in the US, Australia, and the UK (82, 86–90). On the other hand, David Partlett's astute essay '*New York Times v Sullivan* at Fifty Years: Defamation in Separate Orbits' ch 4, 58, is a limpid critique. For him, *Sullivan* took an enormous step in federalising an important tract of the common law; that step impoverished the common law (60, 63), and *Sullivan* has subsequently been an accidental tourist (64–67). Somewhere in the middle is the thoughtful assessment by Andrew Kenyon and Megan Richardson, 'Reverberations of *Sullivan*? Considering Defamation and Privacy Law Reform' ch 16, 331. For them, *Sullivan* is pivotal, but its reverberations are complex, and its legacy remains very different inside and outside the US (332, 350).

When *Sullivan* is treated simply as postulating the actual malice standard, then other jurisdictions find it very hard to accommodate it, eg *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130, 1995 CanLII 59 (SCC) (20 July 1995); *Du Plessis v de Klerk* 1996 (3) SA 850, [1996] ZACC 10 (15 May 1996); *Dow Jones v Gutnick* (2002) 210 CLR 575, [2002] HCA 56 (10 December 2002). However, when *Sullivan* is treated as an example of a process of analysis by which the common law of defamation is adapted in the light of constitutional protections of freedom of expression, then other jurisdictions find it much easier to follow its lead: Mark Tushnet, '*New York Times v Sullivan* Around the World' (2014) 66(2) *Alabama Law Review* 337; see, generally, Ian Loveland (ed), *Importing the First Amendment: Freedom of Speech and Expression in Britain, Europe and USA* (Hart Publishing 1998); Andrew Kenyon, David Partlett, Clive Walker, and Russell Weaver, *The Right to Speak III: Defamation, Reputation and Free Speech* (Carolina Academic Press 2006).

For example, if defamation law makes insufficient allowance for the imperatives of freedom of expression, this will have a 'chilling effect' on speech: *Sullivan* 376 US 254, 301 (Goldberg J, concurring); and lead to 'self-censorship' 279 (Brennan J). Kenyon and Richardson identify similar concerns in UK and Commonwealth cases,

though to a lesser extent than in the US (332–33). Hence, for example, in *Derbyshire County Council v Times Newspapers* [1993] AC 534, [1993] UKHL 18 (18 February 1993) Lord Keith (Lords Griffiths, Goff, Browne-Wilkinson and Woolf concurring) said that, while *Sullivan* and its progeny were related most directly to the First Amendment, ‘the public interest considerations which underlaid them are no less valid in [the United Kingdom] ... What has been described as ‘the chilling effect’ induced by the threat of civil actions for libel is very important’. Again, *Reynolds v Times Newspapers* [2001] 2 AC 127, [1999] UKHL 45 (28 October 1999) followed the lead of *Sullivan* in widening qualified privilege for freedom of expression reasons, though the reformulated test of qualified privilege established in *Reynolds* is different from the *Sullivan* actual malice test. And, because the Supreme Court of Canada followed the same lead in *Grant v Torstar* [2009] 3 SCR 640, 2009 SCC 61 (CanLII) (22 December 2009) and its companion *Quan v Cusson* [2009] 3 SCR 712, 2009 SCC 62 (CanLII) (22 December 2009), Hilary Young describes *Grant v Torstar* as Canada’s *Reynolds* in her ‘“Anyone ... in any medium”? The Scope of Canada’s Responsible Communication Defence’ ch 2, 17.

An article on the possible influence of *Sullivan* on Irish law published in this *Journal* in 1990 prefigured some of these developments: see (1990) 12 *Dublin University Law Journal* (ns) 50. Its wide reading of the right to freedom of expression in Article 40.6.1(i) as covering statements of fact anticipated the judgment of Barrington J (Hamilton CJ, O’Flaherty, Denham, and Keane JJ concurring) in *Murphy v Independent Radio and Television Commission* [1999] 1 IR 12, 26, [1998] 2 ILRM 360, 373 (SC). And its argument that *Sullivan* should be followed not so much for the details of the actual malice test as for the pattern of its reasoning, recasting the common law in the light of constitutional protections of speech, is precisely the approach that other jurisdictions considering *Sullivan* have followed. Where those jurisdictions have confidently marched, Irish law has followed, limping slowly behind.

For example, *Reynolds* recast qualified privilege for free speech reasons, and *Reynolds* was probably followed as a matter of Irish law by in *Hunter v Duckworth* [2003] IEHC 81 (31 July 2003) (where Ó Caoimh J referred to *Sullivan* six times). In *Jameel v Wall Street Journal Europe Sprl* [2007] AC 359, [2006] UKHL 44 (11 October 2006), the House of Lords reformulated *Reynolds* as a test of responsible journalism in the public interest, and *Jameel* was (probably) followed as a matter of Irish law by Charleton J in *Leech v Independent Newspapers* [2007] IEHC 223 (27 June 2007). *Jameel* and *Leech* are not far from Canada’s responsible communication defence discussed by Young. She argues that it is a broad public interest defence (29), and bemoans the fact that the courts have applied it conservatively (25–29), so that ‘there is a risk that the promise of *Grant* will not be met’ (17). Her solution is to reframe *Reynolds* and *Grant* in terms of reasonableness (32–38; see also Eric Descheemaeker, ‘Protecting Reputation: Defamation and Negligence’ (2009) 29 *Oxford Journal of Legal Studies* 603). This is not far from the standard articulated in Australia and New Zealand: see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, [1997] HCA 25 (08 July 1997); *Lange v Atkinson* [2000] 3 NZLR 385, [2000] NZCA 95 (21 June 2000). If these cases are not siblings, they are certainly close cousins.

The 1990 DULJ article reached a similar conclusion, on the basis of an interpretation of the right in Article 40.6.1(i) to express freely ‘convictions and opinions’. In *McDonagh v Sunday Newspapers* [2017] IESC 46 (28 June 2017) [28] Charleton J commented that ‘to guarantee the right to express ‘convictions and opinions’ does not necessarily encompass the right to broadcast a view simply because it is believed to be true’ (emphasis added). That emphasised ‘necessarily’ may provide some wriggle room to maintain an argument that the phrase can, in appropriate cases, be interpreted broadly. Certainly, Barrington J did so in *Murphy v IRTC*. But the lessons of *Sullivan*, both *Lange* cases, *Reynolds*, and *Grant*, are that recasting the common law can flow from general free speech considerations rather than from the minutiae of constitutional provisions.

Developments like those suggested by Young are now foreclosed in England and Wales. The cumbersome *Reynolds* defence has been abolished by s 4 of the Defamation Act 2013, which replaced it with a more straightforward statutory defence of publication on matters of public interest. Unlike the conservative approach in the lower courts in Canada, s 4 of the 2013 Act was broadly applied in *Economou v de Freitas* [2016] EWHC 1853 (QB) (27 July 2016). That section is similar to, but simpler than, s 26 of the Defamation Act 2009, which introduced an unwieldy new defence of fair and reasonable publication into Irish defamation law. In *Meegan v Times Newspapers Ltd* [2016] IECA 327 (09 November 2016) [10] Hogan J for the Court of Appeal (Finlay Geoghegan and Peart JJ concurring) explained:

Section 26 of the 2009 Act is a novel provision which, as we were informed at the hearing of the appeal, has yet to be successfully invoked in any reported defamation case. The section is clearly designed to provide a defence for publishers who show that they acted *bona fide* and that the publication was fair and reasonable having regard, in particular, to the matters set out in section 26(2) of the 2009 Act. Section 26 may be regarded as an endeavour by the Oireachtas to move away in some respects from the strict liability nature of the common law tort of libel and to introduce – in, admittedly, some specific and limited respects – a negligence based standard in actions for defamation under the 2009 Act. This is reflected, in particular, in section 26(2)(i) which requires the court to have regard to the endeavours made by the publisher to verify the contents of the article in assessing the defence of fair and reasonable publication.

Unlike s 4(6) of the 2013 Act in England and Wales, s 26 of the 2009 Act in Ireland does not expressly abolish the *Reynolds/Jameel/Hunter/Leech* defence. Moreover, s 3(2) of the 2009 Act provides that the Act does not affect the operation of the general law of defamation ‘except to the extent that it provides otherwise (either expressly or by necessary implication)’. It may be that, if *Hunter* and *Leech* are ultimately understood to have responded to constitutional concerns, then they might (pursuant to s 3(2), be permitted to) continue to develop independently of the 2009 Act.

However that may be, if the lesson of *Sullivan* is that the common law can be recast in light of constitutional norms, it is even clearer that statutory restrictions can be measured against constitutional rights. The Irish Supreme Court has strongly committed to a proportionality test to review or scrutinise legislative restrictions upon constitutional rights: see *Heaney v Ireland* [1996] 1 IR 580, 607, [1994] 2 ILRM 420, 431 (Costello J), *affd* [1996] 1 IR 580, [1997] 1 ILRM 117 (SC). The Court has applied this test in the context of Article 40.6.1(i): *Heaney* (above); *Murphy v IRTC* (above)), and has even referred to it in the context of defamation claims (*Leech v Independent Newspapers* [2014] IESC 79 (19 December 2014) [21]–[22] (McKechnie J; Dunne and Murray JJ concurring). Given that the defence in s 26 is particularly hedged, it may not be long before a court is called upon to consider whether it is a proportionate restriction upon a defendant’s Article 40.6.1(i) speech rights, and to prune some of that hedging as a consequence.

In Ireland, not only can the Constitution have an impact on common law and statutory defamation provisions, so also may the European Convention on Human Rights, and *Sullivan*’s influence reaches even to the European Court of Human Rights. That court’s decision in *Lingens v Austria* 9815/82 Series A No 103, (1986) 8 EHRR 407, [1986] ECHR 7 (8 July 1986) has been described as its equivalent of *Sullivan* in Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (Vintage Books 1992) ch 20; for more nuance, see Loveland (ed) (above). *Lingens* has been consistently applied, and its ambit increasingly widened, by the ECHR most recently in *Kosc v Poland* 34598/12 [2017] ECHR 501 (1 June 2017); and these developments have been aligned with *Sullivan* in the concurring opinion of Motoc J in *Pentikainen v Finland* 11882/10 [2015] ECHR 926 (20 October 2015). In *Reynolds*, Lord Nicholls said that *Lingens* has been ‘immensely influential’. For example, in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, [1994] HCA 46 (12 October 1994) [28] Mason CJ, and Toohey and Gaudron JJ in the High Court of Australia, equated *Sullivan* and *Lingens*; and *Theophanous* was in turn an important building-block in that court’s reasoning in *Lange*. Moreover, *Lingens* has been cited with approval by Fennelly J (Murray CJ, and Geoghegan, Macken and Finnegan JJ concurring) in *Mahon v Keena* [2009] 2 ILRM 373, [2009] IESC 64 (31 July 2009) [47]. *Lingens* can only serve to reinforce any argument that common law and statutory defamation provisions ought to be recast in the light of free speech considerations.

Not only has *Sullivan* proved influential in defamation cases, but, as Kirsty Hughes and Neil Richards point out, its rationale is applicable to privacy claims as well: ‘The Atlantic Divide on Privacy and Free Speech’ ch 9, 164. Hence, in *Time Inc v Hill* 385 US 374 (1967) the Supreme Court applied *Sullivan* to a claim of false light invasion of privacy (Hughes and Richards, 171; Gadjia, 250; Kenyon and Richardson, 331, 337–39). This is part of the expansion of *Sullivan* welcomed by Weaver and protested against by Partlett, but this expansion has yet to be exported either to Canada or across the Atlantic to the UK, the ECHR, or the Irish courts.

In the English cases, there are two rights in play (Article 8 ECHR on privacy, and Article 10 ECHR on freedom of expression) which have to be balanced. This is also the position under the Irish Constitution. On the other hand, in the US, there is a 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open' (*Sullivan* 376 US 254, 270 (Brennan J)), and privacy is simply an interest to be considered in cases in which the First Amendment is the only right in play (*Florida Star v BIF* 491 US 524 (1989); *Bartnicki v Vopper* 532 US 514 (2001)). Hughes & Richards argue that this analytical difference can be explained by the contrast between the deep commitment to a right to privacy in Article 8 ECHR in the UK and Europe, and the cultural power of the First Amendment in the US. Indeed, this difference between the European vindication of a citizen's right to privacy and the US acknowledgement of a state's interest in protecting its citizens' privacy may reflect a deeper division between conceptions of privacy between Europe and the US: see James Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2004) 113 Yale Law Journal 1151.

The fact that, in the US, reputation is simply an interest to be considered in cases in which the First Amendment is the only right in play (*Sullivan*), whereas, outside the US, reputation is (or at least forms part of) a right in its own terms to be balanced against the right to freedom of expression, might similarly serve to explain (at least in part) why courts in defamation cases outside the US have not adopted *Sullivan's* actual malice standard even as they have followed the pattern of its reasoning, recasting the common law in the light of constitutional protections of speech. Certainly, in Ireland, defamation law must balance the constitutional protection of speech in Article 40.6.1(i) with the constitutional protection of good name in Article 40.3.2: eg *Hynes-O'Sullivan v O'Driscoll* [1988] IR 436, 450, [1989] ILRM 349, 361 (Henchy J); *Foley v Independent Newspapers Ltd* [1994] 2 ILRM 61, 67 (Geoghegan J); *O'Brien v Mirror Group Newspapers Ltd* [2000] IESC 70 (25 October 2000); *Burke v Associated Newspapers (Ireland) Ltd* [2010] IEHC 447 (10 December 2010); *Leech v Independent Newspapers* [2014] IESC 79 (19 December 2014); *McDonagh v Sunday Newspapers Ltd* [2017] IESC 46 (28 June 2017) and [2017] IESC 59 (27 July 2017).

Increasingly, reputation is being seen as just as much an element of Article 8 ECHR as privacy is and, accordingly, as it does so, it will help to set the limits of Article 10 protections in defamation cases just as much as it does in privacy cases; see Stijn Smet 'Freedom of Expression and the Right to Reputation' (2010) 26(1) American University International Law Review 183; Dirk Voorhoof 'Freedom of Expression versus Privacy and the Right to Reputation' in Stijn Smet and Eva Brems (eds) *When Human Rights Clash at the European Court of Human Rights. Conflict or Harmony?* (Oxford University Press, 2017) ch 8; Leto Cariolou 'Circumnavigating the Conflict Between the Right to Reputation and the Right to Freedom of Expression' (*ibid*) ch 9. In *Radio France v France* 53984/00 (2005) 40 EHRR 29, [2007] ECHR 127 (30 March 2004) [31] the Court observed, for the first time, that 'the right to protection of one's reputation is *of course* one of the rights guaranteed by Article 8' (emphasis added). In *Pfeifer v Austria* 12556/03 (2007) 48 EHRR 175, [2007] ECHR 935 (15 November 2007) the Court found, for the first time, that a publication was a breach of the applicant's Article 8 right to reputation. Aplin and Bosland perceive three

separate rationales for this extension. First, reputation might be understood as directly protected by Article 8, so that harm to reputation is a direct breach of that article; they give *Pfeifer* as an example. Second, the harm to reputation might be understood as engaging an aspect of private law sufficient to come within Article 8; they give *Axel Springer v Germany* 39954/08 (2012) 55 EHRR 6, [2012] ECHR 227 (7 February 2012) as an example. Third, the harm to reputation could amount to a harm to private life within Article 8; they give *Karakó v Hungary* 39311/05 [2009] ECHR 712 (28 April 2009) as an example. They argue that, whilst reputation and private life are connected, they are nevertheless two distinct concepts (286); and they conclude that the *Karakó* approach is the most appropriate one.

Aplin and Bosland also raise the important question of whether it is problematic to have different approaches to privacy in an increasingly global media landscape. There is probably no satisfactory answer to this conundrum. The best that can be said is that different jurisdictions must apply their law, even if the outcomes are dissonant. So, for example, in *Weller v Associated Newspapers* [2016] 1 WLR 1541, [2015] EWCA Civ 1176 (20 November 2015) the Court of Appeal awarded damages for infringing the privacy of the children of a well-known musician, by publishing photographs of them taken in California, where the taking and publication of the photographs would not have been actionable invasions of privacy. Moreover, in *PJS v News Group Newspapers* [2016] AC 1081, [2016] UKSC 26 (19 May 2016) the Supreme Court awarded an interim injunction to prevent the identification of the appellant and the publication of stories by the respondent relating to the appellant's sex life, to preserve the privacy interests of the appellant, his partner and their young children, even though the appellant's identity and the facts in the newspaper's stories had received widespread publication abroad, especially in the United States. Most striking of all is the decision of the Court of Justice of the European Union in Case C-131/12 *Google Spain SL & Google Inc v Agencia Española de Protección de Datos & Mario Costeja González* (ECLI:EU:C:2014:317; CJEU, 13 May 2014) that the impact of the rights to privacy and protection of personal data in Articles 7 and 8 of the Charter of Fundamental Rights of the EU upon Articles 12 and 14 of the Data Protection Directive (Directive 95/46/EC of 24 October 1995) [hereafter: DPD] means that the operator of a search engine is obliged to remove links from the list of search results, even where publication of information on the linked pages is lawful. This right to be forgotten is carefully discussed by David Lindsay in 'The "Right to be Forgotten" by Search Engines under Data Privacy Law: A Legal and Policy Analysis of the *Costeja* Decision' ch 10, 199.

Costeja is a problematic decision on many levels. The CJEU held that, for the purposes of Article 2 DPD, online search can be classified as processing of personal data and that the operator of the search engine can be regarded as a controller in respect of that processing. It took a broad view of what constitutes establishment in the EU for the purposes of the application of the Directive. It announced a new right for data subjects that was not explicitly provided for in the Directive. And it simply ignored the concerns of Advocate General Jääskinen that removing links thereby preventing effective access to the underlying website, here the archives of a regional Spanish newspaper, would amount to falsification of history: (ECLI:EU:C:2013:424;

AG, 25 June 2013) [129]. Lindsay identifies several practical problems with the operation of the decision, not least the Court's vagueness as to how a search engine operator can actually comply with ruling (218–19). The resulting outsourcing to online intermediaries of the rights both of data subjects and of internet users is a deeply troubling privatisation of enforcement: see Emily Laidlaw, *Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility* (Cambridge University Press 2015) ch 5. Matters will only be made worse if the CJEU follows the lead of the Supreme Court of Canada in *Google v Equustek* 2017 SCC 34 (CanLII) (28 June 2017) and requires that links be removed from searches worldwide.

Lindsay's chapter also illustrates another theme in this volume: the need to ensure theoretical and doctrinal coherence of both defamation and privacy law. The internal coherence of the law of defamation is the animating concern of Andrew Scott, "*Ceci n'est pas une pipe*": The Autopoietic Inanity of the Single Meaning Rule' ch 3, 40. In defamation cases, the courts take the view that an impugned publication has a single meaning, the 'natural and ordinary meaning', which is the 'right meaning': *Slim v Daily Telegraph* [1968] 2 QB 157, 171–74 (Diplock LJ; Lord Denning MR and Salmon LJ concurring); *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65, [1995] UKHL 6 (30 March 1995); *Griffin v Sunday Newspapers* [2012] 1 IR 114, [2011] IEHC 331 (09 August 2011) (Kearns P); *McGarth v Independent Newspapers* [2004] 2 IR 465, [2004] IEHC 67 (21 April 2004) (Gilligan J). In *Speedie v Sunday Newspapers* [2017] IECA 15 (02 February 2017) [14] (Hogan J) (Finlay Geoghegan and Irvine JJ concurring) explained that the object of this rule is to promote certainty 'by fixing on one, single objectively determined meaning to the relevant words of a particular article and thereby to avoid the possibility of inconsistent verdicts'. Nevertheless, the rule has few fans. In *Ajinomoto Sweeteners v ASDA* [2011] QB 497, [2010] EWCA Civ 609 (02 June 2010) the Court of Appeal declined to import the rule into the tort of malicious falsehood; and in *Interflora v Marks & Spencer* [2013] EWHC 1291 (Ch) (21 May 2013) Arnold J held that the rule did not form part of trademark law.

In *Ajinomoto*, Sedley LJ (Sir Scott Baker concurring) pointed out that the rule makes no sense where reasonable people might have several equally plausible interpretations of the relevant words, and he concluded that the rule 'is anomalous, frequently otiose and, where not otiose, unjust': [2010] EWCA Civ 609 [31]. Similarly, Rimer LJ said that the rule 'is the product of an accident of history resulting in a fiction ... [that] is artificial and has something of the absurd about it' [40]. As a consequence, Sedley LJ was resigned to the conclusion that it is now 'an immovable object ... [that] has passed beyond redemption by the courts' [27]. Scott agrees: he argues that libel cases are over-complicated and expensive, and that the single meaning rule makes things worse, by pushing the courts into damaging mischaracterisations of real-world disputes, providing 'opportunities for parties and their lawyers to indulge in obscurantist, cost-generating game-playing' (40). He therefore argues that the single meaning rule should be abolished by the legislature.

The internal coherence of the law of privacy is the animating concern of Eric Barendt, "*A Reasonable Expectation of Privacy*": A Coherent or Redundant Concept?' ch 6, 96; and Gavin Phillipson, 'Press Freedom, the Public Interest and

Privacy' ch 9, 136. In *Campbell v MGN Ltd* [2004] 2 AC 457, [2004] UKHL 22 (6 May 2004) the House of Lords held that the first question to ask in privacy cases is the relatively flexible and subjective assessment of whether the plaintiff had a reasonable expectation of privacy in the circumstances, eg [21]–[25] (Lord Nicholls), [134]–[137] (Baroness Hale); see also *Khuja (formerly PNM) v Times Newspapers* [2017] UKSC 49 (19 July 2017) [34] (Lord Sumption). At least since *Katz v US* 389 US 347 (1967), this has been the approach of the US Supreme Court in Fourth Amendment cases. It was noted by Charleton J in *CRH plc v Competition and Consumer Protection Commission* [2017] IESC 34 (29 May 2017) [32] and it has strong academic support: see Nicole Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 *Law Quarterly Review* 628; Kirsty Hughes, 'A Behavioural Understanding of Privacy and its Implications for Privacy Law' (2013) 75 *Modern Law Review* 806.

Nevertheless, it has attracted strong criticism in the US: see Orin Kerr, '*Katz* Has Only One Step: The Irrelevance of Subjective Expectations' (2015) 82(1) *University of Chicago Law Review* 113 (2015), and Barendt's contribution to this volume argues that the test is misconceived (96), incoherent (107), and artificial (107), especially where the plaintiff is a child (96). He therefore argues for a more objective formulation (111–14). The main competing formulation is the more objective test of whether the intrusion or disclosure is highly offensive to a reasonable person. This test underlies all four strands of privacy identified by William Prosser, 'Privacy' (1960) 48 *California Law Journal* 383; it featured in important elements of Gleeson CJ's judgment in *Australian Broadcasting Company v Lenah Game Meats* (2001) 208 CLR 199, [2001] HCA 63 (15 November 2001) [42]; and it was the main holding of the New Zealand Court of Appeal in *Hosking v Runting* [2005] 1 NZLR 1, [2004] NZCA 34 (25 March 2004) and of the Court of Appeal for Ontario in *Jones v Tsige* 2012 ONCA 32 (18 January 2012). *Hosking v Runting* was cited with approval by Kearns P in *Hickey v Sunday Newspapers* [2011] 1 IR 228, [2010] IEHC 349 (8 October 2010).

On the other hand, time has not been entirely kind to Prosser's analysis: Neil Richards and Daniel Solove, 'Prosser's Privacy Law: A Mixed Legacy' (2010) 98 *California Law Journal* 1887. Gleeson CJ's reference to a right of privacy in *Lenah* was described by Macken J in *Rotunda Hospital v Information Commissioners* [2011] IESC 26 (19 July 2011) as a 'passing comment' which 'at its height, [is] an *obiter dictum*'. And the standard of whether something is 'offensive', let alone 'highly offensive', is so nebulous as to call its workability into question.

In Ireland, there is a third formulation, which asks whether the invasion of privacy is deliberate, conscious and unjustified: *Kennedy v Ireland* [1987] IR 587, 592–93, [1988] ILRM 472, 477 (Hamilton P); *Herrity v Associated Newspapers* [2009] 1 IR 316, 327, 337, 343, [2008] IEHC 249 (18 July 2008) [32], [55], [69] (Dunne J); *K (A Minor) v Independent Star* [2010] IEHC 500 (03 November 2010) [47], [52], [93] (Hedigan J).

It may not be necessary to choose between these tests. Instead, they may each operate in their own separate realms. The subjective 'reasonable expectation of privacy' test has been articulated in cases where the cause of action is, or grew out

of, the equitable action for breach of confidence. The more objective 'highly offensive' test has been articulated in cases where the cause of action is a tort of invasion of privacy. Finally, the particularly strict 'deliberate, conscious and unjustified' test has been articulated in cases where the cause of action is founded upon the constitutionally protected right to privacy. This gives three separate causes of action – one equitable, one at law, and one under the Constitution – with separate tests for each cause of action. The differences may be especially appreciated in the context of remedies, where, reflecting the increasingly stricter causes of action, compensation for breach of confidence may be modest, eg *Wilson v Ferguson* [2015] WASC 15 (16 January 2015); damages for invasion of privacy may be less modest, eg *Representative Claimants v MGN* [2017] QB 149, [2015] EWCA Civ 1291 (17 December 2015); and damages for infringement of constitutional rights could be relatively substantial, eg *Kennedy* (above) and *Herrity* (above).

Moreover, the English cases have characterised the action for breach of confidence in Article 8 cases as one of misuse of private information, which they are now treating as a tort: see, especially, *PJS* (above). This move may well cause the test in the English cases to move from the subjective 'reasonable expectation of privacy' test to the more objective 'highly offensive' test, as recommended by Barendt, and for damages to increase accordingly, which would explain the relatively high levels of damages in *Representative Claimants* (above).

The 'reasonable expectation of privacy' test, according to Phillipson, is susceptible of being undermined by new or expanded reasons to find no such reasonable expectation in the first place (137–38). And he fears that this is just what the courts are doing; he worries that 'privacy is starting to lose its fight with the press' (137), as recent cases have tilted the balance quite strongly in favour of press freedom (137), through the expansion, broadening, and blurring, of the notion of the public interest (151–54). As Hughes and Richards observe, the public interest means very different things in different jurisdictions, much more easily accepted by US courts than their UK counterparts (196). Irish courts also accept that the public interest can justify disclosure of private facts: see *Herrity* (above), *K (A Minor)* (above), and – especially – *Cogley v Radio Teilifís Éireann* [2005] 4 IR 79, [2005] IEHC 180 (8 June 2005) (Clarke J); see also, generally, Paul Wragg, 'The Benefits of Privacy-Invasive Expression' (2013) 64 Northern Ireland Legal Quarterly 187. Phillipson says that, in *von Hannover v Germany (No2)* 40660/08 (2012) 55 EHRR 15, [2012] ECHR 228 (7 February 2012) and *Axel Springer* (above), the ECHR has started fully to embrace the notion that public figures have a reduced expectation of privacy (145). This development is plainly influenced by the German law notion of public figures *par excellence* (*absolute Personen der Zeitgeschichte*) (*von Hannover* BVerfG, Order of the First Senate of 26 February 2008 – 1 BvR 1602, 1606, 1626/07), as well as by US law on public officials and public figures: Partlett, 73; Hughes and Richards, 183–90; Gadja, 247–53; Kenyon and Richardson, 331, 336–39.

For Phillipson, this notion of the public figure is analytically imprecise (146), asking, as it does, a simplistic general question rather than addressing specific, detailed issues relating to reasonable expectations of privacy and the sufficiency of public

interest in disclosure (149). This essay is an important and timely warning that the important notion of the public interest should not swallow up privacy protections. But the converse also holds true: the important protections of privacy should not overwhelm freedom of speech or of the press. It is hard line to draw; and, in drawing it, courts should be vigilant to impair each right as little as possible. As O'Donnell J put it in *Sunday Newspapers Ltd v Gilchrist and Rogers* [2017] IESC 18 (23 March 2017) [36] 'the Constitution does not itself rank the rights and obligations it provides for, nor does it tell us how to divine any hierarchy. The obligation of a court is to uphold all the provisions of the Constitution.'

A fourth theme that may be discerned in the essays in this volume is the overlap between defamation and privacy. As Cheer observes, 'the intermingling of these torts is increasing, adding to the complexity of the law and damaging its coherence' (310). This is true, both as to the causes of action, and as to available remedies. First, as to causes of action, Cheer notes the capacity of privacy claims to 'swallow up' significant parts of defamation (311–13); the claim of misuse of private information can cover false facts, provided that it is not a defamation claim in disguise: *McKennit v Ash* [2006] EWCA Civ 778 (25 May 2006); *Terry v Persons Unknown* [2010] EWHC 119 (QB) (29 January 2010).

Second, as to remedies, is not clear whether the test for the award of interim or interlocutory injunctions (314–15) should be the same in both cases: Godwin Bustill and Patrick McCafferty, 'Interim Injunctions and the Overlap Between Privacy and Libel' (2010) 2 *Journal of Media Law* 1; David Rolph, 'Irreconcilable Differences: Interlocutory Injunctions for Defamation and Privacy' (2012) 17 *Media & Arts Law Review* 170. In defamation cases, *Bonnard v Perryman* [1891] 2 Ch 269 applies. Lord Chief Justice Coleridge in the Court of Appeal held that the 'importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions': [1891] 2 Ch 269, 284. Hence, as Lord Sumption explained in *Khuja* (above) [19] the invariable rule since *Bonnard* has been that 'even where absolute privilege is not available or its availability is in dispute, the court will not grant an interlocutory injunction in advance of publication if the defendant asserts that he will plead justification, unless, exceptionally, the court is satisfied that the defence is bound to fail'. Indeed, in Ireland, where the question of the availability of injunctions is now governed by s 33 of the Defamation Act 2009, these considerations inform the interpretation of that section, eg *O'Brien v Raidió Telefís Éireann* [2015] IEHC 397 (21 May 2015); *Muwema v Facebook* [2016] IEHC 519 (23 August 2016).

Cheer observes that it is, in fact, easier to obtain interim injunctions in privacy cases than in defamation cases (314). David Rolph, in 'Vindicating Reputation and Privacy' ch 14, 291, makes a similar point (292, 304). The contrast between *Khuja* (defamation) and *PJS* (privacy) would seem amply to bear this out. On the other hand, Cherry discerns a possible conflation of the positions in New Zealand (318–19). Moreover, in Ireland, *Bonnard v Perryman* features in privacy cases in which interlocutory injunctions have been refused: *Cogley* (above); *Murray v Newsgroup Newspapers* [2011] 2 IR 156, [2010] IEHC 248 (18 June 2010). In neither case was

Bonnard directly relied upon to justify the refusal of the privacy injunction, but it was plainly in the mix, and the issue cannot yet be regarded as settled.

Nor is it settled yet whether damages awards ought to be the same in defamation and privacy contexts. This is the central concern of David Rolph's essay. In *Representative Claimants*, Arden LJ held that, just as the English courts have regard to the personal injury scale in defamation cases, so they should also have similar regard in cases of misuse of private information ([2017] QB 149, [2015] EWCA Civ 1291 [61]), but she did not directly compare defamation awards and privacy awards. In *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB) [230] and *Cooper v Turrell* [2011] EWHC 3269 (QB) [93], Eady J and Tugendhat J carefully distinguished the two claims, and defended higher awards in defamation cases as contrasted with privacy cases. Rolph disputes this; he says that there is 'no principled reason' why this should be so (306); and he argues that the vindicatory function relied upon by Eady J and Tugendhat J in the context of defamation cases can apply just as much in the context of privacy cases: like defamation, a significant component of the damages in a privacy case 'should be for the purposes of vindication, to demonstrate and affirm the importance of the right to privacy' (306). That argument might, however, go the other way; if there is a discrepancy in the levels of the awards, why not equalise them down rather than up?

This book is a collection of first class, thought-provoking essays. They will repay careful study by practitioners and academics alike. And they will be of immense comparative value for the bar, the bench, and the academy, in Ireland. In helping to tease through the challenges of balancing or reconciling the rights to privacy, reputation or good name, and freedom of expression, these essays will help to ensure 'that the dignity and freedom of the individual may be assured', and the great promise of the Preamble to Bunreacht na hÉireann will be kept.

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