CHAPTER 9

When Two Tribes go to War: Privacy Interests and Media Speech

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"It's all about the information . . . it's about who controls the information."[1]

INTRODUCTION

People often wish to keep information to themselves; the media almost as often seek to publish it. Of course, there are certain things which people may legitimately keep to themselves. On the other hand, there are certain other things which they may wish to keep to themselves but which it is not legitimate that they should. At least one justification for the media is that they publish this latter information. It may be said that the former information is protected by some sort of right to privacy, and that the latter information is publishable by virtue of some sort of media right to free speech.

In some jurisdictions, such as the United States[2] and Germany,[3] it is meaningful to posit precisely this opposition, since the rights to privacy and free speech are both clearly legally recognised and protected. Analysis of consequent legal issues therefore expressly incorporates, and where necessary, balances the competing rights, and arguments tend to be as to the extent to which one limits the other in a particular set of circumstances.[4]

In other jurisdictions, such as the United Kingdom, even though the

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[1] Cosmo to Bishop in *Sneakers* (1992) UIP/Universal.

[2] *e.g.* Tribe, *American Constitutional Law* (2nd ed., 1988), p. 887, Foundation Press, New York; Stone, Seidman, Sunstein and Tushnet, *Constitutional Law* (2nd ed., 1991, supp. 1995), pp. 1102–1119, 1176–1181, 1391–1397, Little Brown, Boston.

[3] Markesinis, *The German Law of Torts: A Comparative Introduction* (3rd ed., 1994); Lorenz, "Privacy and the Press – A German Experience" in Butterworth Lectures 1989–1990, p. 79. Zweigert and Kötz, *An Introduction to Comparative Law* (2nd ed., 1987), Vol. 2, chap. 20, Oxford. Thwaite and Brehm, "German Privacy and Defamations Law: The Right to Publish in the Shadow of the Right to Human Dignity" [1954] 8 E.I.P.R. 336

[4] Good examples are supplied by *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (statute maintaining anonymity of rape victim unconstitutional on First Amendment grounds); and *Lebach* BVerfGE 35, 202 (1973) translated Markesinis, p. 390 and *Time Inc. v. Hill*, 385 U.S. 374 (1967) (taking different positions on whether speech in fictionalised representation of events of public interest trumped the privacy of the participants).

opposition is often posited as a shorthand, especially in academic treatments,[5] nonetheless, neither right is in fact legally recognised or protected. In such a jurisdiction, what is termed the right to privacy is secured by means of various actions in which the protection of privacy is merely an incidental, but in the circumstances, useful and desired consequence;[6] as a result, the protection of privacy is haphazard, in some cases very strong, in others, it is all but absent. In such circumstances, it is more meaningful to speak of the legal protection of *privacy interests* than of the right to privacy. Further, what is termed the right to free speech is secured only by default: there is publication where there is no impediment or prohibition.[7] In such jurisdictions, the extent to which one or the other right is limited in a particular set of circumstances is merely an *ex post facto* observation, not a consequence of an analysis which expressly incorporates or balances the competing rights.

The position in Ireland is intermediate between these two paradigms. It is, to some extent, meaningful to posit the opposition between the right to privacy and the right to free speech, since each is a constitutionally recognised right.[8] On the other hand, where there is a dispute in which these rights could be in issue, the analysis tends largely to proceed on the basis of one or other of the various actions in which the protection of privacy interests is incidental,[9] and the more abstract rights figure, if at all, in a rhetorical flourish.

Nonetheless, there are some few signs that the analysis is moving from the second paradigm to the first[10]; but any such movement is likely to be slow. When the media disclose information of a private nature, the victim swallows the hurt, the anger, the humiliation, or the embarrassment, and bleats that the media has invaded her right to privacy; the media, in pained voices, harrumph sanctimoniously about

[5] Barendt, *Freedom of Speech* (1985, rev: 1989); Robertson and Nicol, *Media Law* (3rd ed., 1992); Barendt, "Privacy and the Press" (1995) *Yearbook of Media and Entertainment Law*, p. 23; Wacks, *Privacy and Press Freedom* (1995) Blackstone.

[6] See Markesinis and Deakin, *Tort Law* (3rd ed., 1993), chap. 7, sections 2 & 3, Clarendon Press, Oxford.

[7] See Boyle, "Freedom of Expression as a Public Interest in English Law" [1982] P.L. 574.

[8] *e.g.* Hogan and Whyte, *Kelly, The Irish Constitution* (3rd ed., 1994), pp. 767 *et seq.* & 923 *et seq.*, Butterworths, Dublin.

[9] McMahon and Binchy, *The Irish Law of Torts* (2nd ed., 1990), chap. 37, Butterworths, Dublin, on privacy, listing the torts and other civil actions such as breach of confidence by which privacy interests are protected.

[10] The judgment of O'Hanlon J. in *Maguire v. Drury* [1995] 1 I.L.R.M. 108 may be seen in this light. So also may that of Costello J. in *X. v. Flynn*, unreported, High Court, May 19, 1994, positing at p. 1 the "conflict between the plaintiff's constitutional right to privacy and the constitutionally protected right of the individual defendants to communicate . . .". Compare the *Report of the Commission on the Newspaper Industry* (June, 1996), p. 56. See generally, McGonagle, *A Textbook on Media Law* (1996), chap. 5, Gill and Macmillan, Dublin.

freedom of expression. Writs fly (sometimes fists too); but the case is usually settled out of court. There is no resolution of the legal issues. Like the Grand Old Duke of York, the two opposing shibboleths are not put to the test. The next time, the same two hazy undefined concepts of privacy and expression are dusted down and faced off and (after the case is settled) packed away again. It is time they were properly unpacked and examined.

The key elements of the first paradigm are the rights to privacy and free speech. In Ireland, neither right exists as a monolith. As to privacy, at private law, there is a complex of torts, supplemented both by the action for breach of confidence and by the protection of wards; at public law, there is a constitutional right to privacy, but its extent is still unclear. It is meaningful to speak of the protection of *privacy interests*. As to media speech, not only can the Article 40.6.1° right to express convictions and opinions be deployed, there are arguments that the article also contains a special right of media speech, and a right to communicate has been derived from Article 40.3: thus, it is meaningful to speak of a complex of speech rights. When the protection of various privacy interests intersects with such a complex of speech rights, it is not two champions facing each other in single combat but two tribes going to war. It is the aim of this essay to examine the strengths and weaknesses of these tribes.

It has been suggested that "very substantial protection [of privacy interests] is already afforded by a wide range of torts".[11] It is a core contention of this article that such protection as is thereby afforded fails both adequately to protect such privacy interests, or to incorporate legitimate limitations in the interests of free speech in such protections of privacy. The attempt to fit privacy in such actions does a dis-service to both; the right to privacy is not properly protected and those actions are distorted from their true focus. It is necessary, therefore, to discuss, and to demonstrate the inadequacies of, such current legal mechanisms as provide protection for privacy interests.

This route once rejected, it does not follow that the issues raised in the attempt to protect privacy interests in unsuitable terrain ought to be forthwith ignored; it will be seen that legitimate arguments reflecting the importance of both rights have been made in such inappropriate contexts; thus, it is necessary to consider whether any of the insights achieved in such terrain can be rescued and to consider the legal doctrine most suited to the protection of privacy interests, incorporating

[11] McMahon and Binchy, above n.9, *op. cit.*, p. 685, and generally, chap. 37. The point of the chapter is that though substantial, the protection is still haphazard. See also, Clark, *Data Protection Law in Ireland* (1990), chap. 1, Round Hall Press, Dublin. Wacks, *Personal Information, Privacy and the Law* (1989, rev. 1993).

such insights. Finally, it will be necessary to consider any alteration to the shape of such a doctrine on the basis of free speech considerations. The consequence of these last two sections is that we will then have an idea of how the Irish version of the first paradigm might look.

THE PROTECTION OF PRIVACY INTERESTS

For present purposes, invasion of privacy may be divided into two main branches,[12] invasion of privacy by physical intrusion, and invasion of privacy by publication.[13] The primary focus of this essay is the latter, but it is necessary first to deal briefly with the former, at least for this reason: where a journalist obtains information by virtue of physical intrusion (*e.g.* trespass surreptitiously to eavesdrop or photograph) and then publishes it, she commits two invasions of privacy, one by intrusion, one by publication. If the intrusion has occurred but the publication has not, then remedies (for example, an injunction) in respect of the intrusion may prevent publication.

Invasion of privacy by physical intrusion

The paradigm of invasion of privacy by physical intrusion is where the intrusion amounts to a trespass to land,[14] and, within its own, limited, terms,[15] it "affords generous protection of privacy interests (provided that the plaintiff has the requisite possession in land). Any wrongful entry onto property is actionable without proof of damage".[16] Further, the use of a highway not for the purposes of passing but instead

[12] Stoljar, "A re-examination of privacy" (1984) 4 *Legal Studies* 70; to like effect the Report of the Committee on Privacy Cmnd. 5012 (1973) (chaired by Rt. Hon. Sir Kenneth Younger) [hereafter, the Younger Committee Report] para 37. This division is followed in Burrows, "Protection of Privacy" *The Law of Torts in New Zealand* (Todd ed. 1991), p. 754, Law Book Company, Sydney. The Law Reform Commission Consultation Paper on *Privacy: Surveillance and the Interception of Communications* (1996) Dublin, makes a similar division, and discusses the first leg, leaving the second to a later paper. The U.S. division is fourfold, see text with n.317 *et seq.*, below.

[13] We will return to the detail of a definition of privacy below, p. 197 (ftn.301).

[14] McMahon and Binchy, above n.9, *op. cit.*, p. 685. *E.g. Grieg v. Grieg* [1966] V.R. 376 (Gillard J. awarded punitive damages for "hurt feelings" from trespass to install microphone in plaintiff's flat to eavesdrop on plaintiff). *Ramsay v. Cooke* [1984] 2 N.Z.L.R. 680 (aggravated damages awarded for repeated arrogant trespass for "loss of privacy and their rights as landowners" [1984] 2 N.Z.L.R. 680, 687).

[15] See, generally, Handley, "Trespass to Land as a Remedy for Unlawful Intrusion on Privacy" (1988) 62 A.L.J. 216.

[16] McMahon and Binchy, above n.9, *op. cit.*, p. 685. They continue: "If the courts were to hold that a secret purpose on the part of the entrant unknown to the person who has invited him onto the property vitiates permission to be there, many invasions of privacy by surreptitious means would clearly be recognised as tortious". (footnotes omitted). Clearly, this would cover techniques of investigative reporting, but, as the text with

to intrude upon or spy upon an adjacent landowner, can amount to a trespass.[17] In such cases, for Stoljar, "the misuser lay in the fact that the defendant interfered with the plaintiff's enjoyment of his land, "enjoyment" here clearly including a notion of privacy".[18] Yet, as the law now stands, the terms of the protection are limited. In *Victoria Park Racing & Recreation Grounds Co. Ltd v. Taylor*,[19] the broadcasting from the defendant's property of the races on the plaintiff's property was not actionable: a "defendant does no wrong to the plaintiff by looking at what takes place on the plaintiff's land".[20]

There are other weaknesses. First, assume a situation where a photograph is taken of three people by a trespassing photographer, only one of whom is the property owner. It is only the property owner whose property interests have been invaded and who can thus rely on the tort of trespass to land; the other two, whose privacy was equally invaded, cannot, and are left without a remedy under this head. Likewise, if the owner of property is the defendant, who has surreptitiously eavesdropped upon or taped or photographed a plaintiff lawfully on that property, trespass cannot reach that. Second, in many cases, the remedy available may not be sufficient for a plaintiff who seeks to protect a privacy interest. The gravamen of the tort of trespass to land is the protection of property interest, and the remedy will be tailored to make good the invasion of a *property* interest rather than of a privacy interest. As a consequence, the courts will usually be of the opinion that damages are an adequate remedy, and although "injunctions have been granted in England and Australia following trespasses by television crews on to business premises",[21] in general, courts are "most reluctant to grant . . . injunctions against publication of photographs or films obtained in the course of the trespass".[22] Wrongheaded or unfair this may be, but it does illustrate that the protection of property interests in the tort

n.19 below makes clear, even if there is a tort, the remedy may not be sufficient to protect the privacy interest, thus leaving the reporter secure in the fruits of the investigation.

[17] *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142; *Hickman v. Maisey* [1900] 1 Q.B. 752 (defendant observed plaintiff's horses training); *cf. Byrne v. Kinematograph Renters Society* [1958] 2 All E.R. 579.

[18] Stoljar, above n.12, *op. cit.*, p. 71.

[19] (1937) 58 C.L.R. 479; *cf.* the nuisance action in *Poirier v. Turkewich* (1963) 42 D.L.R. (2d.) 259.

[20] *Victoria Park Racing*, above at 479, 494 *per* Latham C.J. Though now *cf. TV 3 Network Services v. B.S.A.* [1995] 2 N.Z.L.R. 720 (H.C., Eichelbaum C.J.).

[21] Burrows, above n.12, *op. cit.*, p. 758, footnotes omitted, citing, *inter alia*, *Savoy Hotel v. BBC* (1983) 133 N.L.J. 105n (QBD, Comyn J.: the Court of Appeal on appeal discharged the injunction: Seipp, "English Judicial Recognition of a Right to Privacy" (1983) 3 O.J.L.S. 325 at 362, n. 330) and *Emcorp Pty Ltd v. A.B.C.* [1988] 2 Qd. R. 169.

[22] Robertson and Nicol, above n.5, *op. cit.*, p. 211, citing *Church of Scientology v. Transmedia Productions Ltd* (1987) *Aust. Torts Reports* 80; *Hunt v. Wilesee* (1986) 4 N.S.W.L.R. 457. See also *Shiel v. Transmedia Productions* [1987] 1 Qd. R. 199. In these three cases, the

of trespass to land, whilst attractive as a means to protect privacy interests, fails to provide an adequate remedy. It may be that some extension of trespass may justify such a remedy, but that would be to distort the focus of trespass.

Again, trespass to goods, conversion and detinue,[23] are also actionable *per se*, and if the invasion of privacy consists in the taking of one's goods, such as photographs or tapes, then the owner of the goods can get an injunction ordering the delivery up of the goods. Indeed, in the great case of *Entick v. Carrington*,[24] the entering of property and the taking of papers each constituted a trespass, the reading of the papers aggravated the tort. However, it is only the owner of the papers, photographs or tape who can do so, and if the owner chooses not to sue or gives permission to use the papers, photographs or tape, then, where people other than the owner are featured, they cannot use this action to protect their privacy interests. Again, if documents such as a diary are simply read, there is clearly an invasion of a privacy interest, but no action for trespass to goods would seem to lie.

The tort of nuisance[25] may be more successful. Indeed, in one of the famous cases in this area, *Bernstein v. Skyviews*,[26] Griffith J. held that the defendant had not committed a trespass in overflying the plaintiff's property, but observed, *obiter*, that the overflight, as a "monstrous

injunctions were refused, but the principles upon which they would, exceptionally, be granted were fully discussed, especially in the judgment of Young J. in *Hunt*. See also *Whiskisoda Pty v. H.S.V. Seven Pty* (1994) 68 A.L.J. 611n (injunction denied: damages adequate remedy) and *Bradley v. Wingnut Films* [1993] 1 N.Z.L.R. 415. Thus, for example, in *O'Sullivan v. Cork Examiner Publications*, *The Irish Times*, March 16, 1996, the Supreme Court, *ex tempore*, refused an injunction to restrain publication of a photograph taken by a trespassing photographer.

[23] McMahon and Binchy, above n.9, *op. cit.*, p. 685.

[24] (1765) 19 St. Tr. 1029; discussed in this context in Stoljar, above n.12, *op. cit.*, p. 74, and in more detail, Seipp, above n.21, *op. cit.*, p. 335. Marston, "Police Surveillance" (1995) 145 N.L.J. 162. See also *Ashby v. White* (1703) 2 Ld. Raym. 938; *Coco v. R.* (1994) 68 A.L.J.R. 401 (HCA) (statute authorising tapping did not authorise trespass to install tap); See also *D.P.P. v. McCreesh* [1992] 2 I.R. 239 (statute authorising arrest did not authorise trespass to make the arrest); *Minister for Social Welfare v. Bracken*, unreported, High Court, July 29, 1992.

[25] *Walker v. Brewer* (1876) L.R. 5 Eq. 26 (large crowds at fêtes on neighbour's lands destroying plaintiff's privacy). *Motherwell v. Motherwell* (1976) 73 D.L.R. (3d.) 62 (Atla. S. Ct), (harassing phone calls constituting actionable nuisance). *Khorasandjian v. Bush* [1993] Q.B. 727.

[26] [1978] Q.B. 479; *cp. Florida v. Riley*, 488 U.S. 445 (1989) (no reasonable expectation of privacy in greenhouse not protected from public view; helicopter surveillance not a breach of Fourth Amendment). Further, at common law, photographing property from outside is not actionable *per se*: *Bathurst City Council v. Saban* [1985] 2 N.S.W.L.R. 704 (though Young J. was in favour of a development of a U.S.-style tort of invasion of privacy in such a situation: [1985] 2 N.S.W.L.R. 704, 708). See also *Sports & General Press Agency v. "Our Dogs" Publishing Co. Ltd* [1916] 2 K.B. 880, discussed in Robertson and Nicol, above n.5, *op. cit.*, p. 208.

invasion of privacy"[27] could constitute a nuisance. The leading Irish definition of nuisance is provided by O'Higgins C.J. in *Connolly v. South of Ireland Asphalt Co.*:

> "The term nuisance contemplates an act or omission which amounts to an unreasonable interference with, disturbance of, or annoyance to another person in the exercise of his rights. If the rights so interfered with belong to the person as a member of the public, the act or omission is a public nuisance. If these rights relate to the ownership or occupation of land, or of some easement, profit or other right enjoyed in connection with land, then the acts or omissions amount to a private nuisance."[28]

This definition sounds sufficiently wide to cover many invasions of privacy by physical intrusion, yet, as "was mentioned in the *Bernstein* case, nuisance is related to a state of affairs: invasions of privacy are frequently "once off" affairs. Moreover, nuisance still is essentially a tort based on occupation of property by the plaintiff".[29] Thus, it shares the weaknesses of trespass to land discussed above: to sue in private nuisance, the plaintiff must have a proprietary or possessory interest in land. Indeed, it is weaker, since, whereas trespass is actionable *per se*, in nuisance, one must prove actual damage,[30] and a *substantial* interference[31] in the enjoyment of land.

Finally, after *Khorasandjian v. Bush*,[32] the emerging[33] tort of harassment[34] may provide some protection from repeated invasions of privacy

[27] [1978] Q.B. 479 at 489.

[28] [1977] I.R. 99, 103. See, generally, McMahon and Binchy, above n.9, *op. cit.*, chap. 24.

[29] McMahon and Binchy, above n.9, *op. cit.*, p. 687. *Southport v. Esso Petroleum* [1957] A.C. 218, 224; *Hanrahan v. Merck, Sharpe and Dohme* [1988] I.L.R.M. 629, 634 *per* Henchy J. In *Motherwell*, above, n.25, however, an injunction was granted to plaintiffs who did not have an interest in the land where the nuisance occurred, as well as to the plaintiff who did (householder and family receiving harassing telephone calls). *cp. Khorasandjian*, above, n.25.

[30] McMahon and Binchy, above n.9, *op. cit.*, p. 454.

[31] *St Helens Smelting Co. v. Tipping* (1865) 11 H.L.C. 642. On the other hand, the requirement that the plaintiff have an interest in the property is being liberalised, at least in the context of nuisance: *Hunter v. Canary Wharf and L.D.D.C.* (1995) 145 N.L.J.R. 1645, though the logic should transfer to the trespass scenario.

[32] Above, n.25 (defendant assaulted plaintiff, threatened violence and behaved aggressively towards her, followed her shouting abuse, and harassed her with telephone calls to her parents' and grandmother's homes; the Court of Appeal held that such actions constituted a private nuisance); *Burris v. Azadani* (1995) 145 N.L.J.R. 1330 (CA). On *Khorasandjian* see Cooke, "A Development in the Tort of Private Nuisance" (1994) 57 *Mod. L. Rev.* 289. Piotrowicz, "Private Lives and Private Nuisance" (1993) 1 Torts C.J. 207; Brazier [1992] Fam. Law 346. The decision is discussed as a possible remedy for invasion of privacy in Feldman, "Secrecy, Dignity or Autonomy? Views of Privacy as a Civil Liberty" (1994) 47(2) C.L.P. 41, p. 46.

[33] Murphy, "The Emergence of Harassment as a Recognised Tort" (1993) 143 N.L.J. 926.

[34] A solicitor who fails to obtain an injunction preventing harassment is negligent: *Heywood v. Wellers* [1976] Q.B. 466, though this is "only indirectly a vindication of privacy rights". Clark, above n.11, *op. cit.*, p. 3.

interests,[35] beyond that provided by the tort of private nuisance or the tort of intentional infliction of emotional distress.[36] But again, the focus of the tort as it currently exists[37] is such that it ultimately affords little protection against all but the most serious, deliberate and repeated invasions of privacy interests.

In summary, then, those torts which can protect against the invasion of privacy by physical intrusion do so only as a consequence of the protection of land, and remedies tailored to protect land are often inadequate to protect privacy interests.

Invasion of privacy by publication

The action to restrain a breach of confidence has been increasingly invoked as a means to protect privacy interests by restraining publication. The wardship jurisdiction has also proved a fruitful source of restraint. They will be examined in some detail; however, to provide some context, some other torts will be discussed briefly first.

There are some occasions where tort is appropriate to the protection of a privacy interest, especially in the context of the protection of trade names[38] and the like.[39] And if the defendant owes a duty of care to the plaintiff, and the defendant publishes, causing loss to the plaintiff, then the plaintiff may have an action for negligent misstatement.[40] However,

[35] Bridgeman and Jones, "Harassing conduct and outrageous acts: a cause of action for intentionally inflicted mental distress?" (1994) 2 *Legal Studies* 180. Birks, "Harrassment and Hubris: The Right to an Equality of Respect" (1996) The Law Faculty, U.C.D.

[36] On this tort, see generally, Handford, "Intentional Infliction of Mental Distress: Analysis of the Growth of a Tort" (1979) 8 *Anglo-American L. Rev.* 1. Trinidade, "The International Infliction of Purely Mental Distress" (1986) 6 O.J.L.S. 219; Townshend-Smith, "Harrassment as a Tort in English and American Law" (1995) 24 *Anglo-American L. Rev.* 299. See also *Turton v. Buttler* (1987) C.C.L.T. 74, concerning a claim for nervous shock allegedly caused by the publication of true facts in a newspaper.

[37] Though there is scope for further development of the tort towards greater protection of privacy interests: see *Roth v. Roth* (1991) 9 C.C.L.T. (2d.) 141 where Mandel J. observed that in the U.S. "harassment is an invasion of privacy. It is an intrusion into another's seclusion".

[38] *Hines v. Winnick* [1947] 1 Ch. 708 (trade name protected by passing off); *Henderson v. Radio Corp Pty Ltd* [1960] S.R. N.S.W. 576 (same); *Mirage Studios v. Counter-Feat Clothing* [1991] F.S.R. 145. *cp. Falcon Travel v. Owners Abroad* [1991] 1 I.R. 176 ("reputation" a "property right" capable of being protected in the action for passing-off).

[39] *Sim v. H.J. Heinz* [1959] 1 W.L.R. 313 (unauthorised impersonation of plaintiff's characteristic voice in television advertisement could constitute passing off). *Hogan v. Pacific Dunlop* (1989) 12 I.P.R. 225 (an advertisement which parodied a movie of the plaintiff held to appropriate the plaintiff's goodwill).

[40] The most relevant of the recent cases is *Spring v. Guardian Assurance* [1994] 3 W.L.R. 354 (H.L.). On the compatibility of such an action with the European Convention, Lord Lowry was of the opinion that "assuming that an action would otherwise lie for negligent misstatement, I do not think that Article 10, a paramount and proper guardian of free speech, was intended to shield a negligent defendant in an action based on

most attempts to deploy specific torts to protect privacy interests simply distort the essential nature of the tort. For example, the blatant attempts so to manipulate the tort of defamation, have, by and large, not been successful. This is as it ought to be. Privacy prevents certain truths being uttered about a person, while defamation prevents untruths being uttered. They are therefore concerned with different wrongs.[41] Nevertheless, since the legal mechanism for the protection of each of these interests is often considered inadequate, the other is often deployed to fill the gap. Thus, although the aim of the tort of defamation is to provide a remedy for the publication of falsity, it does not always do so; and when it does not, putative privacy interests have been deployed instead: hence the development of the tort of false light in the public eye as an aspect of invasion of privacy in the U.S. To say of a famous person X that she likes product Y, if it is not true, is to utter a falsity about X; in England, the tort of defamation has usually not provided X with a remedy,[42] since there is usually no defamatory effect.[43] The exception is *Tolley v. Fry*,[44] upon which much has been constructed by

negligence any more than it would protect a malicious defendant from a well grounded claim in defamation. Freedom of speech, rightly prized in all civilized societies, is not to be identified with freedom to defame maliciously or to damage negligently." [1994] 3 W.L.R. 354, 376–377 and 385 *per* Lord Slynn. See also *G. v. A.G.* [1994] 1 N.Z.L.R. 714 (Crown could owe duty of care to natural mother who wished to remain anonymous to the child she put up for adoption; could breach that duty by disclosing identity; statement of claim not struck out).

[41] See generally, Stoljar, above n.12, *op. cit.*, p. 82 *et seq*. For example, the "whole point of identifying a right of privacy is to protect matters which defamation cannot touch" (see also p. 83). Of course, if the aim of both wrongs is ultimately to protect the dignity of the plaintiff, then they can be seen to be related, but that does not alter the fundamental point of their distinction made in the text.

[42] *Clark v. Freeman* (1848) 11 Beav. 112 (doctor could not prevent his name being used on a quack medicine); *Dockrell v. Dougall* (1899) 80 L.T. 556 (same); *Corelli v. Wall* (1906) 22 T.L.R. 532 (famous authoress could not prevent publication of postcards depicting her).

[43] Defamation does not protect against the publication of an untruth *per se*; it protects against the publication of an untruth which has the defamatory effect of holding the plaintiff up to hatred, ridicule or contempt, or lowering him in the estimation of right-thinking members of society (see McMahon and Binchy, above n.9, *op. cit.*, p. 620). Most of the time, falsity of its nature will have this effect, and thus it is often convenient to equate falsity with liability in defamation. However, it is clear that if a false statement does not have this defamatory effect, then there will be no libel. That is precisely what happened in the above line of authority: there was falsity, but no defamatory effect, and thus no libel. For approaches to the defamation/privacy line similar to that in the text, see Barendt, above n.5, *op. cit.*, pp. 23, 25; Wacks, above n.5, *op. cit.*, p. 89.

[44] [1930] 1 K.B. 467 (CA). *cp.* the earlier *Dunlop Rubber Co. v. Dunlop* [1921] A.C. 367; *Pavesich v. New England Life Insurance Co.* 122 G.a 190, 50 S.E. 68 (1905); and *Herrenreiter* BGHZ 26, 349 (1958), translated Markesinis and Deakin, above n.6, *op. cit.*, p. 380. *Tolley* and *Dunlop* are cases in which, exceptionally, the words used were capable of a defamatory meaning.

commentators,[45] eager to provide protection for this putative privacy interest, who argue either that *Tolley* shows how the tort of defamation protects privacy interests, or that it ought to be seen as the root of a tort of false-light invasion of privacy on this side of the Atlantic. The first argument sees the tort of defamation being used to prevent the publication of truth; the second argument sees the tort of privacy being used to prevent the publication of untruth. The first argument distorts the tort of defamation (an ugly enough tort at the best of times), the second, the tort of privacy;[46] and both should be resisted. In fact, *Tolley* is correct in its own terms: the tort of defamation provided a remedy for the publication of falsity.[47]

Again, although there can be, as Costello J. accepted in *X. v. Flynn*,[48] a serious question to be tried (for the purposes of an interlocutory application) as to whether the untrue suggestion in a newspaper report that the plaintiff had given an interview to an unnamed journalist "amounted to a breach of her constitutionally protected right to privacy",[49] the proper resolution of that question is to be found in the decision of the Supreme Court in the earlier and similar *Quigley v. Creation*[50]: an article gave an account of an interview with the plaintiff which had not taken place, the element of falsity was sufficient for the purposes of the tort of defamation. In sum, then, where the publication of falsity does have defamatory effect, the appropriate vehicle for redress is the tort of defamation, not privacy. Any perceived deficiencies in the tort of defamation in cases similar to *Tolley* or *Quigley* should be remedied, if at all, by reform of that tort and not by the distortion of the protection of privacy by the spurious addition of false light cases.[51]

[45] McMahon and Binchy, above n.9, *op. cit.*, p. 631, ftn.130; and a contemporary anonymous note on *Tolley*, (1930) 3 A.L.J. 359.

[46] In the U.S., the availability of the privacy torts has led to many suits being taken there where the interest being protected is clearly reputation and not privacy. See Stoljar, above n.12, *op. cit.*, p. 85; Kalven "Privacy in Tort – Were Warren and Brandeis Wrong?" (1966) 31 *Law & Contemp. Prob.* 326; Zimmerman, "False Light Invasion of Privacy: The Light That Failed" (1989) 64 N.Y.U.L.R. 364. Younger Committee Report, paras. 70–71.

[47] It is the same with *Yousoupoff v. Metro Goldwyn Mayer* (1934) 50 T.L.R. 581 (C.A.) where the court gave a remedy in defamation for falsity, and which can be mis-characterised, as *Tolley* has been, as a defamation case with traces of the protection of privacy interests.

[48] Unreported, High Court, May 19, 1994.

[49] At p. 2 of the transcript.

[50] [1971] I.R. 269 (S.C.).

[51] In this discussion, I have left to one side the tort of "appropriation of personality", a title which was intended to cover one tort but now encompasses two, only one of which is an invasion of a privacy interest. Where the appropriation simply constitutes an infringement of the dignity of the plaintiff, then it can properly be said to constitute an invasion of the privacy of the plaintiff. Where, however, the plaintiff has a marketable public image, and the appropriation is an attempt by the defendant to exploit it for

Likewise, injurious falsehood: in *Kaye v. Robertson*,[52] it was, with difficulty, pressed into service in an attempt to prevent some "false light" publicity.[53] Again, this tort is generally inadequate to the task of protecting privacy interests since it is aimed, *eo nomine*, at damaging falsehoods which deceive others so as to cause loss to the plaintiff.[54] First, as to falsity, as we saw above in the context of defamation, this is an issue with which privacy ought not to be concerned. Second, as to loss, the notion is very narrow, one case called it "special damage",[55] and McMahon and Binchy make clear that "the damage must be of a monetary nature: such non-financial damage as injured feelings may not be compensated"[56]: it is precisely because invasions of privacy usually result in no pecuniary loss but in great injury to feelings that the tort of injurious falsehood is inadequate to protect privacy interests.

Breach of confidence

Breach of confidence[57] has been described as "a civil remedy affording protection against the disclosure or use of information that is not publicly known, and that has been entrusted in circumstances imposing an obligation not to disclose that information without the authority of the person who has imparted it".[58] Consequently, if "a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express of implied, of

gain, then it cannot properly be said to constitute an invasion of the privacy of the plaintiff, but instead an invasion of what has been termed his right to publicity. (See the discussion of this at n.319, below). Plausibly, the former is open on the facts of *X. v. Flynn*, above n.10, the latter on the facts of *Tolley v. Fry*.

[52] [1991] F.S.R. 62 (CA); see Thompson, "Confidence in the Press" [1993] Conv. 347; *cp. Barber v. Time Magazine*, 159 S.W. 2d. 291 (1942) (invasion of privacy by photograph of patient in hospital taken without permission); *Dietmann v. Time Inc.*, 449 F. 2d. 245 (1971). None of the difficulties discussed in the text were addressed or resolved in *Kaye*, since it was an interlocutory application for an injunction preventing publication of photographs of an actor in hospital, pending trial of the full action. See also *Easycare v. Lawrence* [1995] F.S.R. 597.

[53] Passing off, trespass to the person, and libel all having failed. For full discussion, see Markesinis, "Our Patchy Law of Privacy – Time to do Something About It" (1990) 53 M.L.R. 802, and Markesinis and Deakin, above n.6, *op. cit.*, pp. 614–619.

[54] McMahon and Binchy, above n.9, *op. cit.*, pp. 673–674.

[55] *Royal Baking Powder v. Wright, Crossley and Co.* (1901) 18 R.P.C. 95, 99 *per* Lord Davey.

[56] McMahon and Binchy, above n.9, *op. cit.*, p. 674.

[57] See, generally, Coughlan, "Personal Information and Privacy" in *Human Rights in Europe* (Heffernan ed., 1994), p. 155, Round Hall Press, Dublin. The classic treatment is Gurry, *Breach of Confidence* (1984) Clarendon Press, Oxford. See also *Confidentiality and the Law* (Clarke ed. 1990), Lloyd's, London; Coleman, *Legal Protection of Trade Secrets* (1992) London. McDonagh, "Developments in the Action for Breach of Confidence" (1996) 14 I.L.T. (*N.S.*) 98.

[58] Robertson and Nicol, above n.5, *op. cit.*, p. 173.

the plaintiff, he will be guilty of an infringement of the plaintiff's rights".[59]

The range of situations in which information has been protected by the doctrine is quite bewildering. A flavour: the doctrine has protected secrets as diverse as the process of cultivation of a new strain of nectarine[60] and the secret tribal folklore of Australian aboriginals[61]; there is even old authority[62] in which "the plaintiff was concerned to prevent publication of lectures he had delivered *ex tempore* (and not, like so many of his weaker successors, from a text) to students at St. Bartholomew's Hospital"[63] and succeeded in restraining the diligently transcribing student and his publisher.

It is unsurprising, then, that this jurisdiction has been invoked, seemingly with increasing frequency and increasing success, to protect privacy interests, especially against the media.[64] The Younger Committee certainly felt that the action was sufficient adequately to protect privacy interests.[65] Recent judicial comments from the highest quarters have given this process great impetus. Thus, in *Spycatcher (No. 2)*, speaking of the action for breach of confidence, Lord Keith said that:

> "The right to personal privacy is clearly one which the law should in this field seek to protect."[66]

Laws J. has recently echoed and amplified this:

> "In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence".[67]

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[59] *Oblique Financial Services v. The Promise Production Company* [1994] 1 I.L.R.M. 74, 77, citing *Saltman Engineering Co. v. Campbell Engineering* (1948) 65 R.P.C. 203, 213 (CA); [1963] 3 All E.R. 413, 414 *per* Lord Greene M.R. as approved in *House of Spring Gardens v. Point Blank* [1984] I.R. 611, 659 (H.C., Costello J.), 695 (O'Higgins C.J.).

[60] *Franklin v. Giddins* [1978] Qd. R. 72 (because patent law was then inadequate protection; the information was obtained by trespass, a good example of a remedy both for physical intrusion and proposed publication).

[61] *Foster v. Mountford* (1977) 1 A.L.R. 71.

[62] *Abernethy v. Hutchinson* (1824) 3 L.J. Ch. 209; see also *Caird v. Sime* (1887) 12 App. Cas. 326 (HL).

[63] Meagher, Gummow and Lehane, *Equity – Doctrines and Remedies* (1992), p. 866, para. 4106, Butterworths, Sydney.

[64] Stewart and Chesterman, "Confidential Material: The Position of the Media" (1992) 14 *Adelaide L.R.* 1.

[65] Younger Committee Report, paras 87, 659.

[66] [1990] 1 A.C. 109, 255.

[67] *Hellewell v. Chief Constable of Derbyshire* [1995] 1 W.L.R. 804, 807 *per* Laws J. See also the cases cited in Gurry, above n.57, *op. cit.*, p. 13, n.44.

Each of these statements has been the occasion for many commentators to suggest that the action for breach of confidence is sufficient to protect privacy interests.[68] However, they are, to a very great extent, misconceived. Although the action for breach of confidence does offer protection to privacy interests,[69] it does much else besides, and the level of protection which it gives to those matters within its ambit is often insufficient adequately to protect privacy interests. This much will become clear from a more detailed analysis of the elements of the action.

The duty to respect confidence is said[70] to arise where (i) the information must have "the necessary quality of confidence about it",[71] (ii) it must have been imparted in circumstances importing an obligation of confidence, and (iii) there must have been an unauthorised use of that information to the detriment of the party communicating it. In general, these criteria are usually satisfied in relationships where one party entrusts information to another, and impresses it with that duty. The types of information which have been held to have the necessary quality of confidence are many and varied; as Megarry J. said in *Coco v. A.N. Clark*:

> ". . . if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence".[72]

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[68] On *Spycatcher*, see Lester, "English Judges as Lawmakers" [1993] P.L. 269, 284. Robertson and Nicol, above n5, *op. cit.*, p. 180. Wilson, "Privacy, Confidence and Press Freedom" (1990) 53 M.L.R. 43. Though Michael, "A Breach Too Far" (1992) 142 N.L.J. 835, found the law wanting when photographs were taken of Princess Diana in an exclusive gym. On Hellewell, see Thompson [1995] Conv. 404; Fenwick and Phillipson, "Confidence and Privacy: A Re-examination [1996] C.L.J. 447, 453.

[69] Stoljar writes that "the doctrine of confidentiality far from standing on its own feet, was entirely dependent on a notion of privacy; the very language of confidentiality would not have been intelligible but for a legal policy to keep sensitive private matters firmly unpublicised". Stoljar, above n.12, *op. cit.*, p. 79.

[70] The threefold test flows from the judgment of Megarry J. in *Coco v. A.N. Clark* [1968] F.S.R. 415, 419; [1969] R.P.C. 41, 47. See Gurry, above n.57, *op. cit.*, chap. 1. It has recently been applied in Ireland in *Oblique Financial Services*, above, n.59 and *Private Research v. Brosnan* [1995] 1 I.R. 534; [1996] 1 I.L.R.M. 27.

[71] *Saltman Engineering Co.*, above, n.59.

[72] *Coco*, above, n.70. He was concerned to ensure that the threefold test would not prove too restrictive. *cp. X. v. Y.* [1988] 2 All E.R. 648 (Rose J.). The reasonable man test was accepted by the Supreme Court of Canada in *LAC Minerals v. International Corona Resources* (1989) 61 D.L.R. (4th) 14, 20 *per* La Forest J.

[73] Gurry divides the categories into Trade Secrets, Personal Confidences, Artistic and Literary Confidences, Government Secrets (pp. 7–21, 89–108); the treatment here simply conflates the two middle categories. Goff and Jones, *The Law of Restitution* (4th ed., 1993) divide them differently: "There are secrets which one individual may impart in the course of a business or personal relationship. These are private secrets. In contrast there

However, those relationships impressed with a duty of confidence can broadly be described as commercial, personal, and governmental.[73]

Commercial confidences

The core relationship in this category is based upon contract. For example, contracts of employment[74] will often provide expressly[75] that information transferred or generated within that relationship cannot be used or disclosed either at all or only within the terms provided for in the contract. In such situations, a court will[76] "grant an injunction to restrain publication of something in respect of which there is a clear contractual promise not to publish".[77] Furthermore, a court may find that such a term can be implied[78]; indeed it is often implied as a matter of law in employment contract situations,[79] or contracts providing for joint venture relationships.[80]

are public or State secrets which are highly sensitive . . . " (p. 679). The text more nearly parallels Robertson and Nicol (The "most common forms of relationship that are impressed by a duty of confidence are contractual, domestic, [and] governmental" (p. 176). However, they iterate a fourth category of "legal" relationships, but although there is discussion of the other three categories, they offer no discussion of this category; perhaps it means situations such as professional-client relationships (the obligation of confidence may be implied into such a contract: *e.g. Tournier v. National Provincial Union Bank of England* [1924] 1 K.B. 461 (banker/customer; see nn.208 and 296, below). The courts have held, for example, that in the lawyer-client relationship, there is not only a legal professional privilege, but also a duty of confidence.

[74] Gurry, above n.57, *op. cit.*, chap. 8.

[75] *ibid.*, p. 28; *e.g. Meadox Medicals v. V.P.I.*, unreported, High Court, April 27, 1982, Hamilton J. at pp. 42–47 (use of medical secrets by former employees in breach of a confidentiality clause).

[76] Unless the clause amounts to a restraint of trade and is void as a consequence; see *A.G. v. Barker* [1990] 3 All E.R. 257 (injunction to restrain publication, in breach of contract, by former royal servant). However, it is necessary to distinguish restraint of trade clauses and confidence clauses; although the former is often the context for the latter, they are separate. It is important to distinguish them, since the courts have held that a confidence clause if not express can be implied, whereas they would be unlikely to do so with restraint of trade clause. See, generally, Gurry, above n.57, *op. cit.*, pp. 205 *et seq.*

[77] Robertson and Nicol, above n.5, *op. cit.*, p. 177.

[78] *Saltman Engineering Co.*, above, n.59: "If two parties make a contract, under which one of them obtains for the purpose of the contract or in connexion with it some confidential matter, then, even though the contract is silent on the matter, the court will imply an obligation to treat that confidential matter in a confidential way, as one of the implied terms of the contract . . . ", cited with approval in Ireland in *House of Spring Gardens v. Point Blank* [1984] I.R. 611, 659 *per* Costello J. Scott, "Developments in the law of Confidentiality" [1990] Denning L.J. 77, pp. 79 *et seq.* Gurry, *op. cit.*, pp. 29 *et seq.*

[79] *Cranleigh Precision Engineering v. Bryant* [1965] 1 W.L.R. 1293 (Roskill J.); *Robb v. Green* [1895] 2 Q.B. 315; *Faccenda Chicken v. Fowler* [1987] Ch. 117; *Universal Thermosensors v. Hibben* [1992] 3 All E.R. 257 (Nicholls V.-C.) (former employees could not use trade secrets, especially stolen customer lists).

[80] *Saltman Engineering Co.*, above, n.59.

Furthermore, it is now clear that the duty to respect confidence applies not just to information given in a contractual relationship, but also to information imparted in confidence during negotiations, even if no contract eventuates.[81] Thus, in *LAC Minerals v. International Corona Resources*,[82] Corona had identified but could not exploit a very rich mineral seam on its own and adjoining land, so it sought a joint venture with LAC Minerals; the negotiations broke down, LAC bid for and won the adjoining land, and mined the seam. The Supreme Court of Canada[83] unanimously[84] held that there had been an actionable breach of confidence. Indeed, in *House of Spring Gardens v. Point Blank*,[85] the obligation to respect confidence arose and was enforced entirely independently of the contract.

For present purposes, it is important to appreciate that in such commercial circumstances, what is being protected is not the information itself but its commercial value and exploitability, and the action for breach of confidence here restrains not publication but use of the information. A restraint on use might be achieved by a restraint on publication, but any restraint on publication and thus on free speech is merely incidental to the real thrust of the action. Thus, the gravamen of the action is not publication but exploitation.

Furthermore, since the restraint arises out of a commercial relationship, such as, for example, the contract of employment, then, information obtained in the course of employment but unrelated to the employment relationship is not impressed with employment confidence. Thus "'[t]rivial tittle tattle', embarrassing *faux pas* or personal mannerisms of colleagues and superiors are not usually within this duty of confidence",[86] even though for these colleagues and su-

[81] *ibid.*, *per* Lord Greene M.R.: "the obligation to respect confidence is not limited to cases where the parties are in contractual relationship"; tool designs transferred during negotiations in strict confidence, defendant copied the design, negotiations broke down, defendant restrained from exploiting design.

[82] Above n.72. See generally Waters (1990) 69 *Can. Bar Rev.* 455.

[83] On breach of confidence in Canada, see, generally, Maddaugh and McCamus, *The Law of Restitution* (1990), pp. 670 *et seq.*, Canada Law Book Inc., Ontario.

[84] They divided on the appropriate remedy: the majority awarded a restitutionary remedial constructive trust (a concept explained in O'Dell, "The Principle Against Unjust Enrichment" (1993) 15 D.U.L.J. 27, 45–52; as to whether it was appropriate on the facts, see Davies [1990] L.M.C.L.Q. 4 (approving); Birks [1990] L.M.C.L.Q. 461 and Fridman (1991) 11 *Leg. Stud.* 304, (both critical)); the minority would have been content to award damages (on which see text with nn.215–229 below).

[85] *House of Spring Gardens*, above, n.59.

[86] Robertson and Nicol, above n.5, *op. cit.*, p. 177, citing *Coco*, above n.70 ("equity ought not to be invoked to protect trivial tittle tattle, however confidential") and *Searle v. Celltech* [1982] F.S.R. 92. Note, however, that a court would be most reluctant to characterise personal information as trivial: *Stephens v. Avery* [1988] 2 All E.R. 477, 481 *per* Browne-Wilkinson V.-C.

periors there is (at least arguably) a privacy interest worthy of protection.[87]

Thus, in the context of commercial relationships, the weakness of the breach of confidence jurisdiction as a mechanism for the protection of privacy interests is twofold. First, its ambit is much wider than such protection since it restrains publications and thereby protects some privacy interests only as an incident of protecting commercial exploitation of the information. Second, its ambit is too narrow, since much private information arises, is generated, or is available, in an employment setting, but since it does not arise directly in the employment relationship, it is not protected by the breach of confidence jurisdiction.

Notwithstanding however, the commercial essence of the action, it has been pressed into service further afield, with varying degrees of success, to protect other types of information, such as personal intimacies or state secrets, which, it is argued, have the necessary quality of confidence.

Personal confidences

Though much of the law on breach of confidence concerns commercial confidence, the doctrine is not confined[88] to that, but has been expanded to cover certain confidential domestic, personal and marital information.[89] This is an understandable extension.[90] In *Stephens v. Avery*,[91] the plaintiff passed on to the defendant in confidence, details of her extra-marital lesbian relationship with a woman subsequently killed by her husband; the defendant was restrained from disclosing such confi-

[87] In *X. Pte v. C.D.E.* [1992] 2 *Singapore L.R.* 996; substantially reproduced (1994) 68 A.L.J. 608, the plaintiff managing director of a company had a sexual relationship with his defendant secretary, the defendant had disclosed some of the details to the press of the relationship and of the plaintiff's cheating on the company, the plaintiff obtained interlocutory injunction restraining further disclosure; there was an arguable case that the information was obtained as a consequence of the employment relationship; though *semble* not as a consequence of the sexual relationship.

[88] *Stephens*, above, n.86 *per* Browne-Wilkinson V.-C.; *A.G. v. Guardian Newspapers (No. 1)* (*Spycatcher* case) [1987] 1 W.L.R. 1248, 1264–65 (Browne-Wilkinson V.-C.), 1293 (Lord Templeman); *A.G. v. Guardian Newspapers (No. 2)* [1990] A.C. 109, 147 (Scott J.), 281 (Lord Goff).

[89] *Argyll v. Argyll* [1967] Ch. 302; accepted as correct by Carroll J. in *A.G. for England and Wales v. Brandon Books* [1986] I.R. 597, 601.

[90] Human relations are determined by personal information shared with a partner but with no one else. Privacy, by controlling such information, is the moral capital we spend on love and friendship. Fried, "Privacy" (1968) 77 *Yale L.J.* 475, 489. Again, such confidences are protected because the integrity of a necessary social institution is at stake. Wilson, "Privacy, Confidence and Press Freedom" (1990) 53 M.L.R. 43, 54. There is an excellent discussion of such views in Reiman, "Privacy, Intimacy and Personhood" in *Philosophical Dimensions of Privacy: An Anthology* (Schoeman, ed., 1986, p. 300) Cambridge University Press.

[91] Above n.86; see also *Khashoggi v. Smith* (1980) 124 S.J. 149.

dences to the press, Browne-Wilkinson V.-C. holding that, in principle, there is "no reason why information relating to that most private sector of everybody's life, namely sexual conduct, cannot be the subject matter of a legally enforceable duty of confidentiality. . . . I can see nothing on either principle or authority to support the view that information relating to sexual conduct cannot be the subject matter of a duty of confidence".[92]

The action covers the disclosure by a photographer of photographs[93] taken for private purposes,[94] and as a consequence, it has been held that if "someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence".[95]

It is to the extent that the action for breach of confidence properly reaches such situations that it can properly be said to protect privacy interests. But stretching the action for breach of confidence into this sphere is not without its problems. As Stoljar points out:

> "confidentiality, at any rate in its present scope, cannot even reach situations where there has been no trusting or confiding of any sort, yet where the demands for privacy appear no less great."[96]

In many domestic settings, it is probably more accurate to characterise the situation as one in which such information is not entrusted, it merely arises. But, in answer to these "demands for privacy", an *Argyll* or *Stephens v. Avery* court finds that there has been an "entrusting" to bring the situation within the confines of the action for breach of confidence; though such ascription of entrusting is the sheerest fiction.[97] Thus, the

[92] Stephens, above at 482 *per* Browne-Wilkinson V.-C. Seemingly to the contrary: *X. Pte v. C.D.E.*, above, n.87. See, generally, above n.90 and also Post, "The Social Foundations of Privacy; Community and Self in the Common Law Tort" (1989) *Calif. L. Rev.* 957; Anderson, "Fundamental Issues in Privacy Law" in The Clifford Chance Lectures, Vol. I, *Bridging the Channel* (Markesinis ed., 1996), pp. 123, 128–130.

[93] See, generally, Beddard, "Photographs and The Right of the Individual" (1995) 58 M.L.R. 771.

[94] *Pollard v. Photographic Co.* (1888) 40 Ch. D. 345; *Hellewell*, above n.67 at 807. *cf. Williams v. Settle* [1960] 1 W.L.R. 1072 (subject owns copyright in photographs) noted Dworkin, "Privacy and the Press" (1961) 24 M.L.R. 185.

[95] *Hellewell*, above, n.67.

[96] Stoljar, above n.12, *op. cit.*, p. 79.

[97] Sometimes it is simply forgotten about: see *Hellewell*, above n.67, discussed on this point at p. 171 and n.213 below.

main problem with the action for breach of confidence as it seeks to protect private domestic information is that it must fictitiously ascribe an entrusting of that information so as to provide a remedy.

Government confidences

In recent years, the U.K. Government has, with varying degrees of success, sought to use the doctrine of breach of confidence as a supplement to the Official Secrets Acts to restrain the publication of Government secrets. Thus, in *Attorney General v. Jonathan Cape*,[98] the doctrine of breach of confidence was unsuccessfully invoked to prevent publication of the memoirs of a former cabinet minister, Richard Crossman. There were attempts, successful in England,[99] but unsuccessful in Australia[100] and Ireland,[101] to restrain by injunction the publication of Joan Miller's account of wartime espionage, *One Girl's War*. However, the most important of these cases was the attempt to restrain the publication of Peter Wright's account of Cold War espionage in *Spycatcher*, which reached the House of Lords twice[102] and resulted in a condemnation of sorts from the European Court of Human Rights.[103]

In the context of crown servants, it may be more appropriate to speak of a "duty of secrecy"[104] rather than merely an obligation of confidence, and it may also be that the duty arises as much by virtue of the servant's contract with the crown as by virtue of the extension of the doctrine of breach of confidence, and either or both of these explanations may serve to limit the extension of the doctrine of breach of confidence in this sphere. Nevertheless, these chequered cases establish that the action for breach of confidence does protect Government secrets. Note, however, that in the context of such secrets, not only must the Government fulfil the threefold test set by Megarry J. in *Coco*, but it must fulfil a further fourth requirement before the information is impressed with confidence, and that is that there is a "public interest"

98 [1976] Q.B. 752. See Bryan, "The Crossman Diaries – Developments in the Law of Breach of Confidence" (1976) 92 L.Q.R. 180.

99 *A.G. v. Turnaround Distribution* [1989] F.S.R. 169 (QBD). However, the "decision to injunct *One Girl's War* has been effectively over-ruled by [the] decision of the House of Lords [in *Lord Advocate v. Scotsman Publications* [1989] 2 All E.R. 852]". Robertson and Nicol, p. 189.

100 *A.G. for England and Wales v. Heinemann Publishers* (1988) 167 C.L.R. 30 (HCA).

101 *A.G. for England and Wales v. Brandon Book Publishers*, above n.89; noted Hogan, "Free Speech, Privacy and the Press in Ireland" [1987] P.L. 509.

102 *A.G. v. Guardian Newspapers (No. 1)*, above n.88; *A.G. v. Guardian Newspapers (No. 2)*, above n.88. See Barendt, "Spycatcher and Freedom of Speech" [1989] P.L. 204.

103 *Observer and Guardian v. U.K.* (1992) 14 E.H.R.R. 153; *Sunday Times v. U.K. (No. 2)* (1992) 14 E.H.R.R. 229.

104 *Spycatcher (No. 2)* [1990] 1 A.C. 109, 144 *per* Scott J; See also *A.G. v. Blake* [1996] 3 W.L.R. 741 (such duty did not extend to information no longer confidential).

in maintaining its secrecy;[105] and it seems that there is no public interest in one state maintaining another's secrets.[106] To the extent that the prevention of publication of, for example, *One Girl's War* or *Spycatcher* prevented the publication of private information about individuals, then their privacy is protected. But this is a very indirect consequence of the action.

Finally, Irish Constitutional law has made its own (unique[107]) contribution to the law on Government confidences. In the *Cabinet Confidentiality* case,[108] the Supreme Court held that cabinet discussions were absolutely confidential. The lesson of the Spycatcher affair is that discussion about Government will usually constitute political speech, which is given a very high level of protection by the European Court of Human Rights, interpreting Article 10 of the European Convention on Human Rights.[109] It is not difficult to envisage a situation in the future in which a former cabinet minister seeks to publish a diary of her cabinet career but the Attorney General of the day seeks an injunction in the Irish Courts to restrain publication; after *Cabinet Confidentiality* he would most assuredly be successful. The future former minister then appeals to Strasbourg, arguing that the injunction is a disproportionate restriction on her Article 10 right to free speech; after *Spycatcher* she would most assuredly also be successful. That resulting embarrassing conflict is only one absurd consequence of a most absurd decision.[110] Seeking harmony between the protection of rights under the Irish Constitution and the Convention by interpreting the former to reflect the standards of the latter,[111] thereby avoiding the embarrassment, would not seem to be open to the Supreme Court, since the "right"

105 *ibid. per* Lord Goff.

106 *A.G. for England and Wales v. Brandon Books*, above n.89: "There is no question of the public interest of this State being affected. . . . no cause of action has been shown" (*ibid.*, at p. 602).

107 United States and Australian courts had already rejected the doctrine (*U.S. v. Nixon*, 418 U.S. 683 (1974) and *Sankey v. Whitlam* (1978) 142 C.L.R. 1); at almost exactly the same time as the Irish Supreme Court considered this issue, it was also before the High Court of Australia: their Honours again unanimously rejected the doctrine; see *Commonwealth of Australia v. Northern Land Council* (1993) 67 A.L.J.R. 405 (HCA).

108 *A.G. v. Hamilton (No. 1)* [1993] 2 I.R. 250. See Hogan (1993), *Irish Political Studies* 131; Hogan and Whyte, *Kelly, The Irish Constitution* (3rd ed., 1994), pp. 250–257, 381–385, Butterworths, Dublin.

109 Indeed, in the action for breach of confidence, the public interest in political speech at the heart of the democratic process has been held to trump Government confidence; *e.g. Commonwealth of Australia v. Fairfax* (1980) 147 C.L.R. 39 (H.C.A.); approved in *A.G. for England and Wales v. Brandon Books*, above, n.101.

110 The Supreme Court has resisted attempts to extend its ambit (*e.g. O'Callaghan v. A.G.* [1993] 2 I.R. 17) perhaps indicating a certain discomfort with its absolute nature?

111 On this, see Dillon-Malone, "Individual Remedies and the Strasbourg System in an Irish Context" in Heffernan, above n.57, *op. cit.*, pp. 48, 48–50.

recognised in *Cabinet Confidentiality* is expressed to be "absolute".[112] What then?[113]

Public interest defence[114]

Even if information is impressed with an obligation of confidence, its disclosure may be justified in the public interest.[115] Although "the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure".[116] The courts initially took a very narrow view of when the public interest justified publication, confining it to the exposure of iniquity,[117] but it is now accepted that iniquity "is merely an instance of just cause and excuse for breaking

[112] [1993] 2 I.R. 250, 266 (implicitly) and 272 (expressly) *per* Finlay C.J. Thus in *Lang v. Government of Ireland* (1993) 4 I.C.R. 234, 242 O'Hanlon J. thought that such information was "*precluded* from disclosure" (emphasis added). Of course, this discussion assumes that the Supreme Court would not take the opportunity presented by such an occasion to overrule the earlier decision, or that there has been no constitutional referendum reversing the effect of the decision (see *e.g.* the second Provisional Report of the Constitution Review Group (January 31, 1996, dealing with Art. 28) pp. 4–5 and the Final Report of the Constitutional Review Group (May 1996), pp. 94–95). Hogan and Whyte also regret the decision, and hope for its reconsideration (p. 257).

[113] The stage would then be set for a repeat of the unedifying spectacle of speech restricted in Ireland but protected in Strasbourg seen in the aftermath of *Open Door Counselling v. Ireland* (1992) 15 E.H.R.R. 244. The issues were (i) left unresolved on procedural grounds, in *A.G. (S.P.U.C.) v. Open Door Counselling (No. 2)* [1994] 2 I.R. 333; (ii) not resolved (though it could perhaps have been) in *S.P.U.C. v. Grogan (No. 4)* [1994] 1 I.R. 46 (HC, Morris J.) and (iii) partially resolved by the 14th Amendment, discussed in *Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill, 1995* [1995] 1 I.R. 1. As a consequence of this decision, the return of the *Open Door* case to the Irish courts has now been settled: *The Irish Times*, June 24, 1995, p. 4. The unedifying spectacle has gone away, but the legal issues remain unresolved.

[114] See, generally, Cripps, *The Legal Implications of Disclosure in the Public Interest* (2nd ed., 1994), Sweet & Maxwell, London.

[115] This situation, where publication is in effect permitted, should be distinguished from the stronger situation where publication is *required* by virtue of a duty to disclose: *W. v. Egdell* [1990] Ch. 359; [1989] 1 All E.R. 1089 (duty of confidence owed by psychiatrist to patient overridden by duty to disclose to public authorities adverse psychiatric report on criminally insane patient); see Goff and Jones, p. 696, with references; Gurry, above n.57, *op. cit.*, p. 359.

[116] *Spycatcher (No. 2)* [1990] A.C. 109, 282 *per* Lord Goff. Accord: Gurry, above n.57, *op. cit.*, chap. XV. *Contra*: Meagher, Gummow and Lehane, above n.63, *op. cit.*, p. 885, para. 4125.

[117] See Robertson and Nicol, above n.5, *op. cit.*, p. 183 citing *Gartside v. Outram* (1856) 26 L.J. Ch. 113 (fraud); Maddaugh and McCamus, p. 678, ftn. 150 take the same position; so does Lord Goff in *Spycatcher (No. 2)* [1990] A.C. 109, 282. See also *Initial Services v. Putterill* [1968] 1 Q.B. 396. A similar principle applies in the case of copyright; see *e.g.* Phillips and Firth, *Intellectual Property* (2nd ed.) p. 112, paras 10.12–10.13, and pp. 163–164, paras. 14.5–14.6; Philips, (1978) 6 *Anglo-Am L. Rev.* 138; [1982] E.I.P.R. 336.

confidence".[118] (Furthermore, it is also now accepted that simply because the information is of a sexual nature does not render it iniquitous.[119]) In *Lion Laboratories v. Evans*, the Court of Appeal confirmed that it is no longer the case that it is "an essential ingredient of this defence that the plaintiffs should have been guilty of iniquitous conduct",[120] and in that case, the public interest was held to justify disclosures about potential faults in breath-testing machines in reliance upon which convictions for drunk driving had been obtained. This doctrine has justified exposure of corruption,[121] anti-competitive abuses,[122] "dangerous" cults[123] and public hypocrisy[124]; but the public interest in preserving the confidentiality of hospital records identifying potential AIDS victims outweighed the public interest in the freedom of the press to publish such information because victims ought not to be deterred from seeking treatment, and informed discussion of the disease could take place without publication of the information.[125]

However, there is an important[126] limitation on the principle. *Lion*

[118] *Fraser v. Evans* [1969] 1 Q.B. 349, 362 *per* Lord Denning M.R. *Contra*: *Castrol Australia Pty v. Em Tech Associates Pty* (1980) 33 A.L.R. 31 (S.C., N.S.W., Rath J). It seems that iniquity is also being broadened out to public interest in the context of copyright, *e.g.*, in *British Leyland v. Armstrong Patents* [1986] 1 All E.R. 850 (H.L.) reverse engineering in breach of copyright was validated for (what can be described as) public interest reasons.

[119] *Stephens v. Avery* [1988] 2 All E.R. 477, 480 *per* Browne-Wilkinson V.-C.: "a court of equity . . . will not enforce a duty of confidence, relating to matters which have a grossly immoral tendency. But at the present day the difficulty is to identify what sexual conduct is to be treated as grossly immoral".

[120] [1985] Q.B. 526, 550 *per* Griffiths L.J., and 538 *per* Stephenson L.J. See also, *Beloff v. Pressdram* [1973] 1 All E.R. 421.

[121] *Cork v. McVicar*, *The Times*, October 31, 1985, cited in Robertson and Nicol, above n.5, *op. cit.*, pp. 183–184.

[122] *Initial Services v. Putterill* [1968] 1 Q.B. 396 (horizontal price fixing in the laundry industry). Such activities would now probably be contrary to s.4 of the Competition Act 1991.

[123] *Church of Scientology of California v. Kaufman* [1973] R.P.C. 635, Goff J.; *Hubbard v. Vosper* [1972] 2 Q.B. 84 (both held revelation of Scientology courses justified under this head). See also *Church of Scientology v. Woodward* (1982) 154 C.L.R. 25 (H.C.A.).

[124] *Woodward v. Hutchins* [1977] 2 All E.R. 751 (CA) at p. 754 *per* Lord Denning M.R.:

> "If a group of this kind seek publicity which is to their advantage, it seems to me that they cannot complain if a servant or employee of theirs afterwards discloses the truth about them. If the image which they fostered is not a true image, it is in the public interest that it should be corrected. In these cases of confidential information it is a question of maintaining the confidence against the public interest in knowing the truth".

[125] *X. v. Y.*, above, n.72. Gostin, "Hospitals, Health Care Professionals and AIDS: The 'Right to Know' the Health Status of Professionals and Patients" (1989) 98 *Maryland L.Rev.* 12.

[126] And, in the view of Robertson and Nicol, unjustifiable: it defies "rational explanation", above n.5, *op. cit.*, p. 186.

clarified that not only the fact but also the degree of disclosure must be justified in the public interest. Thus in *Francome v. Mirror Group Newspapers*,[127] information was obtained in breach of confidence and tended to show the commission of crime; the public interest defence permitted the limited disclosure of the information to the relevant authorities, but not disclosure in the press.

The effects of prior or partial publication

Since it seems logical to assert that a secret once public cannot be made secret again, if follows that the "necessary quality of confidentiality" will not exist in respect of "something which is public property and public knowledge".[128] Thus, "something which is public property and public knowledge cannot *per se* provide any foundation for proceedings for breach of confidence".[129] As Lord Oliver so graphically put it:

> "Ideas, however unpopular or unpalatable, once released and however released into the open air of free discussions and circulations, cannot for ever be effectively proscribed as if they were a virulent disease".[130]

Therefore, if the information is already in the public domain, or is put there by the person to whom the duty is owed, then no duty of confidence can arise in respect of it.[131] Exceptionally, as in *Spycatcher*, the very fact that the information has made it into the public domain by virtue of the very breach of confidence which is sought to be restrained will defeat the action. The reality in such situations is said to be that "the material [is] no longer confidential".[132]

But the proposition that prior publication justifies further publication must not be carried too far, for at least two reasons. First, there are contrary *dicta*: "where confidential information is communicated in circumstances of confidence the obligation thus created endures, perhaps in modified form, even after all the information has been published".[133] Thus, in the context of the protection of commercial confidences, and notwithstanding any prior disclosure, information

[127] [1984] 2 All E.R. 408; followed *Lion Laboratories v. Evans* [1984] 2 All E.R. 417; approved *A.G. v. Guardian Newspapers (No. 2)* [1990] 1 A.C. 109, 269 *per* Lord Griffiths, 283 *per* Lord Goff; applied *X. Pte v. C.D.E.*, above, n.87.
[128] *Saltman Engineering Co.*, above, n.59.
[129] *Coco*, above, n.70.
[130] *Spycatcher (No. 1)*, above n.88 at 1321. "Widespread use of the information drives a hole in the blanket of confidence", *Dunsford and Elliott v. Johnson & Firth Brown* [1977] 1 Lloyd's Rep. 505, 509 (no injunction to restrain use of company information marked confidential but widely available within the company).
[131] This proposition applies in respect of commercial (*Mustad v. Allcock* [1963] 3 All E.R. 416n), domestic (*Lennon v. News Group Newspapers and Twist* [1978] F.S.R. 573) and government (*Spycatcher (No. 2)*, above, n.104 at 282, 285) confidences.
[132] Robertson and Nicol, above n.5, *op. cit.*, p. 188.
[133] *Coco*, above, n.70.

may still, *because of its value*, be regarded as "confidential" information and subject to an obligation of confidence.[134]

Such a conclusion can only be explained as protecting the commercial *exploitation* of the information rather than the information itself: it matters little if the information is already in the public domain if its use may be restrained or controlled by the party asserting the confidence. Thus, as we have seen above, the essence of the action for breach of confidence in the sphere is to control and exploit information, not maintain its secrecy.

Second, as we have seen in respect of disclosure in the public interest, both the fact and extent of disclosure must be justified; *mutatis*, it may follow that the prior publication of the information must justify both the fact and the extent of the subsequent publication, use or exploitation, that disclosure for one purpose is not disclosure for every purpose. Thus, it "is clear that the publication of information to a limited number of persons will not of itself destroy the confidential nature of the information".[135] The leading case in favour of this proposition seems to be *Schering Chemicals v. Falkman*.[136] Schering hired Falkman who in turn hired Elstein for the purposes of giving the Schering executives a public relations course to deal with the fallout from the withdrawal of one of their drugs, Primodos, following the discovery of side-effects. Elstein made a documentary about the drug, but, in this action, Schering obtained an injunction against him and the television company, Thames, for breach of confidence; for Shaw L.J.[137] the facts in medical journals were semi-public, a television programme was much more so. Though seriously questionable on its facts,[138] it is submitted that the above proposition is nevertheless correct. In a commercial setting, there are problems where the information exploited is in part public,[139] or

[134] *House of Spring Gardens*, above, n.78 (emphasis added). See *e.g. Cranleigh Engineering v. Bryant* [1964] 3 All E.R. 289; and *Speed Seal Products v. Paddington* [1986] 1 All E.R. 91 (C.A.). (In both, injunctions were granted to restrain use by defendants of information already disclosed; in *Cranleigh*, it was clamping strips for swimming pools, in *Speed Seal*, oil pipe couplings).
[135] Gurry, above n.57, *op. cit.*, p. 73.
[136] [1981] 2 All E.R. 321 (C.A.). Shaw and Templeman L.JJ.; Denning M.R., *dissenting*. See, also, *A.G. v. Heinemann* (1987) 75 A.L.R. 353, 432. Indeed, *Abernethy v. Hutchinson* and *Caird*, above n.62 are also good examples that publication to one group does not constitute publication to the world.
[137] [1981] 2 All E.R. 321, 338–339.
[138] See, *e.g.*, the dissent of Lord Denning M.R. and the criticism and very narrow reading offered in Robertson and Nicol, above n.5, *op. cit.*, p. 179.
[139] *Seager v. Copydex* [1967] 1 W.L.R. 923 (carpet grip design, partly based on information already public, partly – and innocently – on confidential information imparted during unsuccessful negotiations: held to amount to a breach of confidence; a defendant "should not get a start over others by using the information which he received in confidence" (at 932), approved in Ireland in *House of Spring Gardens*, above n.59. As

where information which is public is enhanced by the plaintiff's skill to create a more profitable product.[140] In the context of privacy rather than of commercial exploitation, it seems to follow that disclosure is justified only to the extent that information impressed with confidence has been disclosed; thus, the fact that I share a secret with a few close friends does not justify disclosure to the whole world;[141] again, the fact of a passing reference in a regional journal seems not, on this principle, to justify a full exposé on prime-time television.[142]

The strengths of the action of breach of confidence for the protection of privacy interests

From the perspective of the protection of privacy interests, if a plaintiff can come within the principle, and is not successfully met by a defence, then there are some important aspects of the action which make it very attractive. First, the law "will also ensure that a person who obtains information surreptitiously from another is not allowed to make use of such information to the detriment of the person from whom it [was] obtained".[143] Thus, Laws J. has written that if:

> "someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it."[144]

This must be regarded as an exception to the requirement that there be an entrusting by a confider: in such cases, there is nothing of the

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Megarry V.-C. put it, "he cannot build his superstructure as long as he is forbidden to use the foundations". (*Coco*, above, n.70). [On the remedy in *Seager v. Copydex*, described as "damages", see *Seager v. Copydex (No. 2)* [1969] 1 W.L.R. 809, 813; [1969] 2 All E.R. 718, 719 (CA) *per* Lord Denning M.R.; *Dowson & Mason v. Potter* [1986] 2 All E.R. 418; *Universal Thermosensors v. Hibben* [1992] 3 All E.R. 257; and generally Goff and Jones, pp. 683 *et seq*. On whether damages properly so called are in fact available for breach of confidence, see text with nn.215–229 below].

[140] Discussed by Megarry J. in *Coco*, above, n.70.

[141] *Dicta* of Browne-Wilkinson V.-C. in *Stephens v. Avery* [1988] 2 All E.R. 477, 481–482 seem to support this.

[142] *Schering Chemicals*, *mutatis*, above n.136. To like effect, Gurry, above n.57, *op. cit.*, pp. 73–76. In *G. v. Day* [1982] 1 N.S.W.L.R. 24, two "transitory and brief" references on a local television news show did not justify later full exposé.

[143] Keane, *Equity and the Law of Trusts in the Republic of Ireland* (1988), p. 349, para. 30.05. *Lord Ashburton v. Pape* [1913] 2 Ch. 469, 475 *per* Swinfen Eady L.J.; *Commonwealth of Australia v. Fairfax*, above, n.109. See generally, Wei, "Surreptit takings of Confidential Information" [1992] 12 *Legal Studies* 302.

[144] *Hellewell*, above n.67.

sort.[145] The paradigm of such surreptitious takings is telephone tapping. We have already seen that the placing of a hidden microphone can constitute a trespass.[146] That is invasion of privacy by physical intrusion; the question here is whether the person intruded upon can prevent a further invasion of privacy by the publication of the information so obtained. At common law, in England, information obtained pursuant to a private tap is obtained in breach of confidence,[147] but information obtained pursuant to a tap justified for reasons of public interest such as national security is not.[148] The European Court of Human Rights goes further; a tap in the former category is a breach of Article 8 of the Convention,[149] even a tap in the latter category is a breach if there is no law providing for it.[150] To this must be added the further constitutional refinement that a tap, in the absence of statutory justification, constitutes a breach of the constitutional right to privacy.[151] The position

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[145] *e.g.* Gurry, above n.57, *op. cit.*, p. 164.

[146] *Grieg*, above, n.14.

[147] *Francome v. Mirror Group Newspapers*, above n.127, (newspaper restrained from publishing information obtained from taps of plaintiff jockey's telephone).

[148] *Malone v. Metropolitan Police Commissioner (No. 2)* [1979] Ch. 344; [1979] 2 All E.R. 620, a narrow interpretation of *Malone* is argued for by Stoljar, above n.12, *op. cit.*, p. 76: for him, Malone is a case which suggests not that there is no right to privacy but that privacy is a qualified entitlement subject to the defence of the public interest, a defence made out on the facts. Meagher, Gummow and Lehane, above n.63, *op. cit.*, p. 871, para. 4109 seriously criticise *Malone*; Scott, *op. cit.*, p. 85, simply says that it must be regarded as wrongly decided. Further, the broad assertion of Megarry J. to the effect that a telephone conversation is not impressed with the necessary degree of confidence since the conversors take the risk of someone overhearing (also read narrowly by Stoljar, above n.12, *op. cit.*, p. 76, ftn.36) must be read in the light of *Francome* finding such a degree of confidence, and of *Katz v. U.S.*, 389 U.S. 347 (1967) and *Kennedy v. Ireland* [1987] I.R. 587 finding that such conversations could have the necessary quality of privacy for the purposes of constitutional protection. However, there seems to be a line of U.S. authority which accepts that no such reasonable expectation of privacy is present in mobile phone conversations (the cases are divided: see Speiser, Krause and Gans, *The American Law of Torts* (1991), Vol. 8, 30:17, C.B.C., New York (though it may be present in Email: *U.S. v. Maxwell* (1995) WL 259269; U.S. Air Force Court of Criminal Appeals). See also Castagnoli, "Someone's been reading my E-mail!" (1993) 9 C.L.P. 215.

[149] *A. v. France*, judgment, November 23, 1993; Series A, no. 277–A (police official and private individual bugged the latter's telephone conversation with another private individual; not prescribed by law; breach of Art. 8). See also *Huvig v. France* (1990) 12 E.H.R.R. 528; *Kruslin v. France* (1990) 12 E.H.R.R. 547. Nash (1995) 145 N.L.J. 954

[150] *Malone v. U.K.* (1985) 7 E.H.R.R. 14. See also *Klass v. Germany* (1980) 2 E.H.R.R. 214, illustrating that even if the tap is "prescribed by law", it must then be proportionate to one of the legitimate ends itemised in Art. 8(2).

[151] *Kennedy*, above n.148; *cp. Katz*, cited in Markesinis, above n.3, *op. cit.*, p. 411; see also pp. 413, 419–420. Again, given the importation of "proportionality" considerations into Irish law (see below, text with nn.431–436), even if the tap fulfils the statutory criteria, presumably it must be proportionate to some legitimate end.

in England[152] and Ireland[153] is now governed by statute, and amounts to this: tapping not justified by the statutes is (*prima facie*),[154] a breach of confidence (*Francome*), a breach of Article 8 of the Convention (even when done by public officials (*A. v. France*)), and a breach of the constitutional right to privacy (*Kennedy*); further, where the statutes justify the tapping, the tap itself and the safeguards in place must be such that the right to privacy is not disproportionately interfered with, otherwise the tap is in contravention of the Convention and is also unconstitutional.

Second, in *Abernethy v. Hutchinson* where the lecturer restrained his over-zealous student from publishing his lectures, he obtained the injunction against both student and publisher. This aspect of the case illustrates the more general proposition that the duty to respect confidence can extend to third parties where they are aware of ("or must suspect"[155]) the confidential nature of the information,[156] and a court will therefore grant injunctions against any person into whose hands the information has improperly come.[157] Thus, in *Oblique Financial Services v. The Promise Production Co.*,[158] Keane J. emphasised that:

> "the right to confidentiality, which the law recognises in these cases, would be of little value if the third parties to whom this information has been communicated were at liberty to publish it to another party, or in this case, to publish it to the general public, without the court being able to intervene . . . the obligation of confidentiality . . . can be enforced as against third parties."

Third, anyone who, with knowledge of an injunction[159] does an act calculated to undermine that injunction, commits a contempt of court; thus, once an injunction is granted to restrain a breach of confidence, anyone who, with knowledge of the injunction, publishes the confidence commits a contempt of court.[160] This is the effect of the unanimous decision of the House of Lords in *Attorney General v. Times Newspapers*.[161] Interlocutory injunctions[162] had been obtained against certain newspapers to prevent the publication of *Spycatcher* pending full trial of the action; here, it was held that for other newspapers, with knowledge of those injunctions, to publish extracts from the book before trial, would frustrate the purpose of that full trial, and amounted to impeding or interfering with the administration of justice by the court in the confidentiality actions, and was thus a contempt of court.[163] Irish law is

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[152] The Interception of Communications Act 1985; discussed in *R. v. Preston* [1993] 4 All E.R. 638 (H.L.) (no duty on prosecution to disclose existence of tap; no issue of fairness arises under s. 78 of the Police and Criminal Evidence Act 1984 to exclude prosecution reference to fact of telephone calls where results of tap not disclosed to defence); see also *R. v. Effik* [1994] 3 W.L.R. 583. On the Act, see Leigh, "A Tapper's Charter?" (1986) P.L. 8; and Row and Proulder, "A review of the right to privacy, with emphasis on interception of Communications" (1993) 9 C.L.P. 224. On *Preston* and *Effick*, (i) see Tomkins, "Intercepted Evidence: Now You Hear Me, Now You Don't" (1994) 57 M.L.R. 941; and (ii) contrast *Ludi v. Switzerland* (1993) 15 E.H.R.R. 173 (tap a breach of Art. 8, justified by prevention of crime; failure to cross examine agent provocateur a breach of Art. 6) and *Schenck v. Switzerland* (1991) 13 E.H.R.R. 242. However, evidence obtained by an unlawful police tap is nevertheless admissible in evidence in England: *R. v. Khan* [1996] 3 All E.R. 289 (HC).

[153] Interception of Postal Packets and Telecommunications Messages (Regulations) Act 1993; s. 98(5) of the Postal and Telecommunication Services Act 1983 as amended by ss. 1 and 13(3) of the 1993 Act. See, generally, Hall, *The Electronic Age. Telecommunication in Ireland* (1993), chap. 28, Oak Tree Press, Dublin, "Interception of Telecommunication", pp. 384 *et seq.*, in particular 389–397, and Collins, "Telephone Tapping and the Law in Ireland" (1993) 3 I.J.C.L. 31.

[154] In *Francome*, the public interest defence would have justified limited disclosure to the police; and in *R. v. A.* [1994] 1 N.Z.L.R. 429 (NZ CA) a tap without a warrant was prima facie contrary to s. 21 of the Bill of Rights Act 1990 (freedom from unreasonable search and seizure), but held reasonable on the facts.

[155] Robertson and Nicol, above n.5, *op. cit.*, p. 178 citing *B.S.C. v. Granada* [1981] A.C. 1096. (Granada held to have been aware that the documents acquired from a source internal to B.S.C. were intended to have a restricted internal circulation). Furthermore, "[e]ven if he comes by it [confidential information] innocently, nevertheless once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence". *Fraser*, above, n.118. See also *Spycatcher (No. 2)*.

[156] See, generally, Stuckey, "The Liability of Innocent Third Parties Implicated in Another's Breach of Confidence" (1981) 4 U.N.S.W.L.J. 73.

[157] See the discussion in *Argyll v. Argyll*, above n.89 *per* Ungoed-Thomas J., and in Gurry, above n.57, *op. cit.*, chap. XIII.

[158] [1994] 1 I.L.R.M. 74, 77. Indeed, anyone attempting to exploit or publish information obtained by virtue of the breach of confidence of another of which he had no knowledge may be restrained from so doing: *Printers and Finishers v. Holloway* [1964] 3 All E.R. 731 (Vita-tex, subsequent employers, restrained).

[159] *Lord Wellesley v. Earl of Mornington* (1848) 11 Beav. 180; (W obtained an injunction against M restraining him from cutting timber; B knowing of the injunction, cut, and was committed for contempt). *Seaward v. Paterson* [1897] 1 Ch. 545; (L obtained injunction to prohibit nuisance by T, T and two others created a nuisance, committal orders were made against all three for contempt by obstructing the course of justice; see *per* Lindley L.J. at p. 556). *A.G. v. Leveller Magazine* [1979] A.C. 440 (injunction restraining publication of identity of witness; those with knowledge of the injunction but not party to it, who publish, frustrate its purpose and commit a contempt since the publication "interferes with the due administration of justice" [1979] 1 All E.R. 745, 751 *per* Lord Diplock.). *Z. Ltd v. A.* [1982] Q.B. 558 (knowing assistance in breach of Mareva injunction binding other parties was a contempt for which bank liable).

[160] Thus, on this rule, knowledge of the injunction would seem to be a sufficient condition of liability. In the U.S., the rule is that the third party must not only have knowledge of the injunction, but he must also act in concert with the party to whom it is addressed: Dobbs, *Law of Remedies* (2nd ed., 1993), pp. 148–152, St. Paul, Minn. Thus, whilst the U.S. rule would reach *Wellesley* and *Seaward*, it would not catch *Times* (below) for want of concert.

[161] [1991] 2 All E.R. 398 (H.L.). See the critique in Stewart and Chesterman, above, n.64, pp. 22–34.

[162] In *A.G. v. Guardian Newspapers (No. 1)*, above n.88.

[163] It is a contempt if the third party "by his conduct knowingly impeded or interfered with the administration of justice by the court in the action between" the first two parties (above n.161 at 405 *per* Lord Brandon) or if the third party's "act constitutes a wilful interference with the administration of justice" (at 415 *per* Lord Oliver).

now[164] to the same effect. With regard to *Bar Council of Ireland v. Sunday Business Post*,[165] the *Sun* published a letter the subject-matter of an interlocutory injunction to restrain a breach of confidence, and was held to have committed a contempt which "seriously interfere[d] with the administration of justice".[166] Indeed, in *Times Newspapers*, the House went further and tested the compatibility of this conclusion against Article 10 of the European Convention, and did not find it wanting: it seemed to Lord Oliver that protecting the injunctions by contempt proceedings was "clearly necessary for maintaining the authority of the judiciary if for nothing else".[167] It remains to be seen whether Strasbourg will accept this assessment.[168]

Fourth, interim injunctions are available[169] pending trial to prevent the breach of confidence. In one sense, the availability of interim injunctions to restrain a breach of confidence is simply a reflection in this context of the more general case, and for that reason alone is an attraction for a plaintiff seeking to protect a privacy interest. However, in the context of invasion of privacy, where the harm occurs simply by virtue of the publication, a plaintiff's need is peculiarly great, and the clash between privacy and speech is most stark.[170] In such cases, the *American Cyanamid* presumption in favour of the *status quo* usually pulls in favour of the injunction.[171] On the constitutional plane, therefore, Costello J. in *X. v. Flynn*, held that:

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[164] See also: *Johnston v. Moore* [1965] N.I. 128 (Injunction granted to restrain interference by landowner with a right of way; son of landowner aided landowner to block right of way: son in contempt). *Alumina Contractors v. Manning*, *Irish Times*, March 21, 1981 (criticised in von Prondzynski, "Trade Disputes and the Courts: The Problem of the Labour Injunction" (1981) XVI *I.J. (N.S.)* 229, 239).

[165] Unreported, High Court, March 30. 1993.

[166] At p. 5 of the transcript.

[167] Above n.161 at 421.

[168] See the discussion of this legitimate aim in O'Dell, "Speech in a Cold Climate. The 'Chilling Effect' of the Contempt Jurisdiction" in Heffernan, above n.57, *op. cit.*, p. 219, 223–228; but note the reasoning of the Court in the subsequent *Putz v. Austria*, judgment, February 22, 1996; and *Prager and Obershlick v. Austria* (1996) 21 E.HR.R. 1 (defamation action by judge proportionate to legitimate aim of protecting authority of judiciary).

[169] If a plaintiff satisfies the requirements set out in *American Cyanamid v. Ethicon* [1975] A.C. 396 and *Campus Oil v. Minister for Energy (No. 2)* [1983] I.R. 88, as discussed in a breach of confidence situation in *A.G. v. Times Newspapers* [1991] 2 All E.R. 398, 422 *per* Lord Oliver, above n.161 and *Oblique Financial Services*, above, n.59. Such an injunction was refused in *Private Research v. Brosnan* [1995] 1 I.R. 534.

[170] *e.g. Schering Chemicals*, above n.136 at 333 *per* Denning M.R.: "In some respects breach of confidence is different. Whilst freedom of expression is a fundamental human right, so also is the right of privacy".

[171] The "whole point of a case like this is to preserve the status quo pending resolution of the action, and the status quo would be non-publication", *Oblique Financial Services*, above, n.59.

"the duty of the court is to protect the plaintiff's right to privacy. I am not saying that the plaintiff will succeed at the hearing of the action. What I am saying is that she has undoubtedly suffered and that she will continue to suffer if the defendant's conduct is permitted to continue. In those circumstances, the Court has a clear duty to protect the plaintiff until these issues can be tried, bearing in mind that journalists have a constitutionally protected right to communicate. . . ."[172]

When such injunctions are granted, they are seen as injurious to the right to free speech, and often excoriated by commentators as unjustifiable prior restraints.[173] Infamous examples of the granting of such an injunction include *Schering Chemicals v. Falkman*[174] (restraining the broadcast of a documentary about a discontinued drug) and *Spycatcher (No. 1)*[175] (restraining the publication of *Spycatcher*).

However, there is an emerging line of authority which is more sensitive to media speech rights. First, Lord Denning dissented strongly in *Falkman*, arguing that to restrain Thames from broadcasting Elstein's documentary about Schering would be an impermissible prior restraint; no privacy interest was in issue, (not least because the information was of a commercial nature), and the public's right to receive information tipped the balance against the injunction. Second, Lord Denning has attempted[176] to extend the rule that no injunction will lie to restrain a libel[177] to cover breach of confidence.[178]

Third, there has been a move away from *American Cyanamid* in the context of interlocutory injunctions to restrain breach of confidence. Since it is rare for there to be a full trial of the action (*Spycatcher* in this respect being the exception rather than the rule), usually, therefore, any "'prior restraint' means permanent restraint".[179] Aware of this, the

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[172] *X. v. Flynn*, above, n.10.

[173] *e.g.* Barendt, above n.5, *op. cit.*, pp. 114 *et seq.*; Hall, pp. 536–538.

[174] Above, n.136.

[175] *A.G. v. Guardian Newspapers (No. 1)*, above n.88 (injunctions granted to restrain publication of *Spycatcher* and newspaper coverage of its allegations). See Robertson and Nicol, above n.5, *op. cit.*, pp. 190–194. They were only partially condemned in the European Court of Human Rights: *Observer and Guardian v. U.K.*, above, n.103; *Sunday Times v. U.K. (No. 2)*, above, n.103. See Maguire, "Introduction" in Heffernan, above n.57, *op. cit.*, p. 197.

[176] *Fraser*, above, n.118; *Hubbard v. Vosper* [1972] 2 Q.B. 84; *Schering Chemicals*, above, n.136.

[177] *Bonnard v. Perryman* [1891] 2 Ch. 269 (CA); *Sinclair v. Gogarty* [1937] I.R. 377 (SC); *Connolly v. RTÉ* [1991] 2 I.R. 446.

[178] Not all of his brethren were convinced, accepting that the injunction would be refused only if there is a defamation in issue in the breach of confidence case: *Woodward v. Hutchins* [1977] 2 All E.R. 751, 755 *per* Lawton L.J.; *Lion Laboratories*, above, n.127 at 431, *per* O'Connor L.J. However, it seems recently to have been accepted that the libel rule applies in the context of malicious falsehood: *Easycare v. Lawrence* [1995] F.S.R. 597.

[179] Robertson and Nicol, above n.5, *op. cit.*, p. 173.

courts have begun to alter their attitude to such applications. The House of Lords has held that where neither party could adequately be compensated in damages if the decision went against one or the other, then the court ought to consider the respective chances of the parties to succeed at full trial.[180] Since realistically neither party to a privacy/speech dispute can adequately be compensated in damages, this principle should apply in such situations. Thus, in *Cambridge Nutrition v. British Broadcasting Corp.*,[181] Kerr L.J. approved of the "great reluctance of the courts to fetter free speech by injunction",[182] and as a consequence held that where the subject matter of an injunction application was a broadcast or publication, the court should not apply the *American Cyanamid* test and instead assess the relative strengths of the parties' cases.[183] Again, in *Lion Laboratories v. Evans*, Griffiths L.J. held that when "the press raise the defence of public interest, the court must appraise it critically, but, if convinced that a strong case has been made out, the press should be free to publish, and leave the plaintiff to his remedy in damages".[184]

This development is given added impetus in Ireland by virtue of the constitutional protections of speech. Thus, in *Attorney General for England and Wales v. Brandon Books*, Carroll J. held that any "consideration of the question of preventing publication of material of public interest must be viewed in the light of [Art. 40.6.1°i] . . . in my opinion there is *prima facie* a constitutional right to publish information and the onus rests on the plaintiff to establish in the context of an interlocutory application that the constitutional right of the defendant should not be exercised".[185] Indeed, for Carroll J., what was "at stake [was] the very

[180] In *Factortame v. Secretary of State for Transport (No. 2)* [1991] 1 All E.R. 70.
[181] [1990] 3 All E.R. 523 (CA).
[182] *ibid.*, at 536 *per* Kerr L.J. with references. To like effect, see also *Femis-Bank (Anguilla) Ltd v. Lazar* [1991] 2 All E.R. 865. Avoiding *Cyanamid* was a crucial plank in Lord Denning's reasoning in *Schering Chemicals*, above, n.136.
[183] This is part of a broader trend to pay more attention to the merits of the case on an application for an interim or interlocutory injunction where there is little chance of the case proceeding to full trial: see *Benckiser GmbH. v. Fibrisol Service Ltd*, unreported, High Court, Costello J., May 13, 1988, *Griggs v. Dunnes Stores*, unreported, High Court, McCracken J., October 4, 1996; Zuckerman, "Interlocutory Injunctions on the Merits" (1991) 107 L.Q.R. 196; Delany, "Interlocutory Injunctions – Adequacy of Damages and Other Discretionary Factors" (1993) 15 D.U.L.J. (*N.S.*) 228.
[184] *Lion Laboratories*, above, n.127 at 435. Thus, in the United States, where the rule against prior restraints makes it extremely difficult to obtain an interlocutory injunction to restrain a breach of confidence, in *Snepp v. U.S.*, 444 U.S. 507 (1980) (with *New York Times v. U.S.*, 403 U.S. 713 (1971), the *Pentagon Papers* case, the U.S. equivalent of *Spycatcher*) the Government successfully sought restitution of the profits made by Snepp from his breach of (a contractual duty of) confidence.
[185] Above, n.89 at 600; though as McMahon and Binchy point out (above n.9, *op. cit.*, p. 689) this was *dictum* and not ratio.

important constitutional right to communicate *now* and not in a year or more . . .".[186] O'Hanlon J. was even more forthright in *Maguire v. Drury*, in which he all but announced a rule against prior restraint:

> "it appears to me that the balance of convenience should also take into account the general undesirability of holding up – perhaps for years the publication of material when the ultimate decision is likely to be that it was quite lawful to publish. Otherwise the interlocutory injunction could be used effectively to encroach in a significant manner on the freedom of the press."[187]

In conclusion under this head, although a plaintiff can apply for an interim injunction to restrain a breach of confidence, the courts are increasingly likely to exercise the balance of convenience in favour of publication, and, as a consequence of the Constitution, may even have reached a rule against prior restraints.

The weaknesses of the action of breach of confidence for the protection of privacy interests

The extension of the action for breach of confidence into the area of domestic intimacy is the primary reason why it is being championed as a legal mechanism for the protection of privacy. However, like the other mechanisms discussed in this paper, it is not always adequate to the task. The primary reason for this is that its primary focus is elsewhere, on the protection of the commercial exploitability of the information rather than on the information itself.

For example, one leading author begins his analysis of this topic thus: "the willingness of equity to intervene in a case where one party was abusing the confidence placed in him by another was well established in the first half of the last century. But it has been given renewed vigour in modern times by the growth of the "information economy", the greatly enhanced value of "intellectual property", and the inadequacy, in some respects, of the law of copyright . . .".[188] As a consequence, there is a trend to characterise information as property[189] and to protect

[186] Above, n.89 at 602 (emphasis in original).
[187] *Maguire*, above, n.10 at 116. Such a tendency underlay the decision of Murphy J. in *Dunnes Stores v.* MANDATE, *The Irish Times*, April 1, 1996 (affirmed without reference to this point: [1996] 1 I.L.R.M. 384 (S.C.).
[188] Keane, above n.143, *op. cit.*, p. 354, para. 30.01, Butterworths, London). To like effect, Meagher, Gummow and Lehane, above n.63, *op. cit.*, p. 864, para. 4101 on the inadequacies of intellectual property law as a reason for the increase in litigation involving the action for breach of confidence.
[189] Meagher, Gummow and Lehane, above n.63, *op. cit.*, p. 877, para. 4116.

it for that reason.[190] Whether or not the law eventually accepts this characterisation, (and there are many other competing organising theories for the action for breach of confidence),[191] it sits well with the primary focus of the action as protecting the commercial exploitation of the information rather than keeping it secret, (although a consequence of the former may be the latter). Again, in the case-law, one will find requirements to the effect that to succeed in his claim, "the plaintiff must establish not only that the occasion of communication was confidential, *but also* that the content of the idea was clearly identifiable, original, of potential commercial attractiveness and capable of being realised in actuality".[192] Indeed, in the Supreme Court, in *House of Spring Gardens v. Point Blank*, McCarthy J. "venture[d] the view that the obligation of secrecy whilst enforced by equitable principles, depends more on commercial necessity than moral duty".[193] Furthermore, we perceived a focus on exploitation of information protected by the doctrine of breach of confidence in the context of commercial confidential relationships, and this was reinforced in the context of the discussion of prior and partial publication where it was made clear that as the law now stands, even if information is public, its use can be restricted so as to allow the plaintiff commercially to exploit it. Finally, in *Attorney General for England and Wales v. Brandon Books*,[194] Carroll J. clearly saw

[190] See, *e.g.*, Stuckey, "The Equitable Action for Breach of Confidence: Is Information Ever Property?" (1981) 9 *Sydney L. Rev.* 402; Gurry, above n.57, *op. cit.*, pp. 46–56. *Spycatcher (No. 1)*, above, n.88 at 1264 *per* Browne-Wilkinson V.-C.; Palmer and Kohler, "Information as Property" in *Interests in Goods* (McKendrick and Palmer, eds., 1992), p. 187, Lloyds, London. Indeed, in the leading text on media law, Roberston and Nicol organise their discussion of breach of confidence around the assumption of information as property; for example, they remark "[t]he problem is to find acceptance for the principle that the right to impart and receive information outweighs any rights of property in that information". (p. 186). Contra: Coughlan, above n.57, *op. cit.*, pp. 158 *et seq.* and *Breen v. Williams*, unreported, September 6, 1996, Brennan C.J., High Court of Australia. This chapter takes no side in this debate.

[191] "Property, contract, bailment, trust, fiduciary relationship, good faith, unjust enrichment have all been claimed, at one time or another, as the basis of the judicial intervention. Indeed, some judges have indiscriminately intermingled these concepts". Jones, "Restitution of Benefits Obtained in Breach of Another's Confidence" (1970) 86 L.Q.R. 463, 463. See, generally, Gurry, above n.57, *op. cit.*, chaps. II and III, concluding that it is best seen as *sui generis*.

[192] *Fraser v. Thames Television* [1984] Q.B. 44, 66 *per* Hirst L.J.

[193] [1984] I.R. 611, 709; in the High Court, Costello J., at p. 663 had suggested "moral duty" as the basis of the action. Nevertheless, the principles laid down in that case clearly can apply only to commercial confidences: 663–664 *per* Costello J., approved 696 *per* O'Higgins C.J. (manufacture by defendants of bullet-proof vests based on designs received in confidence constituted a breach of confidence: remedy of account of profits).

[194] Above, n.89.

the principles of breach of confidence as "principles to be applied between private individuals in a commercial context".[195]

In summary, (and whatever the basis upon which courts of equity enforce the duty to respect confidence),[196] the essence of the action for breach of confidence is that it allows the commercial exploitation of information;[197] and, as an incident, may keep information secret. Though there have been extensions (for example, to cover domestic or Government confidences), they have been just that, extensions; they do not define the essence of the action, rather the commercial essence of the action conditions these extensions.

As a consequence, when personal relationships have to be analogised to this commercial essence, the courts must, as we have seen, often fictitiously ascribe a confiding. Attempting to include personal intimacies, though understandable, distorts this commercial focus. However, if that were the only reason against utilising the action as a general vehicle to protect privacy interests, it would be easy simply to assert: well, then, change or enlarge the focus. However, there are further reasons. In combination, they are compelling. First, publication may not amount to sufficient detriment for the purposes of the action though it plainly constitutes an invasion of privacy. Second, the action for breach of confidence is under-inclusive in its ambit if it is successfully to prevent invasions of privacy since it does not afford full protection to a wide range of personal and private information. Third, the action is also under-inclusive since "communication of information is not the only means by which a loss of publicity can occur".[198] Fourth, the requirement of a confiding carries with it the requirement of a confider to enforce the confidence, yet this can pose problems in asserting the secrecy of official records generated by the record-holder rather than confided by the subject who plainly has a privacy interest in maintaining their secrecy. Fifth, the remedies available seem to cater to the commercial nature of the action, and in some sense are inadequate for that, and are certainly often inadequate[199] for the protection of privacy interests. Let us take each such point in turn.

[195] *ibid.*, at 601: thus communications between husband and wife "would also be protected on different grounds", as it seems, would Government confidences.

[196] Coughlan, above n.57, *op. cit.*, p. 157. Meagher, Gummow and Lehane, above n.63, *op. cit.*, pp. 865–870, paras. 4102 – 4108. See, for example, the many possible bases asserted by Jones (above, n.191), or the possible view of breach of confidence as a tort (below, n.228), or the issues posed in Hammond, "Is Breach of Confidence Properly Analysed in Fiduciary Terms" (1979) 25 *McGill L.J.* 244.

[197] To similar effect, Fridman, *The Law of Torts in Canada* (1990), p. 205, Carswell, Toronto.

[198] Gurry, above n.57, *op. cit.*, p. 14.

[199] Coughlan, above n.57, *op. cit.*, p. 164 titles his discussion of relief "Inadequate Remedies".

First, detriment. It is an open question as to whether the breach must result in an identifiable detriment. It was an express element of Megarry J.'s threefold test in *Coco v. A.N. Clark*,[200] and the Court of Appeal clearly thought so in *Faccenda Chicken v. Fowler*,[201] though there was less emphasis on it in the House of Lords in *Spycatcher (No. 2)*.[202] Of course, the mere fact of publication could be deemed to constitute sufficient detriment:

> "It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism".[203]

On the other hand, if its necessity implies that it means something more than merely publication, then the action is less protective of privacy interests than it otherwise would be.

Second, the action does not reach a range of personal, intimate and private, information. On one view, "confidentiality cannot help where a total stranger uses another's name or likeness".[204] Again, there can be situations where one wishes to keep something so secret that one has not confided it to anyone; if another deduces it, the action for breach of confidence will not prevent the other from publishing it.[205] Similarly, the action for breach of confidence would not have availed the plaintiff in *Melvin v. Reid*.[206] Indeed, in the context of employment confidences, we saw that the action for breach of confidence does not reach trivial tittle tattle, embarrassing *faux pas* or personal mannerisms of colleagues and superiors, even though there is here, to some extent, a privacy interest worthy of protection. Furthermore, whilst a privacy interest might protect against speculation, especially speculation about personal relationships, it is difficult to see how the action for breach of confidence can prevent its publication. There is plainly no room for the action for breach of confidence in such a circumstance. Third, and

[200] "... there must be an unauthorised use of that information to the detriment of the party communicating it". *Coco*, above, n.70 (emphasis added). However, he stressed that he was tentative (423, 428) in suggesting this as one of the requirements of the action.

[201] Above n.79 (breach of employment confidence).

[202] [1990] 1 A.C. 109, 256 *per* Lord Keith; 281–282 *per* Lord Goff ("open" question; detriment not always necessary); 270 *per* Lord Griffiths.

[203] *The Commonwealth of Australia v. Fairfax*, above, n.109 at 51–52 *per* Mason J., approved in Ireland in *A.G. for England and Wales v. Brandon Books*, above, n.89.

[204] Stoljar, above n.12, *op. cit.*, p. 83. Of course, this may amount to defamation (see text with nn.41 – 51, above), where it does not, if the law is to see this as an actionable invasion of privacy interests, it will have to find a remedy otherwise than by means of the action for breach of confidence.

[205] Semble, Gurry, above n.57, *op. cit.*, p. 111.

[206] 112 Cal. App. 285 (1931).

related to this, if the protection of privacy is to protect against intrusion as well as publication, then breach of confidence will not supply a cause of action in which to prevent the former. Nor are the torts discussed above sufficient.

Fourth, take the position of confidence in official records, such as medical or college records, which broadly follow the pattern of information about X given to a record-holding institution Y. Clearly, Y owes X a duty of confidence in respect of the information so confided. Thus, if the information is obtained from the records, it is clear X can restrain its unauthorised use by Y and third parties. It is unclear whether Y (the record-holding institution) can restrain unauthorised use by third parties. The general rule is that the party complaining has to be the party who is entitled to the confidence;[207] that is, the party complaining must be the party *to* whom the duty of confidence is owed, and not the party *by* whom it is owed. Therefore, where information is given by A in confidence to B, B cannot complain if A publishes that information. In the context of the example involving the record-keeping institution, since Y owes the duty to X, then X and not Y would seem to be the proper, indeed the only, plaintiff.

On the other hand, it seems that a hospital has an interest in maintaining the confidence of its medical records;[208] it has been held that where questionnaires are filled in by parties and returned in confidence, then the recipient has an interest in restraining a third party from abusing this information,[209] and the recipient of a letter sent by the confider in the context of an investigation obtained an interim injunction to restrain a newspaper from publishing the letter.[210] If these cases now represent the law, then it would seem that Y could restrain the unauthorised use of the information.[211] Of course, this would require

[207] It is "only the confider who may seek a remedy for breach of confidence". Goff and Jones, p. 686; to like effect, Gurry, above n.57, *op. cit.*, p. 121.

[208] *X. v. Y.*, above, n.72 (confidentiality in medical records successfully raised by hospital: the case is also important for the fact that this confidence outweighed public interest in knowing that practising doctors were AIDS sufferers); see also *T. v. A.G.* (1988) 5 N.Z.F.L.R. 357. See generally O'Neill, "Matters of Distinction – The Parameters of Doctor/Patient Confidentiality" (1995) M.L.J.I. 94. The Irish case of *Desmond v. Glackin (No. 2)* [1993] 3 I.R. 67 (see text with n.296 *et seq.*, below.) concerned financial records filed by the plaintiff with the Central Bank; the case was taken by the plaintiff to restrain the Bank from disclosing the files, but why should the Bank of its own motion not also be able to exercise such a duty of confidence, by analogy with the hospital in *X. v. Y.*?

[209] *Koo v. Lam* (1992) 23 I.P.R. 607.

[210] *The Bar Council of Ireland v. Sunday Business Post*, unreported, High Court, March 5, 1993, recorded in the later *The Bar Council of Ireland v. Sunday Business Post*, unreported, High Court, Costello J., March 30, 1993.

[211] Thus, in respect of correspondence both to and from a lawyer, at common law, he could only assert a duty of confidentiality in respect of the latter; in respect of the

that a benign view of detriment be taken, since, in general the only detriment Y (the institution) suffers would most likely be the fact of disclosure. However, if Y could not establish the analogy with hospital records, then it would not be able to rely on breach of confidence to protect that information. Therefore, although there is a possible route by which Y can maintain the privacy of such information in the action to restrain a breach of confidence, it is convoluted and problematic.

Again, there is a related difficulty: much information in official records is not given to the institution but generated by it, so that it is information about X, held by Y, but not given to Y by X. For example, it may be reports on X prepared by a third party for Y, or it may be the results of tests, and the like. It is difficult to see how such generated rather than confided information can be impressed with a duty of confidence, though it is clear that X has a legitimate privacy interest at stake.[212] However, "some judges are beginning to dispense with the requirement that there should be a confider".[213] We have already seen that this is not a realistic requirement in the context of eavesdropping for example; furthermore, the State has been held to have an interest in maintaining the secrecy of information both imparted to it and generated by it.[214] If that were to represent the general case, then there would also be here a possible route by which Y can maintain the privacy of such information in the action to restrain a breach of confidence, but, as before, it is convoluted and problematic.

Fifth, remedies. The primary remedy for breach of confidence is an injunction preventing publication or exploitation of the information.[215] For many plaintiffs seeking to protect their privacy, this will be attractive and sufficient. But posit a situation in which there has already been an invasion of privacy. The plaintiff will then seek damages, and will

former, he owes the duty, it is his client, and only his client, who is held to have an interest in confidentiality. In *Niemietz v. Germany* (1992) 16 E.H.R.R. 97 a lawyer was held entitled to rely on Art. 8 in respect of correspondence both to and from him. In other words, the express protection of privacy under Art. 8 does not have the difficulty discussed in the text.

212 There may be some remedy for disclosure of such information under the Data Protection Act 1988. See, generally, Clark, above n.11, *loc. cit.* However, such remedies are limited, since the Act is primarily aimed at allowing individuals to access data stored on computer about them, and to correct it where it is inaccurate.

213 Coughlan, above n.57, *op. cit.*, p. 160, semble referring to Scott, "Developments in the law of Confidentiality" [1990] Denning L.J. 77, and discussing *Francome v. Mirror Group Newspapers* [1984] 1 W.L.R. 892. In the recent *Hellewell*, above, n.67, Laws J. seemed to ignore this requirement when he said that the publication of surreptitious photographs and stolen diaries would both constitute a breach of confidence: where is the confiding?

214 This can probably be derived from *Spycatcher*.

215 *Lord Ashburton v. Pape* [1913] 2 Ch. 469 (CA). See Meagher, Gummow and Lehane, above n.63, *op. cit.*, p. 887, para. 4127. Goff and Jones, p. 686.

be met with traditional orthodoxy[216] that equity does not give compensatory damages,[217] but only an account of profits,[218] for a breach of confidence.[219] There is a narrow historical damages jurisdiction in equity,[220] a "beneficent interpretation"[221] of Lord Cairns' Act[222] can create an impression of giving a damages remedy, and New Zealand[223] and

216 See, generally, Meagher, Gummow and Lehane, above n.63, *op. cit.*, pp. 634, paras 2301 *et seq.*

217 See, generally, Capper, "Damages for breach of the equitable duty of confidence" (1994) 14 *Legal Studies* 313. Aitken, "Developments in Equitable Compensation: Opportunity or Danger?" (1993) 67 A.L.J. 596. Goff and Jones, p. 693 assert, however, that "an English court may well award damages even though it is inappropriate to grant equitable relief". I am not convinced that the cases yet support such a proposition, though *cf.* the cases cited in nn.84 and 139 above and see now, also, the speech of Lord Bourne-Wilkinson in *Target Holdings v. Redferns* [1996] A.C. 421 (HL). However, if and when such damages become available, the principles discussed in *John v. M.G.N.* [1996] 3 W.L.R. 593, 607 on compensatory damanges in defamation would seem apt (*mutatis*).

218 *House of Spring Gardens*, above, n.59. *cp. A.G. v. Guardian Newspapers Ltd (No. 2)* [1990] 1 A.C. 109 *per* Lord Goff. Difficulties in calculation do not prevent this remedy being applied: *My Kinda Town Ltd v. Soll* [1982] F.S.R. 147. Gurry, above n.57, *op. cit.*, p. 424. But an account of profits does not constitute a damages remedy (McGregor, *Damages* (15th ed., 1988), p. 3), and even if it ought properly to be characterised as damages (Birks, below n.227, p. 59), its aim is restitutionary (to reverse unjust enrichment) not compensatory. See Goff and Jones, p. 690.

219 Except where the duty to respect confidence arises from a contract, then the breach of confidence constitutes a breach of contract, and damages can be awarded for the breach of contract: Capper, (1994) 14 *Legal Studies* 313, 314, ftn. 5. Semble, to the extent (i) that equitable compensation is properly available for breach of fiduciary duty (Meagher, Gummow and Lehane, above n.63, *op. cit.*, pp. 636–638, para. 2304) and (ii) that any given relationship of confidence also constitutes a fiduciary relationship (see Gurry, above n.57, *op. cit.*, pp. 158–162), then there may also for that reason be equitable compensation for breach of confidence which is a breach of fiduciary duty.

220 McDermott, "Jurisdiction of the Court of Chancery to Award Damages" (1992) 109 L.Q.R. 652.

221 *Spycatcher (No. 2)*, above, n.104 at 286; see also "Damages in Equity – A Study of Lord Cairns' Act" (1975) 34 C.L.J. 224, and Meagher, Gummow and Lehane, above n.63, *op. cit.*, p. 640, paras 2307 *et seq.*, discussing 15 issues of construction.

222 Chancery Amendment Act 1858 (21 & 22 Vict. c. 27), s.2. See now, in the U.K., s.50 of the Supreme Court Act 1981. For an analysis of this Act in the Irish context, see Farrell, *Irish Law of Specific Performance* (1994), pp. 19 *et seq.*, Butterworths, Dublin. *Patrick v. Williams* (1897) 31 I.L.T.R. 166, 167.

223 ". . . the law imposes a duty of confidence. For its breach a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity, or statute". *Aquaculture Corporation v. New Zealand Green Mussel Co.* [1990] 3 N.Z.L.R. 299 (N.Z.C.A.) at p. 301 *per* Cook P.; see Beatson, (1991) 107 L.Q.R. 209. Michalik, "The Availability of Compensatory and Exemplary Damages in Equity", (1991) 21 Vict. U.C.L.R. 391. The Court of Appeal expressed similar sentiments in *Mouat v. Clark Boyce* [1992] 2 N.Z.L.R. 559, 566. (On appeal, the Privy Council reversed on the grounds that there had not been a breach of fiduciary duty, and did not need to reach the issue of remedy: [1993] 4 All E.R. 268). See, generally, Rickett, "Where are we going with Equitable Compensation?" in *Trends in Contemporary Trust Law* (Oakley, ed., 1996), p. 177, Oxford.

Canadian[224] courts have impatiently[225] swept away this restriction on damages in equity in general;[226] and from all of this, some academic commentators have argued in favour of such damages.[227] The recognition of breach of confidence as a tort[228] would add impetus to this argument. However, that is not yet the law, and for so long as that remains the case, the private plaintiff seeking compensation for an invasion of privacy by means of the action for breach of confidence will be disappointed. Furthermore, the constructive trust of which the commercial plaintiff can make much use,[229] probably avails the private plaintiff little; thus, the absence of damages means that there is often little incentive to sue after the fact of publication.

These various problems may all in time be resolved so as to allow the action for breach of confidence to protect privacy interests. But, as things now stand, the action requires too much patching to achieve that end. But even if the action to restrain a breach of confidence *per se* is not apt, the fact that it has been used in the past and will no doubt continue in the future to be used to protect privacy interests means that important and correct insights will have been and will continue to be reached which could usefully be deployed in other contexts in which the protection of privacy interests is properly implicated.

224 *LAC Minerals v. International Corona Resources* (1989) 61 D.L.R. (4th) 14 (S.C.C.), (the majority accepted an equitable jurisdiction to grant compensatory damages but awarded a remedial proprietary constructive trust, the minority would simply have awarded compensatory damages). See also *Canson Enterprises v. Boughton* (1991) 85 D.L.R. (4th) 129, 152 *per* La Forest J., *Norberg v. Wynrib* (1992) 92 D.L.R. (4th) 449, 484–507 *per* McLachlin J.

225 Rather more patience is to be seen in the High Court of Australia: *Warman International v. Dwyer* (1995) 69 A.L.J.R. 362 (HCA).

226 On damages in equity in general, see Gummow, "Compensation for Breach of Fiduciary Duty" in *Equity, Fiduciaries and Trusts* (Youdan, ed., 1989), p. 57, Carswell, Toronto. If the restriction in general fell, it follows that it would equally fall in the particular case of breach of confidence. A case in which a court awarded "damages" for breach of confidence is *Talbot v. General Television Pty* [1980] V.R. 224.

227 *e.g.* Birks, "Civil Wrongs: A New World" in Butterworth Lectures 1990–1991 (1992), p. 55 at pp. 90–94, 101–104, Butterworths, London; Gurry, above n.57, *op. cit.*, pp. 364–365, and chap. XXIII. Aitkin, "Developments in Equitable Compensation: Opportunity or Danger" (1993) 67 A.L.J. 596, 600.

228 North, "Breach of Confidence: Is there a New Tort?" (1972) 12 J.S.P.T.L. 149; Vickery, "Breach of Confidence: An Emerging Tort" (1982) 82 Col. L. Rev. 1426.

229 There is much discussion of the remedy of the constructive trust for breach of confidence in many of the articles and cases in the previous footnotes, but see, especially, *LAC Minerals v. International Corona Resources* (1989) 61 D.L.R. (4th) 14 (SCC).

The wardship jurisdiction

Apart from breach of confidence cases, the courts have also had to balance free speech and privacy in the wardship jurisdiction.[230] The conflict arises in this way:

> "From the late seventeenth century, the Court of Chancery claimed a power, derived from the monarch,[231] to exercise protection, and, indeed, control over people with disabilities; in particular, children. The court does not simply act as a delegate of the child's natural parents; it has considerably wider powers. The relationship between this "inherent jurisdiction" and the wardship jurisdiction, which originated earlier with the purpose of safeguarding the property of a child with no parent, is obscure. The two jurisdictions have often been treated as indistinguishable, but more recently the point has been made that the wardship jurisdiction is simply one mode of exercising the inherent jurisdiction. . . . The criterion for intervention is that it is the court's duty to treat the child's welfare as "paramount".[232] . . . Under this jurisdiction the courts may issue orders against third parties . . . for example, . . . a newspaper should not publish material about a child."[233]

Thus, in protecting the welfare of a ward, the court may protect the ward's privacy, and therefore make an order restricting speech.[234] As a prior issue, it may be questioned whether the inherent and wardship jurisdictions, as aspects of the Prerogative, properly survived Independence. Though the Prerogative itself did not,[235] the courts have been

230 *e.g.* Markesinis and Deakin, above n.6, *op. cit.*, pp. 612–614. See, generally, Seymour, "Parens Patriae and Wardship Powers: Their Nature and Origins" (1994) 14 O.J.L.S. 159. The leading case is now *Re Z. (A Minor) (Identification: Restrictions on Publication)* [1995] 4 All E.R. 961 (C.A.); see Moriarty [1996] C.L.J. 212.

231 As an aspect of the Royal Prerogative: *Barnardo v. McHugh* [1891] A.C. 388, 395 *per* Lord Halsbury L.C., quoting from *Re Spense* (1847) 2 Ph 247, 252. See also *Scott v. Scott* [1913] A.C. 417, 437 *per* Viscount Haldane L.C.; 482 *per* Lord Shaw. *Maguire*, above, n.10 at 114. In *Re Birch* (1829) 29 L.R. Ir. 274, 275, Lord Ashbourne C. refers to "delegation . . . of the prerogative jurisdiction . . . to the Lord Chancellor" (cited with approval by Blayney J. in *Re a Ward of Court* [1995] 2 I.L.R.M. 401, 439 et seq.). As a consequence, the publication of in camera wardship proceedings is a contempt: *Re Martindale* [1894] 3 Ch. 193 (now codified in England as s. 12(1) of the Administration of Justice Act 1960). In Ireland, s. 45 of the Courts (Supplemental Provisions) Act 1961 provides an in camera jurisdiction, it refers in particular to "matrimonial causes" (s. 45(1)(a)) and "minor matters" (s. 45(1)(b)), from which a jurisdiction similar to the English is derived. See the important discussion of these issues in *Re K.A.S., an infant; P.S.S. v. J.A.S. (otherwise C.)*, unreported, High Court, Budd J., May 19 and 22, 1995.

232 See, *e.g.*, *J. v. C.* [1970] A.C. 668. See also *Re T (a minor)* (1996) 146 N.L.J.R. 1577 (CA).

233 Eekelaar, "A Jurisdiction in Search of a Mission: Family Proceedings in England and Wales" (1994) 57 M.L.R. 839, 849–850.

234 See, generally, Wright, "The Press, Children and Injunctions" (1992) 55 M.L.R. 857.

235 *Byrne v. Ireland* [1972] I.R. 241; (prerogative of immunity of State from suit in tort did not survive Independence). *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101.

astute to find similar doctrines inherent in the text of the Constitution.[236] Impressionistically, a combination of "the full, original jurisdiction" of the High Court in Article 34.3.1° and the personal rights of the citizens,[237] would be sufficient, if necessary,[238] to generate the inherent and wardship jurisdictions.

The first case in which the privacy of a ward was invoked to restrict publication is the famous *Re X.*[239] Here, the mother and stepfather of a sensitive fourteen-year-old sought to stop publication of a book that ascribed depraved and immoral behaviour to her deceased father, which would cause her gross psychological harm if it ever came to her notice. The Court of Appeal was unanimously of the view that the book could be published. Lord Denning M.R. held that "it would be extending the wardship jurisdiction too far and infringing too much upon the freedom of the Press for us to grant an injunction in this case".[240] A successful example of the invocation of the jurisdiction to restrain publication is supplied by a case almost ten years later reported under

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[236] *Webb v. Ireland* [1988] I.R. 353. An analogue to the prerogative of treasure trove was located in Art. 10 (at 383 *per* Finlay C.J., Henchy and Griffin JJ. concurring) or Art. 5 (at 393 *per* Walsh J., 398 *per* McCarthy J.).

[237] The judgments of Geoghegan J. in *F.N. v. Minister for Education* [1995] 1 I.R. 409 and of Costello J. in *D.D. v. Eastern Health Board*, unreported, High Court, May 3, 1995; *The Irish Times*, June 26, 1995, to the effect that Art. 42(5) of the Constitution imposes an obligation upon the State to cater for the needs of a child with special needs which cannot be provided by the parent or guardian, would seem to come very close, as would the judgment of Finlay C.J. in *Re D.* [1987] I.R. 449, referring to Art. 40.3.2°. See, generally, Hogan and Whyte, pp. 1040–1060.

[238] As a consequence of various statutes (set out in the judgment of Hamilton C.J. in *Re a Ward of Court*, above, n.231 at 407–411), "there is now vested in the High Court . . . the jurisdiction formerly exercised by the Lord Chancellor . . . " (*per* Blayney J. in *Re a Ward of Court*, above, n.231 at 439). But those statutes do not seem to create the jurisdiction *de novo* (see also *State (Bruton) v. Fawcitt*, unreported, High Court, Keane J., July 31, 1984), they simply assume its existence; as such, they are vesting and not enabling provisions. The text poses the question whether that jurisdiction could have carried over, thus posing the question whether there was anything to vest. If not, and even if the Constitution can generate an alternative, it would not be the jurisdiction formerly vested in the Lord Chancellor, and those statutes would be so many dead letters. See Tomkin and McAuley, "Re a Ward of Court: Legal Analysis" (1995) M.L.J.I. 45, 46–47.

[239] *Re X. (a minor)* [1975] 1 All E.R. 697 (CA); see also *Re F. (a minor)* [1977] Fam. 58. *Re X.* is famous not least for Lord Denning's aphorism that we "have as yet no general remedy for the infringement of privacy" (at 704). Though this could be read restrictively, the "as yet" is suggestive of a future development of such a general remedy.

[240] Above *Re F.*, at 59 and 703 respectively. For similar sentiments on free speech in this context, see *Re F.* [1977] 1 All E.R. 114, 125 *per* Lord Scarman; *Re X., Y. and Z. (Wardship: Disclosure of Material)* [1992] F.L.R. 84, 98 *per* Waite J.; *Re C. (a minor) (Wardship: Medical Treatment) (No. 2)* [1989] 2 All E.R. 791, 793 *per* Lord Donaldson M.R.

the same name: *Re X.*[241] Newspapers were prohibited from disclosing the identity of a ward who was the daughter of a notorious mother.

Recently, in *Re H-S*,[242] Ward J. came to a similar conclusion. The respondent had previously been in the news, his children were now wards of court. Whilst the respondent remained in the public eye, Ward J. held that the respondent's freedom to publish and the media's freedom to publish matters of public interest did not outweigh the risk of harm to his children if the media were to disclose their identities or address. In those cases "the publications restrained related to the care and upbringing of the children over whose welfare the court was exercising a supervisory role".[243] Publications beyond that cannot be restrained by this jurisdiction. Thus, the wardship jurisdiction does not, *per se*, provide a basis for restricting publicity about a criminal trial in which the father of the ward is a defendant,[244] (even though the father's trial is in respect of his abduction of the ward). Furthermore, Hoffmann L.J. has stressed that because this jurisdiction is an exception to speech,[245] it must be narrowly construed:

> "But this new jurisdiction is concerned only with the privacy of children and their upbringing. It does not extend as Lord Donaldson of Lymington M.R. made clear in *Re M.* [[246]] to 'injunctive protection of children from publicity which, though inimical to their welfare, is not directed at them or at those who care for them'. It therefore cannot apply to the fact that the child's father has been convicted of a serious offence,

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[241] *Re X. (a minor) (Wardship: Injunction)* [1984] 1 W.L.R. 1422 (Balcombe J.); *sub nom: X Co. v. A.* [1985] 1 All E.R. 53. This case has come to be regarded as exceptional: see Wright, above n.234, *op. cit.*, p. 860, ftn. 19.

[242] *Re H-S (minors: protection of identity)* [1994] 3 All E.R. 390 (CA). Compare the decision of the same judge in the later *Re Z. (a minor) (Identification: Restrictions on Publication)* [1996] 2 W.L.R. 88 (CA). See also *Re M. and N. (minors) (Wardship: Freedom of Information)* [1990] 1 All E.R. 205. *Re W. (a minor) (Wardship: Freedom of Publication)* [1992] 1 All E.R. 794.

[243] *R. v. Central Independent Television* [1994] 3 All E.R. 641, 649 *per* Neill L.J. To like effect, Waite L.J.: "Any element of confidentiality concerning a child in respect of whom the court's jurisdiction is invoked belongs not to the child but to the court. It is imposed to protect the proper functioning of the court's own jurisdiction, and will not be imposed to any further extent than is necessary to afford that protection" at 666.

[244] *Re R. (a minor) (Wardship: Restrictions on Publication)* [1994] 3 All E.R. 658 (CA); though there are *dicta* in the case which suggest that the judge in the criminal trial might have the power to do so under s. 39 of the Children and Young Persons Act 1933 (as amended) (at 668 *per* Bingham M.R., 673 *per* Millett L.J.). For an analysis of the operation of the section, and its impact on freedom of expression, see *ex p. Crook* [1995] 1 All E.R. 537 (CA). Of course, the trial itself may be heard *in camera* (see *Cleveland County Council v. F.* [1995] 2 All E.R. 236). See also *Re Z*, above, n.242 at 104–105, 108–110, *per* Ward L.J.

[245] A point approved by O'Hanlon J. in *Maguire*, above, n.10 at 115.

[246] [1990] 1 All E.R. 205, 216.

however distressing it may be for the child to be identified as the daughter of such a man".[247]

The fact that the jurisdiction is related to the *court's* interest in the care and welfare of the ward means first, that, as the above cases show, many valid privacy interests which a ward may seek to protect fall through the cracks of the wardship jurisdiction, and, second, the court can impose the order even against the wishes of the ward or his or her family.[248] Nevertheless, the recent judgments supply some of the very few examples in English law of sustained judicial discussion of privacy interests. The closest Irish law comes to a case in this jurisdiction is not a case in the wardship jurisdiction at all, but one in which the principles in the above cases were discussed. In *Maguire v. Drury*,[249] the parties were judicially separated,[250] their children remained with the wife. The husband blamed the breakdown upon the wife's infidelity with a priest, stated his intention of suing "some as yet unspecified authorities in the Catholic Church",[251] and sought to sell his story to the press, precipitating many stories in the media. In an interlocutory application on the part of the wife to restrain further media coverage, O'Hanlon J, could not in the circumstances derive "from the provisions of Article 40 or Article 41 of the Constitution any grounds which lead me to believe that there is a fair question to be tried as to whether some right of the plaintiff [wife] under those articles will be breached if further revelations of the kind which have already appeared in print are repeated in the future . . . ".[252] Furthermore, in respect of the children, who had been added as plaintiffs, O'Hanlon J. referred to the wardship cases, and continued:

> "Nevertheless, while holding that such jurisdiction is vested in the courts, the decided cases show that there has been a marked reluctance to exercise it in a manner which would entrench on the freedom of expression enjoyed by the press and by the media generally, merely to avoid the distress caused by publication of matters which show up a parent or parents in a sordid or unfavourable light".[253]

Strictly speaking, the wardship cases did not apply, since the children were not wards. However, O'Hanlon J. accepted that those principles apply mutatis to the constitutional protection of privacy, and then sought to reconcile that with the right to free speech. In all of the torts addressed, in the action for breach of confidence, and in the wardship jurisdiction, there are important impulses towards the protection of privacy; witness, for example Griffiths L.J. in *Skyviews*, Lord Griffiths in *Spycatcher*, and Laws J. in *Hellewell*. There are equally important impulses towards the balancing of the protection of privacy with free speech; witness the public interest defence, Hoffmann L.J. in *Re R.* and O'Hanlon J. in *Maguire*. And yet, it will now be clear that the various legal mechanisms pressed into service to protect privacy interests simply do not adequately address the issues posed by a need to protect privacy interests. To take only two examples from among the many identified. First, the protection afforded is haphazard; it is anomalous that the taking of photographs or the reading of a diary is not a trespass,[254] but the publication of the photograph or the contents of the diary is a breach of confidence.[255] Thus the intrusion is not an actionable invasion of privacy, but the publication is. Second, the remedies are also haphazard; in respect of trespass, a plaintiff will get damages but probably not an injunction, whereas in breach of confidence, it is the other way around. It may be that some of the weaknesses (of breach of confidence and the various torts) have been overstated; the point remains that for so long as there is no legal action the primary focus of which is the protection of privacy, existing legal actions will have their proper primary focus distorted in vain attempts to accommodate the protection of privacy interests within them. For that reason, such actions are inappropriate locations for debates about the clash between privacy and speech.[256] It is necessary, therefore, to turn to a more

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[247] *R. v. Central Independent Television*, above, n.243. One commentator said of this decision that as a consequence, "children's welfare can now also be sacrificed at the altar of freedom of speech". White (1994) 144 N.L.J. 1623, 1624.

[248] *Re W.*, unreported, Court of Appeal, March 8, 1995 (wards restrained from talking to the press).

[249] [1995] 1 I.L.R.M. 108.

[250] See *M.M. v. C.M.*, unreported, High Court, O'Hanlon J., July 26, 1993.

[251] Above n.249 at 111. If the facts alleged are true, then one basis for such an action may be breach of fiduciary duty, by analogy with a recent line of Canadian authority: *Norberg v. Wynrib* (1992) 92 D.L.R. (4th) 449 (SCC); followed in *Taylor v. McGillivray* (1994) 110 D.L.R. (4th) 64 (physician having sex with 16-year-old client constituted a breach of fiduciary duty); in turn applied in *J. (L.A.) v. J. (H.)* (1993) 102 D.L.R. (4th) 177; *C. (P.) v. C. (R.)* (1994) 114 D.L.R. (4th) 151.

[252] Above n.249 at 113. Given that the information was substantially in the public domain already, the action for breach of confidence would not lie. O'Hanlon J. seems simply to be applying the idea that prior disclosure *prima facie* destroys privacy in the more general context of the constitutional protection of privacy.

[253] *ibid.*, at 115.

[254] *Grieg*, above, n.14.

[255] *Hellewell*, above, n.67. See also *Shelley Films v. Rex Features* [1994] 3 Ent. L.R. 45 (interlocutory injunction restraining publication of photographs probably obtained by trespass). Contrast *O'Sullivan v. Cork Examiner*, above, n.22 (similar action based on trespass alone was unsuccessful).

[256] Contra, seeing the various actions as sufficient: Scott, p. 86; Prescott, "*Kaye v. Robertson* – A Reply" (1991) 54 M.L.R. 451; replying to Prescott: Markesinis, "The Calcutt Report Must not be Forgotten" (1992) 55 M.L.R. 118. The same debate is played out at a higher level of abstraction in Thompson, "The Right to Privacy" (1975) 4 *Phil. & Pub. Affairs* 295 and Inness, *Privacy, Intimacy and Isolation* (1992), chap. 3, Oxford.

appropriate location, an independent legal doctrine which has as its primary focus the protection of privacy.

A RIGHT TO PRIVACY

The impulse to protect privacy evidenced by the attempts to extend the various legal mechanisms is a noble one. That impulse ought to be encouraged but not in the manner in which it has currently found expression.[257] It ought to be instead the impetus for the development of an independent legal doctrine which has as its primary focus the protection of privacy. Such an action would therefore provide adequate remedies for any invasion of such privacy interests. (It was, after all, on the level of adequate remedies that the other actions most often fell down.) It would also allow free speech considerations to be properly accommodated. Various routes for the development of such an action have been suggested.

The routes to the right

First, take the case of *Prince Albert v. Strange*.[258] The injunctions granted in that case to restrain publication of a reproduction or description of etchings done by the plaintiff and Queen Victoria are often described[259] as injunctions granted to restrain a breach of confidence, and that is how the case is now treated in the books.[260] Yet, Stoljar distills a different ground for the decision.[261] Pointing to the fact that Lord Cottenham L.C. refers to "the private character of the sketches" and that "the privacy being the right invaded",[262] Stoljar extracts from *Prince Albert v. Strange* a principle which "proscribes the unwanted publication of one's pictures or family scenes" and derives from that a principle which

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[257] See generally, Wacks, above n.5, *op. cit.*, pp. 21–43, 93–107. *Hinish v. Meier & Frank Co. Inc.*, 166 Or. 482; 113 P. 2d. 438 (1941) *per* Lusk J.:

> "There is a good deal to be said for the view that in these cases invasion of privacy was the wrong, though breach of contract, of confidence, or a property right was the peg upon which the decision was hung . . . But we deem it unnecessary to search for a right of property, or a contract, or a relation of confidence . . . It is time that fictions be abandoned and the real character of the injury be frankly avowed".

[258] (1849) 1 Mac. & G. 25, 64 E.R. 293. On this and other royal scandals, see Meagher, Gummow and Lehane, above n.63, *op. cit.*, p. 868, para. 4106, ftn. 3.

[259] In *e.g. House of Spring Gardens*, above, n.59. See also *Pollard v. Photographic Co.* (1888) 40 Ch. D. 345; itself now judicially explained in terms of breach of confidence: *Hellewell.*, above, n.67.

[260] Keane, above n.143, *op. cit.*, p. 346, para. 30.02.

[261] Stoljar, above n.12, *op. cit.*, pp. 78–81.

[262] (1849) 1 Mac. & G. 25, 46–47 *per* Lord Cottenham L.C.

extends "to publicity of one's name, for the interference with privacy is the same in either case".[263] For him, this is the "central principle governing the whole area of unwanted or intrusive publicity".[264] Furthermore, "the disclosure of embarrassing but accurate personal facts[265] . . . does not constitute a *separate* category of privacy, but is a matter already contained in such invasions as the publication of one's likeness or name".[266] However, one problem with this analysis is that the *Prince Albert* principle is a creature of equity, and, as the law now stands, would attract only those remedies available in a chancery court.[267] However, it is strongly persuasive that a common law court should also develop such a principle[268]; indeed, the *Prince Albert* principle formed one of the foundations upon which Warren and Brandeis built their famous argument in favour of a tort which protected the right to privacy at common law in the U.S.[269]; Stoljar's point is that such an argument is also possible on this side of the Atlantic.

Second, other common law jurisdictions are evolving on similar lines. In Canada, in 1973 one commentator perceived the courts to be on the brink of recognising a tort of invasion of privacy,[270] they are

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[263] Stoljar, above n.12, *op. cit.*, p. 80.

[264] *ibid.*

[265] As in *Melvin v. Reid*, 112 Cal. App. 285 (1931).

[266] Stoljar, p. 80. That being so, the case of *Byron v. Johnston* (1816) 2 Mer. 29, likewise a Chancery case, in which the poet injuncted the publication of bad poetry ascribed to him, and which likewise is susceptible of explanation in terms of passing off (Meagher, Gummow and Lehane, above n.63, *op. cit.*, p. 897, para. 4207) may supply the basis for the development of a remedy for appropriation of personality.

[267] These remedies are discussed above, in the context of breach of confidence (text with nn.215–229), and their primary deficiency is the absence of a solid damages jurisdiction.

[268] Of course, this passage assumes the reality of a continuing division between law and equity: "fusion" of law and equity would render such a sentence otiose. On fusion, see Keane, above n.143, *op. cit.*, p. 21, para. 2.20; p. 25, para. 2.24; Meaghar, Gummow and Lehane, above n.63, *op. cit.*, chap. 2.

[269] Warren and Brandeis, "The Right of Privacy" (1890) 4 Harv. L. Rev. 193. (Also *Gee v. Pritchard* (1819) 2 Swan. 402; *Abernethy v. Hutchinson* (1825) 47 E.R. 1313; *Morison v. Moat* (1851) 9 Hare 241). The modern U.S. understanding of the tort stems from Prosser, "Privacy" (1960) 48 Calif. L. Rev. 83. The Warren and Brandeis article initially received mixed judicial reviews (*Robertson v. Rochester Folding Box Co.*, 171 N.Y. 538; 64 N.E. 442; *Pavesich*, above, n.44). Both it and the Prosser article have been recognised by White J. as impressive credentials for a right of privacy: *Cox Broadcasting*, above, n.4. See generally, Kutner and Reynolds, *Advanced Torts* (1989), pp. 385–472, Carolina Academic Press. On current status, compare Zimmermann, "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort" (1981) 68 Connell L. Rev. 291, with Gavison, "Too Early for a Requiem: Warren and Brandeis were Right to Privacy v. Free Speech" (1992) 43 S. Cal. L. Rev. 437.

[270] Gibson, "Common Law Protection of Privacy: What to do Until the Legislators Arrive?" in *Studies in Canadian Tort Law* (Klar, ed., 1973), 343, Butterworths. Gibson commented that the "material is there", all that was needed "is an appropriate opportunity, and more important, a Lord Atkin to declare its existence" (at p. 576). In

getting ever closer to the brink.[271] Many Canadian Provinces[272] have introduced privacy statutes; the Ontario courts have developed a tort of appropriation of personality;[273] the Supreme Court of Canada, in *Hunter v. Southam*, has discovered a general public law right to privacy in the Canadian Charter of Rights and Freedoms,[274] ("a right to be let alone by other people",[275] "the right to be secure against encroachment upon the citizens' reasonable expectation of privacy in a free and democratic society"[276]); and as a consequence, Mandel J. at first instance in *Roth v. Roth*,[277] found a remedy at private law for an invasion of privacy.

Likewise, New Zealand.[278] There were far-reaching *dicta*,[279] and the courts accepted, at the interlocutory stage, that there was an arguable case in favour of a tort of invasion of privacy,[280] and though there was

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1990, I observed of this: "*Kaye [v. Roberston]* probably was the opportunity, alas for a Lord Atkin!" (O'Dell, "Defamation", p. 72, n. 95). Indeed, it was a similar case involving the photographing of Bismarck's corpse on his deathbed (RGZ 45, 170) that saw the beginning of the development of the modern German privacy law: Markesinis, above n.3, p. 64; Lorenz, above n.3, *op. cit.*, p. 85.

271 *Burnett v. R.* (1979) 94 D.L.R. (3d) 281 (H.C., Ont.) (defamation action, court open to privacy-type arguments). But *cf. Turton*, above, n.46.

272 Fridman, above n.197, *op. cit.*, p. 189, n. 3, and pp. 197–201, Carswell, Toronto. Linden and Klar, *Canadian Tort – Law, Cases, Notes & Materials* (10th ed., 1994), p. 94, Butterworths, Toronto. Burns, "Law and Privacy: The Canadian Experience" (1976) 54 Can. Bar. Rev. 1.

273 Though the publicity and privacy elements have yet to be separated out: see the cases cited in n.319 below., and the discussion in Irvine, (1982) 18 C.C.L.T. 37 and Fridman, above n.197, *op. cit.*, pp. 193–197.

274 *Hunter v. Southam* (1984) 11 D.L.R. (4th) 641 (S.C.C.); from the right enumerated in the Charter "to be secure against unreasonable search and seizure" (Art. 8), the Supreme Court derived the more general unenumerated right to privacy. See Ehrcke, "Privacy and the Charter of Rights" (1985) 43 Adv. 53.

275 (1984) 11 D.L.R. (4th) 641, 643 *per* Dickson J., adopting the formulation of Stewart J. in *Katz v. U.S.*, 389 U.S. 347 (1967), at p. 350.

276 *ibid. per* Dickson J., adopting the formulation in the Court below: (1983) 147 D.L.R. (3d.) 420, 426 (Prowse J.A.; Alberta C.A.).

277 (1991) 9 C.C.L.T. (2d.) 141; 4 O.R. (3d.) 740. See also *F. (P.) v. Ontario* (1989) 47 C.C.L.T. 231 (plaintiff claimed invasion of privacy by publication of true facts in a photograph; motion to strike out denied). *Capan v. Capan* (1980) 14 C.C.L.T. 191 (plaintiff claimed persistent harassment by defendant constituted invasion of privacy; motion to strike out refused); *Saconne v. Orr* (1981) 19 C.C.L.T. 37 (invasion of privacy by making a recording of a private telephone conversation played at a public meeting).

278 Burrows, "Protection of Privacy" in *The Law of Torts in New Zealand* (Law Book Company, Sydney (Todd, ed.), p. 754.

279 *e.g.* "The courts will always be careful to guard and protect personal freedoms including the right to privacy", *R. v. Owen* [1984] 2 N.Z.L.R. 416, 417 *per* Woodhouse P. See Burrows in Todd, p. 763.

280 *Tucker v. News Media Ownership* [1986] 2 N.Z.L.R. 716. "I support the introduction into New Zealand common law of a tort covering invasion of personal privacy at least by public disclosure" [1986] 2 N.Z.L.R. 716, 733 *per* McGechan J. (on appeal, Court of

a little academic scepticism[281] as to whether the courts would go the extra mile and develop a tort of privacy, they have nonetheless done so. In *Bradley v. Wingnut Films*,[282] the plaintiff sought to prevent the use of images of his property in a movie. Gallen J. cautiously accepted the *dicta* to the effect that tort law protected a right of privacy,[283] but held that it was not made out on the facts.[284]

These, then, are the influences at work in the common law, influences to which Irish law is also susceptible. Granted, there are *dicta* that there is no right to privacy at common law,[285] but argument by assertion and repetition is not probative. These *dicta*, uttered without reference to the contrary *dicta* in many earlier cases,[286] which can be countered by less unreceptive *dicta* in later cases,[287] take no account of the potential for development of the *Prince Albert* principle or of the impulse which drives the utilisation of many legal doctrines, especially breach of confidence, to protect privacy interests. The Canadian and New Zealand experiences show that these impulses can be channelled into a single tort protecting against invasion of privacy. There is no reason why Irish tort law should not also follow the same route. Indeed, there is every reason why it should.

The common law tradition suggests that Ireland should be alive to the developments of the common law in other jurisdictions. Indeed, one of the reasons for the Canadian development in *Roth* was that the Supreme Court had previously announced in *Hunter v. Southam* that a right of privacy, though unenumerated, was protected by the Charter. The Irish Supreme Court has likewise announced that a right of privacy, though unenumerated, is protected by the Constitution,[288] and

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Appeal, unreported, October 23, 1986). To like effect: *T. v. A.G.* (1988) 5 N.Z.F.L.R. 357, 378 *per* Ellis J.; *Morgan v. Television N.Z.* (unreported, High Court, Holland J., March 1, 1990), cited in Burrows in Todd, p. 764, n. 69.

281 Burrows in Todd, p. 768.

282 [1993] 1 N.Z.L.R. 415; Mullender, [1994] C.L.J. 11. See now also *TV 3 Network Services*, above, n.20.

283 The aspect of privacy discussed in *Bradley* above, was described as public disclosure of private facts of an offensive nature. It is submitted that the tort of privacy is not to be confined to this, and the requirement of "offence" is probably otiose.

284 Defamation, malicious falsehood, negligence and trespass all having failed.

285 *Re X.* [1975] Fam. 47, 58, above, n.239; *Malone v. Metropolitan Police Commissioner* [1979] 2 All E.R. 620, 646 *per* Megarry V.-C.; see also *Victoria Park Racing & Recreation Grounds Co. Ltd. v. Taylor* (1937) 58 C.L.R. 479, 496 *per* Latham C.J. and *R. v. Khan*, above n.152, *per* Lord Nolan. Consequently, Winfield and Jolowicz, *Tort* (14th ed., Rogers, ed., 1994), chap. 20, Sweet and Maxwell, London, lists privacy as a "doubtful tort".

286 Usefully collected in Winfield, "The Right to Privacy" (1931) 47 L.Q.R. 23, 24–35. This article was written to urge the House of Lords in *Tolley v. Fry* [1931] A.C. 333, which appeal was then pending, to recognise a right to privacy.

287 Usefully collected in Seipp, p. 326, n. 11 (discussed pp. 362 *et seq.*) and pp. 353–362.

288 *Norris v. A.G.* [1984] I.R. 36; Gearty, (1983) 5 D.U.L.J. (*n.s.*) 264.

this[289] constitutional[290] right has itself been deployed in the context of both intrusion and publication. For example, to the extent that surveillance constitutes an invasion of the constitutional right to privacy,[291] it

[289] Other constitutional rights may also indirectly protect privacy interests, *e.g.* the right to inviolability of the dwelling (Art. 40.5) has been invoked to prevent use of letters and photographs unlawfully removed from the dwelling (*O'T. v. T.C.*, unreported, High Court, McMahon J., December 8, 1981, *mutatis*; *cf.* the negligence proceedings in *Furniss v. Fitchett* [1958] N.Z.L.R. 396). (See also *Ryan v. O'Callaghan*, unreported, High Court, Barr J., July 27, 1987; *Byrne v. Grey* [1988] I.R. 31; *Berkeley v. Edwards* [1988] I.R. 217; all contain *dicta* that searches pursuant to valid warrants are justifiable invasions of privacy; see also *Farrell v. Farrelly* [1988] I.R. 201). The right to property in documents may be deployed to maintain the confidentiality of the information they contain (*R. v. Mid-Glamorgan Family Health Services, ex. p. Martin* [1995] 1 All E.R. 356 (CA) (owner of records prevented access to them by subject; Dworkin (1979) 42 M.L.R. 88; Feenan (1996) 59 M.L.R. 101; [*cf. Gaskin v. U.K.* (1990) 12 E.H.R.R. 36 (denial of access to medical records a breach of Art. 8). See also *Breen v. Williams*, above n.190]); *Chestvale v. Glackin* [1993] 3 I.R. 35, Murphy J. (duty to disclose here limited, thus intrusion not an unjust attack on property rights: at 46).

[290] The other public law route, the influence of the European Convention on Human Rights must also not be forgotten. Its influences are to be seen in cases discussed in various places in this article; see generally, Loucaides, "Personality and Privacy under the European Convention on Human Rights" (1990) 61 B.Ybk. I.L. 175. Article 10(2) allows freedom of expression to be limited proportionally by "the protection of the reputation or rights of others, [and] for preventing the disclosure of information received in confidence", two rubrics which clearly embrace the right to privacy; conversely, Art. 8(2) allows privacy to be limited proportionally by "the protection of the rights and freedoms of others". As yet, there seems to be no case in which a citizen has sued a State for media invasion of privacy thereby potentially setting up for resolution a direct conflict of Arts. 8 and 10. Though note that the jurisprudence of the Court, by starting with a right and then examining justifiable limitations, rather than balancing, (see, *e.g.*, *Handyside v. U.K.* (1979) 1 E.H.R.R. 737) makes such a direct conflict unlikely.

[291] *The State (Kane) v. The Governor of Mountjoy Prison* [1988] I.R. 757; see Humphreys (1989) 11 D.U.L.J. (N.S.) 138. The case is one in which the "existence of a general right to privacy was again accepted by the Supreme Court" (*Desmond v. Glackin (No. 2)* [1993] 3 I.R. 67, 98 *per* O'Hanlon J.) and the Chief Justice was prepared to accept for the purposes of argument that such a right does "exist in an individual, even while travelling in the public streets and roads". ([1988] I.R. 757, 769; [1988] I.L.R.M. 724, 735). Likewise, Costello J. held that there was a serious question to be tried whether the constitutional right to privacy protected against watching and besetting (*X. v. Flynn*, above, n.10, esp. at p. 8; *cp. Lyons v. Wilkins* [1899] 1 Ch. 255 at 267. So to hold would obviate the need to stretch nuisance (by analogy with *Walker v. Brewer* (1876) L.R. 5 Eq. 26; see also, *Poole v. Ragen and Toronto Harbour Commissioners* [1958] O.W.N. 77: "the technical ground of liability was nuisance; the underlying reason for liability was protection of privacy" (Fridman, above n.197, *op. cit.*, p. 193)), harassment (by analogy with *Khorasandjian v. Bush*, above n.25 or false imprisonment, which can be "committed even where the invasion of a person's liberty of movement is entirely surreptitious." (McMahon and Binchy, above n.9, *op. cit.*, p. 686). Analysis would then proceed on the structure exemplified in *D.P.P. v. Kenny* [1992] 2 I.R. 141, accepting the right and asking whether the facts constituted an invasion of privacy; held: right not infringed by surveillance in custody. Similarly, a right to privacy in prison may be limited for reasons of security: *The State (Richardson) v. Governor of Mountjoy Prison* [1980] I.L.R.M. 82, 92, *per* Barrington J. See, also, *S. v. Switzerland* (1991) 14 E.H.R.R.

constitutes an invasion of privacy by physical intrusion. Again, in *Kennedy*,[292] an unauthorised telephone tap was held to constitute a deliberate, conscious and unjustifiable breach of the applicants' right to privacy.[293] As such, it constituted an invasion of privacy by physical intrusion. Presumably, disclosure of the contents of the taps would have been condemned as an invasion of privacy by publication.[294] Certainly, the fact that the constitutional right to privacy reaches invasion of privacy by disclosure was accepted by Costello J. in *X. v. Flynn*,[295] and confirmed in principle by O'Hanlon J. in *Desmond v. Glackin (No. 2)*[296]: he held that documents obtained by the Central Bank were impressed with a duty of confidence at common law and protected by the constitutional right of privacy (where these protections "are probably co-extensive").[297] The defendant, appointed by the Minister, was investigating certain of the plaintiff's business affairs, and the plaintiff sought an order prohibiting the inspector from using Central Bank records, on the grounds that such disclosure by the Bank would amount to a breach of confidence or invasion of his constitutional right to

670 (surveillance of lawyer and client in custody a breach of Art. 6(3)(c)). See the discussion of "privacy in public" in Feldman, pp. 59 *et seq.* Indeed, for Benn, "Privacy, Freedom and Respect for Persons", NOMOS XIII, Privacy (1971) p. 1, it is a paradigmatic consequence of respect: "some minimal right to immunity from uninvited and reporting is required by certain basic features of our conception of a person". (p. 3). However, in *Barry v. Cork Examiner Publications*, unreported, *The Irish Times*, March 5, 1996, Moron J., in Cork Circuit Court refused an injunction restraining media mortgage upon a doctor at the centre of allegations of misconduct.

[292] *Kennedy v. Ireland* [1987] I.R. 587.

[293] The constitutional developments are discussed in O'Dell, "Does Defamation value Free Expression? The Possible Effect of *New Tork Times v. Sullivan* on Irish Law" (1990) 23 D.U.L.J. (N.S.) 50, pp. 72–74 [hereinafter: O'Dell, "Defamation"].

[294] Certainly, later courts have seen in this case a general "right to privacy in communications" (*Desmond v. Glackin (No. 2)* [1993] 3 I.R. 67, 98 *per* O'Hanlon J.), a proposition which is broad enough to justify the speculation in the text. Hogan and Whyte see Kennedy as a case in which "a general right of privacy was successfully invoked before the High Court" (p. 769).

[295] Unreported, High Court, Costello J., May 19, 1994, at p. 1 (accepting a reasonable question to be tried on the existence of the right). Likewise, in *Re a Ward of Court*, above, n.231, Lynch J. ordered that the action be heard *in camera, inter alia*, to protect the constitutional right to privacy of the ward (on the substantive issue in the case, see now [1995] 2 I.L.R.M. 401 (SC)). On the *in camera* rule, see n.231 above, the contribution of Kevin Boyle and Marie McGonagle to this volume, and compare *O'Connor v. Police* (1990–92) 1 N.Z.B.O.R.R. 259 (HC).

[296] [1993] 3 I.R. 67. See also *Probets v. Glackin* [1993] 3 I.R. 134. In *Glackin v. Trustee Savings Bank* [1993] 3 I.R. 55, Costello J. directed that the Bank comply with a demand by the Inspector to disclose information about funds held by it (as an exception to the duty of confidence implied by *Tournier* [1924] 1 K.B. 461). In the earlier *Murphy v. P.M.P.A. Insurance* [1978] I.L.R.M. 25, an obligation to disclose information about customers to gardaí was construed narrowly by virtue of the rules of natural justice, without reference to the Constitution, or to a right of privacy.

[297] *Desmond* above n.294, at 101.

privacy. Although O'Hanlon J. accepted that disclosure could, prima facie, be prevented, he held that, on the facts, the public interest in disclosure outweighed the public interest in maintaining the confidence.[298]

It would be unfortunate if the Courts were to apply rigidly O'Hanlon J.'s dictum that the protection of confidence at law and the constitutional right of privacy "are probably co-extensive". After all, it is precisely because of the inadequacies of the law on confidence identified above that the need for another mechanism such as a tort or constitutional right to protect privacy was identified. If the former inadequacies are transferred to the latter action, nothing will have changed. In any emerging privacy action, the courts must take care to provide a coherent and consistent set of remedies (including the availability of both injunctions and damanges where necessary), thereby evading the weaknesses of the existing tort actions and breach of confidence. Nevertheless, O'Hanlon J.'s judgment is vastly important for its confirmation that the constitutional right to privacy protects against disclosure of information.[299]

In summary, then, the impulse to protect privacy is driving the development of actions in equity (breach of confidence, the *Prince Albert* principle), at law (tort) and under the Constitution (right to privacy). The action for breach of confidence is inappropriate, the *Prince Albert* principle has not yet borne fruit, the protection of privacy falls to the law of tort and to the Constitution. For most purposes, there is little to choose between them; each is to a very great extent a *tabula rasa*, upon which can be written a coherent set of rules the primary focus of which is the protection of privacy, providing for adequate remedies, and avoiding the anomalies and *lacunae* created by casuistically extending or failing to extend existing inappropriate actions. However, judgments

298 "There appears to me to be a clear public interest in having all the information needed by the inspector for the purposes of his investigation made available. I do not detect the existence of any significant public interest of equal or near equal weight in denying access by the inspector to this source of information. . . . what was done in relation to obtaining information from the Central Bank and making available to the inspector was permissible and did not involve a breach of duty of confidentiality arising in favour of the applicants under the provisions of the Central Bank Acts 1942 to 1989, or the Official Secrets Act 1963, or at the common law or under the Constitution. . . ." *ibid.*, at 102.

299 It was substantially upheld on appeal. McCarthy J. said of this aspect of the case: "I am satisfied that there is no principle of law, nor indeed is there any principle of common sense, which would prohibit a Minister of State who properly has obtained from an agent carrying out on his behalf a statutory power vested in him, information which may be of assistance to another Minister of State in carrying out a statutory duty imposed upon him, such as the investigation by an inspector appointed under s.14 of the Act of 1990 [the Companies Act 1990], from assisting that investigation." *ibid.*, at 152.

such as that of O'Hanlon J. in *Desmond v. Glackin (No. 2)* suggest that most Irish development is likely to be in the context of the constitutional protection of privacy. As we shall see, this will have its own problems, and one possible way of avoiding them is to follow the Canadian example and use the existence of the constitutional right as the final justification for the recognition of the tort.[300]

Accepting, then, that there is emerging a legal mechanism, whether tort or constitutional right, the aim of which is the protection of privacy, it becomes necessary squarely to address the question: what do we mean by privacy?[301] It is to that question that we next turn.

The elements of the right

The elements of the right to privacy can be addressed on two levels. On the more abstract level, it is necessary to determine precisely what aspect of the human existence is protected by a right to privacy. On the more concrete level, it then becomes necessary to define the contents of a legal action to protect it.

At a level of abstraction, a right of privacy is necessary to protect the dignity of the individual. As trespass to land protects property, and trespass to person protects bodily integrity, and defamation protects reputation, so privacy protects dignity. Stoljar argues that the common law is capable of respecting dignity[302] and thus of developing a tort to protect privacy.[303] Dignity features prominently as a value recognised in the Preamble to the Irish Constitution, this has influenced the ac-

300 In a different context, O'Flaherty J. has stated his belief that "it would be correct to describe the right in our law as founded both on common law as well as the constitutional rights of bodily integrity and privacy": *Re a Ward of Court*, above, n.231 at 431. There is no reason why this approach should not also apply to this aspect of privacy. As to the issues which can arise when the Constitution seeks to shape a tort, see Binchy, "Constitutional Remedies and the Law of Torts" in *Human Rights and Constitutional Law* (O'Reilly, ed., 1992), p. 201, Round Hall Press, Dublin. As to resolution of these problems in the speech/privacy context in Germany, where it has been held that the Constitution can mould private law actions (*e.g.*, Luth BVerfGE 7, 198 (1958), translated Markesinis, above n.3, *op. cit.*, p. 352) see Quint, "Free Speech and Private Law in German Constitutional Theory" (1989) 48 Maryland L. Rev. 247.

301 *e.g.*, Fridman, above n.197, *op. cit.*, p. 190 *et seq.* McCormick, "Privacy: A Problem of Definition", (1974) 1 Br. J. of Law and Soc. 75. Wacks, "The Poverty of Privacy" (1980) 96 L.Q.R. 73.

302 Stoljar, above n.12, *op. cit.*, p. 68: "a law of torts could not in fact operate without recognising or at any rate assuming principles of individual autonomy or liberty or respect of persons; . . . What does connect a tort of privacy with other torts is just this element of individual liberty or dignity, an element common to all personal wrongs."

303 For a strong version of this argument, see Benn, "The Protection and Limitation of Privacy" (1978) 52 A.L.J. 601, 686. See, also, Blounstein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 N.Y.U.L.R. 962; followed on this point in an Irish context, in Birks, above n.35.

knowledgment of dignity as a value in the Constitution itself,[304] – indeed for Denham J in *In re A Ward of Court*,[305] one of the unenumerated constitutional rights is the right to be treated with dignity – and the judiciary, when dealing with the constitutional right to privacy have tied it squarely to human dignity. Thus, the decision of Henchy J. in *Norris*[306] contains the famous passage that:

> "There is necessarily given to the citizen, within the required social, political and moral framework, such a range of personal freedoms or immunities as are necessary to ensure his dignity and freedom as an individual in the type of society envisaged. The essence of those rights is that they inhere in the individual personality of the citizen in his capacity as a vital human component of the social, political and moral order posited by our Constitution".[307]

Though spoken in dissent, and not without its problems,[308] this

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304 O'Dowd, "Dignity and Personhood in Irish Constitutional Law" in *Justice and Legal Theory in Ireland* (Quinn, Ingram and Livingstone, eds., 1995), p. 163. Oak Tree Press, Dublin.

305 Above n.300 at 461 (SC).

306 [1984] I.R. 36, 71. The other font of modern privacy law is the dictum of Budd J. in *McGee v. A.G.* [1974] I.R. 284, 322: "Whilst the "personal rights" are not described specifically, it is scarcely to be doubted in our society that the right to privacy is universally recognised and accepted with possibly the rarest exceptions, and that the matter of marital relationships must rank as one of the most important of matters in the realm of privacy." This was the fount of privacy to which O'Hanlon J. referred in *Maguire*, above, n.10 at 115. For a fascinating recent (re)evaluation of the case, see Flynn, "The Missing Body of Mary McGee: The Constitution of Woman in Irish Constitutional Adjudication" in Quinn *et al.* p. 91.

307 To like effect, in the same case, McCarthy J.: "I would uphold the view that unenumerated rights derive from the human personality" [1984] I.R. 36, 99.

308 Hogan, "Unenumerated Personal Rights: Ryan's Case Re-evaluated" (1990–1992) XXV-XXVII Ir. Jur. 95, who argues that the foundations upon which the courts have built the edifice of unenumerated rights are not so much unsafe as unsatisfactory. In the U.S. it has been argued that there is no textual justification for judicial activism in the development of unenumerated rights (Bork, *The Tempting of America – The Political Seduction of the Law* (New York, 1990)); following this, Hogan accepts that the structure of Art. 40.1, Art. 40.2 and Art. 46 leads to the conclusion that there is a textual justification for the Irish development, but there is no principle inherent in Art. 40.1 or elsewhere sufficiently concrete to justify a given right in a given case (*cf.* Humphreys, "Interpreting Natural Rights" (1993–1995) XXVII-XX Ir. Jur. (N.S.) 221). In the specific context of the test adumbrated by Henchy J. in *Norris*, Hogan observes: "This elegantly drafted passage easily commands our admiration, but if one strips away the fine words of Henchy J, one finds that this is merely a secular version of earlier natural law theories. For a start, is there anything in Article 40.3.1° (or elsewhere in the Constitution) which would suggest that the personal rights referred to should be confined to those rights "which are inherent in the human personality"? And even if there were, how could those rights be objectively identified? . . . It seems that this phraseology is no surer a guide to the ascertainment of these rights than is the "Christian and democratic nature of the State"." ((1990–1992) XXV-XXVII Ir. Jur. 95, 111).

passage has been cited with approval and apparently applied in later cases[309] such as *Kennedy*[310] and *Desmond v. Glackin (No. 2)*.[311] Provided that it is taken only as an abstract guide and not as a concrete test, then we can say that respect for dignity is the essence of the right to privacy.[312]

In seeking to give concrete content to this abstract principle, the most famous definition of the right to privacy is that of Cooley: "the right to be let alone".[313] This definition is often judicially deployed as a starting point for analysis,[314] though in its baldest terms, it is probably overbroad.[315] Nevertheless, that aphorism reflects the underlying truth, expressed by Winfield, that an "infringement of privacy" is an "unauthorized interference with a person's seclusion of himself or of his property from the public".[316] Compendiously, we could say that the situations described above, under the various actions implicating what were termed privacy interests, describe incidents or elements of this right to be let alone, describe, in other words, unauthorised interferences with a person's seclusion of himself or of his property.

The twofold division of invasion of privacy into invasion by physical intrusion and by publication serves as good an organising role for this

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309 See also *The State (Richardson) v. Governor of Mountjoy Prison* [1980] I.L.R.M. 82, 84, *per* Barrington J., referring to the applicant's claim to the right to "health, privacy, comfort and human dignity".

310 [1987] I.R. 587, 593 *per* Hamilton P.

311 [1993] 3 I.R. 67, 97 *per* O'Hanlon J.

312 If we accept that the essence of defamation is also dignity (*e.g.*, *Rosenblatt v. Baer*, 383 U.S. 75 (1966) at p 92 *per* Stewart J.; Barendt, *op. cit.*, pp. 173 *et seq.*), then the protection of reputation and privacy could (as in the German right of personality, see Markesinis, above n.3, *op. cit.*, pp. 64–67 and Thwaite and Brehm, above n.3, *op. cit.*, *passim.*) be merged in a single action, see *e.g.* O'Dell, "Defamation", pp. 73–74, with references. The point of that discussion is that if the Constitution is to recalibrate the common law rules on both defamation and privacy, then the U.S. experience suggests that the constitutional protection given to speech should be the same in both cases; (on whether it ought to be case in the U.S., see Nimmer, "The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy" (1968) 56 Calif. L.R. 935). The discussion in this article does not address the question of whether the Constitution ought to recalibrate the law on defamation. If it were to do so, then the conclusions in O'Dell, "Defamation" would have to be added to the conclusions in this article.

313 *Law of Torts* (2nd ed., 1888), p. 29 cited in Burrows by Todd, p. 755, and Markesinis and Deakin, above n.6, *op. cit.*, p. 607. Its first judicial usage seems to be *Union Pacific Rly. Co. v. Botsford*, 141 U.S. 250, 251 (1891), Gray J.; referred to, without citing the famous *dictum*, in the judgment of O'Flaherty J. in *Re a Ward of Court*, above, n.231 at 431.

314 *e.g.*, *Norris v. A.G.* [1984] I.R. 36, 101 *per* McCarthy J. (Irish Supreme Court). *Hunter v. Southam* (1984) 11 D.L.R. (4th) 641, 653 *per* Dickson J. (Supreme Court of Canada). Lebach BVerfGE 35, 202 (1973), translated Markesinis, above n.3, *op. cit.*, p. 390 at p. 397 (German Supreme Constitutional Court).

315 Younger Committee Report, paras 62 and 63.

316 Winfield, p. 24.

material as any other, and better than most. On the other hand, the now classic U.S. fourfold division[317] into (a) intrusion into solitude, (b) public disclosure of embarrassing private facts, (c) publicity which places the plaintiff in a false light, and (d) appropriation of personality, probably seeks to be over-inclusive. Intrusion and disclosure, (a) and (b) broadly speaking constitute intrusion and publication as they have been discussed so far in this article, (though, in respect of disclosure, the treatment here has not been confined to *embarrassing* facts but instead encompasses all disclosures of private facts).

However, consider (c), false light publicity. As discussed above, if the facts asserted are false, the proper action is defamation; if true, it counts as public disclosure: it is an unnecessary addition to intrusion and publication as an aspect of privacy. Again, consider (d) appropriation of personality. The discussion of defamation and false light above left this to one side but suggested that in fact it encompasses two distinct torts. Where the appropriation simply constitutes an infringement of the dignity of the plaintiff, then it can properly be said to constitute an invasion of the privacy of the plaintiff. Where, however, the plaintiff has a marketable public image, and the appropriation is an attempt by the defendant to exploit it for gain, then it cannot properly be said to constitute an invasion of the privacy of the plaintiff, since what is being protected here is not the dignity of the plaintiff but her commercial interests. This has been termed the invasion of her right to publicity. As to this right of publicity, it has been expressly accepted as a distinct tort in the U.S.[318] Though there has been much academic and judicial discussion of appropriation of personality issues outside the US, it has been motivated in the main by arguments about commercial exploitation rather than by considerations of dignity more appropriate to privacy. Thus, there have been some Canadian decisions using "appropriation of personality" to protect such commercial interests,[319] and academic discussion has likewise focused on such interests.[320]

[317] Discussed, O'Dell "Defamation", 54–56, 70–72 (with references).

[318] Exhaustively analysed in McCarthy, *The Rights of Publicity and Privacy* (1987, Boardman, N.Y., looseleaf).

[319] *Krouse v. Chrysler Canada* (1972) 25 D.L.R. (3d.) 49 (HCt, Ont.) rvsd. (1974) 40 D.L.R. (3d) 15 (CA, Ont.); though generally narrow, the decision of the Court of Appeal admits that "the common law does contemplate a concept in the law of torts which may be broadly classified as an appropriation of one's personality" at 28 (using photograph of footballer could appropriate personality, but no damage on facts). The later Ontario first instance decisions in *Racine v. C.J.R.C. Radio Capitale* (1977) 80 D.L.R. (3d.) 441, *Arthans v. Canadian Adventure Camps* (1977) 80 D.L.R. (3d.) 583 and *Heath v. Weist-Barron School of Television* (1981) 18 C.C.L.T. 129 are broader. See also the references at n.273 above.

[320] See generally, Howell, "The Common Law Appropriation of Personality Tort" (1986) 2 Int. Prop. J. 149; Frazer, "Appropriation of Personality – A New Tort?" (1983) 99

Indeed, plausibly, *Tolley v. Fry* can be seen as a possible genesis of such a tort of invasion of publicity at common law on this side of the Atlantic. Whilst there is every good reason to recognise such a tort, its commercial basis makes it inappropriate for inclusion in a catalogue of privacy interests (as the commercial basis of breach of confidence made it inappropriate more generally for the protection of privacy interests). It simply does not fit in an action premised on respect for dignity.

Once invasion of the right to publicity is separated out of the head of invasion of privacy by appropriation of personality, that which remains, the appropriation which is an infringement of the dignity of the plaintiff, can be accommodated within the broad notion of invasion of privacy by publication as discussed in this article.

Accepting then that a right of privacy protects against physical intrusion and disclosure by publication, any further definition of either limb should be seen only as iterating examples, rather than providing a comprehensive and exhaustive list. As to physical intrusion, privacy is protected here since freedom from physical access insulates from distraction, stimulates creativity or relaxation permitting intimacy;[321] it also promotes individual choice about liberty of action.[322] The protection of the action must not be limited to (though it would clearly encompass) proprietary protection, since that would simply be to repeat the *lacunae* identified in respect of trespass and nuisance. Privacy inheres in persons, not property. The torts, by protecting property, fail adequately to protect privacy. That right should protect against surveillance of, or access by others to, one's person, possessions, or property.[323] This is intended to protect against unauthorised observation, photographs, taps, or the reading of one's diary, personal papers and private correspondence, both sent and received. In particular, personal intimacies are most deserving of protection.[324] Furthermore, the right

L.Q.R. 281, suggesting that the protection of commercial and economic exploitation is a justification for the action, thereby restricting recovery to cases where the appropriation is used for "promoting a commercial product or service" (pp. 294–307). Hylton and Goldson, "The New Tort of Appropriation of Personality" [1994] C.L.J. 492.

[321] Gavison, "Privacy and the Limits of the Law" (1980) 89 Yale L.J. 421, 446–447.

[322] *Cp.* Weinstein, "The Uses of Privacy in the Good Life", NOMOS XII, *Privacy* (1971) p. 68.

[323] As in *TV 3 Network Services*, above, n.20, where a television camera taped a conversation on an adjoining property: broadcaster in violation of subject's right to privacy.

[324] Not least for the reasons given in n.90 above. For Gerstein, "Intimacy and Privacy" in *Philosophical Dimensions of Privacy: An Anthology* (Schoeman, ed., 1986), p. 265, Cambridge University Press, not only do intimacy and privacy go together, but intimate relationships simply could not exist as we understand them if we did not insist on privacy for them. See also Inness, *Privacy, Intimacy and Isolation* (1992) *passim*, but in patrticular chap. 8, Oxford.

does not completely disappear even in a public place: the more private the circumstances, the greater the expectation of privacy; the less private, the less the expectation. Thus, (at least, *prima facie*) using a street to get from A to B does not necessarily give a private detective consent to follow me,[325] or a paparazzo consent to photograph me.[326] Again, in the employment context, whilst it may be that an employee's reasonable expectation of privacy has diminished, there is no reason why it should entirely disappear.[327] The same holds true for persons in custody.

As to disclosure by publication, one attempt to get at its essence is provided by the definition proposed in the first *Calcutt Report*, to the effect that a right of privacy would prevent "publication of personal information (including photographs)", where "personal information could be defined in terms of an individual's personal life, that is to say, those aspects of life which reasonable members of society would respect as being such that an individual is ordinarily entitled to keep to himself, whether or not they relate to his mind or body, to his home, to his family, to other personal relationships, or to his correspondence or documents".[328] To this list could be added records and documents *about* him as well as by him. However, it is submitted that the definition which best captures the essence of invasion of privacy by disclosure is that suggested by Westin: privacy is "the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others".[329] The

325 *e.g.*, *Nader v. General Motors*, 25 N.Y.2d 560 (1970).

326 *Cp. Galella v. Onassis* 353 F. Supp. 196 (1972); and the sequel at 533 F.Supp. 1076 (1982). The matters in the text are invasions of privacy, but it has been said on occasion that they can be justified: *e.g.*, using the fruits of such prima facie invasions of privacy to rebut evidence in court: *e.g.*, *Devoy v. Dublin*, unreported, High Court, Carroll J., October 18, 1995; *Irish Times*, January 22, 1996 (taped insubordination in disciplinary proceedings similar to photographs by defendant showing plaintiff with a bad back lifting concrete blocks). *Quaere* whether such decisions are consistent with *The People (D.P.P.) v. Kenny* [1990] 2 I.R. 110.

327 The problem of employer surveillance of employees is growing; see, *e.g.*, "Privacy in German Employment Law" 15 Hastings I.C.L.R. 135 (1992).

328 Report of the Committee on Privacy and Related Matters (Cm. 1102, 1990) (chaired by Sir David Calcutt Q.C.) [hereafter, the first Calcutt Report] para 12.17, noted Monro, "Press Freedom – How the Beast was Tamed" (1991) 54 M.L.R. 104; and Reid, "Press Censorship in the 1990s: The Calcutt Report and the Protection of Individual Privacy" (1992) 43 N.I.L.Q. 99. See also Review of Press Self-Regulation (Cmnd. 2135, 1993) (chaired by Sir David Calcutt Q.C.), noted Michael, "Defective Proposals" (1993) 143 N.L.J. 100. In *Morris v. A.G.* (unreported, Court of Appeal, February 21, 1995), the Court of Appeal dismissed for want of a cause of action a claim against Parliament for failing to enact a Right to Privacy Statute.

329 *Privacy and Freedom* (1970), p. 7; followed in Markesinis and Deakin, above n.6, *op. cit.*, p. 607, and Seipp, *op. cit.*, p. 382; discussed in Lusty, "Invasion of Privacy: A Clarification of Concepts" (1972) 72 Col. L.R. 693, 695 *et seq.* The basis and limits of such a "control" view of privacy are helpfully sketched in Gross, "Privacy and Autonomy" in NOMOS XIII, *Privacy* (1971), p. 169.

Calcutt definition then provides some particular examples of this principle, and they, in turn, are fleshed out by the tendencies discerned above in the decided cases.

In summary, then, in an action for invasion of privacy, the law should protect against physical intrusion (which prevents surveillance of, or access by others to, one's person, possessions, or property) and against disclosure by publication in breach of the individual's right to determine when, how and to what extent personal information is disclosed.

The limits of the right

The action once defined, it becomes necessary to address the question of defences. The Calcutt Report[330] saw the need to develop specific defences such as consent (implicit in the Winfield idea of "unauthorised" publication, or the Westin formula as to individual control over "when, how and to what extent" personal information is disclosed), privilege,[331] reasonable care (which, on one view,[332] may anyway be constitutionally required in Ireland), and lawful authority.

Three more general defences emerge from the earlier discussion: prior disclosure, public interest, and free speech. First, prior disclosure. Much of the jurisprudence developed in the context of breach of confidence on the effect of prior and partial publication would equally apply to this more general action. Indeed, on a reading of *Maguire v. Drury*,[333] O'Hanlon J. has done exactly this. Thus, the fact that the information was already public would usually be a defence;[334] and, while there may be circumstances in which a court would nevertheless exceptionally restrain further publication, the commercial exploitation justification for such exceptions in the context of breach of confidence would have no place here. That justification may be replaced by considerations of dignity: in the wardship jurisdiction, the courts are alive to this: that the wards "have suffered twice from the fact that their unusual lifestyle is public news does not lessen but, in our judgment, aggravates the hurt that they will feel again"[335] from further media

330 The Calcutt Report, para. 12.19.

331 Likewise, Warren and Brandeis, p. 216.

332 O'Dell, "Defamation", *passim*.

333 [1995] 1 I.L.R.M. 108, 113. This reading is advanced in n.252 above.

334 The Calcutt Report, para. 12.19(d) offers the following definition: "the act of publication was done . . . at a time when the personal information in question had already come into the public domain through no act or default of the defendant". Likewise, Warren and Brandeis, p. 218.

335 *Re H-S (minors: protection of identity)* [1994] 3 All E.R. 390 (CA) at p. 397 *per* Ward J. A strong example of prior notoriety not being enough to displace privacy is provided by *Lebach* BVerfGE 35, 202 (1973), translated Markesinis, above n.3, *op. cit.*, p. 390 (armed robber restrained play depicting the not-very-recent robbery).

coverage. Furthermore, the lesson from breach of confidence that the future disclosure must be commensurate with or proportionate to the prior disclosure should not be forgotten.

Second, breach of confidence teaches us that the nebulous notion of the "public interest" may justify disclosure.[336] Even the tort of nuisance, which can protect privacy interests, has occasionally undertaken the balancing of the public utility of the defendant's actions against the plaintiff's rights.[337] But perhaps we should not be too hasty to assume that the *case law* on this issue will transfer. The primary focus of the action for breach of confidence is usually not the protection of privacy, but commercial exploitation, and that which justifies the disclosure in the public interest of commercial information need not justify the disclosure of private information.

Yet the *title* is apt here, even if its application in the context of breach of confidence does necessarily not transfer well to this context. On the other hand, the recent cases in the wardship jurisdiction[338] are replete with detailed analysis of just such issues, and the judgment of O'Hanlon J. in *Maguire v. Drury*[339] is such that this analysis at least does transfer. It is not surprising, therefore, that Warren and Brandeis conceded that the "right of privacy does not prohibit any publication of matter which is of public or general interest".[340] Walsh J., writing extrajudicially, has likewise suggested that publication is justified on the basis of "a genuine public interest in knowing the truth".[341] *Woodward v. Hutchins*[342] illustrates that, as I have argued elsewhere,[343] the public interest is greater in cases where the facts relate to public people. In such a context, it seems that the question turns on whether the plaintiff had by his actions made the facts disclosed "relevant"[344]: if a person makes a claim on an issue, it is clearly relevant and in the public interest that any fraud behind the claim be exposed. The wardship cases make the point, however, that what is relevant about one person may not be about her family. Furthermore, "the chances of success of a privacy claim tend to decrease as the public profile of the plaintiff increases. But even public

[336] Above, p. 204.

[337] *Mullin v. Hynes*, unreported, Supreme Court, Henchy J., November 13, 1972; *contra*: *Bellew v. Irish Cement* [1948] I.R. 61.

[338] Above, p. 219.

[339] [1994] 2 I.R. 8.

[340] Warren and Brandeis, *op. cit.*, p. 214.

[341] Walsh, "The Judicial Power and the Protection of the Right to Privacy" (1977) D.U.L.J. 3, 8.

[342] [1977] 2 All E.R. 751 (CA).

[343] O'Dell, "Defamation", p. 55.

[344] *ibid.*, pp. 65, 73–74.

figures can seek protection of their privacy in appropriate circumstances".[345]

On the other hand, Calcutt had "serious reservations about a general defence merely labelled "public interest'",[346] and suggested instead a more "tightly drawn and specific" defence the elements of which were that only (a) the prevention of crime, (b) public health and safety, or (c) a real risk that a substantial proportion of the public would be materially[347] misled, would justify disclosure under this head. This seems unduly narrow, and probably should best be regarded as a non-exhaustive list of those occasions upon which the public interest justifies publication.

Third, free speech. There are two elements to this: the common law and the Constitution. At common law, if the initial interest in confidence which is being protected is privacy,[348] and the countervailing public interest includes free speech,[349] then this balance of public interests can be presented as a conflict between privacy and expression.[350] A good example is provided by *X. v. Y.*[351] But, as in the general case above, perhaps we should not be too hasty to assume that the caselaw on this issue will transfer to a more open discussion of this conflict in the context of a balance between expressly recognised rights to privacy and speech (especially in the constitutional context.)[352] Not only is the primary focus of the action for breach of confidence not usually the protection of privacy, but the public interest wears many guises, where speech is only one interest among many (such as fair trial[353] or the

[345] *Lebach* BVerfGE 35, 202, 230. Markesinis, p. 412. Again, "this does not mean that every public personage is open to scrutiny in all of his activities; he, too, can claim areas of life which should remain sheltered from public gaze". Stoljar, above n.12, *op. cit.*, p. 82.

[346] The Calcutt Report, para 12.22.

[347] This section falls for the same reason that Calcutt doubted the full defence: vagueness; though it is probably intended to cover a situation like *Lion Laboratories*, above, n.127.

[348] The ". . . expectation of privacy is itself a public interest *prima facie* meriting protection." (Robertson and Nicol, above n.5, *op. cit.*, p. 172). "It is public interests rather than private interests that must be considered, although the private interest of the plaintiff is dressed up as a public interest by the judicial assumption that there is a general public interest that confidences should be respected." (*ibid.*, p. 185).

[349] Boyle, "Freedom of Expression as a Public Interest in English Law" [1982] P.L. 574.

[350] As to the sensitivity of the judiciary to such a conflict in this context, see Robertson and Nicol, above n.5, *op. cit.*, pp. 185–186.

[351] [1988] 2 All E.R. 648 (Rose J.).

[352] Keane, above n.143, *op. cit.*, pp. 350–351, para. 30.06.

[353] For example, in the important *Marcel v. Commissioner of Police* [1992] Ch. 225; ([1992] 2 W.L.R. 50 (CA), reversing [1991] 2 W.L.R. 1118 (Browne-Wilkinson V.-C.), accepted in Ireland in *Desmond v. Glackin (No. 2)* [1993] 3 I.R. 67, 98 *et seq.*, *per* O'Hanlon J. (HC)., it was held that the public interest in confidentiality did not, in the circumstances, outweigh that in a full and fair trial: on the duty of police not to use confidential information as evidence without the leave of the court, *cf. Cleveland County Council v.*

prevention of crime)[354] is often not given much or any weight.[355] One way to ensure that sufficient weight is given to the speech is to call the Constitution in aid, and in two[356] important recent cases, that is precisely what the defendant has done. Likewise, the wardship jurisdiction: the judgment of Hoffmann L.J. in *R. v. Central Independent Television*,[357] is an important judicial contribution to the privacy/speech dilemma, and, in a third[358] recent Irish case, the defendant again called the Constitution in aid. It is necessary, therefore, to turn to the constitutional protections of speech interests, and to analyse (at last) the second tribe the subject matter of this article.

THE PROTECTIONS OF SPEECH AT IRISH CONSTITUTIONAL LAW

We have seen that in *Maguire v. Drury*, O'Hanlon J., relying on the constitutional protection of speech, all but announced a rule against prior restraint. Such an approach can also undercut the contempt rule

F. [1995] 2 All E.R. 237. In proceedings before E.U. organs, compare case T–353/94, *Postbank NV v. Commission* (CFI, September 18, 1996).

354 *Malone v. Metropolitan Police Commissioner* [1979] 2 All E.R. 620. *Hellewell*, above, n.67 (photograph taken by police released to potential victims of crime was a breach of confidence justified by reasons of prevention of crime); (the initial taking of the photograph is not a breach of Art. 8 of the Convention: *Murray v. U.K* (1995) 19 E.H.R.R. 193; paras 39–40, 83–95).

355 One hare that will not be chased is the proposition that there is a public interest in receiving the information. In *Schering Chemicals*, above, n.136 at 334, Lord Denning M.R. referred to the "right of the public to receive information" (though this would not, in English law, seem to be of general operation outside the sphere of breach of confidence: *R. v. Secretary of State for Defence, ex p. Sancto* (1992) 142 N.L.J. 1748n). Quaere: whether the constitutional equivalent postulated by McCarthy J. in *Cullen v. Tóibín* [1984] I.L.R.M. 577, 582 ("the citizen . . . also has the right to be informed") gives any greater status to this in the public interest calculus? Art. 10 of the Convention expressly provides for a right to receive information and ideas; as to its status in the caselaw of the Court, see *Leander v. Sweden* (1987) 9 E.H.R.R. 433; (denial of access to secret files on applicant *prima facie* a breach of Art. 8, but necessary for reasons of security); *Gaskin v. U.K.* (1990) 12 E.H.R.R. 36 (denial of access to medical records breach of Art. 8 but not of Art. 10; Walsh J. dissenting held no breach of Art. 8, but breach of applicant's Art. 10 right to receive information); and *Herczegfalvy v. Austria* (1993) 15 E.H.R.R. 437 (restrictions on access to reading matter, radio and television a breach of applicant's right to receive information under Arts. 8 and 10). *Cp. Board of Education Island Tress School District v. Pico*, 457 U.S. 853 (1982) (right to receive information and ideas justified by sender's right to speak and recipient's meaningful exercise of speech rights).

356 *A.G. for England and Wales v. Brandon Books*, above, n.89; *Oblique Financial Services*, above, n.59.

357 [1994] 3 All E.R. 641; approved in *Ex p. Crook* [1995] 1 All E.R. 537, 542 *per* Glidewell L.J.

358 *Maguire*, above, n.10.

protecting such interlocutory injunctions, as well as recasting the protection of privacy in other significant ways. It becomes important therefore to examine the nature of the constitutional protections of speech. Three rights, at least, have been identified as protecting the right to free speech at Irish law. First, the primary protection of speech under the Constitution[359] is to be found in Article 40.6.1°i, which guarantees to protect, subject to certain restrictions, "the right of the citizens to express freely their convictions and opinions".[360] Despite cases like *Brandon Books*, this section has failed to develop any meaningful protection for speech, especially in comparison with the protection accorded in other jurisdictions.[361] For example, in the Section 31 cases,[362] which had the potential to be leading cases on the nature and extent of permissible political speech, the members of the Supreme Court confined their judgments in the main to administrative law matters.[363]

Second, notwithstanding that Carroll J. in *Attorney General for England and Wales v. Brandon Books*[364] clearly thought that Article 40.6.1°i protects the expression of information, the protection offered by that Article is thought to be limited to convictions and opinions, and the courts have derived from Article 40.3 a right to communicate. In *Attorney General v. Paperlink*,[365] Costello J. held:

> "As the act of communication is the exercise of such a basic human faculty a right to communicate must inhere in the citizen by virtue of his human personality and must be guaranteed by the Constitution. But in what Article? The exercise of the right to communicate can take many

359 See generally, Hogan and Whyte, pp. 923ff. Fennelly, "The Irish Constitution and Freedom of Expression" in *Constitutional Adjudication in European Community and National Law* (Curtin and O'Keeffe, eds., 1992), p. 183, Butterworths, Dublin.

360 I have elsewhere subjected this rubric to detailed analysis: O'Dell, "Defamation", *passim.*; O'Dell, "Reflections on a Revolution in Libel" (1991) 9 I.L.T. (N.S.) 181, 214, *passim*. [hereafter, O'Dell, "Reflections"]. See also Law Reform Commission, Report on the Civil Law of Defamation (LRC 38–1991), 111 *et seq.*

361 See, *e.g.*, the material discussed in n.410 below.

362 *The State (Lynch) v. Cooney* [1982] I.R. 33; Gearty, (1982) 4 D.U.L.J. (N.S.) 95; *O'Toole v. RTÉ (No. 2)* [1993] I.L.R.M. 458.

363 See, generally, Morgan, "Section 31: The Broadcasting Ban" (1990–1992) XXV-XXVII Ir. Jur. 117. Hogan, "The Demise of the Irish Broadcasting Ban" (1994) 1 E.P.L. 458.

364 ". . . in the light of [Art. 40.6.1°i] . . . in my opinion there is prima facie a constitutional right to publish information". [1986] I.R. 597, 600 *per* Carroll J. (emphasis added).

365 [1984] I.L.R.M. 373; *cf. West Virginia State Board of Education v. Barentte*, 425 U.S. 748 (1976); *Wooley v. Maynard*, 430 U.S. 705 (1977). On *Paperlink*, see Flynn, "Locating the Missing Link: Postal Communication Monopolies in Ireland and E.C. Law" (1992) 10 I.L.T. (N.S.) 233, 247. *Cp. Cohen v. California*, 403 U.S. 15 (1971) at p. 24 *per* Harlan J. for the Court: "The right of free expression . . . is intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests".

forms and the right to express freely convictions and opinions is expressly provided for in Article 40.6.1°i. But the activity which the defendants say is inhibited in this case is that of communication by letter, and as this act may involve the communication of information and not merely the expression of convictions and opinions, I do not think that the constitutional provision dealing with the right to express convictions and opinions is the source of the citizen's right to communicate. I conclude that the very general and basic human right to communicate which I am considering must be one of those personal unspecified rights of the citizen protected by Article 40.3.1°."[366]

Third, there are arguments in favour of the proposition that Article 40.6.1°i, by its recognition of the "rightful liberty of expression" of "the organs of public opinion", must therefore recognise the right of the press to freedom of expression.[367] If, for textual reasons, such a right is not located in Article 40.6.1°i, but if the arguments in principle in its favour are sufficiently strong, then that right might be located in Article 40.3 (by analogy with *Paperlink*).[368]

[366] Although there are arguments that the assertion of facts reasonably believed to be true is covered by the Art. 40.6.1°i right to express convictions (O'Dell, "Defamation", pp. 58–59), Costello J. was to offer the same analysis in *Kearney v. Minister for Justice* [1986] I.R. 116. The Law Reform Commission, in its Defamation Report, accepted the Paperlink analysis, and it has most recently been followed twice by Keane J.; first, in *Oblique Financial Services*, above, n.56, where he held that "Article 40.6.1° is concerned, not with the dissemination of factual information, but the rights of the citizen, in formulating or publishing convictions or opinions, or conveying an opinion; and the rights of all citizens, including conveying information, arises in our law, not under Art. 40.6.1° but from Article 40.3.1°" ([1994] 1 I.L.R.M. 74, 78.); and then, to like effect, in *Carrigaline Community Television Broadcasting v. Minister for Transport, Energy and Communications*, unreported, High Court, Keane J., November 10, 1995 at pp. 186–187 of the transcript.

[367] *e.g.* McDonald, "Defamation Reform – A Response to the L.R.C. Report" (1992) 10 I.L.T. (N.S.) 270. Indeed, there are dicta (collected in O'Dell, "Defamation" p. 61) which assert the existence of such a right, though they do not ascribe a source. For the contrary view, see O'Dell, "Defamation", p. 60; O'Dell, "Reflections", p. 215; Defamation Report, pp. 116–120; Casey, *Constitutional Law in Ireland* (2nd ed., 1992), p. 437, Sweet & Maxwell, London; Hogan and Whyte, p. 925. On the debate in the U.S., see Stewart, "Or of the Press" (1975) 26 Hastings L.J. 631. For general assessments, see Marshall, "Press Freedom and Free Speech Theory" [1992] P.L. 40, and the contribution of John O'Dowd to this volume. See now, also, *People (D.P.P.) v. M.C.*, unreported, Flood J., June 16, 1995.

[368] A related candidate-right for location in either Art. 40.6.1.i or Art. 40.3 is the right not to speak/communicate. If the right to associate can generate a right not to associate (whether as a consequence of Art. 40.6.1°iii, see *Educational Company of Ireland v. Fitzpatrick (No. 2)* [1961] I.R. 345, or ought more properly to have been located, if at all, in Art. 40.3, see Smartt, "The Right to Associate: Hohfeld Revisited" (1993) 3 I.S.L.R. 116), then a right to speak or communicate can generate a right not to speak/communicate (see *Heaney v. Ireland* [1997] 1 I.L.R.M. 117, 123, 126–127 *per* O'Flaherty J.). Publication of something which one had chosen to keep silent (private) could then amount to an infringement of this right as much as an invasion of privacy. Presto: we have another constitutional right to add to the list of those which can

Whatever the merits of the various arguments about the meaning of Article 40.6.1°i as against 40.3, and whatever their inter-relationship,[369] it is clear that there can be at least three putative speech interests set up to justify publication of information otherwise protected by the right to privacy. In one breach of confidence case, *Brandon Books*,[370] the defendant relied upon Article 40.6.1°i; in another, *Oblique Financial Services*,[371] the defendant relied upon Article 40.3; it is only a matter of time before this triptych is completed by reference to a case in which a media defendant asserts a media right to speech (where-ever located). It is therefore important to understand why we protect free speech in a constitutional liberal democracy[372] such as Ireland,[373] since, in understanding why we protect speech we may discern some clues as to how to draw the line between privacy and speech.

Ireland can claim[374] to be a liberal State, in the Lockian sense that it respects the rights of its citizens. Many of the classic justifications for freedom of speech are liberal in that sense, since they see speech as an aspect of dignity and self-fulfilment, and necessary fully to develop and respect the autonomy[375] of the individual,[376] whether of the

protect privacy interests and restrain disclosure: for other rights on that list, apart from privacy itself, see n.289 above. For an interesting spin on this right not to speak, see Pettit, "Enfranchising Silence: An Argument for Freedom of Speech" in *Freedom of Communication* (Campbell and Sadurski, eds., 1994), p. 45, Dartmouth, Aldershot.

[369] See, generally, Hall, *The Electronic Age. Telecommunication in Ireland* (1993), chaps. 26 and 27, Oak Tree Press, Dublin.

[370] [1986] I.R. 597, 600 *per* Carroll J.: "Any consideration of the question of preventing publication of material of public interest must be viewed in the light of [Art. 40.6.1°i] . . . in my opinion there is prima facie a constitutional right to publish information and the onus rests on the plaintiff to establish in the context of an interlocutory application that the constitutional right of the defendant should not be exercised". (*cf.* McMahon and Binchy, above n.8, *op. cit.*, p. 689).

[371] Above, n.59.

[372] See the discussion of these terms in Quinn, "Comparative Commercial Speech" in *Human Rights. A European Perspective* (Heffernan, ed., 1994), pp. 228, 228–231, Round Hall Press, Dublin.

[373] There is some detail in O'Dell, "Defamation", pp. 62 *et seq.*, with references. See, especially, Barendt, chapter 1; Schauer, *Free Speech. A Philosophical Enquiry* (Cambridge, 1980), *passim*; Greenawalt, *Speech, Crime and the Uses of Language* (1989), chaps. 2 and 3. See also Campbell, "Rationales for Freedom of Communication" in Campbell and Sadurski, p. 17, and the excellent Wellington, "On Freedom of Expression" (1979) 88 Yale L.J. 1105.

[374] On the merits of that claim, see Quinn, "Reflections on the Legitimacy of Judicial Activism in the Field of Constitutional Law" (1991) Dlí: *The Western Law Gazette* 29; Whelan, "Constitutional Amendments in Ireland: The Competing Claims of Democracy" in Quinn *et al.*, p. 45.

[375] Gavison, above n.269, *op. cit.*, p. 449.

[376] See Baker, *Human Liberty and Freedom of Speech* (1989), seeking to replace the marketplace rationale and reclaim a more general liberal justification.

speaker[377] or the listener.[378] The common heritage of all such arguments is *On Liberty*, by John Stuart Mill,[379] and the most potent judicial articulation of the Millian principle is the judgment of Holmes J. in the U.S. Supreme Court in *Abrams v. U.S.*[380]. Such arguments do not really apply to justify expression which invades privacy *per se*,[381] since they are all fundamentally arguments in favour of the expression of individual opinions. Thus, although personal dignity forms the well-spring for the protection of a speech right (the right to communicate located in Article 40.3, on the basis of the approach of Costello J. in *Paperlink*) as well as for the protection of privacy (witness the approach of Henchy J. in *Norris*), it seems to pull more strongly in favour of privacy than speech when they clash. Thus, the decision of Costello J. in *X. v. Flynn*[382] may be viewed in these terms.

In this regard, the decision reflects the low standard of protection of liberal speech afforded by the Constitution and the Convention. The paradigm protected liberal speech ought to be an opinion about morals; yet in the Constitution, "public morality" is iterated as an exception; in the Convention, the exception is phrased "the protection of morality". Because there is no European conception of morality, States have a wide margin of appreciation in deciding when to restrict speech on the basis

[377] *e.g.* Raz, "Free Expression and Personal Identification" (1991) 11 O.J.L.S. 303: free speech is a public good (p. 306) if only because "public portrayal and expression of forms of life validate the styles of life portrayed, and therefore censoring expression normally expresses authoritative condemnation not merely of the views or opinions censored but of the whole style of life of which they were a part". (p. 310).

[378] *e.g.* Scanlon, "A Theory of Freedom of Expression" (1972) 1 Phil & Pub. Affairs 204: expression is necessary to the development of the human personality and autonomy of the listeners; though *cf.* his later "Freedom of Expression and Categories of Expression" 40 U. Pitt. L Rev 519 (1979); see also Freid, "The New First Amendment Jurisprudence: A Threat to Liberty" 59 U.Chi. L.Rev. 225 (1992) and Baker, "Turner Broadcasting: Content-Based Regulation of Persons and Presses" 1994 S.Ct.Rev. 57 (analysing *Turner Broadcasting v. F.C.C.*, 114 S.Ct. 2445 (1994) in terms of listener autonomy).

[379] Sketched in O'Dell, "Defamation", p. 63, discussed Barendt, *op. cit.*, p. 8 *et seq.*

[380] 250 U.S. 616 (1919). Polenberg, *Fighting Faiths. The Abrams Case, the Supreme Court, and Free Speech* (1987), Viking, N.Y. I leave aside in this discussion the consequent Holmesian marketplace of ideas justification for speech, discussed in an Irish context in Quinn, "The Right of Lawyers to Advertise in the Market for Legal Services" (1992) 20 Anglo-Am. L.R. 1 and in Quinn, above n.372, *op. cit.*, p. 228. To the cases there cited, add *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); *Edenfeld v. Fane*, 113 U.S. 1792 (1993); *Florida Bar v. Went-for-It*, 115 S.Ct. 2371 (1995); *Casado Coca v. Spain* (1994) 18 E.H.R.R. 1; *Jacubowski v. Germany* (1995) 19 E.H.R.R. 64; *TV 10 v. Commissariaat Voor de Media* (1995) 74 C.M.L.R. 284 (E.C.J.).

[381] *e.g.* Barendt, *op. cit.*, p. 190, discussing Mill.

[382] Unreported, High Court, Costello J., May 19, 1994 Interlocutory injunctions granted to restrain publication of details of evidence, given at a preliminary District Court hearing and in consequent depositions, by the 14-year-old girl at the centre of the X. case.

of morality, and the Court is slow to find that the State's actions within this margin are disproportionate attacks on speech.[383] Whether this timidity ought to remain the position is one of the questions which it is possible to address when the issues are properly framed, and the background justifications brought clearly into focus.[384] Thus, in the German courts, where dignity figures in the justifications for both speech and privacy, "freedom of expression will, on the whole, prevail over the right to privacy where the publication, broadcast, etc. aim at educating and informing the public rather than pursuing mere sensationalism or trying to satisfy the public's taste for gossip".[385] Again, the European Court of Human Rights has, on occasion,[386] significantly narrowed the margin of appreciation allowed to a State in respect of the morals exception, thus increasing the protection afforded to liberal speech. And the U.S. Supreme Court has, in circumstances similar to *X. v. Flynn*, come down firmly in favour of speech.[387]

Ireland can also claim to be a democratic state,[388] and the protection of privacy is said to be essential to democratic government because it fosters and encourages the moral autonomy of the citizen, a central requirement of democracy.[389] On the other hand, the argument from democracy forms one of the most potent justifications for speech, especially for speech of a political nature.[390] It is a significant feature of

[383] *Handyside v. U.K.* (1979) 1 E.H.R.R. 737; *Muller v. Switzerland* (1991) 13 E.H.R.R. 212. *Cp. Otto-Preminger Institute v. Austria* (1995) 19 E.H.R.R. 34; (seizure of blasphemous film not a breach of Art. 10(2), no European conception of significance of religion) on which see Pannick, "Religious Feelings and the European Court of Human Rights" (1995) P.L. 7. *Cf. Scherer v. Switzerland* (1994) 18 E.H.R.R. 276, the Commission (January 14, 1993) had found that the conviction of the applicant for showing homosexual movies was a breach of Art. 10; but the applicant died before the hearing of the Court, and the case was struck out. *Wingrove v. U.K.*, unreported, European Court of Human Rights, November 25, 1996 (refusal of a certificate to a blasphemous video within margin of appreciation).

[384] For Bollinger, tolerance of such speech is of the essence of freedom of expression: Bollinger, *The Tolerant Society* (1986), Clarendon Press, Oxford; Bollinger, "The Tolerant Society : A Response to Critics" (1990) 90 Colum. L. Rev. 979.

[385] *Lebach* BVerfGE 35, 202, 230. Markesinis, above n.3, *op. cit.*, p. 412.

[386] *Open Door Counselling*, above, n.113.

[387] *Cox Broadcasting*, above, n. 4; *The Florida Star*, above, n.4: though it might be constitutional to restrict publication of private matters unrelated to the public interest, public matters on the judicial record may be freely published, for they are already in the public domain and are necessarily matters of public interest.

[388] At least, if we believe Art. 5 of the Constitution; the effects of which were analysed in *Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 I.R. 1, seemingly aiding the rejection of the argument that the Constitution is subject to Natural Law.

[389] Gavison, above n.269, *op. cit.*, p. 455.

[390] The classic text is Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948), Harper, New York, reprinted in Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1960), Harper, New York. The position can be seen to develop in

the jurisprudence of the U.S. Supreme Court,[391] of the European Court of Human Rights,[392] and now also of the High Court of Australia.[393] It has been discussed academically in Ireland,[394] and there are traces of the argument underlying some Irish cases.[395] This argument justifies speech invasive of privacy where it contributes to the formation of public opinion.[396]

Thus, both the liberal and the democratic justifications for speech justify disclosure in certain circumstances (which might be described as the public interest), notwithstanding considerations of dignity and privacy; in turn, this lends support the broad *dicta* of O'Hanlon J. in *Maguire v. Drury*[397]:

> "In the present case the court is asked to intervene to restrain the

the course of the pieces collected in Political Freedom; it finds its most refined expression in Meiklejohn, "The First Amendment is an Absolute" 1961 S.Ct.Rev. 245. The best modern exponent of this position is Sunstein whose views evolved from "Free Speech Now" 59 U.Chi.L.Rev. 255 (1992) through *The Partial Constitution* (1993), Harvard, Mass. to *Democracy and the Problem of Free Speech* (1993), Free Press, N.Y., rev. 1995. For an important variant, see Shiffrin, *The First Amendment, Democracy and Romance* (1990) Harvard, Mass.

391 From amongst almost innumerable authorities, two in particular stand out: *Whitney v. California*, 274 U.S. 357 (1927) *per* Brandeis J. and *New York Times v. Sullivan*, 376 U.S. 254 (1964) *per* Brennan J.

392 Of the important cases, see, from amongst many, *Lingens v. Austria* (1986) 8 E.H.R.R. 103; *Observer and Guardian v U.K.*, above, n.103; *Sunday Times v. U.K. (No. 2)*, above n.103; *Castells v. Spain* (1992) 14 E.H.R.R. 445; *Informationsverein Lentia v. Austria* (1993) 17 E.H.R.R. 93; *Piermont v. France* (1995) 20 E.H.R.R. 301, paras. 73–78; paras. 82–86 (detention and expulsion of a political dissident a breach of her Art. 10 rights); *Vogt v. Germany* (1996) 21 E.H.R.R. 205.

393 See the cases cited in n.410 below.

394 Schermers, "Freedom of Expression" in Heffernan, *op. cit.*, p. 201 and Boyle, "Freedom of Expression and Democracy" in Heffernan, *op. cit.*, p. 211. Hogan, "Federal Republic of Germany, Ireland and the United Kingdom. Three European Approaches to Political Campaign Regulation" (1992) 21 Cap. U.L.R. 501, contains a sustained analysis of one aspect of political speech at Irish law.

395 *Dillon v. Minister for Posts and Telegraphs*, unreported, Supreme Court, June 6, 1981 (Henchy J. protected "the currency of political controversy" in the context of an election campaign: can be described as the protection of political speech). *A.G. for England and Wales v. Brandon Books*, above, n.89 (Carroll J. relied on Art. 40.6.1°i to refuse the application of the Attorney General of England and Wales to ban a book which revealed Government secrets: can be described as the protection of political speech) and *Desmond v. Glackin (No. 2)* [1992] I.L.R.M. 490 (O'Hanlon J. held that the comments of the Minister about an ongoing investigation of a matter of public and political concern did not constitute contempt: can be described as the protection of political speech.); *cp. McKenna v. An Taoiseach* [1996] 1 I.L.R.M. 81, 112 *per* Denham J. In other words, these authorities support the proposition that Irish law can generate a doctrine of political speech: certainly Irish law is in a much stronger position to accept this logic than Australian law prior to *Nationwide News* and *A.C.T.* See also *Derbyshire County Council v. Times Newspapers* [1992] 3 W.L.R. 28 (H.L.).

396 Barendt, *op. cit.*, pp. 189–191.

397 [1995] 1 I.L.R.M. 108, 116.

> publication of material, the truth of which has not as yet been disputed, in order to save from the distress that such publication is sure to cause, the children of the marriage who are all minors. This would represent a new departure in our law, for which, in my opinion, no precedent has been shown, and for which I can find no basis in the Irish Constitution, having regard, in particular, to the strongly expressed guarantees in favour of freedom of expression in that document."

Furthermore, on either justification for speech, it is clear from the jurisprudence of the Court of Human rights that once information has already been disclosed, the protection of speech pulls very strongly in favour of speech rather than restriction,[398] and the decision of O'Hanlon J. in *Maguire v. Drury*, on one view,[399] supports the proposition that this also forms part of Irish law.

In conclusion under this head therefore, where, on a given set of facts, a liberal or democratic justification for speech is very strong, that may well be sufficient to justify favouring speech over privacy. If not, the considerations of dignity may justify favouring privacy over speech.

The scene is therefore set for a clash between two tribes, between that protecting privacy interests, and that protecting speech. In analysing such a clash, it must be determined whether it is a clash between a tort (privacy) and a constitutional right (one of the speech rights), or whether it is a clash exclusively on the constitutional plane, which it would be if the right of privacy in issue were a constitutional right. In other words, clarity of analysis seems here to require that the choice between protecting privacy as a tort or as a constitutional right must now be made.

Taking, first, privacy as a tort, against one of the speech rights. The fact that the former is a creature of private law does not automatically mean that it is trumped by the latter, a creature of public law.[400] Indeed, in Germany,[401] where the right to personality has the status of a tort,[402] and the right to free speech has the status of a constitutional right,[403]

398 *Weber v. Switzerland* (1990) 12 E.H.R.R. 508; *Observer and Guardian v U.K.*, above, n.103; *Sunday Times v. U.K. (No. 2)* (1992) 14 E.H.R.R. 229; *Verenining Weekblad Bluf! v. The Netherlands* (1995) 20 E.H.R.R. 189.

399 Advanced in n.236 above; again, compare the position in respect of breach of confidence, above n.128.

400 To like effect, [1982] I.R. 1, 56 *per* Griffin J., referring to them respectively as civil and fundamental human rights.

401 See Markesinis, above n.103, pp. 63–66, 358–424; Lorenz, *passim*.

402 It is located in § 823(1) Bürgerliches Gesetzbuch (the German Civil Code), enumerated in the *Schacht* decision BGHZ 12, 334 (1954), (translated Markesinis, above n.3, *op. cit.*, p. 376), having regard to the protection of dignity in Art. 1 of the Grundgesetz (the German Constitution).

403 It is located in Art. 5 of the Grundgesetz.

in some of the most famous clashes,[404] it is the former which has triumphed, notwithstanding the constitutional status of the latter. Likewise in *Oblique Financial Services*,[405] the private law doctrine of breach of confidence trumped the public law freedom of communication. In other words, leaving the protection of privacy substantially on the private law plane as a tort, does not, of itself, place it at a disadvantage in a clash with a public law speech-right.

Turning then, to privacy as a constitutionally-protected right. On one view, constitutional rights are exercisable by an individual only against the State and not against private individuals. Irish law has not, however, adopted that position. "Uniquely, the Irish Constitution confers a right of action for breach of constitutionally protected rights against persons other than the State and its officials".[406] Such a right of action can lie at the suit of one private individual against another private individual.[407] Thus, a private plaintiff can rely on the constitutional right to privacy in an action against a private defendant, and, conversely, the private defendant can rely on a constitutional speech-right. Unfortunately, the principles with which to reconcile such a conflict are far from clear. Three trends can be discerned.[408]

First, the conflict is stated, but there is little or no attempt at nuanced resolution. For example, the impact of Article 40.6.1°i on the tort of defamation is still unclear. To meet an invitation to discuss that impact with a reference to the competing Article 40.3.2° right to good name, as Geoghegan J. did in *Foley v. Independent Newspapers*,[409] does not

[404] *e.g.*, *Mephisto* BVerfGE 30, 173 (1971), (translated Markesinis, above n.3, *op. cit.*, p. 358), discussed in Lorenz, p. 107, and, in an Irish context, in O'Dowd, pp. 170–171.

[405] "[T]he respondents' right to communicate information must be subject to other rights and duties, and in particular, to the right of confidentiality enjoyed by . . . the plaintiff", above, n.59 of course, this applies only to the extent that the Constitution contemplates such limitation see *Meskell v. C.I.É.* [1973] I.R. 121..

[406] *P.H. v. John Murphy and Sons* [1987] I.R. 621, 626 *per* Costello J.

[407] *Educational Company v. Fitzpatrick* [1961] I.R. 323; *Educational Company v. Fitzpatrick (No. 2)* [1961] I.R. 345; *Meskell v. C.I.É.* [1973] I.R. 121; *A.G. (S.P.U.C.) v. Open Door Counselling* [1988] I.R. 593.

[408] For a different approach to the area, see Hogan and Whyte, pp. 691 *et seq.*

[409] [1994] 2 I.L.R.M. 61, 67–68 *per* Geoghegan J.: "Counsel for the Defendant, Mr. Fennelly apart from relying on the ordinary common law defence of fair comment calls in aid also Art. 40.6.1°i of the Constitution. He has referred me to authorities indicating that the traditional law of contempt of court has been affected by that constitutional provision and he argues that the law of libel may also be affected by it. Even if that submission as a general proposition is correct any consideration of that particular constitutional provision would have to be balanced by consideration of Article 40.3.2° which requires that the State shall by its laws protect as best it may from unjust attack and in the case of injustice done vindicate the good name of every citizen. As far as this particular case is concerned, I am satisfied that once that balancing is done the Plaintiff's entitlement to succeed under the ordinary laws of libel is unaffected." (On good name, *cp. Stringer v. Irish Times*, unreported, High Court, Carney J., February 3, 1993, p. 4).

resolve the conflict; it merely states it, and gives no guidance as to how that or similar conflicts may be resolved in the future.[410] The converse of this, and equally as unhelpful, is a rule which resolves for all time how the conflict of rights is to be resolved, whatever the individual circumstances. This is the consequence of the second technique, the notion of a hierarchy of constitutional rights. It has its genesis in the decision of the Supreme Court on the stark facts of *The People (D.P.P.) v. Shaw*.[411] Kenny J. asserted that there "is a hierarchy of constitutional rights, and, when a conflict arises between them that which ranks higher must prevail".[412]

It is difficult to postulate an *a priori* test to determine which of privacy and speech is to rank higher. This is not surprising. The notion of hierarchy is predicated upon the assumption of an objective order of rights, yet, it is very difficult to discern an *a priori* test to decide an objective order. For example, from *Shaw* itself, one might believe that at the apex of the hierarchy sits the right to life, but in *Attorney General v. X.*,[413] Egan J., observed of the notion of hierarchy that it:

> "cannot be taken to mean that an immutable list of precedence of rights can be formulated. The right to life of one person (as in *Shaw's* case) was held to be superior to the right to liberty of another, but, quite clearly, the right to life might not be the paramount right in every circumstance.

[410] First, contrast the detail with which a conclusion similar to *Foley* was reached in the contemporary Canadian case of *Hill v. Church of Scientology* (1994) 20 C.C.L.T. (2d.) 129, 151–167; upheld [1995] 2 S.C.R. 1130 (SCC). Second, there are arguments that the Constitution can reshape the tort of defamation notwithstanding the good name guarantee (see O'Dell, "Defamation"), arguments to which courts in other jurisdictions (outside the U.S.) have recently harkened and followed; the House of Lords used Art. 10 of the European Convention to reshape the law on libel of Government in *Derbyshire County Council* (see also *Ballina Shire Co. v. Ringland* (1994) 35 N.S.W.L.R. 680); but the most extraordinary example is provided by a recent line of cases in the High Court of Australia which held that the right to communicate, especially political speech, was unenumerated in, but protected by, the Australian Federal Constitution: *Nationwide News Pty. v. Wills* (1992) A.L.J.R. 658 (statute preventing criticism of public body unconstitutional); *Australian Capital Television v. The Commonwealth* (1992) A.L.J.R. 695 (statutory prohibition of political advertising invalid); *Theophanous v. Herald & Weekly Times* (1994) 68 A.L.J.R. 713 (Constitution protects criticism of political representative; no action in defamation unless article unreasonable); *Stephens v. West Australian Newspapers Ltd* (1994) 68 A.L.J.R. 765 (same). The *Theophanous/Stephens* rule is very similar to the position posited in O'Dell, "Defamation" as required by the Irish Constitution.

[411] [1982] I.R. 1.

[412] *ibid.* at 63. Protecting the right to life of a missing girl ahead of the right to liberty of the defendant "was a question of vindicating the higher-ranking constitutional right" (*ibid.*).

[413] [1992] 1 I.R. 1. For an example of such reasoning in a privacy speech context, see Elford, "Trafficking in Stolen Information: A 'Hierarchy of Rights' Approach to the Private Facts Tort" (1995) 105 Yale L.J. 727

If, for instance, it were necessary for a father to kill a man engaged in the rape of his daughter in order to prevent its continuance, I have no doubt but that the right of the girl to bodily integrity would rank higher than the right to life of the rapist."[414]

With respect, if there is a "hierarchy" in which the elements change in precedence according to the circumstances, that hierarchy exists in name only, circumstantially changing precedence negates the very notion of a hierarchy.[415] Nevertheless, this bankrupt idea has made its way into an area of the law contiguous to the privacy/speech conflict.

In determining whether or not pre-trial publicity has prejudiced a trial, formerly, the courts rigidly applied principle[416] which had the effect of chilling speech, but a recent line of authority has taken a more realistic approach to the effectiveness of directions to insulate juries from being influenced by prejudicial publicity. Although free speech considerations do not expressly form part of the reasoning, the effect is to increase the ambit of permissible speech. Instead, in *D. v. Director of Public Prosecutions*,[417] Denham J. posits a clash between the right to a fair trial and "the community's right to prosecute",[418] and ordains that the former must win every time:

"The applicant's right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights it is a superior right.

414 *ibid.*, at 92. See also, for an analysis accepting the importance of the right to life but without ascribing it to a hierarchy, *Murray v. Ireland* [1985] I.R. 532 *per* Costello J. The Supreme Court, on appeal ([1991] I.L.R.M. 465) accepted the notion of hierarchy, but did not need to deploy it on the facts.

415 The approach of Hamilton C.J. in *Re a Ward of Court* is less dogmatic: he would have recourse to a notion of a priority of the right to life over other rights if he could not harmonise the interaction of the rights: above, n.231 at 425).

416 *e.g. The People (Attorney General) v. Singer* [1975] I.R. 405. For a recent example of the strict application of the rules, see *Doherty v. D.P.P.*, unreported, High Court, Carney J., February 5, 1993. On this issue generally, see the contributions to this volume by Lord Williams of Mostyn Q.C, chap. 7, above, and Kevin Boyle and Marie McGonagle, chap. 8, above: Duffy, "Pre-Trial Publicity" (1994) 4 I.C.L.J. 113; Naylor [1994] C.L.J. 492. However, for a very important decision on media rights to report trials, see *People (D.P.P.) v. M.C.*, above n.367.

417 [1994] 2 I.R. 465; [1994] 1 I.L.R.M. 435.

418 In theory, in a liberal State, citizens, and citizens alone, are rights-bearing, since it is the protection of the individual from the State. Thus, groups such as the cabinet (in *A.G. v. Hamilton* [1993] 2 I.R. 250; and the community (here), are not citizens and consequently cannot properly be described as rights-bearing. They may and do have legitimate interests which ought properly to be considered, but to insist that such interests are best served by ascribing to them the status of rights is to dilute the notion of a right. One consequence of this analysis is that the community interest in prosecuting offences does not properly belong to a hierarchy of rights (even if such a notion is a legitimate one).

"A court must give some consideration to the community's right to have this alleged crime prosecuted in the usual way. However, on the hierarchy of constitutional rights there is no doubt but that the applicant's right to fair procedures is superior to the community's right to prosecute".[419]

It may very well be that the individual's right to a fair trial will, as a matter of fact, always be more important than the interest of the community in prosecuting crimes, it is difficult to conceive of a situation in which the converse could occur, but it is not necessary to go the next step and expressly ascribe this consequence to a hierarchy; it stands well enough on its own, without turning this matter of fact into a matter of necessity.

Nevertheless, in the later *Z. v. Director of Public Prosecutions*,[420] Hamilton P. in the High Court and Finlay C.J. in the Supreme Court quoted[421] this analysis with approval. Indeed, for the latter, "no mere statement about balancing would be correct".[422] Nevertheless, his approach in *Burke v. Central Independent Television*[423] was less dogmatic: the Supreme Court had to consider the balance between the rights to life and bodily integrity on the one hand, and the right to good name on the other. Although the Chief Justice held that the former were superior, he did not have regard to the notion of hierarchy to do so,[424] and O'Flaherty

419 [1994] 1 I.L.R.M. 435, 441 *per* Denham and O'Flaherty JJ. concurring.

420 [1994] 2 I.R. 476. If D and Z are not seen as successive stages in a trend in liberalising the rules, then Z would seem to be inconsistent with D on their facts.

421 *ibid.*, at 492 (HC, Hamilton P.), 498–499 (Finlay C.J. for a unanimous Supreme Court).

422 *ibid.*, at 498.

423 [1994] 2 I.R. 61. The plaintiffs claimed that a television programme which linked them with the I.R.A. had defamed them, (compare *Duffy v. News Group Newspapers* [1992] 2 I.R. 369 and *McDonagh v. News Group Newspapers*, unreported, Supreme Court, November 23, 1993) and sued the defendants, the makers of the programme. On an application for discovery, the defendants refused to disclose to the plaintiffs documents which identified their sources, since, if their allegations were correct, their sources could be in danger from I.R.A. reprisals. In essence, the Supreme Court upheld this contention, (Finlay C.J. was prepared to go further, and hold that what was "necessarily at issue here is not merely an immunity of documents from discovery by one party to another but an immunity . . . which must affect what the court could permit as admissible evidence upon the hearing of the action." [1994] 2 I.L.R.M. 161, 175). Note also that if discovery worked a substantial invasion of privacy on the third party, it may not be ordered: *Fitzpatrick v. Independent Newspapers* [1988] I.R. 131. Indeed, in an extraordinary holding in *M.M. v. C.M.*, unreported, High Court, July 26, 1993), O'Hanlon J. held that the public interest in confidential disciplinary proceedings against a priest at Canon law justified both confidentiality at the time and a privilege against disclosure in later judicial proceedings.

424 "With regard to the two contesting constitutional rights which the court finds in conflict . . . there can be no doubt but that the constitutional right of individual citizens to the protection of their life and of bodily integrity must of necessity take significant precedence over so important a right as the right of citizens to the protection and vindication of their good name. That does not mean of course that it excludes or

J. expressly saw the issue as one of balancing[425] the claims of competing constitutional rights on a case-by-case basis.[426]

As an alternative to the notion of hierarchy, the notion of balancing supplies the third possible approach of the courts to the issue of resolution of a conflict of rights. Despite the *D.* and *Z.* line of authority, there are signs that the courts have been uncomfortable with the notion of hierarchy, and are instead balancing rights (even if they do not admit that this is what they are doing). The rejection of hierarchy in favour of balancing began in the very case that bequeathed hierarchy to the law: *Shaw*. Griffin J's approach to the issue is very different to that of Kenny J:

> "If possible, fundamental rights under a Constitution should be given a mutually harmonious application, but when that is not possible, the hierarchy or priority of the conflicting rights must be examined both as between themselves and in relation to the general welfare of society. This may involve toning down or even putting into temporary abeyance of a particular guaranteed right so that, in a fair and objective way, the more pertinent important right in a given set of circumstances may be preferred and given application."[427]

Two points about this passage must be noted. First, the resolution of a conflict between rights is made a matter of harmonious interpretation.[428] Second, while he spoke the language of hierarchy, what he described as hierarchy is in fact balancing: it is not the mechanical ascription of immutable precedence of one right over the other, but instead an assessment *"in a given set of circumstances"* of which of the conflicting rights must be put "into *temporary* abeyance". It may be that this approach was what Egan J. had in mind in X. But this less mechanical view of hierarchy means that the precedence of the rights changes according to the circumstances, which means that it is not a

extinguishes in any way consideration for and the importance of the right to a good name." [1994] 2 I.L.R.M. 161, 176, *per* Finlay C.J. (Egan, Blayney and Denham JJ. concurring).

425 "The balancing of constitutional rights, which we are required to engage in on occasion, would not necessitate in this case – to recall the vivid phrase of McCarthy J. in *The People (D.P.P.) v. Ryan* [1989] I.L.R.M. 333 – "a recalibration of the scales of justice"." [1994] 2 I.L.R.M. 161, 185.

426 Indeed, in *Magee v. O'Dea* [1994] 1 I.R. 500, Flood J., applying *D*, found on the facts a serious risk of an unfair trial if the applicant were extradited to Northern Ireland, but he did not have regard to the notion of hierarchy. Thus, the *D* and *Z* conclusions have been reached judicially without hierarchy reasoning.

427 Above, n.411 at 56.

428 Again, "where there exists an interaction of constitutional rights, the first objective of the courts in interpreting the Constitution and resolving any problems thus arising should be to seek to harmonise such interacting rights", *Re a Ward of Court*, above, n.231 at 425 *per* Hamilton C.J.

hierarchy at all, but rather the result of an individuated balancing process.

Therefore, McCarthy J. has expressly disavowed reliance on hierarchy, preferring instead, as a consequence of the doctrine of harmonious interpretation, to balance the conflicting rights on a case-by-case or issue-by-issue basis. Thus, in *Attorney General v. X.*, he said:

> "If there be a hierarchy of constitutional rights . . . *it is, perhaps easier to compare two of them rather than to identify the level of each particular right.* This is all the more so since the catalogue of unenumerated rights remains incomplete. . . . *I would prefer to seek harmony between the various rights guaranteed and to reconcile them to each other rather than rank one higher than another*".[429]

Put simply, for McCarthy J., the doctrine of harmonious interpretation requires that competing rights be balanced, in a context-sensitive, issue by issue, manner. This is as it should be. This balancing process is how a clash between privacy and speech ought to be resolved. Two important trends in the case law give us a flavour of what this balancing process might look like. The first is X. itself. Finlay C.J. accepted the proposition that in the clash of two rights the doctrine of harmonious interpretation required that they be balanced, and struck the balance on the basis of "a real and substantial risk" to the one right by virtue of the exercise of the other.[430] A problem with this approach *simpliciter*, however, is that the result of the balance can depend on which right the analysis proceeded from, so that in protecting one right, the courts go too far in restricting the other. To remedy this problem, it is therefore necessary to turn to the second trend. Presumably, the doctrine of harmonious interpretation further requires that the exercise of each right restrict the other as little as possible: this is the doctrine of pro-

429 Above, n.413, at 79, emphasis added. Such reconciliation must be a matter of balancing, even though he asserted that it "is not a question of setting one [right] above the other . . . It is not a question of balancing . . .", but Hogan and Whyte speculate that perhaps "such casuistry was required because the text of the Constitution equated two rights, which, in fact, cannot be reconciled on the rare occasions in which they come into conflict" (at p. 695).

430 [1992] 1 I.R. 1, 53; to like effect, see pp. 87, 92; *contra*: pp. 63, 70-77, who also accepted that the amendment set up a balance but proposed a different balancing test. The decision in X. is minutely dissected in Byrne and Binchy, *Annual Review of Irish Law 1992* (1994), pp. 154–208, Round Hall Press, Dublin; see also Whelan and Kingston, "The Protection of the Unborn in Three Legal Orders" (1992) 10 I.L.T. (N.S.) 93, 104, 166, 279, with references; and Ward, "Ireland: Abortion: X + Y = ?!" (1994–5) 33 U. Louisville J.F.L. 385. The "real and substantial risk" test was approved in *Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 I.R. 1.

portionality,[431] a doctrine which can be detected performing this function in some important judgments[432] and which has recently been accepted by Costello and O'Flaherty JJ. in the Supreme Court in *Heaney v. Ireland*[433] and by Finlay C.J. in *Re the Matrimonial Home Bill 1993*,[434] as performing such a function on the constitutional[435] plane. The doctrine, by requiring that the least restrictive invasion of any given right be adopted so as to respect the other, would therefore ensure that any precedence which is to be given to one right over the other as a consequence of balancing is only so much as is strictly necessary in the circumstances. In making such a determination, the issues identified in the discussion as to when, in theory, privacy is limited in the interests of speech, should be applied to the facts.

In summary then, in a conflict between constitutional rights to

[431] Seen as a recent (and by some, unsuccessful: Boyron, "Proportionality in English Administrative law: A Faulty Translation" (1992) 12 O.J.L.S. 237) import into the common law: Nolte, "General Principles of German and European Administrative Law – A Comparison in Historical Perspective" (1994) 57 M.L.R. 191.

[432] In *A.G. v. Quinn's Supermarkets* [1972] I.R. 1, the Supreme Court held that while the impugned statutory instrument pursued a legitimate aim, it went too far, thus disproportionately infringing the applicants' rights. There are discernible traces in *Hand v. Dublin Corporation* [1989] I.R. 26 and *Cox v. Ireland* [1992] 2 I.R. 503.

[433] *Heaney and McGuiness v. Ireland* [1994] 3 I.R. 593 (HC); [1997] 1 I.L.R.M. 117 (SC). Section 52 of the Offences Against the State Act 1939 does not disproportionately interfere with the applicant's right to silence. This is the same as the approach taken in the US Supreme Court, which requires that infringements of rights be subject to strict scrutiny, so that, to be justified, any infringement must be narrowly tailored to a compelling State interest; this analysis commended itself to McCarthy J. in *Norris v. A.G.* [1984] I.R. 36, 101. See the submission in *Carrigaline Community Television Broadcasting v. Minister for Transport, Energy and Communications*, unreported, High Court, Keane J., November 10, 1995 at pp. 147–149 of the transcript) that restrictions on speech must be proportionate; this is not expressly considered in the relevant later treatments (pp. 186–188, 194–195).

[434] [1994] 1 I.R. 305, 326; the court was satisfied that the impugned provisions of the Bill "do not constitute a reasonably proportionate intervention by the State with the rights of the family and constitute a failure by the State to protect the authority of the family." Similarly, in *T.F. v. Ireland* [1995] 2 I.L.R.M. 321, it was held that the Judicial Separation and Family Law Reform Act 1989 does not constitute an unjust attack on property rights or the institution of marriage, there being "a resonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizens." At 347 citing *Ryan v. A.G.* [1965] I.R. 294, 312 *per* Kenny J. See also *Re a Ward of Court*, above, n.231 at 450 *per* Denham J., discussing submissions as to when an interference with bodily integrity will be "gross and disproportionate". Indeed, it may be that in protecting constitutional rights from "unjust" attack, an attack will be "unjust" if it is "disproportionate". Following the *Matrimonial Home Bill* case, in *Iarnród Éireann v. Ireland*, Keane J. in the High Court ([1995] 2 I.L.R.M. 161, 196) and O'Flaherty J. in the Supreme Court ([1996] 2 I.L.R.M. 500) both held the contribution provisions of the Civil Liability Act 1961 proportionate and constitutional.

[435] Formerly, it had gained acceptance only at administrative law. See Hogan and Morgan, *Administrative Law in Ireland* (2nd ed., 1992), pp. 529–544, Sweet & Maxwell, London, 1992.

privacy and expression,[436] the courts should not seek to resolve the conflict by recourse to the illegitimate notion of a hierarchy, but should instead balance the rights in question, and seek to resolve the conflict in a context-sensitive, issue-by-issue, way, so that holding in favour of the one does not disproportionately[437] restrict the other, having regard to the value which each right has in the Constitutional and legal order. In so doing, the courts should have regard to the justifications for each of the rights, and the weight each carries in the constitutional order.

Conclusions

On the cusp between the twentieth and twenty-first centuries, the defining icon of our age is information. More information is more easily available about many more topics, all the more so as a consequence of technological advances in this century which will probably continue at least exponentially into the next. We are only just beginning to explore the legal problems associated with information in the hyperspace thereby generated;[438] this will be a major challenge for the lawyers of the next century. The present strategy is to take the law as it exists in the real world, and to apply it (or as much of it as is possible) to the virtually real world of hyperspace. Thus, for example, the unauthorised disclosure of information on the internet would be governed by broadly the same legal regime as that to which the unauthorised disclosure of information is subject in the real world. However, this strategy assumes that the underlying legal concepts are substantially settled; yet, in the example given of unauthorised disclosure of information, the law as it applies in the real world is not clear. This need not be the case.

It is within the range of interpretative development of Irish law to state a general action for the protection of privacy (whether at private or at public law). In such an action for invasion of privacy, respecting the autonomy and dignity of the individual, the law should protect against physical intrusion (which prevents surveillance of, or access by others to, one's person, possessions, or property) and against dis-

[436] In *Kennedy v. Ireland* [1987] I.R. 587, 593, Hamilton P. found an invasion of privacy where "communications of a private nature are deliberately, consciously and unjustifiably interfered with". But that does not really serve as a balancing test, since it begs the question: when is an interference "unjustifiable"? It is only after some test has been applied, and a conclusion drawn, that one can say that a given interference is unjustifiable.

[437] This is the position in the German courts: *Lebach* BVerfGE 35, 202 (1973), translated Markesinis, above n.3, *op. cit.*, p. 390 at p. 396. It is also now the position in the Australian courts: see the cases cited in n.410 above.

[438] *e.g.*, Auburn, "Usenet News And The Law" [1995] 1 *Web Journal of Current Legal Issues* (http://www.ncl.ac.uk/~nlawwww/articles1/ auburn1.html).

closure by publication in breach of the individual's right to determine when, how and to what extent personal information is disclosed. This section should provide a coherent and consistent set of remedies (including the availability of both injunctions and damages where necessary): to defences which, *inter alia*, respect the right to freedom of expression such as prior disclosure and the public interest. It may very well be that the action for the protection of privacy so laboriously built up will prove of little value when faced with a speech right. If that is so, then in the end, that is the price we pay for speech.

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