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## **Beyond breach of confidence: an Irish eye on English and Scottish privacy law**

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**Abstract**

This article is based on comparative comments (with special attention paid to Irish law) presented at a seminar on breach of confidence and privacy. It is first argued that a continuing uncertainty regarding the role of statute in relation to privacy is common to the development of doctrines in both England and Scotland, with similar anxieties present in other jurisdictions. In the absence of statutory clarity, the questions arising out of debate on the nature of the cause of action, and the consequences of variation in definitions of “privacy”, are considered - with special attention to developments in Ireland and New Zealand. The relationship between the evolution of breach of confidence and the human rights framework is also noted. Finally, the prospects for law reform and/or convergence across jurisdictions in the United Kingdom are assessed.

**Keywords**

breach of confidence, privacy, article 8, delict

**Beyond breach of confidence: an Irish eye on English and Scottish privacy law**

**Daithí Mac Síthigh<sup>1</sup>**

**1. Introduction**

This article is based on comparative comments (with special attention paid to Irish law) offered at a seminar<sup>2</sup> in response to papers presented by Prof. Paula Giliker<sup>3</sup> and Prof. Elspeth Christie Reid.<sup>4</sup> It is first argued that a continuing uncertainty regarding the role of statute in relation to privacy is common to the development of doctrines in both England and Scotland, with similar anxieties present in other jurisdictions. In the absence of statutory clarity, the questions arising out of debate on the nature of the cause of action, and the consequences of variation in definitions of ‘privacy’, are considered. The relationship between the evolution of breach of confidence and the human rights framework is also noted. Finally, the prospects for law reform and/or convergence across jurisdictions in the UK are assessed.

**2. The role of statute**

Giliker recalls the debating of the Human Rights Bill and the infamous promise that the Bill did not constitute statutory controls on the press. But as also pointed out, it was on the same record that the Government expected that the courts would be able to ‘fashion a common law right to privacy’. The present-day debate on the implementation of the recommendations of the Leveson inquiry has been characterised by similar questions. Government and others have spent energy crafting a legal form that would be enforceable and meaningful without being labelled as ‘statutory’. In this situation, the route of proposing a Royal Charter with a modified form of amendment,<sup>5</sup> plays the role of being sufficiently ‘non-statutory’ to soothe

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<sup>2</sup> Joint seminar of the British Association of Comparative Law (BACL) and Scottish Association of Comparative Law (SACL), University of Edinburgh, 3 September 2013.

<sup>3</sup> Paula Giliker, ‘English Tort Law and the “Tort” of Breach of Confidence’ [2014] *Jur Rev* 15.

<sup>4</sup> Elspeth Christie Reid, ‘Breach of Confidence: Translating the Equitable Wrong into Scots Law’ [2014] *Jur Rev* 1.

<sup>5</sup> Department for Culture, Media & Sport, ‘Draft Royal Charter on self-regulation of the press’ (March 2013) <https://www.gov.uk/government/publications/leveson-report-draft-royal-charter-for-proposed-body-to-recognise-press-industry-self-regulator>; see also Enterprise and Regulatory Reform Act 2013, s 96 (‘Where a body is established by Royal Charter after 1 March 2013 with functions relating to the carrying on of an industry, no recommendation may be made to Her Majesty in Council to amend the

concerns about ‘statutory regulation’, as the expectation that the courts would use one statute to develop the common law did before it. The question long predates the Human Rights Act, though; in Scotland, the Scottish Law Commission considered the law on breach of confidence in 1973. It did not find in favour of or against a statutory approach, although it did draft a bill.<sup>6</sup>

The question of whether the law of privacy should be put on a statutory basis has also been considered of late, in a more careful way, in other jurisdictions. In Ireland, the law on privacy is based on a combination of the constitutional right of privacy under article 40.3, and the Irish doctrine that breach of constitutional rights (in some circumstances by non-State actors) can be the subject of an action against the infringing party. A Privacy Bill proposed in 2006, after a report,<sup>7</sup> would have codified and amended the evolving doctrine. It was heavily criticised by the media and by some scholars, and ultimately the Government of the day decided to proceed with reforms to defamation law (including a new Press Council) and defer further consideration of privacy law to a later point.<sup>8</sup> However, this proposal has been considered from time to time since then by successive Ministers (across governments), typically in reaction to allegations of media malpractice.<sup>9</sup>

In New Zealand, the matter was studied in some detail by the Law Commission, but in its four-volume report, its conclusion regarding civil actions (in 2010) was that judicial development should be allowed to continue and that codification was not necessary.<sup>10</sup> The Law Commission also argued that ‘there is a privacy tort, or something equivalent to it, in Europe and the United Kingdom, some provinces in Canada and the United States’ (as well as proposals in Australia).<sup>11</sup> In the 2004 *Hosking v Runting* decision, the Court of Appeal had already argued that it was

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body’s Charter or dissolve the body unless any requirements included in the Charter on the date it is granted for Parliament to approve the amendment or dissolution have been met.’)

<sup>6</sup> Scottish Law Commission, ‘Breach of confidence’ (1984) Cmnd 9385, [www.scotlawcom.gov.uk/download\\_file/view/435](http://www.scotlawcom.gov.uk/download_file/view/435).

<sup>7</sup> ‘Report of the working group on privacy’ (March 2006), <http://www.justice.ie/en/JELR/WkgGrpPrivacy.pdf/Files/WkgGrpPrivacy.pdf>.

<sup>8</sup> Liam Reid, ‘Print media reaches consensus on press watchdog’ (*Irish Times* 6 December 2006) 7; Stephen Collins, ‘Lenihan to postpone enacting Privacy Bill’ (*Irish Times* 12 November 2007) 12.

<sup>9</sup> See for example Olivia Kelly, ‘Photographs of duchess prompt Shatter to review Privacy Bill’ (*Irish Times* 18 September 2012) 7; Paul Cullen, ‘Ahern says he plans to revive privacy Bill’ (*Irish Times* 1 April 2009) 5; Paul Cullen, ‘Lenihan warns media on privacy issue’ (*Irish Times* 10 January 2008) 1;

<sup>10</sup> New Zealand Law Commission, ‘Review of the law of privacy, stage 3; Invasion of privacy: penalties and remedies’ (2010) NZLC R113, chapter 7, in particular [7.9] and [7.18].

<sup>11</sup> *Ibid* [7.7].

‘legally preferable and better for society’s understanding’ for there to be a clear privacy cause of action.<sup>12</sup>

The curious development of the Irish action should be considered in more detail, so as to identify those features unique to Irish constitutional practice and those relevant to other jurisdictions. The action is founded on two principles: (a) the recognition over the space of a few months in the early 1970s by the Supreme Court that courts can grant a remedy for breach of constitutional rights against the State<sup>13</sup> or against a private party (in *Meskill*),<sup>14</sup> and (b) the identification of privacy as one of the personal rights protected by article 40 in the *McGee*<sup>15</sup> decision (challenging the prohibition of contraception). *McGee* is applied to a more recognisable form of privacy claim in *Kennedy*,<sup>16</sup> where journalists successfully argued in a claim against the State that their constitutional rights had been breached by interception of their telephone calls, and were awarded damages of £50,000.<sup>17</sup> It was soon clarified that, for the purposes of limitation and damages, actions of this nature were treated as if they were torts.<sup>18</sup> It was not until much more recently, though, that a direct action against a non-State actor for breach of privacy was successful; although the elements were all there, a suitable case had not been before the court.<sup>19</sup>

The past decade has seen a flurry of privacy-related cases, against the State<sup>20</sup> and against others. Successful actions against non-State actors include the award of €115,000 against a property-owner who secretly filmed tenants<sup>21</sup> and, in the fully-reported High Court decision in *Herrity v Associated Newspapers*, €90,000 (including

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<sup>12</sup> [2004] NZCA 34 [246]. See also Giliker (n 3) 20.

<sup>13</sup> *Byrne v Ireland* [1972] IR 241.

<sup>14</sup> *Meskill v CIE* [1973] IR 121.

<sup>15</sup> *McGee v AG* [1974] IR 284; see generally Gerard Hogan & Gerry Whyte, *Kelly: The Irish Constitution* (4<sup>th</sup> edn Dublin: Butterworths, 2004) 1346-1355.

<sup>16</sup> *Kennedy v Ireland* [1987] IR 587.

<sup>17</sup> Irish punt (approximately €63,000).

<sup>18</sup> *McDonnell v Ireland* [1998] 1 IR 134.

<sup>19</sup> However, it was assumed in cases disposed of at a preliminary stage, e.g. *Cogley v RTE* [2005] 2 ILRM 529.

<sup>20</sup> E.g. *Gray v Minister for Justice* [2007] IEHC 52.

<sup>21</sup> Unreported decision of the Circuit Court. See ‘Landladies ordered to pay students €115,000 in damages’ (*Irish Times* 11 November 2007). Curiously, it appears as if a judgement against the property (for unpaid damages) has prompted an appeal six years later: Tim Healy, ‘Landlady who spied on tenants may lose house’ (*Evening Herald* 8 March 2013) <http://www.herald.ie/news/courts/landlady-who-spied-on-tenants-may-lose-house-29117862.html>; ‘Landlady to appeal decision awarding damages to Galway students’ (*Galway Bay FM* 8 March 2013) <http://www.galwaybayfm.ie/schedule/big-breakfast-show/item/470-landlady-to-appeal-decision-awarding-damages-to-galway-students>.

€30,000 in punitive or exemplary damages) against a newspaper which published illegally-recorded telephone conversations.<sup>22</sup> Cases have also dealt with applications for injunctions.<sup>23</sup> This has all been achieved without recourse to breach of confidence, but ironically not confirmed until *after* the English developments, despite the much clearer legal basis. Each of these cases see reference to Convention decisions (and to some English decisions under the new approach), but the availability of the constitutional action has meant that breach of confidence, as a doctrine, is of little relevance.

### 3. The nature of the cause of action

The development in England of breach of confidence into an action for misuse of private information is often described as a ‘shift in the centre of gravity’.<sup>24</sup> However, the new action still has associated with it some unanswered questions regarding its juridical status or classification. For example, whether the action is a tort for the purposes of international private law is considered in *Douglas v Hello (no 3)*.<sup>25</sup> This decision was made on the basis of s 9(1) Private International Law (Miscellaneous Provisions) Act 1995. Further questions will arise; perhaps the provision of the Rome II Regulation that ‘non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation’<sup>26</sup> are excluded from its application. However, in this section, two further questions are highlighted: damages, and legal origins.

The matter of damages has been the subject of some development in England. Giliker highlights the questions arising out of the position being taken so far that exemplary damages are unavailable.<sup>27</sup> This too is affected or at least potentially recast by the implementation of Leveson’s report.<sup>28</sup> The proposed incentives for participation in self-regulation include the permitting of exemplary damages in respect of a number of

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<sup>22</sup> *Herrity v Associated Newspapers* [2008] IEHC 249.

<sup>23</sup> *Murray v News Group Newspapers* [2010] IEHC 248.

<sup>24</sup> Drawing upon Lord Hoffman’s formulation in *Campbell v MGN* [2004] UKHL 22 [51].

<sup>25</sup> [2005] EWCA Civ 59. But see now the decision of the High Court in *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB) [61-71], where Tugendhat J found that misuse of private information is a tort, although breach of confidence is not.

<sup>26</sup> Article 1(2)(g).

<sup>27</sup> Giliker (n 3) 19 ; see also Mark Warby, Nicole Moreham & Iain Christie (eds), *Tugendhat and Christie: The Law of Privacy and the Media* (Oxford University Press, 2nd edn 2011) [13.121] (on the HRA), [13.124] (on misuse of private information).

<sup>28</sup> Report of the Leveson Inquiry, volume IV, at 1512.

actions (including ‘breach of confidence’ and ‘misuse of private information’), with publishers being able to avoid this prospect through participation in a regulatory scheme.<sup>29</sup> Although concerns have been raised that exemplary damages against publishers raise questions of compatibility with article 10 ECHR,<sup>30</sup> recall that exemplary damages are already granted in (constitutional) privacy actions under Irish law. In Scotland, the absence of exemplary damages meant that Leveson’s report created unforeseen problems in relation to Scots law, becoming the subject of a separate review commissioned by the Scottish government.<sup>31</sup>

Finding alternative sources for emerging problems continues to be a feature of privacy law. For instance, the links drawn between modern cases and the older *actio iniuriarum* has been an ongoing concern in Scots law.<sup>32</sup> Whitty argues that the *actio iniuriarum* was potentially applicable and useful for a number of emerging privacy-like matters.<sup>33</sup> (This appeared to be accepted, without reference to Whitty, in *Stevens v Yorkhill*<sup>34</sup>). Reid has argued, however, that links in legal origins might not be a ‘sustainable model for the modern development of personality rights protection’, particularly given the requirement of malice and the lack of the type of development seen in South African under this heading.<sup>35</sup>

It was therefore especially interesting that, in the Irish decision in *Sullivan v Boylan* (considered in more detail below) in 2013, Hogan J pointed to how the matters before him would have been actionable under Roman law,<sup>36</sup> and that continental civil codes often permitted an *actio iniuriarum* where conduct of this nature occurred. Hogan J added that in some jurisdictions, human rights provisions of national constitutions

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<sup>29</sup> Crime and Courts Act 2013, s 34, s 42.

<sup>30</sup> See in particular *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB) [197] (on necessary and proportionality obstacles to the availability of exemplary damages in privacy claims); *Mosley v UK* (2011) 53 EHRR 30 [129] (on ‘punitive fines’ for a possible pre-notification requirement as a potential threat to freedom of expression) – but see a critique of the relevance of the latter case in Hugh Tomlinson, ‘Why extending exemplary damages is the best approach for public interest journalism’ (*Inform Blog* 27 March 2013) <http://inform.wordpress.com/2013/03/27/why-extending-exemplary-damages-is-the-best-approach-for-public-interest-journalism-hugh-tomlinson-qc/>.

<sup>31</sup> ‘Report of the Expert Group on the Leveson Report in Scotland’ (2013) <http://www.scotland.gov.uk/Resource/0041/00416412.pdf>

<sup>32</sup> Elspeth Christie Reid, *Personality, confidentiality and privacy in Scots law* (W Green 2010) [17.05] (discussing *Martin v McGuiness* 2003 SLT 1424 (OH)).

<sup>33</sup> Niall Whitty, ‘Rights of Personality, Property Rights and the Human Body in Scots Law’ (2005) 9 *Edinburgh Law Review* 194, 199-208.

<sup>34</sup> [2006] CSOH 143. See the comment on the acceptance of Whitty’s argument in Hector MacQueen, ‘Scots law news’ (2007) 11 *Edinburgh Law Review* 1, 5.

<sup>35</sup> Reid (n 32) [17.12]

<sup>36</sup> [37]; also citing Peter Birks, ‘Harassment and Hubris’ (1997) 32 *Irish Jurist* 1, 6

were also relevant (highlighting in particular personal rights and human dignity)<sup>37</sup> He concluded:

‘All of this is merely to say that the common law might well yet develop unaided to match its civilian counterparts so that in time that the law of nuisance and the rule in *Wilkinson v Downton* [two possible existing remedies, which were not applicable to this case] would be regarded as just distinct sub-rules of a more general tort which protected human dignity and the person.’<sup>38</sup>

Hogan J’s parting shot was that, but for (in part) the Protection from Harassment Act 1997 in England, there could have been similar English developments. This observation can be linked with the discussion in the opening part of this article, on the merits and demerits of statutory intervention, and the idea that limited statutory change puts a ceiling on the extension of privacy law rather than encourages it.

#### **4. The role of the Convention**

The indirect horizontal effect of the ECHR, through the Human Rights Act, has contributed to the development of English privacy law. This is not just a point of general human rights adjudication or interpretation, though. Compare the scope of development with that of other Convention provisions. The opportunities to argue that a private party has infringed freedom of expression or assembly are famously limited and underdeveloped.<sup>39</sup> Giliker’s discussion of how the new tort takes its content from articles 8 and 10 (which she compares with the normal way in which English torts develop)<sup>40</sup> is a reminder that article 8 is the basis of wide change or recasting in England; take for the example the way that the restraint of publicity regarding a case

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<sup>37</sup> For a thorough treatment of the relationship between the modern Scots *actio iniuriarum* and dignity, particularly in the medical context, see Shawn Harmon, ‘*Yearworth v North Bristol NHS Trust*: A Property/Medical Case of Uncertain Significance?’ (2010) 13 *Medicine, Health Care & Philosophy* 343, 348.

<sup>38</sup> *Sullivan v Boylan* [38].

<sup>39</sup> *Appleby v UK* (2003) 37 EHRR 38 (in particular, the necessity that the ‘essence of the right has been destroyed’ before positive obligations would be contemplated); on the lack of impact of the Convention on private restrictions on freedom of expression, see further Emily Laidlaw, ‘The responsibilities of free speech regulators: an analysis of the Internet Watch Foundation’ (2012) 20 *International Journal of Law & Information Technology* 312; Daithí Mac Síthigh, ‘Virtual walls: the law of pseudo-public spaces’ (2012) 8 *International Journal of Law in Context* 394; David Mead, ‘A chill through the back door? The privatised regulation of peaceful protest’ [2013] *Public Law* 100.

<sup>40</sup> Giliker (n 3) 23.

in order to protect a child is now taken directly from the Convention, in place of inherent jurisdiction.<sup>41</sup>

Reid draws the attention of the reader to *White v Dickson*<sup>42</sup> and how it engaged a debate on the relationship between reputation and privacy.<sup>43</sup> She also calls into question, in the context of damages, the use of the Stair Memorial Encyclopaedia by Lord Hope, where a specific passage on ‘fame, reputation and honour’ is not reproduced.<sup>44</sup> It can be added that the importance of this material is of wider interest in human rights law. One of the areas of development (and academic critique) in ECHR ‘media’ law is the status of reputation as something protected under article 8 (as compared with being one of the ‘rights of others’ potentially supporting a restriction on freedom of expression, under article 10(2)). This debate has ebbed and flowed in the courts,<sup>45</sup> and been the subject of historical analysis,<sup>46</sup> doctrinal review<sup>47</sup> and consideration from the point of view of social psychology.<sup>48</sup> As such, there is evidence from both Scotland and England that the role of the Convention in encouraging or constraining how the available causes of actions develop is a question of the content of the action as well as its legal form.

## 5. More than one type of privacy

Existing sub-definitions of privacy can be used to test both the extent of the development of breach of confidence in England and Scotland, and the way in which

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<sup>41</sup> *Re S* [2004] UKHL 47 [23] per Steyn LJ: ‘the earlier case law about the existence and scope of inherent jurisdiction need not be considered in this case or in similar cases. The foundation of the jurisdiction to restrain publicity in a case such as the present is now derived from convention rights under the ECHR. This is the simple and direct way to approach such cases.’

<sup>42</sup> (1881) 8 R 896.

<sup>43</sup> Reid (n 4) 4.

<sup>44</sup> *Ibid* 9.

<sup>45</sup> Initially, *Radio France v France* (2005) 40 EHRR 706 [31]: ‘The Court would observe that the right to protection of one’s reputation is of course one of the rights guaranteed by Article 8 of the Convention, as one element of the right to respect for private life’ and developed in *Pfeifer v Austria* (2009) 48 EHRR 8. But a different approach is taken in *Karako v Hungary* (2011) 52 EHRR 36 [22]-[23]. See also *Re Guardian News & Media* [2010] UKSC 1.

<sup>46</sup> Rónán Ó Fathaigh, ‘The Recent Recognition of a Right to Reputation: A Judicial Response to a Perceived Media Crisis’, presented at *International Association for Media and Communications Research*, Dublin, June 2013.

<sup>47</sup> Mark Warby, Nicole Moreham & Iain Christie (eds), *Tugendhat and Christie: The Law of Privacy and the Media* (Oxford University Press, 2nd edn 2011) [7.38]-[7.40]. [7.69]; Helen Fenwick & Gavin Phillipson, *Media freedom under the Human Rights Act* (OUP 2006) 1098-9; see also Eoin Carolan, ‘Defamation and privacy laws after press regulation’, presented at *Recent developments in media law and regulation*, Trinity College Dublin, 17 January 2008.

<sup>48</sup> Alastair Mullis & Andrew Scott, ‘Reframing Libel: taking all rights seriously and where it leads’ (2012) 63 Northern Ireland Legal Quarterly 5, 10-11.

issues not yet before a court might proceed. It is well known how the US tort of privacy takes four forms: intrusion, appropriation, unreasonable publicity, and ‘false light’.<sup>49</sup> Reid argues that private information presents a not unreasonable challenge in Scotland because the centre of gravity was already suitably situated as being based on ‘secrets’, rather than ‘confidence’ as in England.<sup>50</sup> However, publicity rights will prove more difficult to ‘translate’ to Scots law.<sup>51</sup>

In New Zealand, *Hosking* has recently been the subject of an important extension in *C v Holland*<sup>52</sup> – one which may give some support to those who fear that once privacy is established in private law, courts can and will develop it beyond the initial acceptance. The case also demonstrates the importance of the origins of the law on privacy. The defence had argued that

‘There is no support for such a tort of simple intrusion into privacy in other common law jurisdictions, such as Australia and the United Kingdom. To the extent that there is support for such a tort, it derives from genuinely foreign constitutional arrangements, for example in the United States and Canada’

However, the court responded that the New Zealand Bill of Rights ‘should not become dominated by formal proprietary notions given the universal nature of the rights it protects’. It also turned to recent developments in Canada, where the Ontario Court of Appeal had found a right of action for intrusion upon seclusion.<sup>53</sup> Recall also that the New Zealand Law Commission had deliberately decided to leave the matter open in its post-*Hosking* report.

Recently, the importance of the flexibility provided by the Irish Constitution became apparent once more. In *Sullivan v Boylan*,<sup>54</sup> discussed above in the context of Roman and continental influences, Hogan J awarded damages (€15,000, plus €7,500 in exemplary damages) against a debt collector for intrusive, harassing behaviour against a debtor. Although it is the established approach that an action on the basis of the Constitution is not appropriate if there is a suitable existing cause of action available

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<sup>49</sup> Restatement (Second) of Torts §652A.

<sup>50</sup> Reid (n 4).

<sup>51</sup> Ibid 7.

<sup>52</sup> *C v Holland* [2012] NZHC 2155.

<sup>53</sup> *Jones v Tsiga* [2012] ONCA 32.

<sup>54</sup> *Sullivan v Boylan* [2013] IEHC 104.

to an applicant,<sup>55</sup> Hogan J found that in this case, neither the common law of nuisance nor the rule in *Wilkinson v Downton* (intentional infliction of mental shock) were sufficient to protect the (infringed) constitutional rights of the applicant. In an earlier decision as part of the same proceedings (regarding an interim remedy), Hogan had assessed the constitutional text,<sup>56</sup> pointing to the Irish-language version ('is slán do gach saoránach a ionad cónaite' – slán (security or safety) used where 'inviolable' is used in English) in order to highlight the purpose of the right, even where a dwelling had not been, in a literal sense, entered.

If the legislative bodies responsible for English and Scots law were concerned about these developments, they could act to define the scope of the action (as long as this remained consistent with the Convention). If media interests concerned about the 'creep' of privacy law wanted to do something, they might find themselves advocating what they have opposed for so long: a statute.

## 6. Conclusion

Of late, the attention of media law practitioners has turned to the position of *Northern* Ireland. Differences between defamation law in England and Scotland are known,<sup>57</sup> but until now there were few differences of any import between the defamation law of England and of Northern Ireland. This is no longer the case. This is because the UK parliament has adopted a new Defamation Act, but none of it extends to Northern Ireland (and little of it to Scotland).<sup>58</sup> Furthermore, there is no sign that either the Northern Ireland Assembly or the Westminster parliament intends to act. As such, the changes to defamation law (including some new statutory defences) applicable in England (often perceived as defendant-friendly) cannot be assumed to be applicable in Northern Ireland. Applicants may therefore choose to initiate action in Belfast, if concerned that the new definitions or defences might hinder their chances had the

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<sup>55</sup> *Hanrahan v Merck, Sharp & Dohme* [1988] ILRM 629: 'the courts are entitled to intervene only where there has been a failure to implement or, where the implementation relied on is plainly inadequate, to effectuate the constitutional guarantee in question' (per Henchy J, at 636).

<sup>56</sup> *Sullivan v Boylan* [2012] IEHC 389 [24].

<sup>57</sup> See for example Rosalind McInnes, *Scots law for journalists* (8th edn W Green, 2010) ch 31; Elspeth Reid, 'English Defamation Reform: A Scots Perspective' (2012) 18 SLT 111.

<sup>58</sup> Defamation Act 2013, s 17(3) (providing that only ss 6 (peer reviewed statements), 7(9) (qualified privilege for conference reports), 15 (definitions) and 16(5) (preserving existing causes of action) apply in Scotland).

claim been brought in England. This situation serves as a reminder of a trivial point: differences between jurisdictions may be exploited for strategic purposes.

Reid previously wondered whether the sparse case law on confidentiality under Scots law was a result of ‘the Scots (having) few secrets or (being) good at keeping them’.<sup>59</sup> The present author is not qualified to answer this question, but a serious issue is raised by it. In other areas of divergence between Scots and English law in the media, journalistic and editorial practice has played the role of ensuring *de facto* harmonisation. (An example is the voluntary non-disclosure of the names of alleged victims of sexual offences in Scotland, achieving in respect of Scottish proceedings the same effect as the Sexual Offences (Amendment) Act 1992 does in respect of those in England and Wales). But of course, the nature of secrecy and confidentiality is at least in part cultural. The willingness (or otherwise) of potential litigants to highlight these matters, and the approach to question of risk and ethics by journalists, cannot but affect the nature and number of cases brought forward. It can therefore be a long time before, in a small jurisdiction, these matters are truly put to the test.

Perceived differences between media law in England and Scotland were brought before a wide audience when the Glasgow-based *Sunday Herald* identified (in its print edition, circulating within Scotland) the footballer Ryan Giggs as being the subject of an injunction under English law as part of privacy proceedings he had instigated. The injunction<sup>60</sup> was without force in Scotland,<sup>61</sup> although making it enforceable would not have been particularly difficult.<sup>62</sup> Even so, the idea that the intended result of the English injunction could be frustrated so easily was held up either as evidence of a need to offer greater protection to applicants, or proof of the futility of trying to suppress information in the cross-border age of the Internet. A parliamentary committee has also heard evidence of the implications in terms of cost and speed of enforcing injunctions across jurisdictions and recommended action be taken to ensure that interim injunctions are enforceable in all UK jurisdictions.<sup>63</sup>

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<sup>59</sup> Elspeth Reid, ‘No Sex Please, We’re European: *Mosley v News Group Newspapers Ltd*’ (2009) 13 *Edinburgh Law Review* 116-121.

<sup>60</sup> *CTB v News Group Newspapers* [2011] EWHC 1232 (QB)

<sup>61</sup> Civil Jurisdiction and Judgments Act 1982, s 18(5)(d).

<sup>62</sup> *Ibid* s 27(1)(c).

<sup>63</sup> Joint Committee on Privacy and Injunctions, ‘Privacy and Injunctions’ (2012) HL Paper 273 / HC 1443 [70]-[74].

In her contribution to this issue, Reid is rightly sceptical about the way in which the House of Lords and the Court of Session dealt with the perceived gap in Scots law in respect of breach of confidence.<sup>64</sup> This is echoed by Giliker's finding that the English developments reflect a lack of conceptual coherence, primarily as a result of how the cause of action is classified.<sup>65</sup> What these two arguments share is a recognition that the emphasis has been placed on getting the right result, without due regard either for the intellectual coherence of the law (of interest to some) or for the longer-term consequences of making an action possible without due regard for important features like remedies, procedures, liability, and scope (of interest to all). The alternative tradition is one rooted in a combination of human rights law and Roman concepts of dignity, with courts being secure in the existence of a right so as to find themselves searching for a suitable remedy. This is why the Irish doctrines that made the modern privacy claim possible emerged in the first place, and a key feature of the New Zealand and Ontario decisions regarding intrusion. Hogan J's twinned reference to the *actio iniuriarum* and constitutional rights, an unusual and thoughtful approach in an Irish decision, suggests that English and Scottish developments might well inform one another as the realisation of article 8 continues – even if parliamentary interest remains minimal.

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<sup>64</sup> Reid (n 4) 6-8; discussing *Lord Advocate v Scotsman Publications* 1989 SC (HL) 122.

<sup>65</sup> Giliker (n 3) 25.