



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Privacy & the media. Traditional and emerging protections in an online world

IP/IT MEDIA & TELECOM Workshop

LONDON 2015

National Report of Ireland

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20 February 2015

1. Privacy Rights

1.1 Privacy rights in Ireland are derived from the Irish Constitution (Bunreacht na hÉireann), European Convention of Human Rights (“**ECHR**”) and case law. The right to privacy is not expressly provided for in the Irish Constitution, but has been held to be an unenumerated personal right under Article 40 of the Constitution. Article 40.3.2 of the Constitution states that the State, ‘*shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen*’. The general right to privacy recognised as subsisting in the Constitution can, however, be limited or restricted by legislation in the interests of the common good, public order and morality.

In addition to the Constitution of Ireland, the ECHR has been transposed into Irish law by the European Convention on Human Rights Act 2003 (the “**ECHR Act**”). The ECHR expressly provides for the right to privacy in Article 8. Under the ECHR Act, the organs of the State must exercise and interpret the law in line with the ECHR, unless otherwise precluded from doing so by domestic law. In particular, the Irish courts are required to apply statute and common law in a manner compatible with the EHCR and have the power to declare that any such provision is incompatible with the Convention.

In addition to general rights of privacy under the Constitution and the ECHR, the Data Protection Acts 1988 and 2003 (the “**DPA**”) specifically protect against the publication of “personal data”. The DPA transposes into Irish law Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Personal data is defined in section 1 of the DPA as data relating to a living individual who is or can be identified either from the data or from the data in conjunction with other information that is in, or is likely to come into, possession of the data controller. Consequently, a picture or a sound can be personal data if it is capable of identifying the individual in question.

The development of privacy rights in Ireland under the aegis of the Constitution can be traced incrementally through case law. For example, marital privacy rights were first recognised by the Irish courts in the case of *McGee v Attorney General* [1974] 1 I.R. 284. This case saw the Irish High Court infer a right of personal autonomy in respect of married couples given the specific protections afforded to families under Article 41 of the Constitution of Ireland. A more general right to privacy was recognised in *Kennedy & Arnold v Ireland* [1987] 1 I.R. 587. This case concerned the illegal tapping of journalists’ phones on the instructions of a Government minister. The journalists were awarded damages for the unlawful invasion of their right to privacy.

The concept of privacy rights in Ireland is quite wide. The Irish courts will look at each case on its facts to determine whether there has been an interference with an individual’s privacy rights and balanced against the constitutional right to free expression. The balancing test that the Irish courts use was originally set out in the case of *M v Drury* [1994] 2 I.R. 8. In this case, one of the defendants gave newspapers information of his marriage having broken down because he alleged that his wife had been having a

relationship with a Catholic priest. The wife's application for an injunction restraining any further publication on the subject was rejected. The High Court held that the constitutional guarantee of freedom of expression was more persuasive than the applicant's right to privacy and that the ambit of the privacy interest that the applicant claimed she was entitled to was better defined in legislation passed by the legislature rather than in case law handed down by the Court. Further, the plaintiff did not deny the truth of the core allegation about her adultery with a priest and most of the damage done to her and her children's privacy had already been done in what had been published to date. If the plaintiff wanted to contest the truth of the alleged adultery, the Court held that she could sue the defendants for defamation.

A case with similar facts, *Herrity v Associated Newspapers (Ireland) Ltd.* [2009] 1 I.R. 316, saw the High Court hold:

- (i) There is a right to privacy under the Irish Constitution.
 - (ii) The right to privacy is not an unqualified right.
 - (iii) The right to privacy may have to be balanced against other competing rights or interests.
 - (iv) The right to privacy may be derived from the nature of the information at issue (i.e. the Court is more likely to view with scepticism claims that information should be published about matters which are entirely private to an individual and where no valid contention can be given for the disclosure of the information).
 - (v) There may be circumstances in which an individual may not be able to maintain the privacy of certain information having regard to the competing interests which may be involved. However, in such circumstances, the individual can complain about the manner in which the information was obtained.
 - (vi) The right to sue for damages for breach of the constitutional right to privacy is not confined to actions against the State or State bodies or institutions.
- 1.2 The concept of privacy at common law in Ireland does not generally dictate the types of information which an individual can claim to be private and personal to them. In this context, the use of pictures, sounds, recordings and written information could all constitute breaches of an individual's right to privacy under the Constitution. This is provided it can be proven that it was not in the public interest that such information be released and that the individual enjoyed a reasonable expectation of privacy as regards the information released.

Specific pieces of legislation clarify the law in relation to certain types of information. For example, the DPA regulates an individual whose image is captured by CCTV. Under the terms of the DPA, any person whose image is recorded on a CCTV system has a right, like that under the Directive, to seek and be supplied with a copy of their own personal data from the footage.

- 1.2.1 For the purposes of invoking the rights afforded to data subjects under the DPA, the identity of the data subject is irrelevant. This means that the restrictions on collection and processing of personal data without consent apply to all individuals regardless of their media profile or fame.

Breaches of common law or constitutional rights are usually pursued by individuals in court actions for unlawful intrusion of privacy or the transmission of highly confidential information without consent. These options to vindicate privacy rights are open to all citizens of Ireland. Privacy rights of individuals remain the same for each individual regardless of their position in society, as do the potential routes that individuals can use to vindicate their privacy rights. Being in the public eye does not entitle an individual to either a greater or lesser entitlement to privacy under Irish law. Despite this, the circumstances of fame or familiarity surrounding a particular publication or disclosure could conceivably influence the Court's decision.

- 1.2.2 Privacy rights, the right to access to personal data and not to have personal data collected or processed without consent established under the DPA can only apply to individuals. They do not apply to corporate entities.

The case of *The Competition Authority v The Irish Dental Association* [2005] I.E.H.C. 361 concerned the searching of the defendant's premises and removal of information by the plaintiff using a defective search warrant. However, the High Court accepted the defendant's argument that it enjoyed constitutional rights of freedom of expression and privacy despite not being a natural person. In circumstances where the defendant enjoys such constitutional rights, the search of its premises with a defective search warrant constituted a breach of its constitutional rights. The High Court had no discretion to receive the evidence obtained by the plaintiff as a result. Further, the High Court held that the defendant's right to freedom of expression and privacy were not too remote so as to allow the defendant vindicate the rights.

It is worth noting here, however, that Irish law does provide for a defamation action where the subject of the defamatory statement is a legal, as opposed to a natural, person.

- 1.2.3 In circumstances relating to the disclosure of confidential information, individuals may also be able to rely on the tort of breach of confidence. This tort protects private information that is conveyed in confidence. A duty of confidence can be implied into many relationships, even if absent from any contractual agreement. A claim for breach of confidence typically requires the information to be of a confidential nature, which was communicated in confidence, and was disclosed to the detriment of the claimant. The protection of confidential information may also be available under the more general constitutional right to privacy. As seen in *Herrity*, and the earlier case of *Haughey v Moriarty* [1999] 3 IR 1, the courts will consider whether there was sufficient justification for the disclosure. This will, however, be balanced against compliance with fair procedure.

Separately, section 2D DPA sets out certain “fair processing” disclosures that must be made to data subjects at the point of collection of their personal data. These include informing

data subjects of any third party recipients or categories of recipient of their personal data. Additionally, any use or disclosure of personal data by a data controller must be necessary for the purpose(s) or compatible with the purpose(s) for which the data controller collects and processes the data. A data controller should ask itself whether the data subject would be surprised to learn that a particular use of or disclosure of their data is taking place.

A key test of compatibility that the Irish Data Protection Commissioner has laid down is:

- (i) does the data controller use the data only in ways consistent with the purpose(s) for which they are kept; and
- (ii) does the data controller disclose the data only in ways consistent with that purpose(s)?

Section 8 DPA provides certain specific exceptions from the obligations and restrictions of the DPA. In particular, these include exempting certain disclosures of information. Examples of such cases would include situations where disclosure of the information is required by law. Despite this, fair processing notices will generally provide that disclosures may be made to third parties where required by law or for the protection of individuals, property or other rights.

Any processing of personal data by a data processor on behalf of a data controller must also be undertaken in compliance with the DPA. This requires that, as a minimum, any such processing takes place subject to a contract between the controller and the processor which specifies the conditions under which the data may be processed, the security conditions attaching to the processing of the data and that the data be deleted or returned upon completion or termination of the contract. The data controller is also required to take reasonable steps to ensure compliance by the data processor with these requirements.

- 1.3 There are no specific legislative provisions or legal precedents which deal with the ‘fictional use’ of information related to an individual in Irish law.

2. Freedom of Speech

- 2.1 The freedom of expression is expressly recognised under Article 40.6.1.i of the Constitution. It provides that:

The State guarantees liberty for the exercise of the following rights, subject to public order and morality: –

i The right of the citizens to express freely their convictions and opinions.

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of

Government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.

While the freedom initially focuses on “*citizens*” of the State, Article 40.6.1.i recognises the freedom of expression for “*organs of public opinion*”, discussed further below.

The Irish Supreme Court has also accepted that the right to communicate is protected as one of the unenumerated or implied rights under Article 40.3 in the case of *The Irish Times v Ireland* [1998] 1IR 359. In considering this right as one to communicate facts, the Court added that it could also cover the right to communicate one’s convictions and opinions.

The ECHR Act provides further protection for the freedom of expression at Irish law. Article 10 of the ECHR protects the freedom of expression. Under the ECHR Act, the organs of the State must exercise and interpret the law in line with the ECHR, unless otherwise precluded from doing so by domestic law. In particular, the Irish courts are required to apply statute and common law in a manner compatible with the EHCR and have the power to declare that any such provision is incompatible with the Convention.

Finally, the freedom of expression is further protected by the European Charter of Fundamental Rights (the “**Charter**”), which applies in the implementation and interpretation of EU law at national level. Article 11 protects the freedom of expression.

- 2.2 The Irish Constitution can be considered domestic law. It has been interpreted by the Irish courts as being based on the Christian and democratic nature of the State. Consequently, it can be seen as drawing on elements of natural justice and a wider Christian background.

Both the ECHR and the Charter are supranational European law. While the ECHR is applicable in Ireland by virtue of the ECHR Act, the Charter was given the same legal value as the main EU treaties following the passing of the Treaty of Lisbon.

- 2.3 The Constitution, various statutes and related case law set down the boundaries within which the freedom of expression can be exercised.
- 2.3.1 The Irish Constitution guarantees to both individuals and the media the freedom of expression. As indicated above, Article 40.6.1.i guarantees “*citizens*” the right to freely express their convictions and opinions. It is not certain whether this term also encompasses bodies corporate (legal persons). While there have been decisions of the Irish courts accepting that legal persons may invoke certain ‘personal rights’ (such as the right to private property in *Iarnród Éireann v Ireland* [1996] 3 IR 321), a similar interpretation has not been adopted with respect to the right to freely express one’s convictions and opinions.

As indicated previously, Article 40.6.1.i also highlights the “*grave import*” of the education of public opinion and guarantees to protect the “*organs of public opinion*”. The “*organs*”, in this instance, are indicated as including the radio, the press and the cinema – essentially the media of the day. The decision in *The Irish Times* clarified that this reference had to mean those persons, natural or legal, who control the organs of public opinion, as organs are not capable of having rights.

Given that the Constitution was drafted in 1937, it preceded the advent of both the television (in Ireland) and the Internet. Despite this, the text of the Article is not constrained by exhaustive language and is open to the inclusion of other forms of the media which could be classed as “*organs of public opinion*”. It is worth noting in particular that blogs and other forms of ‘new media’ have more recently been accepted by the Irish High Court. In the case of *Cor nec v Morrice & Ors* [2012] IEHC 376, the Court accepted the expansion of what can be considered an “*organ of public opinion*” and therefore attracts additional protection under the Constitution by virtue of Article 40.6.1.

- 2.3.2 In terms of the right afforded to citizens, the freedom applies to the expression of one’s “*convictions and opinions*”. The Supreme Court decision in *The Irish Times* suggests that the right is primarily concerned with the public statements of the citizen. The Court did qualify this by stating that it was not suggesting that to avail of the protection a person must be “*attempting to influence the citizens at large*.”

The text of the Article relating to the “*organs of public opinion*” provides somewhat more specificity around the extent of the freedom. The Article contains an express reference to criticism of Government policy as one of the instances in which an organ of public opinion might wish to avail of the freedom. The Supreme Court in *The Irish Times* also commented on the extent of the rights afforded to the organs of public opinion, commenting that this “*must include the right to report the news as well as the right to comment on it*”.

- 2.3.3 As with any right or freedom, there are a number of restrictions and exceptions imposed on the freedom of expression under Irish law. The Constitution, common law and statute each impose their own individual restrictions.

It is important to first highlight the specific limitations set down in the Constitution itself. As seen in the quote from Article 40.6.1.i above, the right is first restricted by and must be exercised subject to “*public order and morality*”.

Additionally, the freedom afforded to the “*organs of public opinion*” is similarly restricted. While the liberty of expression includes, in particular, the criticism of Government policy, the Constitution still provides that the freedom “*shall not be used to undermine public order or morality or the authority of the State*”. This restriction was considered in the case of *Attorney General for England and Wales v Brandon Book Publishers Ltd* [1986] IR 597 and held to relate only to the State of Ireland.

It is also worth noting that Article 40.6.1.i expressly provides that the publication of “*blasphemous, seditious, or indecent matter*” be a criminal offence.

Beyond Article 40.6.1.i, the Constitution protects further rights that compete with and restrict the freedom of expression. For example, the Constitution explicitly guarantees the right to one’s good name in Article 40.3. Similarly, the unenumerated right to privacy recognised in *Kennedy and Arnold v Ireland* also limits or balances the freedom of expression. These provide just some examples on the balancing act with other constitutionally-protected rights.

Moving away from the protections of the Constitution, many Irish statutes can be seen as curtailing the freedom of expression. State security, the administration of justice, public health and safety, public morality, the right to privacy and the right to one’s good name are all recognized exceptions to the freedom of expression and upon which the freedom has been limited in statute.

- 2.3.4 The Constitution specifically calls out the rightful liberty of expression of the “*organs of public opinion*”. As outlined above at 2.3.1, the press is explicitly referenced in the text of Article 40.6.1.i. as benefiting from this freedom. Similarly, the decision in *Corneau* has further extended this definition by accepting that it covers blogs and ‘new media’ provided their activities fall squarely within the education of public opinion. Consequently, while the ‘online press’ do not explicitly benefit from protection, to the extent they play a role in the education of public opinion, ‘online media’ should be able to avail of the protection. Of course, as already discussed above, it is important to note that these freedoms afforded to the press can be restricted. In *The Irish Times*, the Supreme Court considered the power of the Irish courts to restrict the freedom of expression of the press in the context of its reporting of a trial.

3. Hierarchy between Freedom of Speech on the one side and privacy rights on the other side

- 3.1 As set out above in section 1, the judgment of the High Court in *Herrity v Associated Newspapers (Ireland) Ltd.* [2009] 1 I.R. 316 establishes the test for conflicts between freedom of expression and privacy. As stated previously, the plaintiff sought damages from the defendant for the wrongful invasion of her privacy. Associated Newspapers had published an article about the plaintiff’s extra-marital affair with a priest. The plaintiff’s husband had recorded conversations between the plaintiff and the priest and the newspaper article included details of these conversations, which the plaintiff’s husband had provided to Associated Newspapers. In *Herrity*, the High Court set out the balance that should be struck between an individual’s right to privacy and the competing right to freedom of expression. It held that there is a hierarchy of constitutional rights in Ireland and the right to privacy will prevail over the right to freedom of expression only in narrow circumstances.

Concluding that the right to freedom of expression is important but not unqualified, the Court found that privacy rights can trump freedom of expression in rare cases. The

publication of family photographs and details of the plaintiff's family circumstances was unjustified and was a '*conscious and deliberate and unjustified breach of the plaintiff's right to privacy*', with much of the private information obtained by unlawful means. The newspaper might well have been justified in publishing the woman's identity but much of the material had no bearing on the public interest.

The court awarded the plaintiff €60,000 in general and aggravated damages, plus €30,000 in punitive damages to mark the court's disapproval of the '*blatant use of unlawfully obtained transcripts of telephone conversations*'. The hierarchy established by the High Court in this case is set out at section 1.1 above.

Where there appears to be sufficient justification for any particular invasion of a person's privacy, fair procedures may still require safeguards. It is important to ensure that the disclosure in question is warranted and that excessive steps are not taken with a view to securing the disclosure.

- 3.2 The balancing test which the Irish courts will adopt when there is a conflict between freedom of expression and an individual's right to privacy has been set out at section 1.1 above and discussed in detail at section 3.1.

When determining whether there is public interest in the publication of particular information, the Irish courts may also have regard to ECHR jurisprudence. Cases like *Von Hannover v Germany* [2004] 59320/00 have been cited with approval by the Irish High Court.

As set out in *Herrity*, there must be an overriding public interest for the publication of an individual's private information. The Irish courts have created a hierarchy of constitutional rights which places freedom of expression and speech at the top and are generally reluctant to curtail these freedoms. However, in circumstances where the information published has been acquired illegally or by the exertion of pressure, the courts are naturally less willing to immediately protect the publisher's constitutional expectation of freedom of expression.

The right of privacy under Irish law is not absolute. Its exercise in any given circumstance is necessarily tempered by the constitutional rights of others, and the requirements of public order, public morality and the common good.

In the context of discussing what factors would allow either freedom of expression or privacy to prevail over the other, it is useful to distinguish at the outset between two separate (but closely related) issues that these exceptions present – the relationship between the individual and the State, and the relationship between private citizens. Generally, where issues have arisen in the Irish courts relating to privacy, they have involved conflicts between the interests of the State and those of individual citizens. The right of the citizen to be let alone by the State is well established, and widely accepted. This is not surprising in light of the power of the Irish State to intrude upon the private

affairs of citizens, to use its legislative authority to inquire into those affairs, or to gather, access, intercept and disseminate information.

Deciding on the balance to be struck between the privacy of the individual and the legitimate interests of the State presents a range of issues for both the Irish courts and the legislature. These issues include law enforcement, the necessary ability of law enforcement agencies to conduct surveillance and collate information, the common good in the dissemination of certain types of information, or disclosure of or inquiry into particular facts events or circumstances. In the case of a conflict between these various factors on the one hand and the right to privacy on the other, the outcome will generally depend upon whether it has taken place pursuant to proper legal authority and/or whether that legal authority is constitutionally defensible. The question of being constitutionally defensible is determined by whether it has been undertaken with a view to a legitimate objective and, if so, whether the impairment of the right is proportionate to that objective.

Where a conflict occurs in the relationship between private citizens, some of the same issues, but also some different and more complex problems, arise. The citizen's right to privacy can equally be attacked by the actions of other private individuals through the access and publication of information, surveillance, or the recording or publication of audio or visual images. The Irish courts are alive to technological developments, and the power of print media, television and the internet, which render such intrusions easier now than before, and make it possible for information about and images of citizens to be disseminated faster and to a wider audience.

In certain circumstances, however, what might in one situation be regarded as an illegitimate intrusion upon the affairs of another may instead be considered justified by reference to the conduct of that person or a public interest in the provision of information or exposing of wrongdoing. In other circumstances, the person alleged to be infringing the privacy of another may feel that s/he is merely exercising his/her own constitutional rights, whether of expression, or movement, or property. The Irish courts will judge each case on its individual and particular facts. The Irish courts are aware of the need to pay careful attention to striking a proper and reasonable balance in determining clashes between rights. This entails balancing the right to privacy against the rights of other persons and the keystones of freedom of expression and of the press.

4. Remedies available to protect individuals against disclosure of information belonging to their privacy

- 4.1 The High Court has the power to grant a variety of injunctions, both mandatory and prohibitory. These orders can be used to prevent the disclosure or publication of information. Pre-trial injunctions include interim injunctions, made in cases of extreme urgency. Such orders are made on an *ex-parte* basis, that is, without notice to the defendant. Interim injunctions are generally short-lived, and followed by an application for interlocutory relief, which is made on notice to the defendant. Where a party is

seeking to prevent the anticipated infringement of their rights, such as their right to privacy, they can apply for a Quia Timet injunction. This is a form of interlocutory relief, imposed temporarily until the case comes before the courts. In this instance, the applicant must have a solid case for the anticipated infringement of their rights and the court must believe that the applicant will suffer irreparable harm if the defendant discloses or publishes the information.

The criteria that are considered by the Irish courts in an application for an injunction were set out in the decision of the English House of Lords in *American Cyanamid v Ethican Limited* [1975] 1 All ER 504. This was later followed in Ireland in *Campus Oil v Minister for Energy* [1983] 1 IR 88. The three part test is as follows:

- There must be a serious/fair issue to be tried;
- Damages must not be an adequate remedy; and
- The balance of convenience lies in favour of granting the injunction.

It is important to note that in most applications for injunctive relief, the applicant will be required to provide an undertaking as to damages to the court. This means that the applicant agrees to compensate the defendant for losses suffered arising from the granting of the injunction, if the applicant/plaintiff loses their case at trial.

4.2 The concept of a “super injunction” is uncommon in the Irish legal system. The Irish Constitution provides that justice shall be administered in public and such severe forms of injunction encroach on this guarantee. It appears that the Irish courts are yet to make such an order. If a super injunction or equivalent is ever made by the Irish courts, it is likely to only be in extremely exceptional circumstances.

The *McKeogh* case, considered further below, saw an attempt by the plaintiff to secure a super injunction where he sought to restrict or prevent the press from reporting on the main case. He argued that such reporting would constitute a republication of the subject of the alleged defamatory statement and should therefore be prevented. The High Court rejected the application.

4.3 The main post-disclosure remedy is damages. The court has the power to grant damages under a variety of heads to those whose rights have been infringed. While damages are awarded in cases of breaches of constitutional and common law rights, they can also arise under statute.

Exemplary damages are the principal head under which the court will make an award for breaches of constitutional rights and tort. This form of damages is perceived as being to punish the defendant, to deter such infringements of rights and to vindicate and defend the plaintiff's rights. The court can also award compensatory damages to the plaintiff, to return them to the position they were in prior to the infringement or wrong suffered. Compensatory damages are often awarded by the court for a claim under equity, drawing on the court's inherent jurisdiction to make the order it sees fit. The court may also

decide to award aggravated damages, which are a more uncertain form of award. These tend to arise in instances where the defendant's actions have been malicious or particularly injurious to the plaintiff.

- 4.4 In general, the Irish courts will assess each case for damages on its individual facts. It is worth noting at this point, however, that the jury assesses the level of damages awarded in a defamation action.

When the Court calculates the level and types of damages to award, it will look at a number of factors. However, in many past cases the Irish courts have not provided any detailed reasoning on quantum of damages. As indicated above, the Court can make the award under heads of general and special damages, including exemplary, compensatory, aggravated and restitutionary damages. In general, levels of damages are not capped, meaning that the Court can adapt the award to the specific circumstances. The Court may also take into account whether any criminal penalties have already been imposed and if any restitution orders have been granted.

In particular, the Court will attempt to quantify the loss suffered by the plaintiff. This will be the primary factor considered for compensatory damages, with the Court aiming to return the plaintiff to the position s/he was in before the injury or wrong suffered.

Aggravated and exemplary damages are less common in Irish case law. The Court will review the conduct of the defendant and any distress caused to the plaintiff to determine aggravated damages. Exemplary damages can vary and may depend on the defendant's circumstances.

- 4.5 In cases of disclosure of private information, the parties that can be held liable for damages will depend on the type of claim. If a plaintiff takes an action under the DPA, it is likely that the data controller or data processor will be sued for breach of the duty of care. It is important to note that the High Court in *Collins v FBD Insurance* [2013] IEHC 137 held that plaintiffs must prove actual damage in an action for breach of duty of care under the DPA.

In other instances, it is likely to be the publisher(s) that will be held liable. There have been numerous cases under both Irish and English law as to what parties may be considered a publisher.

It is important to note that the European Communities (Directive 2000/31/EC) Regulations 2003 (“**Ecommerce Regulations**”) provides a defence for intermediaries. The defence mirrors that which is provided in the underlying directive and may apply to intermediaries who solely cache content or who act either as a host or ‘mere conduit’. In this way, certain parties may be able to raise the defence that they act only as an intermediary and therefore cannot be held liable as a publisher.

- 4.6 While the Constitution specifically provides for the freedom of expression for “*organs of public opinion*”, Irish legislation does not offer any specific protection for the press or media.

The Defamation Act 2009 (the “**Defamation Act**”) sets down a number of defences that a defendant may rely upon in such an action. These include truth, honest opinion, absolute or qualified privilege, consent or fair and reasonable publication on a matter of public interest. The Defamation Act does specify that, in relation to the defence of fair and reasonable publication, the Court shall take into account whether the person adhered to the code of standards of the Press Council in publishing the statement.

As considered further below, where an action is taken for a breach of duty of care owed under section 7 DPA, the press may avail of exemptions provided under section 22A DPA. This section offers exemptions from many of the main obligations arising under the DPA. The exemptions include where the processing of personal data is carried out for journalistic purposes. The data controller must reasonably believe that the publication would be in the public interest and that compliance with the relevant obligation would be incompatible with journalistic purposes.

The Ecommerce Regulations, as mentioned above, also provide various immunities to intermediaries.

- 4.6.1 As the press/media are not specified, the range of news information organisation is not relevant. The Constitution provides the freedom of expression for “*organs of public opinion*”, which explicitly includes the press. The non-exhaustive definition provided in the text of the Constitution was broadened by the High Court in *Cornew*. The Court held that blogs could constitute “*organs of public opinion*” which therefore introduced a wider definition at Irish law.
- 4.6.2 Ireland law does not currently have overarching whistleblower protection and has traditionally had few statutory whistleblower protections. In *NIB v RTÉ* (unreported, High Court, March 6, 1998), the High Court confirmed that disclosing confidential information is generally justified on the ground of public interest where the disclosure relates to a crime.

In recent years, a number of statutes have been passed to increase whistleblower protection. Separately, the DPC has released a guidance note concerning how Irish data protection law affects the operation of the U.S. Sarbanes-Oxley Act (SOX). According to this guidance note, corporations run the risk of breaching Irish data protection law when seeking to comply with SOX. To limit this risk, the DPC recommends that such a scheme should focus primarily on *specific issues* and not on individuals.

A recent advancement in this area has been the passing of the Protected Disclosure Act 2014. The Act aims to promote the disclosure of information relating to wrongdoing in the workplace by offering protection against penalization for all workers who make a protected disclosure.

- 4.7 The principles described above apply generally and there is no real distinction from the online world. Of course, the defences provided under the Ecommerce Regulations apply specifically to intermediaries in the online and electronic fields. It is worth highlighting Ireland's role as a centre for online and social media. As a result, many of these services tend to be regulated and litigated under Irish law.

In particular, it is worth noting the recent (and ongoing) case of *McKeogh v John Doe 1 & Ors [2012] IEHC 95*. This is relevant as it involved the defamation of the plaintiff across various social media networks. The plaintiff was wrongly identified in a video uploaded to YouTube as a man exiting a taxi in Dublin without paying a fare in November 2011. The defamatory false allegations against the plaintiff subsequently spread to various articles in the printed press and across the sites of service providers such as Facebook and Google. The allegation was found to be defamatory by a judgement of the Irish High Court in 2012. Subsequently, in May 2013, the plaintiff was granted an interlocutory mandatory order requiring that steps be taken by Google, Facebook and YouTube to permanently remove the video. This order was stayed by the Court in December 2013, though previous interim orders, originating in the 2012 judgment, remained in place. This judgment is pending appeal by the defendants before the Irish Supreme Court.

- 4.8 The Defamation Act introduced to Ireland a new tort of defamation, doing away with the traditional distinction between slander and libel. Under the Defamation Act, a defamatory statement is defined as one "*that tends to injure a person's reputation in the eyes of reasonable members of society*". Consequently, it is possible that where someone, without a defence, discloses information which could damage another's reputation, the affected party may be able to seek a remedy under the Defamation Act.

In terms of remedies, an affected party can seek to restrain the publication or disclosure by way of an injunction. The Defamation Act provides the Court with the power to make an order prohibiting the publication or further publication of the relevant statement provided the court is of the opinion that (i) the statement is defamatory and (ii) the defendant has no defence to the action that is reasonably likely to succeed.

The plaintiff can also pursue the publisher for damages, the most usual type of relief sought. In the High Court, defamation actions are – unless otherwise agreed – tried in front of a jury. The jury is tasked with the determination of the level of damages awarded, leading to some particularly large awards in recent years (€10m in one case, €1.9m in another). The Defamation Act also sets down the ability to impose aggravated and punitive damages.

However, if the disclosure in question could attract a defence under the Defamation Act, such as where it is true, then a rights-based action might be more appropriate. Despite this, the remedies in such an action will reflect those above – injunction and/or damages.

4.9 Forum and Applicable law

- 4.9.1 In order to determine which court will have jurisdiction over an international dispute, the first step is to determine where each of the parties to the dispute comes from or is domiciled in. The general rule in the recast Brussels I Regulation (1215/2012) is that a party should be sued in the courts of the Member State in which it is domiciled.

The jurisdictional rules on disputes concerning damage arising out of a tort or delict are set out in Article 7(2). In general terms, this covers all actions seeking to establish the liability of a defendant which are not “*matters relating to a contract*” (*Kalfelis* (Case C-189/87)). In such cases, this is the courts of the Member State where the harmful event does or will occur. This has been interpreted as being either where the damage occurs, or where the event giving rise to the damage occurred – the plaintiff can choose where to take proceedings (*Bier BV v Mines de potasse d'Alsace* (Case C-21/76)). Article 7(2) can be particularly complicated to apply in the context of online publications which give rise to damages, as seen in various cases including *Shevill v Presse Alliance* (Case C-68/93) and *eDate Advertising GmbH v X* (Case C-509/09).

- 4.9.2 As indicated above, Article 7(2) of the recast Brussels I Regulation sets down jurisdictional rules on tortious disputes. The CJEU has considered how this might apply in cases of pan-European defamation and online publication. In *Shevill*, the ECJ stated that, in the context of a multijurisdictional defamation action, the defendant could be sued before its home courts, which could award damages for all the harm caused by the defamation. Alternatively, the plaintiff could sue in the courts of any other state where the article was published and where the plaintiff claimed to have suffered damage to his reputation. However, these courts would only be able to award damages for the harm suffered within their jurisdiction. Furthermore, in *eDate Advertising*, the ECJ considered a breach of personality rights in the context of an online publication. In its decision, the ECJ extended the rights of plaintiffs to seek to recover *all* the damage before his or her home courts. The Court based this principle on the fact that content placed on the internet could be accessed globally so there ought to be a single jurisdiction where the plaintiff can bring proceedings based on where the damage occurred.
- 4.10 It is arguable that privacy rights are sufficiently protected in Ireland. Almost 10 years ago, the then Irish Government published the controversial Privacy Bill 2006. The Bill largely focused on media invasion of privacy and its publication was confronted by considerable opposition, particularly based on the argument that privacy rights are already the subject of strong protection at Irish law.

The Bill saw a brief resurrection in 2012, around the time the French magazine ‘Closer’ published topless photographs of the Duchess of Cambridge. The aim of the Bill was to provide a new tort of violation of privacy. However, it was evident that this was largely covered by a claim for defamation and that the Bill focused narrowly on press invasion of privacy, rather than considering issues of broader application to the general public. Critics highlighted the fact that the Bill was predominantly aimed at protection of the rich and famous.

Despite these attempts, there is still an argument that advances in technology and the development of the Internet have highlighted gaps in the law that the courts are playing catch up to fill. Similarly, privacy rights in terms of both the State and private surveillance could arguably be better protected. While it is accepted that the Constitution provides an implicit right to privacy, the 2006 Working Group on Privacy found that the nature and extent of remedies are uncertain. Consequently, there still remains a case that such rights and associated remedies could be better provided for.

5. Interplay between data protection rules and privacy rights

5.1 Irish data protection law sets down a range of obligations for data controllers, similar to those provided under the European Data Protection Directive (95/46/EC). A number of these obligations are central to the protection of individuals' privacy and personal data in online media.

In particular, data controllers must:

- obtain and process personal data fairly;
- keep information only for one or more specified, explicit and lawful purposes;
- use and disclose information only in ways compatible with these purposes;
- keep information safe and secure;
- keep information accurate, complete and up-to-date;
- ensure that information is adequate, relevant and not excessive in relation to the purpose(s) for which it was sought; and
- retain information for no longer than is necessary for the purpose(s) for which it was collected.

Despite this range of data controllers' obligations, it is worth noting that certain exemptions may be available to data controllers. Section 22A DPA offers exemptions from a large number of these obligations (other than obligations relating to the security of data). These exemptions can apply where the processing is carried out for journalistic, artistic or literary purposes. Section 22A sets down a test that the data controller must reasonably believe that the publication would be in the public interest and that compliance with the relevant obligation would be incompatible with journalistic, artistic or literary purposes.

Alternatively, where a data controller cannot avail of the section 22A exemption, it may be able to process non-sensitive personal data¹ by relying on its own ‘legitimate interests’ or those of third party recipients of the data. According to the Article 29 Working Party (the “WP29”) (WP217), one of the most common contexts in which this ground for processing may arise is in the “*exercise of the right to freedom of expression or information, including in the media and the arts*”. This example is of broader application than the journalistic, literary or artistic exemptions discussed above. It is important to note here, however, that this only provides a ground for processing non-sensitive personal data, and the data controller will still be subject to the full extent of obligations under the DPA.

In relying on the legitimate interests ground, data controllers must carry out a balancing exercise. In short, data controllers are required to balance the legitimate interests upon which they are relying against the rights and interests of the data subjects. Data controllers must consider the nature and scope of the legitimate interest against the impact on the relevant data subjects. The WP29 recommend considering “*the nature of the personal data, the way the information is being processed, the reasonable expectations of the data subjects and the status of the controller and data subject*.” The WP29 has suggested that additional weight may be attached where the data controller not only acts in its own legitimate (e.g. business) interest, but also in the interests of the wider community.

Where fundamental rights and freedoms are concerned – such as a conflict between one’s right to privacy and the freedom of expression – for the controller’s legitimate interest to prevail, the data processing must be ‘necessary’ and ‘proportionate’. The Article 29 Working Party notes that these cases:

“*typically raise complex issues of assessment, and to help guide the assessment, specific legislation, case law, jurisprudence, guidelines, as well as codes of conduct and other formal or less formal standards may all play an important role.*”

- 5.2 Sections 6 and 6A DPA provide individuals with certain rights of opposition around the processing (including collection) of personal data.

As set out further below in terms of a ‘right to be forgotten’, individuals have the right under section 6 DPA to request that their data be blocked or erased. This right applies where the data controller has failed to comply with its obligations under the DPA. This could arise in particular where a data controller fails in its ‘fair collection’ obligations or where the data controller has not collected the data for a specific and legitimate purpose.

Individuals also have a right to object to processing in instances where a data controller is attempting to rely on the legitimate interests ground as the basis for processing. Under section 6A DPA, a data subject can submit a written request to the data controller if the

¹ Data which does not relate to an individual’s: racial or ethnic origin; political opinions or religious or philosophical beliefs; membership of a trade union; physical or mental health or condition or sexual life; commission or alleged commission of any offence or any related proceedings.

processing is likely to cause unwarranted damage or distress to the data subject or another person.

It is important to point out that a data controller can, in certain circumstances, avail of an exemption from compliance with sections 6 and/or 6A. As discussed previously, a data controller can be relieved of such obligations if it “*reasonably believes that, in all the circumstances*,” compliance with the relevant section would be incompatible with journalistic, literary or artistic purposes.

6. Right to be forgotten

6.1 Drawing from the Data Protection Directive, section 6 DPA provides data subjects with the right to have their personal data blocked or erased within 40 days of their request. This right arises where the data controller has breached its obligations under the DPA. These obligations include:

- obtaining and processing the data fairly;
- ensuring the data is accurate, complete and up to date;
- obtaining the data for one or more specified, explicit and legitimate purposes;
- ensuring the data is adequate, relevant and not excessive in light of the above purposes;
- not keeping the data longer than necessary for the above purposes; and
- taking appropriate security measures.

Section 6A DPA provides data subjects with an additional right to object to the processing of their personal data. This right arises where the processing is likely to cause unwarranted substantial damage or distress to the data subject or another person. However, this right applies in narrow circumstances. The most relevant is where the data controller is relying on its legitimate interests to process the data.

- 6.2 There has been no case law in Ireland considering data subjects' rights of erasure or the 'right to be forgotten'. Guidance from the DPC has been very limited. From a European perspective, the Article 29 Working Party published lengthy guidelines in late 2014 discussing the manner in which 'right to be forgotten' for online search engines should be implemented in EU Member States.
- 6.3. The decision of the CJEU in *Google Spain v AEPD and González* (C-131/12) arguably brought about a much broader right of erasure or 'right to be forgotten' in Ireland. In particular, the CJEU took the view of search engines as being data controllers in their own right, increasing the obligations imposed on them for their search results. This view

differed materially from that of the Advocate General. While the *Google Spain* decision is controversial, there have been no Irish cases considering these issues.

7. **Are there other aspects to take into consideration in your jurisdiction in relation to freedom of speech, the privacy right and the right to be forgotten?**

No.

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