CHAPTER 5

Defamation and Privacy

CONNECTED WITH defamation is the topic of privacy. The right of individuals to be free from highly offensive publicity concerning their private lives has now been recognised by many countries. Legal relief for invasion of privacy is achieved through an action for the "public disclosure of private facts". The interest of human dignity protected by this action, however, is viable only to the extent that the publicity is not "newsworthy"—*i.e.* not of legitimate public concern.

Although defamation and privacy are often discussed together, one should not forget that theoretically the scope of each is different, and the values which each seeks to protect are also different. In the first place, though the concept of privacy is, by now, understood in its broad essence, it should be borne in mind that privacy could possibly cover so many aspects of a person's life. In the United Kingdom, the Justice Committee on Privacy and the Law ended up with defining privacy as "that area of a man's life which, in any given circumstances, a reasonable man with an understanding of the legitimate needs of the community would think it wrong to invade".[1] This is obviously very wide, not only because it makes the problem run into the general issues of liberty and the limits of state action, but also because it covers so many areas.[2] Later, the Younger Committee on Privacy in the United Kingdom concluded that there was no satisfactory definition of privacy for enacting a general law to protect it and that no such law was needed.[3]

Turning to the United States, Thomas Cooley, the American scholar, who is regarded as the father of the term "privacy", simply spoke of the right to be let alone; and this was also the concept made popular by the authors of the famous article on privacy published in 1890 in the *Harvard Law Review*.[4] Again the contest between what is private and what is not so occurs in a number of fields, and, in different fields, the distinction may mean different things.

Professor Westin says that privacy is, in the first place, "a state of solitude or small group intimacy".[5] The emphasis here is on protecting a person's right

1. Justice Committee, *Report on Privacy and the Law*, ch. 2, p 5, para 19 (1970).
2. Geoffrey Marshall, The Right to Privacy : A Sceptical View, 21 *McGill L.J.* 242, 243 (1975).
3. Younger Committee, *Report on Privacy*, Cmd. 5012 (1972).
4. Warren and Brandeis, The Right to Privacy, 4 *Harvard Law Rev.* 193, 195 (1890).
5. Alan F. Westin, *Privacy and Freedom* 7 (1970).

to be allowed to remain lone (solitude) or to remain with a chosen group. But even then, one must know the area of life in which solitude is claimed by asserting a right to privacy.

A recent book by Wacks is of interest. After giving a short history of privacy in English law, Wacks moves on to what he calls "The Obscurity of Privacy". His theme is that "the currency of privacy has been so devalued that it no longer warrants if it ever did serious consideration as a legal term of art".[6] Again, he says:

> Any attempt to restore it to what it quintessentially is—an interest of the personality—seems doomed to fail for it comes too late. "Privacy" has become as nebulous a concept as "happiness" or "security". Except as a general abstraction of an underlying value, it should not be used as a means to describe legal right or cause of action.[7]

He also analyses four main areas which are customarily lumped under the heading of privacy. They are : first, physical and electronic intrusion such as telephone tapping, searches; *etc.*, second, publicity; third, computers; and fourth, identity, meaning the appropriation of a person's name or likeness for commercial purposes and placing someone in a false light.

According to Prosser,[8] the law of privacy really embraces "four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common"[9] apart from the fact that they interfere with the right "to be let alone". These four different torts are :

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[10]

The evolution of common law liability for the appropriation of personality is of interest. There are some well-known cases in passing off and defamation, the picturesque "name" cases of the nineteenth century beginning with *Lord Byron* v. *Johnston*[11] which has discerned property rights in a person's image, reputation and name. Outside the ambit of well established torts, there is a residue of case law which provides a remedy for wrongful appropriation of personality.

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6. Raymond Wacks, *Protection of Privacy* 10 (1980).
7. *Id.* at 21
8. William L. Prosser, Privacy, 48 *Cali L. Rev.* 383 (1960).
9. *Id.* at 389.
10. *Ibid.*
11. (1816) 2 Mer 29 : 35 E.R. 851.

Privacy does, on occasions, enter into arguments about free speech. The question that arises is this: To what extent is privacy a candidate for further specific protection by extension of the existing civil and criminal heads of liability relevant to speech and expression ? Here again, some preliminary observations are in order. The concepts seem to protect a number of values. Even in the narrower sphere of gathering and disclosing information about a private individual, one must keep separate freedom from physical intrusion (on the one hand) and protection against unwelcome publicity about private affairs (on the other). As Geoffrey Marshall has stated :

> There cannot be a single answer to the question, "Is there a right to publish true but unwelcome or damaging information about other people" Anybody asked to answer this question in a particular case would want to know and weigh four considerations (assuming the information to be true):
>
> (a) Was the information acquired properly or innocently, or by wrongful means ?
>
> (b) Was there any consent to disclosure or could any be implied ?
>
> (c) Was the activity described or exposed itself innocent or disreputable ?
>
> (d) Was there any actual damage caused, or just annoyance ?[12]

All these questions, which are of a fairly difficult nature, must arise when one is concerned with the issue of privacy in the context of unwarranted disclosure of information. It is obvious that they necessitate the making of a choice between different values. The law cannot, by itself, decide them finally by legal principles alone.

Of course, the head of privacy concerned with "disclosure of private facts comes nearest to defamation".[13] From the legal aspect, it is useful to remember that protection against defamation and protection against breach of privacy (exemplified by the unwarranted disclosure of facts about the private lives and affairs of an individual), really cover two different areas of a person's life. The law of defamation protects the reputation of an individual (or a corporation). The law of privacy protects the feelings of an individual. Reputation is external. Feelings are internal. No doubt, one and the same statement can injure a person's reputation and also hurt his feelings. Nevertheless, one can also conceive of statements that injure one's feelings (*e.g.* statements giving details of a person's illness), without causing any harm to reputation. Reputation is a kind of intangible wealth. It is what a man possesses, because it represents what others think of an individual. It is, therefore, (as stated above) external. But the sense of intimacy, the desire to be left alone, and similar emotional underpinnings of privacy, belong exclusively to the area of an

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12. *Supra* note 2 at 252.
13. See *supra* p. 19.

individual's feelings. They constitute his own experience. Therefore, they are internal. They do not constitute a person's wealth, tangible or intangible; they contribute to an individual's internal happiness. The fact that there is sometimes overlapping between statements that are defamatory and statements that impinge upon privacy should not make one forget the essential distinction between the two concepts.

The theoretical distinction between the two concepts of defamation and privacy can be well illustrated by taking a few instances. A company (or other artificial persons) can have a reputation and can, therefore, sue or prosecute for defamatory statements that cause harm to its reputation. But a company (or other artificial person) can never sue for the breach of privacy. Conversely, a person whom society regards as a moral wreck, an intellectual moron and a financial burden on the community, might have very little of reputation left for which he can claim legal protection. But he may still claim compensation for injury to feelings caused by a breach of privacy—provided the legal system that is applicable to him recognises the tort of violation of privacy as constituted by unwarranted disclosure of private facts. The interest protected is, in each case, different. As has been pointed out:

> Such invasions of privacy as disclosure of private facts and unauthorised use of a person's name and likeness may also amount to defamation, but, from the point of view of the interests protected this is, in principle, immaterial.[14]

The confusion between the wrong of defamation and the wrong of breach of privacy arises because (*i*) the statement may be defamatory as well as violative of privacy (as elaborated above), (*ii*) a balancing of interests is required in both, and some of the balancing considerations may be substantially identical; and (*iii*) the remedies used to protect both the types of wrongs (at least as evolved in common law jurisdictions) are similar.

Some of the points stated above could be made more concrete by referring to the position that prevails in a few other countries where violation of privacy is recognised as affording a cause of action. In the United States [15] one branch of the privacy tort (as evolved in that country) and the one most nearly protecting a pure privacy interest, offer a remedy for highly objectionable publicity of embarrassing private facts. In the situations encompassed by this branch of the tort of privacy, no civil action for defamation would lie, because the information that is disclosed is merely embarrassing, not false. A new cause of action has to be evolved. The leading American case on the subject (which was decided in California) involved a prostitute who, in 1918, had been acquit-

14. Stromholm, *Right of Privacy* and *Rights of the Personality* 132, para 82 (1967.)
15. Geoffrey Palmer, Defamation and Privacy Down Under, 64 *Iowa Law Rev.* 1209, 1235 (1979).

ted of a murder charge.[16] She had abandoned her life of shame and became entirely rehabilitated and had married into respectability. Some years later, the defendants made a movie based on her earlier life. As the statements made were true, there was no cause of action for defamation. However, she recovered on the score of unwarranted disclosure of facts.

In the English case of *Prince Albert* v. *Strange*[17] (not decided under the rubric of privacy), the court prevented the defendant from publishing etchings made by the royal parents of their children, the defendant having obtained the etchings by surreptitious means. In a New Zealand case,[18] the court awarded money damages against a physician who had given his female patient's husband a certificate concerning the patient's paranoia. The husband produced the certificate in separation proceedings, causing mental shock to the female patient. It was held that the physician should have foreseen that the certificate was likely to come to his patient's notice and that she was likely to suffer injury as a result.[19] The English and the New Zealand cases mentioned above (though not decided under the head of privacy) are cited here to show how the two torts differ, as also differ the values protected by each.

It may be pertinent to mention that in their famous article on privacy, Warren and Brandeis[20] stressed that, while recognising the right of privacy, proof of special damage should not be required, but that substantial compensation should be awarded for the presumed *injury to feelings*. In such an action, truth would not be an appropriate defence, because the right of privacy "implies the right not merely to prevent the inaccurate portrayal of private life, but to prevent its being depicted at all". But the publication of matters of public interest or consent to publication would prevent recovery by a plaintiff for violation of privacy. These exceptions or defences bar recovery otherwise permissible under the general rule in the United States that unwarranted disclosure of private facts is actionable.

Constitutional law may also super-impose exceptions on liability for defamation that might otherwise arise. Thus, in the United States[21] an exception has been recognised for "events of legitimate concern to the public" and this exception has been held by a decision of the Supreme Court to cover, *inter alia*, accurate publicity given to open public records relating to criminal prosecutions. The decision is grounded on the public's right to be informed of matters of significance to a democratic form of government, particularly judicial proceedings.

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16. *Melvin* v. *Reid*, 112 Cal. App. 285, 297, Pac. 91 (1931)
17. 64 E.R. 293, 307, 315 (1849).
18. *Furniss* v. *Fitchett*, (1958) N.Z.L.R, 396, 398, 404, 408 (N.Z S.C.).
19. See *supra* note 15.
20. *Supra* note 4 at 219.
21. *Cox Broadcasting Corp.* v. *Martin Cohn*, 420 U.S. 469, 487, 491, 495, 496 (1975).

One can have a look at the law in a few continental countries also. According to section 390 of the Norwegian Penal Code, 1902,[22] it is a punishable act to "violate privacy by communicating, *in public*, facts concerning personal or domestic affairs". The notion 'in public" is defined in section 7, no. 2 of the code; an act is "public" when performed either by means of publishing a printed matter, or in the presence of a large number of persons or under such circumstances that it could easily be observed from a public place and is, in fact, observed by some persons who are present at, or in the vicinity of, the place where the act was committed.

In the United Kingdom, Lord Mancroft's Right of Privacy Bill dealt only with disclosure cases. According to the proposed clause 1 of that Bill, a person shall have a right of action against any other person who, without his consent, publishes of, or concerning, him in any newspaper or by means of any cinematograph exhibition or any television or sound broadcast any words—that term including, under section 5(1), pictures, visual images, gestures and other methods of signifying meaning—relating to his personal affairs or conduct.[23]

Indian law has not yet come to recognise privacy as a tort under the head of unwarranted disclosure of private facts.

It may be mentioned that the Second Press Commission, in its report, while dealing with the right of privacy, did not consider it necessary to recommend legislation on the subject. It noted that the Law Commission had recommended legislation regarding eaves-dropping and unauthorised publication of photographs and it endorsed the recommendations of the Law Commission to amend the Indian Penal Code to include offences against privacy for the above purpose. But beyond that, the Press Commission, having regard to the fact that privacy is an extremely nebulous concept and also to the fact that criteria which may constitute its violation cannot be easily drawn out, did not recommend any general law regarding privacy. At the same time, it recommended that section 13(1)'c) of the Press Council Act, 1978, should be amended by adding, after the words "the maintenance of high standards of public taste", the words "including respect for privacy."[24].

22. S. 390, Norwegian Penal Code, 1902, cited by Stromholm, *supra* note 14 at 123.
23. Cl. 1, Right of Privacy Bill, cited by Stromholm, *Id.* at 169.
24. *Second Press Commission Report*, vol. 1, Ch 6, pp. 67-77, particularly paragraphs 41 to 44 (1982).