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THE RELATIONSHIP BETWEEN DEFAMATION, BREACH OF PRIVACY AND OTHER LEGAL CLAIMS INVOLVING OFFENSIVE INTERNET CONTENT

Defamation Law in the Internet Age

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I. Overview

When seeking to protect reputation there are different arguments available. The primary route is defamation because it is the tort that has been devised to protect reputation. Due to its longer history, defamation also stands out as the most recognisable. This tort has evolved more recently. It is now discussed as an action that balances reputation and free speech; where this balance is concerned in particular with free speech considerations that can attenuate the recourse an aggrieved individual may have in bringing a claim in defamation. The next option seems to be privacy-based. An action based upon some form of privacy is likely to be pursued where there

may be a questionable defamation claim (such as, the remarks are within the growing spectrum of the defamation defences such as fair comment or responsible publication on a matter of public interest). The nature of the privacy action is nuanced (more so than defamation with its slander and libel elements). There are different aspects to privacy that are protected – though they each have varying levels of strength in the law. For example, if the aggrieved believes that information was wrongfully disclosed, an action in breach of confidence may be pursued (in Canada this has been treated as a hybrid of tort and equity) because the information had been disclosed in a confidential setting (i.e. not for broadcast to others). Another aspect of privacy is data protection. This too is a matter of disclosure because it deals with the propriety of dissemination of data. It may also include the way in which personal data is processed.

The connection amongst defamation, privacy and data protection is viewed as the next stage in the development of the law's engagement with reputation issues. It is envisioned that the tort of defamation will be limited as a means of redress.[1] There are robust (and developing) defences within this tort designed to protect a wider range of speech. The impact of these defences is that even speech that may satisfy the criteria for the tort will still be excused based on the imperative of free speech. As a result, defamation may not always be a viable claim when reputation has allegedly been harmed using internet-based forms of communication. Where the remarks made fall outside of the parameters of defamation (taking the perspective of the plaintiff seeking redress for perceived reputational harm), there will be a search for other tools the law may provide. To this end, claims in breach of confidence, intentional infliction of mental distress and invasion of privacy are canvassed. Of these actions, breach of confidence and invasion of privacy will be explored in greater detail.

An action based upon privacy will be used where information is disclosed (i.e. published or passed on to others in some form) that may 'harm' reputation. The likely claim is that the information was obtained or released through some breach of privacy. The alleged contravention may be defined as either physical or informational (though there is overlap). Breach of physical privacy would arise where there is a breach of physical space wherein there was an expectation of privacy (for example a photograph of an individual in a bathroom). Breach of informational privacy focuses on disclosure of information intended to be kept private. Here, information gained through confidence or information lawfully collected but misused in some way would be examples. There is overlap amongst these areas. Breach of physical privacy may also entail breach of informational privacy. Returning to the example of the photograph of an individual in a bathroom, the dissemination of a picture of the naked individual would breach physical privacy (i.e. a photograph where the individual clearly has an expectation of not being photographed) but also informational privacy (i.e. information which can be gleaned from the sight of the naked individual, such as medical information). There is also an overlap within the second form of breach of privacy with other torts. Breach of confidence can arise when information obtained in confidence is disclosed. Disclosure of medical information alludes to the developing tort of misuse of private information, as outlined in the UK. Further to the point of informational privacy, data protection enters the consideration.

As the call for papers has mandated, this research engages with the theoretical aspects of privacy and reputation as well as their connection with defamation. This theoretical overview will

[1] The focus of this discussion is on the public and not those who would be deemed public figures, such as celebrities, politicians, certain businesspeople. Those who are public figures because of their online presence are included in the public here because this cohort can provide some further guidance regarding the remit of the present work.

foreground a comparative analysis of the constitutional protection of privacy and reputational rights. A useful frame of reference here will be the law in the U.K. and E.U. (particularly decisions of the European Court of Human Rights) because there has been a pronounced engagement with defamation and the protection of privacy through the interpretation of the *European Convention of Human Rights* (ECHR) (articles 8 (privacy) and 10 (freedom of speech)). The touchstone for these discussions remains their implications for the law of defamation (in Ontario) in an era that stretches the boundaries of this tort from its origins in print media. To that end, guidance is taken from the practice of law where it is foreseen that pleadings in this area will increasingly be packaged together; that is, a claim in both defamation and in privacy is anticipated, thereby necessitating careful work by the courts in discerning the differing objectives of the claims.

II. Jurisdictions considered

An aim of the research is to situate Canada (and Ontario where possible) within a multi-jurisdictional context. This effort will go some ways towards also placing defamation in the age of the internet within trends emerging in the twenty-first century. One trend, of which Canadian courts have partaken, is a wider spectrum for the protection of free speech.[2]

Used as an entry point for discussion, reforms in the English law of defamation have been promulgated for the purpose of extending protection of free speech. Consequently, there is a more singular focus and one that (for some) recedes from balancing the competing goods of free speech and protection of reputation. Decisions from the European Court of Human Rights (ECtHR) contrast with English law: where the latter is viewed as emphasizing free speech, the ECtHR is seen as being more protective of reputation. These two jurisdictions offer admirable resources in moving towards a more balanced framework that better responds to the landscape as altered by the internet. ECtHR decisions are used sporadically here to underpin principles in conjunction with UK jurisprudence.

Finally, the American approach remains a consideration. This is not because it may be followed outright. The decision of the United States Supreme Court in *Sullivan v New York Times* remains the benchmark for those advancing a less fettered (if any) system for free speech. This approach, though, leaves open the question to what extent privacy is protected. The landmark nature of the US Supreme Court's decision in *Sullivan v New York Times*[3] is well-established. The later case of *Time v Hill*[4] involved a claim in which defamation and privacy arguments were intertwined. The combination of these two decisions set a particular trajectory for the combination of these two private law actions in the country.[5] Aside from the United States, common law countries have been engaged in expanding the scope for freedom of speech, notably since the turn of the 21st century. The *Sullivan* model has been considered in Australia, Canada, New Zealand and the United Kingdom. In each instance, it has been rejected in favour of what these courts view as a

[2] On this topic, see the Supreme Court of Canada's decision in *Grant v Torstar Group* 2009 SCC 61. The court took guidance from the law of other jurisdictions which "have modified the law of defamation to give more protection to the press, in recognition of the fact that the traditional rules inappropriately chill free speech": *Grant* [40]. The point was repeated in *Bou Malhab v Diffusion Metromedia CMR Inc.* 2011 SCC 9, [21]. *Bou Malhab* was a case which turned on the application of the Quebec *Charter* and the *Civil Code*.

[3] 376 US 254 (1964).

[4] 385 US 374 (1967).

[5] This matter is studied further in Andrew T. Kenyon and Megan Richardson, "Reverberations of *Sullivan*? Considering defamation and privacy law reform" in Andrew T. Kenyon (ed) *Comparative Defamation and Privacy Law* (Cambridge: CUP 2016) 331-353.

more balanced system. The critic may point to this development as the essence of the point: libel law was too firmly entrenched in favour of the plaintiff. Tort textbooks have tended to write of defamation as a tort, the primary purpose of which is to protect the good reputations of individuals.[6] And yet, the premise of defamation has in Canada and the UK (as well as the European Union) seems to be that of balancing of reputation (itself given weight through s.7 of the *Charter* and art.8 of the ECHR) with the right to free speech (s.2(b) and Art.10 of the ECHR).

III. The tort of defamation in the internet age

The Law Commission's project engages with a remarkably varied area. As such, the call for proposals is understood to contain discrete areas for discussion within this topic. Still, these areas are linked and it is this connection that is of importance at the outset of the present study. The present work focuses on comments made by identifiable individuals.[7] It is understood that another portion of the call specifically deals with the topic of anonymity in defamation. There will be overlap with two other areas of the call for proposals: *Revisiting the Core Elements of Defamation Law, Too Late to Change?* as well as *Bridging the Technological/Doctrinal Divide: How the Technology Behind Internet Communications Impacts Defamation Law Doctrine.* These two topics are foundational by nature; that is, they engage with the substance of defamation law in the internet age. Below is an overview the tort of defamation (focusing on libel) which incorporates discussion of these two topics.

Defamation remains a civil action which fits uneasily within the spectrum of tort law.[8] And so, it has remained a rather nebulous concept within tort. The present offers an admirable opportunity to engage anew with defamation as a tort based upon the impact of internet communications. In this section, these interlinked points will be elaborated upon; but with the caution prompted by Professor Barendt's article which remains a lingering question today, "What is the point of libel law?"[9] Defamation's 'essential' purpose has been described as protecting reputation from harm by false statements.[10] This classification as it applies to tort requires unpacking.

(i) Defamation's private law evolution

Once the common law courts took jurisdiction of defamation (from the Star Chamber), the view emerged that the written form was of a greater concern. In *King v Lake*[11] Hale C.B. ruled that the

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[6] Allen M Linden & Bruce Feldthusen, *Canadian Tort Law,* 10th ed (Toronto: Lexis Nexis, 2015), 791; Robert Solomon, Mitchell McInnes, Erika Chamberlain and Stephen Pitel, *Cases and Materials on the Law of Torts*, 9th ed (Toronto: Carswell, 2015) [Solomon *et al*], 1075.

[7] Though it is limited to the legal avenues noted above, there may be other areas of law which also apply depending on the facts, such as copyright or other intellectual property-based claims. The topic is discussed in Alexandra Couto, "Freedom of expression, freedom of information IP rights in the age of ICT" in Mireille Hildebrandt and Bibi van der Bert (eds) *Information, Freedom and Property* (Oxford: Routledge, 2016), 131-150; as well as, in Stephen Bate and Gervase de Wilde, "Copyright, Moral Rights, and The Right to One's Image" in N.A. Moreham and Sir Mark Warby (eds), *Tugendhat and Christie The Law of Privacy and the Media* (Oxford: OUP, 2016), Chapter 9.

[8] The fact that both the plaintiff and defendant may simultaneously plead the matter of reputation underlines the uniqueness of this tort. In *Awan v Levant* 2016 ONCA 970, the defendant (appellant) argued that he had a "reputation as a right-wing provocateur" as a means of defending against the plaintiff's defamation claim.

[9] (1999) 52 *Current Legal Problems* 110.

[10] Gavin Millar QC and Andrew Scott, *Newsgathering: Law, Regulation and the Public Interest* (Oxford: OUP 2016), [17.03].

[11] (1668) Hardr 470.

written form "contains more malice than if they had been once spoken".[12] The finding contrasted with what would have occurred if the matter had been slander: "although such words spoken once, without writing or publish[ing] them, would not be actionable". Kaye criticised taking this meaning from *King* and instead analysed the matter as one of malice.[13] Professor Mitchell placed Kaye's argument in doubt by suggesting the reading was inconsistent with Hale C.B.'s reasoning.[14] For some time, the matter remained unsettled,[15] though there was a hint of a continuing line with *Villers v Monsley*.[16]

The emphasis on the written form by which we abide today was entrenched by 1812. The decision of Chief Justice Mansfield in *Thorley v Lord Kerry*[17] marked a point of change in the courts' attitude towards written and spoken forms of defamation. Identifying the precedent "established by some of the greatest names known to the law, Lord Hardwicke, Hale, … Holt …", though contrary to his personal view,[18] Mansfield C.J. concluded: "an action for a libel may be brought on words written, when the words, if spoken, would not sustain it".[19] The distinction owed to arguments such as "written scandal is more generally diffused than words spoken".[20] Although the permanence of form allowed comments to be read by a wider audience, Mansfield C.J. was not entirely convinced as he contended making a remark in a public place "may be much more extensively diffused than a few printed papers dispersed".[21] Harm has been a foundation as passed from the history of the law of defamation for application today and Bayley J. in *Clement v Chivis* encapsulated the point that writing is both "premeditated" and "is more permanent and calculated to do a much greater injury than slander merely spoken."[22] Underlying the notion of what may be viewed as the more egregious act of libel is that the written form is presumed to be undertaken concurrently with thinking about what is written; that is, there is some form of self-editing or reconsideration embedded within writing. As a result of this presumption, forceful terms are applied to the alleged defamer, notably falsehood (malice, in some instances). These words suggest a harsh certainty that is not in fact reflected in defamation adjudication; which is itself a much more nuanced process.

A negative tone has developed in the understanding of defamation and it has led to a critical view of libel law; to the point that statements such as "[a]lmost all uncomplimentary comments

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[12] *Ibid* 471. Another case that arises in readings is *Austin v Culpepper* (1683) 2 Show KB 313. The defendant had forged an order of the Chancery Court stating that Sir John Austin should 'stand committed'. Culpepper's conduct however should distinguish this decision.
[13] J.M. Kaye, 'Libel and Slander – Two Torts or One?' (1975) 91 LQR 524, 531. Note, there is no reference to Kaye in Lawrence McNamara, *Reputation and Defamation* (Oxford: OUP, 2007) which is another notable source of the history of defamation.
[14] Paul Mitchell, *The Making of the Modern Law of Defamation* (Oxford: Hart, 2005) 5. The *King* court rejected the argument that no action where words were too vague and uncertain to cause loss because the words were written: Mitchell, 6.
[15] *Ibid* 8.
[16] (1769) 2 Wils KB 403.
[17] (1812) 4 Taunt 355.
[18] *Ibid* 366: 'If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken'.
[19] *Ibid* 365.
[20] *Ibid* The point was made in Thomas Starkie, *Law of Slander, Libel, Scandalum Magnatum, and False Rumours* (1812), 126-44.
[21] *Thorley* 365.
[22] (1829) 9 B & C 172, 174.

are defamatory"[23] are found in Canadian tort textbooks. These assessments speak of a plaintiff-centred system. Increasing scrutiny of the tort is the view that it is "relatively easy for plaintiffs to make out a *prima facie* case of defamation".[24] This line of critique takes aim at the determination of whether or not the impugned remark is defamatory (one of the three criteria for establishing a *prima facie* defamation claim). Adjudication of this point will likely be further examined as cases between parties that do not include news media organisations increase in number based upon capacities provided to individuals through internet-based communications. And yet, there may be points to identify for clarification purposes with regards to this tort, prior to continuing on to consider the influence of information technology on the future developments in protection of reputation.

Defamation has long been taught as a strict liability tort.[25] Like much of defamation law, there is a curious ambiguity to the notion. The aim here is to underscore that developments in information and communication technology offer an occasion to review the tort with a new perspective. In aid of that aim, it is worth briefly noting the challenge of situating defamation as a strict liability tort.

Strict liability arises when the plaintiff has proven that the defendant caused her loss in the manner alleged and there are no defences excusing liability.[26] Part of the challenge with defamation is that it appears to be a right-based form of strict liability: imposing liability "on boundary crossings that may *both* do no harm and be entirely free of fault."[27] Battery is used to explain what is meant by strict liability absent harm or fault. No harm may be caused by the unlawful touching of another (with force beyond a *de minimis* threshold), but there remains a cause of action for the innocent party because their bodily integrity has been unlawfully violated. Strict liability is justified on the basis of infringement of control; here over the individual's person. The difficulty with defamation is that there is a debateable amount of control an individual has over her reputation. Defamation may involve protection of the individual's autonomy. And yet, reputation, based upon the criteria for establishing a defamation claim, includes an assessment of a person by others. A tort (let alone a strict liability tort) to protect such a difficult entity seems to be a challenging endeavour.

These difficulties appear to have been weighed to a certain extent insofar as the concept itself can become compromised without a firm boundary. Professor Keating's comments provide context: "They are rights to exclusive control over one's person and one's property, real and moveable. Liability for violation of a right of exclusive control is strict for the simple reason that the right itself would be fatally compromised by tolerating all reasonable (or justified) boundary crossings without regard to whether consent was given to those crossings."[28] In debates regarding legislative changes to defamation in the UK, Lord MacKay anticipated Keating: "[the

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[23] L.N. Klar, *Tort Law* (Toronto: Carswell, 2012), 789. This statement is quoted in Philip Osborne, *The Law of Torts* (Toronto: Irwin Law, 2015), 428.
[24] Solomon *et al*, 1090. A similar remark is also made at 1078.
[25] See texts such as Osborne, 428; Linden and Feldthusen, 816;
[26] Definitions in Canadian tort law texts speak to these criteria. Osborne, 358. In his *Tort Law Cases and Materials* (Toronto: Emond Montgomery, 2014), 579, Professor Weinrib defines strict liability as "the result of the defendant's causation of the harm under particular circumstances rather than the defendant's culpability." This definition is set within the context of the rule in *Rylands v Fletcher*
[27] Gregory C. Keating, "Strict Liability Wrongs" in John Oberdiek (ed) *Philosophical Foundations of the Law of Torts* (Oxford: OUP, 2014), 296.
[28] Keating 298.

plaintiff] is the person who has the reputation, and if somebody is going to seek to deprive him of it, that person should be under the obligation to show that that deprivation is justified."[29] On this point, it is worth noting that altering the burden of proof had been contemplated when the *Defamation Act 1996* was being debated in the UK. The proposed amendment was: "In an action for defamation, the burden shall be upon the plaintiff to prove that the defamatory words of which he complains are false." To this, Lord MacKay (the Lord Chancellor at the time) argued against the amendment: "The amendment would alter the whole structure of defamation law so that every hapless person against whom another chose to allege dishonesty, immorality, dishonourable conduct, incompetence and so forth would always have to prove his innocence in order to protect his reputation."[30]

As is well-known, there are three criteria the plaintiff must meet in order to establish a *prima facie* defamation claim (before applicable defences are considered). Looking at two of the three requirements, a defamatory remark and publication, there is a confusing disconnect when viewing defamation as a strict liability tort. To illustrate, the following definitions from the same text of each criteria (respectively) are used:

> "Liability in defamation is strict. The plaintiff is not required to prove that the defendant intended to defame the plaintiff or that the defendant failed to take reasonable care in ascertaining the truth of the statement."[31]
>
> "The strict liability for defamation is also alleviated to some degree by the requirement that the publication must be intentional or due to a lack of care … or making defamatory statements where it is foreseeable that others may overhear the conversation"[32]

Rather than being a critique of the author, these quotations explain how the criteria for establishing a defamation claim have been dulled over time. The hallmark of strict liability is that the focus is on the act (or omission to act) leading to damage. There is no consideration of intention. A classic example has been the rule in *Rylands v Fletcher.*[33] In that case, the plaintiff established the defendant's liability for damage to his property by the defendant (in fact contractors working for the defendant) bringing a dangerous substance onto his property. This was a non-natural use of the land leading to a dangerous substance escaping the defendant's property and causing the damage in question. Over time, the English courts modified this tort by adding an element of foreseeability. As one example, Lord Bingham in *Transco plc v. Stockport MBC*[34] phrased the addition as follows: "It must be shown that the defendant has done something which he recognised, or judged by the standards appropriate at the relevant time and place, he ought reasonably to have recognised, as giving rise to an exceptionally high risk of danger or mischief if there should be an escape, however unlikely an escape may have been thought to be."

In the two strict liability quotations above, defamation contains an element of intention with regards to publication. The requirement, however, is understated and as such practically infrequently arises as an issue. The publication process emerges as a factor. Publication itself implies an intentional action. It is a term that suggests (at least) a process of editing and reconsideration of the words published: "A printer and publisher intends to publish, and so intending cannot plead as a justification that he did not know the contents."[35] Culpability, then, is

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[29] Lord Chancellor, *Hansard* HL Deb 2 Apr 1996: Col 242.
[30] *Ibid*.
[31] Osborne 428.
[32] *Ibid* 433.
[33] (1868) LR 3 HL 330.
[34] [2003] UKHL 61, [10].
[35] *McLeod v St Aubyn* [1899] AC 549, 562 (PC).

subsumed by the process: those involved knew or ought to have known that they were publishing these words. "[F]or a person to be held responsible there must be knowing involvement in the process of publication of the relevant words".[36] The words themselves may not have been intended to defame; and still the words attract a strict liability approach which is confusingly undermined by the intention to publish. The innovation of internet-based communications technologies is that the process of publication is truncated. What before required a series of individuals working together (from writing to publication), now requires only one person who serves each of those roles. This one person may publish any comment to an undetermined audience consisting of individuals with access to internet-based communications. This is an important consideration: should the presumption of intention in publication be maintained with information technology or should this be reconsidered given the truncated process between thought to publication?

In assessing protection of reputation in the internet age, consideration of a negligence standard in defamation (whether it should be the standard or in effect this is the standard of analysis) will arise. The argument has been put forward by Eric Descheemaeker and, in Canada, Hilary Young. The contention is that in enlarging protection for free speech, the standard for liability has more closely approximated that of negligence (though statutory changes in 2013 suggest this too has been altered). Descheemaeker's work in this area is particularly helpful in explicating the movement.[37] With the shift noted above, harming reputation remains wrongful, but what constitutes a challenge to that reputation (or an opinion in relation to an individual's reputation) has grown and as a result the scope for impairment has diminished. A caution is noted here with regards to a (more overt) negligence standard for defamation. Further development along this line may stunt the growth of reputation claims because it will be a procedural assessment instead of a balancing of competing interests. It may be queried whether there is a way to factor dignity into negligence claims.[38]

(ii) A tort with public importance

Aside from the strict liability issue, a question has long lingered as to what is the objective of this tort of libel. It has been written that "[i]n defamation … the defendant commits the wrong by making statements about the plaintiff to people other than the plaintiff."[39] This is not the most precise rendering. The 'wrong' is not simply making statements about the plaintiff to others. It is publishing what are considered to be defamatory statements to others. Nevertheless, there has been a legitimate argument of a disconnect in calling speech (free speech being a cherished right in a liberal democracy) a wrong. It should be noted that there has been movement at common law to address this argument.

A starting point is to look at the more recent emphasis in defamation law (notably libel) on protection of a wider range of speech. The ascendant view is that speech, in its multifarious forms, must be protected but some level of guardianship over reputation should be noted. Different sources are cited to underpin the importance of speech, such as: The *Universal*

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[36] *Tamiz v Google Inc.* [2013] EWCA Civ 68, [23].

[37] For example, Eric Descheemaeker, "Protecting Reputation: Defamation and Negligence" (2009) 29 *Oxford Journal of Legal Studies* 603-641: "the fact of the matter is that it is less and less true that defamation is not negligence-based." The *Defamation Act 2013*, s.4 may limit this idea.

[38] The difficulty is increased if one is to consider defamation through corrective justice as the Supreme Court of Canada suggested negligence is supposed to be in *Clements v Clements* 2012 SCC 32, [21], [37]: "the theory …that underlies the law of negligence" and as the "anchor" of negligence.

[39] Ripstein, 189. Ripstein identifies his ill-ease with the definition.

Declaration of Human Rights recognizes the importance of free speech in its preamble; it is also recognized in Art.19 of the *International Covenant on Political and Civil Rights*.[40] The late Professor Weir's trenchant criticisms in the early years of the 21st century expressed unabated disdain for defamation law as a "blot on the lawscape"[41] because it accorded protection to reputation similar in strength as protection of liberty, a "surely more important value".[42] Even at that time, the tort was under significant change; to the point that now a view of defamation as an action that fits with other torts by compensating for harm has become more difficult to reconcile. As the end of the 20th century was in view, the House of Lords in *AG v Guardian Newspapers Ltd (No.2)*[43] established that interference with freedom of expression should only be undertaken where there was a pressing social need. Mullis and Scott cited this case as one of the first representing a "rebalancing of the law".[44] To this we may add Lord Nicholls' words in *Reynolds:* "To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved."[45] Arguments regarding safeguarding plurality and democratic values are readily recognizable.[46] In *Chase v Newsgroup Newspapers Ltd.,* the English Court of Appeal, synthesizing decisions from the European Court of Human Rights,[47] determined why free speech remains pivotal:

> (1) Freedom of expression constitutes one of the essential foundations of a democratic society, and the safeguards to be afforded to the press are of particular importance.
> (2) Not only does the press, playing its vital role of "public watchdog", have the task of imparting information and ideas of public interest or serious public concern, but the public also has a right to receive them.
> (3) The test of "necessity in a democratic society" requires the court to determine whether the "interference" complained of corresponds to a "pressing social need", whether it is proportionate to the legitimate aim pursued, and whether the reasons given by the national authorities to justify it are relevant and sufficient.
> (4) Notwithstanding the essential function the press fulfils in a democratic society, it must not overstep certain bounds, in particular in respect of the reputation and rights of others.[48]

Professor Cane wrote that we recompense when "some other person can be said to be responsible for that harm in one of the senses of 'responsible' recognized by tort law in its heads of liability."[49] Professor Ripstein contends that defamation law, as a tort, "is a system of responsibility in the sense that its basic doctrines are expressions of an idea that human beings are responsible agents to whom particular acts can be attributed."[50] Amending this rendering, defamation (notably libel) has been tempered as a tort of responsibility by concerns regarding

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[40] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.
[41] Tony Weir, *An Introduction to the Law of Tort* 2nd ed (Oxford: OUP, 2006) [Weir], 190. Slightly more charitable, William Prosser, in *The Handbook of the Law of Torts* (St Paul: West, 1941), 778, stated: "there is a great deal of the law of defamation which makes no sense."
[42] *Ibid* 176. Plural in original.
[43] [1990] 1 A.C. 109 (HL) (often referred to as the *Spycatcher* case).
[44] Alastair Mullis & Andrew Scott, "The swing of the pendulum: reputation, expression and the re-centring English libel law" (2012) 63 *Northern Ireland Legal Quarterly* 27-58 [Mullis & Scott], 29.
[45] *Reynolds v Times Newspapers Ltd.* [1999] 3 WL.R. 1010 [*Reynolds*], 1022.
[46] See for example the decision of the European Court of Human Rights in *Steel and Morris v UK* (2005), 41 E.H.R.R. 22, [87] where the court wrote of free speech: it is "one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment".
[47] *Jersild v Denmark* (1994), 19 E.H.R.R. 26, [31]; *Stemsaas v Norway* (1999), 29 E.H.R.R. 125, [58]-[59].
[48] [2002] EWCA 1772, [60].
[49] Peter Cane, "Retribution, Proportionality, and Moral Luck in Tort Law" in Peter Cane and Jane Stapleton eds *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press: Oxford, 1998), 141-173 [Cane], 141.
[50] Ripstein 191.

free speech. Libel has become less about assigning responsibility and more about tending a gate through which speech passes. The importance of speech in a democracy influences the structure of this private law tort. Twenty-first century libel law has emphasized protection of speech.

This is all before we even consider the nature of the defences. The 'wrong' may be permitted where the libel defences may apply; suggesting a vital role for them in this tort.[51] The defences range in their objectives:[52] from protecting truth (justification) to preserving space for value judgments (fair comment).[53] The more recent development of the responsible communication defence on matters of public interest, developed by the Canadian Supreme Court in *Grant v Torstar*, moved Canada more into line with libel law defences in Australia, New Zealand and the United Kingdom. For those who followed developments in UK libel cases between *Reynolds v Times Newspapers Ltd*[54] and *Jameel v Wall Street Journal Europe SPRL (No.3)*[55], the non-exhaustive criteria in *Grant* for this defence[56] gives rise to foreseeable concerned commentary.[57] Foremost, there is a strong possibility of lower courts employing the criteria exhaustively (despite the Supreme Court's final point being "any other relevant circumstances"). In the UK, lower courts did just this and it took the House of Lords in *Jameel* to disabuse the lower courts of this technical application. These decisions and the criticism thereof underscore the inextricable nature of the claim and defences in libel adjudication. And so, there must be an understanding of this tort which links the elements of the cause of action with the defences because these defences stand out as unique aspects peculiar to this tort.

It is not suggested that reputation has been devalued in defamation. Rather, this is how libel is an action within a juridical process. Reputation includes an individual's good name as well as her economic interests. The law recognizes that both[58] may be diminished by defamatory remarks. Reputation remains difficult to firmly define. A complicating factor for this study, it is influenced by the society (sometimes it may seem that reputation is adjudicated in a manner which seems closer to a perception of society). The absence of controlled factors renders the concept subjective and therefore difficult to assess in absolute terms. The difficulties experienced by the law with regards to this term may be attributable to the 'relatively recent' development of defamation law as a means of protecting reputation.[59] Legal conceptions of reputation are

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[51] David Mangan, "Social media in the workplace" in David Mangan and Lorna E. Gillies (eds) *The Legal Challenges of Social Media* (Cheltenham: Edward Elgar, 2017).

[52] Eric Descheemaeker has aptly characterised defamation defences as 'reclaiming much – if not most – of the "territory" that the first part of the enquiry [satisfying the tripartite criteria] had handed to the pursuing party': Eric Descheemaeker "Mapping Defamation Defences" (2015), 78 *Modern Law Review* 641.

[53] The widening of the defence more recently to an opinion being one that "anyone could honestly have expressed": *WIC Radio Ltd v Simpson* 2008 SCC 40, [26]; *Grant v Torstar* 2009 SCC 61, [31].

[54] [1999] UKHL 45.

[55] [2006] UKHL 44.

[56] *Grant* [126].

[57] Hilary Young has suggested this is happening: Hilary Young, "'Anyone … in any medium'? The scope of Canada's responsible communication defense' in Andrew T. Kenyon (ed) *Comparative Defamation and Privacy Law* (Cambridge: CUP, 2016)17-39.

[58] Eric Descheemaeker makes this point in his discussion of claims in negligence and defamation as considered in the well-known case of *Spring v Guardian Assurance* [1994] 3 All ER 129: Eric Descheemaeker, *The Division of Wrongs* (Oxford: OUP, 2009), 250.

[59] Lawrence McNamara noted the development in the law of defamation from 'a strategy for maintaining the social order, the spiritual order, or the public peace' 'to protection of reputation' as 'a very real and meaningful justification for the law today': Lawrence McNamara, *Reputation and Defamation* (Oxford: OUP, 2007) [McNamara], 94, 102, 108.

protected; that is, safeguards are restricted to "a certain class of acts".[60] Still, it cannot be said that libel precludes anyone from challenging reputation. This is the less defined area of defamation which highlights the tension between protecting reputation and ensuring free speech. People are entitled to hold opinions and to express them. These opinions may be rude, unkind and even inappropriate. And yet, they may not be actionable by way of defamation. Defamation, then, is not necessarily the personal tort about reputation it may appear to be. A dual function for libel may be more readily discerned that balances protection of reputation as well as a spectrum for free speech. This dual function may be best represented in the defences to a defamation action: speech may be found to be defamatory and still not be the subject of legal sanction because robust defences have been put in place so that speech is protected.

The defences are a testament to the importance placed on free speech.[61] For example, qualified privilege "applies even if the statements are untrue."[62] This is an important aspect of the defence because defamation has often been discussed as a matter of truth and falsehood. Understandably this arises as a result of the defence of justification which provides a full defence if the impugned remark is truthful.

An arguably larger portion of comments consist of opinions; assessments of individuals based upon inferences drawn from points in the public domain.[63] Opinions are subject to their own defence, namely fair comment (now honest opinion in the UK).[64] In explicating the defence of fair comment, Professor Ripstein contrasts the Canadian decision of *Vander Zalm v Times Publishers*[65] with the UK decision in *British Chiropractic Association v Singh.*[66] The comparison serves a purpose here as well. In the Canadian decision, the plaintiff had been the subject of a political cartoon in the defendant publication (he was depicted picking the wings off flies). Overturning the trial decision, the Court of Appeal determined the claim[67] failed because there was no depiction of an actual offence.[68] The matter was not so simple in the UK case.

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[60] Ripstein 192.
[61] In Canadian tort textbooks, there had been a muted discussion of the importance of the defences. Solomon *et al* (1075) note: "The defences signal that, in some situations, the value of free and uninhibited speech outweighs the need to protect a person's reputation."
[62] Solomon *et al* 1104.
[63] Often referred to as facts, but this nomenclature can be misleading because these may not be facts in the sense of truth and falsehood. Rather these are statements in the public domain upon which opinions may be formed; that is, they are predicated upon remarks found elsewhere.
[64] *Defamation Act, 2013*, s.3.
[65] (1980), 109 D.L.R. (3d) 531 (BCCA).
[66] [2010] EWCA Civ 350 [*Singh*]. The case is discussed in David Mangan, "An Argument for the Common Law Defence of Honest Comment" (2011), 16 *Communications Law* 140.
[67] Vander Zalm claiming the cartoon depicted him as "a person of cruel and sadistic nature who enjoys inflicting suffering and torture on helpless beings who cannot protect themselves".
[68] Of the opinions rendered, that of Atkins J.A. [82] best encapsulates the matter in relation to the aims of this study: "The reasonable man of ordinary intelligence would clearly understand that political cartoons are rhetorical in the sense that the cartoonist makes his point indirectly by the use of symbolism, allegory, or satire and, I would add, exaggeration. The trial judge, having correctly concluded that the cartoon should be and would be considered symbolically, allegorically or satirically, then found that the cartoon's "natural and ordinary meaning", as understood by viewers, was that the plaintiff was "a person of a cruel and sadistic nature who enjoys inflicting suffering on helpless persons". No doubt, in doing so, the trial judge considered the meaning symbolically, allegorically or satirically. My difficulty with the finding is that the meaning found is in fact, in my respectful view, too close to the literal meaning that would be taken by a viewer who did not take into account the symbolism, allegory or satire and usual exaggeration to be found in cartoons, or the consideration that it was a political cartoon."

The defendant in *Singh* was not the publishing newspaper (*The Guardian*) but the author of the article in question. To situate the case, it is worth noting the defendant's prominence. Simon Singh MBE is a known author and journalist specialising in science and mathematics. He obtained his doctorate in particle physics from Cambridge University. The contested article was published in the *The Guardian* of April 19, 2008 and contained the following statement: "The British Chiropractic Association [BCA] claims that their members can help treat children with colic, sleeping and feeding problems, frequent ear infections, asthma and prolonged crying. Even though there is not a jot of evidence. This organisation is the respectable face of the chiropractic profession and yet it happily promotes bogus treatments."[69] Singh adopted the study of chiropractic by his co-author (Edzard Ernst) in a text of alternative medicines in support of his comments.[70] The BCA claimed that the article was defamatory because it alleged the Association was not a legitimate collection of medical professionals and, instead, was fraudulently taking money for worthless treatments. Eady J. heard the case at first instance. Finding for the BCA, he ruled that Singh's words would mean the following to a reasonable reader: (a) that the BCA claimed that chiropractic was effective in helping to treat a variety of ailments, although it knew that there was absolutely no evidence to support its claims; (b) that by making those claims the BCA knowingly promoted 'bogus' treatments; and (c) that Singh's remarks were 'factual assertions rather than the mere expression of opinion.'[71] The phrases 'not a jot of evidence' and 'happily promoted bogus remedies' appeared to be statements of fact. The Court of Appeal overturned the trial decision.

The composition of the bench (comprised of the Lord Chief Justice, the Master of the Rolls and Lord Justice Sedley) intimated the Court of Appeal wished to provide an unequivocal statement about defamation in this decision. Lord Chief Justice Judge, for the court, wrote: "The material words, however one represented or paraphrased their meaning, were expressions of opinion. The opinion might be mistaken, but to allow the party which had been denounced on the basis of it to compel its author to prove in court what he had asserted by way of argument was to invite the court to become an Orwellian ministry of truth."[72] Curiously, the decision glossed over points that would have been worthy of consideration, such as the BCA "happily promot[ing] bogus remedies". For the Court of Appeal, honest comment protected speech which challenged the standing of a collective of individuals in matters of public interest, even if it consisted of a denunciation. The tone of *Singh* suggested the Court of Appeal intended to speak most particularly to the critics of English defamation law. Singh offered readers a value judgment[73] and this opinion was found worthy of the protection afforded by the defence. It remained unclear how the court differentiated between facts and opinions;[74] though value judgment provided the means by which the distinction was made. Part of the reflection on value judgments insisted that courts were to remain outside of debates in the nature of scientific controversies. The legal considerations extended beyond the scientific, however, and could well have included the extent of Singh's disparagement of the BCA. After all, Singh was challenging

[69] *Singh* [1].
[70] *Ibid* [28].
[71] [2009] EWHC 1101 (QB), [14].
[72] *Singh* [23].
[73] 'If in the course of the debate the view is expressed that there is not a jot of evidence for one deduction or another, the natural meaning is that there is no worthwhile or reliable evidence for it. That is as much a value judgment as a contrary viewpoint would be': *Singh*, [26].
[74] Eric Barendt, "Science Commentary and the Defence of Honest comment to Libel Proceedings" (2010), 2 *Journal of Media Law* 43, 47.

not just the science behind chiropractic but also suggesting the BCA and its members may well have been engaged in unsavoury (if not criminal) conduct.[75]

Libel, then, is even a challenging subject within its home of tort. It raises questions regarding the value placed on free speech. Additionally, it compels consideration of the foundation of tort law. Tort has been dissected in differing ways, but most often it has been understood as assigning responsibility for a wrong. In libel, the wrong is speech and this surface level contradiction presents remarkable difficulties for consistency: how can speech be viewed as a wrong (given the importance placed on it within a democracy)? The question casually alludes to the influence of the American decision of *Sullivan.* And yet, there remains an importance to understanding that the present exercise is one of looking at defamation in Canada, specifically Ontario. For, in Canada, the *Charter* governs rights and freedoms (whether they are public sector matters or having a level of consistency with *Charter* values in the private sector[76]) and s.1 of the *Charter,* paraphrasing, states that there are rights and freedoms outlined herein, but they are subject to limitation in accordance with a democratic society. As a result, the *Charter* encapsulates the rights as well as the correlating responsibilities of individuals. The starting point is to recognize there is a limitation which has been deemed acceptable. To this is added the understanding that the *Charter* penetrates these private instances: "*Charter* values, framed in general terms, should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary".[77] Balancing *Charter* values with changing times as they pertain to the common law, the court's role was explained by Chief Justice McLachlin as follows: "It is implicit in this duty that the courts will, from time to time, take a fresh look at the common law and re-evaluate its consistency with evolving societal expectations through the lens of *Charter* values."[78]

(iii) The influence of information technology on libel

Synthesizing these points, the combination of the development of defamation law and innovations in internet communication, participation in discourse has come to the forefront. The influence of internet-based communication developments on reputation matters (and more generally on speech) has been the crystallization of a dialogical format. What this means is that news has long been reported (and commented upon) by what are now viewed as traditional news media and this format was one-way: media to audience. Free speech was largely dominated by the notion of a free press. With internet-based forms of communication, the capacity for the individual to participate in free speech has greatly advanced, resulting in a more individualized demonstration of free speech that encourages discourse. User-generated content on the internet would seem to only further imperil reputation.[79] And yet, free speech would seem to necessarily mean that individuals (utilizing information technology platforms) as well as news media are both granted free speech rights that are subject to limitation.

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[75] On this point it is worth noting the decision in *Robins v Kordowski* [2011] EWHC 1912, [31] where the defendant asserted a defence of honest comment which was denied by the court because the remarks - that the claimant was a liar and unscrupulous - were statements of fact.

[76] "*Charter* values, framed in general terms, should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary": *Hill v Church of Scientology of Toronto,* [1995] 2 S.C.R. 1130, [97].

[77] *Hill v Church of Scientology of Toronto,* [1995] 2 S.C.R. 1130, [97].

[78] *Grant v Torstar* 2009 SCC 61, [46].

[79] Danah Boyd's term 'persistent' embodies the challenges here: Danah Boyd, 'Social Network Sites as Networked Publics: Affordances, Dynamics, and Implications' in Zizi Papacharissi (ed) *Networked Self: Identity, Community, and Culture on Social Network Sites* (New York: Routledge, 2011) 39-58.

The effect of information technology granting individuals the capacity for expression is that it broadens what is meant by free speech. Defamation cases have primarily been between public figures (of some form) and news media companies. The latter often arguing in favour of freedom of speech. Since much of the litigation was taken by this litigant, the arguments were steeped in democratic underpinnings. Social media platforms, as one example of internet-based communication technology,[80] have now vaulted the individual into a novel dimension that challenges the domain held by traditional news agencies. As noted by the European Court of Human Rights, the internet "has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest."[81]

As a result of internet communication capabilities, a disconnect between the legal and lay understandings of these media has emerged. Taking social media platforms as a subset of internet communications, the belief that social media is 'only' another medium for oral discussion remains ubiquitous amongst a non-legal audience. In *Pridgen v University of Calgary*[82] one of the claimants offered the following understanding of Facebook: "… it's a social networking site, things that are said on here are not designed to be held up to intense scrutiny, it is merely the equivalent of having an online conversation. It is as public as … standing in the middle of the University … hallway and saying the exact same thing".[83] The perception of the medium[84] does not fit with long-held distinctions in the law regarding liberties attached to speech.[85] Disconnect between users' perceptions of the role of the medium and legal distinctions[86] adds to this complicated topic and also confirms the impact of the distinction between slander and libel[87] where, for the most part, the latter has been actionable *per se*.[88] The intrigue between the legal and lay understanding of the actionability of written statements is that it recalls Professor Mitchell's passing note that the court in *Thorley* may have "felt free to take a more critical, principled line" had it been aware of the weak foundation of the law at that time.[89] This is intriguing because the widespread use of internet communications may provide an

[80] An overview of this topic can be found in Andrew Murray, *Information Technology Law: The Law and Society* 3rd ed (Oxford: OUP, 2016), Chapter 8.
[81] *Yildirim v Turkey* [2012] ECHR 2074, [56].
[82] 2012 ABCA 139.
[83] *Ibid* [32].
[84] Voorhoof and Humblet have called this a "virtual conflict zone": Dick Voorhoof and Patrick Humblet, "The Right to Freedom of Expression in the Workplace under Article 10 ECHR" in Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Right and the Employment Relation* (Hart 2013) 238.
[85] The argument that Twitter comments are akin to a private conversation was expressly rejected by a Canadian labour tribunal in *Toronto Professional Firefighters Association, Local 3888 v Grievance of Edwards*, *F13-142-07*, 2014 CanLII 62879, [178].
[86] The employer's successful argument in *Canada Post Corp v Canadian Union of Postal Workers* [2012] CLAD No 85 [82] is of note: "The Employer suggested that there is a fundamental difference between "bar talk" and social media: social media is accessible for months or years; it has a huge potential audience; the contents are discoverable through key word searches, and the contents are easily copied and forwarded to others".
[87] Note legislative exceptions in the UK: *Defamation Act 1952*, s 16(1) words shall be construed as including a reference to pictures, visual images, gestures and other methods of signifying meaning' and its extension under the *Cable and Broadcasting Act 1984*, s 28; as well as the *Theatres Act 1968*, s 4(1). Similar provisions are found in Ontario such as the *Libel and Slander Act* R.S.O. 1990, c.L.12, s.1(2)
[88] With s.1 of the UK *Defamation Act 2013* (a claim must meet a threshold of serious harm), this statement has become equivocal.
[89] Mitchell 9.

opportunity to rethink accepted distinctions.[90] In comparison to the various internet-based means of communication, the spoken word now reaches a smaller audience. The reach of the social media platforms (for example) makes it difficult to separate damage from the vastness of the audience; for this must be considered an aspect of the harm.

Internet communications have demonstrated two related points about this long-held understanding of defamation. First, writing itself does not necessarily embody premeditation. Individuals may write just as 'unthinkingly' as they may speak. Second, the permanent form of writing was more a reference to a process of intention. It may be viewed as the process of publication which entails editing and refining (if not also reconsidering) what has been written. Implying this process, the permanence of the form imbued the act of publication with the intention to inflict harm on the subject's reputation. As compared to slander, the permanent form of libel was interpreted as evidencing intentional conduct that carried greater possibility for harm to reputation. The concern has been potential for injury and opinions differed (Chief Justice Mansfield's statements in *Thorley* being one example) as to which medium (spoken or written word) reached the larger audience. The various internet communication technologies permit a similar kind of unthinking publication as had been associated with slander; a version of speaking without thinking, but in a published form. These technologies also bring into question the intention behind publication: does the individual intend to disparage the subject's reputation or are they commenting in an imprudent, emotional manner? Overall, the premeditated, calculated action to injure reputation becomes a more nuanced consideration once internet-based forms of communication are included. To this it must be added that the spectrum of harm remains difficult to define; reminiscent of defining reputation. Hate speech would be a classic example of harmful speech;[91] that is, speech that would encourage physical harm to come to a class of persons. Hate speech may also lead to reputational harm insofar as being the subject of hate speech may equally cause those adopting the message of hate speech to shun the objects of the remarks. Beyond these examples, there is much contested ground as to what constitutes crossing a threshold of harming an individual's reputation.

It is anticipated that discussions will increasingly consider what has been called "cyberspace liberum".[92] With regards to free speech, the issue is of one of extraterritoriality. Perhaps the most pertinent example is the French Court decision of 2000 in *LICRA and UEJF v Yahoo! Inc and Yahoo France*[93] where the court ordered Yahoo! to block access to an auction on its site where Nazi paraphernalia was being sold (such a sale being a criminal offence in France). The order has met with praise (as respecting national democracies) and criticism (such a precedent being open to undemocratic government actions).[94] Unlike Hugo Grotius' *Mare Liberum*,[95] cyberspace

[90] Defamation law appears to be one area in which some concepts were decided long ago, despite more recent criticisms. The single publication rule was set out in the 19th century and by *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65, 71 was 'too well established to require citation of authority'. And yet, consider the arguments against the rule in Andrew Scott, 'Ceci n'est pas une pipe: the autopoietic inanity of the single meaning rule' in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP, 2016).

[91] Eric Heinze has recently critically engaged with hate speech in *Hate Speech and Democratic Citizenship* (OUP 2016).

[92] Mireille Hildebrandt, "Extraterritorial Jurisdiction to Enforce in Cyberspace? Bodin, Schmitt and Grotius in Cyberspace" (2013), 65 *University of Toronto Law Journal* 163.

[93] Order of November 20, 2000 by the Superior Court of Paris.

[94] Hildebrandt 218.

[95] Hugo Grotius, *The Freedom of the Sea* (1668), translated and revised by Ralph Van Deman Magoffin (New York: Oxford University Press, 1960)

does not have the natural boundaries of land as found in the law of the sea. While there are clearer points to be made about cyberspace and commerce,[96] the pernicious challenge remains the democratic nature of free speech extraterritorially. The Law Commission's project is situated within this more difficult space.

Finally, the legal avenues for protection of reputation are at the heart of this discussion. The "vital importance" of reputation stems from it being the "fundamental foundation on which people are able to interact with each other in social environments".[97] The crux of the difficulty in answering the question 'what is the point of libel law?' is set within the law's mandate to balance these competing interests. The age of the internet has in fact intensified the challenges posed to reputational concerns. Mister Justice Binnie identified reputation as the "regrettable but unavoidable road kill on the highway of public controversy"[98] remains poignant given these new capacities. And still, this battered notion remains one of such importance that it warrants protection. Consider Lord Nicholls' remark in *Reynolds* that "[p]rotection of reputation is conducive to the public good".[99]

Complicating this topic is the fact that reputation is a difficult term to define. A reputation stands out as simultaneously a personal matter and one of public input. Using the analogy of an individual's Facebook profile, a reputation may be constructed to convey a certain character. However, reputation, like the profile page, does not exist in isolation as others may add their own assessments. Professor Ripstein argues "against the balancing picture, suggesting instead that the law of defamation serves to protect each person's entitlement that no other person determines his or her standing in the eyes of others".[100] Reputation certainly includes a personal entitlement. Still, the concept of a reputation seems to be more of a dialectic between the individual and the community (immediate or broader, depending on the individual). There is indeed a relativity to a reputation which can be used to undercut the need for its protection: if it is so ethereal why should it be protected at the 'expense' of free speech. Professor Howarth's response seems apt in this instance:

> The content of reputations might well change as social and cultural conditions change, but that does not alter the fact that, at every moment throughout those changes, individuals have reputations the loss of which would do them harm. Even if individuals have no legitimate expectations that social and cultural conditions will remain unchanged, they do have a legitimate interest in the maintenance of their reputations for the time being.[101]

Overall, there is an importance to protection of reputation that has been recognized at the highest level of English courts:

> Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased

[96] Hildebrandt 223.
[97] *Hill* 160, 162-163.
[98] *WIC Radio Ltd v Simpson,* [2008] 2 S.C.R. 420, [2].
[99] *Reynolds*, 201.
[100] Arthur Ripstein, *Private Wrongs*, (HUP: Boston, 2016), 188.
[101] David Howarth, 'Libel: Its purpose and reform' (2011) 74 *Modern Law Review* 845, 849. Reference should also be made to Lord Nicholls' remark in *Reynolds* that 'Protection of reputation is conducive to the public good': *Reynolds*, 201.

> falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others.[102]

Brought together, reputation is a matter of personal entitlement that has historically been expressed in law through the tort of defamation. Contemporaneous with this tort have been the fluctuations of social and cultural influences. While the law does not render a reputation impregnable from those influences, it does provide for redress so that individuals may take steps to protect the legitimate interest they have in a good reputation. In a word, dignity[103] (of the person) is an essential aim of protection of reputation. It is noteworthy then that the importance of reputation was recognized in the U.S. even after *Sullivan*. Stewart J in *Rosenblatt v. Baer*[104] stated: "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being-a concept at the root of any decent system of ordered liberty."

IV. Forms of expression on the internet similar to or contrasting with defamatory speech

The internet has augmented the means by which expression (speech) may be made. Guidance is taken from the Commission's focus on defamation law as a private law tort. This section points out that with information technology, there are now different means of expression beyond words or photos. For example, social media has introduced the concepts of 'liking' or 're-tweeting' (even emojis) as means of expression. (To some they may be similar to the concept of re-publication in defamation. And yet, they also add an element of approval that may be absent in re-publication.) The different forms of expression inform the substantive discussions that follow. The objective of this section is to note the expanding means for expression precipitated by information technology.

It remains unclear if this issue may have been addressed through previous Canadian jurisprudence. Redress in these scenarios may be within the tort of defamation, but the Supreme Court of Canada's decision in *Crookes v Newton*[105] (where the court ruled that hyperlinks in an article did not constitute publication in itself) raises a question regarding the extent of re-publication. The acts of liking, re-tweeting or employing an emoji can be understood as forms of expression that are positive acts, distinguishable from hyperlinks insofar as they are forms of expression.[106]

There is a distinction to be made in this discussion. There are forms of expression via the internet which would fall outside of the private law aspects denoted by defamation. These may broadly be classified as part of the public law domain of criminal or quasi-criminal law. For example, a term that has developed through notorious circumstances is 'cyberbullying'. It is defined broadly to include any electronic communication that would reasonably be expected "to cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional

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[102] *Reynolds* 201; also cited in Richard Parkes QC, "Privacy, Defamation, and False Facts" in N.A. Moreham and Sir Mark Warby (eds), *Tugendhat and Christie The Law of Privacy and the Media* (Oxford: OUP, 2016), [8.13].
[103] This is the third of three ways in which reputation was understood by Robert Post: Robert Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 *California Law Review* 691. This work is used as a tool for elaboration and so the many authors who have offered critical commentary on this piece (such as Howarth) will not be explored here.
[104] (1966) 383 US 75, 92.
[105] 2011 SCC 47.
[106] It is understood that of these forms of communication, re-tweeting may be the closest to reproducing a hyperlink (following *Crookes)* and so there may be distinctions made within the forms of expression denoted here.

well-being, self-esteem or reputation."[107] Nova Scotia developed specific legislation, the *Cyber-safety Act.* It has subsequently been called into question through a constitutional challenge.[108] Where there are relevant points, this area and others like it are discussed in a manner strictly limited to the regulatory lessons to be drawn.

V. Reputation and privacy

The intersection between privacy and reputation was identified some time ago by Cory J in *Hill v Church of Scientology of Toronto*: "reputation is intimately related to the right to privacy which has been accorded constitutional protection."[109] As noted in the Overview section above, there are different layers to this study; namely, privacy, the intersection between defamation and privacy; data protection. The starting point will be privacy because it is viewed as an umbrella term that will be dissected into subsets; for these distinctions are important in meeting the aims of the Commission's mandate.

(i) Limitations of defamation

There are two premises for the argument here that defamation is a tort of limited utility in the age of the internet.

First, free speech should be protected for both the free press as well as the individual expressing herself online. This is not to suggest the two are necessarily the same. Rather, the argument is that information technology has provided the unprecedented potential for one person to speak to anyone who has internet access. The freedom to do so should be protected, but like a free press, should not be unfettered. As a result, the strengthened defences of this tort should also be available to the individual. Second, defamation is a tort that protects reputation in the circumstances of an individual making a defamatory statement. However, it does not guarantee redress where an individual (for example) releases information that the subject has tried to keep private. It may be said this information should come out. While this may be true in certain circumstances, it should not be true in every circumstance; that is, there should be a means for reparation when appropriate.

With regards to free speech for the individual with a (for example) social media platform, free speech may be identified as containing the individual good of self-development. Free press has been the more dominant focus of endorsement. This may not quite be understood as the same as free speech insofar as the latter term alludes to the individual right and the former a more particular form of the right. This distinction seems crucial for the law's application to the broad forms of internet communication under contemplation. Information technology invigorates the idea of free speech insofar as the individual possesses a platform for expression. However, if free speech is viewed as a free press, then the role and influence of information technology may be significantly truncated. In the tort of defamation, there is an imprint of the importance of free speech. This tort operates in a unique manner insofar as the defences to a claim are of great importance to the action: speech may be found to be defamatory and still not be the subject of legal sanction because robust defences signify that speech should (generally) be protected. Defamation defences should also apply to individuals, but the matter is currently unclear.[110]

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[107] *Cyber-safety Act* S.N.S. 2013, c. 2, s.3(1)(b).
[108] *Crouch v Snell* 2015 NSSC 340.
[109] [1995] 2 S.C.R. 1130, [121].
[110] In *Seaga v Harper* [2008] UKPC 9, [11], Lord Caswell for the Privy Council wrote: "whether the *Reynolds* defence is available only to the press and broadcasting media, or whether it is of wider ambit.

Second, defamation is viewed as a tort of limitation because of the key question posed in establishing a claim: Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? This is the often-cited phrase from Lord Atkin's judgment in *Sim v Stretch.*[111] (A more contemporary version may be the "reasonable, thoughtful and informed reader".)[112] Defamation has been the tort for those seeking redress for alleged harm to reputation. Words may indeed prompt right-thinking members of society to think less of an individual, but these remarks are not automatically defamatory. Information about an individual may be released and digested by (right-thinking) members of the public in a range of ways spanning the positive and the negative. While this information may be accurate, we may not wish for it to be released to the general public for the very reason that some may not view it favourably. And so, we take control over the information (to varying extents) we place in the public domain. Couple this attitude with developments in information technology through which information online is said to be: persistent; replicated; carries the potential to be viewed by an indeterminate audience; and can be accessed through search functions.[113] Mister Justice La Forest in *R. v Dyment* anticipated this discussion: "In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected."[114] To the individual seeking to keep certain information to herself, the internet has emerged as a pernicious challenge. According to a 2012 Pew Research Center study of US residents, 44% of survey participants using social media have deleted comments made by others on their profile and 37% have removed their names from photos that were tagged to identify them.[115] These numbers reflect how information about us posted by others has developed into a concern. The associated care taken directly relates to how we protect our reputation.

To illustrate, consider *The Intimate Image Protection Act.*[116] This Act came into force in January 2016. Directly linked with the capacities provided by the internet to share information, it creates a tort of non-consensual distribution of intimate images. This tort is actionable *per se* and arises when a "person who distributes an intimate image of another person knowing that the person depicted in the image did not consent to the distribution, or being reckless as to whether or not that person consented to the distribution, commits a tort against that other person." The Act is a legislative response to the sordid phenomenon of revenge porn. In itself, these images would not ground a claim of defamation.[117] And yet, recalling the measurement long ago set down, the

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In *Kearns v General Council of the Bar* [2003] EWCA Civ 331, the Court of Appeal expressed the view that it was confined to media publications. That was not, however, necessary to the decision and their Lordships are unable to accept that it is correct in principle. They can see no valid reason why it should not extend to publications made by any person who publishes material of public interest in any medium, so long as the conditions framed by Lord Nicholls as being applicable to "responsible journalism" are satisfied."

[111] [1936] 2 All E.R. 1237 (HL). See Solomon *et al* 1080; Linden & Feldthusen 793.

[112] *Creative Salmon Company Ltd v Staniford* 2009 BCCA 61, leave to appeal refused [2009] SCCA No.154.

[113] Danah Boyd, 'Social Network Sites as Networked Publics: Affordances, Dynamics, and Implications' in Zizi Papacharissi (ed) *Networked Self: Identity, Community, and Culture on Social Network Sites* (New York: Routledge, 2011), 39-58.

[114] [1988] 2 S.C.R. 417, [22].

[115] Mary Madden, 'Privacy management on social media sites' 24 February 2012 http://www.pewinternet.org/2012/02/24/privacy-management-on-social-media-sites/

[116] C.C.S.M. c. I87, s 11.

[117] Depending on who took the photo, there may be a claim in copyright.

unlimited availability on the internet of such would likely prompt some right-thinking members of society to think less of the target in those images. For this reason, we have seen the development of tort law surrounding privacy in conjunction with reputation issues.

Defamation (as the most identifiable tort protecting reputation) and privacy have been gradually moving towards each other in the early 21st century.[118] Instruction on this movement can be taken from English jurisprudence. The intersection informs developing parameters regarding content published online.[119] The common form of online publication is made by (what might be called) mainstream media. Social media, however, is a form in which personal information may be disclosed to a public audience. The overlap between defamation and privacy is evident through the test for the developing English tort of misuse of personal information that juxtaposes free speech with privacy considerations:

> 1) Does the claimant have a 'reasonable expectation of privacy' in respect of the information in question? If yes, then:
> 2) Does the claimant's interest in maintaining their right to informational privacy outweigh the defendant's interest in publishing the information in pursuit of their right to freedom of expression?[120]

Lord Hoffmann further drew out the connection between privacy and defamation in describing this tort as a "cause of action … [which] focuses upon … the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people".[121] While questions have arisen as to whether it is a tort,[122] breach of confidence has been deemed to 'better encapsulate' the action.[123] In the context of the present work, the action in breach of confidence will be considered later.

(ii) Truth and falsity

The call for research proposals includes mention of "the nature of truth and falsity and their legal significance in distinguishing between the torts of defamation and breach of privacy, particularly in the context of internet communications".

Historically, defamation has been viewed as a tort protecting reputation from the publication of false statements but may also capture legitimate criticisms.[124] While the latter point is not (technically) within the remit of the tort, a cynical view has developed regarding how defamation

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[118] A point attested to by Eady J. in *Hunt v Times Newspapers Ltd.* [2012] EWHC 1220, [13] as well as the comments of the editors of the 12th edition of *Gatley*: Alastair Mullis & Richard Parkes QC (eds) *Gatley on Libel and Slander* 12th edn (London: Sweet & Maxwell, 2013), vi, [22.1]. Though data on actions in these two areas remain incomplete: Judith Townend, "Closed Data: Defamation and Privacy Disputes in England and Wales" (2013) 5 *Journal of Media Law* 31-44.

[119] Consider the following statement from Gavin Millar QC and Andrew Scott, *Newsgathering: Law, Regulation and the Public Interest* (OUP, 2016), [17.02]: "The influence of the law of defamation on what is published is perhaps less definitive than the rapidly developing law of confidentiality and privacy."

[120] As stated in a number of cases: see for example *Campbell v MGN* [2004] UKHL 22 and the extended discussion in *ETK v News Group Newspapers Ltd.* [2011] EWCA Civ 439, [10]. This tort is the renamed an action for breach of confidence: *Campbell* [14]. Whether or not this tort is now separate from the equitable cause of action remains to be firmly established: *Vidal-Hall v Google Inc* [2015] EWCA Civ 311 (leave to appeal to the United Kingdom Supreme Court on the tort issue refused 23 July 2015).

[121] *Campbell* [51].

[122] See *Mosley v New Groups Newspapers Ltd* [2008] EWHC 1777, [184]. But see discussion under Breach of Confidence in Section (iv)(b) below.

[123] *Campbell v MGN Ltd* [2004] UKHL 22, [14].

[124] Andrew Scott, *Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance* (June 2016) [1.01].

is used. This cynicism recalls some of the questions that surround the aim of defamation.[125] The definitional problems complicate the investigation of reputation. As with much private law in Canada, defamation law is influenced significantly by English law. The court in *Parmiter v Coupland*[126] provided an early, expansive definition: "A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule". In the later decision of *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd.,*[127] Slesser L.J. expanded the *Parmiter v Coupland* definition: "not only is the matter defamatory if it brings the plaintiff into hatred, ridicule, or contempt by reason of some moral discredit on [the plaintiff's] part, but also if it tends to make the plaintiff be shunned and avoided and that without any moral discredit on [the plaintiff's] part. It is for that reason that persons who have been alleged to have been insane, or to be suffering from certain diseases, and other cases where no direct moral responsibility could be placed upon them, have been held to be entitled to bring an action to protect their reputation and their honour." The now classic statement regarding the aim of defamation is that of Lord Atkin in *Sim v Stretch.*[128] Lord Atkin critiqued the understanding to that point as expressed in *Parmiter v Coupland*. Finding this standard to be too narrow, he restated the assessment in the now familiar form: "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?" In 1975, the Faulks Committee recommended: "Defamation shall consist of the publication to a third party of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally."[129] In what has become an influential decision, Tugendhat J. wrote in *Thornton v Telegraph Media Group Ltd*:[130] "It will be seen from this collection of definitions that words may be defamatory, even though they neither impute disgraceful conduct to the plaintiff nor any lack of skill or efficiency in the conduct of his trade or business or professional activity, if they hold him up to contempt, scorn or ridicule or tend to exclude him from society. On the other hand, insults which do not diminish a man's standing among other people do not found an action for libel or slander. The exact borderline may often be difficult to define."

It is important to note that falsity is not part of this lineage of definitions. The question persists: why do we associate falsehood with defamation claims. Take as one example the 1974 Report of the UK Law Commission which wrote: "An action for defamation lies in respect of the publication of information which is untrue where the publication results in the lowering of the reputation of the plaintiff in the view of right-thinking members of society."[131] The measurement, instead, has been ensconced within the rubric of society: would other right-thinking members of society think less of the individual based upon the published remark. To some this may be an unhelpfully arbitrary guide. It is suggested the absence of a firm definition is consistent with the case-by-case approach of the common law. Nevertheless, truth remains a part of defamation, most clearly in the form of the defence of justification. With this defamation (libel) defence,

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[125] Eric Barendt, (1999) 52 *Current Legal Problems* 110-125; David Howarth, "Libel: Its purpose and reform" (2011) 74 *Modern Law Review* 845-877; Alastair Mullis & Andrew Scott, "Reframing libel: taking (all) rights seriously and where it leads" (2012) 63 *Northern Ireland Legal Quarterly* 5-25.
[126] (1840), 151 E.R. 340, 341-342.
[127] (1934), 50 T.L.R. 581, 587.
[128] [1936] 2 All E.R. 1237, 1240.
[129] *Committee on Defamation* (1975) (Cmnd 5909), [65]. It is worth noting that the 1977 *Restatement of the Law (Second) Torts* (§559) seemed to match the Faulks Committee's statement: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."
[130] [2010] EWHC 1414 (QB), [28].
[131] *Working Paper No. 58, Breach of Confidence* (London: HMSO, 1974), [65].

there is an undertone of John Stuart Mill's contention regarding the benefits of a range of perspectives being voiced in public.[132]

Today publications have become more nuanced than the dichotomy of truth and falsehood because of the increase in publications of opinion. Opinion would be the publication of remarks that are intended to be a value judgment of a topic as culled from various statements or facts in the public domain (though opinions may also publish new facts upon which they draw judgement). Inference would be an operable term here. These opinions may challenge the target's reputation. Opinions do not necessarily rely upon truth or falsehood, but rather underscore the common metaphor of the marketplace of ideas. Where these opinions are more likely to be attacked arises with claims that insufficient data were assessed[133] or that there was disclosure of personal information (thereby constituting a breach of privacy in some form).[134] From a strategic perspective, there is also an opening for claims to protect reputation that plead both defamation and privacy. For example, the publication of an opinion may be defamatory, but even so, may also attract the protection of one of the defences. Remarks made that draw inferences from or analyse points in the public domain can fall outside of the parameters of a successful defamation action. As a result, there may be a question as to the sufficient factual basis for the opinion (notably within the fair comment defence). Plaintiffs may try to attack this point by arguing that the defendants failed to take into consideration further facts and so there was not a sufficient factual basis.[135] And so, this research is mindful of the long-standing ambiguity in the tort of defamation regarding reputation, coupled with efforts to protect reputational interests through other claims, notably privacy-based arguments.

While defamation is connected with truth in a direct manner, privacy is not. While truth and defamation discussions precipitate citation of the free and democratic society, privacy instead looks to protect information that has been controlled in a manner so as to remove it from the public gaze. Even the truth, when confronted by a privacy claim, is not necessarily the trump that it can be in defamation. Here, there is an indication of what is to come: when seeking to protect reputation, defamation and privacy claims have different aims.

(iii) Privacy as a concept in law

With developments in information technology, freedom of expression has either been interpreted in a wider manner so as to include (or the notion has emerged as a corollary to) freedom of information.[136] The idea of access to information continues as an undercurrent to this discussion.

Early mention of privacy comes from the United States. Justice Thomas Cooley wrote of a right "to be let alone".[137] Two years later, in 1890, the seminal article of Samuel Warren and Louis Brandeis, "The Right to Privacy",[138] argued the development of privacy was "inevitable"; that is,

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[132] "… it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied": John Stuart Mill, *On Liberty* (1859).

[133] This was part of the claim made in *Cook v Telegraph Media Group* 2011] EWHC 763 (QB).

[134] Part of the claim made in *Campbell v MGN* [2004] UKHL 22 (though this information pertained to the plaintiff's medical condition.)

[135] This was a line used in *Cook v Telegraph Media Group Ltd* [2011] EWHC 763 (QB) to avoid a strike out motion for the claimant's action.

[136] But see the discussions with regards to the "right to be forgotten" in Section VI (i) and Section VII.

[137] Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs which Arise Independent of Contract*, 2nd ed. (Chicago: Callaghan & Company, 1888) 29.

[138] (1890), 4 *Harvard Law Review* 193. William Prosser's "Privacy" (1960) 48 *California Law Review* 383 has also been a foundational article. It is best to discuss it within the context of Ontario law based on the Ontario Court of

"[t]houghts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature."[139] This notion of a cause of action in privacy has not been fully entrenched in the common law. Instead, there is a patchwork of protections. Primary amongst those has been privacy relating to personal data.

Looking at the concept more generally, privacy speaks to a human desire to be separated from others in some form. While people are social, there is a notion of limiting the extent of social interaction. We do not interact with others at all points each day. It may be conjectured that we need privacy just as much as we need social interaction. The fact that there are certain activities that are done in private would seem to attest to the assertion. Still, there is an element of choice to privacy; that is, an individual may elect to not share aspects of her life with anyone else (just as one may elect to share the most private of experiences). This is about an entitlement to control that each person possesses: over information about oneself; about some space for the exclusion of others; and it can even be about the select disclosure of this information or the select invitation of others into these spaces. This information or these spaces, however, are not impregnable because others can intrude upon them. And yet, this intrusion does not automatically vitiate the entitlement. Instead, the infringement of that entitlement is recognised. Madam Justice L'Heureux-Dubé contended that privacy was also an essential part of freedom.[140] This point has not been as fully engaged in Canadian jurisprudence. And yet, there would seem to be a connection. If the concept of privacy is about exclusion (removing the individual or information about the individual from the public gaze) then freedom must accompany this choice; notably the choice as to what is excluded.

In Canada, a starting point for discussion is the 1972 Canadian Task Force on Privacy and Computers which concluded that the concept of privacy consisted of three zones:

1. territorial privacy: relating to that physical domain within which a claim to be left in solitude and tranquillity is advanced and recognized;
2. privacy of the person: in which the physical person is protected from harassment, and protection is also given to the dignity of the human person; and
3. informational privacy: which derives from the assumption that all information about a person is in a fundamental way his or her own, to be communicated or retained as one sees fit.[141]

Just as Warren and Brandeis identified property as the first recognized area of some form of privacy, witnessed by tort law, so too does the Task Force place territorial privacy as the first distinct area in privacy speech. The second kind of privacy is personal and is more akin to a viewing of privacy as a human right.[142] Personal privacy is in its infancy of recognition in

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Appeal's reliance on its content in *Jones v Tsige* 2012 ONCA 32. This appears in Section (iii) (b) ii. below and Section VII.

[139] *Ibid* 195. This comment is to be contrasted with the final section of this paper. In the United States a right of privacy has been found. However, other common law nations, such as Canada and the United Kingdom, have not done so. Warren and Brandeis' comments are specific to the United States' experience, and yet these words still have resonance for this analysis insofar as they articulate an early articulation of privacy.

[140] *R. v. O'Connor*, [1995] 4 S.C.R. 411, [113]. Two decades later Daniel Solove contends that reputation and freedom are interlinked: *The Future of Reputation* (New Haven: Yale University Press, 2007).

[141] Department of Communications and Department of Justice, *Privacy and Computers: A Report of a Task Force* (Ottawa: Information Canada, 1972), 12-13. This approach has been received positively internationally: Ian Lawson, *Privacy and Free Enterprise: The Legal Protection of Personal Information In the Private Sector* (Ottawa: Public Interest Advocacy Centre, 1992), 57.

[142] Privacy has been recognized internationally as a human right: International Labour Office (ILO) (1988) *Human Rights: A Common Responsibility*, Part I: Report of the Director-General to the 75th Session of the International Labour Conference (Geneva), 48-49; *European Convention for the Protection of Human Rights and Fundamental*

Canada. The last form of privacy is informational. EU law is particularly influential here as will be discussed below. At present, and applying one of Professor Prosser's four torts,[143] Sharpe J.A. in *Jones v Tsige*[144] summarizes the state of privacy as a protected interest in Canada: "The question of whether the common law should recognize a cause of action in tort for invasion of privacy has been debated for the past one hundred and twenty years. Aspects of privacy have long been protected by causes of action such as breach of confidence, defamation, breach of copyright, nuisance, and various property rights. Although the individual's privacy interest is a fundamental value underlying such claims, the recognition of a distinct right of action for breach of privacy remains uncertain."

The focus is on categories 2 and 3 as outlined by the 1972 Canadian Task Force, above. Canvassing the common law and considering the proliferation of internet-based forms of communication, these privacy interests may be interfered with in different ways. As an example of information privacy, an individual may reveal information about a person where the information was obtained in a private (re: confidential) setting. Privacy of the person, though, requires further nuance. The Task Force noted two forms of privacy here, physical and dignity. These may be interlinked such as an intrusion into a person's private space that would negatively impact the person's dignity (such as a barging into a bathroom when the person is using these facilities). However, to affect the dignity of the individual, there need not be a physical intrusion.[145] There may also be an impact on the individual's dignity by the disclosure of the information obtained by intruding upon the person in a private setting. And so, there can be overlap between categories 2 and 3; but there may also be discrete instances of each, independent of each other. Professor Moreham has written of discovery and disclosure in relation to informational privacy.[146] It is suggested that these two terms apply more broadly to the present discussion insofar as they speak of the ways in which privacy interests can be infringed. The plaintiff may allege interference with her privacy interests by the means of discovery, the disclosure of the information or both.

(a) Privacy in Canada

The status of a right of privacy in Canada as a civil action is briefly surveyed here. Some provinces have created a statutory tort.[147] If an individual's *Charter* rights have been violated and that violation cannot be justified, the individual may apply to a court of competent jurisdiction under s.24(1) for a remedy. Section 32 limits this to federal and provincial laws and the actions of governments and government officials. More precisely focused on privacy are acts of federal and provincial law. The provincial versions are more pertinent here because they centre on private law redress in Ontario.

Freedoms (1950), Eur.T.S. No.5, Art.8; also protected in the European Union: *Commission* v. *Germany*, [1992] ECR I-2575 (CJEU).

[143] William Prosser, "Privacy" (1960) 48 *California Law Review* 383 [Prosser], 389.

[144] 2012 ONCA 32, [15]. This decision has been widely discussed in the common law world. See for example, *C v Holland* [2012] NZHC 2155.

[145] N. A. Moreham further considers this point in "Intrusion into physical privacy" in N.A. Moreham and Sir Mark Warby (eds), *Tugendhat and Christie The Law of Privacy and the Media* (Oxford: OUP, 2016), Chapter 10.

[146] N.A. Moreham, "A Conceptual Framework for the New Zealand Tort of Intrusion" (2016), 47 *Victoria University Wellington Law Review* 283, 288.

[147] British Columbia, R.S.B.C. 1996, c.373; Manitoba, *The Privacy Act*, R.S.M. 1987, c.P125; Newfoundland, *Privacy Act*, R.S.N. 1990, c.P-22; Quebec, *An Act respecting the protection of personal information in the private sector* R.S.Q. c.P-39.1; Saskatchewan, *Privacy Act*, R.S.S. 1978, c.P-24.

Focusing on information privacy (as the 1972 Task Force identified it above), the *Personal Information Protection and Electronic Documents Act*[148] was passed in 2000 by the Canadian Parliament to ensure that steps were taken by private sector entities to securely handle personal data collected in the course of business pursuant to Directive 95/46/EC. This legislation relates directly to the discussion of the EU General Data Protection Regulation (and its predecessor) below.

Within a *Charter* context (particularly the purposive approach to s.8), in *Hunter* v. *Southam,*[149] the Supreme Court of Canada acknowledged the existence of "the right to be left alone by other people" and that this right is independent of a tort of trespass.[150] The right is to be "secure against encroachment upon the citizens' reasonable expectation of privacy in a free and democratic society".[151] Canada's highest court has recognized the Task Force on Privacy and Computers' three areas of privacy as being protected by the *Charter*.[152] Mr. Justice La Forest's thoughts on informational privacy at that time were:

> Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force [1972 Task Force on Privacy and Computers] put it (p.13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. . . .
>
> One further general point must be made, and that is that if privacy of the individual is to be protected, we cannot afford to vindicate it only after it has been violated. This is inherent in the notion of being secure against unreasonable searches and seizures. Invasions of privacy must be prevented, and where privacy is outweighed by other societal claims, there must be clear rules setting forth the conditions in which it can be violated.[153]

These words are made in the context of s.8 of the *Charter of Rights and Freedoms*, protection against search and seizure. Still, the potency of these comments should not be merely distinguished. Outlined in this passage is an articulation of what protection of the individual's personal data means and, furthermore, an argument of its societal importance. There is guidance for the present study within these remarks. Mister Justice Cory's definition of defamation in *Hill* crystalizes the direct link with privacy: "[defamation] is an invasion of personal privacy".[154]

(b) Privacy in Ontario

This section is divided into two. The first section outlines pertinent Ontario legislation; while keeping in mind these statutes may be of limited utility within the context of the Commission's objectives. The second section delves into the more relevant area of the common law.

i. Statutory recognition

In keeping with the mandate outlined by the Commission, this research will not map out all law related to defamation and privacy. Here it will suffice to note the following acts:

- *Employment Standards Act*[155]

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[148] S.C. 2000 c 5.
[149] [1984] 2 S.C.R. 145.
[150] *Ibid* 159.
[151] *Ibid.*
[152] *R.* v *Dyment,* [1988] 2 S.C.R. 417, 429.
[153] *Ibid* 429 - 430.
[154] *Hill* 1179.
[155] S.O. 2000, c. 41, ss. 68, 70.

- *Human Rights Code*[156]
- *Freedom of Information and Protection of Privacy Act*[157]
- *Municipal Freedom of Information and Protection of Privacy Act*[158]
- *Occupational Health and Safety Act*[159]
- *Personal Health Information Protection Act*[160]

There have been provincial statutes in British Columbia[161] Manitoba,[162] Newfoundland[163] and Saskatchewan.[164] These are similar in content insofar as they each provide for a limited right of action where the defendant acted wilfully (except for Manitoba) and without claim of right. These provisions are classified as granting a limited right because, taking the Newfoundland statute as an example, they contain language such as: "The nature and degree of privacy to which an individual is entitled … is that which is reasonable in the circumstances, regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a violation of the privacy of an individual, regard shall be given to the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties."[165]

It may be queried whether Ontario should develop its own Act (beyond that which exists for personal health information). To this, the response must include the equivocal assessment of Sharpe J.A. in *Jones* when he characterized the aforementioned provincial acts:

> Significantly, however, no provincial legislation provides a precise definition of what constitutes an invasion of privacy. The courts in provinces with a statutory tort are left with more or less the same task as courts in provinces without such statutes. The nature of these acts does not indicate that we are faced with a situation where sensitive policy choices and decisions are best left to the legislature. To the contrary, existing provincial legislation indicates that when the legislatures have acted, they have simply proclaimed a sweeping right to privacy and left it to the courts to define the contours of that right.[166]

If there were to be an Ontario Act, it would seem that work would need to be undertaken to render it useful, such as some parameters as to what would constitute an invasion of privacy. There is scope for legislation which is more targeted; if that was determined to be a more viable route. Manitoba enacted *The Intimate Image Protection Act,*[167] which came into force in January 2016, and created a tort of non-consensual distribution of intimate images. This tort is actionable

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[156] R.S.O. 1990, c. H.19.
[157] R.S.O.1990, c. F.31, s. 1.
[158] R.S.O. 1990, c. M.56, ss. 1, 14, 21.
[159] R.S.O. 1990, c. O.1, s.63. The *OHSA* raises a particular issue of intersection between personal data protection and labour relations where the employer has requested medical information of the employee. The seriousness of the protection for personal medical information is demonstrated by the different means of regulation under which regulated health practitioners practice. For example, s.1(10) of O.Reg 799/93 under the *Nursing Act* S.O. 1991, c.32 and s.22 of R.R.O. Reg. 965 under the *Public Hospitals Act* R.S.O. 1990, c. P.40; as well as *PHIPA*. As the implications for employment are not part of the remit of the Commission's project, this point will not be considered further.
[160] S.O. 2004, c 3 [*PHIPA*].
[161] *Privacy Act,* R.S.B.C. 1996 c.373.
[162] *Privacy Act*, R.S.M. 1987 c.P125.
[163] *Privacy Act*, R.S.N. 1990, c.P-22.
[164] *Privacy Act*, R.S.S. 1978, c.P-24.
[165] *Privacy Act,* R.S.N. 1990, c.P-22, s 3(2).
[166] *Jones* [54].
[167] S.M. 2015 c.42, s.11. Of interest, New Zealand common law also protects a similar form of intrusion: *C v Holland,* [2012] NZHC 2155.

per se[168] and arises when a "person who distributes an intimate image of another person knowing that the person depicted in the image did not consent to the distribution, or being reckless as to whether or not that person consented to the distribution, commits a tort against that other person." It is with interest that s.12 of the *Act* is noted because this provision deals with the expectation of privacy, a challenge for many jurisdictions. Manitoba has determined that an expectation of privacy regarding an intimate image is not lost if s/he "(a) consented to another person recording the image; or (b) provided the image to another person; in circumstances where that other person knew or ought reasonably to have known that the image was not to be distributed to any other person." The Ontario case of *Jane Doe 464533* vindicates the importance of these parameters. Anticipating the discussion regarding the development of breach of confidence below, this statute recalls that the common law has not found the expectation of privacy is necessarily lost when private matters are shared with a particular audience (for example a friend). It retains the developed concept of confidence in law in order to achieve this end.[169]

A further aspect of the consideration of statutory recognition is whether or not the statutes preclude common law claims. This point was considered in *Hopkins v Kay*[170] where the plaintiffs brought a class action claim for intrusion upon seclusion (based upon *Jones v Tsige*) and the defendant sought to dismiss the claim by asserting that the *Personal Health Information Protection Act* precluded the common law action. Lending some consistency to the jurisprudence in this area, Sharpe J.A. provided the unanimous decision of the court. In considering whether *PHIPA* constituted an exhaustive code, he found that there were neither explicit nor implicit indications in the legislation leading to a conclusion that the *Act* precluded the plaintiffs from making a claim for intrusion upon seclusion. Comparing the requirements for the statute and the common law action, Sharpe J.A. determined: "The elements of the common law cause of action are, on balance, more difficult to establish than a breach of PHIPA, and therefore it cannot be said that a plaintiff, by launching a common law action, is "circumventing" any substantive provision of PHIPA. The aspects of the common law that may at first glance appear more lenient are not, upon closer consideration, significantly advantageous."[171]

ii. Common Law

In Ontario, there have been lethargic moves towards recognition of a right of privacy. For instance, a pleading alleging invasion of privacy was not dismissed on the basis that the right does not exist.[172] At times, there has been a vagueness to how the law protects privacy. For example, in *Motherwell v Motherwell*,[173] a daughter made several harassing phone calls to her mother. The essence of the claim against the daughter was breach of privacy and yet the action was in private nuisance; that is, the daughter's activities interfered with the plaintiff's enjoyment of land. The appellate court cautioned regarding the awkward legal development that may ensue from this action: "the interests of our developing jurisprudence would be better served by approaching invasion of privacy by abuse of the telephone system as a new category".[174] An Ontario example comes from *Saccone v Orr*[175]where the plaintiff was suing for the secret audio

[168] S.M. 2015 c.42, s.11(2).
[169] Further discussion of breach of confidence appears in subsection (iv) below.
[170] 2015 ONCA 112.
[171] *Jones v Tsige* 2012 ONCA 32, [52].
[172] *Capan v Capan* (1980), 14 C.C.L.T. 191 (Ont. H.C.J.).
[173] (1976), 73 D.L.R. (3d) 62 (Alta. S.C. (A.D.)).
[174] *Ibid* [26].
[175] (1982), 34 O.R. (2d) 317 (Ont. Co. Ct.).

recording of a discussion between the two parties and which the defendant then replayed at a city council meeting (ironically to vindicate his status as someone who does not breach confidences). During examination-in-chief, Saccone testified (in the court words): "Really, all he's claiming is the embarrassment which he feels he suffered". The court in *Roth* v. *Roth*[176] found that a right of privacy does exist – "employees in Ontario do have a right to privacy" – the only question being whether there is a remedy for violation of such a right.[177] Unfortunately, these cases offer nothing more than commentary since a common law right to privacy has not been established. Instead the matter has been dealt with through torts such as nuisance and defamation. Mr. Justice Adams' comments in *Ontario (Attorney-General)* v. *Dieleman*[178] explained the reluctance to recognize the common law right of privacy: "If there is to be an independent tort of invasion of privacy in Canada, the literature and the experience in the United States reveals the need to be sensitive to the close connection between privacy and freedom of expression."[179] If these decisions hint at tacit recognition of the right, there are further issues to engage. Mr. Justice Linden suggested in 2001 that the *Charter of Rights and Freedoms* may further propel privacy rights to the forefront.[180]

As greater acceptance of privacy claims at common law have developed, there has been a need to make distinctions between defamation and privacy actions. In *Warman v Grosvenor,*[181] the plaintiff lawyer could recover damages in defamation and assault, but not in invasion of privacy, for the defendant's "two-year 'campaign of terror' against him, achieved through postings on the Internet and personal e-mails."[182] Some of these postings included Warman's homes address as well as aerial photos of the location of his residence. Although constituting an invasion of privacy, the court did not find that these facts grounded a separation action for damages which was distinct from the defamation and assault claims.[183] On one level this decision is understandable insofar as it follows the principle that there will not be double compensation for the same action. However, it is unclear how this distinction holds up if the subject matter in question (personal information) could itself ground a separate actionable harm such as the invasion of privacy. To say that the same facts are compensated by defamation seems to elide two torts and therefore make it difficult for a clear separation to be followed.

The most pertinent movement within Ontario as it relates to the present project is the Ontario Court of Appeal's decision in *Jones v Tsige.*[184] *Jones* was a case about informational privacy.[185] This decision arguably extends the notion of information privacy identified by the 1972 Task Force. Sharpe J.A., in *Jones*, further contributed to the conversation of the implications of developments in privacy in law for defamation. Briefly, the facts are:

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[176] (1991), 4 O.R. (3d) 740 ((Gen. Div.)).
[177] *Ibid* 757-758. The decision was based in part on the idea that the right of privacy "has been acknowledged in years of arbitral jurisprudence".
[178] (1994), 117 D.L.R. (4th) 449 (Ont. Ct. (Gen. Div.)).
[179] *Ibid* 688. Theorists on a right of privacy have opined the interconnection between a right of privacy and a right to freedom of speech: Eric Barendt "Privacy as a Constitutional Right and Value" in Peter Birks (ed.) *Privacy and Loyalty* (Clarendon Press: Oxford, 1997) 1-14,13.
[180] Allen Linden, *Canadian Tort Law* 7th ed. (Butterworths: Markham, 2001), 56 – 60.
[181] (2008), 92 O.R. (3d) 663 (S.C.J.).
[182] Ibid [1].
[183] "the conduct causing the harm is recoverable in damages for defamation and assault and there is no separate tortious conduct resulting in separate harm, in my view, that is recoverable by the plaintiff for a tort of invasion of privacy": *Ibid* [70].
[184] 2012 ONCA 32
[185] *Jones* [66].

> In July 2009, the appellant, Sandra Jones, discovered that the respondent, Winnie Tsige, had been surreptitiously looking at Jones' banking records. Tsige and Jones did not know each other despite the fact that they both worked for the same bank and Tsige had formed a common-law relationship with Jones' former husband. As a bank employee, Tsige had full access to Jones' banking information and, contrary to the bank's policy, looked into Jones' banking records at least 174 times over a period of four years.[186]

The legal issue for the appellate court was whether the motion judge erred by granting summary judgment and dismissing Jones' claim for damages on the ground that Ontario law does not recognize the tort of breach of privacy. Determining that Prosser's intrusion upon seclusion tort applied to the present facts, Sharpe J.A. adopted the *Restatement of the Law, Second, Torts*[187] definition: "One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person."[188] *Jones* confirmed the existence of a right of action for intrusion upon seclusion.[189] The plaintiff must establish: "(i) the intrusion was unauthorized; (ii) the intrusion was highly offensive to a reasonable person; (iii) the matter intruded upon was private; and (iv) the intrusion caused anguish and suffering." For the court, Sharpe J.A. found that the claim was made out and awarded $10,000 in damages (what he called a mid-point award).

Jones has brought into consideration (particularly in Ontario) the four torts identified as protecting a general right to privacy pioneered by William Prosser in his 1960 article ''Privacy". (*Jones* relied upon Prosser's category "intrusion upon seclusion".) The American Law Institute adopted Prosser's categories in the *Restatement of the Law, Second, Torts* §652:

> (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interest of the other.
> (2) The right of privacy is invaded by:
> (a) unreasonable intrusion upon the seclusion of another; (intentionally intruding, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, if the intrusion would be highly offensive to a reasonable person) §652B
> (b) appropriation of the other's name or likeness; §652C
> (c) unreasonable publicity given to the other's private life; (giving publicity to a matter concerning the private life of another if the matter publicized is of a kind that would be highly offensive to a reasonable person and is not of legitimate concern to the public) §652D
> (d) publicity that unreasonably places the other in a false light before the public. (giving publicity to a matter concerning another that places the other before the public in a false light, if the false light in which the other was placed would be highly offensive to a reasonable person, and the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed) §652E

A question to be considered is whether Sharpe J.A. brought Prosser's categories (and by extension the *Restatement of the Law, Second, Torts*) within the ambit of Ontario common law. In *Jones,* Sharpe J.A. surveyed the caselaw pertaining to claims for protection of privacy. Some of the cases have been noted above. He also determined that there were decisions which could be categorized within Prosser's four tort listing. For example, he determined that *Athans v Canadian Adventure Camps Ltd.*[190] was a successful claim for appropriation of personality insofar as the defendant had used a photograph of the plaintiff (an expert water-skier) in advertisements. The potential implications for defamation in the age of the internet are apparent.

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[186] *Ibid* [2].
[187] The American Law Institute, *Restatement of the Law, Second, Torts* (1977). An online version of the provisions is found at: https://cyber.harvard.edu/privacy/Privacy_R2d_Torts_Sections.htm.
[188] *Jones* [19].
[189] *Ibid* [65].
[190] (1977), 17 O.R. (2d) 425 (H.C.J.)

For example, category 2(c) (§652D) may interact with reputation interests (classically falling into defamation law) where personal information that may affect an individual's reputation is disclosed on a social media platform.

The treatment of Sharpe J.A.'s decision in *Jones* has been positive (though cautious). The court in *Jane Doe 464533 v ND*[191] applied the reasoning to a situation of 'revenge porn'; though this case remains inconclusive at present.[192] Jane Doe 464533 was the victim of an ex-partner posting a sexually explicit video of her on the internet without her consent or knowledge. The video was made at the persistent urging of the defendant. Defamation is not a claim that could be made here. And yet, the reputational (not to mention emotional and psychological) harm remains a point for significant consideration.

The Federal Court of Appeal interpreted *Jones* as opening the door to a common law actionable tort in privacy (limited to intrusion upon seclusion); though it found in this instance that the pleadings were not supported by material facts.[193] The court also interpreted the tort of "unreasonable publicity given to the other's private life". It adopted the comment appended to this section of the *Restatement of the Law, Second, Torts* which stated:

> It is one of a communication that reaches, or is sure to reach, the public. … it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons. On the other hand, any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section. The distinction, in other words, is one between private and public communication.

There is a threshold to be met in order for the publicity to be actionable. The impression given by the American Law Institute is that unreasonable publicity does not include communication to a person or a small group. The publicity must be sufficient to reach the public. In Canada, the notion of a threshold has not been canvassed in the defamation setting as it has been in the UK where s.1 of the *Defamation Act 2013* establishes a threshold of serious harm for a claim to proceed. And yet, with this privacy tort, a threshold has clearly been contemplated in order to successfully advance such an action, thereby meeting the claim's elements: "publicity to a matter concerning the private life of another if the matter publicized is of a kind that would be highly offensive to a reasonable person and is not of legitimate concern to the public". In *Canada v John Doe*, the Federal Court of Appeal scrutinized the threshold of publicity and found there could be no claim advanced based on the absence of material facts.[194]

This question of threshold, with the capacity of online communication, remains one to consider further. There may be an opening for the publicity threshold to be met even when communication has been to a small group. The UK decision in *McManus v Beckham*[195] illustrates. This is a matter of slander and third party publication. The facts are as follows.

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[191] 2016 ONSC 541.
[192] The decision was initially resolved by way of default judgment (the defendant failing to appear). However, default judgment was set aside on 27 January 2017 (2016 ONSC 4920) and subsequent leave to appeal the setting aside was denied the same month (2017 ONSC 127). As it stands, this case may proceed to trial. Still, it is important to note that in the decision denying leave to appeal, the court cited [47] the defendant's sworn affidavit that seemed to suggest a challenge on the basis of quantum of damages as opposed to liability itself. The difficulty is that, in setting aside default judgment, the court set aside both the finding of liability as well as quantum of damages.
[193] *Canada v John Doe* 2016 FCA 191 [*John Doe*], [52]-[53].
[194] *John Doe* [46].
[195] [2002] 1 WLR 2982 (CA) [*McManus*].

Victoria Beckham enters McManus' shop and declared that the sports memorabilia there signed by David Beckham (her husband) was fake. As has been the custom, paparazzi followed her into this shop and then published her statements. McManus sued in defamation. The issue was whether or not it was reasonably foreseeable that her claims would be reported in the media.[196] The Court of Appeal found in favour of McManus but it had difficulty in balancing between when a defendant should be liable for all the consequences set in train by his conduct and the need to limit liability to his own actions.[197] A defendant may be liable where a reasonable person in the same position as the defendant would have been aware that publication of her comments would take place. And so, the potential for communication to a small audience, though in itself below the threshold of publicity, may cross that threshold in an instance readily familiar to users of information technology and in particular social media where a posting may be shared to an unlimited number of individuals.

(iv) Breach of confidence

Given the developing notion of privacy at common law, it is likely plaintiffs will also pursue other legal avenues to protect their reputations. With this in mind, further consideration is whether an action in breach of confidence can be a path for protection of reputation where defamation cannot be. This point of law is complicated by two matters. First, there remains ambiguity about the concept of breach of confidence that renders the action equivocal. Second, breach of confidence originates in equity but has been used as a tort. In Canada, this cause of action has been classified, by the Supreme Court of Canada, as a hybrid that draws on equity and common law principles.[198] The link to reputation is identified by the Manitoba Court of Appeal: "Tort law has recognized that a breach of confidence in certain circumstances may create a cause of action".[199] Courts are afforded discretion when it comes to remedies in breach of confidence instances. In the U.K., the cause of action has been more recently recognized as a tort, called misuse of private information.[200] This tort has been used to protect personal information of a highly private nature (such as sexual liaisons).

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[196] It could also be added whether or not it would be reasonable for the press to report the claims.

[197] "What the law is striving to achieve in this area is a just and reasonable result by reference to the position of a reasonable person in the position of the defendant. If a defendant is actually aware (i) that what she says or does is likely to be reported, and (ii) that if she slanders someone that slander is likely to be repeated in whole or in part, there is no injustice in her being held responsible for the damage that the slander causes via that publication. I would suggest further that if a jury were to conclude that a reasonable person in the position of the defendant should have appreciated that there was a significant risk that what she said would be repeated in whole or in part in the press and that would increase the damage cause by the slander, it is not unjust that the defendant should be liable for it. Thus I would suggest a discretion along the above lines rather than by reference to foreseeability": *McManus,* [34] (*per* Waller L.J.)

"The root question is whether D, who has slandered C, should justly be held responsible for damage which has been occasioned, or directly occasioned, by a further publication by X. I think it plain that there will be cases where that will be entirely just. The observation of Bingham LJ as he then was in *Slipper*'s case [1991] 1 All E.R. 165 at 179, [1991] 1 QB 283 at 300 that '[d]efamatory statements are objectionable not least because of their propensity to percolate through underground channels and contaminate hidden springs' states an ancient and persistent truth..."

"...It must rather be demonstrated that D foresaw that the further publication would probably take place, or that D (or a reasonable person in D's position) should have so foreseen and that in consequence increased damage to C would ensue" : *McManus,* [42]-[43] (*per* Laws L.J.).

[198] *Cadbury Schweppes Inc v FBI Foods Ltd.,* [1999] 1 S.C.R. 142.

[199] *Grant v Winnipeg Regional Health Authority* 2015 MBCA 44, [118].

[200] *PJS v News Group Newspapers Ltd.* [2016] UKSC 26.

(a) Canada

The Supreme Court of Canada's decision in *LAC Minerals Ltd v International Corona Resources Ltd*[201] has been the starting point for discussion. There, the court established the test for a successful claim. The plaintiff has to establish the criteria set out by Megarry J. (as he then was) in *Coco v. A. N. Clark (Engineers) Ltd.*[202] (and adopted in *LAC Minerals*):

> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself … must "have the necessary quality of confidence about it." Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it…

Mister Justice Sopinka, in *Lac Minerals,* articulated the action in this way: "The foundation of action for breach of confidence does not rest solely on one of the traditional jurisdictional bases for action of contract, equity or property. The action is sui generis relying on all three to enforce the policy of the law that confidences be respected."[203] Recalling the facts of that case, the Supreme Court of Canada found that the defendant, Lac Minerals, had misused confidential information it obtained from Corona in the course of joint venture negotiations in order to advance its own commercial opportunities.

As a result of breach of confidence's hybrid nature (equity and common law principles), the wider range of remedies that could be awarded in Canadian cases of breach of confidence was confirmed in *Cadbury Schweppes;*[204] though *LAC Minerals* provides a clear example. In *Lac Minerals*, the Supreme Court imposed on the defendant a constructive trust regarding the mine property in question (which the defendant obtained using confidential information from the plaintiff). This provided for the conveyance of the land, minus expenses the defendant incurred in the mine's development. The Supreme Court of Canada found no reason for "*frisson* of apprehension or uncertainty" with the hybrid nature of breach of confidence.[205] Instead, the "jurisdictional basis supporting the claim" (as Sopinka J. described it)[206] aligns the remedy with the policy objective of that particular claim. And so, the breach of confidence in question being described as contractual, tortious, proprietary or trust constitutes the means of determining the appropriateness of the remedy; not a limitation of the court's jurisdiction.[207] Parties, then, may contract so as to limit or negate other general duties, such as tort or confidentiality; that is, a general duty "must yield to the parties' superior right to arrange their rights and duties".[208] Where there is a claim in breach of confidence, the objective for the court "is to put the confider in as good a position as it would have been in but for the breach."[209] In *Cadbury,* the breach resulted in placing the plaintiff behind the defendant in terms of competition (after Cadbury had shared its recipe with the defendant). This was a lost opportunity. The distinction for the present study is that retaining some level of confidentiality (in the nature of maintaining privacy) of information is not similar to a lost opportunity in the commercial sense. In this way, the action for breach of confidence where information has been imparted in a situation of confidence and then subsequently disclosed falls into the tort category.

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[201] [1989] 2 S.C.R. 574.
[202] [1969] R.P.C. 41 (Ch.), 47. Adopted in by the House of Lords in *MGN v Campbell* [2004] UKHL 22, [13].
[203] *Lac Minerals* 615.
[204] It was also found that breach of confidence no longer requires there to be a fiduciary relationship: *Cadbury* [60].
[205] *Cadbury* [28].
[206] *Lac Minerals* 615.
[207] *Cadbury* [25].
[208] *BG Checo International v British Columbia Hydro and Power Authority* [1993] 1 S.C.R. 12, 27.
[209] *Cadbury* [61].

An action in breach of confidence in Canada pertaining to disclosure of information where there is an argument based upon confidence (outside of confidentiality clauses in employment contracts) is not an area that has been explored in as much detail, compared to the U.K.. Despite the Supreme Court's guidance, the merging of common law and equity principles can be a complicating factor in this setting. Still, guiding points may be sketched out pertaining to law in Ontario. Further guidance can be sought from the UK cases which contemplate both a breach of confidence and a derivative tort, misuse of private information. The U.K example is explored in the immediately ensuing section.

A starting point must be the courts' view of the fusion of common law and equity. In Canada, there has been an emphasis placed upon fusion that remains open to development stemming from contemporary influences; as opposed to being set within one of the two streams.[210] Further outlining a philosophy regarding breach of confidence as applied to the topic of protection of reputation through a law related to privacy, Sharpe J.A. in *Jones v Tsige* brought the tort of intrusion upon seclusion into Ontario law because it "would amount to an incremental step that is consistent with the role of this court to develop the common law in a manner consistent with the changing needs of society."[211] A trajectory for further development of this area of the common law appears to be present.

Most often, the claim for breach of confidence arises in the context of commercial relationships.[212] This tendency makes the decision in *Jane Doe 464533 v ND*[213] noteworthy. *Jane Doe 464533* constitutes one of the sad cases that has arisen from internet communications. The decision was initially resolved by way of default judgment (the defendant failing to appear). However, default judgment was set aside by a judgment released on 27 January 2017[214] and leave to appeal the setting aside was denied the same month.[215] As it stands, this case may proceed to trial. Still, it is important to note that in the decision denying leave to appeal, the court cited the defendant's sworn affidavit that seemed to suggest a challenge on the basis of quantum of damages as opposed to liability itself. The difficulty is that, in setting aside default judgment, the court set aside the finding of liability as well as quantum of damages. The decision of Mister Justice Stinson finding in favour of Jane Doe 464533 will be focused upon as an example of how the breach of confidence may be utilised in the non-commercial setting.

The facts of this case were noted in section V (iii) (b) ii. above. As part of the action, the court found that the first two elements of the test were met: the video was sent based upon the assurance that the video would only be viewed by ND;[216] and the video "was communicated to

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[210] *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 64 (CA), [290]: "While no doubt the categories that were shaped by the historical influences of common law and equity of law remain relevant for certain purposes, the spirit of the fusion of the two streams is the dominant theme and influence in the modern era. In our view, the modern conception of our private law as a fusion of equitable and legal principles provides added weight to the argument that the discretionary factors associated with equitable remedies may be considered in the present case. For these reasons, we reject the contention that the sui generis right of aboriginal title should be rigidly classified as falling exclusively into one of the historic streams of our legal history, completely immune from the influence of the other."
[211] 2012 ONCA 32, [65].
[212] For example, *Sabre Inc. v International Air Transport Association*, 2011 ONCA 747.
[213] 2016 ONSC 541 [*Jane Doe 464533*].
[214] 2016 ONSC 4920.
[215] 2017 ONSC 127.
[216] *Jane Doe 464533* [20].

the defendant on the express basis that he would treat it as confidential".[217] In finding the final criteria satisfied (an unauthorized use of that information to the detriment of the party communicating it), Mister Justice Stinson wrote: "I see no rational basis to distinguish between economic harm and psychological, emotional and physical harm, such as was experienced by the plaintiff in the present case. In any event, the possible future adverse impact on the plaintiff's career and employment prospects arising from the possibility that the video may someday resurface, also demonstrates actionable harm."[218]

The adage in law is that sad cases make for bad law. It is contended that the remarkably sad facts here do not overshadow how it illustrates the limitations of defamation as the sole means of redress for reputation claims; boundaries that are readily recognisable when internet-based forms of communication are employed. Moreover, the case bridges an important boundary for the hybrid breach of confidence action in that it illustrates the applicability of the claim to a non-commercial context. Finally, *Jane Doe 464533* stands out as a case study in 1) the profoundly negative effects on reputation of remarks published using internet-based forms of communication and 2) the ways in which the common law in particular can be adapted to the challenges posed by innovation in information technology. On the critical side, the decision is light on treatment of these legal claims; but this is perhaps the by-product of the absence of arguments for the defendant. Overall, there are indications, though few, that demonstrate reputation interests can be defended using the common law and this is an important step at this early stage of jurisprudence.

(b) United Kingdom – breach of confidence to misuse of private information

A starting point is offered by Francis Gurry in his treatise *Breach of Confidence*:[219] "In a breach of confidence action, the court's concern is for the protection of a confidence which has been created by the disclosure of confidential information by the confider to the confidant. The court's attention is thus focused on the protection of the confidential information because it has been the medium for the creation of a relationship of confidence; its attention is not focused on the information as a medium by which a pre-existing [fiduciary] duty is breached." As noted above, the modern court analysis commences with Megarry J (as he then was) in *Coco v. A. N. Clark (Engineers) Ltd.*.[220] It is worth noting that the UK Law Commission in 1974 recommended what today we would see as an assumption of responsibility for there to be liability in breach of confidence. The Commission wrote (with reference to companies): "it is sufficient for the plaintiff to establish that the defendant should have realised that the information was being given to him in confidence: in contrast, our propositions would make it necessary for the plaintiff to go further and show that the defendant, either expressly or by implication, accepted an obligation to treat the information as confidential."[221] Refraining from imposing this standard on plaintiffs (especially non-corporate individuals) has focussed instead on either the relationship of confidence or the nature of information in question as being confidential. If it were to be required that plaintiffs established defendants' assumption of responsibility for the confidentiality of the information, it would arguably have rendered this action quite limited in scope and so less likely

[217] *Ibid* [23].
[218] *Ibid* [24].
[219] Francis Gurry, *Breach of Confidence* (Oxford: Clarendon Press, 1984), 161-162 (emphasis in original).
[220] [1969] R.P.C. 41 (Ch.), 47. Adopted in by the House of Lords in, for example, *MGN v Campbell* [2004] UKHL 22, [13].
[221] *Working Paper No. 58, Breach of Confidence* (London: HMSO, 1974), [72].

to have developed in its current form.[222] Certainly the law in this area was permitted to develop (when it otherwise would not have)[223] when the recommendation of the Law Commission in 1981 to abolish the action in breach of confidence and replace it with a statutory tort of breach of confidence[224] was ignored.

For some time, English common law has recognized there are certain occasions during which information therein obtained cannot be published to others. The foundational example of breach of confidence is *Prince Albert v Strange*[225] where the court enjoined a third party from publishing copies of the claimant's etchings as well as a catalogue describing the same. The purported sale of copies or the creation of a catalogue could only have been accomplished by surreptitiously obtaining the items in breach of trust, confidence or contract.[226] The only means by which these etchings could have been made public was through the gift of some to friends or the delivery of others to a printer for impressions to be made. At the time, relationships of confidence stood out as the essence of the judgment. Perhaps with a 21st century revisionist perspective, we may look at *Strange* as an early decision about privacy. It is suggested that it can be both. Materials were shared within a selective group for limited purposes. The court ruled Prince Albert had maintained the privacy of these items; that is, he was not releasing them to the public but sharing them within a confined social (friends) and commercial (printer) space.[227] For present purposes, in a time of widespread use of information technology, *Strange* contests the assertion that once information is posted, the author has no control over what is done next. While he had given the etchings to some friends, this did not vitiate Prince Albert's exclusive claim over the items.

The well-known decision in *Argyll v Argyll*[228] continues the early recognition of the confines of private information by 'unambiguously" finding it appropriate to protect personal confidences.[229] At this point, the action was still set within existing relationships of confidence. The claimant successfully restrained the defendants (who included her former husband) from publishing personal details of her life that she had shared during their marriage. Establishing that a contractual relationship was not necessary, the court found the publication of these personal details to be a breach of confidence warranting an injunction:

> It thus seems to me that the policy of the law, so far from indicating that communication between husband and wife should be excluded from protection against breaches of confidence given by the court in accordance with *Prince Albert v Strange* strongly favours its inclusion and in view of that policy it can hardly be an objection that such communications are not limited to business matters.[230]

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[222] The Law Commission's concern was the strategic use of breach of confidences; that is, the creation of "the unsolicited confidence" where the recipient of the information could not decide whether or not to assume the responsibility.
[223] As noted by Baroness Hale in *Douglas and others v Hello! Ltd and others (No 3)* [2007] UKHL 21, [307].
[224] *Report on Breach of Confidence* (1981) (Law Com No. 110) (Cmnd. 8558), 103.
[225] (1849) 1 H & TW 5 1302 (Ch.).
[226] *Ibid* 1311.
[227] On the commercial point, the finding of the defendant's 'gross breach of faith' in *Pollard v Photographic Co* (1889), 40 Ch. D 345 reinforces the necessity in obtaining permission to sell photographs of an individual who did not give consent. Providing private material to a company for the purpose of reproducing the item is not tantamount to consent to reproduction by the proprietor beyond the customer's personal consumption.
[228] [1967] Ch. 302.
[229] Tanya Aplin, Lionel Bently, Philip Johnson, Simon Malynicz, *Gurry on Breach of Confidence: The Protection of Confidential Information* 2nd edn (Oxford: OUP, 2012) [6.56].
[230] *Argyll* 329.

More generally, where the defendant has been found to have used (without consent) confidential information obtained from the plaintiff, there will have been a violation of the claimant's rights.[231] Mere disclosure of personal information does not vitiate claims to retain the privacy thereof unless the subject matter were disclosed or known to a substantial audience. This principle was derived from *Stephens v Avery*[232] where the issue was whether confidential disclosures about a person's sexual conduct were protected. Stephens admitted to a former friend (and the first defendant in the case) that she had an affair with a woman (who had been subsequently murdered by the woman's husband). The friend passed on this information to the *Mail on Sunday* (second defendant). In granting an injunction the court rejected the defendants' arguments that the subject matter should not be protected because it constituted gross immoral conduct and that the information was known to the parties and so could not be confidential. Regarding the latter, the court ruled: "Information only ceases to be capable of protection as confidential when it is in fact known to a substantial number of people."[233] The authors of *Gurry on Breach of Confidence* have identified two strands of judicial thinking from this early period:

1. Obligations of confidence in the area of personal information very much serve privacy interests.
2. Importance is attached to relationships in which personal, confidential information may be disclosed.

The relationships, however, had been a closed category, limited to matrimonial or some special type of relationship (such as in *Prince Albert*). Commenting on the action in breach of confidence in 1974, the Law Commission of the United Kingdom viewed the action as, more realistically, *sui generis*.[234]

The House of Lords moved away from a closed category of relationships to recognising circumstances in which a duty of confidence arises in *Attorney General v Guardian Newspapers (No2)*[235] when Lord Goff wrote:

> … a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. …
>
> I have expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers - where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by

The duty of confidence grew slowly during this time to include, for example, instances where a certain kind of information was viewed as confidential for the purposes of safety.[236] Still, in *Spycatcher*, the House of Lords maintained that breach of confidence was equitable.

The moment of change came with *Campbell v Mirror Group Newspapers Ltd.*[237] when English law adapted the action in breach of confidence for the purposes of protecting the unauthorized disclosure of personal information. Lord Hoffmann wrote:

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[231] *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 R.P.C. 203.
[232] [1988] Ch. 449.
[233] *Ibid* 454.
[234] *Working Paper No. 58, Breach of Confidence* (London: HMSO, 1974), 11.
[235] [1990] 1 A.C. 109 (HL), 281.
[236] *Venables and Thompson v News Groups Newspaper* [2001] 2 W.L.R. 1038 (CA), [78], [81].
[237] [2004] UKHL 22 (HL), [44] and [55] respectively.

> Breach of confidence was an equitable remedy and equity traditionally fastens on the conscience of one party to enforce equitable duties which arise out of his relationship with the other. So the action did not depend upon the personal nature of the information or extent of publication but upon whether a confidential relationship existed between the person who imparted the information and the person who received it. …
>
> Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.

Facilitating this change was the coming into force of the *Human Rights Act, 1998* which brought the European Convention of Human Rights into English law. Its direct application to English law can be seen, for example, in s.6(1): "It is unlawful for a public authority to act in a way which is incompatible with a Convention right." As with defamation, here too Articles 8 and 10 of the ECHR form the crux of the tension. The text of these provisions are provided here:

> Article 8
>
> Right to respect for private and family life, home and correspondence
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> Article 10
>
> Freedom of Expression
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority. . .
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence...

With *Campbell,* the tort of misuse of private information slowly emerged from breach of confidence. This developed in the United Kingdom partly due to the absence of a more general tort of privacy.[238] The balancing of the two Convention rights is expressed in English law through the test developed for this tort. It was noted at the start of this section but warrants repetition here:

> 1) Does the claimant have a 'reasonable expectation of privacy' in respect of the information in question? If yes, then:
>
> 2) Does the claimant's interest in maintaining their right to informational privacy outweigh the defendant's interest in publishing the information in pursuit of their right to freedom of expression?[239]

Lord Hoffmann explicates upon the aim as a "cause of action … [which] focuses upon … the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people".[240] With regards to the first part of the test, Sir Anthony Clarke M.R. in *Murray v Express Newspapers plc*[241] stated: "The approved test is not whether a person of ordinary sensibilities would find the publication highly offensive or objectionable . . . but … what a reasonable person of ordinary sensibilities would feel if he or she was placed in the same position as the claimant and faced with the same publicity." At the second stage of the test,

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[238] *Kaye v Robertson* [1991] F.S.R. 62 (CA); *Wainwright v Home Office* [2003] UKHL 53.

[239] As stated in a number of cases: see for example *Campbell v MGN* [2004] UKHL 22 and the extended discussion in *ETK v News Group Newspapers Ltd.* [2011] EWCA Civ 439, [10]. This tort is the renamed action for breach of confidence: *Campbell* [14]. Whether or not this tort is now separate from the equitable cause of action remains to be determined: *Vidal-Hall v Google Inc* [2015] EWCA Civ 311 (leave to appeal to the United Kingdom Supreme Court on the tort issue refused 23 July 2015).

[240] *Campbell* [51].

[241] [2008] EWCA Civ 446.

balancing requires "an intense focus on the comparative importance of the specific rights being claimed in the individual case".[242] Further guidance on the balancing of these two rights comes from s.12(3) of the *Human Rights Act, 1998*: no interim injunction is to be granted "unless the court is satisfied that the applicant is likely to establish that publication should not be allowed". In *Cream Holdings Ltd v Banerjee,*[243] Lord Nicholls reinforced the high standard to satisfying the criteria for injunctive relief: "the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court that he will probably ("more likely than not") succeed at the trial."

The development of the relationship of confidence continued consideration of the intersection between protection of reputation and privacy. In *McKennit v Ash*,[244] the defendant learned intimate information through her friendship with the claimant. The court prevented Ash from publishing the information because the intended publication contained material disclosed in confidence. The focus on a pre-existing relationship of confidence where intimate or personal information is likely to be imparted is a lasting facet of this and other decisions.[245]

Taking us closer to the context of statements on internet-based platforms, the authors of *Gurry* contend that some of these decisions establish a principle: "A person's opinions concerning matters in the public domain, as well as their feelings and emotional state, have been regarded as giving rise to a reasonable expectation of privacy."[246] Presently there is greater nuance developing in the characterization and therefore legal implications of relationships. The Court of Appeal's decision in *Murray* demonstrated:

> As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.[247]

In *Douglas v Hello! Magazine*,[248] the House of Lords moved from a determination of establishing a relationship of confidence, to whether the information in question (on an objective basis) is confidential. The guidance drawn from *Douglas* is that for the purposes of breach of confidence, the action may be established through a relationship of confidence, but it may also be achieved by assessing the nature of the information itself. OK! was seeking to enforce an obligation of confidence imposed upon all attendees of the wedding regarding any photographs by an agreement it reached with the plaintiffs. OK! sought to enforce this right against Hello! when it had published photos taken by a photographer it had paid for surreptitious photos. The ruling shoehorns the concept of information into the reasoning: "the point of the transaction was that each picture would be treated as a separate piece of information which OK! would have the exclusive right to publish."[249] While useful for the present study, it is not an easy fit to call each photo a piece of information within the context of *Douglas*.

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[242] *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47.
[243] [2004] UKHL 44, [22].
[244] *McKennit v Ash* [2006] Q.B. 73 (CA)
[245] *Associated Newspapers Ltd v HRH Prince of Wales*, [2008] Ch. 57 (CA); *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] Q.B. 103 (CA)
[246] *Gurry* [6.140]
[247] *Murray v Express Newspapers*, [2008] EWCA 446, [36].
[248] *Douglas and others v Hello! Ltd and others (No 3)* [2007] UKHL 21.
[249] *Ibid* [122].

The Court of Appeal in *Google Inc v Vidal-Hall*[250] considered whether misuse of private information was a tort or an action in breach of confidence. The matter arose within the context of a civil procedure issue (whether service of a tort claim outside of the jurisdiction can be made in this instance). Concluding this is a tort, the Court wrote:

> Against the background we have described, and in the absence of any sound reasons of policy or principle to suggest otherwise, we have concluded in agreement with the judge that misuse of private information should now be recognised as a tort for the purposes of service out the jurisdiction. This does not create a new cause of action. In our view, it simply gives the correct legal label to one that already exists. We are conscious of the fact that there may be broader implications from our conclusions, for example as to remedies, limitation and vicarious liability, but these were not the subject of submissions, and such points will need to be considered as and when they arise.[251]

The UK Supreme Court revisited confidentiality in *PJS v News Group Newspapers Ltd.*.[252]The majority in *PJS* reinstated the injunction banning the British media from naming PJS and his partner (two well-known public figures) after PJS engaged in a sexual encounter with another couple. This other couple told their story to an English newspaper that sought to publish. The Court of Appeal quashed the injunction stating that "[c]laims for confidentiality generally fail once information has passed into the public domain."[253] According to the Supreme Court majority, the Court of Appeal did not give "due weight to the qualitative difference in intrusiveness and distress likely to be involved in … [an] unrestricted publication by the English media in hard copy as well as on their own internet sites."[254] It may be a curiosity to reinstate this injunction considering part of the argument was that the identity of PJS (and his partner) was known in other jurisdictions as it had been widely circulated through internet platforms. The argument that the information was widely available failed, however, to accurately identify the relevant issue. Instead, the question was "whether an injunction would serve a useful purpose".[255] At the end of his judgment, Lord Mance offered the following explication:

> At the end of the day, the only consideration militating in favour of discharging the injunction is the incongruity of the parallel - and in probability significantly uncontrollable - world of the internet and social media, which may make further inroads into the protection intended by the injunction. Against that, however, the media storm which discharge of the injunction would unleash would add a different and in some respects more enduring dimension to the existing invasions of privacy being perpetrated on the internet.[256]

As *PJS* was the Supreme Court's first opportunity to comment on the *Vidal-Hall* ruling with respect to the tort issue (leave to appeal on this issue being dismissed), the Court endorsed the Court of Appeal's conclusion:

> It is right that the Supreme Court should on the present application express its own view on the correctness of the approach taken in the authorities discussed in the preceding paragraphs (paras 26-32). In my opinion, the approach is sound in general principle. Every case must be considered on its particular facts. But the starting point is that (i) there is not, without more, any public interest in a legal sense in the disclosure or publication of purely private sexual encounters, even though they involve adultery or more than one person at the same time, (ii) any such disclosure or publication will on the face of it constitute the tort of invasion of privacy, (iii) repetition of such a disclosure or publication on further occasions is capable of constituting a further tort of invasion of privacy, even in

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[250] [2015] EWCA Civ 311.
[251] *Ibid* [51].
[252] [2016] UKSC 26 [*PJS*]. On the argument of confidentiality, Lord Neuberger summarised the state of the matter in this case: 'if one was solely concerned about confidentiality, that point had indeed been passed in this case.' [57]
[253] [2016] EWCA Civ 393, [35].
[254] *PJS* [35]
[255] *Ibid* [26].
[256] *Ibid* [45].

> relation to persons to whom disclosure or publication was previously made - especially if it occurs in a different medium.[257]

As it currently stands, misuse of private information stands as a tort action. Still, confidence remains a factor. In sum, confidence can arise: in contract (provisions relating to confidentiality); in tort (misuse of private information); or *sui generis* relationship of confidence which has been breached. The challenge will be how the tort and breach of confidence elements develop.[258] One such challenge focuses on the voluntariness of the recipient of the confidence. In its 1974 report, the Law Commission expressed concern over the strategic use of breach of confidence; that is, the creation of "the unsolicited confidence" where the recipient of the information could not decide whether or not to assume the responsibility.[259] The caution raised continues to be pertinent: the recipient of the confidence should voluntarily accept this position; it cannot be foisted upon a person. The confidence or misuse of private information focuses upon the nature of the information. In so doing, there has been a movement away from the nature of the relationship between the parties. And yet, there are remnants of the relationship analysis; such as the close friendship between McKennit and Ash, the commercial relationship between the parties in the *Prince of Wales* decision. To note the point does not undercut the analysis of the information. Rather, acknowledge should also be made of the differing ways in which the analysis has been conducted.

(v) Intentional infliction of mental distress

Intentional torts, within the context of a tort law course, are usually the first topics covered. They are also less prevalent when compared to negligence-based torts. This is mentioned because the fact of publication in a defamation context (considered in Part III of the work) seems to constitute intention for the purposes of tort. Still intentional torts may have a place in claims to protect reputation.

The action derived from *Wilkinson v Downton* has evolved into an action for intentional infliction of mental distress. In Ontario, the test for intentional infliction of mental distress was set out in *Prinzo v Baycrest Centre for Geriatric Care*[260] where Weiler J.A. adopted the test for the same action set out in the BC Supreme Court by McLachlin J. (as she then was) in *Rahemtulla v. Vanfed Credit Union*[261]:

> (i) conduct that is flagrant and outrageous;
> (ii) calculated to produce harm; and,
> (iii) resulting in a visible and provable injury.

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[257] *Ibid* [32].

[258] On this matter consider this summary: "The misuse action is distinct from breach of confidence, which is designed to protect confidential information or secrecy. There is, however, an overlap between the misuse of private information and breach of confidence actions. Many factual situations may give rise to viable claims in both causes of action; a misuse claim may be reinforced by a claim for breach of confidence; and the authorities relating to breach of confidence may have relevance to the newer cause of action": Sir Mark Warby, Adele Garrick and Chloe Strong, "Misuse of Private Information" in N.A. Moreham and Sir Mark Warby (eds), *Tugendhat and Christie The Law of Privacy and the Media* (Oxford: OUP, 2016), [5.12].

[259] *Working Paper No. 58, Breach of Confidence* (London: HMSO, 1974), [53]: "there is some danger of persons communicating ideas in confidence with the sole object of laying the foundation for a future claim if the recipient of the information happens to use a similar idea; the recipient would, on using the similar idea, have great difficulty in proving that it was arrived at independently of the idea originally communicated to him."

[260] (2002), 60 OR (3d) 474 (CA).

[261] (1984), 51 BCLR 200 (SC).

There is no requirement in this action for there to be a malicious act. Instead, the defendant may have conducted herself with reckless disregard as to whether or not shock would ensue.[262] Unlike in defamation (which focuses on the potential for harm), there must be some provable injury. In the context of the internet and harm to reputation (amongst other aspects of the action) *Jane Doe 464533 v ND*[263] considered the matter (though the decision remains in question. *Jane Doe 464533* contained compelling evidence (which was undisputed by the defendant who failed to attend the trial). Many cases may not have such direct evidence of conduct. And so, it remains an open question whether a plaintiff could argue that there was a negligent infliction of mental distress. McLachlin C.J. considered some loose boundaries on the matter in *Mustapha v. Culligan of Canada Ltd.*: "The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept."[264]

VI. General Data Protection Regulation

There has been more movement in the protection of personal data than in other areas of privacy protection. A major force in the regulation of this area has been the European Union. This trend looks primed to continue. The GDPR was passed as a regulation of the European Union in 2016 (Regulation (EU) 2016/679). It will come into force 25 May 2018. This regulation will affect all EU member states and does not need the national government of each member state to pass enabling legislation.

For Canada, this regulation is significant because it is the successor to Directive 95/46/EC that was adopted in 1995 and came into effect on October 25, 1998. The Directive prohibits members of the European Union from transporting personal data to third countries that do not have adequate levels of privacy protection for personal information.[265] In order to trade with EU member states, Canada had to put in place legislation pertaining to private sector organisations that collect, use or disclose personal information in the course of commercial activities. The real potential barrier to trade posed by the Directive created an incentive for Canada to adopt privacy legislation.[266] Importantly with reference to the Directive, the GDPR states: "[the] objectives and principles of Directive 95/46/EC remain sound".[267]

The *Personal Information Protection and Electronic Documents Act*[268] was the legislation passed in 2000 by the Canadian Parliament to ensure that steps were taken by private sector entities to securely handle personal data collected in the course of business. This legislation has promulgated provincial acts aimed at personal data in various forms.[269] The legislation was

[262] *Prinzo* [44].
[263] 2016 ONSC 541.
[264] 2008 SCC 27, [9].
[265] Notably, the 'safe harbour' aspect of the Directive regarding information exchanged between the EU and the US was found to be invalid by the CJEU in *Schrems v Data Protection Commissioner* (Case C-362-14) (judgment of 6 October 2015).
[266] For example, in 1991 the German Data Protector moved to block the transmission from Germany to Canada of personal information about Germans by Air Canada. The reason given for this action was that Canada did not possess private sector privacy laws to protect the information: Ian Lawson, *Privacy and Free Enterprise: The Legal Protection of Personal Information In the Private Sector* (Ottawa: Public Interest Advocacy Centre, 1992), 73.
[267] Recital 9.
[268] S.C. 2000 c.5.
[269] For example, *Personal Information Protection Act* S.B.C. 2003, c.63; *Personal Health Information Protection Act* S.O. 2004, c.3.

subsequently approved of by the EU Data Protection Working Party *Opinion 2/2001 on the adequacy of the Canadian Personal Information and Electronic Documents Act.*[270] And so, the GDPR will be highly relevant to the present discussion in the not-so-distant future.[271] Of note at this point, Article 4 of the GDPR defines personal data widely: "any information relating to an identified or identifiable natural person 'data subject'; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person".

With the passage of the Directive and related legislation in Canada, new-found importance has been placed on personal data protection as a subset of privacy. There has been public concern regarding personal data protection; though it has likely been difficult to pinpoint. A 1992 survey conducted for Equifax Canada found that the majority of the public saw privacy as a fundamental right in Canadian society. The public expressed concern over threats to their personal privacy and believed that consumers had lost all control over the way organizations used personal information. The survey found that two-thirds of Canadians (66%) felt that a specific guarantee of personal privacy over personal information should be added to the *Charter of Rights and Freedoms*, providing a constitutional basis for asserting individual privacy rights.[272] A 1995 survey of Canadians found that the idea of businesses selling personal information without consent was viewed, almost unanimously (95%) as an invasion of privacy.[273] These concerns form an historical background to the present study insofar as they speak to a public unease with the state of privacy (as an umbrella term). They also suggest that claims relating to privacy and attempts at expanding privacy protection should be anticipated.

A question remains whether or not personal data protection will be a viable avenue for protection of reputation interests in Canada. With the GDPR and the fact that Canada would again need to earn approval from the European Data Protection Commissioner, it is difficult to state what the precise path will be. It may be that in Canada plaintiffs will elect to fit these claims under the developing torts and therefore avoid raising a complaint with the relevant Privacy Commissioner.

In this final section, considerations will be outlined with a view to providing guidance leading up to the implementation of the GDPR and its potential impact on Canada insofar as data protection may be applicable to protection of reputation. At the end of this report there is an appendix that contains summaries of talks from the 2017 Computers, Privacy and Data Protection Conference in Brussels, Belgium, where the concerns regarding the GDPR were discussed.

(i) Right to be forgotten

The 'right to be forgotten' has quickly developed as an area of equal interest and concern. The concept stems from the CJEU's decision in *Google Spain SL and Google Inc. v Agencia*

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[270] 5109/00/EN WP 39.

[271] It should also be noted that the definition of a data controller has been found to include a search engine: *Vidal-Hall v Google Inc* [2015] EWCA Civ 311 (leave to appeal to the United Kingdom Supreme Court on the tort issue refused 23 July 2015).

[272] Louis Harris and Associates in association in association with Alan F. Westin, *The Equifax Canada Report on Consumers and Privacy in the Information Age* (New York: Louis Harris and Associates, 1992) 17.

[273] Public Interest Advocacy Centre and Federation of Quebec Consumer Groups, *Surveying Boundaries: Canadians and their Personal Information* (Ottawa: Public Interest Advocacy Centre, 1995).

Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez.[274] The case centred on the rights of data subjects pursuant to the Directive: it requires that personal data must be processed fairly and lawfully; collected for legitimate and specified reasons; adequate, relevant, and not excessive in relation to the purposes for which it is collected: accurate, where necessary kept up-to-date, and; retained as identifiable data for no longer than necessary to serve the purposes for which the data were collected. In *Google Spain,* the CJEU laid down a presumption in favour of the rights to privacy and the protection of personal data: "[those] rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name".[275] This presumption could only be rebutted "if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question."[276] The measurement here is not whether the information brought up by a "Google" search caused prejudice to the data subject; but rather, whether there is compatibility with the parameters set out in the Directive for the entirety of the period of the data processing in question.[277] Compounding the challenge posed by this decision is the fact that Google and other entities are dealing with many de-listing requests. Guidance has been provided by the U.K.'s Information Commissioner's Office.[278] A checklist has been developed by Jaani Riordan in his book, *The Liability of Internet Intermediaries*.[279] It should be noted that continue to be challenges with, for example, global versus territorial de-indexing.[280] The topic remains one of concern because Article 17 of the GDPR enshrines this "right to be forgotten".

Google Spain stands out as a departure from the legal concepts of privacy discussed in section V above. Here, data protection "is a proactive right to control one's personal data."[281] This is distinct from privacy as an action (in some form) that responds to an intrusion. The private law actions in privacy have developed lethargically compared to the ruling in *Google Spain*. Further speaking to that point, this decision, arguably, set a precedent that the CJEU will interpret law made prior to the issues before the court arising. To expand, the Directive being applied in *Google Spain* was created in 1995 – before much of the framework within which we currently work had its influence.[282] The CJEU, without tempering the matter due to age of the Directive, establishes a few points. First, any law which is devised in this area would likely need to be providing a framework as well as more specific details. The framework would be instrumental in anticipating the developments in information technology (related to data processing) and therefore speaking to guidelines for interpreting these future instances. Second, the court may be signalling that it sees its role as an active one: not only applying law, but also fitting (what will be) the Regulation to its contemporary circumstances. It may be expected that the court should work this way. It should be remembered, though, that there was widespread negative reaction to

[274] Case C-131/12 (13 May 2014) (CJEU).
[275] *Ibid* [81], [99].
[276] *Ibid* [97], [99].
[277] Ibid [92].
[278] https://ico.org.uk/for-organisations/data-protection-reform/overview-of-the-gdpr/individuals-rights/the-right-to-erasure/
[279] (Oxford: OUP, 2016), [10.228].
[280] See further *Ibid* [10.230]ff.
[281] Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford: OUP, 2016), 149.
[282] In his opinion, Advocate General Niilo Jääskinen had recommended the CJEU interpret the matter with this fact in mind.

the decision; a ruling that could attract the 'activist' moniker. The point, here, is to draw out the landmark nature of the ruling within the context of an area of rapid innovation.

Google Spain also prompts thought on the Supreme Court of Canada's decision in *Crookes v Newton*[283] where the court ruled that hyperlinks in an article did not constitute publication in itself. Hyperlinks which linked to personal data about Mr. Costeja were required to be removed. The decision was grounded in the Directive's Articles 12(b) and 14 which provided data subjects with: the right to obtain from the data controller "the rectification, erasure or blocking of data the processing of which does not comply with the provisions of the Directive …, in particular because of the incomplete or inaccurate nature of the data" ; as well as the right to object to processing of data by "advancing compelling legitimate grounds relating to his particular situation, save where otherwise provided by national legislation."[284]

The link to the Law Commission's current project is that the 'right to be forgotten' presents an opportunity for another claim to protect reputation. Recall in *Google Spain,* Mr. Costeja was seeking to remove from internet searches the fact that he was bankrupt a number of years ago. This 'action' (if it might be loosely called such) aims to remove certain data from the public domain which may affect an individual's reputation. *Google Spain* sparks thoughts on the significant movement of reputation management since 1936 when *Sim v Stretch* was decided. While more thorough engagement is adjacent to the present study, it contextualises, nonetheless, the considerations here. Internet communications are a new plain on which reputation management has become concerned.

A further element of convergence is that both the Data Protection Directive and Canada's compatible legislation, *Personal Information Protection and Electronic Documents Act*, have been established at the behest of commercial interests, but also profess to provide individual rights of control over personal information. This tension has not become as prevalent in Canada (discussed in section 3 of this part below). However, *Google Spain* did illustrate this tension:

> rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question.[285]

Aside from a public figure, a data subject's right is supposed to override the economic and access to information interests, as a general rule. The conception put forward by the CJEU here seems to suggest that when privacy and data protection rights are in play, freedom of expression may displace these rights only when there is a public interest. Surely this is a high threshold with regards to free speech, the hallmark of a liberal democracy. In 2008, the CJEU first wrote of "the right that guarantees protection of personal data and hence of private life."[286] Furthermore, there remains a curious interaction between privacy and data protection: is the latter a subset of the former or adjacent to it? It would seem that there are different avenues available to the individual seeking to protect her reputation. This will be demonstrated more precisely in the next subsection.

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[283] 2011 SCC 47.
[284] *Google Spain* [76].
[285] *Google Spain* [97].
[286] Case C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU*, [63].

(ii) UK claims in defamation and data protection

In the UK, recent cases have demonstrated a robust approach to litigating reputation matters. In these decisions claims are made which bring together the notions of protection of reputation and the disclosure of personal information (personal data).[287] A key difference to keep in mind is whether the plaintiff (or data subject in data protection terms) must show damage. Section 14(4) of the UK's *Data Protection Act 1998* requires the "data subject" to show she has suffered damage. This is distinct from the EU Directive which does not require establishing any prejudice against the data subject.[288] What is not clear is whether defamation in the UK remains actionable *per se*[289] because arguably some proof of harm is required. Still, as these two actions stand, there would seem to be at least an argument regarding disparity in what a plaintiff would need to prove when pursuing both actions in tandem. This may well factor into the final determination of which claims, if any, to pursue.

In defamation, the defence of qualified privilege includes protection where there is a duty and corresponding interest in disclosing information. When this is the case, the decision in *Clift v Slough BC*[290] illustrates that proportionality will be an operating factor. Ms. Clift witnessed the damaging of some flowerbeds. She was threatened when she intervened. On the advice of the police, she called Slough's anti-social behaviour co-ordinator, Ms. Rashid. The conversation went very poorly and angry words were exchanged. The claimant terminated the call and she subsequently wrote a very strongly worded letter of complaint about Ms. Rachid's conduct. Slough investigated, and rejected the complaint. It found her behaviour to Rashid was violent and threatening. It placed a 'marker' against her name for 18 months. And her name was placed on a register of violent persons. Details were sent to those with whom Clift might have contact, and to four wide categories of people connected with Slough. Clift sued in libel. The Court of Appeal accepted that the council had an obligation to inform those other groups who provided services to Clift since she had uttered threats against a Council employee. The court ruled the council had advised an overly broad range of agencies in that Clift had been added to the Violent Persons Register and so had violated the claimant's privacy right. While overly broad dissemination may prove to be a problematic basis for determining legal protection, an important question is the interest of the intended audience.

With data protection and defamation, the overlap arises because different aspects of privacy are protected (in UK terms, a right to private life as outlined in the ECHR).[291] In *HH Prince Moulay Hicham Ben Abdallah Al Alaoui of Morocco v Elaph Publishing Ltd*,[292] the Court of Appeal assessed Elaph's argument that a data protection claim was "not legally sustainable because it

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[287] An overview of this topic can be found in Andrew Murray, *Information Technology Law: The Law and Society* 3rd ed (Oxford: OUP, 2016), Chapter 20.

[288] *Google Spain* [96]: "In the light of the foregoing, when appraising such requests made in order to oppose processing such as that at issue in the main proceedings, it should in particular be examined whether the data subject has a right that the information relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name. In this connection, it must be pointed out that it is not necessary in order to find such a right that the inclusion of the information in question in the list of results causes prejudice to the data subject."

[289] Section 1 of the *Defamation Act 2013* requires plaintiffs to meet a threshold of "serious harm" in order to advance a claim.

[290] [2010] EWCA Civ 1484 application for leave to appeal to the Supreme Court refused.

[291] Data protection and defamation are not intended to be an exhaustive pairing. There can be other claims such as misuse of private information coupled with a data protection claim as in *ZXC v Bloomberg LP* [2017] EWHC 328.

[292] [2017] EWCA Civ 29.

was an attempt to fashion a remedy for damage to reputation where the law of defamation did not provide one"[293] The court rejected this argument stating:

> I can see no good reason of principle why a claim under the DPA cannot be linked to a defamation claim, and why it should not be added by amendment if the test for amendment is otherwise met. In the present case Elaph contend that the article is not defamatory of the Prince. If that defence succeeds the DPA claim may found an appropriate alternative means of redress, although §8 of the Amended Particulars of Claim, which treats the damage arising under the two claims as effectively the same, will require some further thought by those advising the Prince.[294]

Consider the situation where a member of the public sets up and operates a website which takes aim at specific lawyers who are viewed as disreputable. Can the lawyers sue in defamation or could there be a data protection claim? In *Law Society v Kordowski*[295] the court considered this question and granted a permanent injunction for the website to be shut down. Publishing of defamatory material through the website "Solicitors from Hell" which encouraged the public to write negative comments about lawyers, the court ruled, was by definition unlawful processing and material could be erased under s.14(1) of the UK's *Data Protection Act*. Under s.4(4) of the *Act*, Kordowski acted as a "data controller" and therefore was required to comply with the data protection principles outlined in Part I of Schedule I, including: processing of personal data "fairly and lawfully" (the first data protection principle); personal data must be accurate and be kept up-to-date (the fourth data protection principle); personal data must be processed in accordance with the rights of data subjects under the *Act* (the sixth data protection principle).

Kordowski is a noteworthy decision for the fact that Tugendhat J. rejected the Information Commissioner's reasoning as to why the plaintiffs' complaint fell outside the Office's jurisdiction. The Commissioner wrote, in part:

> The inclusion of the "domestic purposes" exemption in the Data Protection Act (s.36) is intended to balance the individual's rights to respect for his/her private life with the freedom of expression. These rights are equally important and I am strongly of the view that it is not the purpose of the DPA to regulate an individual right to freedom of expression – even where the individual uses a third party website, rather than his own facilities, to exercise this. (The s.36 exemption clearly did not anticipate individuals using third party websites to carry out their 'personal' processing). The situation would clearly be impossible were the Information Commissioner to be expected to rule on what it is acceptable for one individual to say about another be that a solicitor or another individual. This is not what my office is established to do. This is particularly the case where other legal remedies are available – for example, the law of libel or incitement.…[296]

Rejecting this statement of the law, Tugendhat J retorted:

> I do not find it possible to reconcile the views on the law expressed in the Commissioner's letter with authoritative statements of the law. The DPA does envisage that the Information Commissioner should consider what it is acceptable for one individual to say about another, because the First Data Protection Principle requires that data should be processed lawfully. … where the DPA applies, if processing is unlawful by reason of it breaching the general law of confidentiality (and thus any other general law) there will be a contravention of the First Data Protection Principle within the meaning of s.40(1), and a breach of s.4(4) of the DPA. … The fact that a claimant may have claims under common law torts, or under HRA s.6, does not preclude there being a claim under, or other means of enforcement of, the DPA.[297]

Data protection claims are not precluded as a result of a concurrent claim in defamation (though the bar to double compensation noted above will still apply). As well, while there is an

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[293] *Ibid* [21].
[294] *Ibid* [44].
[295] [2011] EWHC 3185.
[296] *Ibid* [96].
[297] *Ibid* [100].

exemption for journalism, literature and the arts (s.32), Kordowski did not fall under this provision:

> "If there is a provision of the DPA which would give effect to Art 10 rights engaged in the activities of the Defendant, it would be s.32 (journalism, literature and art). Journalism that is protected by s.32 involves communication of information or ideas to the public at large in the public interest. Today anyone with access to the internet can engage in journalism at no cost. If what the Defendant communicated to the public at large had the necessary public interest, he could invoke the protection for journalism and Art 10. But for reasons given in the many judgments in cases against him referred to in this judgment, he cannot make any such claim, nor any claim at all for the protection under Art 10 for what he has communicated, because what he does is against the public interest. It has equally been established many time that the Defendant is responsible in law for what he communicates through the Website."[298]

As noted above, s.36 of the *Data Protection Act* includes an exemption for data processed for domestic purposes: "personal data processed by an individual only for the purposes of that individual's personal, family or household affairs". In *Kordowski*, this exemption did not apply because there was an eminently public basis for the defendant's conduct. It may be surprising, though, how narrowly this exception has been interpreted. At the EU level, the applicable provision is Art.3(2) as it states that the Directive is inapplicable to data processing "by a natural person in the course of a purely personal or household activity." In interpreting this provision, the CJEU has rendered two decisions which should be borne in mind when considering the implications of the GDPR for Canada with particular effect to protection of reputation.

In *Bodil Lindqvist v Sweden*[299], Ms. Lindqvist was a catechist at her parish in Sweden. She took a data processing course in order to enhance the online presence of her church. On the website she established for the church, she described her colleagues including family circumstances, personal telephone numbers and, in one case, the medical reason for one colleague being on half time work. She neither informed nor obtained the consent of these colleagues. The Swedish data protection authority charged her with breaching the Swedish Data Protection Act. The Swedish Court of Appeal referred the case to the CJEU. The CJEU interpreted the domestic purposes exemption as a provision that "must therefore be interpreted as relating only to activities which are carried out in the course of private or family life of individuals, which is clearly not the case with the processing of personal data consisting in publication on the internet so that those data are made accessible to an indefinite number of people."[300] Since she fell outside of the exemption, she was required to have processed the data fairly and lawfully.

Several years later, the CJEU returned to this matter in *Ryneš v Úřad pro ochranu osobních údajů*.[301] Mr. *Ryneš* installed a CCTV camera outside of his house as a security measure (a response to earlier vandalism of his property). The camera recorded movements on his own property as well as on the public sidewalk. The camera became useful when his house was once again attacked (windows being broken). The camera was used to identify two individuals; one of which queried the lawfulness of the camera's position (capturing the public sidewalk). The Czech court referred the matter to the CJEU. The incident was found to fall within the purview of the Directive: the subject captured on camera constituted personal data and recording was found to be within the application of Art.3(1) (automatic processing of personal data). The Court ruled against Mr. *Ryneš*:

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[298] *Ibid* [99].
[299] C-101/10 (6 November 2003).
[300] *Ibid* [47].
[301] C-212/12 (11 December 2014).

> "…the processing of personal data comes within the exception provided for in the second indent of Article 3(2) of Directive 95/46 only where it is carried out in the purely personal or household setting of the person processing the data. Accordingly, so far as natural persons are concerned, correspondence and the keeping of address books constitute, in the light of recital 12 to Directive 95/46, a 'purely personal or household activity' even if they incidentally concern or may concern the private life of other persons. To the extent that video surveillance such as that at issue in the main proceedings covers, even partially, a public space and is accordingly directed outwards from the private setting of the person processing the data in that manner, it cannot be regarded as an activity which is a purely 'personal or household' activity for the purposes of the second indent of Article 3(2) of Directive 95/46."[302]

Article 2(2) of the GDPR contains the personal use exemption with wording that is largely similar to that found in the 1995 Directive. As a result, it seems as though the *Lindqvist* and *Ryneš* rulings will remain guiding considerations. We may apply the notion of the benefits for self-development that we ascribe to free speech in libel to the domestic purposes exemption. The stumbling block, however, appears to be when self-development moves into a public domain, such as the internet. For here the concern is when the individual becomes a data processer as in *Lindqvist* and *Ryneš*. However innocuous the means may be, there seems to be a healthy, cautious awareness of the thin line between an individual in a domestic circumstance and one moving beyond that situation.

There are a few points to draw upon from this discussion of the data protection regime established by the EU Directive and implemented in the UK. The data protection regime has a remarkable capture area. For example, individuals may be data processers. There is a strict understanding of what separates the domestic purposes from a situation in which an individual is a data processer. This arises when there seems to be any sort of public engagement with people (data subjects) and the processing of the information gathered (publishing it on a website). A guiding factor for these decisions may be the data subjects lacked control over their personal data; something notable in *Lindqvist*.[303]

(iii) Limitations of PIPEDA

Based on the discussion in the section immediately preceding, the question is whether or not there is a similar option in Canada with regards to claims in both libel and data protection. The brief answer appears to be there is not. Looking at *PIPEDA*, the regime for personal data protection (personal information) does not offer similar options to plaintiffs seeking to protect their reputations. Mister Justice Sharpe in *Jones* highlighted this point when he wrote: "the remedies available under PIPEDA do not include damages and it is difficult to see what Jones would gain from such a complaint."[304] There does not seem to be an equivalent understanding of individuals being data processers as is found under the EU Directive (and by extension UK law). Below is an outline of *PIPEDA* ending with a brief assessment of the place of these claims within the spectrum of legal options to protect reputation. Again, this discussion is prompted by the aforementioned UK and EU decisions which do contemplate both libel and data protection options.

The declared purpose of *PIPEDA* is:

> to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that

[302] *Ibid* [31]-[33].
[303] Lynksey 146.
[304] *Jones* [50].

> recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.[305]

This legislation recognizes the "right of privacy of individuals with respect to personal information". *PIPEDA* applies to "every organization" that "collects, uses or discloses in the course of commercial activities" personal information. It also applies to "every organization" that holds personal information "about an employee of the organization and that the organization collects, uses or discloses in connection with the operation of a federal work, undertaking or business".[306] *PIPEDA* has "quasi-constitutional status".[307] Pursuant to s.14, a complainant to the Office of the Privacy Commissioner of Canada (OPCC) may, after receiving a report from the OPCC, apply for a hearing in the federal court. The *Act* does not apply to government institutions to which the *Privacy Act* pertains; any personal information held by an individual for "personal or domestic purposes and does not collect, use or disclose for any other purpose"; or to any organization which collects, uses or discloses personal information for "journalistic, artistic or literary purposes" and for no other purpose.[308] An organization to which *PIPEDA* applies must comply with its provisions. Assessment of compliance is on the objective standard: "for purposes that a reasonable person would consider are appropriate in the circumstances".[309] The court will adjudicate this matter by determining whether the collection, use or disclosure of personal information is directed to a *bona fide* business interest, and whether the loss of privacy is proportional to any benefit gained.[310] A primary element of compliance with *PIPEDA* originates in obtaining consent from an individual. Consent can range from collection to use or disclosure of personal information granted by the individual. Consent may not be necessary if it falls within the parameters of s.7. It provides a lengthy list of exclusions enumerated under the heads of collection, use and disclosure.

Section 6 requires that an individual or team be put in place to ensure compliance with *PIPEDA*. Section 13 speaks of the timeline for the Commissioner to issue a report if settlement between the parties is not achieved. A report is not binding. The Commissioner's finding is more of a half measure since s.14 allows the Complainant or the Commissioner (with leave of the Court under s.15(c)) to request a hearing before the Federal Court, Trial Division on any matter on which the complaint was made. This application to the Court allows for a form of enforcement mechanism if the Court agrees with the Commissioner's findings. The additional remedies available to the Court under *PIPEDA* are:

> The Court may, in addition to any other remedies it may give,
>
> (a) order an organization to correct its practices in order to comply with sections 5 to 10;
>
> (b) order an organization to publish a notice of any action taken or proposed to be taken to correct its practices, whether or not ordered to correct them under paragraph (a); and
>
> (c) award damages to the complainant, including damages for any humiliation that the complainant has suffered.[311]

Section 28 governs offences and punishment. In order to be found in contravention of *PIPEDA*, the applicant must establish that the respondent "knowingly" contravened the *Act*. The application of s.28 is further narrowed to only those who knowingly contravene s.8(8), s.27.1(1) or those who obstruct the Commissioner or his/her delegate in an investigation or in conducting

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[305] *PIPEDA,* s.3.
[306] Section 4(1)
[307] *A.T. v Globe24h.com*, [2017] FC 114, [91].
[308] Section 4(2)
[309] Section 5(3)
[310] *Turner v Telus Communications Inc,* 2005 FC 1601, [48], aff'd 2007 FCA 21.
[311] Section 16

an audit. These offences are punishable either by summary conviction and a fine not exceeding $10,000 or by indictable offence, liable for a fine not exceeding $100,000. With regards to damages pursuant to s.16 there has been no guidance through statute. At common law, three main functions have been identified regarding damages under *PIPEDA*: (1) compensation; (2) deterrence; and (3) vindication.[312] This includes a non-exhaustive list of factors: "(1) whether awarding damages would further the general objects of PIPEDA and uphold the values it embodies; (2) whether damages should be awarded to deter future breaches; and (3) the seriousness of the breach".[313]

Analysing the utility of *PIPEDA* as a vehicle for protection of personal data is limited. It is not legislation that engages with "private rights of action between individuals."[314] Its origins are in facilitating commerce; a response to the EU's Data Protection Directive. This is an important premise to remember since it diverges from the aims discussed with regards to the privacy-based actions noted above. It can also render a purposive approach difficulty. [315] *A.T. v Globe24h.com*,[316] a decision of the Federal Court, suggests that there may be an opening for an interpretation of *PIPEDA* similar to that found in the CJEU decisions noted in the immediately prior section. The collection of information about individuals by the defendant culled from online court documents was found to be inappropriate because the collection, use and disclosure was not, on an objective assessment, for a *bona fide* business interest.[317] In order to remove the information from the site, individuals were compelled to pay a large fee instead of waiting over 150 days for the same action. In the court's words, even though the information in question was freely available on court websites apart from Globe24h.com's actions, the defendant's conduct brought on "needless exposure of sensitive personal information of participants in the justice system via search engines."[318] Damages were awarded to A.T. in the amount of $5000 which was deemed "appropriate based largely on the conduct of the respondent. It is clear from the record that the respondent has commercially benefited from the breach through targeted advertising and by requiring a fee for removing the personal information of individuals contained in the decisions. The respondent has also acted in bad faith in failing to take responsibility and rectify the problem."[319]

It may be that in Canada the understanding of the data protection avenue for protection of reputation has developed slowly because these decisions of the Federal Court indicate that there is scope for redress pursuant to *PIPEDA.* As a result of the limited use of this *Act, PIPEDA* is equivocal legislation when it comes to protection of reputation. Its aims are dual: protection of personal data privacy *and* facilitation of the collection, use and disclosure of this data. Consequently, when the matter arises before the courts, adjudication at that level "must strike a

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[312] *Nammo v TransUnion of Canada Inc,* 2010 FC 1284, [72]-[76].
[313] I *Ibid* [76].
[314] *Jones* [51].
[315] The Supreme Court of Canada had employed the purposive approach repeatedly in labour law decisions such as: *BC Health* and *Ontario (Attorney-General) v Fraser,* 2011 SCC 20; *Mounted Police Association of Ontario v. Canada (Attorney General)* 2015 SCC1; *Saskatchewan Federation of Labour v Saskatchewan,* 2015 SCC 4.
[316] 2017 FC 114 [*Globe24h.com*]
[317] *Ibid* [91].
[318] *Ibid* [74].
[319] *Ibid* [101].

balance between [these] two competing interests."[320] Recalling the decision in *Jones v Tsige*, a complaint to the Federal Privacy Commissioner (since the matter was one involving banks and this is a federally-regulated industry) was available to Jones. Tsige, seizing on this opportunity, contended that this and other legislation closed off any sort of common law action (such as intrusion upon seclusion). The Ontario Court of Appeal expressly rejected this argument.[321] The ruling remains important for claims relating to personal data because it permits complainants to avoid the limitations of *PIPEDA* and to pursue the developing jurisprudence in common law privacy.

VII. Synthesis

Defamation law (libel) initially developed as an action to protect reputation. Towards the end of the 20th century and into the early part of the 21st century, this tort evolved to protect a wider range of speech; a movement that served to recognize the importance placed on freedom of expression in modern liberal democracies. Also, emerging as the same time as we approached the end of the 20th century was an evolution in freedom of expression that included or was adjacent to freedom of information. However, just as we recognized a fettered right to speech so too is the understanding of access to information. There is a justifiable infringement of both, but it must be strong enough to displace what may be viewed as a presumption in favour of these rights. This presumption, though, is not inviolable; but the threshold remains one of the most contested areas in modern democracies.

(i) Intrusion as an operating concept

Privacy can be separated into physical privacy and information privacy. With regards to protection of reputation and internet-based forms of communication, attention focuses on information privacy.

If there is a guiding term for the interconnection between privacy and defamation (especially in the social media context), it may be intrusion.[322] Privacy here is about the protection of or respect for private life and intrusion is utilised (though there could be other conceptions)[323] here to be an encompassing term. Writing about privacy, Mister Justice Eady observed: "it is important always to remember that the modern law of privacy is not concerned solely with information or 'secrets': it is also concerned importantly with *intrusion*".[324] Intrusion also appears to be a term of developing importance as suggested by Mister Justice Sharpe's extensive use of the term in *Jones v Tsige.* The UK Supreme Court's decision in *PJS* emphasises intrusion as a core aspect.

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[320] *Englander v Telus Communications Inc.* [2004] FCA 387, [46]. It is worth noting that in this case, the plaintiff had not been personally affected by the defendant. Still, the court made a "future-oriented" order requiring Telus to change its practices so as to comply with *PIPEDA.*

[321] *Jones* [50]-[51].

[322] David Mangan 'Regulating for Responsibility: Reputation and Social Media' (2015) 29 *International Review of Law, Computers and Technology* 16.

[323] In *Goodwin v NGN Ltd.* [2011] E.M.L.R. 27, [28], Tugendhat J. called the core components of private life confidentiality and intrusion. Offering another consideration, Roderick Bagshaw writes in "Obstacles on the Path to Privacy Torts" in Peter Birks (ed.) *Privacy and Loyalty* (Oxford: OUP, 1997), 133-144, 140: "The relationship between 'intrusion' and 'disclosure' is one of the most difficult to chart. Whether 'disclosure' is wrongful clearly turns to a large extent on the nature of the information disclosed, and the reasons for disclosing it. If there are forms of 'intrusion' which we regard as wrongful even if the purpose was to obtain information which could have been legitimately disclosed, then we must concede that 'disclosure' and 'intrusion' torts will protect different aspects of privacy, though the 'intrusion' tort could also sometimes protect the aspect protected by the 'disclosure' tort."

[324] *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB), [23] (emphasis in original).

The publication of information about an individual by another on his social media platform to a wide audience intrudes upon the claimant's reputation in a notably personal way. In law, the intrusion may be viewed as a matter of privacy and/or as one of libel. There are faint signs of contemporaneous connection but taken together it would seem that legal developments in both countries are following a similar path. On the Canadian side, though, this is mostly attributable to Mister Justice Sharpe. His use of Prosser developed the concept of intrusion in Canadian privacy law. It is intrusion that has also been developed in the English law, but more extensively.

The starting point for understanding intrusion as a central term must be Professor Prosser's seminal 1960 article. In it, he outlined four distinct torts in the following manner:

> It is not one tort, but a complex of four. The law of privacy comprises 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 except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, "to be let alone." Without any attempt to exact definition, these four torts may be described as follows:
> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
> 2. Public disclosure of embarrassing private 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.[325]

Professor Prosser argued against the notion of intrusion being a connecting factor. Instead his contention was that there had been a failure to see the distinct elements amongst these four torts.

> Taking them in order-intrusion, disclosure, false light, and appropriation- the first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not. The fourth involves a use for the defendant's advantage, which is not true of the rest. Obviously this is an area in which one must tread warily and be on the lookout for bogs. Nor is the difficulty decreased by the fact that quite often two or more of these forms of invasion may be found in the same case, and quite conceivably all four.'"[326]

These distinctions, though, do not overlook the similarities such as each of the torts, like libel, are actionable *per se*.

There are separate and distinct aspects to these torts; however they are part of the range of actions available to plaintiffs to protect separate aspects of reputation against intrusion. They are connected in a few ways. For example, the right protected is individual and non-assignable. It protects the individual in the sense of personal integrity. However, there is no right against challenges to or questioning of that reputation.

Looking at the first of Prosser's torts, intrusion upon seclusion, we may discern a physical act of intrusion (such as surreptitiously entering a person's house without invitation). This would be an intrusion that recalls the tort of trespass to land: there is an integrity which is breached upon entry that does not require there to be any actual damage inflicted. And yet, we may query the point further: why would an individual want to preserve a place of seclusion? As noted earlier, there are certain matters we would prefer to keep to ourselves. The reasons for this may vary. We may wish to preserve a place of solitude; though the likelihood of this in fact being a place of solitude (rather than a place of exclusion where some individuals enter) may be questioned. More often, there are certain matters we keep to ourselves because we do not want others to make judgements. This is a point about reputation. Ms. Tsige would not want any unauthorized

[325] Prosser 389 (references omitted).
[326] Prosser 407-408 (references omitted).

individual to check her bank account because, if just anyone can see this, judgements can be made based upon its contents.

The second privacy tort for Prosser is public disclosure. The essence of the tort is that some personal information has been made public. The means by which this information was obtained may itself be the subject matter of another privacy tort such as intrusion upon seclusion or breach of confidence. The fact of public disclosure, though, means that unwanted attention has been invited upon the innocent party; that is, there has been intrusive attention foisted upon the individual. Again, the basis for keeping this information from the public domain will likely bear upon reputation considerations.

The third privacy tort "consists of publicity that places the plaintiff in a false light in the public eye",[327] whether it is attributing a poor piece of writing to a famous author (as was the example of Lord Byron used by Prosser) or the unlicensed use of a photo of an individual to promote a product. Prosser identifies the reputation interests involved in this tort. In terms of intrusion, the emphasis is on the unwarranted, sordid attention regarding one's reputation/name.

Finally there is appropriation (specifically of an aspect of the plaintiff's identity). This tort is usually committed with some form of gain in mind. While Prosser contends there is no matter of intrusion here, it is suggested that this is indeed a matter of intrusion into reputation: appropriating an individual's identity for financial gain (because that identity facilitates it) or for purposes of sullying that individual's reputation. This tort seems to have more of a proprietary element; [328] a good name is a matter of goodwill or a commodity upon which to trade. Appropriation may overlap with defamation as it did in *Tolley v. J.S. Fry & Sons Ltd.*[329] The plaintiff was a prominent amateur golfer who recovered damages for the unauthorized use of his photograph in an advertisement by the defendant. The basis for the successful defamation claim was that the insinuation Tolley was paid for using his image would jeopardise his amateur standing. The Ontario Court of Appeal protected the commercial use of an individual's name (including his likeness, voice and reputation) without the individual's permission in *Krouse v Chrysler Canada Ltd*.[330] *Krouse* underscores that intrusion is at the heart of Prosser's appropriation tort because it vindicated the plaintiff's control over the use of his name as linked to its commercial value. There is a space against which unauthorized incursions are protected.

The above elaboration of the unifying premise of intrusion may appear to stretch the centrality of the term. A further reason for using intrusion is the importance of an accessible unifying element. What is meant by this is that there is a real potential for efforts to protect reputation to take the law into divergent terrain. The hope is that intrusion may serve the purpose of being a term of reference moving forward which encapsulates some element of widespread understanding when it comes to protection of reputation.

This discussion of intrusion may be set within a framework of high and low expectations of privacy. The aforementioned decisions speak to a spectrum of protection for private information;

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[327] Prosser 398.
[328] This conception is echoed by Robert Post who saw reputation as a type of property where an individual builds up her reputation through hard work: Robert Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 *California Law Review* 691.
[329] [1931] A.C. 333.
[330] (1970), 1 O.R. (2d) 225.

that is, there is a range to the expectation of privacy that spans high to low. One point that emerges clearly from the UK decisions is that courts will be vigilant regarding intrusion where children are involved.[331] Furthermore, there seems to be a jurisdictional element to these decisions. Looking again at *PJS,* the injunction was maintained within the jurisdiction even though the information could be obtained in other jurisdictions. The British Columbia Court of Appeal's decision in *Equustek Solutions Inc. v Google Inc.,*[332] where the court maintained an injunction barring Google from permitting the defendants' websites from coming up in search options, adds to this discussion insofar as it states that jurisdictions (and in keeping with s.92 of the *Constitution Act, 1867*) may be maintained even on the borderless internet.

To further illustrate intrusion, consider the European Court of Human Rights' decision in *Bărbulescu v Romania*.[333] While the pleadings in *Bărbulescu* asserted a violation of privacy rights, the majority's remarks on this topic prompts further consideration in relation to protection of speech within the workplace. And so, there are two further points from the decision that situate the case and ground the ensuing critique. Mr Bărbulescu was terminated from his employment as an engineer in charge of sales for the personal use of a Yahoo Messenger account he had set up for the purpose of clients' inquiries.[334] During a period of a work week, his employer had monitored his account and found that he had exchanged messages with his fiancée and brother. The employer had also monitored a personal Yahoo Messenger account in which there were exchanges between Bărbulescu and his fiancée. The basis of his termination was for breach of the company's internal regulations prohibiting such activity, namely the following provision: "It is strictly forbidden to disturb order and discipline within the company's premises and especially … to use computers, photocopiers, telephones, telex and fax machines for personal purposes."[335] The employer's termination was upheld at all levels of court, up to and including the ECtHR. From a strict construction of the facts, some form of discipline may have been justified since Bărbulescu had put into evidence, during disciplinary proceedings, that he had not used Yahoo Messenger for personal purposes at the office.[336]

Still, a difficulty with *Bărbulescu* stems from what seems to be a casual assessment of these facts. Employer monitoring of his accounts (work and personal) was justified because it was limited in scope (seemingly because it consisted of one work week).[337] There was no evidence of the employer suspecting the use of company time for personal messages. Nevertheless, monitoring these accounts was reasonable "for an employer … to verify that the employees are completing their professional tasks during working hours."[338] These points require further consideration (discussed in the ensuing paragraphs) than was provided by the Court. And yet, the questions continue. The text of Bărbulescu's messages was produced in court, including those from his personal account. Even this was justifiable because the content of the communications was not a decisive factor in the domestic courts' decision.[339] The fact of disclosure elicited no consideration.

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[331] See for example the *PJS* and *Murray* decisions.
[332] 2015 BCCA 265.
[333] Application 61496/08 [*Bărbulescu*]. A hearing by the Grand Chamber started 30 November 2016.
[334] In Romania, home internet access is notoriously slow; whereas workplaces have better connections. And so, individuals tend to check social media (for example) at work.
[335] *Bărbulescu* [8].
[336] *Ibid* [10].
[337] *Ibid* [60].
[338] *Ibid* [59].
[339] *Ibid* [58].

Moving to the decision itself, first, for the ECtHR, the issue before it was "whether, in view of the general prohibition imposed by his employer, the applicant retained a reasonable expectation that his communications would not be monitored."[340] It cannot be said that Bărbulescu had an expectation of privacy while at work. The ECtHR made this clear when it found "that it was not unreasonable for an employer to want to verify that the employees are completing their professional tasks during working hours."[341] Instead, as alluded to above, there were no specific grounds for monitoring Bărbulescu's messages. It must be wondered if the Court was giving effect to a general power for employers to intrude upon a worker's privacy, regardless of reason. Furthermore, the evidence of a first warning was dubious; putting aside that incremental discipline has long been a standard workplace practice.

Second, the court examined the case from the "standpoint of the State's positive obligations since he was employed by a private company, which could not by its actions engage in state responsibility under the Convention."[342]This was an important case for the ECtHR to take up. The starting point of the employer was entirely within reproach: an absolute ban on personal communications at work acts as a strict liability approach to worker discipline that is entirely unrealistic. A role remains for the State's positive obligations in this instance. This case evidenced a selective interpretation of intrusion: the right of an individual was trumped by commercial interests (as expressed through an absolute ban on non-work internet access at the workplace). Employment law will likely be a source of further consideration of these issues.[343] In that setting there are persistent efforts to contract out of having to deal with the foibles of people. The handmaiden of this approach is the measurement of harm: what harm has the worker caused to the employer. Bărbulescu, we must infer, wasted company time and resources. And yet, this approach entirely ignored that there were other considerations. Work is an important part of an individual's life; but it is not the entirety of that life. Personal matters may arise at any time: whether that is a family emergency during working hours or a moment to step away[344] from one work item in order to start another. To be clear, there is no endorsement here of lazy work habits. Rather, there is an acknowledgement that people occupy jobs and as a result there are certain matters which (try as we might) cannot be eradicated by precatory rules.

If we endeavour to surmise the path charted for protection of reputation, there is an unclear map provided by the law. *Google Spain* illustrates. In *Google Spain,* the CJEU did not mention Art.11 of the EU Charter. It also described access to information by the internet as an "interest" rather than a right. This classification gives rise to a general rule that a "data subject's right to privacy and data protection override the interest of Internet users in having access to information."[345]

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[340] *Ibid* [42].
[341] *Ibid* [59].
[342] *Ibid* [53]
[343] David Mangan, "Social media in the workplace" in David Mangan and Lorna E. Gillies (eds) *The Legal Challenges of Social Media* (Cheltenham: Edward Elgar, 2017). Employment law has not been considered here as it was understood to have diverted attention from the Commissions primary aim, protection of reputation. It is viewed as a future potential source of consideration because of its connection with the dignity of the person as expressed by the Supreme Court of Canada in *Re: Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 368: "[a] person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being."
[344] According to one report from the United States, 34% of those surveyed used social media to 'take a mental break from work': K Olmstead, C Lampe and N B Ellison, 'Social Media and the Workplace' Pew Research Center (22 June 2016) http://www.pewinternet.org/2016/06/22/social-media-and-the-workplace/
[345] Lynskey 147-148

Lynskey concludes: "the Court appears to assume that when the rights to privacy and data protection are at stake the right to freedom of expression extends only to 'public interest' information as opposed to information in which the public may have an interest."[346] Applying this line of thinking to the present project in Canada, there is a question as to whether or not Canadian courts would view this hierarchy of privacy as data protection being preserved at the expense of a more robust freedom of expression. It may be that the matter is more about access to information in the CJEU's conception. However, the difficulty with this is that the premise of free speech is the sharing of information through remarks. It would seem difficult to parse freedom of expression from freedom to information. This is a challenging balance as it seems that there is concern that freedom to information will form an end-run around privacy. However, a statement suggesting that freedom of expression is to be subservient to a right of privacy will encounter some significant challenges in response.

(ii) Reputation: the legal means for redress

The challenge in Ontario (and by extension Canada) is that the notion of privacy remains rhisomatic. There is much reliance on UK law in the area of breach of confidence. In privacy, there has been adoption of Prosser's four privacy torts (as stated in the American *Restatement of the Law (Second) Torts*). If the matter remained at that point, perhaps the area would be clearer. However, there seems to be further reliance upon the English law based upon how breach of confidence has developed. While Canada has not reached this point, English law has developed the tort of misuse of personal information from the origins of the action in breach of confidence. Given the continuing close linkage between Canadian and English private law (notably contract and tort),[347] it is foreseeable that a similar tort will develop in Canada. This would then leave the quandary of how the Prosser privacy torts and the English misuse of personal information tort may co-exist. Just as foreseeable is that this matter will take some time to develop. For this reason, it is suggested that a focus on clarifying the purposes of these actions is necessary. The UK Law Commission, in 1974, put the rationale for establishing clarity in prescient terms: "The question of the basis of the jurisdiction is not any longer a matter of particular importance in establishing the existence of the jurisdiction; the cases themselves provide ample authority. But it remains a vital question in forecasting the future development of the law. No one can say with any assurance how a particular issue will be decided in the future if it is not certain, for instance, whether the courts will apply equitable or tort principles."[348] The Ontario Court of Appeal's interpretation in *Chippewas* of the fusion of equity and common law as a matter requiring on-going adaptation to the contemporary circumstances points to a broad range of remedies for the courts. Still, there should be some clarity as to the aims of the actions, putting aside the remedial action courts may take.

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[346] *Ibid* 150.

[347] Canadian common law is largely derived from the UK and continues to borrow from it. For example, J.D. students will study the Canadian law of contract; but many of the cases studied are English. This is not to say all Canadian law is strictly adherent. Canadian law diverged from UK tort law with the retention of Lord Wilberforce's duty of care analysis in *Anns v. Merton London Borough Council*, [1977] 2 All E.R. 492 by the Supreme Court of Canada in *Kamloops (City) v. Nielsen* (1984), 10 D.L.R. (4th) 641. The House of Lords in *Murphy v. Brentwood District Council*, [1991] 1 A.C. 338 overruled *Anns*. Still, the Supreme Court of Canada's decision in *Cooper v. Hobart* [2001] 3 S.C.R. 537 recalls the cautious approach to the duty of care analysis by the House of Lords in *Caparo Industries plc v. Dickman* [1990] 2 A.C. 605.

[348] *Working Paper No. 58, Breach of Confidence* [40].

VIII. Summation

This research aims to provide the Commission with guidance regarding actions to protect reputation beyond defamation. Common law avenues have been primarily pursued as this seems to be the more likely route for more immediate development; though statutory routes have been discussed also. This study has kept in mind how this research relates to the Commission's mandate for this project.

The Commission has aptly identified the intersection between privacy and defamation as an area for discussion within its project. Research has been conducted focusing on the developing law pertaining to privacy. Privacy is explored through privacy as a concept as well as current legal formulations in Canada (particularly Ontario). Connected to this analysis is the action in breach of confidence. In relation to both privacy and breach of confidence, legal developments in the UK have been explored. The reasons for this include: the significant foundation that English law has and continues to play in Canadian law as well as the fact that these areas have developed quite a bit in the UK (such as claim in misuse of private information). Finally, UK law has developed a further area for reputation redress through data protection. This is largely due to the influence of the UK (until 2019) being a member of the European Union. These three areas (privacy, breach of confidence and data protection) have been explored insofar as they pertain to the remit of the Commission's project.

IX. Appendix

(i) Speeches from the Computers, Privacy and Data Protection Conference, Brussels, Belgium 25-27 January 2017.[349]

In a keynote address at the Computers, Privacy and Data Protection Conference in Brussels in 2017, Vera Jourova, European Commissioner for Justice, Consumers and Gender Equality,[350] spoke of the European Commission's expectations regarding the GDPR. Overarching the speech were certain guiding principles including: the need to harmonise rules; a greater level of certainty for businesses and those who handle data. This speech confirmed what to many developed countries seems to have emerged as the case: Europe is a world leader in protection in personal data and sees itself as a "digital single market". With regards to implementation Commissioner Jourova identified four point. First, the Commission must work with member states to make sure that legislation will be harmonised. Second, coherent enforcement, though challenging because Data Protection Agencies in Europe are autonomous, must be achieved. Associated with this point, the third matter is discretion power for imposing sanctions with some form of equivalency across the single market. Finally, there is acknowledgement that there must be buy-in by those who fall under the regulation. To this end, the Commission must explain and inform businesses and citizens as to how to apply the regulation in the day to day. This purpose is currently being served by the Article 29 working party (its report will be published by mid-2017).

Bruno Gencarelli, Head of the Data Protection Unit at the European Commission, spoke about the adequacy regime for third countries (of which Canada would be one).[351] He stated: "Adequacy is not about being a photocopy." For him, the effective implementation of privacy rights requires a foreign system to deliver similar protection; what was called "essential equivalence". The *Schrems* decision was identified as demonstrating different means of providing this similar level of protection. The process of gaining this status commences when a foreign government expresses interest. He envisioned such an approach being undertaken by a government in conjunction with its Data Protection agency with expression of interest coming from "quite a high political level."

Gencarelli seemed to admit to a certain level of fluctuation in the term adequacy. He commented: "Adequacy is a finding at a certain point in time. A country can evolve. An adequacy decision is a living document and must be monitored." The elements considered in a ruling regarding adequacy can be found through the work of the Article 29 Working Party. As well, Art. 45 of the GDPR contains a detailed list of items to be considered. An emphasis was placed upon equivalence not meaning being symmetrical or a point to point duplication. Rather, the key principles of the GDPR must be addressed; but protection can be reached by different means.

As has been the case with many EU initiatives, there are critics. In the same panel on which Gencarelli appeared there were two other panel members who drew out the criticisms of the

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[349] The conference website is: http://www.cpdpconferences.org

[350] "Implementing the Data Protection Regulation" Computers, Privacy and Data Protection, Brussels, Belgium, January 25, 2017. This keynote address is found at the start of the following video: https://www.youtube.com/watch?v=gBBSOS9GvNA

[351] "EU Adequacy Status for International Data Transfers" Computers, Privacy and Data Protection, Brussels, Belgium, January 25, 2017. This speech is found at: https://www.youtube.com/watch?v=DylC9xCSskU

adequacy process. Daniel Cooper of Covington and Burling (UK) outlined five concerns or criticisms:

- Lack of certainty: question of investing resources
- Lack of adequacy of measures: measures are not good for facilitating data transfer across jurisdictions
- Lack of uniformity: Data Protection Agencies have different standards (though he noted the consistency mechanism in GDPR may resolve this)
- Lack of alacrity: mechanisms are slow in coming into place. There are few known adequacy determinations completed by the EU Commission.
- Lack of transparency: industry would benefit from understanding the timeframes and clarity as to adequacy measures.

Another line of critical engagement came from Professor Kristina Irion, a Senior Researcher at the Institute for Information Law at the University of Amsterdam and an Associate Professor at the School of Public Policy at the Central European University. She contended that the language of the GDPR remains vague. The vagueness jeopardizes the preference private businesses have in keeping personal data (such as servers) in EU countries. They do so because the current Directive reduces legal uncertainty. Therefore, EU has become a major locale for data servers. Not only a legal problem plus the Snowden revelations (pulls the trust out of the market).

(ii) A note on U.K. law

Given the outcome of the 2016 referendum in the United Kingdom to leave the European Union, there is a potential for the law to change insofar as it pertains to the present research. It may be of interest to note that there seems to have been a recent movement towards developing horizontal direct effect with regards to certain rights; that is, enforcement of rights may not necessarily be limited to government conduct. For a Canadian audience, this may be similar to the Supreme Court of Canada writing of *Charter* values permeating into private sector scenarios.

Recent decisions of English appellate courts have elaborated upon the horizontal direct effect of rights. These cases do not necessarily establish a concrete rule. They do set a course for further consideration of the topic. In this manner the decisions line up with the argument that there is horizontal direct effect of public rights in private law circumstances. The Court of Appeal in *Benkharbouche & Anor v Embassy of the Republic of Sudan*[352] outlined the horizontal direct effect of Article 47 of the Charter of Fundamental Rights of the European Union 2004 (effective remedy for a violation of a right). The court grounded its decision in the more recent case law of the Court of Justice of the European Union (CJEU). In particular, the English court took note of the CJEU's decision in *Kucukdeveci v Swedex GmbH and Co KG*[353] which found that non-discrimination (here, age discrimination) was a general principle of EU law to which effect must be given horizontally. This decision effectively extended the principle from *Mangold v Helm*[354] to the equivalent Charter provision. However, in *CGT (Union Association de mediation sociale v Union locale des syndicats CGT,*[355] the CJEU found that workers' right to information and consultation (Article 27) did not have horizontal direct effect without enabling national legislation. Article 47 was distinguished as a provision that did not require national legislation to

[352] [2015] EWCA Civ 33 [*Benkharbouche*]. The reasoning here was applied in the later Court of Appeal decision in *Vidal-Hall v Google Inc* [2015] EWCA Civ 311 [105]. Leave to appeal to the United Kingdom Supreme Court was granted 23 July 2015 on this issue.
[353] Case C-555/07 [2010] All ER (EC) 867.
[354] Case C-144/04 [2005] ECR I-9981.
[355] Case C-176/12 [2014] ICR 411.

be effective. And so, the question remains 'which rights and principles contained in the Charter might be capable of having horizontal direct effect and which would not.'[356] The *Benkharbouche* Court ruled that Article 47 was 'enshrined … as a general principle of Union law'[357] based upon the aforementioned CJEU decisions coupled with explanations accompanying the Charter.[358] These decisions suggest scope for the argument that speech rights permeate the public/private divide. Article 11 (free speech) of the Charter of Fundamental Rights of the European Union 2004 would seem to be one of the general principles of EU law (akin to Article 47 in *Benkharbouche*). Despite departure from the European Union, free speech remains an important right that has garnered persistent attention; for example the efforts to reform defamation law lead to the passage of the Defamation Act 2013 that codified (among other points) the common law defences.

The status of certain rights can give effect to opportunities for individual development. On that point, the United Kingdom Supreme Court in *Preddy v Bull*[359] (notably Baroness Hale) discussed the concept of rights permeating into the private setting. The Court unanimously found that the couple (Mr and Mrs Bull) who owned and operated a private hotel had discriminated against the same sex couple (Mr Preddy and Mr Hall) by refusing them a room with a double-bed. While the Bulls were religious and objected on those grounds, Parliament had stepped in 'to secure that people of homosexual orientation were treated equally with people of heterosexual orientation by those in the business of supplying goods, facilities and services.'[360] The importance of this measure stems from the notion of individual personhood: '[s]exual orientation is a core component of a person's identity'.[361] Finally, the Supreme Court's decision in *Kennedy v Information Commissioner*[362] suggests that English courts may be willing to use the common law in order to give effect to rights. In that decision, the majority discussed the 'common law presumption of openness';[363] though the dissent's scepticism should be noted.

Gathered together, these appellate level rulings fall short of unequivocal statements on future directions. Nevertheless, they do suggest a willingness by English courts to move in a direction of giving effect to rights in both horizontal and vertical manners.

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[356] *Benkharbouche* [80].
[357] *Ibid.* It should be noted that the arguments here do not depend upon the finding that the Lisbon Treaty accorded the Charter of Fundamental Rights with the same status as a treaty: *Benkharbouch* [78]. This has been a contested point: Andrew Sanger, 'State immunity and the right of access to a court under the EU Charter of Fundamental Rights" (2016), 65 *International and Comparative Law Quarterly* 213; Joshua Folkard, "Privacy and conflicts in the Court of Appeal" (2016), 132 *Law Quarterly Review* 31.
[358] OJ 2007 C303, p17.
[359] [2013] UKSC 73.
[360] *Ibid* [38].
[361] *Ibid* [52].
[362] [2014] UKSC 20.
[363] *Kennedy* [47]. Consider Lord Mance's statement: 'Since the passing of the Human Rights Act 1998, there has too often been a tendency to see the law in areas touched on by the Convention solely in terms of the Convention rights. But the Convention rights represent a threshold protection; and, especially in view of the contribution which common lawyers made to the Convention's inception, they may be expected, at least generally even if not always, to reflect and to find their homologue in the common or domestic statute law.'