

**SHEEHAN &
PARTNERS
SOLICITORS**

**Criminal Defence &
Human Rights
Specialists**

**MEDIA INTRUSION ON PRIVACY
DURING DUE PROCESS**

VS

FREEDOM OF SPEECH

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PRIVACY AS A RIGHT

- THE CONSTITUTION

- Right to Privacy – Unenumerated – Article 40.3
 - *McGee v. Attorney General* [\[1974\] I.R. 284](#)
 - *Norris v. Attorney General* [1984] I.R. 36
 - *Kennedy v. Ireland* [1987] 1 I.R. 587

- THE EUROPEAN CONVENTION ON HUMAN RIGHTS

- Right to respect for private and family life, home and correspondence – Article 8

THE INTERNATIONAL COMPARISON

USA

- Recognised as a right since 1890's
- Privacy Act 1974
- Samuel Warren and Louise D Brandeis (1890) "The Right to Privacy", Harvard Law Review (Vol.4, No. 193)
- Roe v Wade 1973 – the Fourteenth Amendment to US Constitution contains a right to privacy that protects a woman's right to choose.

EU

- France
 - Article 9 of the Civil Code "everyone has right to respect for private life"
 - Remedies to breaches of privacy include civil claims for damages and criminal offences
- Germany
 - Legacy of WW2
 - Enacted world's first data protection law in 1970

RIGHT TO PRIVACY IS NOT ABSOLUTE

Competing rights:

- Freedom of Expression :—
 - Article 40.6.1 – subject to public order and morality
 - Article 10 ECHR– freedom of press to inform the public of matters and for the public to be properly informed (Sunday Times v United Kingdom (1979 – 80) 2 EHRR 245)
- Public Administration of Justice:-
 - Article 34.1
 - Article 6 – Right to fair public hearing

FREEDOM OF EXPRESSION VS PRIVACY

- *Herrity v Associated Newspapers (Ireland) Ltd* [2008] IEHC 249, [2009] 1 IR 316

“There is a hierarchy of constitutional rights and as a general proposition, I think that cases in which the right to privacy will prevail over the right to freedom of expression may well be far and few between. However, this may not always be the case and there are circumstances where it seems to me the right to privacy could be such that it would prevail over the right to freedom of expression. One of those circumstances arises on the facts of this case where the freedom of expression asserted is the publication of material obtained unlawfully.”

- *R. v Central Independent Television Plc* [\[1994\] 3 WLR 20](#)

'Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.'



ANY IMPAIRMENT TO RIGHTS
MUST BE
LEGITIMATE
AND
PROPORTIONATE

FREEDOM OF EXPRESSION VS PRIVACY – OUTSIDE THE COURT PROCESS

Hanahoe v Hussey [1998] 3 IR 69

“This was a deliberate leaking to the media which caused considerable embarrassment to the [firm]...it was an outrageous interference with their privacy and constitutional rights.”

Gray v Minister for Justice [2007] 2 IR 654

Family forced from their home when it was reported their relative, who lived with them, was a convicted sex offender. Breach of family’s right to privacy.

LK Newspapers v Independent Star Ltd. LK v Independent Star td. [2011] 2 ILRM 272

Held the plaintiffs privacy was not breached following the defendants publication of the identity of a convicted rapist which inadvertently led the neighbours of the victim to identify her

RESTRICTIONS ON FREEDOM OF EXPRESSION DURING DUE PROCESS

STATUTE

- Criminal Law (Rape) Act 1981
 - Section 7 – Anonymity of Complainants
 - Section 8 – Anonymity of Accused
- Criminal Justice Act 2006 Section 181
- The Children Act 2001
 - Section 252

SECTION 252 CHILDREN ACT 2001

- In relation to any proceedings for an offence against a child or where a child is a witness in any such proceedings
- No report or picture which is likely to lead to the child's identification may be published
- **DPP v E.C. and Media Outlets [2020] IECA 292**
- **DPP v DH [2020] IECA 321**
- Prosecutions under Section 51 (3) Children Act 2001

SUB JUDICE RULE

- Sub judice rule - criminal contempt of Court
- Operates to prevent the publishing of material that would interfere with the administration of justice
 - **Irish Times Ltd v Ireland [1998] 1 IR 359**
 - Real risk of an unfair trial?
- Only applies to *pending* proceedings i.e. after charging but includes before sentencing – **Kelly v O’Neill [2000] 1 IR 354**
- Does not apply to imminent proceedings – **DPP v Independent Newspapers (Irl) Ltd. [2003] IEHC 624, [2003] 2 IR 367**
 - Prejudicial material can be published until charging which remains online
- **DPP v Independent Newspapers ([2005] IEHC 353, [2006] 1 IR 366**
 - Is the material published intended to interfere with the administration of justice or does it create the perception of such interference?
 - Is there a real risk the accused will not receive a fair trial?

REMEDIES TO UNJUSTIFIED MEDIA INTRUSION DURING CRIMINAL TRIAL

- Against mainstream media
 - Inherent jurisdiction of trial judges to make orders restricting publication.
 - Defamation proceedings
 - Sub judice contempt

- Against social media
 - ?
 - Prosecutions under section 51 (3) CA

A photograph of Mark Zuckerberg sitting at a desk in a hearing room, looking forward. He is wearing a dark suit, a light blue shirt, and a blue tie. In front of him is a microphone and some papers. The background is filled with other people seated at desks, some looking towards the camera and others looking towards the front of the room. The lighting is somewhat dim, typical of an indoor hearing room.

**Baroness Massey – UK Parliament Human Rights Committee 9th
December 2020**

*Do social media platforms get the balance right between guaranteeing
freedom of expression and protecting people from abuse?*

SOCIAL MEDIA

- “Trying to regulate – for lack of a better word – what goes on in social media is a real challenge...How that medium is used in respect of court cases must be guided in some manner. This is becoming one of our biggest challenges.” **Mrs Justice Susan Denham, May 2014**
- Unregulated ?
- Unmonitored?
- Twitter and fact checking fake news = regulating content?





WHAT
HAPPENS
WHEN
PRIVACY IS
NOT
RESPECTED?

- Attacks on family homes
- 'Belfast trial'
- Impact on mental health of victims and accused
- Infringement on right to fair trial
- Barrier to rehabilitation

HOW CAN WE STRIKE THE BALANCE?

- What is the objective of freedom of expression? – to inform the public of matters that are in the public interest.
- Is it in the public interest to know the full names and addresses of persons charged or suspected of criminal offences?
- Is it in the public interest to hear intimate and graphic details of trials?
- How can freedom of expression and privacy both be protected?



SO WHAT DO WE DO?

- Legislation? How do we define what is reasonable?
- Practical protections – no publishing of addresses, no publishing of names unless convicted? How do we protect right to fair trial and appeal?

THANK YOU!

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