

Institution: Durham University
Unit of Assessment: 20. Law
Title of case study: Privacy, Libel and Freedom of Expression [CS2]
<p>1. SUMMARY OF THE IMPACT</p> <p>Research conducted by Durham University on the reconciliation of free speech with rights of privacy and reputation has significantly affected contemporary law and policy around the law of privacy, media injunctions and libel reform. Specifically, it has:</p> <ul style="list-style-type: none"> (1) resulted in a substantial contribution to the Ministry of Justice (MoJ) Libel Working Group and hence to the Defamation Bill 2012 which followed (now the Defamation Act 2013); (2) strongly influenced the report of Parliament's Joint Committee on Human Rights on the human rights aspects of that Bill; (3) influenced a major parliamentary inquiry on privacy; (4) helped change Crown Prosecution Service (CPS) guidelines on prosecuting the media for privacy-related offences including phone-hacking; (5) been used in argument by an NGO intervening in two important cases before the European Court of Human Rights (ECtHR). <p>2. UNDERPINNING RESEARCH</p> <p>The underpinning research was carried out by Phillipson (partly in collaboration with Fenwick), under the auspices of the Human Rights Centre and its major three-year, AHRC-funded project, <i>Judicial Reasoning under the Human Rights Act</i> (2002-05). The research addressed the problem of how English law can accommodate the developing case-law of the ECtHR setting out the correct interpretation of Article 8 of the European Convention of Human Rights (ECHR) – which protects privacy and reputation – and its interplay with Article 10 of the ECHR, which protects freedom of expression. This jurisprudence has fed into English law in two major areas: first, the development since 2000 of a common law action for invasion of privacy by publication of private information, often resulting in injunctions preventing publication of articles in the media (analysed in outputs 1-4); second, judicial and legislative reform to the law of libel, and in particular the Defamation Act 2013 (outputs 1 and 5).</p> <p>In particular, the research: (a) analysed the proper scope and weight of Article 8 of the ECHR in relation to publication by the media of non-consensually taken photographs of individuals in what was the first and most influential full length analysis of this issue (outputs 1, 3, & 4) and (b) set out an original methodology for courts engaged in complex proportionality-based balancing of Articles 8 and 10 of the ECHR in privacy cases; this was based in turn on a theoretical analysis of the philosophical values underlying these two rights (outputs 1, 2, 3 & 5). Phillipson's research, rejecting the presumptive priority of freedom of expression (as seen, for example in US law), has affected English law's treatment of this issue and continues to influence both the public policy debate and specific proposals for reform in this area in libel and privacy.</p> <p>It also fed into a further issue: the implications for reform of domestic libel law of the recent recognition by the ECtHR of reputation as an aspect of Article 8 of the ECHR. Phillipson's research in this area consisted of outputs 1 and 5, the former constituting the first full length academic treatment of the Article 8/libel issue, the second the first full analysis of the then Defamation Bill 2012. Phillipson concluded that the current stance of the common law of defamation represented by what is known as <i>Reynolds</i> privilege – protecting responsibly-published, public interest journalism – was broadly in accordance with ECHR principles and that the more radical reform proposals of the highly influential Libel Reform Campaign (http://libelreform.org/) were based on unsound comparative law analysis, failed to engage with the philosophical foundations for free speech and would, if implemented, place the UK in breach of its obligations under Article 8 of the ECHR.</p> <p>Phillipson was a lecturer, then senior lecturer at Durham between 2000 and 2005, and has been a</p>

Professor of Law at Durham University since 2007. Fenwick has been at the Law School since 1987 and a Professor since 2001.

3. REFERENCES TO THE RESEARCH

1. G Phillipson and H Fenwick, *Media Freedom under the Human Rights Act*, (Oxford: OUP, 2006) pp. 1115 [ISBN: 978-0-40-694289-0] (chapter 21 was co-authored by Phillipson and C. O'Brien, then doctoral candidate at European University Institute, Florence; Phillipson's c. 60%). Submitted as RA2 output in RAE 2008 where 95% of outputs rated 2* or above and reviewed favourably in the leading journal: (2007) *Public Law* 852-855. The book's analysis of the leading UK and European privacy cases was discussed by the UK Court of Appeal in *McKennitt v Ash* [2006] EWCA 1714 at [40] and [41].
2. G Phillipson, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' [2000] 63(5) *Modern Law Review*, 660-693 (with Fenwick) [DOI: 10.1111/1468-2230.00286] Submitted as RA2 output in RAE 2001. The *Modern Law Review* is rated A* by the Australian Research Council in 2010 and is generally regarded as one of the top four general journals in the UK with an ISI impact factor of 0.453.
3. G Phillipson, 'Transforming Breach of Confidence? Towards a common law right to privacy under the Human Rights Act' (2003) 66(5) *Modern Law Review* 726-59 [DOI: 10.1111/1468-6605003]. The article was cited by the Court of Appeal (*Douglas v Hello* (No 3) [2005] 3 WLR 881 at [47]) and House of Lords in the UK (*Campbell v MGN* [2004] 2 AC 457 at [18]) and the Court of Appeal in New Zealand (*Hosking v Runting* [2003] 3 NZLR 385 at [44] and [132]).
4. G Phillipson, 'The Common Law, Privacy and the Convention' in H. Fenwick, G. Phillipson, and R. Masterman (eds) *Judicial Reasoning under the UK Human Rights Act* (Cambridge, CUP, 2007) [DOI: 10.1017/CB09780511493775.012] Favourably reviewed in (2008) *Public Law* 406-407.
5. G Phillipson, "The "Global Pariah", the Defamation Bill and the Human Rights Act' (2012) 63(1) *Northern Ireland Legal Quarterly*, 145-82 [Can be supplied on request]. The *Northern Ireland Legal Quarterly* is one of the UK's leading generalist law journals and rated A by the Australian Research Council in 2010.

4. DETAILS OF THE IMPACT

The considerable reach of these impacts may be seen by the fact that they have extended to two major government bodies (the MoJ and CPS), two Parliamentary Joint Committees, and an NGO. Their significance lies in the substantial changes they have brought about to legislation, parliamentary assessment of the human rights implications of that legislation, the judgment of an international human rights court, and national policy on prosecuting journalists.

1. Influencing the Defamation Act 2013

Phillipson was invited to be the sole academic member of the Ministry of Justice Libel Working Group (Jan-March 2010), which considered options for reform of defamation law. Proposals from the Report were then embodied in the Government's Defamation Bill, published in draft in 2011 and introduced into Parliament in 2012. Drawing on **output 1**, Phillipson drafted a report for the Group ("*Public Interest Defence*" (1 Mar 2010)), summarising his research findings on relevant case-law of the ECtHR. His arguments were incorporated into the Working Group's Report and assisted in convincing the MoJ that proposals for more radical pro-media reforms advocated by the Libel Reform Campaign (LRC) over-privileged free speech and therefore risked breaching the UK's obligations under Article 8 ECHR. Paragraph 79 of the Report adopted Phillipson's argument (in particular paragraphs 83-85 were drafted and corrected by Phillipson (**source 1**)) and advocated using legislation not to introduce the radical new defence advocated by the LRC, but instead to consolidate and clarify the existing *Reynolds* defence. The Defamation Bill (cl 4) followed this recommendation (**source 2a at [29]**). An amendment to clause 4 in the name of Lord Lester was subsequently made to the Bill – see now section 4 of the Defamation Act 2013 – but this simply amounted to a different way of capturing the existing defence, as the Explanatory Notes to the Act make clear (**source 2b at [29]**).

2. Contribution to Parliamentary assessment of human rights implications of Defamation Bill

Impact case study (REF3b)

Parliament's Joint Committee on Human Rights (JCHR) considers the compatibility of all proposed legislation with the UK's human rights obligations. Drawing on **output 5**, Phillipson submitted evidence to the Committee on the Defamation Bill 2012 which, inter alia:

- (a) argued against a radical change to the Bill proposed by the Libel Reform Campaign [17-28];
- (b) suggested that the Bill should be amended to require a higher burden of harm to be shown by corporate claimants [46-47] (http://www.parliament.uk/documents/joint-committees/human-rights/Prof_Gavin_Phillipson.pdf).

In its Report (**source 3**), the JCHR responded to each point:

On point (a) the Committee gave extensive consideration to Phillipson's arguments [29-34] and adopted them, stating: "We share the view of Professor Phillipson on this matter..." [34].

On point (b) the Committee set out Phillipson's argument with approval at [55] and its recommendation concurred with his [58].

Parliamentarians and the Government followed the recommendation in point (a) by continuing to resist the proposed Libel Reform Campaign amendment. The House of Lords amended clause 1 of the Bill in line with the JCHR's recommendation on point (b) – see now s1(2) of the Act.

Moreover, the significance of JCHR reports extends well beyond specific changes made to the legislation to which they relate in Parliament. Their reports are an authoritative finding by Parliament on the compliance of legislation with the UK's human rights obligations and are used by lawyers preparing court challenges, and influence other parliamentary bodies, NGOs, and the findings of international human rights bodies, including the UN and ECtHR.

3. Contribution to Parliamentary Inquiry on Privacy

Phillipson gave oral and written evidence to the Joint Committee on Privacy and Injunctions in October 2011, which was established following controversies around the granting of 'super injunctions' to celebrities and public figures, to consider whether changes in the law and media regulation were needed (p 848-857: http://www.parliament.uk/documents/joint-committees/Privacy_and_Injunctions/JCPIWrittenEvWeb.pdf). Phillipson was one of only four legal academics invited to give oral evidence to the Committee. His evidence (**drawing on outputs 1-4**) argued that section 12 of the Human Rights Act (HRA) struck an appropriate balance between Articles 8 and 10 of the ECHR and therefore should not be radically reformed, as many in the media were arguing. The Committee's Report cited Phillipson's evidence (**source 4, at [55]; note 63**) and endorsed his argument against the radical reform of section 12, saying "We do not recommend any alteration to the law in this area" [59]. This recommendation has been followed by Parliament and the Government in that neither has announced any plans to reform section 12 of the HRA.

4. Influence on Crown Prosecution Service official guidance

The Director of Public Prosecutions (DPP), in the light of the phone hacking scandal, published draft guidelines to assist prosecutors considering the "public interest" element of the decision whether to prosecute journalists who commit offences such as phone and email hacking. Phillipson was invited to discuss the guidelines in a small seminar with interested parties (mostly national media bodies; Phillipson was one of only three legal academics invited) and respond to the formal consultation process (**source 7**).

Drawing on **outputs 1-4**, Phillipson, in his written and oral evidence to the DPP (<https://www.dur.ac.uk/resources/hrc/projects/ConsultationontheInterimGuidelinesforProsecutorsonAssessingthePublicMediaInterestinCasesAffectingtheMedia.pdf>), recommended narrowing how the interim Guidelines defined the "public interest" journalists might be considered to have served by obtaining information through unlawful means. Para 31(d) of the interim Guidelines stated that this included conduct "capable of raising or contributing to an important matter of public debate" (**source 5**). Phillipson argued that, in order to avoid privileging speech over privacy, a more restrictive interpretation of "public debate" was needed, indicating what types of debate were

Impact case study (REF3b)

sufficiently important here. He suggested instancing “seriously unethical conduct”, “misuse of public money” and seriously misleading the public. The Final Guidelines partially adopted this point by re-defining “public debate” as including “serious impropriety, significant unethical conduct and significant incompetence, which affects the public” (**source 6, [31(d)]**).

5. Influence on submission to and judgment of European Court of Human Rights

Output 1 impacted on the third party intervention submitted by the Media Lawyers Association (MLA) to the Grand Chamber of the ECtHR in relation to the cases of *Von Hannover v Germany (No 2)*, Application 40660/08 and 60641/08 (7 Feb 2012) and *Springer v Germany*, Application 39954/08 (7 Feb 2012). The submission adopted and cited the argument, developed in **outputs 1 & 5**, that the scope of Article 8 had been over-extended by the ECtHR in the previous decision *Von Hannover v Germany* (2004) by finding that the press would generally be invading privacy if they published photographs of an individual, even in public, without their consent. The argument was that this gave too much priority to privacy over free speech (**source 8, [16-17] & fn 14 and 17 citing p 677-683 of output 1**).

The Court’s judgment cited the MLA intervention at (**source 10, [92]**) and responded by shifting the balance between the two rights towards freedom of speech, such that the case has been described academically as an “important win for the press” (**source 9, at p. 108**). The Court indicated that, where pictures complained of were anodyne and taken in public places without aggravating factors, prohibition of their publication could not be justified given even a weak public interest in the text accompanying them (**source 10, [122-123]**). This partially accepted the MLA’s argument that Article 8 privacy rights had been taken too far. The judgments of the Court bind the state party to the case and govern the interpretation of the Convention, acceded to by the 47 states of the Council of Europe – covering some 800 million people.

5. SOURCES TO CORROBORATE IMPACT

1. Ministry of Justice Report 23 March 2010:
<http://webarchive.nationalarchives.gov.uk/20110201125714/http://www.justice.gov.uk/publications/docs/libel-working-group-report.pdf> and correspondence between CS author and Chair of Working Group.
2. (a) Explanatory Notes to Defamation Bill at [29]:
<http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0005/en/13005en.htm>;
(b) Defamation Act 2013 s4 and Explanatory Notes to Defamation Act at [29]:
<http://www.legislation.gov.uk/ukpga/2013/26/contents/enacted>
<http://www.legislation.gov.uk/ukpga/2013/26/notes/contents>
3. Report of the Joint Committee on Human Rights on the Defamation Bill [29-34], [55]:
<http://www.publications.parliament.uk/pa/jt201213/itselect/jtrights/84/8402.htm>
4. Parliamentary Joint Committee on Privacy and Injunctions. Report (HL Paper 273, HC 1443 (2010-12)): [55], fnote63, [59]
<http://www.publications.parliament.uk/pa/jt201012/itselect/jtprivini/273/273.pdf>
5. Interim Guidelines for prosecutors: assessing the public interest in media cases: [31(d)]
http://www.cps.gov.uk/consultations/mg_consultation.pdf
6. Final Guidelines for prosecutors: assessing the public interest in media cases [31(d)]:
http://www.cps.gov.uk/legal/d_to_g/guidance_for_prosecutors_on_assessing_the_public_interest_in_cases_affecting_the_media/
7. Letter dated 8 June 2012 from the Director of Public Prosecutions inviting Phillipson to a meeting on 25 June 2012
8. Media Lawyers Association, Third Party Intervention to the European Court of Human Rights in *Von Hannover No 2*, 6 August 2010, [16-17]; fn 14 and 17:
<http://inform.files.wordpress.com/2010/09/mla-submission.pdf>
9. B. Jordon and I. Hurst: “Privacy and the Princess - a review of the Grand Chamber's decisions in *Von Hannover* and *Axel Springer*” (2012) 23(4) Ent. L.R. 108-113 at 108.
10. *Von Hannover v Germany (No 2)*, Application 40660/08 and 60641/08 (7 Feb 012):
<http://www.bailii.org/eu/cases/ECHR/2012/228.html>, at [122-123].