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978-0-521-19491-4 — Personality Rights in European Tort Law
Edited by Gert Brüggemeier, Aurelia Colombi Ciacchi, Patrick O'Callaghan
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Personality Rights in European Tort Law

This volume provides a comprehensive analysis of civil liability for invasion of personality interests in Europe. It is the final product of the collaboration of twenty-seven scholars and includes case studies of fourteen European jurisdictions, as well as an introductory chapter written from a US perspective. The case studies focus in particular on the legal protection of honour and reputation, privacy, self-determination and image. This volume aims to detect hidden similarities (the 'common core') in the actual legal treatment accorded by different European countries to personal interests which in some of these countries qualify as 'personality rights', and also to detect hidden disparities in the 'law in action' of countries whose 'law in the books' seem to protect one and the same personality interest in same way.

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THE COMMON CORE OF EUROPEAN PRIVATE LAW

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For the transnational lawyer the present European situation is equivalent to that of a traveller compelled to cross legal Europe using a number of different local maps. To assist lawyers in the journey beyond their own locality *The Common Core of European Private Law Project* was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger.

The aim of this collective scholarly enterprise is to unearth what is already common to the legal systems of European Union Member States. Case studies widely circulated and discussed between lawyers of different traditions are employed to draw at least the main lines of a reliable map of the law of Europe.

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CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
 One Liberty Plaza, 20th Floor, New York, NY 10006, USA
 477 Williamstown Road, Port Melbourne, VIC 3207, Australia
 314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi - 110025, India
 103 Penang Road, #05-06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9780521194914

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First published 2010

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging in Publication data

Personality rights in European tort law / [edited by] Gert Brüggemeier, Aurelia Colombi Ciacchi and Patrick O'Callaghan.

p. cm.

Includes index.

ISBN 978-0-521-19491-4 (hardback)

1. Personality (Law)—Europe. 2. Privacy, Right of—Europe. 3. Torts—Europe. 4. Personality (Law)—United States. 5. Privacy, Right of—United States. 6. Torts—United States. I. Brüggemeier, Gert, 1944– II. Ciacchi, Aurelia Colombi III. O'Callaghan, Patrick.

KJC1646.P47 2010

346.2403'3—dc22 2009052177

ISBN 978-0-521-19491-4 Hardback

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General editors' preface

This is the twelfth book in the series *The Common Core of European Private Law* published within the *Cambridge Studies in International and Comparative Law*. The project was launched in 1993 under the auspices of the late Professor Rudolf B. Schlesinger.

The methodology used in the project is still unparalleled. By making use of case studies it goes beyond mere description to detailed inquiry into how most European Union legal systems resolve specific legal questions in practice, and to thorough comparison between those systems. It is our hope that these volumes will provide scholars with a valuable tool for research in comparative law and in their own national legal systems. The collection of materials that the Common Core Project is offering to the scholarly community is already quite extensive and will become even more so when more volumes are published. The availability of materials attempting a genuine analysis of how things are is, in our opinion, a prerequisite for a fully-fledged and critical discussion on how they should be. Perhaps in the future European private law will be authoritatively restated or even codified. The analytical work carried on today by the almost 200 scholars involved in the Common Core Project is a precious asset of knowledge and legitimisation for any such normative enterprise.

We must thank the editors and contributors to the already published volumes, and those who are working hard to achieve future results. With a sense of deep gratitude we also wish to recall our late Honorary Editor, Professor Rudolf B. Schlesinger. We are sad that we have not been able to present him with the scholarly outputs of a project in which he believed so firmly.

No scholarly project can survive without committed sponsors. The Italian Ministry of Scientific Research is funding the project, having

recognised it as a 'research of national interest'. The International University College of Turin with the Compagnia di San Paolo and the Consiglio Nazionale del Notariato allow us to organise the General Meetings. The European Commission has partially sponsored some of our past general meetings, having included them in their High Level Conferences Programme. The University of Torino, the University of Trieste, the Fromm Chair in International and Comparative Law at the University of California and the Hastings College of Law, the Centro Studi di Diritto Comparato of Trieste, have all contributed to the funding, and/or the success of this project.

Our home webpage is at www.iuctorino.it. There you can follow our progress in mapping the common core of European private law.

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Preface

Comparative legal studies performed by a large network of academics from many different countries usually require many years of work and indeed a great deal of patience from all persons involved. This book, like most volumes of the Common Core series, is no exception to this rule. A first draft questionnaire on civil liability for the violation of personality rights was presented by Gert Brüggemeier and Aurelia Colombi Ciacchi and discussed in Trento in 2001. After settling on the final version of the questionnaire, first draft country reports were completed between 2002 and 2004. In August 2004, Patrick O'Callaghan joined the editors' team. Draft comparative remarks and an introductory chapter were written in 2005–06. Then the last missing country reports were drafted and the review of the other reports and the drawing of our conclusions for this project continued until early 2007, followed by final editing and proofreading until 2008.

We would like to express our deepest thanks to all national reporters and contributors for their enthusiasm and long-term commitment to this project, which did not provide any other remuneration but for the publication itself and the enjoyment of wonderful meetings in both Trento and Turin.

We are grateful to the general editors of the Common Core project, Mauro Bussani and Ugo Mattei, for their constant support. An enormous thank you to the chairs of the Tort session of the Common Core project, Mathias Reimann (until 2002) and Franz Werro (since 2003), and all participants to the annual meetings of the Tort sessions for their valuable comments and suggestions.

Our thanks to Carol Forrest for her help in editing this book. We would also like to thank Eric Engle for his collaboration in this project between 2002 and 2004. Last but not least, we are indebted to Carla Boninsegna for her precious help in organising our meetings, and

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to Jodie Barnes, Sinéad Moloney and Finola O'Sullivan at Cambridge University Press who so kindly helped to bring this project to a good end.

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Editorial note

Most of the following country reports were completed in 2007 but for reasons of the work schedule we were unable to make major updates to the reports before publication. Naturally, there have been developments since 2007, some of a relatively minor nature and some which are clearly quite significant. In England, while *Campbell v. MGN* remains the leading authority for the fledgling informational privacy tort, there have been some decisions of the lower courts, which should be mentioned here, namely *McKennitt v. Ash*,¹ *Murray v. Express Newspapers plc*² and *Mosley v. News Group Newspapers Ltd.*³ In Germany, as set out in Case 7, courts and scholars traditionally regarded pictures of public figures as pictures of contemporary history.⁴ But the German reporters inform us that the legal landscape has changed following the decision of the European Court of Human Rights in *von Hannover*.⁵ Courts in Germany now allow publication of pictures of public figures only when they are deemed newsworthy. The newsworthiness may be due to the fact that the person is depicted in an official function or if there is a story to the photo which is of public interest.⁶ The public interest may also follow from a text added to the photo.⁷

¹ [2008] QB 73.

² [2008] 3 WLR 1360.

³ [2008] EMLR 20.

⁴ *Personen der Zeitgeschichte*, see H. Neumann-Duesberg, 'Bildberichterstattung über absolute und relative Personen der Zeitgeschichte' (1960) JZ 114–18. Cf. KG Berlin ZUM-RD 2006, 552; LG Berlin ZUM-RD 2006, 571.

⁵ ECHR decision of 24 June 2004 – 59320/00, GRUR 2004, 1051; (2005) 40 EHRR 1.

⁶ BGHZ 171, 275; 158, 218, 222; NJW 2008, 3134; BVerfGE 101, 361, 389.

⁷ BGH NJW 2008, 3141.

But perhaps the most extensive changes have occurred in Ireland. Val Corbett, the Irish reporter, has kindly provided the following overview of these changes:

Since the time of writing, there have been significant developments in Irish defamation and privacy law which will alter the advice provided in many of the cases contained within the text.

First, the Defamation Bill was enacted in the form of the Defamation Act 2009 and took effect from 1 January 2010. The Act applies to all causes of action accruing before its commencement.⁸ Much of the reform introduced by the Act is procedural in effect. Many of its provisions have simply put the common rules relating to defamation on a statutory footing. For example, the common law of justification has been abolished and replaced with the similar defence of truth.⁹ Furthermore, the common law defences of absolute privilege,¹⁰ qualified privilege,¹¹ consent¹² and offer to make amends¹³ are put on a statutory footing. The legislation alters the common law defence of 'fair comment' to a statutory one of 'honest opinion'.¹⁴ A new defence of 'innocent publication' has also been introduced.¹⁵ This defence will be welcomed by publishing houses (and possibly internet service providers) who – under the old regime – could be potentially liable for defamation even though they may have only innocently facilitated the publication of the defamatory material. Equally welcome is the provision which allows the defendant to give evidence in mitigation of damage where [s]he published (or offered to publish) an apology and crucially provides that any such apology is not admissible in any civil proceedings as evidence of liability in defamation proceedings.¹⁶

Much of the criticism of Irish defamation law derived from the fact that the tort was essentially one of strict liability, i.e. there was no defence if the defamatory statement was mistakenly – although not negligently or recklessly – published. The Act has introduced a new defence of 'fair and reasonable publication on a matter of public interest' to fill this lacuna.¹⁷ The stated purpose of this defence is to allow reasonable and fair publication of material which is considered to be in the 'public interest' even where it is capable of being defamatory. While it remains to be seen how this defence will be interpreted by the courts, there is concern that, as drafted, the defence is unduly

⁸ Section 3 of the Defamation Act 2009.

⁹ Section 16 of the Defamation Act 2009.

¹⁰ Section 17 of the Defamation Act 2009.

¹¹ Section 18 of the Defamation Act 2009.

¹² Section 25 of the Defamation Act 2009.

¹³ Section 22 of the Defamation Act 2009.

¹⁴ Section 20 of the Defamation Act 2009.

¹⁵ Section 27 of the Defamation Act 2009.

¹⁶ Section 24 of the Defamation Act 2009.

¹⁷ Section 26 of the Defamation Act 2009.

XX EDITORIAL NOTE

narrow and could be practically unworkable. Furthermore, the introduction of this defence could be seen as a retrograde step for proponents of freedom of expression as it expressly replaces¹⁸ innovative defences which have been developed by the Irish courts in recent years.¹⁹

The second development in Irish law is that breach of privacy claims as between private parties are now recognised under Irish law. While claims for breach of privacy by the State have long been recognised by the Irish courts,²⁰ it was not until the recent High Court decision of *Herrity v. Associated Newspapers (Ireland) Limited*,²¹ that it was explicitly recognised that a cause of action for breach of privacy could exist between private parties.

Once again we would like to express our gratitude to the individual authors for all of their hard work and effort.

Gert Brüggemeier
Aurelia Colombi Ciacchi
Patrick O'Callaghan
January 2010

¹⁸ Section 15 of the Defamation Act 2009.

¹⁹ In particular, the defence of public interest developed in *Leech v. Independent Newspapers (Ireland) Ltd* [2007] IEHC 223.

²⁰ See *McGhee v. Attorney General* [1974] IR 384; *Norris v. Attorney General* [1984] IR 36; *Kennedy v. Ireland* [1987] 1 IR 587.

²¹ [2008] IEHC 249.

Abbreviations

General abbreviations

§	paragraph
§§	paragraphs
Art.	Article
CC	Civil Code
cf.	confer
ch.	chapter
COM	Document of the European Commission
EC	European Community
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECR	Reports of the Decisions of the European Court
ECtHR	European Court of Human Rights
ed.	editor
edn.	edition
eds.	editors
e.g.	<i>exempli gratia</i>
EHRR	European Human Rights Reports
ERPL	European Review of Private Law
<i>et al.</i>	<i>et alia</i>
<i>et seq.</i>	<i>et sequitur</i>
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
<i>ibid.</i>	<i>ibidem</i>

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ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
i.e.	<i>id est</i>
p.	page
PC	Penal Code
pp.	pages
TEU	Treaty establishing European Union
UN	United Nations
v.	versus
Vol.	volume
Vols.	volumes

Abbreviations by Country

Austria

ABGB	Allgemeines Bürgerliches Gesetzbuch
ASVG	Allgemeines Sozialversicherungsgesetz
BlgNR	Beilage(n) zu den stenographischen Protokollen des Nationalrates
ECG	E-Commerce Gesetz
EO	Exekutionsordnung
EvBL	Evidenzblatt der Rechtsmittelentscheidungen des Obersten Gerichtshofs
MedienG	Mediengesetz
MR	Medien und Recht
OGH	Oberster Gerichtshof
ÖJZ	Österreichische Juristen-Zeitung
RV	Regierungsvorlage
StGB	Strafgesetzbuch
UrhG	Urheberrechtsgesetz
UWG	Gesetz gegen den unlauteren Wettbewerb

Belgium

AJT	Algemeen Juridisch Tijdschrift
AM	Auteurs et Média
Cass.	Cour de cassation (belgique)

C.civ.	Code civil
JLMB	Jurisprudence de Liège, Mons et Bruxelles
JT	Journal des tribunaux
Rec.Cass.	Recente Arresten van het Hof van Cassatie
TBBR	Tijdschrift voor Belgisch Burgerlijk Recht
<i>England</i>	
AC	Law Reports, Appeal Cases
All ER	All England Law Reports
CA	Court of Appeal
Ch	Law Reports, Chancery Division
EMLR	Entertainment & Media Law Reports
EWHC	England and Wales High Court
FSR	Fleet Street Reports
HL	House of Lords
HRA	Human Rights Act
KB	Law Reports, King's Bench
LR	Law Reports
QB	Law Reports, Queen's Bench
TLR	Times Law Reports
WLR	Weekly Law Reports
<i>Finland</i>	
FIM	Finnish Markka
<i>France</i>	
Ann.prop.ind.	Annales de la propriété industrielle, artistique et littéraire
Ass. plén.	Assemblée plénaire
Bull. civ.	Bulletin des arrêts de la Cour de cassation (chambres civiles)
Bull. crim.	Bulletin des arrêts de la Cour de cassation (chambre criminelle)
Cass	Cour de cassation
Cass. I civ.	Cour de cassation (1ère chambre civile)
Cass. II civ.	Cour de cassation (2ème chambre civile)
Cass. III civ.	Cour de cassation (3ème chambre civil)
Cass. comm.	Cour de cassation, chambre commerciale
Cass. crim	Cour de cassation, chambre criminelle
CC	Conseil constitutionnel

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C. civ.	Code civil
CE	Conseil d'Etat
chr.	chronique
D	Dalloz
DC	Décision du Conseil constitutionnel
Décl./DDHC	Déclaration des droits de l'homme et du citoyen
DP	Dalloz Périodique
Gaz. Pal.	Gazette du Palais
IR	Informations rapides
JCP	JurisClasseur Périodique (Semaine juridique)
RDP	Revue du droit public et de la science politique en France et à l'étranger
rec.	Recueil
Rev. Trim. Droit Civ.	Revue trimestrielle du droit civil
somm.	Sommaire(s)
TGI	Tribunal de grande instance
Trib. civ.	Tribunal civil
<i>Germany</i>	
AG	Amtsgericht
ArbG	Arbeitsgericht
BAG	Bundesarbeitsgericht
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
EuGRZ	Europäische Grundrechte-Zeitschrift
GG	Grundgesetz
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
JZ	Juristen-Zeitung
KUG	Kunsturhebergesetz
LG	Landgericht
NJW	Neue Juristische Wochenschrift

NJW-RR	Neue Juristische Wochenschrift – Rechtsprechungsreport
OLG	Oberlandesgericht
RG	Reichsgericht
RGBl.	Reichsgesetzblatt
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
StGB	Strafgesetzbuch
<i>Greece</i>	
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<i>Ireland</i>	
IEHC	The High Court of Ireland Decisions
IR	Irish Reports
<i>Italy</i>	
App.	Corte d'appello
Arch. civ.	Archivio civile
Cass.	Corte di Cassazione
Cass. pen.	Cassazione penale
CC	Codice civile
Corriere giur.	Corriere giuridico
Corte cost.	Corte costituzionale
Cost.	Costituzione della Repubblica Italiana
CP	Codice penale
Danno e resp.	Danno e responsabilità
Dir. Aut.	Diritto d'autore
Foro it.	Foro italiano
Giur. cost.	Giurisprudenza costituzionale
Giur. it.	Giurisprudenza italiana
Giust. civ.	Giustizia civile
Nuova giur. civ. comm.	Nuova giurisprudenza civile commentata
Rass. dir. civ.	Rassegna di diritto civile
Resp. civ.	Responsabilità civile e previdenza
Riv. crit. dir. priv.	Rivista critica del diritto privato
Riv. dir. civ.	Rivista di diritto civile
Riv. trim. dir. proc. civ.	Rivista trimestrale di diritto e procedura civile

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The Netherlands

BW	Burgerlijk Wetboek
HR	Hoge Raad
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NJV	Nederlandse Juristenvereniging

Portugal

Ac. STJ	Acórdão do Supremo Tribunal de Justiça
Ac. TC.	Acórdão do Tribunal Constitucional
BMJ	Boletim do Ministério da Justiça
CC	Código Civil
CP	Código Penal
CPC	Código de Processo Civil
CPP	Código de Processo Penal
Cpub	Código da Publicidade
CRP	Constituição da República Portuguesa
EJ	Estatuto do Journalista
LI	Lei de Imprensa
STJ	Supremo Tribunal de Justiça

Scotland

SC	Session Cases
SLT	Scottish Law Times

Spain

ADC	Anuario de Derecho Civil
CC	Código civil
CE	Constitución Española
LO	Ley Orgánica
RTC	Repertorio del Tribunal Constitucional
STC	Sentencia del Tribunal Constitucional
STS	Sentencia del Tribunal Supremo
STSJ	Sentencia del Tribunal Superior de Justicia
TC	Tribunal Constitucional

Switzerland

ATF/BGE	Arrêts du tribunal fédéral/Entscheidungen des Bundesgerichts
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CC/ZGB	Code Civil/Zivilgesetzbuch
CO/OR	Code des Obligations/Obligationenrecht
JAAC	Jurisprudence des autorités administratives de la confédération
JdT	Journal des tribunaux
JTPI	Journal des tribunaux de première instance
RS/SR	Recueil systématique du droit fédéral/ Systematische Sammlung des Bundesrechts
RVJ	Revue valaisanne de jurisprudence
SJ	Semaine judiciaire
SJZ	Schweizerische Juristen-Zeitung
TF/BG	Tribunal fédéral/Bundesgericht
USA	
A./Atl. (2d)	Atlantic Reporter (Second Series)
Ala.	Alabama Reports
Amends.	Amendments
App.	Appellate Reports
Cal.	California Reports
cert. den.	certiorari denied
Cir.	Circuit (Federal Courts of Appeal)
Const.	Constitution
D.	District (Federal Courts)
D.C.	District of Columbia
F.	Federal Reporter
Ga.	Georgia Reports
Kan.	Kansas Reports
Ky.	Kentucky Reports
La.	Louisiana Reports
Md.	Maryland Reports
Mich.	Michigan Reports
Minn.	Minnesota Reports
Mo.	Missouri Reports
N.C.	North Carolina Reports
N.E.	North Eastern Reporter
N.H.	New Hampshire Reports
N.W.	North Western Reporter
N.Y.	New York Reports

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N.Y.S.	New York Supplement
N.Y. Sess.	New York Session Laws
N.Y. Sup. Ct.	New York Supreme Court of Judicature (State Court of First Instance (1848–date))
P./Pac.	Pacific Reporter
R.I.	Rhode Island Reports
S.Ct.	U.S. Supreme Court Reports
S.E.	South Eastern Reporter
So.	Southern Reporter
S.W.	South Western Reporter
Tex.	Texas Reports
U.S.	U.S. Supreme Court Reports
Wis.	Wisconsin Reports