IN THE COURT OF APPEAL OF NEW ZEALAND

CA101/03

BETWEEN	MICHAEL NOEL JAMES HOSKING AND MARIE ANGELA HOSKING Appellants
AND	SIMON RUNTING First Respondent
AND	PACIFIC MAGAZINES NZ LIMITED Second Respondent
AND	COMMISSIONER FOR CHILDREN First Intervener
AND	COMMONWEALTH PRESS UNION (NZ) Second Intervener
AND	ACP MEDIA LIMITED Third Intervener

Hearing: 12, 13 and 14 August 2003

Coram: Gault P
Keith J
Blanchard J
Tipping J
Anderson J

Appearances: W M Wilson QC, M Chen and L McGrath for Appellants
J G Miles QC and P D Sills for Respondents
S M Cooper for First Intervener
B D Gray for Second Intervener
S J Mills for Third Intervener

Judgment: 25 March 2004

JUDGMENTS OF THE COURT

Judgments

GAULT P AND BLANCHARD J
(DELIVERED BY GAULT P)

[1] The first respondent Mr Runting, a photographer, was commissioned by the second respondent, the publisher of the magazine *New Idea!* to photograph the appellants' 18 month old twins. He did so, in the street in Newmarket. The appellants in this proceeding seek to prevent publication of the photographs. They seek to have the Court extend the law to provide them with a remedy.

[2] The law of civil liability may be said to be in transition. The impetus for development is coming not from the Judges by whom the common law has been developed over the centuries, but from other major movements influencing the law. The emergence internationally of concern for the protection of human rights and of individual consumers provides examples reflecting the shift in emphasis from the traditional approach to tort liability (liability for reprehensible conduct) to the protection of identified rights. But even the great cases of the past, accepted as representing significant developments in the law, can be seen as recognising the need to provide remedies for interference with rights: *Entick v Carrington* (1765) 19 State Tr 1030, 95 ER 807 and *Ashby v White* (1703) 2 Ld Raym 938, 92 ER 126 are examples. *Donoghue v Stevenson* [1932] AC 562 can be said to represent the foundation of consumers' rights.

[3] The law governing liability for causing harm to others necessarily must move to accommodate developments in technology and changes in attitudes, practices and values in society. These are drawn into the law in the main by legislation, often these days to conform with obligations assumed under international treaties and conventions. Such developments, introduced by legislation, emerge from processes

which employ extensive consultation and procedures designed to take into account all affected interests.

[4] From time to time, however, there arise in the courts particular fact situations calling for determination in circumstances in which the current law does not point clearly to an answer. Then the courts attempt to do justice between the parties in the particular case. In doing so the law may be developed to a degree. It is because the legislative process is inapt to anticipate or respond to every different circumstance that some developments in the law result from such case by case decisions. That is the traditional process of the common law.

[5] The courts are at pains to ensure that any decision extending the law to address a particular case is consistent with general legal principle and with public policy and represents a step that it is appropriate for the courts to take. In the last respect there are matters that involve significant policy issues that are considered best left for the legislature.

[6] Increasingly the courts, in approaching arguments calling for development of the common law, take leads from legislative developments in the same or related fields. Similarly there is increasing recognition of the need to develop the common law consistently with international treaties to which New Zealand is a party. That is an international trend. The historical approach to the State's international obligations as having no part in the domestic law unless incorporated by statute is now recognised as too rigid. To ignore international obligations would be to exclude a vital source of relevant guidance. It is unreal to draw upon the decisions of courts in other jurisdictions (as we commonly do) yet not draw upon the teachings of international law. There is the additional factor in the field of human rights declared by the International Covenant on Civil and Political Rights (the International Covenant) that individuals can seek remedies against the State at international law after exhausting domestic remedies. This cannot be disregarded in considering whether, in a particular case in the domestic courts, a remedy should be available.

[7] Development of the common law generally in accordance with the approach outlined is just what has been occurring in recent years in the courts in the United

Kingdom in the area of the law with which we are concerned. The arguments we have heard in this case have been directed to the extent to which those developments are appropriate for New Zealand and should be built upon. In fact, we consider that in substance the law in New Zealand developed at the High Court level is very close to the position now reached (or approached) by the English courts, though different terminology is used. The position in the United Kingdom is that there is not a general law of invasion of privacy. But the law will protect against the publication of private information where that is harmful and is not outweighed by public interest or freedom of expression values. In England that is done within the scope of the tort of wrongful disclosure of confidential information. In New Zealand we prefer to categorise it as a separate head of liability.

[8] However categorised, we agree with Randerson J that the law does not and cannot extend to provide a remedy for the appellants in this case.

Background facts

[9] Mr and Mrs Hosking became a "celebrity" couple when Mr Hosking's broadcasting career put him into the public limelight. Since 1991 numerous articles have been published about the couple, touching on a range of personal matters. In 2001 it was revealed that Mrs Hosking was pregnant, and that the pregnancy involved IVF treatment. Several magazines published articles on the appellants and the impending birth of their children. Both Mr and Mrs Hosking were open and willing to discuss these issues, and did not object to the articles being published. However, following the birth of their children (twin girls named Ruby and Bella) in June 2001, the Hoskings declined to give interviews about them, or allow photographs of the twins to be taken.

[10] Mr and Mrs Hosking separated in August 2002. Several magazines ran articles on the separation during that year. *New Idea!*, one of the second respondent's magazines, proposed an article on the change to Mr Hosking's personal life, and the fact that he would be spending Christmas without the company of his children. Mr Runting, the first respondent, was commissioned by the second respondent to take photographs of the twins to supplement the article that was to be

published in the 2002 Christmas edition. He took the photographs of the children in the street being pushed in their stroller by their mother. The photographs were taken in mid-December 2002, without Mrs Hosking's knowledge.

[11] The second respondent informed the appellants of the intention to publish the article and photographs in the Christmas edition. The appellants were strongly opposed to this and commenced this proceeding. They pleaded that the photographing of the children and the publication of the photographs without their consent amounted to a breach of the twins' privacy. The appellants sought a permanent injunction restraining the respondents from taking and publishing photographs of their children until they turn 18. The respondents agreed not to publish the particular pictures at issue until the disposal of the proceeding and have honoured that agreement.

[12] As the scope of privacy protection is of considerable importance and has not previously been fully argued before this Court, we received submissions from three interveners on the matter. The Commissioner for Children argued in favour of the appeal, while ACP Media Ltd and the Commonwealth Press Union supported the respondents' position.

[13] As noted in the High Court judgment, the case is not concerned with the privacy of Mr and Mrs Hosking, but solely with that of their children, on whose behalf the proceedings were effectively brought. No issue has been taken with the fact that Mr and Mrs Hosking were not appointed as guardians *ad litem*.

High Court judgment

[14] In a judgment now reported at [2003] 3 NZLR 285, Randerson J recorded a concession by counsel for the appellants that a claim in breach of confidence could not be sustained, because the photographs were taken while the children were in a public place. The Judge therefore concerned himself solely with whether a free-standing tort of privacy exists in New Zealand and, if so, whether it would cover this situation so as to provide a remedy for the appellants. In a full and careful judgment he examined a number of New Zealand authorities that have cautiously recognised a

separate tort of privacy, then considered the approach of the courts in the United Kingdom, where a common law privacy tort has not been recognised. Instead, the English Court of Appeal has developed the equitable cause of action of breach of confidence to prevent the publication of private information in certain circumstances. Randerson J reviewed authorities from Australia, Canada and the United States, finding that only the United States recognised a separate tort of privacy, and that the right to privacy is generally outweighed there by the First Amendment right to freedom of expression.

[15] The Judge concluded that New Zealand courts should not recognise a privacy tort, and that any gaps in privacy law should be filled by the legislature not the courts. He noted that this topic is currently under consideration by the Law Commission. He considered that, in any event, granting a remedy preventing public disclosure of photographs of children taken in a public place would go beyond the scope of previous New Zealand authority. It would not fit the elements of the tort of privacy set down in the judgment of Nicholson J in the High Court in *P v D* [2000] 2 NZLR 591. It is convenient to set out the four elements identified in that case which were:

> 1. That the disclosure of the private facts must be a public disclosure and not a private one.
> 2. Facts disclosed to the public must be private facts and not public ones.
> 3. The matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.
> 4. The nature and extent of legitimate public interest in having the information disclosed must be weighed.

[16] Randerson J considered that in the present case there would be no public disclosure of private facts. In addition, the photographs could not be described as offensive to persons of ordinary sensibilities.

Grounds of appeal

[17] Before this Court the claim for breach of confidence was revived, in addition to the claim for breach of privacy. Counsel made it clear that the appellants were not concerned with which approach is adopted, provided that a remedy is made available to prohibit publication of the particular photographs. The appellants also relied on alternative claims for misappropriation of image, trespass to the person (assault) and negligent infliction of emotional harm. The respondents raised a preliminary objection that a number of these were not pleaded and were not foreshadowed in the points of appeal. Given the significance of the issues at hand, however, we did not exclude any of the wide-ranging submissions.

[18] The appellants' primary position is that there is an established tort of privacy in New Zealand, as recognised in *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716, *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 and *P v D*. In the present case, the factors said to provide the necessary "private facts" include the circumstances in which the photographs were taken (in particular, the youth of the twins, the surreptitious "stalking" of the children, the hiring of a professional photographer and the commercial element), and the lack of parental consent. In relation to the breach of confidence action, those same factors are said to establish the requisite "element of confidence". It was submitted that the countervailing policy arguments (in particular free speech) raised by the respondents are insufficient to outweigh the claim for protection of privacy or confidence.

[19] The Commissioner for Children submitted that the United Nations Convention on the Rights of the Child (UNCROC) should guide the disposition of cases like this. Children are entitled to recognition of the right to privacy set out in Article 16 of the Convention. The Commissioner advocated a test that recognises and upholds the privacy of children and protection of their identity, unless it is demonstrably and legitimately in the public interest, or the child's own interest, to disclose the child's identity. Again the Commissioner would be happy for a remedy

to be granted either under a breach of confidence claim, or as a breach of the tort of privacy.

[20] The respondents' position is that there is no tort of privacy in New Zealand, particularly having regard to the legislative framework contained in the Privacy Act. In any event, if there is, Randerson J correctly concluded that the elements of the tort defined in *P v D* are not satisfied in the current case. Alternatively, the respondents submitted that they have a defence of public interest in publishing the photographs. Mr Hosking is a public figure who had submitted his family for public approval in the past. As the photographs are not unreasonably intrusive and do not go beyond the limits of decency, they are newsworthy and should be protected.

[21] In relation to the breach of confidence action, the respondents accept that this could be developed as in England to provide an adequate remedy in most cases where a publication involves deeply personal information. However, they submitted that the circumstances surrounding the taking and intended publication of the photographs in the present case do not give rise to any obligation of confidence. There was no undertaking of confidence, and the nature of the information was not such that would give rise to an obligation of confidence. As conceded by the appellants in the High Court, the photographs were taken in public and do not reveal anything particularly private.

[22] The Commonwealth Press Union submitted that freedom of expression is an important right guaranteed under s14 of the New Zealand Bill of Rights Act 1990. In contrast, there is no express right to privacy in the Bill of Rights Act. Many of the rights contained in ss8-25 do protect autonomy and dignity, but do not extend to information about a person or to reasonable interaction by others with that person. Freedom of expression should not therefore be restrained unless the exercise of that freedom threatens the very conscience of a citizen, and his or her ability to move freely within the community and be safe from harm. This constitutes a reasonable limit prescribed by law as can be demonstrably justified in terms of s5 of the Bill of Rights Act. ACP Media's submissions concentrated on the policy considerations that this Court must take into account when deciding whether to develop a new tort, by reference to *South Pacific Manufacturing Ltd v NZ Security Consultants &*

Investigations Ltd [1992] 2 NZLR 28. These factors were said to point against a free-standing tort of privacy in New Zealand.

Breach of confidence – the United Kingdom approach

[23] Given the appellants' pleadings and the effect of the High Court decision, it is helpful to begin by considering whether breach of confidence should be available in New Zealand in cases such as the present. The approach of the English courts to the issue is instructive. They have been reluctant to recognise a stand-alone tort of invasion of privacy. In *Kaye v Robertson* (1991) 19 IPR 147 journalists gained access to the hospital room of a television celebrity who was recovering from serious head injuries. A tabloid newspaper intended to publish photographs of the celebrity, and details of statements he made when interviewed by the journalists. He had no recollection of the events and was not in any state to consent to the photographs or interview. An interim injunction was granted on the basis of libel and malicious falsehood, but the members of the Court took the opportunity to comment on the inadequacies of English law in relation to privacy. Bingham LJ said (at 150):

> This case nonetheless highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens. The defendant's conduct towards the plaintiff here was "a monstrous invasion of his privacy" (to adopt the language of Griffiths J in *Bernstein v Skyviews Ltd* [1978] QB 479 at 489G). If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief in English law.

[24] Similar expressions of dissatisfaction are to be found in *R v Khan (Sultan)* [1997] AC 558; *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1; and *Morris v Beardmore* [1981] AC 446.

[25] Despite the resistance to breach of privacy at common law, however, breach of confidence has long been available to plaintiffs complaining that confidential information about themselves has been, or is threatened to be, revealed to a third party. In *Pollard v Photographic Co* (1888) 40 Ch D 345 a woman who

commissioned photographs of herself for private use successfully prevented the photographer from incorporating her image onto Christmas cards for general sale, on the basis of a "gross breach of faith". In *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 the Duke of Argyll prevented his former wife from publishing information about their intimate relationship, on the basis of a breach of marital confidence. Many breach of confidence cases have also involved the publication of "trade secrets" and valuable commercial information: for example *Seager v Copydex Ltd* [1967] 1 WLR 923.

[26] The elements of the traditional cause of action were clearly set out in the judgment of Megarry J (as he then was) in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47. In what has been generally accepted as an accurate statement of the law, he identified the three elements required to succeed in a breach of confidence case, in the absence of a contractual provision: (1) the information must have the necessary quality of confidence about it; (2) the information must have been imparted in circumstances importing an obligation of confidence; and (3) there must be an unauthorized use or disclosure of that information to the detriment of the party communicating it. This formulation has been adopted and applied in a number of cases within the commercial and private spheres, see for e.g.: *Faccenda Chicken Ltd v Fowler* [1987] Ch. 117; *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804; *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134; *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444; *Barrymore v News Group Newspapers Ltd* [1997] FSR 600.

[27] In *Attorney-General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109 Lord Goff (in a passage the significance of which seems to have taken some time to emerge) discussed the broad general principle underlying duties of confidence. According to His Lordship (at 281), the duty arises when a person receives information in circumstances where he has notice, or is held to have agreed, that it is confidential, and where it would be just that he should be precluded from disclosing the information to others. Although in the "vast majority of cases" the duty of confidence will arise from a transaction or relationship between the parties, Lord Goff considered that:

> … *it is well settled that a duty of confidence may arise in equity independently of such cases*; and 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 circumstances, 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. (emphasis added)

His Lordship went on to discuss three limiting principles: (a) the principle of confidentiality only applies to information to the extent that it is confidential; (b) no duty of confidence attaches to useless information or trivia; and (c) the public interest in protecting confidences may be outweighed by the public interest in disclosure, particularly in the case of disclosure of iniquity.

[28] Several cases in the 1990s recognised the potential availability of a claim for breach of confidence to restrain publication of photographs taken outside a clearly private domain such as the home. The reasoning in each indicates the start of a relaxation of the established elements of breach of confidence by the English courts. The Court in *Creation Records*, applying *Shelley Films*, granted an injunction to restrain publication of photographs taken surreptitiously in circumstances where the photographer would be taken to have known that the occasion was private. In that case there was a roped-off area around a hotel swimming pool where a photo shoot for a record cover was taking place, and the defendant had intentionally evaded security efforts in order to take the photographs. The facts in *Shelley Films* pointed more strongly to a confidential situation, because there were also signs posted in the area of a film set banning photography. An obiter statement by Laws LJ in *Hellewell* (at 807) also addressed the issue of photographs taken without authority, and highlighted the confusion that English courts have faced with privacy cases and breach of confidence:

> I entertain no doubt that disclosure of a photograph may, in some circumstances, be actionable as a breach of confidence … If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as

> surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence.

[29] The Human Rights Act 1998 came into force in England in October 2000, incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 into the domestic law. Article 8 of the Convention provides that everyone has the right to respect for his private and family life, his home and his correspondence. Sections 3 and 6 of the Human Rights Act state that legislation must be given effect to, and courts must act, in a way that is compatible with the rights contained in the Convention. These provisions have had a significant impact on the approach of the English courts to questions of privacy. The result has been the continued evolution of the existing breach of confidence action to address privacy concerns.

[30] Evidence of the willingness of courts to broaden the scope of the action could already be found in cases such as *Creation Records*, but the Judges still worked within the traditional framework of the *Coco v Clark* elements. Since the Human Rights Act, however, a series of cases has seen English judges move beyond those borders. Successive courts have seized on the possibility left open by Lord Goff in *Attorney-General v Guardian Newspapers* that no pre-existing relationship is required for the imposition of a duty of confidence.

[31] It is of interest that by 1998 the British Government was able to persuade the European Human Rights Commission that a breach of the European Convention had not been established and that the domestic British law of confidence would provide a remedy to restrain publication of private information about the applicants' marriage and medical condition: see *Earl Spencer v United Kingdom* (1998) 25 EHRR CD 105.

[32] A significant judgment of the Court of Appeal addressed an application for an interim injunction in *Douglas and Others v Hello! Ltd* [2001] QB 967; [2001] 2 All ER 289. *Hello!* magazine had obtained photographs of the "celebrity" wedding of Michael Douglas and Catherine Zeta-Jones, despite a prohibition against

employees and guests bringing recording devices to the event. The plaintiffs had entered an exclusive contract with *OK!* magazine to publish the wedding photographs, and stringent security measures were in place to protect that exclusivity. Hunt J upheld an interim injunction on the ground that publication of the photographs by *Hello!* would constitute a breach of confidence, malicious falsehood and interference with contractual relations. On appeal the Court of Appeal concluded that the plaintiffs were likely to be able to establish a cause of action in breach of confidence at trial, but discharged the injunction on the grounds that the balance of convenience favoured publication, and that damages or an account of profits would be sufficient remedy for the plaintiffs in the event they were successful.

[33] It is the approach of the Court to privacy law that is of interest for the purposes of this appeal. After observing that there is no tort of privacy in English law, Brooke LJ considered it well-settled that "equity may intervene to prevent the publication of photographic images taken in breach of an obligation of confidence" (at 1012). This would be the case where the plaintiffs had made it clear that photographs were not to be taken. This restriction would give rise to obligations of confidence. However, that duty would not protect against a similar intrusion where those conditions were not present, as was the case in *Kaye v Robertson*. Keene LJ agreed that the dicta in cases like *Hellewell* and *Attorney-General v Guardian Newspapers* indicated that a pre-existing confidential relationship between the parties is not required for a breach of confidence claim. The nature of the subject matter or the circumstances of the defendant's activities may suffice to give rise to liability. In the case before him, the information contained in the photographs was burdened with obligations of confidence because it was not "truly obtainable" in any other way.

[34] Sedley LJ went further in concluding (at 1021) that while English courts have been unable to articulate a discrete principle of law in relation to protection from outrageous invasions of privacy, nonetheless a point had been reached "at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy". The Human Rights Act requires courts to give appropriate effect to the right to respect for private and family life set out in art 8.

This could be achieved by relaxing the elements of the traditional breach of confidence action. The Judge commented (at 1025):

> What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwarranted intrusion into their personal lives. *The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim*: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy. (emphasis added)

[35] In his judgment after the subsequent substantive High Court trial in *Douglas* [2003] 3 All ER 996, Lindsay J described the line of recent English judgments as "a fusion between the pre-existing law of confidence and rights and duties arising under the Human Rights Act". Despite the comments of the Court of Appeal, the Judge preferred to treat the images of the wedding as "trade secrets" on the basis that information about private lives can become a lucrative commodity for certain sections of the media. The event was private in character and the plaintiffs had taken elaborate steps to exclude the uninvited, and to preclude unauthorised photography. Therefore, the photographs were taken in circumstances importing an obligation of confidence in the traditional sense. It followed that the *Hello!* defendants were liable on the basis of their knowledge of the breach of confidence by the photographer. On its facts, the case can be seen as analogous to *Creation Records* and *Shelley Films*.

[36] Lindsay J declined, however, to hold that England now has a general tort of privacy as a result of the Convention, the Human Rights Act and decisions of the European Court of Human Rights. On the facts, the plaintiffs had been protected by the existing law of confidence so "no relevant hole exists in English law". Lindsay J felt the development of a free-standing tort should be left to Parliament in an area as broad as privacy.

[37] A major development (though still in the context of breach of confidence) came in the case of *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908. Dame Elizabeth Butler-Sloss P granted an injunction against all the world,

preventing publication of information about the identity of the two boys convicted of the widely publicised murder of two year old James Bulger. The Judge said (at 933):

> The duty of confidence may arise in equity independently of a transaction or relationship between the parties. In this case it would be a duty placed upon the media. A duty of confidence does already arise when confidential information comes to the knowledge of the media, in circumstances in which the media have notice of its confidentiality … The issue is whether the information leading to disclosure of the claimants' identity and location comes within the confidentiality brackets … In my judgment, the court does have the jurisdiction, in exceptional cases, to extend the protection of confidentiality of information, even to impose restrictions on the press, where not to do so would be likely to lead to serious physical injury, or to the death, of the person seeking that confidentiality, and there is no other way to protect the applicants other than by seeking relief from the court.

In that case the Judge considered that there was a real risk of vigilante attacks on the applicants if their identities and whereabouts upon release from prison were made public.

[38] In *A v B (a company)* [2002] 2 All ER 545 the Court of Appeal again departed from the *Coco v Clark* elements in favour of the concept of "reasonable expectation of privacy". A well-known English footballer (A) had been granted an interim injunction to prevent publication by a national newspaper (B) of details disclosed by C and D of extra-marital affairs A had with them. The Court of Appeal discharged the injunction, with Lord Woolf CJ observing that Arts 8 and 10 (freedom of expression) of the European Convention had provided new parameters within which breach of confidence actions must be heard. In relation to the action itself, he said (at 553-4):

> A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected. (See Lord Goff of Chieveley in *A-G v Guardian Newspapers (No 2)* [1988] 3 All ER 545 at 658, [1990] 1 AC 109 at 281.) The range of situations in which protection can be provided is therefore extensive. Obviously, the necessary relationship can be expressly created. More often its existence will have to be inferred from the facts …

> If there is an intrusion in a situation where a person can reasonably expect his privacy to be respected then that intrusion will be capable of giving rise to liability in an action for breach of confidence unless the intrusion can be justified. (See the approach of Dame Elizabeth Butler-Sloss P in *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908 at 933.)

In that case, maintaining the injunction would have constituted an unjustified interference with the freedom of the press, particularly because C and D were also involved in the relationship and they wanted to tell their stories. The judgment is directed primarily to the matter of restraint of publication by interim injunction.

[39] In *Campbell v Mirror Group Newspapers Ltd* [2003] 1 All ER 224, the English Court of Appeal overturned the award of damages by two lower courts to supermodel Naomi Campbell. Photographs were published showing Miss Campbell leaving a Narcotics Anonymous meeting, together with an article referring to the model's battle to overcome her drug addiction. The cause of action was framed as breach of confidence. The plaintiff had conceded that publication of the facts of her drug problem and subsequent treatment was justified in the public interest, because it was necessary to correct her own media claims that she had never used drugs. The legal argument was, therefore, focused on whether publication of the photographs of Miss Campbell on the street outside the meeting venue in itself constituted a breach of confidence. The court did not consider this case to be analogous with the wedding photographs in *Douglas*. The photographs published by the Mirror depicted a street scene, and did not convey any information that could be described as confidential beyond that discussed in the article.

[40] Despite the broadening of the breach of confidence action and the relaxation of the traditional element it is clear that, by dealing with them in the context of a cause of action the essential element of which is an obligation of confidence, the United Kingdom courts will increasingly have difficulty reconciling decisions with Human Rights Act obligations.

[41] These developments are the subject of a penetrating commentary by Gavin Phillipson in "Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act" [2003] MLR 726. In *Wainwright v Home Office* [2003] UKHL 53, judgment 16 October 2003, the House of Lords reviewed the developments in the English decisions uncritically, although their Lordships determined that there is and should be no "high-level principle of invasion of privacy" justifying "a general tort of invasion of privacy" that would extend to provide remedies for prison visitors strip-searched for drugs inappropriately by prison officers.

[42] It seems then that there are now in English law two quite distinct versions of the tort of breach of confidence. One is the long-standing cause of action applicable alike to companies and private individuals under which remedies are available in respect of use or disclosure where the information has been communicated in confidence. Subject to a possible "trivia" exception and to public interest (iniquity) defences, those remedies are available irrespective of the "offensiveness" of the disclosure. The second gives a right of action in respect of the publication of personal information of which the subject has a reasonable expectation of privacy irrespective of any burden of confidence, but only where that publication is or is likely to be highly offensive to a reasonable person. Plainly the public interest defences apply here also. The first formulation reflects the historical approach to the law of torts with the focus on wrongful conduct whereas the second reflects more the impact of a developing rights-based approach.

[43] In identifying the circumstances in which the second formulation may be involved the courts have drawn upon the tort of wrongful publication of private facts as developed in the United States of America. The test for the "privacy" of information, i.e. information that warrants protection (that its disclosure would be highly offensive to a reasonable person of ordinary sensibilities), taken in *Campbell* from the judgment of Gleeson CJ in the High Court of Australia in *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199, comes directly from the American privacy jurisprudence. Similarly the "reasonable expectation of privacy" criterion specified in the *A v B* case is some distance from

the three elements of the tort identified in *Coco v Clark.* In effect, the second element has disappeared.

[44] In the present case, Randerson J indicated a preference for the future development of New Zealand law to follow the same course, commenting (at para [158]):

> I see no reason why our courts should not develop the action for breach of confidence to protect personal privacy through the public disclosure of private information where it is warranted. In doing so, it should be informed by the recent developments in the United Kingdom and elsewhere while taking into account New Zealand law and conditions.

The Judge accepted that there may be "exceptional cases" where the nature of a photograph or the manner in which it was obtained could amount to a breach of confidence, as that cause of action is developing in the United Kingdom, even if the photographs were taken in a public place.

[45] While that approach may well lead to the same outcome, we consider that it will be conducive of clearer analysis to recognise breaches of confidence and privacy as separate causes of action. We say immediately, and emphasise, that we are not to be taken as establishing a general cause of action encompassing all conduct that may be described as invasion of privacy. There can be no such broad ground of liability.

[46] The elements of the breach of confidence action are well established in New Zealand, and our courts have adopted the formulation in *Coco v Clark* in areas such as employment, trade secrets and information about a plaintiff's private life: *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515; *X v Attorney-General* [1997] 2 NZLR 623; *G v Attorney-General* [1994] 1 NZLR 714, 717. As the law currently stands, a successful action requires information that is confidential, communication of that information to another in circumstances importing an obligation of confidence and unauthorised use or disclosure. Many privacy cases simply do not fit within this analysis, yet undoubtedly justify legal remedies.

[47] The circumstances of *Kaye v Robertson* could not be brought within the tort of breach of confidence. But for the fortuitous circumstances of the false claim to consent, publication would not have been prevented. The orders in the *Venables* case extend to prevent publication of the concealed identity of the persons concerned no matter how the information may be obtained. In the *Douglas* case the facts were quite appropriately dealt with as breach of confidence but, as Sedley LJ pointed out, the photographs might well have been obtained by someone who was under no obligation of confidence.

[48] Privacy and confidence are different concepts. To press every case calling for a remedy for unwarranted exposure of information about the private lives of individuals into a cause of action having as its foundation trust and confidence will be to confuse those concepts.

[49] If breach of confidence is to be used as the privacy remedy in New Zealand, then the requirement of a confidential relationship must necessarily change. That will lead to confusion in the trade secrets and employment fields. The English authorities seem largely to ignore the fact that Lord Goff's dictum was only directed at exceptional cases where the relevant information was "obviously confidential", yet no confidential relationship existed. The expansion of the focus of the cause of action was not contemplated by him to change the nature of the information disclosed, but rather the nature of the relationship or circumstances of the parties.

[50] Our concerns in this regard were foreshadowed by Lord Phillips MR in *Campbell*, where His Lordship doubted the efficacy of the path the English courts had started down (at 240):

> The development of the law of confidentiality since the Human Rights Act 1988 came into force has seen information described as "confidential" not where it has been confided by one person to another, but where it relates to an aspect of an individual's private life which he does not choose to make public. We consider that the unjustifiable publication of such information would better be described as breach of privacy rather than breach of confidence.

[51] The problems with the English approach were exemplified by the European Court of Human Rights' decision in *Peck v United Kingdom* (Application No 44647/98, 28 January 2003). The facts in *Peck* highlight the limitations of the law of confidence in protecting privacy interests, even under the broadest form of the action. In 1995 the appellant, suffering from serious depression, attempted suicide by cutting his wrists while standing in a public street. A surveillance camera operated by the local council captured footage of the appellant leaning on a fence shortly after this incident. He was still holding the knife. The council later disclosed photographs extracted from the video footage to the media. The photographs were published in newspapers and on a national television show. In each case the appellant's face was unmasked, or inadequately masked, and he was clearly recognisable. The European Court awarded the appellant non-pecuniary damages for the violation of his art 8 right to respect for his private life, concluding that the law of the United Kingdom, including the Data Protection Act 1998, did not provide an effective remedy for the breach.

[52] In *Peck*, the Government had argued that a breach of confidence action was available to the appellant. It relied on *Spencer v United Kingdom* (1998) 25 EHRR CD 105 where a similar application failed because the appellants had not exhausted all avenues of redress in the domestic courts. However, the Court in *Peck* was not convinced that on the facts an actionable remedy was available in breach of confidence to this appellant. It said (at para [111]):

> ... *Douglas v Hello!* post-dated the relevant facts of the present case and, as importantly, the entry into force of the Human Rights Act 1998. In any event, only one of three judges in that case indicated that he was prepared to find that there was now a qualified right to privacy in domestic law. Moreover, the Court is not persuaded by the Government's argument that a finding by this Court that the applicant had an "expectation of privacy" would mean that the elements of the breach of confidence action were established. The Court finds it unlikely that the domestic courts would have accepted at the relevant time that the images "had the necessary quality of confidence" about them or that the information was "imparted in circumstances importing an obligation of confidence".

[53] Relevant decisions from the European Court can be important in helping develop New Zealand jurisprudence: *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385, 397 per Eichelbaum CJ. *Peck* is instructive, particularly given the similarities between the provision in art 8 of the European Convention and art 17 of the International Covenant and art 16 of UNROC.

Privacy law in Australia

[54] An analysis of Australian case law does not advance the issue very far. Plaintiffs in Australia have had to rely on existing causes of action and self-regulation by the media in order to protect their privacy. There were some early indications that a privacy tort might be introduced, and in *Church of Scientology v Woodward* (1982) 154 CLR 25, 68 Murphy J identified "unjustified invasion of privacy" as a developing tort. However, later courts have declined to recognise a stand-alone right to privacy in Australian law: *Cruise and Kidman v Southdown Press Pty Ltd* (1993) 26 IPR 125; *Australian Consolidated Press Ltd v Ettingshausen* (Unreported, CA (NSW), BC9302147, 13 October 1993. The development of a tort of privacy at common law has long been regarded as restricted by the decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479. In that case, Latham CJ rejected the submission that the law of nuisance included protection of a right to privacy, and declined a remedy to the owner of a racecourse to prevent radio broadcasts of events from a platform on neighbouring land.

[55] There have been some legislative developments in Australia. The Privacy Act 1988 (Cth) (amended by the Privacy Amendment (Private Sector) Act 2000 (Cth)) confers a degree of enforcement power upon the Federal Court and the Federal Magistrates Court. However, it cannot be said that there is now a statutory tort of invasion of privacy: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*. In fact the Australian Law Reform Commission has rejected a general tort of privacy in favour of piecemeal attention to specific problems: Australian Law Reform Commission, *Privacy* (ALRC No 22, 1983) at para [1081].

As a result, the Australian cases fit more comfortably with those in England, as plaintiffs have frequently turned to breach of confidence claims to provide redress.

[56] The recent High Court of Australia decision in *ABC v Lenah* does little to clarify the future direction of Australian jurisprudence. In that case, Lenah was a processor and supplier of game meat. A third party surreptitiously filmed employees of Lenah slaughtering possums in Tasmania. The possum-killing operations were lawful, but were objected to by some members of the public. ABC obtained the footage and intended to broadcast the film. Lenah was granted an interim injunction to restrain publication on a number of grounds, including breach of the company's right to privacy. On appeal to the High Court, the majority discharged the injunction on the basis that the lower court did not have jurisdiction to grant it. However, the Judges also commented on the nature of the substantive claims.

[57] Gleeson CJ considered that the English approach to breach of confidence was an appropriate means by which to protect the filming of private activities. The dictum in *Hellewell* (cited in para [28] above) was referred to with approval. Gummow and Hayne JJ left open the possibility that a tort of privacy might develop in Australia, but concluded that it could only be for the benefit of natural persons, not companies. Kirby J commented (at paras [188] – [189]):

> In recent years, stimulated in part by invasions of individual privacy, including by the media, deemed unacceptable to society and, in part, by the influence of modern human rights jurisprudence that includes recognition of a right to individual privacy, courts in several jurisdictions have looked again at the availability under the common law of an actionable wrong of invasion of privacy. It is this course that the respondent invited this court to take to remove any doubt that the interlocutory injunction it sought was fully justified …
>
> Whether, so many years after *Victoria Park* and all that has followed, it would be appropriate for this court to declare the existence of an actionable wrong of invasion of privacy is a difficult question. I would prefer to postpone an answer to the question.

Kirby J also expressed doubts about whether a company could rely on such a tort, as it would be artificial to describe the harm to the plaintiff as an invasion of its privacy.

[58] Like Gleeson CJ, Callinan J favoured the evolution of the breach of confidence action to cover cases where there has been a "misuse of a relationship", in this instance by reason of the acquisition or use of the videotapes. However, in agreement with Gummow and Hayne JJ, the Judge did not consider that the decision in *Victoria Park* would prevent a future court from concluding that a right to privacy exists in Australian law. That case was decided by a narrow majority in a very different social climate to the present.

[59] Essentially, therefore, the High Court of Australia has not ruled out the possibility of a common law tort of privacy, nor has it embraced it with open arms. As it currently stands, the case law provides this Court with little guidance on relevant principles.

Privacy law in Canada

[60] Like the New Zealand Bill of Rights Act, the Canadian Charter of Rights and Freedoms 1982 does not specifically guarantee a right to privacy. However, recognition of the desirability of privacy protections can be seen in other areas of Charter jurisprudence. In particular, the right to be secure against unreasonable search and seizure contained in s8 has received a broad interpretation from the Supreme Court of Canada to include a right of a reasonable expectation of privacy in relation to governmental acts: *R v Dyment* [1988] 2 SCR 417, 426. In *Godbout v Longueuil (City)* [1997] 3 SCR 844, the Supreme Court held (at 913) that the purpose of the protection accorded to privacy under s8 is to guarantee a sphere of individual autonomy for all decisions relating to "choices that are of a fundamentally private or inherently personal nature". In *R v Duarte* [1990] 1 SCR 30, s8 was thought to protect the right of individuals to control the release of personal information about themselves.

[61] However, the decisions in relation to s8 do make it clear that there is a fundamental difference between a person's reasonable expectations of privacy when dealing with the state, and that person's expectations in relation to other citizens: *R v Duarte*; *R v Wong* [1990] 3 SCR 36, 48. This same consideration must be borne in mind in the New Zealand context.

[62] Quebec has gone further than the Federal Government towards protecting privacy, enacting s5 of the Quebec Charter of Human Rights and Freedoms which guarantees every person "a right to respect for his private life". In *Les Editions Vice-Versa Inc v Aubry and Canadian Broadcasting Corporation* (1998) 157 DLR (4th) 577, a photographer took a picture of the respondent without her knowledge as she sat on a Montreal street. The photograph was subsequently published in an artistic magazine. An award of damages for breach of s5 was upheld by the majority in the Supreme Court, who considered (at 594) that the purpose of s5 is to protect a sphere of individual autonomy. To that end, the right to one's image must be included in the right to respect for one's private life, since it relates to the ability of a person to control his or her identity. The right to respect for private life is infringed as soon as an image is published without consent, provided the person is identified. It is irrelevant to the question of breach whether the image is in any way reprehensible, or has injured the person's reputation.

[63] The Court in *Aubry* recognised, however, that expectations of privacy may be less in certain circumstances. This will often be the case if a plaintiff is engaged in a public activity where the public interest in receiving the information should take priority. The right to a private life may also be less significant where the plaintiff appeared only incidentally in a photograph of a public place, or as part of a group of persons.

[64] The *Aubry* case is based on a specific provision of the Quebec charter. Quebec is a civil law jurisdiction with close ties to the law of France (where a right to privacy has long been included in the civil code). Supreme Court decisions on appeal from Quebec have no binding effect on the common law provinces. In *Hung v Gardiner* [2002] BCSC 1234 the Supreme Court of British Columbia declined to follow *Aubry*, on the grounds that it was a decision from Quebec. The

Charter provision creates, in effect, a right of property in one's image. It cannot provide the foundation for such a right in New Zealand.

[65] There are other indications, however, that privacy concerns are increasingly receiving legal protection in Canada. Privacy Acts providing for a statutory tort of privacy have been enacted in British Columbia, Manitoba and Saskatchewan. The wording of the statutes is very general, and they provide civil sanctions for violating the privacy of another. In relation to the common law, Linden writes in *Canadian Tort Law* (6th ed, 1997 at 56) that:

> Several trial judges have refused to dismiss actions for the invasion of privacy at the pleading stage on the ground that it has not been shown that our courts will not create a right to privacy. Recently, Chief Justice Carruthers has stated "the Courts in Canada are not far from recognizing a common law right to privacy if they have not already done so".

Linden refers to *Motherwell v Motherwell* (1976) 73 DLR (3d) 62; *Burnett v R in Right of Canada* (1979) 94 DLR (3d) 281 and *Ontario (Attorney-General) v Dieleman* (1994) 117 DLR (4th) 449. In *Hunter v Southam Inc* [1984] 2 SCR 145, cited in *Roth v Roth* (1991) 4 OR (3d) 740, 757, the right to be let alone was acknowledged as a right linked to a citizen's reasonable expectation of privacy in a free and democratic society rather than being tied to an action in trespass. In addition, the District Court in *Mackay v Buelow* (1995) 11 RFL (4th) 403 held that a tort of invasion of privacy does exist in Canadian common law. It seems a fair inference that United States jurisprudence will continue to influence Canadian decisions.

United States jurisprudence

[66] Causes of action for invasion of privacy have their origins in United States jurisprudence. The Restatement of Torts (Second) (1977) 383-394 refers to the general principle relating to the tort of privacy as follows:

> **§ 652A General Principle**
>
> (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
>
> (2) The right to privacy is invaded by
>
> (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or
>
> (b) appropriation of the other's name or likeness, as stated in § 652C; or
>
> (c) unreasonable publicity given to the other's private life, as stated in § 652D; or
>
> (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.

That law has developed with the experience of numerous cases over more than a century. Such experience is of real value, but it must be considered in its full context.

[67] The formulation in the Restatement is adopted from Dean Prosser's article entitled *Privacy* (1960) 48 Cal L Rev 383. In it Prosser considered the developments in the law since Warren and Brandeis's highly influential article ("The Right to Privacy" (1890) 4 Harv L Rev 193), and concluded that the existence of a right of privacy (in fact four separate torts) was recognised in the great majority of the American jurisdictions that had considered the question.

[68] For the purposes of this case, we are concerned primarily with the third of the torts identified by Prosser described in the Restatement as:

> **§ 652D Publicity Given to Private Life**
>
> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

[69] The leading case in this area is *Melvin v Reid* 297 Pac 91 (1931). A former prostitute had been the defendant in a sensational murder trial. Following her acquittal she attempted to leave her past behind and married a respectable citizen. Seven years later the defendant produced and exhibited a motion picture enacting the true story of Melvin's old life. This was held to be an actionable invasion of her right of privacy. Later cases have addressed a wide range of fact scenarios, see for example: *Mau v Rio Grande Oil Inc* 28 F Supp 845 (ND Cal 1939) (the use of a plaintiff's name in a radio dramatization of a robbery in which he was the victim); *Trammell v Citizens News Co Inc* 148 SW 2d 708 (1941) (publication of information about the plaintiff's debts); *Banks v King Features Syndicate* 30 F Supp 352 (SDNY 1939) (publication of medical pictures of the plaintiff's anatomy); *Briscoe v Readers' Digest Association* 483 P 2d 34 (1971).

[70] The limits of this branch of the right of privacy have been marked out by the United States courts. First, the disclosure of the private facts must be a public disclosure, not a private one. The requirement of "publicity" means that the matter must be communicated to the public at large, or to so many persons that it must be regarded as substantially certain to become one of public knowledge. An action will not succeed if the alleged disclosure was to only one or two people.

[71] The second limitation is that the facts disclosed to the public must be private facts, not public ones. Relevantly for our purposes, Prosser noted (at 394) that:

> The decisions indicate that anything visible in a public place may be recorded and given circulation by means of a photograph, to the same extent as by a written description, since this amounts to nothing more than giving publicity to what is already public and what any one present would be free to see: citing *Sports & General Press Agency and "Our Dogs" Pub Co* [1916] 2 KB 880; *Humiston v Universal Film Mfg Co* 189 App Div 467, 178 NYS 752 (1919); *Merle v Sociological Research Film Group* 166 App Div 376, 152 NYS 829 (1915) *Berg v Minneapolis Star & Tribune Co* 79 F Supp 957 (D Minn 1948); *Lyles v State* 330 P 2d 734 (1958).

> On the other hand it seems clear that when a picture is taken surreptitiously, or over the plaintiff's objection, in a private place, or one already made is stolen, or obtained by bribery or other inducement of breach of trust, the plaintiff's appearance which is thus made public is at the time still a private thing and there is an invasion of a private right for which an action will lie: [citing *Barber v Time Inc* 348 Mo 1199, 159 SW 2d 291 (1942) (photograph of plaintiff in hospital bed); *Peed v Washington Times* 55 Wash L Rep 182 (DC 1927) (photograph of plaintiff stolen and published)].

The Supreme Court has held that under the First Amendment there can be no recovery for disclosure of, and publicity to, facts that are a matter of public record, such as information about births and marriages, military records or pleadings that have already been filed in a lawsuit: *Cox Broadcasting Co v Cohn* 420 US 469 (1975).

[72] Finally, the matter made public must be one that would be offensive and objectionable to a reasonable man of ordinary sensibilities: *Reed v Real Detective Pub Co* 63 Ariz 294, 162 P 2d 133 (1945); *Davis v General Finance & Thrift Corp* 80 Ga App 708, 57 SE 2d 225 (1950). It is only when the publicity given is such that a reasonable person would feel justified in feeling seriously aggrieved by it that the cause of action arises. Prosser explained that this is because, given the nature of society, no one can avoid the public gaze or public inquiry entirely and "complete privacy does not exist in this world" (at 396).

[73] As already mentioned, the United States cases have directly or indirectly influenced the development of the English law. A key feature evident in those cases is the impact of the constitutional guarantee of freedom of expression in the First Amendment. Prosser commented in his article (at 410) that:

> At an early stage of its existence, the right of privacy came into head-on collision with the constitutional guaranty of freedom of the press. The result was the slow evolution of a compromise between the two.

Freedom of expression, not so far mentioned in this judgment, requires careful consideration. In reality, that "compromise" seems to have made the right to privacy in the United States a somewhat hollow one, due to the weight that is given to free

speech. Freedom of expression is essentially seen as a trump card, even in cases where protection of privacy interests is clearly warranted. For example, in *Cox Broadcasting Corp v Cohn*, Mr Cohn's daughter was raped and beaten to death. Eight months after the killing her name was broadcast by an Atlanta television station, and Mr Cohn sued for damages for an invasion of his privacy. The United States Supreme Court held that the publication of the victim's name was protected by the First Amendment because of the public nature of the judicial process (cf. s139 Criminal Justice Act 1985 in New Zealand). The constitutional right to freedom of expression took priority even in the face of a Georgia statute prohibiting the news media from publicising the names of rape victims.

[74] Similar reasoning was employed in *The Florida Star v B.J.F.* 105 1 Ed 2d 443 (1989) which also concerned publication of the name of a rape victim. A copy of the name had been mistakenly left in the police press-room. Despite the fact that the reporter was aware that she was not allowed to publish the information, the First Amendment again prevailed over the victim's right to privacy. For further discussions of the privilege of the news media, see *Coverstone v Davies* 38 Cal 2d 315, 323 (1952) *Spahn v Julian Messner Inc* 18 NY 2d 324, 328 (1966). Cases such as these have severely limited the number of successful claims for breach of privacy in the United States. The priority accorded, because of its constitutional status, to the right to freedom of expression has led to the submersion in the United States of other important values. As Anderson states in "The Failure of American Privacy Law", referred to in Markesinis (ed) *Protecting Privacy* (1999) 139, 140:

> But privacy is not the only cherished American value. We also cherish information and candour, and freedom of speech. We expect to be free to discover and discuss the secrets of our neighbours, celebrities and public officials … The law protects these expectations too – and when they collide with expectations of privacy, privacy almost always loses. Privacy law in the United States delivers far less than it promises.

[75] A similar concern was identified by Rosen in *The Unwanted Gaze: The Destruction of Privacy in America* (2000) at 223-4:

> We are trained in this country to think of all concealment as a form of hypocrisy. But we are beginning to learn how much may be lost in a culture of transparency: the capacity for creativity and eccentricity, for the development of self and soul, for understanding, friendship and even love. There are dangers to pathological lying, but there are also dangers to pathological truth-telling.

After analysing a number of United States cases, Bedingfield concludes in "Privacy or Publicity? The Enduring Confusion Surrounding the American Tort of Invasion of Privacy" [1992] 55 MLR 111 that the right to privacy in that country has been limited to such a degree that most courts do not even allow a complaint for invasion of privacy to get past the initial stage of litigation.

[76] It would be pointless to formulate a cause of action with one hand and take it away from potential claimants with the other. If this Court is to rely on the United States jurisprudence to inform our developments in this area, we must remain alive to the outcome for the tort of privacy that that country has witnessed. It will be necessary to consider the different constitutional framework of the New Zealand legal system and its social climate.

The New Zealand authorities

[77] There is no guaranteed right of privacy in the New Zealand Bill of Rights Act: *Lange v Atkinson* [2000] 3 NZLR 385, 396; *R v Jeffries* [1994] 1 NZLR 290. However, following the lead of the United States, a series of High Court cases have identified the emergence of a common law tort of breach of privacy.

[78] In *Tucker v News Media Ownership Ltd* McGechan J in the High Court accepted that a claim for breach of privacy was at least arguable. The plaintiff, who had undertaken a public campaign to raise funds for a heart transplant, sought an injunction against publication of reports referring to his convictions for certain criminal offences, including offences of indecency, years earlier. The evidence suggested that the stress of publication could cause the plaintiff grievous physical or emotional harm in his current state. An interim injunction was granted by Jeffries J

in the High Court at Wellington (quoted at 731-2 in McGechan J's judgment) who said:

> I am aware of the development in other jurisdictions of the tort of invasion of privacy and the facts of this case seem to raise such an issue in a dramatic form. A person who lives an ordinary private life has a right to be left alone and to live the private aspects of his life without being subjected to unwarranted, or undesired, publicity or public disclosure.

Jeffries J identified that the action was not concerned with injury to character or reputation, but instead with the plaintiff's peace of mind. The Judge was satisfied that the right to privacy might provide a valid cause of action in New Zealand where there had been an "unwarranted publication of intimate details of the plaintiff's private life which are outside the realm of legitimate public concern, or curiosity". This was seen by him as a natural progression of the tort of intentional infliction of emotional distress in *Wilkinson v Downton* [1897] 2 QB 57. The Court of Appeal upheld the injunction on the basis that there was a seriously arguable question to be tried. [We note that in *Wainwright v Home Office* Lord Hoffmann rejected *Wilkinson v Downton*, as a basis for developing a law of privacy].

[79] At a further hearing, McGechan J accepted that there was a serious question to be tried, but discharged the injunction because organisations other than the defendants had already revealed the fact of the plaintiff's convictions to the public, so that further restraining publication would be an exercise in futility. Importantly McGechan J said (at 733):

> I support the introduction into the New Zealand common law of a tort covering invasion of personal privacy at least by public disclosure of private facts. The legislature has recognised a need for protection in the privacy field. I refer for example to s67 of the Human Rights Commission Act 1977; s22(1) of the Wanganui Computer Centre Act 1976; the heading to Part IXA of the Crimes Act 1961; and in a broadcasting context ss24(1)(g) and 95(1)(g) of the Broadcasting Act 1976. The tort is well known in the United States of America … While the American authorities have a degree of foundation upon constitutional provisions not available in New Zealand, the good sense

> and social desirability of the protective principles enunciated are compelling.

[80] In *Bradley v Wingnut Films Ltd* Neazor J granted an interim injunction. At the substantive hearing Gallen J accepted that the tort of invasion of privacy formed part of the law of New Zealand (at 423):

> The present situation in New Zealand then is that there are three strong statements in the High Court in favour of the acceptance of the existence of such a tort in this country and an acceptance by the Court of Appeal that the concept is at least arguable. I too am prepared to accept that such a cause of action forms part of the law of this country but I also accept at this stage of its development its extent should be regarded with caution … [T]here is a constant need to bear in mind that the rights and concerns of the individual must be balanced against the significance in a free country of freedom of expression.

On the facts of this case, the publication of a "splatter film" in which one scene depicted a cemetery containing the plaintiff's family tombstone did not meet the criteria for the tort on any test. While the disclosure would be public, it could not be said that the existence of a tombstone in a public cemetery was a private fact. The very purpose of a tombstone is to act as a public memorial. The Judge also felt the plaintiff would have difficulty establishing that the matter would be highly offensive and objectionable to a reasonable person of ordinary sensibilities. Nothing in the scene reflected directly on the tombstone or the persons associated with it, and the shot itself was very brief. The Judge declined to grant an injunction.

[81] In *P v D* Nicholson J in the High Court at Auckland granted an injunction preventing publication of an article that referred to the fact that P, a public figure, had been treated at a psychiatric hospital. A claim for breach of confidence would not succeed because the information obtained by D (a journalist) could have been received from a person who was not under a duty of confidence, such as a member of the public, and therefore could not be said to have been imparted in circumstances importing an obligation of confidence. In relation to privacy, Nicholson J said (at 599):

> … the right of freedom of expression is not an unlimited and unqualified right and in my view is subject to limitations of privacy as well as other limitations such as indecency and defamation. I adopt the statements of Jeffries J, the Court of Appeal and McGechan J in the *News Media Ownership* case and I join with Gallen J in accepting that the tort of breach of privacy forms part of the law of New Zealand.

[82] Nicholson J then attempted to outline the scope of the tort, again with reference to the position in the United States. The Judge set out the four factors already referred to that he believed would provide an appropriate balance for weighing the right to privacy against freedom of expression in cases of public disclosure of private facts.

[83] In granting the injunction the Judge concluded that disclosure of the fact of a psychiatric disorder in the current social climate could be considered highly objectionable to a reasonable person. There was no legitimate public interest in publication of the information.

[84] Recently in *L v G* [2002] DCR 234 damages were awarded for breach of privacy following a substantive trial in the District Court at Christchurch. Ms L, a prostitute, had a sexual relationship with Mr G, her client. Mr G took a number of sexually explicit photographs of Ms L, and had one of them published without her consent in an adult magazine. Ms L could not be identified in the photograph, but Abbott DCJ had no hesitation in concluding that breach of privacy is an actionable tort in New Zealand, and that Mr G's actions had destroyed her "personal shield of privacy" (at 246). It may be that this case would have been better dealt with as a breach of confidence claim; cf. *Theakston v MGN* [2002] EMLR 22.

[85] Also relevant in the New Zealand context is the growing body of decisions of the Broadcasting Standards Authority (BSA). Without creating a civil cause of action, section 4(1)(c) of the Broadcasting Act provides that broadcasters are responsible for maintaining standards consistent with, inter alia, the privacy of the individual. The BSA is obliged by s21 of the Act to ensure that broadcasters comply with s4. To this end the BSA has adopted privacy principles which will be referred

to. Eichelbaum CJ accepted in *TV3 Network Services v BSA* [1995] 2 NZLR 272; (1995) 1 HRNZ 558 (HC) that the BSA was entitled to draw on United States case law in developing the privacy principles, particularly given the relative paucity of experience in this field of the New Zealand judiciary. As a result, the BSA jurisprudence is derived from the same foundation as the existing High Court authorities on breach of privacy.

[86] The BSA decisions demonstrate that privacy interests do not exist in a vacuum. The facts and context of each case has determined its outcome. These decisions show that protection of private information is workable. An expert Authority, experienced in media issues, must be taken as giving useful guidance. Indeed in Britain the Human Rights Act requires professional codes to be taken into account. The BSA has dealt in the New Zealand context with numerous issues likely to come before the courts whether as matters of privacy or confidence. For example, in *Re McAllister* [1990] NZAR 324 the BSA commented that on a public street or in any other public place, the plaintiff has no legal right to be let alone, and it is no invasion of privacy to follow him about and watch him there, nor to take a photograph of him. Such an action amounts to nothing more than making a record not essentially different from a full written description of a public site which anyone would be free to see.

Should the New Zealand developments continue?

[87] In his judgment Randerson J listed several reasons for his conclusion that the courts should not recognise a separate privacy tort. The same reasons were at the forefront of the arguments in this Court. The first of these is that the deliberate approach taken by the legislature to date on privacy issues suggests caution towards "creating new law in this field". Emphasising this, the respondents contend that the deliberate exclusion from the Bill of Rights Act indicates a clear decision not to introduce any broad privacy protection in our law.

[88] The Judge also expressed the view that existing remedies are likely to be sufficient to meet most claims to privacy based on public disclosure of private information and to protect children whose privacy may be infringed by such

disclosure. To the extent that there may be gaps in privacy law, he considered they should be filled by the legislature not the courts.

[89] The Judge also said that in light of "subsequent developments" (presumably referring to the United Kingdom developments) the privacy cases decided in New Zealand to date are difficult to support.

[90] As we have already tried to demonstrate, the developments in the United Kingdom, although by a different route, have arrived at a position not substantially different from the recognition of legal protection from publicity of private information. The New Zealand cases have not really gone beyond that. It is necessary to consider whether the development in those cases should be rejected on the grounds suggested.

The legislative landscape

[91] The legislative landscape is important. As already mentioned, when enacting the Bill of Rights Act to affirm New Zealand's commitment to the International Covenant Parliament did not include among the provisions affirming specific rights and freedoms a provision corresponding to art 17 of the Covenant. That provides:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

Article 8 of the European Convention is to similar effect.

[92] We do not accept that omission from the Bill of Rights Act can be taken as legislative rejection of privacy as an internationally recognised fundamental value. It is understandable that, in an enactment focussed more on processes than substantive rights, privacy law, which has a very wide scope, would be left for incremental development. The breadth of matters encompassed by privacy had been emphasised by Geoffrey Palmer in his article "Privacy and the Law" [1975] NZLJ 747. Issues of

definition, scope of protection and relationship with other societal values clearly would have been such as to defeat any attempt to comprehensively delineate the legal principle.

[93] The White Paper on the proposed Bill of Rights showed that Parliament was concerned not to entrench a vague and uncertain privacy right in the current New Zealand social climate.

[94] As Richardson J said in *R v Jeffries* (at 302).

> The nature and significance of a privacy value depends on the circumstances in which it arises. Thus privacy values relied on in search and seizure cases under the Fourth Amendment range from security, to secrecy, to the broad right to be let alone … It is not surprising that there is no single readily identifiable value applying in all cases.

[95] The Law Commission's Preliminary Paper "Protecting Personal Information from Disclosure" (NZLC PP49, February 2002) also highlights the diverse nature of privacy rights in New Zealand. Privacy is seen to include such varying rights as freedom from surveillance (whether by law enforcement or national security agents, stalkers, paparazzi or voyeurs); freedom from physical intrusion into one's body, through various types of searches or drug testing procedures, or into one's immediate surrounding; control of one's identity; and protection of personal information.

[96] We do not draw from the absence from the Bill of Rights Act of a broad right of privacy any inference against incremental development of the law to protect particular aspects of privacy (or confidence) as may evolve case by case.

[97] It is appropriate to look at legislative provisions that have been enacted to ascertain whether there can be discerned any policy indications in respect of the protection of privacy and whether statutory protections so far enacted amount to a comprehensive treatment.

The Privacy Act 1993

[98] The Privacy Act which deals primarily with the collection and disclosure of personal information, provides that a breach of an information privacy principle, or of a code of practice, constitutes an interference with the privacy of an individual under s66 if in the opinion of the Privacy Commissioner the action:

> 1. Has caused, or may cause, loss, detriment, damage or injury to that individual; or
>
> 2. Has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that individual; or
>
> 3. Has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual.

[99] However, the relevant Principles 10 and 11 in the Privacy Act do not confer on any person legal rights enforceable in a court of law (s11). Instead, the aggrieved individual is able to make a complaint under s67 to the Commissioner alleging an interference with privacy. The Commissioner has the power to investigate the action, but can also refer the complaint to an Ombudsman, the Health and Disability Commissioner or the Inspector-General of Intelligence and Security. If the Commissioner is not able to secure a settlement of the complaint following the investigation civil proceedings before the Human Rights Review Tribunal may be instituted pursuant to s82. The Tribunal may grant a range of remedies if it is satisfied on the balance of probabilities that there has been an interference with the complainant's privacy (s85). These include declarations, orders restraining the conduct complained of, and damages (limited to $200,000). The Tribunal cannot grant name suppression.

[100] Parliament, in enacting the Privacy Act, exempted media agencies from its operation when information is collected for news activities (s2(1)(b)(xiii)). "News activity" is broadly defined in s2 to mean:

> (a) The gathering of news, or the preparation or compiling of articles or programmes of or concerning news, observations on

news, or current affairs, for the purposes of dissemination to the public or any section of the public.

(b) The dissemination, to the public or any section of the public, of any article or programme of or concerning –

(i) News

(ii) Observations on news

(iii) Current affairs.

The Broadcasting Act 1989

[101] The media are not, however, exempt from all privacy restrictions in their reporting. As mentioned s4 of the Broadcasting Act 1989 provides that:

(1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with -

(a) The observance of good taste and decency; and

(b) The maintenance of law and order; and

(c) The privacy of the individual; …

[102] "Broadcaster" is defined in s2 as a person who broadcasts programmes. "Programmes" are defined as a combination of sound or visual images intended to inform, enlighten, entertain, promote the interests of any person, or promote any product or service.

[103] The Broadcasting Act is similar to the Privacy Act in that it does not create any civil liability in the event that a broadcaster fails to comply with the provisions of s4. Instead, broadcasters have a responsibility pursuant to s5 to deal with complaints relating to broadcasts, and to this end must establish a proper procedure to address such complaints. If the BSA thinks that the complaint is justified, it has the power to make a range of orders pursuant to s13. These include an order to refrain from broadcasting the programme, or an order to pay compensation not exceeding $5000. A broadcaster who fails to comply with an order under s13

commits an offence and is liable on summary conviction to a fine not exceeding $100,000 (s14).

[104] The Broadcasting Act does not provide any guidelines for what constitutes a breach of privacy of the individual. In 1992 the BSA enunciated five relevant privacy principles in an Advisory Opinion. They were the principles that it had been applying in respect of complaints alleging a breach of s4(1)(c) of the Act. The principles are drawn from American case law and are essentially restatements of Prosser's principles. Two additional principles were added in 1996 and 1999 to address factual situations not covered by the existing principles, but which the BSA considered clearly showed a breach of s4(1)(c). The possibility of developments like this was foreshadowed in the 1992 Advisory Opinion, which made the following points:

1. The principles are not necessarily the only privacy principles that the BSA will apply;
2. The principles may well require elaboration and refinement when applied to a complaint;
3. The specific facts of each complaint are especially important when privacy is an issue.

Such comments are clearly relevant to any considerations of privacy, whether under statute or in tort, and highlight again the wide-ranging and fact-specific nature of privacy complaints.

[105] The relevant privacy principles identified and applied by the BSA are:

1. The protection of privacy includes protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.
2. The protection of privacy also protects against the public disclosure of some kinds of public facts. The "public" facts contemplated concern events (such as criminal behaviour) which have, in effect, become private again, for example through the passage of time. Nevertheless, the public disclosure of public facts will have to be highly offensive to a reasonable person.

3. There is a separate ground for a complaint, in addition to a complaint for the public disclosure of private and public facts, in factual situations involving the intentional interference (in the nature of prying) with an individual's interest in solitude or seclusion. The intrusion must be offensive to the ordinary person but an individual's interest in solitude or seclusion does not provide the basis for a privacy action for an individual to complain about being observed or followed or photographed in a public place.

4. The protection of privacy also protects against the disclosure of private facts to abuse, denigrate or ridicule personally an identifiable person. This principle is of particular relevance should a broadcaster use the airwaves to deal with a private dispute. However, the existence of a prior relationship between the broadcaster and the named individual is not an essential criterion.

5. The protection of privacy includes the protection against the disclosure by the broadcaster, without consent, of the name and/or address and/or telephone number of an identifiable person. This principle does not apply to details which are public information or to news and current affairs reporting, and is subject to the "public interest" defence in principle (6).

6. Discussing the matter in the "public interest", defined as of legitimate concern or interest to the public, is a defence to an individual's claim for privacy.

7. An individual who consents to the invasion of his or her privacy, cannot later succeed in a claim for a breach of privacy. Children's vulnerability must be a prime concern to broadcasters. When consent is given by the child, or by a parent or someone in loco parentis, broadcasters shall satisfy themselves that the broadcast is in the best interest of the child.

The Harassment Act 1997

[106] Some complaints of interference with privacy may arise from a fear for the safety of the complainant. In these cases, the claim may be covered by the Harassment Act. The key feature of harassment claims is, however, that the complainant must establish a pattern of behaviour rather than a single incident. Section 3 defines "harassment" as follows:

(1) For the purposes of this Act, a person harasses another person if he or she engages in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that

includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months.

Section 4 defines "specified act":

> (1) For the purposes of this Act, a specified act, in relation to a person, means any of the following acts:
>
> (a) Watching, loitering near, or preventing or hindering access to or from, that person's place of residence, business, employment, or any other place that the person frequents for any purpose:
>
> (b) Following, stopping, or accosting that person:
>
> (c) Entering, or interfering with, property in that person's possession:
>
> (d) Making contact with that person (whether by telephone, correspondence, or in any other way):
>
> (e) Giving offensive material to that person, or leaving it where it will be found by, given to, or brought to the attention of, that person:
>
> (f) Acting in any other way –
>
> (i) That causes that person ("person A") to fear for his or her safety; and
>
> (ii) That would cause a reasonable person in person A's particular circumstances to fear for his or her safety.

[107] Section 8 provides for criminal sanctions where the defendant harasses another person, and intends that harassment to cause the other person to fear for his or her safety, or the safety of any person that he or she is in a family relationship with. Section 9 gives a person who has been or is being harassed by another person the ability to apply to the Court for a restraining order.

[108] It is apparent that such legislative protection as has been provided has been of specific focus and limited. It clearly recognises the privacy value and entitlement to protection. But it cannot be regarded as comprehensive so as to preclude common law remedies. In its preliminary paper (PP49) the Law Commission said (para 78):

> There is no reason why the development of a judge-made tort and the creation of statutory protections by the legislature for particular types of personal information or for particular methods of publication could not develop side-by-side.

[109] Even in the limited area of privacy with which we are presently concerned there are acknowledged gaps in the law. That is why, in the United Kingdom where the legislative landscape is not dissimilar, the tort of breach of confidence has been re-shaped. The hurt or harm caused by wide publicity of intimate private information will be no less because the information has been obtained without associated obligations of trust and confidence. The intrusiveness of the long-range lens and listening devices and the willingness to pay for and publish the salacious are factors in modern society of which the law must take account. The provision of civil remedies in appropriate circumstances represents the response. That is something the courts are equipped to do. It is the very process of the common law.

[110] In *R v Hines* [1997] 3 NZLR 529 this Court made it clear that the relative institutional capacities of the courts and Parliament must always be carefully considered, particularly where a substantial element of policy is involved. Certainly we agree with Randerson J, and with the House of Lords, that the introduction of any high-level and wide tort of invasion of privacy should be a matter for the legislature. But that is not envisaged. Rather we are taking developments that have emerged from cases in New Zealand and in the larger British jurisdiction and recognising them as principled and an appropriate foundation on which the law may continue to develop to protect legitimate claims to privacy. Once we dispense with any necessary link with obligations of confidence we prefer in the New Zealand legal environment to describe the cause of action as what it truly is.

[111] While developments in the common law must be consistent with the rights and freedoms contained in the Bill of Rights Act, such developments are not precluded merely because they might encroach upon those rights and freedoms. It becomes a matter of whether such common law encroachment meets the test of a reasonable limit on the applicable right or freedom which is demonstrably justified in a democratic society in s5. Relevant considerations were reviewed in *Duff v*

Communicado Ltd [1996] 2 NZLR 89, 99. Through this judgment we have surveyed the various considerations and their evaluation in other jurisdictions.

[112] We have carefully considered whether allowing the development of the law in this way would be to encourage unjustifiable limits on the freedom of expression. Freedom of expression has long been an important value in the development of the law in New Zealand and, since the passing of the Bill of Rights Act and the decision in *Baigent's* case (*Simpson v Attorney-General* [1994] 3 NZLR 667), it must be seen as itself capable of legal enforcement (compare the comments of Lord Hoffmann in the *Wainwright* case, para [31]). It is fundamental to the democratic process and gained its pre-eminence in the United States because of its perceived importance in that respect. In that country it has since been carried far beyond that and perhaps further than would sit comfortably in many other societies.

[113] The fundamental importance of the freedom of expression is not in issue. But it has never been, nor claimed as, an absolute freedom. That is seen in the International Covenant in the recognition of the right to privacy, and in the Bill of Rights Act by the general provision for limits justifiable in a free and democratic society.

[114] Without addressing the complex question of the extent to which the courts are to give effect to the rights and freedoms affirmed in the Bill of Rights Act in disputes between private litigants, it could not be contended that limits imposed to give effect to rights declared in international conventions to which New Zealand is a party cannot be demonstrably justified in a free and democratic society. Those rights include the privacy rights in the International Covenant (art 17) and UNCROC (art 16).

[115] As we understand the judgment of Keith J, which we have read in draft, he recognises the appropriateness of the law providing a remedy in circumstances similar to those addressed in *Kaye, Venables, and Peck,* but considers this can be provided by legal mechanisms other than tort. Whatever mechanism is adopted, however, the same encroachment on the freedom of expression occurs. This seems substantially to undermine the principal reason for his view.

[116] The question is how the law should reconcile the competing values. Few would seriously question the desirability of protecting from publication some information on aspects of private lives, and particularly those of children. Few would question the necessity for dissemination of information albeit involving information about private lives where matters of high public (especially political) importance are involved. Just as a balance appropriate to contemporary values has been struck in the law as it relates to defamation, trade secrets, censorship and suppression powers in the criminal and family fields, so the competing interests must be accommodated in respect of personal and private information. The approaches adopted by the Privacy Act and in the jurisdiction of the BSA provide informative examples.

Elements of the Tort

[117] The scope of a cause, or causes, of action protecting privacy should be left to incremental development by future courts. The elements of the tort as it relates to publicising private information set down by Nicholson J in *P v D* provide a starting point, and are a logical development of the attributes identified in the United States jurisprudence and adverted to in judgments in the British cases. In this jurisdiction it can be said that there are two fundamental requirements for a successful claim for interference with privacy:

1. The existence of facts in respect of which there is a reasonable expectation of privacy; and

2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

[118] No court can prescribe all the boundaries of a cause of action in a single decision, nor would such an approach be desirable. The cause of action will evolve through future decisions as courts assess the nature and impact of particular circumstances. However, some general comments may be useful. First, we emphasise that at this point we are concerned only with the third formulation of the privacy tort identified by Prosser and developed in the United States cases: wrongful publicity given to private lives. We need not decide at this time whether a tortious

remedy should be available in New Zealand law for unreasonable intrusion into a person's solitude or seclusion. In many instances this aspect of privacy will be protected by the torts of nuisance or trespass or by laws against harassment, but this may not always be the case. Trespass may be of limited value as an action to protect against information obtained surreptitiously. Long lens photography, audio surveillance and video surveillance now mean that intrusion is possible without a trespass being committed. This Court has recognised the impact that such technology can have on, for example, search and seizure in the context of s21 of the Bill of Rights Act: *R v Grayson and Taylor* [1997] 1 NZLR 399.

Private Facts

[119] In many instances the identification of private facts will be analogous to the test of "information with the necessary quality of confidence" employed in breach of confidence cases. Private facts are those that may be known to some people, but not to the world at large. There is no simple test for what constitutes a private fact. The comments of Gleeson CJ in *ABC v Lenah Game Meats* (at para [42]), cited by the English Court of Appeal in *Campbell*, are helpful:

> There is no bright line which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measures of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved.

[120] The present case raises an important issue in relation to private facts. Should public figures have lower expectations of privacy in relation to their private lives, and how does this impact on the families of public persons? Prosser identified three

reasons why, in the United States context, public figures are held to have lost, at least to some extent, their right of privacy: (1) by seeking publicity they have consented to it; (2) their personalities and affairs are already public facts not private ones; and (3) there is a legitimate public interest in the publication of details about public figures. That third factor is an important consideration to which we will return. In the High Court, Randerson J stated (at para [141]):

> It is also relevant to consider what reasonable expectations of privacy the plaintiffs' family are entitled to. In an ideal world, most of us would prefer to have the right to choose where and when photographs or other personal material about ourselves is published to the world at large. But it is an uncomfortable fact that those in public life, including the plaintiff Mr Hosking, necessarily sacrifice to a greater or lesser degree, the privacy ordinarily enjoyed by those who are not household names or identities in the community. Viewed objectively, as it must be, the reasonable expectations of privacy of such persons will necessarily be lower since it is inevitable the media will subject celebrity figures such as Mr Hosking to closer scrutiny and because the public has a natural curiosity and interest not only in the personal lives and activities of the celebrity but also in their families.

[121] The Restatement observes (at 389) that voluntary public figures (those who engage in public activities, assume a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or submit themselves or their work for public judgment) have no right of privacy in relation to public appearances or activities. But as Lord Woolf CJ said in *A v B* (supra at 554):

> Where an individual is a public figure he is entitled to have his privacy respected in the appropriate circumstances. A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media.

The right to privacy is not automatically lost when a person is a public figure, but his or her reasonable expectation of privacy in relation to many areas of life will be correspondingly reduced as public status increases. Involuntary public figures may also experience a lessening of expectations of privacy, but not ordinarily to the extent of those who willingly put themselves in the spotlight.

[122] The Restatement further indicates that in the United States the families of people who court public attention will also have lower expectations of privacy because the legitimate public interest in the public figure is not necessarily limited to the individual himself. In *Kapellas v Kofman* 1 Cal 3d 20 (1969) a newspaper editorial was published urging electors not to vote for a certain candidate for the city council. The article referred to the fact that three of the candidate's six children had committed various offences and misdemeanours. She sued for, inter alia, an invasion of her children's privacy but the claim failed, with the Court observing (at para [17]):

> … when the legitimate public interest in the published information is substantial, a much greater intrusion into an individual's private life will be sanctioned, especially if the individual willingly entered into the public sphere … The children's loss of privacy is one of the costs of the retention of a free marketplace of ideas.

The Court went on to note that family members or others closely associated with newsworthy individuals have been precluded from maintaining actions for invasion of privacy in other cases, such as *Carlisle v Fawcett Publications Inc* 201 Cal App 2d 733, 747; 20 Cal Rptr 405 (1962) where the Court said:

> …a necessary corollary [of the relinquishment of a public figure's right to privacy] is that people closely related to such public figures … must also to some extent lose their right to the privacy that one unconnected with the famous or notorious would have.

[123] The special position of children must not be lost sight of, however, and we will address that. In the present case, the appellants' position was that the right of the twins to privacy cannot be synonymous with the privacy right of the appellants. This, it was said, would result in an unfortunate situation where the celebrity status and behaviour of parents will always determine the privacy rights of their families, regardless of how those family members behave. While sympathetic to the children of public figures who have no choice about their parents' career paths, Randerson J considered that in this case Ruby and Bella's reasonable expectations of privacy were likely to be diminished simply by the flow-on effects of their relationship with their celebrity parent. In addition, the fact that the Hoskings had placed the fact of

their children's pending birth in the public light must have objectively diminished expectations of privacy.

[124] It is a matter of human nature that interest in the lives of public figures also extends to interest in the lives of their families. In such cases, the reasonable expectations of privacy in relation to at least some facts of the families' private lives may be diminished. Of course there may be special circumstances pointing away from that conclusion, such as where there is evidence before the Court establishing a risk to the plaintiff directly resulting from the nature of the public figure's role: see the approach of the Court in *Venables*. The appellants in the present case submitted that publication of the images of the twins would increase the risk that they may be kidnapped. We will consider that in due course.

Publicity that is highly offensive

[125] In theory, a rights-based cause of action would be made out by proof of breach of the right irrespective of the seriousness of the breach. However, it is quite unrealistic to contemplate legal liability for all publications of all private information. It would be absurd, for example, to consider actionable merely informing a neighbour that one's spouse has a cold. By living in communities individuals necessarily give up seclusion and expectations of complete privacy. The concern of the law, so far as we are presently concerned, is with wide-spread publicity of very personal and private matters. Publication in the technical sense, for example as applies in defamation, is not in issue.

[126] Similarly publicity, even extensive publicity, of matters which, although private, are not really sensitive should not give rise to legal liability. The concern is with publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned. The right of action, therefore, should be only in respect of publicity determined objectively, by reference to its extent and nature, to be offensive by causing real hurt or harm. In the Restatement the requirement is "highly offensive to a reasonable person"; the formulation expressed in Australia by Gleeson CJ (drawn from the United States cases) and referred to by the English

Court of Appeal in *Campbell* imbues the reasonable person with "ordinary sensibilities". In similar vein the Privacy Act, in s66 defining interference with the privacy of an individual, requires "significant" humiliation, loss of dignity or injury to feelings.

[127] We consider that the test of *highly offensive to the reasonable person* is appropriate. It relates, of course, to the publicity and is not part of the test of whether the information is private.

[128] We do not see personal injury or economic loss as necessary elements of the action. The harm to be protected against is in the nature of humiliation and distress. These are concepts now familiar in the law having recognition in statutes such as the Employment Relations Act and the Privacy Act. We are not concerned with issues of whether there need be recognised psychiatric harm.

Legitimate public concern

[129] There should be available in cases of interference with privacy a defence enabling publication to be justified by a legitimate public concern in the information. In *P v D*, absence of legitimate public interest was treated as an element of the tort itself. But it is more conceptually sound for this to constitute a defence, particularly given the parallels with breach of confidence claims, where public interest is an established defence. Moreover, it would be for the defendant to provide the evidence of the concern, which is the appropriate burden of proof if the plaintiff has shown that there has been an interference with his or her privacy of the kind we have described.

[130] Furthermore, the scope of privacy protection should not exceed such limits on the freedom of expression as is justified in a free and democratic society. A defence of legitimate public concern will ensure this. The significant value to be accorded freedom of expression requires that the tort of privacy must necessarily be tightly confined. In *Douglas v Hello!* Brooke LJ formulated the matter in the following way (at para [49]):

> [A]lthough the right to freedom of expression is not in every case the ace of trumps, it is a powerful card to which the courts of this country must always pay appropriate respect.

[131] The appellants submitted that the type of speech that the respondents are seeking to impart in this case should receive lesser protection under the Bill of Rights than political or artistic speech, because of its "commercially motivated gossip nature". In *Virginia Pharmacy Bd v Virginia Consumer Council* 425 US 748, 96 S Ct 1817, 48 L Ed 2d 346 (1976), the US Supreme Court afforded commercial speech only:

> a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression.

[132] The importance of the value of the freedom of expression therefore will be related to the extent of legitimate public concern in the information publicised. Phillipson refers to proportionality which captures the interrelationship between the competing values. That this may draw the courts into determinations of what should or should not be published must be accepted. Such judgments are made with reference to indecent publications and suppression orders and are part of the judicial function. It is not a matter of judges being arbiters of taste, but of requiring the exercise of judgment in balancing the rights of litigants.

[133] The word "concern" is deliberately used, so as to distinguish between matters of general interest or curiosity to the public, and matters which are of legitimate public concern. We accept in this respect the observation of Eichelbaum CJ in *TV3 Network Services Ltd v Broadcasting Standards Authority* (at 733) that there is a difference between material that is "merely interesting" to the public and material "properly within the public interest, in the sense of being of legitimate concern to the public".

[134] A matter of general interest or curiosity would not, in our view, be enough to outweigh the substantial breach of privacy harm the tort presupposes. The level of legitimate public concern would have to be such as outweighs the level of harm likely to be caused. For example, if the publication was going to cause a major risk of serious physical injury or death (as in the *Venables* case), a very considerable level of legitimate public concern would be necessary to establish the defence.

[135] We do not think it is helpful in an area like this for the Court to adopt categories such as "commercial" and "non-commercial" speech. Instead, we prefer an approach that takes into account in each individual case community norms, values and standards. An approach such as is summarised in the Second Restatement (at 391) should apply:

> The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards would say that he had no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure.

There are of course analogies here with qualified privilege in defamation and the iniquity defence in cases of breach of confidence.

Privacy and defamation

[136] In the conclusion to his 1960 article Prosser drew attention to the potential impact the protection against public disclosure of private facts may have on the carefully developed "defences, limitations and safeguards" in the law of defamation. This Court has taken account of the potential impact on defamation of upholding claims for new duties of care where the claim relates to the plaintiff's reputation: see *Midland Metals Overseas Plc Ltd v The Christchurch Press Co Ltd* [2002] 2 NZLR 289 and the cases there cited.

[137] We are not persuaded that to recognise a claim in respect of the publicising of private information will intrude into the law of defamation any more than does the

action for breach of confidence. The defence of truth in response to a claim for defamation may raise issues of privacy just as it may involve issues of breach of confidence. The objectionable disclosure may be entirely factually accurate.

[138] To the extent that a remedy in damages is awarded arising from publicity given to private information it may be seen as constituting a remedy for damage to reputation which hitherto has been the almost exclusive realm of defamation. But the true focus is on hurt and distress rather than standing in the eyes of others. The objectionable disclosure may be entirely factually accurate.

The position of children

[139] The United Nations Convention on the Rights of the Child (UNCROC), ratified by New Zealand and all but two United Nations member states, declares for children the same right of privacy as appears in the International Covenant. Article 16 states:

> 1. No child shall be subjected to arbitrary or unlawful interferences with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
>
> 2 The child has the right to the protection of the law against such interference or attacks.

The Convention states in art 3:

> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[140] Counsel for the Commissioner for Children presented submissions based on UNCROC and seeking protection against publicity (seemingly whether or not involving private facts) unless shown to be in the best interests of the child or demonstrably in the public interest.

[141] Reliance was placed on the approach of the Broadcasting Standards Authority and upon the recently formulated Guidelines of the International

Federation of Journalists which require similar special consideration of the position of children. The law has long recognised that. There are two clear recent examples.

[142] In *TV3 Network Services Ltd v ECPAT New Zealand Incorporated* [2003] NZAR 501, Chambers J was concerned with a documentary aired by TV3 showing child prostitution in Fiji. Chambers J observed (at para [43]) that:

> TV3's absolutist stance – that freedom of speech trumps all – is simply not right. A balancing of interests is required. The restriction on freedom of speech effected by the authority's decision is minor when compared with the competing need for protection of children.

[143] In *Re an Unborn Child* [2003] 1 NZLR 115, Heath J emphasised the need to give appropriate weight to New Zealand's obligations under UNCROC.

[144] It would be unrealistic and unnecessary to consider a legal prohibition against the publication of all photographs depicting children without parental consent. That would inhibit media coverage of, for example a children's Christmas parade.

[145] In the context of the protection of privacy, we consider that the criteria for protection, requiring private information in respect of which there is a reasonable expectation of privacy the publicising of which would be highly offensive, provide adequate flexibility to accommodate the special vulnerability of children.

[146] We were invited to draw from provisions of UNCROC relating to the preservation of identity (art 8) and freedom from exploitation (arts 19, 32 and 36) the imperative to prevent the publication of the photographs in issue. But read in context, those provisions are directed at serious physical and mental abuse of children in situations we are not concerned with.

[147] Of course, the vulnerability of children must be accorded real weight and their private lives will seldom be of concern to the public. In this respect, courts in New Zealand might be expected to be more sensitive to the separate interests of the children of "celebrities" than the United States cases suggest. And of course, potential danger may justify strong measures, even to the extent of the order in

Venables. But danger is not to be lightly assumed. As in all fields of law, the courts must act on evidence not speculation.

[148] Accordingly we are of the view that the way in which the law has been developing through the decisions of the High Court should not be interrupted. We think the case for a right of action for breach of privacy by giving publicity to private and personal information is made out. We take that view, in summary, because:

- It is essentially the position reached in the United Kingdom under the breach of confidence cause of action.

- It is consistent with New Zealand's obligations under the International Covenant and UNCROC.

- It is a development recognised as open by the Law Commission.

- It is workable as demonstrated by the experience of the Broadcasting Standards Authority and similar British tribunals.

- It enables competing values to be reconciled.

- It can accommodate interests at different levels so as to take account of the position of children.

- It avoids distortion of the elements of the action for breach of confidence.

- It enables New Zealand to draw upon extensive United States experience.

- It will allow the law to develop with a direct focus on the legitimate protection of privacy, without the need to be related to issues of trust and confidence.

Remedies

[149] The primary remedy upon a successful claim will be an award of damages. As in breach of confidence and defamation cases, injunctive relief may be appropriate in some circumstances.

[150] It is important to distinguish between the elements of the action and available remedies when it is established, on the one hand, and questions of interlocutory relief, on the other.

Prior restraint

[151] The major concern of the respondent and the media interveners was in respect of "prior restraint". That is a legitimate concern and will be dealt with. But, as Mr Miles accepted in the course of argument, after a claim has been established, whether in defamation or breach of confidence, if the circumstances warrant, an injunction against (further) publication is unobjectionable. The same must apply to wrongful publicity of private information.

[152] Traditionally in applications for interim injunctive relief in defamation cases, the Courts have been extremely alert to prior restraint issues. The English courts have always been reluctant to restrain publication before trial where the publisher has indicated it will rely on a defence of truth, qualified privilege or honest opinion: see *Herbage v Pressdram Ltd* [1984] 2 All ER 769; *Quartz Hill Consolidated Goldmining Company v Beall* (1882) 20 Ch D 501; *Fraser v Evans* [1969] 1 QB 349. New Zealand courts have taken a similar position: see *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4; *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406; *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129. In such cases, exceptional, clear and compelling reasons are required before injunctive relief will be made available.

[153] As Randerson J identified, the rationale for the rule is the importance attached by the law to freedom of expression. In *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406, 407 (CA) it was said:

> The principles have been stated by this Court in *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4 and *Ron West Motors Ltd v Broadcasting Corporation of New Zealand (No 2)* [1989] 3 NZLR 520. By reason of the principle of freedom of the media, which has been emphasised by this Court in those cases and others including *Attorney-General for the United Kingdom v Wellington Newspapers Ltd (No 2)* [1988] 1 NZLR 1, and

> *Television New Zealand Ltd v Solicitor-General* [1989] 1 NZLR 1, and which is reinforced by s14 of the New Zealand Bill of Rights Act 1990 as to the right of freedom of expression, it is a jurisdiction exercised only for clear and compelling reasons. It must be shown that defamation for which there is no reasonable possibility of a legal defence is likely to be published.

[154] The principle was recently affirmed in *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129, 132-133. The European Court of Human Rights also considered the issue in *The Observer and The Guardian v United Kingdom* (1991) 14 EHRR 153 and observed (at 191):

> On the other hand, the dangers inherent in prior restraint are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned.

[155] It was argued before us that if the New Zealand courts develop a tort of interference with privacy, cases that would previously have been pleaded in defamation will be pleaded in the privacy tort instead. If a less stringent approach to interim restraint pending determination of claims is adopted it would enable plaintiffs to avoid the principle of prior restraint. As was said by Tipping J in *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* [2002] 2 NZLR 289 at para [65] care is needed to avoid upsetting "the careful balance between private interests and freedom of speech which the law of defamation and the associated torts have struck". This was said to be equally applicable to prior restraint on publication.

[156] The respondents' submissions were that the approach to prior restraint should not differ simply on the basis of the cause of action involved. Where freedom of expression rights are involved it is necessary to consider the substance of the interest the applicant is seeking to protect. Where the underlying interest is reputational, the prior restraint rules should be consistent between defamation and any privacy tort.

[157] Much will depend upon the particular circumstances. In *TV3 Network Services Ltd v Fahey* this Court set aside an interim injunction preventing the

screening of a videotape depicting a woman confronting the respondent about his past sexual misconduct towards her. Richardson P observed (at 132) that:

> *Any prior restraint of free expression* requires passing a much higher threshold than the arguable case standard. In *Attorney-General v British Broadcasting Corporation* [1981] AC 303 at 362 Lord Scarman said:
>
> > "[T]he prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice."
>
> (emphasis added)

Valuable guidance is available from the judgment of the Court of Appeal in *A v B* where Lord Woolf, for the Court, dealt extensively with the approach to be adopted on interlocutory applications to restrain publication of private (confidential) information.

[158] The general position, then, is that usually an injunction to restrain publication in the face of an alleged interference with privacy will only be available where there is compelling evidence of most highly offensive intended publicising of private information and there is little legitimate public concern in the information. In most cases, damages will be considered an adequate remedy.

This appeal

[159] Although he expressed a preference for developing the action of breach of confidence as in the United Kingdom, Randerson J did state the view that even if there were in New Zealand law an independent action for wrongfully publicising private information, as in *P v D,* it would not assist the appellants. He considered that if there were a right of privacy as alleged it would be clearly overwhelmed by the right of freedom of expression. He said that there is nothing in the evidence to suggest there is a serious risk to the children if publication occurs as intended.

[160] We are satisfied that no other conclusion is reasonably open.

[161] The real concern of the appellants as parents relates not to the publication of photographs of their two children in the street, but to publication of the photographs along with identification and the association of them with a "celebrity" parent. We accept the sincerity of their anxiety for the wellbeing of the children and their concern at the prospect of recurring unwanted media attention. They wish to protect the freedom of the children to live normal lives without constant fear of media intrusion. They feel that if publication of the present photographs is prevented there will be no incentive for those who, in the future, might pursue the children in order to capture marketable images.

[162] We must focus on the issues now presented. If there is no case for relief now, we cannot address the future. We are inclined to the view, however, that the concerns are overstated.

[163] We are not persuaded that a case is made out for an injunction to protect the children from a real risk of physical harm. We do not see any substantial likelihood of anyone with ill intent seeking to identify the children from magazine photographs. We cannot see the intended publication increasing any risk that might exist because of the public prominence of their father.

[164] The inclusion of the photographs of Ruby and Bella in an article in *New Idea!* would not publicise any fact in respect of which there could be a reasonable expectation of privacy. The photographs taken by the first respondent do not disclose anything more than could have been observed by any member of the public in Newmarket on that particular day. They do not show where the children live, or disclose any information that might be useful to someone with ill intent. The existence of the twins, their age and the fact that their parents are separated are already matters of public record. There is a considerable line of cases in the United States establishing that generally there is no right to privacy when a person is photographed on a public street. Cases such as *Peck* and perhaps *Campbell* qualify this to some extent, so that in exceptional cases a person might be entitled to restrain

additional publicity being given to the fact that they were present on the street in particular circumstances. That is not, however, this case.

[165] We are not convinced a person of ordinary sensibilities would find the publication of these photographs highly offensive or objectionable even bearing in mind that young children are involved. One of the photographs depicts a relatively detailed image of the twins' faces. However, it is not sufficient that the circumstances of the photography were considered intrusive by the subject (even if that were the case, which it is not here because Mrs Hosking was not even aware the photographs had been taken). The real issue is whether publicising the content of the photographs (or the "fact" that is being given publicity) would be offensive to the ordinary people. We cannot see any real harm in it.

[166] The Code of Practice of the United Kingdom Press Complaints Commission states in cl 3 that everyone is entitled to respect for his or her private and family life. Clause 6 states that where material about the private life of a child is published there must be justification for publication other than the fame, notoriety or position of his or her parents or guardian.

[167] Ms Alex Kingston (who had some celebrity status) and her partner objected to publication in *Hello!* Magazine on two occasions of photographs of their daughter; one taken in a quiet street, the other on a shopping expedition. It was said Ms Kingston had frankly and publicly discussed the conception of her daughter and her birth.

[168] A complaint to the Press Complaints Commission was rejected. The reasons for the decision include:

> The Commission did not consider – in line with previous findings – that public roads or pavements were places where people could have a reasonable expectation of privacy under the Code. The Commission also considered that a glass shopfront in the full view of passers-by was in the same category.
>
> …

> With regard to the photograph of the complainants' daughter, the Commission did not consider that the photographs could reasonably be held to have affected her welfare or to concern any aspect of her private life. The Commission has decided before that the mere publication of a child's image cannot breach the Code when it is taken in a public place and is unaccompanied by any private details or material that might embarrass or inconvenience the child. While the Commission sympathised with the complainants' desire to protect their daughter's privacy it could not, for the reasons outlined above, conclude that a breach of the Code had been established.

[169] This accords entirely with our view of the present case.

[170] As a result of these conclusions it is unnecessary to consider whether the respondents could rely on a defence that there is a legitimate public concern in publishing the photographs.

[171] It will be apparent from the reasons given that we do not consider there is a cause of action in our law directed to unauthorized representation of one's image; that on the facts of this case no trespass occurred in the taking of the photographs; that there was similarly no assault; and that there has been no foundation laid for a claim of negligent infliction of emotional harm to the children.

[172] Further evidence was tendered on appeal but it can make no difference to the outcome relating, as it does, more to the position of Mr Hosking than to that of the children.

Result

[173] The appeal is dismissed.

[174] The respondents are together entitled to costs which we fix at $18,000, with disbursements including the travel and accommodation expenses of counsel approved, if necessary, by the Registrar. The interveners are to meet their own costs.

KEITH J

[175] I agree that the appeal fails. For me, it fails whether the proceeding is for breach of confidence or for breach of privacy, broadly for the reasons given by Randerson J in the High Court (*Hosking v Runting* [2003] 3 NZLR 385 paras [135]-[141], [149]-[151] and [184]) and by Gault P and Blanchard J in this Court (paras [159]-[172]. Nor do the other possible grounds of claim have any foundation (see Gault P and Blanchard J, paras [17] and [171]). I also agree with the costs order they propose.

[176] I am writing to indicate why I consider that a separate cause of action for giving unreasonable publicity to private facts does not exist in the common law of New Zealand.

[177] The reasons for that conclusion can be assembled under three headings: the central role in our society of the right to freedom of expression; the array of protections of relevant privacy interests in our law against disclosures of private information and the deliberate and specific way in which they are in general elaborated; and the lack of an established need for the proposed cause of action. Such matters of principle, policy, the existing pattern of the law (including defences and remedies), and the statutory context help resolve questions about whether liability in tort is to be recognised or imposed; see eg *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282. In this context they also relate directly to the operation of the New Zealand Bill of Rights Act 1990 and in particular to the limits that may be imposed under it on the rights and freedoms it affirms.

The importance of freedom of expression

[178] The right to freedom of expression is recognised in our law (notably by Parliament in s14 of the Bill of Rights), as in the law of many other parts of the world, as being of the highest importance in a modern democracy. The purposes and values underlying it are also widely accepted. They include individual liberty and

self-fulfilment, the value of the marketplace of ideas and the protection and advancement of democratic self-government; eg *White Paper on a Bill of Rights for New Zealand* (1985) para 10.54; *Lange v Atkinson* [1998] 3 NZLR 424, 460-467; *R v Secretary of State for the Home Office, ex parte Simms* [2000] 2 AC 115, 126; and Huscroft in Rishworth and others *The New Zealand Bill of Rights* (2003) 309-311. The primary response to those who would say that the relevance of those purposes and values may not be immediately obvious on the facts of this case or in comparable cases about celebrities is that the scope of the right is not limited to or by those purposes, for instance in terms of the information and ideas protected by it. It is information and ideas *of any kind* that are protected by the statements of the freedom in s14 of the Bill of Rights and in article 19(2) of the International Covenant on Civil and Political Rights 1996 (999 UNTS 171) which the Bill of Rights is designed to affirm.

[179] Those purposes and values may be relevant when possible limits on the right and their application are considered, although in my view that matter does not arise in the circumstances of this case. In terms of s5 of the Bill of Rights they may be "only such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Article 19(3) of the Covenant states limits specific to freedom of expression, a statement which we may consider in applying the generally applicable terms of s5 of the Bill of Rights; see eg *Re J (An Infant) : B and B v Director-General of Social Welfare* [1996] 2 NZLR 134, 145, *Television New Zealand Ltd v R* [1996] 3 NZLR 393, 396, and *Lange v Atkinson* at 466. According to article 19(3),

> 3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[180] In terms of that wording the question raised by this appeal is whether a tort restricting publication in the manner proposed by three members of the Court is necessary for respect of the rights of the appellants (or rather their children)

(reputation not being in issue). That possible limit is given content by article 17 of the Covenant:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

The related provision of the Convention on the Rights of the Child 1989 (1577 UNTS 3) (article 16) is almost identical.

[181] It is significant that a general provision on privacy was deliberately excluded from the Bill of Rights. According to the *White Paper*, because there was not any general right to privacy (although specific rules of law and legislation protected some aspects of it) it would be inappropriate to entrench a right that was not by any means fully recognised, which was in the course of development, and whose boundaries would be uncertain and contentious (para 10.144). The lessening of the status of the proposed Bill from an entrenched to an interpretive measure did not lead to the right to privacy being introduced. The extensive existing array of specific rules of law and legislation protecting aspects of privacy had been valuably catalogued for the benefit of those involved in New Zealand's ratification of the Covenant in 1978 and the preparation of the draft Bill of Rights just a few years earlier by Professor Geoffrey Palmer in "Privacy and the Law" [1975] NZLJ 747. He also helpfully identified the many layers of ambiguity and uncertainty surrounding the idea of privacy.

[182] The complexity of that idea was already appearing in the United States. While the fourth amendment prohibition on unreasonable search and seizure could be applied without too much difficulty to new search technologies (as in *Katz v United States* 389 US 347 (1967)) broader concepts of privacy (not expressed in the Constitution) were invoked amidst controversy to strike down prohibitions on the sale of contraceptives to married couples (*Griswold v Connecticut* 381 US 479 (1965)) and to others, state abortion laws (*Roe v Wade* 410 US 113 (1973)) and sodomy laws (*Lawrence v Texas* 539 US ____ (2003) overruling *Bowers v Hardwick* 478 US 186 (1986)). In New Zealand those aspects of privacy were dealt with by

legislation – also heavily contested – including the Contraception, Sterilisation and Abortion Act 1977 and the Homosexual Law Reform Act 1986.

[183] Although articles 19(3) and 17 of the Covenant provide a more specific indication than does s5 of the limits on freedom, of expression that may be justified to prevent interference with privacy by the exercise of the freedom they too are stated in general terms: the restrictions provided by law are to be "necessary for respect of the rights or reputation of others," and interferences with privacy are not to be "arbitrary". The Human Rights Committee set up to monitor compliance with the Covenant, in its General Comment 16 of 8 April 1988 on article 17, provides no assistance relevant to the issue before us, and the Committee on the Rights of the Child has made no general comment at all on article 16 of the Children's Convention. I agree with Gault P and Blanchard J that the other provisions of the Children's Convention to which we were referred do not assist the appellants (para [146]).

[184] A brief review of the statute book and the established common law does however provide some greater specificity. It also highlights important aspects of the approaches which our law and more broadly our society have taken and continue to take to protecting privacy interests against the exercise of the right to freedom of expression, particularly by the media and more specifically the print media.

Existing protections of relevant privacy interests

[185] The many existing protections of privacy interests against the exercise of freedom of expression incorporate a range of variables: they may relate to face to face encounters or less direct ones; they may be limited to one on one encounters or cover communication to wider groups; they may be limited to expression or extend beyond it; they may simply prohibit release of private information or they may also require a judgment to be made about the impact of the release; they may apply to particular categories of persons who exercise freedom of expression and not to others (who may indeed be explicitly excluded); they may specifically respond to particular technologies; they may mention privacy explicitly or they may not; they may be elaborated by international agencies, legislatures or courts or by the relevant

profession, industry or occupational group; they may be supported by criminal, civil, disciplinary or other sanctions, in the ordinary courts, special tribunals, disciplinary bodies, or self-regulatory bodies; or the protection may come solely from the personal or professional assessment of the individual or organisation concerned. As will appear, the resulting landscape of the law, with its varieties of planting, some of it very dense and deliberate, and its contrasting bare plains, is sharply distinct from that in *Donoghue v Stevenson* [1932] AC 562 where, for the majority and minority alike, common law authorities and principle completely occupied the field.

[186] A first set of legislative provisions deals with communications in a one on one situation. They are designed to protect privacy interests of a particular individual from being improperly interfered with by another person claiming to exercise the right to freedom of expression. The expression may be oral and direct, as with addressing words to a person in a public place, intending to threaten, alarm, insult or offend that person (Summary Offences Act 1981 s4(1)(b)), or addressing indecent or obscene words to that person (s4(1)(c)(ii); see also the Crimes Act 1961 s126); or the offensive communication might be through the post or the telephone (Postal Services Act 1998 s22; and Telecommunications Act 2001 s112).

[187] The offence provisions regulating the exercise of freedom of expression but also extending to other acts, covering both face to face and less direct communication, penalise offensive, threatening, insulting and disorderly behaviour (Summary Offences Act s3, but notice that it now contains a requirement of a likelihood of violence, an element which was not included in the offensive behaviour provision which was applied to the burning of the Union Jack in *Derbyshire v Police* [1967] NZLR 391); threatening to injure a person or to damage their property with intent to frighten or intimidate them (Summary Offences Act s21(1)(a)); and making contact with a person (by telephone, correspondence or in any other way) at least twice within a year, intending the harassment to cause that person to fear for their safety or that of family relations (Harassment Act 1997 ss3, 4 and 8; see also the civil harassment provisions in part 3).

[188] Another set of provisions prohibits particular methods of gathering personal information - through a listening device for instance; it is also an offence to disclose information obtained by such an unlawful interception of a private communication (Crimes Act 1961 s216C(1) (enacted in 1979)). And, coming closer to the present facts, it is an offence for a private investigator to take photographs or make recordings of any person without their written consent (Private Investigators and Security Guards Act 1974 s52(1)); under subs (2) the offending photographs and recording are not admissible in civil proceedings – a sanction additional to those listed in para [185]).

[189] Then there are the many statutory provisions which control the release by state agencies of particular categories of personal information obtained by them. In 1981 the Danks Committee on Official Information, in its *Supplementary Report,* noted the existence of a large number of specific statutory provisions enacted over a lengthy period requiring that certain official information be kept confidential, in many cases to protect individual privacy, an interest which was of course to be protected in the proposed Official Information Act (see now s9(2)(a) of the Official Information Act 1982). They protected, for instance, education information, complaints about safety matters, medical and related health records, tax returns and documents, electoral and polling secrecy, information about complainants, witnesses and sometimes defendants in criminal prosecutions, adoption records, children's court information, certain other court records, Wanganui Computer records, prison records, security information, information concerning savings accounts, postal, telephone, telegraphic and radio communications, social welfare information and statistical information (including the census) (Committee on Official Information *Towards Open Government, Supplementary Report* (1981) 55-58 and 119-138). In the factual context of this case it is significant that Parliament has from time to time given specific additional protections to children by placing further limits on the disclosure of information about children, particularly in respect of court proceedings. Those protections are to be related to the obligations stated in the Convention on the Rights of the Child, particularly article 16 (para [180] above).

[190] The principal functions of the Information Authority set up under the Official Information Act included "as a first priority" reviewing that legislation to see

whether the protection it gave was reasonable and compatible with the purposes of the Official Information Act (s38(1)(a)). The Danks Committee had accepted that a detailed examination of the particular provisions was called for. It could not propose wholesale repeal or amendment, first, because in many cases the provisions protected interests which justified the withholding and, second, because a series of questions had to be considered in each case. A basic question was of course whether the limit on release was justified; another what type of sanctions – contractual, disciplinary, civil or criminal – were needed if the basic question was answered affirmatively.

[191] Of the approximately 200 protective provisions identified by the Authority and relevant departments, the two largest categories covered commercial information and personal information. Those provisions were reviewed over the following few years. Amendments and repeals were recommended and some were enacted, several by the Privacy Act 1993. One of the repeals was of the provision of the Wanganui Computer Centre Act 1976 which empowered the Policy Committee set up under it to determine the policy of the Centre relating to the privacy and protection of the rights of individuals, a most uncommon statutory reference at that time to "privacy".

[192] All of that legislation was of course about *official* information. It did not extend to information held about individuals by persons outside government, for instance by credit agencies and insurance companies. From at least the 1970s concern grew about such information (as well as publicly held information), a concern accentuated by the development of new technologies which facilitated data matching, use and disclosure. That concern led in due course to the Privacy Act 1993. According to its title, the Act is to promote and protect individual privacy in general accordance with the Recommendation of the Organisation for Economic Cooperation and Development concerning guidelines governing the protection of privacy and transborder flows of personal data, and, among other things, it is an Act to establish principles concerning the collection, use and disclosure by private as well as public agencies of information relating to individuals.

[193] Among the possibly relevant principles are that personal information is to be collected directly from the individual concerned unless, among other things, the

information is publicly available (principle 2); that information obtained for one purpose is not in general to be used for another (principle 10); and that information is not in general to be disclosed unless, among other things, disclosure is one of the purposes for which the information is obtained (principle 11). On the facts of this case however none of those principles would help the appellants or their children – assuming, that is, that they could invoke them in these proceedings.

[194] That they could not in fact do, however, because the principles, with an irrelevant exception, do not confer on any person a legal right that is enforceable in a court of law (s11(2)), and possibly, in addition, because the Act, including its principles, does not apply to the news media in relation to its news activities (see para (b)(xiii) of the definition of agency in s2(1)); see Randerson J at para [129]. The Act has two other significant characteristics. First, following processes of consultation, codes relating to particular categories of information may be and have been elaborated under the Act; the operation of the Act was not going to depend simply on the principles. And, second, the Act and the codes are administered and adjudicated upon by expert bodies – in general, the Privacy Commissioner and the Human Rights Review Tribunal. If the matter goes on appeal to the High Court, an additional member, drawn from the panel of those who sit on the Tribunal, sits with the Judge. Panel members are to have knowledge and experience in matters with which the Tribunal is concerned (Human Rights Act 1993 ss126 and 101). Parliament recognises in those provisions, as in legislation for the classification of publications and broadcasting (discussed next), that specialist bodies and not the regular judiciary are to make the judgments about the release of certain sensitive information. A similar judgment appears in Parliament's choice of the Ombudsmen rather than the courts to resolve disputes (including those involving privacy) about the release of official information. Lord Woolf MR made essentially the same point, in a judicial review case, about the nature of decisions concerning privacy, and the advantages that members of the expert commission in that situation had compared with the courts; *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885, para [14].

[195] I have already mentioned some of the specific legislative regulation of particular technologies designed to protect individuals from interference with their

privacy interests. To that body of law is to be added the legislation regulating radio and television broadcasting. That legislation contains the only provisions expressly protecting individual privacy interests against general publication through the news media. Given the complete absence of comparable provisions regulating the print media, their enactment must in significant part be explained by the need to regulate those licensed to use a limited, rationed resource. The privacy provisions are to be traced back to 1976 (the date of the Wanganui computer legislation with its express reference to privacy) when provision was first made for the licensing of private radio and television stations (Broadcasting Act 1976 ss24(1)(g) and 95(1)(f)). Those provisions have been carried forward into the Broadcasting Act 1989, s4(1)(c) of which requires broadcasters to maintain in their programmes standards which are consistent with the privacy of the individual. As in 1976, Parliament states that no broadcaster is under any civil liability for failure to comply with that and the other provisions, including ones about decency, law and order, balance on controversial matters and any approved code of broadcasting practice (s4(3) of the 1989 Act and ss24(4) and 95(2) of the 1976 Act).

[196] One of the functions of the Broadcasting Standards Authority set up under the 1976 Act is to encourage the development and observance by broadcasters of codes of practice in relation, among other things, to privacy, to issue such codes itself, and to approve those prepared by broadcasters (s21(1) (e)(vii), (f) and (g)). It also has the power, under s21(1)(d), to issue advisory opinions which it did in respect of privacy in 1992 (accepted by Eichelbaum CJ in *TV3 v Broadcasting Standards Authority* [1995] 2 NZLR 720), with three additions made in 1996 and 1999 (reproduced by Gault P and Blanchard J in para [105]). The BSA, in principles 1 and 6, adhered closely to the wording adopted by the American Law Institute in its 1976 *Restatement of the Law, Torts (2d)* (set out by Gault P and Blanchard J in para [68]) and it has continued to emphasise what it first said in 1992:

- These principles are not necessarily the only privacy principles that the Authority will apply;
- The principles may well require elaboration and refinement when applied to a complaint;
- The specific facts of each complaint are especially important when privacy is an issue.

[197] Eichelbaum CJ made it clear in the *TV3* case that the reference to privacy in the broadcasting legislation was not to be limited by the narrow setting of the tort of that name (referring to the only two reported decisions at the time the opinion was first issued: *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 and *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415). What was in issue was not whether publication of the particular facts would constitute a tort but whether there was a fit basis for the Authority imposing the standard, charged as it is with maintaining standards consistent with the privacy of the individual. The broad scope of the Authority's power was also, in the Chief Justice's mind, to be seen in the limiting of right of appeal to the High Court: the Court was to determine the appeal as if the decision appealed against had been made in the exercise of a discretion (s18(4); see similarly *Robson v Hicks Smith Ltd* [1965] NZLR 1113, 1115, 1120 and 1125-1126 (FC) in respect of appeals to the Supreme Court from decisions of the Indecent Publications Tribunal).

[198] While the privacy and broadcasting statutes do not apply to the print media in their news activities they may of their own choice become subject to privacy codes adopted and applied by two bodies administering systems of self-regulation. The Press Council, the first of the bodies, has authority over those members of the print media which accept its authority, and privacy is one of the principles it applies:

> **Privacy**
>
> Everyone is entitled to privacy of person, space and personal information, and these rights should be respected by publications. Nevertheless the right of privacy should not interfere with publication of matters of public record, or obvious significant public interest.
>
> Publications should exercise care and discretion before identifying relatives of persons convicted or accused of crime where the reference to them is not directly relevant to the matter reported.
>
> Those suffering from trauma or grief call for special consideration, and when approached, or enquiries are being undertaken, careful attention is to be given to their sensibilities.

The Council consists of six lay and five industry members. Its website records 28 decisions over the past four years on complaints of breaches of privacy.

[199] The second self-regulatory regime which includes within its Code of Ethics a rule on privacy is that set up by the Advertising Standards Authority:

> **10. Privacy** - Unless prior permission has been obtained an advertisement should not portray or refer to any persons, whether in a private or public capacity, or refer to any person's property, in a way likely to convey the impression of a genuine endorsement.

The Authority's website indicates that this rule is almost never invoked. It can be related to the provision in §652C of the American Law Institute *Restatement* on torts making the appropriation of the name and likeness of another one of the privacy torts. Parliament in 1993 expressly deferred to the self regulatory functions of the Authority and its Complaints Board in ss8(2) and 21(3) of the Broadcasting Act: the functions of the Broadcasting Standards Authority do not include advertising where the broadcaster and advertiser have accepted the Board's jurisdiction.

[200] Common law and equity also regulate the release of private information on the basis of duties of confidence which may be founded in contract or which may arise from the relationship between the parties. As I have already indicated, I agree that the appellants are unable to bring their case within this body of law. As the judgment of Gault P and Blanchard J shows, this law has broad application, continues to develop and can frequently be used and is used to protect privacy interests. A notable recent English example is *Douglas v Hello ! Ltd* [2001] QB 967, if it is accepted, as many would not, that that case about a very widely publicised event concerned the protection of privacy interests rather than purely commercial ones.

[201] I should say in this context that I have difficulty with the application of the law of confidence to situations in which there is no relationship between the parties. The very word “confidence”, its origins and the body of law surrounding it appear to me all to require that an element of trust or something equivalent exist between the parties. Accordingly, if that relationship does not exist, as, for instance, I would say was the case in *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908 and *Peck v United Kingdom* (2003) 13 BHRC 669 (Eur Ct HR), then some other basis must be found if disclosure is to be prevented or penalised. In the first case, in New Zealand at least, that basis may well be found in the limit placed on the right to

freedom of expression arising from the right to life also affirmed in the Bill of Rights (see *Re J (An Infant) : B and B v Director-General of Social Welfare* [1996] 2 NZLR 134, 144-146, and on the applicability of the Bill of Rights see *Lange v Atkinson* [1997] 2 NZLR 22, 32, and [1998] 3 NZLR 424 (CA)). In the end, notwithstanding its protestations to the contrary early in its judgment (paras [24]-[27]), the *Venables* court appears to have done exactly that when assessing the right to life and other rights set out in the European Convention against the right to freedom of expression (paras [34]-[51]). In cases like *Peck* (the disclosure to the media by a local authority of CCTV footage of the appellant in a public street brandishing a knife with which he had attempted to commit suicide) there may be an argument that the local authority is acting outside its powers. While it presumably had power to collect the information for proper public purposes, such as public safety, what power could it have to disclose the information publicly in the way it did in the absence, for instance, of a proper law enforcement purpose? Any resulting encroachment on freedom of expression in those and like cases accordingly should be capable of definition in rather precise terms and demonstrated justification (to anticipate the last part of this judgment) by reference to such relatively concrete matters as rights specifically affirmed in the Bill of Rights or legally enforceable limits on the powers of governmental bodies.

[202] This body of law, designed to protect or at least protecting, privacy interests against the exercise of the right to freedom of expression, has several characteristics.

[203] One is that much of the law is particular, often responding to new technology, as with telecommunications, broadcasting, photography, audio recording and technical means of intercepting private conversations. The particular response may also be to new or newly perceived situations or changing social conditions and attitudes. One instance of that is provided by recent legislation enacted in a number of countries aimed at terrorist activities and providing for the surveillance of private communications. Another, addressing a different social issue, is so called "clean slate" legislation relating to what some see as relatively minor criminal convictions. A further particular element is the choice between control over the release of information and requiring a judgment of consequence. The particularity also appears in the choices that are made between legislation and self-regulation and, within the

legislative responses, between criminal liability, civil liability or both (as with harassment), liability through special tribunals (but not in the courts) and disciplinary processes.

[204] A second characteristic is the reluctance of the law, in the absence of obligations arising from a confidential relationship or an agreement (as in employment), to recognise or impose a broad obligation to respect "privacy". That reluctance is not simply to be seen in the silences in the law, but also in the lack of legislative or other responses to persistent law reform proposals and scholarly calls in those Commonwealth jurisdictions of which I am aware for a tort of the unreasonable publishing of private facts (alone or as part of a broader tort) to be introduced by statute, with the exception of four Canadian provinces mentioned later.

[205] To move to a third matter, if that reluctance is overcome, at least on the evidence of the privacy and broadcasting statutes, Parliament, far from establishing a right to privacy enforceable in civil actions in the general courts, denies any such right and leaves "privacy" to be developed and stated in codes or opinions by an expert person or body and then to be applied by them or other expert bodies in particular cases, with the expectation that those bodies will build up experience and a consistent and evolving approach both in preparing codes and in applying them.

[206] A fourth matter is that the legislature has deliberately excluded the news media in its news gathering capacity from the scope of the general privacy legislation. Among the news media themselves, print is then to be distinguished from the broadcast media and is subject, on the face of it, only to self-regulation to afford explicit protection to privacy interests against the exercise of the right to free expression.

[207] Each of those characteristics of the law and the processes followed in its elaboration appears to me to be in essence inconsistent with the recognition of a general tort preventing the public disclosure of private facts by the media along the lines adopted by the three members of the Court. I am not saying that the array of legislation absolutely excludes the proposed tort. Rather, the statutory context tells

strongly against the existence of such a tort. Further, the caution expressed by this Court in *R v Hines* [1997] 3 NZLR 529 about the choice of the method of law reform and the advantages of widely informed processes for legislative change applies.

The Bill of Rights, especially s5: a reasonable limit prescribed by law and demonstrably justified?

[208] That provisional conclusion is strengthened and, for me, becomes final when the Bill of Rights is brought into play. It recognises that there may be limits but they must be "reasonable limits prescribed by law" and they must be "demonstrably justified in a free and democratic society". The provision requires those supporting the proposed limit to justify it to a high standard.

[209] Gault P and Blanchard J state these two fundamental requirements for a successful claim for an interference with privacy:

1. The existence of facts in respect of which there is a reasonable expectation of privacy; and

2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person (para [117]; see also paras [118]-[128]).

Such publication could be justified by a legitimate public concern (paras [129]-[135]). Under Tipping J's formulation, the tort would appear to be rather easier to establish (see paras [255]-[258]).

[210] The question which s5 of the Bill of Rights presents is whether that limit on freedom of expression is a reasonable one which can be demonstrably justified in a free and democratic society. The tort, particularly in the form proposed by Gault P and Blanchard J, is closely related to the formulation adopted in 1976 by the American Law Institute – and rightly so, if I may say so, since United States jurisdictions how have over 100 years of experience of the tort, experience way beyond that of other jurisdictions. But what does that experience show? It is of

course experience that we may properly consider in determining, as required by s5, whether the limit is demonstrably justified in a free and democratic society. I refer to two scholarly and detailed reviews of the law.

[211] In 1966 a major American constitutional scholar, Professor Harry Kalven Jr, condemned the tort as originally stated by Samuel D Warren and Louis D Brandeis in 1890 in their famous article "The Right to Privacy" 4 Harv L Rev 193 and as it still appeared 75 years later, as having "no legal profile":

> We do not know what constitutes a prima facie case, we do not know on what basis damages are to be measured, we do not know whether the basis of liability is limited to intentional invasions or includes also negligent invasions or even strict liability. "Privacy in Tort Law – Were Warren and Brandeis Wrong?" (1966) 31 Law and Contemporary Problems 326, 333.

[212] On the first point, he asked what accurate unconsented public reference to the plaintiff is prima facie tortious. Where is the line to be fixed by judge or jury? The analogy of battery – that every unconsented touching is prima facie a tort – cannot be applied.

[213] On the measurement of damages, Kalven rejected the resemblance to defamation claimed by Dean William L Prosser in his very influential article, "Privacy" (1960) 48 Calif L Rev 383, 409. According to Kalven:

> It remains odd to give recovery for emotional disturbance without any showing that [the] plaintiff suffered or was upset. And defamation at least has the rationalization that it is trying to infer what degree of injury there has been to reputation and what degree of emotional upset a false and defamatory statement has caused. Surely it is even more conjectural to price the emotional impact of a truthful nondefamatory statement. (334)

(Kalven addressed remedies primarily in terms of damages since Warren and Brandeis, referring to defamation and copyright, had suggested that while damages would be available in all cases an injunction might be available "in perhaps a very limited class of cases" (219).)

[214] On his last point Kalven emphasised that "there is virtually no discussion in the books of whether or not privacy is an intentional tort. And this is especially

striking since the underlying basis of liability for defamation has been so famous a point of tort doctrine." (335)

[215] For Kalven the lack of an intelligible version of a prima facie case was only half of the difficulty; the other half was the impact of the generous privilege to serve the public interest in news, a privilege accepted since Warren and Brandeis wrote:

> The lack of legal profile and enormity of the counterprivilege converge to raise with me the question of whether privacy is really a viable tort remedy. The mountain, I suggest, has brought forward a pretty small mouse. (337)

[216] That ridiculous mouse born of all that mountainous labour introduces a second scholarly review supporting the lack of demonstrated need. Ninety years after the Warren and Brandeis article, Professor Diane L Zimmerman in her "Requiem for a heavyweight : a farewell to [their] privacy tort" (1983) 68 Cornell L Rev 291 found fewer than 18 cases in the United States – or about two each decade – in which a plaintiff was either awarded damages or found to have stated a cause of action sufficient to withstand a motion for summary judgment or a motion to dismiss (293, n5). (See also the rather negative conclusions reached by the commentators quoted by Gault P and Blanchard J in paras [74]-[75].) She says this at the beginning of her conclusion:

> After ninety years of evolution, the common law private-facts tort has failed to become a usable and effective means of redress for plaintiffs. Nevertheless, it continues to spawn an ever-increasing amount of costly, time-consuming litigation and rare, unpredictable awards of damages. In addition, this "phantom tort" and the false hopes that it has generated may well have obscured analysis and impeded efforts to develop a more effective and carefully tailored body of privacy-protecting laws.
>
> Many of the most troubling privacy questions today arise not from widespread publicizing of private information by the media, but from electronic eavesdropping, exchange of computerized information, and the development of data banks. Much of this information, which individuals supply as a necessary prerequisite to obtaining important benefits like credit, medical care, or insurance, can cause serious harm, even if circulated only to one or two unauthorized recipients. Privacy law might be more just and effective if it were to focus on identifying (preferably by statute) those exchanges of information that warrant protection at their point of origin, rather than continuing its current capricious course of imposing liability only if the material is ultimately disseminated to the public at large.
>
> For example, thoughtful elaboration of privacy law involving intrusions on solitude is likely to promote greater protection of the individual's interest in

> being free of public scrutiny than is the vague and hard-to-apply law governing the publicity of private facts. (362-363, references excluded)

She also proposed increasing the use of legal sanctions for the violation of special confidential relationships.

[217] The law of New Zealand has, of course, frequently responded in the particular ways Professor Zimmerman proposes, primarily through many particular pieces of legislation, including now the codes prepared by the Privacy Commissioner, and also through the largely court made law of breach of confidence, a law that, in many areas, is supported by professional and occupational codes, practices and disciplinary processes.

[218] Those responses may be through civil proceedings, criminal sanctions, special tribunals and procedures, and self-regulatory regimes. Particular choices are made between the remedies, especially by the legislature which has also dealt distinctly with the print media, essentially by leaving it outside the steps it has taken to protect privacy interests. As already indicated, those established responses may also provide an available basis for relief in the very situations in which the lack of a right of privacy is lamented by the Judges or commentators, as in the cases brought by the well known actors Alastair Sim, Gordon Kaye and Michael Douglas and Catherine Zeta Jones (*Sim v H J Heinz Co Ltd* [1959] 1 WLR 313 (on which see D L Mathieson (1961) 39 Can B Rev 409); *Kaye v Robertson* [1991] FSR 62 CA; and *Douglas*).

[219] The very limited value of a general privacy tort is also suggested by the history of Privacy Acts enacted decades ago in four Canadian provinces – British Columbia, Manitoba, Newfoundland and Saskatchewan. The leading Canadian tort book scarcely mentions the statutes (Allen M Linden *Canadian Tort Law* (7th ed 2001) 58), Professor Peter Hogg omits any reference to them in his authoritative *Constitutional Law of Canada*, and only a handful of relevant cases on the statutes appear in the law reports and at least some that do illustrate the limits of the general tort (see eg *Hollinsworth v BCTV* (1998) 44 CCLT (2d) 83). It must also be significant that very recently Canadian provincial legislatures have moved to adopt privacy statutes along the lines of those enacted elsewhere in recent years, including

the 1993 New Zealand Act, to regulate through special procedures and often in detail the gathering and use of data. They are moving far beyond the brief general privacy statutes enacted by four of them.

[220] To the argument that because the general tort is rarely invoked there is no harm in recognising it, there are two answers : that limited effect demonstrates a lack of pressing need (the basic point being made in this part of these reasons) – a need which, especially in terms of s5 of the Bill of Rights, has to be demonstrably justified by the proponents; and the very existence of an ill-defined tort carries with it costs, not simply financial but also those arising from the chilling effect it may have on freedom of expression. The prospect of that effect arising from the shadowy existence of the proposed tort is the more serious if interim relief is available, as it was here. As Gault P and Blanchard J recall (paras [151]-[158]) and Warren and Brandeis recognise, the policy of the law has long been against prior restraints in situations such as this.

[221] I accordingly conclude that a general tort of the unreasonable publicising of private information should not be recognised in our law. I reach that conclusion in agreement with Randerson J in the High Court and broadly for his reasons (including his commentary on the New Zealand cases, especially at paras [171]-[178]). I also recall the lack of legislative responses to calls for such a tort, in New Zealand, as elsewhere in the Commonwealth.

[222] To repeat, the proposed tort would place a generally stated limit on the centrally important right to freedom of expression; it would depart, without good reason, from long established approaches to the protection of personal information; those approaches are based on identifying particular privacy interests which call for protection and determining the components of the protection (such as restricting a technology, or prohibiting release, or requiring a judgment of effect), and involve making particular choices of remedy; and, finally, the proposed limit has not been demonstrably justified, as s5 of the Bill of Rights requires.

TIPPING J

Introduction

[223] I am in general agreement with the judgment which Gault P has delivered and in which Blanchard J has joined. I am writing a judgment of my own because of the significance of the issues which this case presents. I propose to focus first on s5 of the New Zealand Bill of Rights Act 1990 which is of central importance to those issues. That section provides that, subject to s4 (which gives supremacy to legislation), the rights and freedoms contained in the Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[224] In the privacy field, as in many other fields of law, the Courts are engaged in reconciling competing values. First, there is the value to society of the right to freedom of expression which is expressly recognised by s14 of the Bill of Rights. But the Courts should also recognise and give appropriate effect to the values involved in the broad concept of privacy. Those values are also important in our society and hence are recognised in our international commitments. They are recognised less directly, but no less significantly, in provisions such as s21 of the Bill of Rights, namely the right to be free from unreasonable search and seizure. That right is not very far from an entitlement to be free from unreasonable intrusions into personal privacy. Indeed s21 speaks of unreasonable search or seizure, whether of the person, property, correspondence "or otherwise". Those last two words signal the breadth of reach which s21 was intended to have.

[225] Rishworth, Huscroft, Optican and Mahoney, in their recent (2003) publication *The New Zealand Bill of Rights* (to which I will refer simply as Rishworth), discuss at pp419-420 the strong privacy rationale of s21 of the Bill of Rights. They refer to *R v Jefferies* [1994] 1 NZLR 290 (CA), and regard the decision of the Court in that case as having focused on the importance of s21 for defending "those values or interests which make up the concept of privacy", as Thomas J put it at page 319. Rishworth then states that in so holding, the Court of Appeal followed the lead of what the authors describe as the revolutionary judgment of the United

States Supreme Court in *Katz v United States* 389 US 347 (1967). In that case the Court held that the right to be free from unreasonable search or seizure contained in the Fourth Amendment to the US Constitution protected people not places. Rishworth states that this simple observation modified centuries of common law thinking and established privacy, not property, as the core value guarded by the US Constitutional requirement of reasonable search. Indeed Harlan J, who wrote a concurring judgment in *Katz*, indicated that the search and seizure jurisprudence should be triggered whenever the activity in question invaded a "reasonable expectation of privacy".

[226] It is not necessary for present purposes to discuss the scope of the concepts of search and seizure in the light of the privacy rationale. At least at first blush it would seem very strained to view photographs as a form of seizure, or indeed search; and, in any event, seizing the image of a person who is in a public place could hardly be regarded as unreasonable, unless there was some very unusual dimension in the case. My present point is that the values that underpin s21 and which are reinforced by New Zealand's international obligations can, by reasonable analogy, be extended to unreasonable intrusions into personal privacy which may not strictly amount to search or seizure. The lack of any express recognition of a right to privacy in the Bill of Rights should not, in my view, inhibit common law developments found to be appropriate. Society has developed rapidly in the period of nearly 15 years since the enactment of the Bill of Rights in 1990. Issues and problems which have arisen, or come into sharper focus, as a result of this development should, as always, be addressed by the traditional common law method in the absence of any precluding legislation.

[227] The same can be said of the fact that in 1993 Parliament enacted the Privacy Act. I do not regard the ground as having been entirely captured by that enactment so as to preclude common law developments. Indeed it might well seem very strange to those who see the Privacy Act as preventing the supply of information about whether a friend is in hospital or on a particular flight, for the common law to be powerless to remedy much more serious invasions of privacy than these would be. In the absence of any express statement that the Privacy Act was designed to cover the whole field, Parliament can hardly have meant to stifle the

ordinary function of the common law, which is to respond to issues presented to the Court in what is considered to be the most appropriate way and by developing or modifying the law if and to the extent necessary.

[228] If Parliament wishes a particular field to be covered entirely by an enactment, and to be otherwise a no-go area for the Courts, it would need to make the restriction clear. I am unpersuaded by the view that if Parliament has only gone so far, this is an implicit message to the Courts to stay their hands. Any such implication would have to be both clear and necessary: see *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), and *B v Auckland District Law Society* [2004] 1 NZLR 326, 349 (PC). Here the posited implication is far from clear or necessary.

[229] The Bill of Rights is designed to operate as between citizen and state. Nevertheless it will often be appropriate for the values which are recognised in that context to inform the development of the common law in its function of regulating relationships between citizen and citizen. The judicial branch of government must give appropriate weight to the rights affirmed in the Bill of Rights when undertaking that exercise.

[230] Freedom of expression must accommodate other values which society regards as important. That accommodation must be carefully worked out, as it has been over many years in the law of defamation which protects personal reputation, a value which is also not expressly recognised in the Bill of Rights. When deciding whether, and if so how, to develop or mould the common law to achieve such an accommodation, the Courts must do their best to strike the right balance between the competing values. In fields like the present this necessarily includes considering whether the limit on a right affirmed by the Bill of Rights such as freedom of expression, which the proposed common law development would create, is both reasonable and demonstrably justified in a free and democratic society.

[231] It is not, however, enough for those who are asked to accept some limit on freedom of expression simply to rely on s14 of the Bill of Rights as if it were some universal social panacea which must be seen as trumping other rights and values in most, if not all circumstances. Society cannot be expected to vest unrestrained or

insufficiently restrained power in the news media and others under the banner of freedom of expression. So far as the news media are concerned the law of qualified privilege, particularly as it relates to political matters, has recently embraced the concept of responsible journalism as a touchstone to regulate the competing values in that field. Responsible journalism is the basis upon which the values of personal reputation and freedom of expression are reconciled: see *Bonnick v Morris* [2003] 1 AC 300 (P.C.) 309 at para 23. It would not be in society's interests to allow freedom of expression to become a licence irresponsibly to ignore or discount other rights and values.

[232] But against that, the importance to society of the values enshrined in the right to freedom of expression suggests that the Courts should allow those who invoke that right appropriate latitude in what they say and publish. It is not for the Courts to apply controls which are too exacting in their reach or content. In short, all limitations on freedom of expression must be reasonable and demonstrably justified. They must also, of course be "prescribed by law", a matter to which I will return.

[233] There are said to be three theoretical bases on which the right to freedom of expression is founded. They can be described, in short, as (1) the marketplace of ideas theory, (2) the maintenance and support of democracy theory, and (3) the liberty theory: see Rishworth at 308ff. An exercise of the right to freedom of expression which impinges on privacy values is unlikely to fit within the marketplace of ideas theory. The expression involved will seldom be of that kind. Expression which impinges on privacy may be desirable to support the proper workings of democracy; but the defence of legitimate public concern will largely accommodate that dimension. Privacy values will not normally constitute a justified limitation on freedom of expression if the information being imparted is a matter of legitimate public concern. In that way the right to freedom of expression is not subject to limitation if the expression (ie. the imparting of the information) is reasonably related to the maintenance of the democratic process, in the sense of advising the public of what they have a right to know in that context.

[234] The liberty theory is the broadest and potentially the most problematic of the three. The theory is essentially that it is for the ultimate good of society for citizens

to be able to say and publish to others what they want. Liberty is fine in the abstract, but in concrete terms all those living in an organised society must accept some curtailment of their abstract liberty to enjoy freedom of expression when the curtailment is necessary for the greater good of society as a whole and its individual members. Therein lies the conundrum. The liberty theory rests on the ultimate public good; but the full flowering of the theory undoubtedly has the capacity to harm the public good. When the expression in issue provides little public benefit, except in theory, but significant individual or public harm in concrete terms, the theory must give way. Thus, in the particular instance society's pragmatic needs or the welfare of its individual members can outweigh the general benefits supported by the theory of liberty. The theory, however, has a head-start. Any pragmatic or concrete benefit must pass the threefold test in s5 of the Bill of Rights, namely reasonableness, justification and prescription by law.

[235] Limits on the right to freedom of expression which do not fit within the purposes of the first or second theories may be easier to justify, depending on what public good or benefit the expression in question is seen as fulfilling. What I am suggesting is that the nature of the information imparted may well have a bearing on the reasonableness and justifiability of the limitation in issue. This is a manifestation of proportionality. The more value to society the information imparted or the type of expression in question may possess, the heavier will be the task of showing that the limitation is reasonable and justified. As already noted, the proposed tort of invasion of privacy recognises this through the defence of legitimate public concern. There may well be a greater potential for legitimate public concern about information imparted as part of the marketplace of ideas or in support of the democratic process than there is with information, the imparting of which is supported only by the abstract theory of liberty.

[236] In the end someone has to make a judgment on behalf of society as to where the balance falls. The question may often be whether individual harm outweighs public good. The responsibility for striking the right balance is vested in the Courts. In discharging that responsibility it is perfectly appropriate for the judicial branch of government to determine, after hearing argument on all sides, that an appropriately formulated free-standing tort of privacy should exist; but subject to a defence

designed to protect freedom of expression values when the privacy values which the tort is designed to protect fail to outweigh them.

[237] The weight one gives to privacy values in concrete terms is no doubt a matter of assessment in the individual case. But I do not consider there can be any room to doubt that, on appropriately defined occasions, privacy values can outweigh the right to freedom of expression. There is obviously room for differences of view as to how these occasions should be defined but that is a different matter. When privacy values are found to outweigh the right to freedom of expression, and the law recognises that by placing a limitation on freedom of expression, that limitation will, in terms of s5 of the Bill of Rights, be a limit prescribed by law. It will also be a limit which is reasonable and demonstrably justified in a free and democratic society.

Privacy Values

[238] What then are the privacy values to which I have been referring? Privacy is potentially a very wide concept; but, for present purposes, it can be described as the right to have people leave you alone if you do not want some aspect of your private life to become public property. Some people seek the limelight; others value being able to shelter from the often intrusive and debilitating stresses of public scrutiny. As Professor John Fleming put it in the 8th edition of his *Law of Torts* (at 601), people often wish to shelter their private lives from the "degrading effect of intrusion or exposure to public view". For some people the offices they hold, or the activities they engage in, necessarily carry an expectation of some degree of legitimate public interest and scrutiny. The activities and personal attributes of people in this category can reasonably be regarded, at least up to a point, as being in the public arena. The public may well have a right to know certain things about them.

[239] But, even for those in this category, most people, I suggest, would agree that there should be limits. It is of the essence of the dignity and personal autonomy and well-being of all human beings that some aspects of their lives should be able to remain private if they so wish. Even people whose work, or the public nature of whose activities make them a form of public property, must be able to protect some aspects of their lives from public scrutiny. Quite apart from moral and ethical issues,

one pragmatic reason is that unfair and unnecessary public disclosure of private facts can well affect the physical and mental health and wellbeing of those concerned. Their effectiveness in the public roles they perform can be detrimentally affected to the disadvantage not only of themselves, but of society as a whole.

[240] It is something of an irony that the United States of America, with its very strong First Amendment emphasis on freedom of expression, has been at the forefront of developing a separate tort of invasion of privacy. Even in a country whose defamation laws go as far in favour of freedom of expression as *New York Times v Sullivan* 376 US 254 (1964), it has, in many quarters, been regarded as appropriate to give a fair measure of protection to privacy interests. The American Law Institute's Restatement of Torts (Second) formulates the general position in these terms, at 652D:

> He who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicised is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

[241] Privacy values have achieved wide recognition throughout the world. Indeed the terminology of rights is often used. In *Cox Broadcasting Co v Cohn* 420 US 469 (1975) the Supreme Court, when recognising a right of action for invasion of privacy, noted that privacy rights had been accepted at common law in thirty states and by statute in four. In 1980, in England, Lord Scarman described the right to privacy as fundamental: see *Morris v Beardmore* [1981] AC 446, 464. Article 12 of the Universal Declaration of Human Rights states that no-one shall be subjected to arbitrary interference with his privacy. Article 8 of the European Convention on Human Rights speaks of the right to respect for private life. Article 17 of the International Covenant on Civil and Political Rights states that no-one shall be subjected to arbitrary or unlawful interference with his privacy and that everyone has the right to the protection of the law against such interference. It is worth pointing out that the word "unlawful", coupled with the specifically affirmed right to the protection of the law against unlawful interference with privacy, suggests that it is

the function of the national law of each State (in New Zealand both statute and common law) to determine what comprises such unlawful interference.

[242] In an address to the Ontario Institute of the Canadian Bar Association delivered on 28 January 2000 and entitled "The Evolution of Canada's Privacy Laws" the Privacy Commissioner for Canada, Mr Bruce Philips, said that there remained many reasons for continuing to promote respect for individual privacy which he described as a fundamental human right. He continued "I would like to suggest two in particular – the ever increasing intrusiveness of technology and the seemingly insatiable appetite of even democratic governments and the private sector for intruding into the lives of individuals".

[243] These then are some features of the values recognised under the heading of privacy. In the foregoing section of this judgment I have also endeavoured to articulate some of the reasons why privacy values are important.

A separate tort of invasion of privacy

[244] Against that background I will examine first the question whether there should in New Zealand be a separate tort of invasion of privacy covering at least unjustified publication of information about a person's private life. Being of the view that such a tort should exist, I will then, to the extent necessary for the purpose of this case, address the ingredients of the tort.

[245] As Gault P has demonstrated, the jurisprudence of the United Kingdom Courts has so far declined to recognise a free-standing tort of invasion or breach of privacy. The same can be said of Australia at superior Court level. In the United Kingdom the Courts have chosen incrementally to develop the equitable remedy of breach of confidence. But, in so doing, it has been necessary for the Courts to strain the boundaries of that remedy to the point where the concept of confidence has become somewhat artificial. The underpinning element of the breach of confidence cause of action has conventionally been that either by dint of a general or a transactional relationship between the parties, one party can reasonably expect that the other will treat the relevant information or material as confidential and will

not publicly disclose it. It is of course of the essence of breach of confidence that for whatever reason the information or material be confidential and intended to remain so.

[246] There are by the same token circumstances in which reasonable expectations of privacy will arise and should be recognised by our Courts, quite apart from existing legislative provisions. These occasions will include, but should not necessarily be confined to, circumstances which can appropriately be regarded as involving conventional confidentiality issues. It therefore seems to me, with respect to those who do not share this view, that it is more jurisprudentially straightforward and easier of logical analysis to recognise that confidence and privacy, while capable of overlapping, are essentially different concepts. Breach of confidence, being an equitable concept, is conscience based. Invasion of privacy is a common law wrong which is founded on the harm done to the plaintiff by conduct which can reasonably be regarded as offensive to human values. While it may be possible to achieve the same substantive result by developing the equitable cause of action, I consider it legally preferable and better for society's understanding of what the Courts are doing to achieve the appropriate substantive outcome under a self contained and stand-alone common law cause of action to be known as invasion of privacy. I prefer that terminology to breach of privacy because, to my mind, the word "invasion" more aptly describes the essence of the wrong than the word "breach", the connotations of which are less flexible.

[247] The result in substantive terms of recognising a separate tort is not significantly different from the extended form of the breach of confidence cause of action as it is being developed in the United Kingdom. What is at stake is really a matter of legal method rather than substantive outcome. It cannot logically be held that one method is an unjustified limit on freedom of expression whereas another is not. New Zealand Courts have, to a greater or lesser extent, already espoused a separate tort to protect privacy interests. I am not persuaded there is any good reason to put the clock back and confine our law to a method of analysis which does not fit the true nature or the realities of the cause of action.

Indicia of invasion of privacy

[248] What then should the indicia of the tort of invasion of privacy be? As noted above, the compass of the tort, as presently under consideration, is to give a remedy when there is unjustified publication of information about the plaintiff's private life. We have guidance in the American jurisprudence. Gault P has examined that topic and I will not repeat his discussion in that or the other fields which he has surveyed. We also have guidance in the previous New Zealand cases, and in the discussions in the English cases which include the recent decision of the House of Lords in *Wainwright v Home Office* [2003] UKHL 53. It is inherent in what I have already written that I prefer a different structural path to that which the House of Lords followed in that case. The English approach is nevertheless instructive from the substantive point of view.

[249] For me the first and fundamental ingredient of the tort should be that the plaintiff must be able to show a reasonable expectation of privacy in respect of the information or material which the defendant has published or wishes to publish. The necessary expectation can arise from the nature of the information or material or the circumstances in which the defendant came into possession of it, or both. It has been suggested that the concept of a reasonable expectation of privacy is amorphous and ill-defined. I do not consider that anything more precise is either desirable or possible at this stage of the development of the law and at this level of generality.

[250] Nor do I think that when the concepts are carefully examined, there is much force in the criticism that the new tort is so uncertain that it should never be born. The plaintiff must show first an expectation of privacy and, more importantly in most cases, that such expectation is a reasonable one. The latter dimension of reasonableness, familiar in many fields of law, controls the subjective expectation of the individual. It introduces an objective element upon which, as with all questions of reasonableness, in the end the Court has to make a value judgment. It is a very familiar exercise and cannot, in my view, validly be criticised on the basis of uncertainty. The concept is clear. The fact that its application in a marginal case may be difficult is not a valid reason to regard the concept as possessing

objectionable uncertainty. Expectations of privacy are really no more uncertain or elusive than expectations of confidence; or the expectation that reasonable care will be taken not to damage the interests of others. The parameters of any general duty are constantly being worked out and refined by the Courts. An underpinning jurisprudence can be allowed to develop for privacy as it has for confidence and negligence. What expectations of privacy are reasonable will be a reflection of contemporary societal values and the content of the law will in this respect be capable of accommodating changes in those values.

[251] This is the traditional common law method. It would be a most undesirable fetter on this method if this kind of incremental development were regarded as so uncertain that it could not pass muster as a justified limitation on another right, nor as one which was justified by law for the purposes of s5 of the Bill of Rights. In this respect I share the views expressed by Blanchard J in *Duff v Communicado Ltd* [1996] 2 NZLR 89 at 100. His Honour there referred to the European jurisprudence on the meaning of the phrase "prescribed by law", which is also found in s5 of our Bill of Rights.

[252] That phrase is likely to have a somewhat different meaning for those brought up in a common law tradition from its meaning for those brought up in the kind of legal environment familiar in most European countries. Those countries depend much more on codes than on Judge-made law with the attendant incremental developments familiar to common law and equity regimes. The level of prescription which seems to be required in European jurisprudence is rather higher than is appropriate to New Zealand's legal traditions.

[253] I immediately accept that a principle or rule which is enunciated in a wholly uncertain manner could well be a principle or rule which is not sufficiently prescribed by law for the purposes of s5. What I cannot accept is that incremental common law or equitable developments, or reshapings of the law; or principles which are stated at a higher level of generality than may be the European method, should be regarded in New Zealand as not sufficiently prescribed by law. It is inevitable of course that questions of degree will arise. But I do not consider the phrase "prescribed by law" in s5 was intended or should be construed so as to

stultify traditional common law methodology and prevent Courts from implementing legal developments which they regard as appropriate and necessary, on the premise that the obvious and unavoidable uncertainty that often exists at the margins in some fact situations should prevent an otherwise appropriate development.

[254] Except perhaps in some clear instances of uncertainty, any limitation inherent in a determination of a Court on the rights and freedoms affirmed by the Bill of Rights should be regarded as prescribed by law. The control which s5 is intended to provide on such limitations comes essentially from the need for them to be reasonable and demonstrably justified in a free and democratic society. Whether that is so is in the end a judgment which the Courts themselves must make. Once they have made it after following due process, I cannot envisage many circumstances in which it could sensibly be said that a resulting limitation was not prescribed by law.

[255] It is conventional in the American jurisprudence to measure expectations of privacy and whether any asserted expectation is reasonable by the level of offence, and thus of harm, which publication of the material in question might be expected to cause an ordinary member of society in the plaintiff's circumstances. The standard criterion has been to require a high level of offence. Such a formulation is a useful reminder that relatively trivial invasions of privacy should not be actionable. This criterion also has the effect of requiring something substantial before there can be any intrusion on freedom of expression.

[256] While I recognise the value and the importance of these factors, and would not wish to encourage litigation at a low level of impact, I would myself prefer that the question of offensiveness be controlled within the need for there to be a reasonable expectation of privacy. In most cases that expectation is unlikely to arise unless publication would cause a high degree of offence and thus of harm to a reasonable person. But I can envisage circumstances in which it may be unduly restrictive to require offence and harm at that high level. That might be so if, for example, the publication served little or no public good, save an abstract upholding of the liberty theory. I accept that it will always be necessary for the degree of offence and harm to be substantial, so that freedom of expression values are not limited too readily. At the risk of being thought guilty of a verbal quibble, I would

prefer the qualifier to be a substantial level of offence rather than a high level of offence. That seems to me to be a little more flexible, while at the same time capturing the essence of the matter.

[257] As earlier foreshadowed, it should be a defence to an action for invasion of privacy that the information or material published about the plaintiff's private life is a matter of legitimate public concern. This is analogous to the iniquity defence in the breach of confidence area. It also has parallels with the developing jurisprudence in the area of qualified privilege when publication has been to a wide audience. The greater the invasion of privacy the greater must be the level of public concern to amount to a defence. This is no more than another application of the need for proportionality. No verbal formulation can hope to do more than lay out the principles to be applied in the individual case. Further than that I do not think it appropriate to go at this very early stage of the development of what should now be recognised as a discrete branch of the law.

[258] I see the remedy for invasion of privacy as being primarily an award of damages. Prior restraint by injunction, such as is sought in the present case, will be possible but should, in my view, be confined to cases which are both severe in likely effect and clear in likely outcome. Freedom of expression values will ordinarily prevail at the interlocutory stage. I am mindful of the chilling effect which potential claims for damages for invasion of privacy might have on the activities of news media organisations and perhaps others. But against that I am mindful too of the considerable distress which unwarranted invasion of privacy can cause. The right to freedom of expression is sometimes cynically invoked in aid of commercial advantage. Of course the right to freedom of expression exists in the commercial field, but it should not be allowed to become a justification for what may be little more than a desire to boost circulation or ratings when that legitimate commercial objective has a substantial adverse impact on the personal dignity and autonomy of individuals and serves no legitimate public function.

The tort of invasion of privacy in summary

[259] Holding the balance fairly between plaintiffs and defendants in this field is not likely to be easy. The law should be as simple and easy of application as possible in the interests of those who have to make decisions about what and what not to publish. I would therefore summarise the broad content of the tort of invasion of privacy in these terms. It is actionable as a tort to publish information or material in respect of which the plaintiff has a reasonable expectation of privacy, unless that information or material constitutes a matter of legitimate public concern justifying publication in the public interest. Whether the plaintiff has a reasonable expectation of privacy depends largely on whether publication of the information or material about the plaintiff's private life would in the particular circumstances cause substantial offence to a reasonable person. Whether there is sufficient public concern about the information or material to justify the publication will depend on whether in the circumstances those to whom the publication is made can reasonably be said to have a right to be informed about it.

The present case

[260] Turning to the present case I am of the view that neither Mr and Mrs Hosking, nor the children themselves, had a reasonable expectation of privacy in the photographs in question. They were taken in a public place. There is no evidence which satisfies me that publication would be harmful to the children, either physically or emotionally. There is, in my view, no greater risk to the safety of the children than would apply to a photograph of any member of society taken and published in a similar way. Any other conclusion would be based on speculation rather than reasonable inference from evidence. I doubt whether many members of society would regard the Hoskings as having expectations of privacy in current circumstances in respect of their children. I cannot accept that any such expectation as might be held would be reasonable in all the circumstances. I cannot see how it can reasonably be said that publication of these photographs should be regarded as

likely to cause substantial offence or other harm to a person of reasonable sensibility.

[261] I would therefore join in dismissing the appeal, with costs as proposed by Gault P.

ANDERSON J

[262] I am in agreement with Keith J's judgment in its entirety and in writing separately I seek only to emphasise my concern that the right to freedom of expression, affirmed by s14 of the New Zealand Bill of Rights Act 1990, is now to be limited because publication of truth might be "highly offensive to an objective reasonable person".

[263] In my respectful view, the emergence of an "invasion of privacy" tort has gained impetus from semantic imprecision and questionable analysis of the relationship between rights and values. The term "invasion" has broad, emotional connotations which can tend to obscure the true nature of the question being examined in this case. It may be an appropriate term for those encroachments on personal autonomy which involve trespass and eavesdropping, but this case is not about invasion even in a metaphorical sense. It is about publication.

[264] What is meant by "privacy" and what is the nature of a right to it? In a strict sense "privacy" is a state of personal exclusion from involvement with or the attention of others. More important than its definition is the natural human desire to maintain privacy. Only a hermit or an eccentric wishes to be utterly separated from human society. The ordinary person wishes to exercise choice in respect of the incidence and degree of social isolation or interaction. Because the existence of such a choice is a fundamental human aspiration it is recognised as a human value. The issue raised in this case is the extent to which the law does, and the common law may, give effect to that aspiration.

[265] The extent to which that human value is also a right is described by the multitude of legal, equitable and administrative remedies and responses for derogation of the value which Keith J has identified in his judgment. The small

residue of the concepts with which cases such as the present are concerned has not been a right at all but an aspect of a value. An analysis which treats that value as if it were a right and the s14 NZBORA right as if it were a value, or treats both as if they were only values when one is more than that is, I think, erroneous.

[266] Thus, cases such as the present are not about invasion but publication; and they are not about competing values, but whether an affirmed right is to be limited by a particular manifestation of a value.

[267] Having regard to s5 of NZBORA there should be no extension of civil liability for publication of true information unless such a liability is a reasonable limitation which is demonstrably justified in a free and democratic society. Freedom of expression is the first and last trench in the protection of liberty. All of the rights affirmed by NZBORA are protected by that particular right. Just as truth is the first casualty of war, so suppression of truth is the first objective of the despot. In my view, the development of modern communications media, including for example the world wide web, has given historically unprecedented exposure of and accountability for injustices, undemocratic practices and the despoliation of human rights. A new limitation on freedom of expression requires, in my respectful view, greater justification than that a reasonable person would be wounded in their feelings by the publication of true information of a personal nature which does not have the quality of legally recognised confidentiality.

[268] Nor is there any demonstrable need for an extension of civil liability. Peeping, peering, eavesdropping, trespassing, defaming, breaking or exploiting confidences, publishing matters unfairly, are already covered by the legislative array. What is left to justify the breach of the right to freedom of expression?

[269] Cases such as *Douglas v Hello! Ltd* [2001] QB 967 and *Kaye v Robinson* [1991] FSR 62 CA, could well have been dealt with on the conventional bases of contract and trespass and remedied in terms of the ancient and fundamental principle that no one shall be permitted to benefit from his own wrong. In *Douglas*, for example, the photographs could only have been taken by a person who was either not invited and therefore a trespasser, or by an invitee who breached a significant

stipulation of the licence to be present. In either case, an orthodox cause of action and remedy was available. In *Kaye* there could have been no question of an implied licence to enter the hospital room and photograph the injured patient, so that the people who took the photograph must have been trespassers and could have been prevented from exploiting the fruits of the trespass on conventional grounds. There is no need to develop new concepts to meet the iniquities evident in such cases. As for the rare type of case exemplified by *P v D and Independent News Auckland Ltd* [2000] 2 NZLR 591, should existing protections of confidentiality in respect of medical care and the absence of adequate public interest not be adequate to prevent embarrassment, then in my view the principles of s14 NZBORA must prevail.

[270] As well as being unnecessary, the extended liability could be incidentally harmful to the right of freedom of expression. This is for at least two reasons. First, there is the ability of a plaintiff, aggrieved by the prospective publication of truth, to be able to prevent publication by an injunction. A plaintiff who objects to impending publication in a defamation case, faced with a prospective publisher's conventional argument against prior restraint, namely an intended plea of truth, will be entitled to argue that if the material is false it should be restrained to prevent damage to reputation, and if it is true it should be restrained to protect privacy. It is ironical that publication of allegedly false matters would not be restrained but publication of allegedly true ones would. Second, the new tort is imprecise in its definition, both semantically and in terms of its application in reality. A potential publisher of personal information which hitherto has not been protected by the array of laws and disciplines must now try to work out whether the subject of the information has a reasonable expectation of privacy, whatever meaning, objectively, in any given situation may be accorded to that expression, and if so, whether on an imputation of objectivity and reasonableness to that person he or she would be highly offended by the publication; and if so, whether publication would nevertheless be justified by legitimate public concern. I suspect these tests may prove easier to state than to apply; and will thereby inhibit expression of truth more than a protection of the relevant privacy value justifies.

[271] I think we should not lose sight of the fact that this litigation came into being to prevent the publication of photographs of people in a public street. It is quite

unlike the situation of Mr Peck in that there was nothing in the least personally embarrassing or distressing about the material which might be published. We have held, unanimously, that there was no right in anyone to prevent publication, but in the process the majority has declared that there is a new civil liability for publishing facts about a person. In my respectful view, this new liability, created in a sidewind, is amorphous, unnecessary, a disproportionate response to rare, almost hypothetical circumstances and falls manifestly short of justifying its limitation on the right to freedom of expression affirmed by NZBORA.

Solicitors:
Chen Palmer & Partners, Wellington, for Appellants
Bell Gully, Auckland, for Respondents