IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2004-404-3536

BETWEEN	GARY ROBERT ANDREWS AND PENELOPE JOAN ANDREWS Plaintiffs
AND	TELEVISION NEW ZEALAND LIMITED Defendant

Hearing: 14-17 August 2006

Appearances: B P Henry for plaintiffs
W Akel and N Alley for defendants

Judgment: 15 December 2006

JUDGMENT OF ALLAN J

In accordance with r 540(4) I direct that the Registrar endorse this judgment with the delivery time of 1 pm on Friday 15 December 2006

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[1] In *Hosking v Runting* [2005] 1 NZLR 1, the Court of Appeal affirmed the existence in New Zealand of a tort of invasion of privacy. Certain of the principles discussed there were very recently re-affirmed in *Television New Zealand Limited v Rogers* CA12/06 7 August 2006. There are two fundamental requirements for a successful claim:

a) The existence of facts in respect of which there is a reasonable expectation of privacy;

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

[2] At [118] of the *Hosking v Runting* judgment Gault P and Blanchard J said:

> 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.

[3] The present case, involving the filming and subsequent screening on public television of the victims of a road accident, raises issues as to the scope and applicability of the tort in circumstances which, in a broad sense, are likely to recur from time to time.

Factual background

[4] The plaintiffs are husband and wife. They are now in their 40s. There is evidence that over a period of some years each had been prominently involved in the commercial life of the Papakura district where they reside; so they are relatively well known in that area.

[5] On the evening of 21 December 2002 they attended a social function together. Each consumed a quantity of alcohol. During the evening an argument developed between them and there remained a degree of tension when they left the

function in order to drive home. While driving homewards in the southbound lane of the Southern Motorway near Ramarama, the driver lost control of the vehicle, which left the roadway, passed over a fence and came to rest in a field some considerable distance from the carriageway. At that point the motorway is significantly elevated above surrounding farmland. Both Mr and Mrs Andrews profess to have no recollection of the journey, and in particular, no memory at all as to which of them was driving.

[6] Blood samples were subsequently obtained from each of them. Upon analysis those samples revealed that each was significantly over the legal blood alcohol limit. They were both charged under the relevant blood alcohol legislation, but ultimately the charges were withdrawn because the police were unable to establish which of them was the driver of the vehicle.

[7] Fortunately, neither plaintiff was seriously injured in the accident, although they were both admitted to hospital in the first instance. Mrs Andrews suffered a blow to the head and superficial scratches and bruises. However the injury to her head proved to be transitory in nature. Mr Andrews was rather more significantly affected. He sustained a minimally displaced fracture to his neck, together with some relatively minor bruising. He was in hospital for a day or so, but was then discharged. It was necessary for him to wear a collar to protect his neck injury for some three months. Subsequently he suffered spells of dizziness and experienced pins and needles in his limbs, but overall it appears that he has made a full recovery.

[8] The accident was witnessed by several people who were on the motorway at the time. Two truck drivers were the first to reach the plaintiffs' vehicle. They were followed some minutes later by police officers and then by a fire fighting team and ambulance officers. The fire fighters were accompanied by a camera operator who filmed the subsequent rescue operation in its entirety. The plaintiffs were trapped in the vehicle and it was necessary to call upon so-called "jaws of life" equipment in order to free them. About an hour elapsed between the time at which the fire crew and camerawoman arrived at the scene and the time of the departure of the plaintiffs in an ambulance.

[9] Footage derived from the camera operator's activities was supplemented by that obtained from a helmet camera worn by one of the fire fighters, and from a camera inside the cab of the fire truck.

[10] The filming was undertaken by Greenstone Pictures Limited as part of a series commissioned by the defendant. The series was known simply as "Fire Fighters". The purpose of the series was to portray the lives and daily work of fire officers.

[11] Evidence given by witnesses for the defendant was to the effect that the Fire Fighters series, and this episode in particular, had multiple aims:

a) public education in respect of fire safety, and the perils of car accidents;

b) the importance of road safety;

c) the promotion of the work and lifestyle of fire fighters with a view to encouraging recruitment into the Fire Service.

[12] The plaintiffs were unaware at the scene, or indeed thereafter until the programme was screened, that they were being filmed. The field tapes were later edited, and coverage of the accident appeared as part of episode eight of the Fire Fighters series, which screened on TV1 on 28 February 2004 at 7 pm. So a little over a year had elapsed between the date of the accident and the date of screening. The plaintiffs received no prior indication of the defendant's intention to screen material relating to the accident, and were unaware it was being screened until they were advised of it while attending a party at a neighbour's house. They then viewed the programme in the company of a number of others, some of whom were known to the plaintiffs, and some not.

[13] The programme, as screened, focused to a significant degree on the work of the fire fighters attending the scene and those assisting them, but considerable footage was devoted to depicting the plaintiffs while they were trapped in their car,

primarily in respect of their interaction with rescue staff. There were shots of Mr Andrews, whose face was largely obscured on each occasion by an oxygen mask. There was some coverage of Mrs Andrews as she spoke both to her husband and to the rescue team. Her face was the subject of pixilation in each instance, but the extent of the pixilation was not always sufficient to obscure the whole of her face. At times the lower part of her face was plainly visible.

[14] There was coverage of what passed between Mr and Mrs Andrews. Mrs Andrews in particular was naturally distressed and there were expressions by her of her concern and love for her husband, and exhortations to him to "stay with her". Little, if anything said by Mr Andrews was included in the programme. The plaintiffs were referred to on a number of occasions by their Christian names. There was no reference to the surname of the plaintiffs and no identification of their vehicle by the depiction of its registration plates. There was no reference to the cause of the accident, nor to the fact that each of the plaintiffs had consumed a quantity of alcohol prior to the accident.

[15] The plaintiffs were greatly distressed by the screening of the programme. They had had no warning of it. The accident had given rise to tensions within the family, particularly in the relationship between the plaintiffs themselves and in respect of the emotional health of one of their children. They were forced to re-live the trauma of the accident, as they saw the scene from an entirely different viewpoint. Moreover, all of this occurred while they were in the company of a number of other people, not all of whom were known to them.

[16] The plaintiffs say they were shocked, humiliated and embarrassed by the screening of the programme without warning. They contended there had been an interference with their privacy rights, and so have issued this proceeding.

The pleadings

[17] In their statement of claim, the plaintiffs say the conversations and scenes depicted in the defendant's television programme gave rise to a reasonable expectation of privacy. They say that the conversations in which Mrs Andrews took

part occurred while she was dazed and suffering from shock, and that she was unaware at all material times that she was being filmed, or that her private conversations were to be recorded and published.

[18] The plaintiffs then plead that the broadcast was highly offensive to them, and to an objective reasonable person. By way of particulars of that allegation they refer to the following matters:

> 9.1 the entire contents and circumstances of the conversations as contained in the programme.
>
> 9.2 the medical condition of the plaintiffs at the time the filming took place.
>
> 9.3 the stressful nature of the plaintiffs' circumstances at the time the filming took place.
>
> 9.4 the belief held at the time the filming took place on the part of the second named plaintiff that her husband was seriously injured.
>
> 9.5 the private nature of the conversations which took place.
>
> 9.6 the broadcast took place for the purpose of private gain.
>
> 9.7 neither the makers of the film recording at the scene of the accident nor the defendant ever sought the plaintiffs' consent to such broadcast.
>
> 9.8 there was no public need served by the broadcast.

[19] They then allege that they have suffered damage, in that they were not notified that the programme was to be screened, that it was seen by friends and relatives who recognised them despite pixilation, and that screening occurred at a time when they were at a party with friends. They say that they have suffered substantial humiliation, pain and suffering and they claim that the defendant's conduct is a "flagrant departure from the precepts of prudence or standards of a broadcaster". They seek damages of $100,000, together with punitive damages of $15,000.

[20] In its amended statement of defence, the defendant denies that the plaintiffs were identifiable to the general public in the broadcast, and pleads specifically that the scenes and conversations broadcast in the programme all occurred in a public place, or in a place in the view of the public. It denies there was any reasonable

expectation of privacy in the conversations and scenes relied upon by the plaintiffs and says that the broadcast would not be considered highly offensive by an objective reasonable person. It further pleads two affirmative defences:

a) that the broadcast related to a matter of legitimate public concern and/or was in the public interest;

b) liability is excluded by the provisions of s 4(3) of the Broadcasting Act 1989 (the Act).

[21] Finally the defendant pleads that if the plaintiffs are entitled to damages, then such damages should be limited to a sum not exceeding $5000 each, consistent with s 13(1)(d) of the Act.

The issues

[22] The issues which arise on the pleadings are:

a) whether the plaintiffs have established an actionable interference with their right to privacy in the light of the criteria discussed in *Hosking v Runting*;

b) if the plaintiffs' claim is made out, was the broadcast nevertheless justified because it covered matters of legitimate public concern;

c) whether liability is excluded by the provisions of s 4(3) of the Act;

d) whether the plaintiffs have an entitlement to an award of damages (including punitive damages) and if so the proper quantum of such damages.

Privacy expectations

[23] *Hosking v Runting* concerned photographs taken in public of the young children of a television celebrity. A majority of the Court (Keith and Anderson JJ dissenting) ruled in favour of the existence of a tort of interference with (or invasion of) privacy in New Zealand. The leading judgment (of Gault P and Blanchard JJ) summarised the elements of the cause of action and certain of its limitations in [125]-[128] as follows:

> **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 widespread 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 a similar vein the Privacy Act, in s 66 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.

[24] In a separate judgment, Tipping J, while in support of the existence of a remedy in tort, was nevertheless inclined to pitch the required level of offence rather lower than Gault P and Blanchard J. At [255]-[256] he said:

> [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.

[25] It is to be noted that at [256] Tipping J expressed the view that in most cases no expectation of privacy is likely to arise unless publication would cause a high degree of offence, and thus of harm to a reasonable person. To some degree, the Judge thought the two elements might be regarded as likely to coalesce. But it is important to bear in mind as a matter of analysis at a practical level that the "highly offensive" test relates to publicity. It is not part of the test of whether information is private. The Court does not reach the stage of considering the "highly offensive" test unless and until it has concluded that what has been disclosed was private information: see the judgment of O'Regan and Panckhurst JJ in *Television New Zealand Ltd v Rogers* at [68].

[26] The first inquiry is therefore whether facts exist in respect of which there is a reasonable expectation of privacy. By way of aside, it is to be observed that Tipping J at [257] of *Hosking v Runting* uses the expression "information or material" rather than the simple word "facts". It might be thought that such a phrase describes rather more accurately what is involved in this case (as to the distinctions see the useful article by N A Moreham (2005) 121 LQR 628 at 648-656).

[27] The test for a reasonable expectation of privacy is a single test, and is not to be subdivided into two parts: whether there are private facts and, if so, whether they are of such a character as to give rise to a reasonable expectation of privacy: *Television New Zealand Limited v Rogers* at [41].

[28] As noted in the judgment of Gault P and Blanchard J in *Hosking v Runting* at [119], there is no simple test for what constitutes circumstances giving rise to a reasonable expectation of privacy, although it may be possible to draw an analogy with the test employed in breach of confidence cases – whether the information has about it the necessary quality of confidence. By definition, private facts are those not known to the world at large, but they may be known to some people, or even a particular class.

[29] It is common ground in this case that no bright line is to be drawn between what is private and what is not. The following passage from *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199, was cited with approval in *Hosking v Runting* at [119]:

> [42] 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.

[30] As a matter of principle the question of whether there is a reasonable expectation of privacy is to be assessed at the time of publication. That is because the interference complained of arises by reason of the publicity. That is not to say that circumstances existing when the facts first arose will always be irrelevant. But the passage of time and changed circumstances may well impact upon reasonable expectations held in relation to the facts: *Television New Zealand Limited v Rogers* at [52]-[54].

[31] As a general rule something which occurs in a public place is unlikely to give rise to a reasonable expectation of privacy: *Hosking v Runting* at [164]. In that case, photographs of the plaintiff's children taken on the street in Newmarket, Auckland, were held to do no more than portray what could have been observed by any member of the public in Newmarket on the particular day. But there are exceptions to the general rule. It will not always be a complete answer to a claim to a reasonable expectation of privacy to show that the relevant facts or information arose from something occurring in public. In exceptional cases a person might be entitled to maintain a claim to protection from additional publicity, although the relevant circumstances arose in public, and were observed, or were observable, by those in the immediate vicinity.

[32] Situations in which reasonable expectations of privacy might arise for matters occurring in public have been considered in two recent European cases. *Campbell v MGN Ltd* [2004] 2 AC 457 concerned the activities of Ms Naomi Campbell, a celebrity supermodel. Her status is rather memorably described in the opening words of the judgment of Lord Nicholls of Birkenhead at [1]:

> My Lords, Naomi Campbell is a celebrated fashion model. Hers is a household name, nationally and internationally. Her face is instantly recognisable. Whatever she does and wherever she goes is news.

[33] A publication of the respondent, the Mirror newspaper, had for some considerable period avidly followed Ms Campbell's career. There had been rumours that she took drugs. She volunteered information to the media claiming, untruthfully as it turned out, that she did not take drugs. The respondent secured photographs of Ms Campbell in the street outside a drug therapy clinic. The learned Law Lords were all agreed that it was legitimate to publish a story to the effect that Ms Campbell had deceived the public about her drug-taking, but a majority held that the publication of the information in its totality went beyond disclosure which was necessary to add credibility to that story. Although the photographs were taken in a public place, the context in which they were used, and the manner in which they were linked to the articles, added to the overall intrusion into Ms Campbell's private life. Her right to privacy was held to outweigh the newspaper's rights to freedom of expression.

[34] The majority took into account the reasons for Ms Campbell's visit to the clinic, related as they were to the condition of her physical and mental health and the treatment she was receiving for it. They held that those considerations were akin to private and confidential information contained in medical records, and their publication required specific justification which the newspaper was not able to provide.

[35] On the other hand, Lord Nicholls and Lord Hoffman held against Ms Campbell. Their approach is, I think, neatly illustrated by the following passage from the judgment of Lord Hoffman at [66]. Speaking of Ms Campbell he said:

> She has given them stories to sell their papers and they have given her publicity to promote her career. This does not deprive Ms Campbell of the right to privacy in respect of areas of her life which she has not chosen to make public. But I think it means that when a newspaper publishes what is in substance a legitimate story, she cannot insist upon too great a nicety of judgment in the circumstantial detail with which the story is presented.

[36] The ultimate outcome of that case turned upon an assessment of reasonableness. The learned Law Lords differed in making their assessments. That reflects the difficulty inherent in making a value judgment in a marginal case.

[37] In considering the English cases, it is to be remembered that the tort of invasion of privacy is not recognised there. Rather, a claimant must rely upon an alleged breach of confidence. But the English test, although differently underpinned, nevertheless involves, as here, a consideration both of those facts which are contended to give rise to a reasonable expectation of privacy, and of the extent to which a reasonable person of ordinary sensibilities would find disclosure offensive. For present purposes, the importance of *Campbell v MGN* is that it provides an illustration of a case in which facts arising in public were nevertheless held to justify protection. As to that, the learned Law Lords recognised that reasonable expectations of privacy will not ordinarily arise in respect of things which occurred in public. But as Lord Hope of Craighead pointed out (at [122]):

> ... private life considerations may arise once any systematic or permanent record comes into existence of such material from the public domain.

[38] The second case is *Peck v United Kingdom* (2003) 13 BHRC 669, a judgment of the European Court of Human Rights (4th Section). The judgment in *Peck* preceded that in *Campbell* by a little over a year. The applicant, who was suffering from depression, had attempted suicide by cutting his wrists with a knife in a town High Street, late at night. He was unaware that a local authority closed circuit television (CCTV) camera, installed to facilitate the prevention of crime, was filming his movements. The CCTV operator notified the police and observed their intervention. Subsequently the authority released to regional and national media the CCTV footage capturing the immediate aftermath of the episode, with the aim of advertising the effectiveness of the CCTV system in the prevention and detection of crime. Still photographs taken from the footage were published in newspapers, and extracts were broadcast on television without the applicant's knowledge or consent. In some instances the applicant's face was masked, but he remained easily recognisable to anyone who knew him.

[39] The Court held that although the incident took place in a public street, the authority's disclosure of the footage to the media caused it to be viewed to a degree surpassing that which the applicant could possibly have foreseen. Thus, the disclosure by the authority of the relevant footage constituted a serious interference with the applicant's right to respect for his private life. Moreover, although the state had a strong interest in detecting and preventing crime, and in those respects the CCTV system played an important role rendered more effective and successful through advertising the system and its benefits, the authority could have achieved its objectives by obtaining the applicant's consent prior to disclosure, or properly masking, or taking appropriate steps to ensure such masking, of the applicant's identity. The Court found that there had been a violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

[40] It is necessary to exercise some care when analysing European cases in this area. Privacy is expressly protected by the European Convention on Human Rights, and ranks equally alongside the right to freedom of expression. The latter freedom is enshrined in the New Zealand Bill of Rights Act 1990, but privacy is not.

[41] In the United States, a person who is in a public place cannot ordinarily claim a right to privacy. In *Hosking v Runting* at [164], Gault P and Blanchard J drew together the principles in other jurisdictions in this way:

> 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.

Plaintiff culpability

[42] On occasion, it may be appropriate in assessing the reasonableness of an expectation of privacy, to take into account the culpability or blameworthiness of the plaintiff. In the passage from *Australian Broadcasting Ltd v Lenah Game Meats* cited earlier in this judgment, the Court said that "contemporary standards of morals and behaviour" would need to be taken into account in assessing whether certain types of activity were meant to be unobserved, and therefore private in character.

[43] In England, the Court will not protect facts or information which, to use a term ordinarily associated with breach of confidence cases, evidence iniquity: see for a local example *European Pacific Banking Corporation v Television New Zealand Ltd* [1994] 3 NZLR 43.

[44] In *Campbell*, Lord Nicholls at [24] agreed that Ms Campbell's counsel was right to concede that she could have no reasonable expectation of privacy in the fact that she continued to take drugs, because she had previously claimed in public that she was drug-free. Lord Nicholls agreed with the observation made in the Court of Appeal that:

> … where a public figure chooses to present a false image and to make untrue pronouncements about his or her life, the press will normally be entitled to put the record straight.

[45] A striking example of a case in which a plaintiff was refused a remedy was *Theakston v MGN Ltd* [2002] EMLR 22, where a prominent television personality had been recognised by the media when entering a brothel. Ouseley J said that

information about sexual activity of that sort would not be protected from publication, in circumstances where the plaintiff had courted publicity in the past, and had fostered an image founded upon his physical and sexual attractiveness to women. On the other hand, evidence of the plaintiff's sexual activity in the context of a more enduring personal relationship might have been entitled to protection. That approach was affirmed by the Court of Appeal in *A v B* [2003] QB 195.

[46] It is difficult, and indeed undesirable, to lay down any general principle governing the extent to which personal culpability might impinge upon reasonable expectations of privacy. This tort is in its early stages of development. The character and seriousness of blameworthy conduct, or iniquity, will vary significantly from case to case. The effect of such conduct on a reasonable expectation of privacy will therefore also vary.

[47] I accept however, that an expectation of privacy, otherwise reasonable, may in certain circumstances be lost by reason of culpability on the part of the plaintiff. It is to be observed that the same consideration might well arise in a given case in the course of an assessment of whether publication of private facts is highly offensive, and further, in relation to the assessment of a defence of legitimate public concern.

Highly offensive

[48] I turn now to the second limb of the inquiry, namely whether, if there are private facts, publication would be highly offensive to the reasonable person in the shoes of the complainant.

[49] Mr Akel submitted that the burden faced by a plaintiff is a high one. I agree. The test was explained in the joint judgment of Gault P and Blanchard J in *Hosking v Runting* at [125]-[127]. The Court must keep clearly in mind the role of the "reasonable person" in the overall assessment. The mind that must be considered is not that of a general reader, but of the person who is affected by the publicity, assuming that person to be a reasonable person of ordinary sensibilities. In *TVNZ Ltd v Rogers* O'Regan and Panckhurt JJ said:

> [66] In *Campbell v MGN Limited* [2004] 2 AC 457 (HL) Lord Hope of Craighead said at [99]:
>
> > The mind that has to be examined is that, not of the reader in general, but of the person who is affected by the publicity. The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity.
>
> This must be so. The present case well demonstrates the point.
>
> [67] The ordinary viewer would perhaps be curious about and want to see the videotape. But, placed in Mr Rogers' shoes, and asked whether they would then consider disclosure of the videotape highly offensive, the answer may well be different. The value which underpins the tort is personal privacy. Its gravamen is publicity which is truly humiliating and distressful or otherwise harmful to the individual concerned: *Hosking v Runting* at [126]. It follows that whether disclosure would be highly offensive must be tested from the perspective of that person, but subject to an objective overlay. The fragile sensibility of the claimant cannot prevail, so a reasonable person test is introduced to that extent.

[50] In a given case, indeed in most cases, it may be that a Court, having satisfied itself that a plaintiff is a person of ordinary sensibilities, can proceed without resort to a fictitious "reasonable person". But that will not always be so.

[51] It is to be observed also that there may be instances where the disclosure of otherwise relatively inoffensive facts may become offensive by reason of the extent and tone of a publication. So the manner of disclosure is a relevant consideration. O'Regan and Panckhurt JJ said in *TVNZ Ltd v Rogers*:

> [68] In addition, the proposed manner of disclosure is a relevant consideration. As this Court observed in *R v Mahanga* [2001] 1 NZLR 641 at [41], public disclosure in a controlled environment like a courtroom may not be offensive, but transmission of excerpts of the videotape on national television may be.

Identification

[52] Identification was not in issue in either *Hosking v Runting* or *TVNZ Ltd v Rogers*. At least in most circumstances, in order to make out a claim, a plaintiff will need to establish that he or she has been identified in the publication, either directly or by implication.

[53] In *Bradley v Wingnut Films* [1993] 1 NZLR 415, Gallen J upheld the existence in New Zealand of a tort of invasion of privacy involving public disclosure of private facts, but ruled that the disclosure, to be actionable, must be highly offensive and objectionable to a reasonable person of ordinary sensibility. That was a case in which the plaintiffs complained that a relative's tombstone was depicted in a satiric film set in part in a cemetery, and containing a significant degree of gore and violence. The tombstone was never shown in its entirety. It appeared in the film for a total of 14 seconds only, and it was not possible to read any writing on the tombstone.

[54] In consequence, the tombstone could not be identified by viewers. Moreover, there was nothing to connect the action in the film with the tombstone. Publication could not therefore be highly offensive. The action failed.

[55] The Broadcasting Standards Authority has developed certain privacy principles which it applies in considering complaints made under the Broadcasting Act. The first of those principles is materially the same as the principle developed in *Hosking v Runting*. It reads:

> It is inconsistent with an individual's privacy to allow the public disclosure of private facts, where the disclosure is highly offensive to an objective reasonable person.

[56] The Authority requires that a complainant be able to establish that he or she is identifiable beyond his or her immediate circle, before a privacy complaint may be upheld. In *Television New Zealand Ltd v Broadcasting Authority* HC WN CIV 2004-485-1299 and 1300, 13 December 2004, Miller J said:

> [7] The Authority held that its first task when determining a complaint when a broadcast involves a breach of privacy is to decide whether the complainant is identifiable from the broadcast. The complainant must be identifiable beyond immediate family and close acquaintances who may reasonably be expected to be aware of the activities for which the complaint has received publicity.

[57] That case was an appeal from the Broadcasting Standards Authority. The Court therefore applied the privacy principles developed by that Authority. The plaintiff had to show that she was identifiable to those who knew her, but did not

know of the facts. In that particular case she was held to have been so identifiable, by reason of her voice, the visual depiction of her hands and torso which showed distinctive jewellery, and evidence that others had identified her. There was also reference to her occupation, which was revealed in the relevant footage; only two people held that particular role in the organisation concerned.

[58] The only other New Zealand case going directly to identification, to which I have been referred, is the District Court decision in *L v G* [2002] DCR 234. That case is succinctly summarised and commented upon at [84] of the judgment of Gault P and Blanchard J in *Hosking v Runting* as follows:

> [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 Judge Abbott had no hesitation in concluding at p 246 that breach of privacy is an actionable tort in New Zealand, and that Mr G's actions had destroyed her "personal shield of privacy". 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.

[59] In the circumstances, the judgment in *L v G* is of little assistance.

[60] In cases such as the present, it seems that plaintiffs will ordinarily be concerned about being identified in the context of the facts of a particular case to those who know them but do not know the facts. Identification to those who already know the facts will, in general, be of little moment. Identification to the world at large, which does not know the plaintiff, will often likewise be of limited concern although cases will no doubt arise in which a plaintiff becomes known to the world at large simply by reason of the publicity. But publication to those who know the plaintiff, but not the facts, is likely in many instances to be central to a plaintiff's claim.

Private facts?

[61] This accident occurred in public. The plaintiffs' vehicle left the Southern Motorway and came to rest in a field some distance from the motorway but clearly

visible from it. Four fire tenders attended the scene. There were also about 20 emergency services personnel, including representatives of the Fire Service, the Police, and the Ambulance Service. Members of the public were also present. Indeed, the first two people to reach the wrecked vehicle were other drivers who had seen the accident.

[62] Commonly it will be the case that road accident victims are the subject of treatment, attention and advice from a range of people, including both those whose job it is to attend at accident scenes, and those members of the public who happen to be in the vicinity. In general terms it can be said there will be no right to privacy in the fact of the accident, and the circumstances surrounding it. Nor can there be any legitimate complaint about the fact that Mrs Andrews' conversations with her husband were overheard by those attending the couple.

[63] In tacit acknowledgement of that consideration the plaintiffs do not pitch their claim at that level. Mrs Andrews agreed that she had no difficulty at all about the fact that what she said at the accident scene was heard by those in attendance. Likewise, there could be no real objection to filming, or the taking of still photographs, of an accident scene in general, if it occurs on a public road. Such an accident is a public event.

[64] But the facts of this case are readily distinguishable from, for example, limited news footage of an accident scene which might, for a matter of seconds, depict wrecked vehicles, and even injured occupants. Here, the camera operator filmed the area around the car continuously for a period of about an hour, so catching much of what passed between those present. Mr Akel submitted that nevertheless, there was no disclosure in the programme, as screened, of information about the plaintiffs that was sufficiently private to be actionable.

[65] I do not agree. Mrs Andrews asked where she was, asked her husband and others whether he was "ok", told her husband that she loved him, told him she did not want to leave him and as she was removed from the vehicle, made a light hearted reference to her attempts to diet. Mr Andrews indicated that he had a sore back and neck. In my view, most of these communications were private. Those between the

plaintiffs were of an intimate character and of an altogether more personal nature than the information with which *Hosking v Runting* was concerned. Although the plaintiffs would have been aware that they would be overheard by those around them, they had a legitimate expectation that there would be no additional publicity. Neither was aware that they were being filmed throughout from close range. I do not accept, as Mr Akel submitted, that the footage of the plaintiffs went no further than observing them at the scene. It went much further than that. The length of the screened footage combined with the accumulation of depicted intimate communications, serves to distinguish the privacy expectations in this case from those in which the images portrayed and the information conveyed can be characterised as part and parcel of general news footage.

[66] In the circumstances of this case, I consider the plaintiffs were entitled reasonably to expect that their conversation would not be heard beyond those within earshot.

Was the publication offensive?

[67] As Tipping J noted in *Hosking v Runting* there may be cases in which a reasonable expectation of privacy, and a high degree of offence, will amount to one and the same thing. Indeed, such cases may well be in the majority. But in my view this is not such a case. Although by reason of the intimate and highly personal character of what passed between them, the plaintiffs had a reasonable expectation of privacy, they have not, in my opinion, made out the second limb of the *Hosking v Runting* test. There was no reference whatever in the programme to the precise cause of the accident, and no mention of the fact that the driver of the vehicle was intoxicated. Mr Andrews accepted that there was nothing in the programme which showed him in a bad light. In cross-examination he was unable to point to anything in the programme which he regarded as humiliating or embarrassing. Indeed, his stance was that Mrs Andrews was the primary target of the programme, and it was she who felt aggrieved.

[68] But Mrs Andrews was equally unable to identify anything specific in the broadcast which she claimed to be offensive. She accepted that she was portrayed as

a caring person, very much concerned about her husband's wellbeing. She acknowledged that her comment to the effect that she was trying to diet as she was being lifted from the car, depicted her as someone who was coping well by making light of the situation. She further acknowledged that nothing she said to her husband could be regarded as humiliating or embarrassing to either of them.

[69] The fact that nothing inherently embarrassing was said by one to the other, or by one of them to those in attendance, does not lead inexorably to the conclusion that disclosure was not humiliating or distressful. But as the evidence unfolded, it emerged that it was not the intrusion on the plaintiffs' privacy which lay at the heart of the proceeding, but rather the plaintiffs' chagrin and annoyance at not being advised they were being filmed at close range, either at the time or later. Even more importantly, they were given no prior notice of the date of the broadcast and their role in it. By reason of this latter omission, the plaintiffs found themselves viewing the programme without prior warning in the company of a significant number of people, some of whom knew them but did not know of the circumstances of the accident.

[70] A failure to obtain consent prior to publication is not an ingredient of the tort of breach of privacy. Consent and notification issues fall within the jurisdiction of the Broadcasting Standards Authority, but no complaint has ever been made by the plaintiffs to that body. There was evidence from Mr Manson (of TVNZ) as to the protocols under Broadcasting Standards Authority principles for obtaining appropriate consents. For example, consent is required from parents where a child is to be shown, and consent is sought from key participants if the focus of a story is upon them and their activities. But consent is not ordinarily sought where filming takes place in public view, particularly if those involved are not identifiable to the general public.

[71] I accept Mr Akel's submission that, in the circumstances of this case, it is not possible to conclude that a reasonable person in the shoes of the plaintiffs would consider the publication of the conversations at the accident scene to be highly offensive, given that neither plaintiff did so. As Gault P and Blanchard J said in their judgment in *Hosking v Runting*, the concern is with publicity that is truly

humiliating and distressful, and not with publicity, even extensive publicity, of matters which, although private, are not really sensitive.

[72] I hold accordingly, that the plaintiffs have been unable to satisfy the "highly offensive" test. It follows that the proceeding must fail.

[73] However, in deference to the detailed arguments advanced by counsel, I propose to touch briefly on one or two further matters.

Were the plaintiffs identifiable?

[74] Mr Akel submitted that the plaintiffs must fail because they were not identifiable to the public at large. He pointed out that they were referred to throughout the programme only by their first names, and when in full view, Mrs Andrews' face was pixilated.

[75] I would not have held against the plaintiffs on the ground that they were not identifiable. It is correct of course, that the plaintiffs were not known to the world at large, and in my view pixilation was sufficient to preclude subsequent recognition of the plaintiffs by members of the general public. It is equally correct that the plaintiffs may have been identified by close friends and family, who would have been likely to have known about the accident and the surrounding circumstances, so nothing significantly new and personal would be disclosed to them.

[76] But that overlooks a further group: those who knew the plaintiffs but were not aware of the accident, or at least of the circumstances of the accident. During the programme, the use of Christian names (Gary and Penny) is likely to have alerted a number of those persons. Moreover, having observed Mrs Andrews give evidence for some time, I am not satisfied that the extent of the pixilation was sufficient to prevent her from being identified by those acquainted with her.

Involuntary participants?

[77] Mr Akel submitted that the plaintiffs had brought the publicity upon themselves. This was not a case of persons lawfully going about their own business, and becoming the innocent victims of another driver's negligence, he argued. Both plaintiffs were well over the legal alcohol limit. The driver should not have driven; the other should have prevented the driver from doing so. Mr Akel submitted they were the authors of their own misfortune, and ought not to have been able to claim they should not have been filmed.

[78] I would not have upheld that argument. This emergency scene was not selected because it was the site of the commission of a criminal offence, or because the makers of the programme were engaged in filming those involved in the detection of crime. Rather, the focus of the makers of the series was upon fire fighting staff, and the purpose in filming the accident scene was to illustrate the work of fire fighters. At least primarily, the focus was not upon the road toll, or the perils of drinking and driving. The plaintiffs were not, in my view, disqualified from maintaining this proceeding simply by reason of the fact that they had been consuming alcohol before driving.

[79] It must be emphasised that an argument based upon plaintiff culpability raises quite different issues from those relevant to the defence of legitimate public concern, a matter to which I now turn.

Legitimate public concern

[80] In *Hosking v Runting* the Court of Appeal recognised the availability in appropriate cases of a defence of legitimate public concern. The applicability of the defence will depend upon the outcome of a balancing exercise described in that case by Gault P and Blanchard J at [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.

[81] The word "concern" is deliberately used, in order to distinguish between matters that are merely of general interest or curiosity to the public and matters which are "properly within the public interest". A matter which is simply of general interest will not be enough to outweigh a substantial breach of privacy: *Hosking v Runting* at [133]-[134].

[82] In assessing an asserted defence of legitimate public concern, the Court will ordinarily permit a degree of journalistic latitude, so as to avoid robbing a story of its attendant detail, which adds colour and conviction. In *TVNZ Ltd v Rogers* William Young P said at [128]:

> I agree that the underlying issues can be debated without the videotape being shown on national television. But experience shows that arguments are usually more easily understood where they are contextualised. An esoteric argument … becomes far more accessible to the public if the implications can be assessed by reference to the concrete facts of a particular case.

[83] To the same effect is the dissenting judgment of Lord Nicholls in *Campbell v MGN*.

[84] The extent of the invasion of privacy will be an important factor when conducting the balancing exercise mandated by *Hosking v Runting*. The greater the invasion of privacy, the greater must be the level of public concern to amount to a defence: Tipping J in *Hosking v Runting* at [257]. But if the invasion of privacy is less serious, then the degree of legitimate public concern necessary to establish the defence will likewise fall towards the lower end of the scale: O'Regan and Panckhurst JJ in *TVNZ Ltd v Rogers* at [86].

[85] An illustration of the application of the defence in California is provided by *Shulman & Ors v Group W Productions Inc & Ors* 955 P.2d 469 (Cal.1998), a decision of the Supreme Court of California. That case also involved a road accident, but the circumstances were altogether more serious than here. A woman injured in a road accident was left a paraplegic. She was filmed at the scene and

while receiving treatment in a rescue helicopter. By reason of the position of the vehicle when it came to rest, she was unlikely to have been seen by those on the nearby freeway. A nurse who attended the plaintiff at the scene wore a wireless microphone that picked up conversations with the plaintiff and other rescue personnel. The plaintiff was shown several times, either by brief shots of a limb or torso, or with her features blocked by others or obscured by an oxygen mask. Several times she was heard speaking. For example, she was heard to say "This is terrible" and "I just want to die". Reference was made only to her first name. Footage was included of the nurse speaking into a radio microphone and transmitting certain of the plaintiff's vital medical signs, including statements that she could not move her feet and had no sensation. The footage obtained was screened on an episode of "On Scene: Emergency Response".

[86] The Supreme Court held that where footage of a person (not being a public figure), who has become involuntarily involved in an event or activity of legitimate public concern, is broadcast, a defence of legitimate public concern will be made out only where a logical nexus exists between the role of the complainant and the matter of legitimate public concern. The contents of the publication or broadcast will be protected only if they have some substantial relevance to that matter. The public's right to know is balanced against the plaintiff's privacy interest, by drawing a protective line at the point at which the material revealed ceases to have any substantial connection to the subject matter of the newsworthy report.

[87] The Court went on to say that, in some instances, while a particular event may be newsworthy, identification of the plaintiff as the person involved, or use of the plaintiff's identifiable image, adds nothing of significance to the story. But the fact that the broadcast could have been edited to exclude some of the plaintiff's words and images, will not be determinative. Nor is the possibility that a Court might find a differently edited broadcast more to its taste, or even more interesting. The Court does not sit as a censor.

[88] This last comment echoes the observation of Cooke P in *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 at 407, to the effect that:

> …It is not part of the function of the Court to act as a censor.

See also the comments of Elias CJ in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at [68].

[89] Ultimately the Court in *Shulman* decided that the degree of detail shown was not only relevant, but essential to the narrative. The rescue and medical treatment of accident victims was said to be of legitimate concern to much of the public, involving as it does a critical service that any member of the public may some day need. The focus of the piece was the challenges facing emergency workers dealing with serious accidents. The images did not constitute morbid and sensational prying into private lives for its own sake: the intrusiveness was not disproportionate to its relevance.

[90] *Shulman* is a useful illustration, albeit in a different jurisdiction, of a balancing exercise conducted in the context of a serious road accident case.

[91] Had it been necessary, I would have upheld the defendant's invocation of the defence of legitimate public concern. The television series, while providing a certain level of entertainment, nevertheless had a serious underlying purpose. The entertainment aspect is not to be taken as somehow cancelling out that purpose.

[92] The programme was not primarily about road safety. Its focus was on the lives of fire fighters and their work, but there is an undoubted public cost to road accidents, and the impact of such accidents on rescue teams is something that attracts a significant level of public concern. The detail of the crash scene, including conversations between participants, provided a necessary degree of versimilitude. The fact that the defendant might have achieved its objectives without identifying the plaintiffs does not preclude the defendant from advancing the defence.

[93] Had I held that there was an actionable invasion of privacy here, then it must have fallen towards the lower end of the scale. Accordingly, the degree of public concern needed to maintain the defence would not be high.

[94] In the course of the balancing exercise I would have taken into account such considerations as the fact that only first names were used throughout the programme, the omission of any reference to drink/driving issues, the fact that the car itself was not identifiable, the significant degree (albeit incomplete) of pixilation, and the generally low-key and sensitive treatment of the plaintiffs.

Broadcasting Standards Authority decisions

[95] In the course of argument the defendant made extensive reference to a number of decisions of the Broadcasting Standards Authority, issued in the context of certain privacy principles developed by the Authority. Those principles offer a remedy somewhat wider than the tort of privacy affords. The Authority's decisions relating to publicity given to motor vehicle accidents tend not to consider complaints as involving the public disclosure of private facts. Rather, they are regarded as constituting instances of intrusion into solitude and seclusion, grief and distress, or unfairness. In the cases to which the Court was referred, the Authority did not in most cases uphold the complaint, usually by reason of the public interest element (the footage being neither lingering nor gratuitous). In some instances the fact that the complainant could not be identified was relevant.

[96] It is not necessary to say anything more about the decisions themselves, save to note, as did the Court of Appeal in *Hosking v Runting* at [85]-[86] that the Broadcasting Standards Authority, an expert body with great experience in media issues, is able to offer useful guidance in this area.

Section 4: Broadcasting Act 1989

[97] Section 4 of the Broadcasting Act 1989 provides:

> **Responsibility of broadcasters for programme standards**
>
> (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; and

(d) The principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest; and

(e) Any approved code of broadcasting practice applying to the programmes.

(2) Where, in respect of any film within the meaning of the Films, Videos, and Publications Classification Act 1993,—

(a) There is in force under that Act a decision classifying that film as objectionable; or

(b) There is in force under that Act a decision classifying that film as if certain excisions had been made,—

no broadcaster,—

(c) In the case of a film to which paragraph (a) of this subsection applies, shall broadcast that film or any part of that film; or

(d) In the case of a film to which paragraph (b) of this subsection applies, shall broadcast the film or any part of the film, if the film or, as the case may be, that part includes any part of the film required to be excised,—

except with the consent of the Chief Censor of Film and Literature and subject to any conditions subject to which the Chief Censor has given the consent.

(3) No broadcaster shall be under any civil liability in respect of any failure to comply with any of the provisions of this section.

[98] Mr Akel submitted that by virtue of s 4(3), no cause of action for breach of privacy should be available where the plaintiff could have made a complaint about breach of one or more of the Authority's broadcasting standards. Given that I have already held that this proceeding must fail, it is unnecessary for me to discuss that argument in any depth. But, if the argument is that where a claim might be made to the Authority, it ought not also to lie in tort, it is not immediately attractive. Section 4 is (necessarily) silent in respect of the tort of invasion of privacy. In its terms therefore, the section does not operate to prohibit the bringing of a proceeding in tort. Moreover, a strong case in tort concerning a broadcast falling within s 4 will in many (if not most) cases also constitute a breach of a provision in an approved code of broadcasting practice. If the defendant is right, then the most meritorious claims will fail. Additionally, there is no logic in a state of affairs which would leave a plaintiff able to sue for breach of privacy occurring in print, but not by way of broadcast.

[99] On the other hand, if Mr Akel's argument is simply intended to ensure that the bar is set at a relatively high level, because there are other avenues of redress for those less seriously affected, the majority judgments in *Hosking v* Runting clearly

articulate the heavy burden borne by a plaintiff in this area of the law. I say no more on the point. The issue will be for determination (if ever) by another Court at another time.

Result

[100] I have held that, although the plaintiffs have established that the defendant has published information in which they had a reasonable expectation of privacy, such publication would not be highly offensive to a reasonable person in the shoes of the plaintiffs. The claim therefore fails and the proceeding is dismissed.

[101] The defendant is entitled to costs. Counsel may file memoranda if they are unable to agree.

C J Allan J