

# The Tort of Privacy

## Recent legal developments in New Zealand

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### Introduction

On 30 March 2008, the *News of the World* in London followed its motto of the fearless advocacy of truth, and published a story headlined: "FI BOSS HAS SICK NAZI ORGY WITH 5 HOOKERS." Mr Max Mosley, the President of the FIA, sued the newspaper for breach of privacy, and for the accompanying information placed on the newspaper's website, including video footage secretly obtained of the alleged orgy. He was not successful in obtaining an injunction to prevent publication, but was awarded the highest damages to date for a privacy claim in Britain - £60,000.<sup>1</sup> Mr Mosley is now suing the *NoW* in defamation for the Nazi references in its coverage, which were found in the privacy case to be untrue. This case has been extraordinary in that it demonstrates that some public figures are prepared to sacrifice their privacy all over again to protect what could be referred to as an emerging human right. Furthermore, the tabloid media in Britain has been shocked to discover that 'kiss and tell' stories and others involving similarly inherently private subject matter are difficult to justify in the public interest, especially where journalists have behaved irresponsibly. Finally, the case demonstrates clearly that the recognition and protection of privacy is not connected with morality as far as the courts are concerned – even those whose behaviour appears abhorrent, depraved or otherwise unconventional are entitled to privacy, so long as they have behaved generally within the law.

This paper examines the right of private citizens in New Zealand to sue each other using the tort of privacy. The tort is in an early stage of development which is influenced by what is happening in the UK and elsewhere, and the questions currently being raised about it reveal much about how we think and feel about privacy generally and its place in the liberal democracy we have in this country. I investigate the emerging 'shape' of the tort of privacy, in particular the line between what is public and what is private. I also make mention of the place of freedom of expression in the tort and how this impacts on the public interests involved. I briefly mention the wider context of privacy in New Zealand, including the status of privacy generally, and its increasing manifestation in cases outside the tort. I conclude by suggesting that the privacy tort is perhaps metamorphosing into something altogether more important.

### The Decision in *Hosking*

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<sup>1</sup> *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (24 July 2008).

In 2004, the existence of a New Zealand tort protecting informational privacy was finally confirmed in the leading case of *Hosking v Runting*.<sup>2</sup> Like *Campbell v MGN Ltd*<sup>3</sup> and the more recent *Murray v Express Newspapers plc (2) Big Pictures (UK) Limited*,<sup>4</sup> *Hosking* involved the actual or threatened publication of facts about celebrities which were recorded in public, in the form of paparazzi photographs. Although the New Zealand Court of Appeal rejected the Hoskings' specific privacy claim,<sup>5</sup> in a 3:2 majority judgment it confirmed that a tort of invasion of privacy exists in New Zealand. The two fundamental requirements for a claim were essentially stated to be: (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.<sup>6</sup>

As described quite cautiously by the Court of Appeal, the recognised action does not deal with unreasonable intrusion into solitude.<sup>7</sup> Further, there is no simple test for what constitutes a private fact.<sup>8</sup> The tort concerns itself with publicity (not facts) which is highly offensive, and that publicity must be highly offensive to the reasonable person.<sup>9</sup> The harm protected against is humiliation and distress, and personal injury and economic loss are not required.<sup>10</sup> Crucially, there is a public interest defence, described broadly as a legitimate public concern in the information.<sup>11</sup> Acknowledging our non-constitutional Bill of Rights, the Court stated that any limits imposed on free speech by this privacy tort must not exceed those justified in a free and democratic society.<sup>12</sup>

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<sup>2</sup> [2005] 1 NZLR 1. For previous forays into the area, see *L v G* [2002] DCR 234, *P v D* [2000] 2 NZLR 591; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415; *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *Tucker v News Media Ownership Ltd* HC Wellington CP477/86 20 Oct 1986 Jeffries J; *News Media Ownership Ltd v Tucker* 23 October 1986, CA172/86. See also Rosemary Tobin, 'Yes, Virginia, there is a Santa Claus: the tort of invasion of privacy in New Zealand' (2004) 12(2) *TLJ* 95, Katrine Evans, 'Was Privacy the Winner on the Day?' (2004) *NZLJ* 181.

<sup>3</sup> [2004] 2 All ER 995.

<sup>4</sup> [2007] EWHC 1908 (Ch).

<sup>5</sup> The photographs did not show anything that any member of the public could not have seen on the relevant day. The magazine involved, *New Idea*, stated after the Court of Appeal decision it did not intend to publish the photographs.

<sup>6</sup> [2005] 1 NZLR 1, para [117]. Tipping J agreed with the joint judgment, with slight variation, but his judgment focussed to a much greater degree on the New Zealand Bill of Rights Act and the balancing of values required by it: *ibid*, paras [226]-[260].

<sup>7</sup> *Ibid*, para [118].

<sup>8</sup> *Ibid*, para [119].

<sup>9</sup> Tipping J would settle for substantial offence and harm, which is a lesser test than his fellow judges: *Ibid*, para [256].

<sup>10</sup> *Ibid*, para [126]-[128].

<sup>11</sup> *Ibid*, para [129].

<sup>12</sup> *Ibid*, para [130]. See ss 14, and 5 of the New Zealand Bill of Rights Act 1990.

The scope of any public interest defence is therefore intricately bound up in this balancing exercise. Finally, the primary remedy is damages, but injunctive relief has been recognised as appropriate also.<sup>13</sup> As in defamation, prior restraint is to 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.<sup>14</sup> Armed with these basic requirements, it is possible to examine the question of what can be the subject of the tort in New Zealand.<sup>15</sup>

What are facts giving rise to an expectation of privacy?

Like the United Kingdom, we have not been able to escape the inherent difficulty of determining what is private. However, in *Mosley*, Mr Justice Eady said ‘...one is usually on safe ground in concluding that anyone indulging in sexual activity is entitled to a degree of privacy – especially if it is on private property and between consenting adults (paid or unpaid).’<sup>16</sup> The Court of Appeal in *Hosking* adopted the phraseology of the English cases in speaking of an expectation of privacy, and so we continue to look to cases like *Campbell* and *Mosley* for assistance,<sup>17</sup> albeit with some caution. But it seems at least clear that the New Zealand courts have accepted the core idea of facts which are inherently private, such as personal and sexual relationships, financial matters,<sup>18</sup> and medical conditions.<sup>19</sup> For example, it has been accepted that the expectation can arise in relation to sexual photographs,<sup>20</sup> and information about past treatment for psychiatric illness.<sup>21</sup>

However, determining the status of facts in the penumbra has been much more problematic. In these cases, the facts present as a mixture of both public and private and there appears no principled method of disentanglement.<sup>22</sup> But it seems at least that a rehabilitated or

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<sup>13</sup> Ibid, paras [149]-[150].

<sup>14</sup> Ibid, para [158].

<sup>15</sup> Although the subject of privacy has been further than the Court of Appeal in *Rogers v Television New Zealand* [2008] 2 NZLR 277, the Supreme Court did not deal substantively with the tort in that case, and left further argument about its form for another day.

<sup>16</sup> See n. 1 above, [98].

<sup>17</sup> *Andrews v Television New Zealand* Unreported, High Court, Auckland, CIV-2004-404-3536, 15 December 2006, para 37.

<sup>18</sup> *Television New Zealand v Rogers*[2007] 1 NZLR 156, para [49].

<sup>19</sup> *P v D*[2000] 2 NZLR 591, para [36].

<sup>20</sup> *L v G* [2002] NZAR 495.

<sup>21</sup> *P v D*[2000] 2 NZLR 591.

<sup>22</sup> See Elizabeth Paton-Simpson, ‘Private Circles and Public Squares: Invasion of Privacy by the Publication of ‘Private Facts’ [1998] 61 *Mod L Rev* 318. Paton-Simpson makes strong arguments that the labels ‘public’ and ‘private’ may be used in both a descriptive, or a normative sense, the two are not mutually exclusive categories, cases cannot be considered in isolation, and privacy may be about more than information.

rehabilitating offender may have a reasonable expectation of privacy in relation to appearance and location or the fact of the previous conviction, even though this information is public or was public at some stage in the past. In *Brown v AG*,<sup>23</sup> the District Court found that although the facts of the plaintiff's conviction and sentence for kidnap and indecent assault of a child were public, he had a reasonable expectation that publicity given in a police flyer about his release would not include a photograph which he had only consented to for use for general police business, or the actual street where he was living. The earlier decision in *Tucker v News Media Ownership*<sup>24</sup> had demonstrated that in such contexts once public facts can become private again over time. There, a man who was the focus of a public campaign to raise funds to pay for an essential heart operation was initially able to obtain an injunction preventing publication of past convictions for sexual offending.<sup>25</sup> But more recently, in *Television New Zealand v Rogers*,<sup>26</sup> a reasonable expectation of privacy did not arise in relation to a videotaped murder confession made for the police, because the videoed confession was produced for a public court process where anyone could have attended, including the media.<sup>27</sup>

### Public facts can be private in exceptional cases

As in *Campbell* in the United Kingdom, it has been accepted in New Zealand that in exceptional cases, a reasonable expectation of privacy can arise even though the facts have been captured in a public place.<sup>28</sup> *Andrews v TVNZ*<sup>29</sup> was one of those exceptional cases.<sup>30</sup> The Andrews' claim for damages arose because they were filmed by a production company for a series commissioned by TVNZ while being rescued by fire fighters following an accident in their vehicle. The accident occurred when the plaintiffs were returning from a party at which they had both been drinking. When tested later, both were found to be over the legal blood alcohol limit. The rescue operation was a complex one because the plaintiffs were trapped and had to be removed using "jaws of life". They were unaware they were being filmed and were also unaware edited footage of the incident would be used about a year later in an episode of the television series 'Fire Fighter,' which was broadcast by TVNZ. The programme focussed on the activities of the fire fighters, but also showed the plaintiffs interacting with their rescuers. Although some pixilation was used, parts of the plaintiffs' faces were shown, and statements of endearment made by Mrs Andrews to her husband were broadcast. In a thoughtful judgment, Allan J concluded that the claim failed, but did find that the Andrews had a reasonable expectation of privacy in relation to the broadcast. The judgment makes it clear that private facts do not need to be absolutely secret. In New Zealand,

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<sup>23</sup> [2006] NZAR 552.

<sup>24</sup> [1986] 2 NZLR 716.

<sup>25</sup> The injunction was not made permanent because the information became public in any event.

<sup>26</sup> [2008] 2 NZLR 277.

<sup>27</sup> *Ibid*, paras [48], [63], and [104].

<sup>28</sup> *Hosking v Runtig* [2005] 1 NZLR 1, para [164].

<sup>29</sup> Unreported, High Court, Auckland, 15 December 2006, CIV 2004-404-3536.

<sup>30</sup> *Ibid*, para [41].

private facts are those unknown to the world at large, but possibly known to some people or a class of people.<sup>31</sup> Further, whether a reasonable expectation exists is assessed at the time of publication, although the passage of time and changed circumstances may impact on the reasonable expectations actually held. Although the event in *Andrews* took place in public, the footage of intimate and personal conversations between the Andrews did give rise to a reasonable expectation of privacy. This was because in character, the footage went beyond mere observation of the scene, and its extent was prolonged. Allan J concluded therefore, referring to *Hosking*, that in exceptional cases such as *Campbell* and *Peck*<sup>32</sup>, the fact that the event took place in public may not prevent a reasonable expectation of privacy from arising.<sup>33</sup>

Although *Hosking* recognised the possibility of exceptional cases where an expectation of privacy can arise, the specific claim failed in that case because it related to photographs of the Hosking children being pushed in their pram in a public street. The court held that the images did not show anything that any member of the public could not have seen on the relevant day.<sup>34</sup> The judgment was hailed as a victory by the media, which had argued in extremis that allowing the claim would significantly chill its newsgathering activities, in particular because the taking of any photographs in public would require the consent of all whose images were captured, whether as principle subjects or merely incidental participants in the background. This raises the issue of innocuous activities carried on in public.

#### Treatment of innocuous public activities

It is interesting that *Hosking* was followed recently in the United Kingdom in the High Court to strike out a claim, but that claim has since been reinstated by the Court of Appeal. In *Murray v Express Newspapers plc*,<sup>35</sup> Mr Justice Patten in the High Court struck out the claim of the very famous author J K Rowling and her husband seeking to establish a right to personal privacy for themselves and their family when also engaged in the innocuous activity of pram-pushing in a public place. In spite of Ms Rowling's vigorous efforts in the past to keep her children out of the glare of publicity which surrounds her, the claim was initially struck out, largely because the activities captured by long distance lens were seen as 'ordinary' 'innocuous' and in the nature of 'popping out for a pint of milk'.<sup>36</sup> It is apparent that Patten J shared the fear of the *Hosking* court that protecting routine public activities would create a monstrous tort, capable of devouring all before it and destructive of a free press – '...it will have created a right for most people to the protection of their image. If a

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<sup>31</sup> Ibid, para [28].

<sup>32</sup> *Peck v United Kingdom* (2003) 36 EHRR 41.

<sup>33</sup> *Andrews*, above n. 34, paras [31]-[41] from the oft-quoted *Australian Broadcasting Corporation v Lenah Game Meats* (2001)208 CLR 199.

<sup>34</sup> *Hosking*, paras [164], [260].

<sup>35</sup> [2007] EWHC 1908 (Ch).

<sup>36</sup> Ibid, paras [58], and [59]. See also Baroness Hale in *Campbell v MGN Ltd* [2004] 2 All ER 995, para [154].

simple walk down the street qualifies for protection, then it is difficult to see what would not'.<sup>37</sup> Wisely, there was no attempt to categorise what is innocuous or trivial, and the court acknowledged that it 'is a matter of fact and degree in every case'.<sup>38</sup> However, any attempts to draw lines within public activities will, I believe, simply obfuscate and are doomed to fail. Fortunately, such an approach was not followed when the Murrays appealed and asked for their claim to be reinstated. The Court of Appeal restored the claim, holding that no presumption about innocuous public activities should arise and all the circumstances have to be considered.<sup>39</sup> What was also decisive was that the claim was brought on behalf of David, the Murrays' son, not the parents. The UK Court of Appeal has been very concerned to take account of the position of children, and their inability to consent and to avoid the state of celebrity of their parents. It should be noted that the United Kingdom has stronger constitutional arrangements than New Zealand which require equal balancing of the freedom of expression and privacy rights.<sup>40</sup> Furthermore, English law can be influenced by the jurisprudence of the European Court of Human Rights, which has carved out a greater zone of privacy protecting even the mundane and unofficial but public activities of public figures in a German case involving Princess Caroline of Monaco.<sup>41</sup> There the Princess made a successful claim following publication of a number of photographs of her and her family engaged in family activities such as playing in the park, sitting in a café and skiing. The outcome of the *Murray* case will be closely watched in New Zealand to determine whether the approach to innocuous activities taken in *Hosking* will continue to be rigidly applied here.

As to public activities generally, I would not take anything prescriptive from either *Murray* or *Hosking*. There has been too much reliance on a simplistic approach focussing on the locational character of the activity. A fairer and more logical approach must be a contextual one in which the mere fact that something occurs in public and further, that it is innocuous, do not necessarily prevent a reasonable expectation of privacy arising. The whole context of the publication or threatened publication must be considered to determine the issue, including any element of intrusiveness arising from collection of the information and the nature of the publication. This deeply contextual approach was apparently preferred by Mr Justice Eady in *Mosley* although mainly applied in the area of weighing the public interests involved.<sup>42</sup> That case also addressed the issue of whether plaintiff behaviour has any relevance to the tort of privacy. I now turn to examine that question.

## The Relevance of Plaintiff culpability

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<sup>37</sup> *Murray*, n. 35 above, para [65]. There is no mention in the judgment of the House of Lords in *OBG Ltd v Allan, Douglas v Hello! Mainstream Properties Ltd v Young* [2007] UKHL 21, which, on one view, did allow claimants to protect their image using breach of confidence.

<sup>38</sup> *Ibid*, para [67].

<sup>39</sup> *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, 7 May 2008.

<sup>40</sup> Articles 8 and 10 of the European Convention on Human Rights.

<sup>41</sup> *Von Hannover v Germany* [2004] EMLR 21.

<sup>42</sup> See n. 1 above, [10]-[12].

What is the relevance of plaintiff culpability in relation to establishing a reasonable expectation of privacy? I would suggest none. In this, I disagree with the approach taken in *Andrews*, where Allen J concluded, after examining overseas law<sup>43</sup> that the morality and behaviour of the plaintiff can be taken into account, with appropriate varying effects on any reasonable expectation of privacy, even to the extent of its total destruction.<sup>44</sup> In my view, the question of culpability should be treated with caution and without presumption, and then only treated in relation to the defence of public interest.

The reason for this stance is that in many cases, it will be wrong, or too difficult, or simply unfair, to allow blameworthy plaintiff behaviour to destroy an expectation of privacy. This is because apparently culpable acts and breach of privacy often go hand in hand. It might be argued that it is possible to make rational arguments about criminal behaviour, to formulate a general rule that any private behaviour which also involves a crime should result in loss of the privacy right. However, this is not self-evident. In *Peck v United Kingdom*,<sup>45</sup> Mr Peck complained about the disclosure to the media of closed-circuit television footage which showed him staggering along a street at night after having attempted to slash his wrists with a kitchen knife. The ECHR held that the lack of an effective domestic remedy such as privacy to protect Mr Peck was in breach of his rights under the European Convention. Individuals might well, if feeling suicidal like Mr Peck, destroy or steal property as well as attempt to slash their wrists late at night on a public street. Extreme stress, or the results of alcoholism or drug addiction could result in inappropriate public sexual behaviour which might be an offence as well as distressing and humiliating. In such cases, criminal charges, and loss of privacy rights would be utterly inappropriate. It is apparent that extreme care would be required in deciding what kind of culpability can be relevant to the limits of tortious privacy protection. *Mosley* also illustrates the weaknesses inherent in such a punitive approach. The *News of the World* there argued that a number of crimes had been committed during Mr Mosley's S and M session, including sexual assault occasioning bodily harm, and keeping a brothel. Mr Justice Eady did not regard the latter as bearing close scrutiny and saw the former as minor offences only, if they were made out. He took pains to point out that 'even those who have committed serious crimes do not thereby become "outlaws" so far as their own rights, including rights of personal privacy, are concerned,'<sup>46</sup> and used *Campbell* as an example where privacy had been upheld even though it was clear that Naomi Campbell's drug dependency would have involved the possession of prohibited drugs.<sup>47</sup>

It is even less obvious why the *moral* behaviour of an individual should feature in the equation. The approach in the older UK cases such as *A v B* and *Theakston*, which attempted to evaluate sexual relationships based on an idealised notion of shared morality, is to be avoided. If we still accept a zone of inherent privacy around sexual activity, for example, then it is of no relevance

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<sup>43</sup> *ABC v Lenah Game Meats Pty Ltd* 185 ALR 1; *Campbell v MGN Ltd* [2004] 2 All ER 995; *Theakston v MGN Ltd* [2002] EMLR 22, *A v B* [2003] QB 195.

<sup>44</sup> *Andrews v TVNZ* Unreported, High Court, Auckland, 15 December 2006, CIV 2004-404-3536 paras [46]-[47].

<sup>45</sup> See n. 32 above.

<sup>46</sup> See above, n. 1, [118].

<sup>47</sup> *Ibid*, [119].

whether or not the parties involved are married, engaged, living in a long-term defacto relationship or just involved in a friendly one-night stand. It is not the role of judges to rate the acceptability of such liaisons and condemn perceived weakness as culpable behaviour. Again, Mr Justice Eady in *Mosley* had useful comments to make:

The modern approach to personal privacy and to sexual preferences and practices is very different from that of past generations. First, there is a greater willingness, and especially in the Strasbourg jurisprudence, to accord respect to an individual's right to conduct his or her personal life without state interference or condemnation. It has now to be recognised that sexual conduct is a significant aspect of human life in respect of which people should be free to choose.<sup>48</sup>

So at the very least, a remarkably cautious approach is required to development of any 'clean hands' doctrine.<sup>49</sup> But I go further, and argue that culpability should be treated as relevant only to the question of the public interest defence, because only in this context can it be appropriately focussed and the evidential burden properly assigned. Although some overlap between the two is often possible, generally the element of reasonable expectation of privacy in any case investigates the character of the material, while the public interest defence allows a defendant to put forward the reasons why that character should not attract protection of the law in that case. To test this, we can turn to the categories of inherently private information. For instance, culpability would not render the financial records of an individual in our society any the less inherently private. However, it might justify disclosure of those records in the public interest, if the wrong-doing is relevant (sexual offending would not be relevant to this issue, but financial wrong-doing would). Wrong-doing will be relevant if it is connected to the information which is of legitimate concern to the public, and privacy should be lost because of that public interest element, not because people who are 'bad' or 'immoral' do not deserve privacy. It is also appropriate that the party which wishes to argue there is relevant wrong-doing has the burden of establishing it, as the defendant is required to do for the public interest defence. These burdens lie naturally together. This is in fact how Justice Eady treated the matter in *Mosley*, concluding:

...it is not for the state or for the media to expose sexual conduct which does not involve any significant breach of the criminal law. That is so whether the motive for such intrusion is merely prurience or a moral crusade. It is not for journalists to undermine human rights, or for judges to refuse to enforce them, merely on grounds of taste or moral disapproval.<sup>50</sup>

In fact, I would argue that in New Zealand, *Allen J* appeared to apply such an approach indirectly in *Andrews*, even after having stated that culpability could deprive a plaintiff of privacy. In that case, although the defendant submitted that the plaintiffs were the authors of their own

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<sup>48</sup> Ibid, [125].

<sup>49</sup> Burrows, 'The Tort of Privacy Post-Hosking and Post-Andrews', Paper delivered at LexisNexis Media Law Conference, 7 March 2007, 4. The sensitive approach in *Campbell* also supports this.

<sup>50</sup> See above, n. 1, [127]. See also [128].

misfortune because they were driving while intoxicated and thus had lost any right to privacy, the judge ultimately rejected this because the filming had not been about those involved in the detection of crime, the road toll and the perils of drinking and driving.<sup>51</sup>

The point I make here by way of summary is that apparent culpability should never disentitle a plaintiff to a right of privacy – but it could validly bolster the public interest in the publication provided it is significant and relevant to that. I am pleased to see that Mr Justice Eady in the *Mosley* case has very much endorsed this sort of approach and I hope that it is adopted in New Zealand.

#### Publication would be highly offensive to a reasonable person

It was not until *Hosking* that the New Zealand courts clarified this requirement by emphasising that the concern is with *publicity* which is highly offensive, and not the facts themselves.<sup>52</sup> However, *Hosking* did not make clear that the test is one with both subjective and objective elements, so that the matter has to be highly offensive to the reasonable person in the shoes of the plaintiff, a desirable position similar to that taken in *Campbell*.<sup>53</sup> The Court of Appeal confirmed that approach in *Rogers*, where it was put thus: ‘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.’<sup>54</sup> Additionally, in the most recent decision, *Andrews*, where Allen J summarised the existing law, he noted about this element of the tort that the burden is a high one, the court may be able to use the plaintiff where he or she is found to be a person of ordinary sensibilities but otherwise a fictitious reasonable person should be used, and the character of disclosure must be examined because tone and extent of a publication may be determinative.<sup>55</sup>

In *Andrews*, the plaintiff’s case essentially failed at this point. Although the judge had found the Andrews had a reasonable expectation of privacy as to the intimate and highly personal communication between them during the filming, he ultimately held that a reasonable person in their shoes would not consider publication of the statements to be highly offensive.<sup>56</sup> This was

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<sup>51</sup> *Andrews*, above, n. 44, para [78]. However, the defendant was ultimately able to resist the claim because the programme was a reality show about the daily activities of fire fighters, and although it had a significant entertainment element, the judge found there would be sufficient legitimate public concern in its content. *Ibid*: paras [91] – [93]. These comments were obiter since the case had been decided on lack of highly offensive publication.

<sup>52</sup> *Hosking*, para [117]. *TVNZ v BA* Unreported, High Court, Wellington, CIV-2004-485-1299, 13 December 2004, appears to be wrong in this regard. See Cheer, [2005] *NZLJ* 222.

<sup>53</sup> *Campbell*, for example, Lord Hope, para [98].

<sup>54</sup> Also cited by Professor J Burrows, QC, Law Commissioner, ‘The Tort of Privacy Post-Hosking and Post-Andrews’, an address to LexisNexis Media Law Conference, 7 March 2007, 2.(a).

<sup>55</sup> *Andrews*, above n. 44, paras [49]-[50].

<sup>56</sup> *Ibid*, para [71].

largely because the Andrews were not able to show they were humiliated or embarrassed by the broadcast, because it treated them sympathetically and did not disclose the drunk driving they had been involved in. But the judge thought ultimately that the real cause of the plaintiffs' concern was their upset at being filmed without consent and not told about the planned broadcast. Although the court was prepared to use the plaintiffs as people of ordinary sensibilities, the character of the publication was determinative, in that it meant the test of high offensiveness was not met.

Undoubtedly, in some cases, the subjective/objective test is not an easy one to apply. Burrows has remarked that the test is problematic if the plaintiff is manifestly not an ordinary person.<sup>57</sup> Nonetheless, the courts have managed to apply it. In *Brown*,<sup>58</sup> the publication of the information in the police flyer giving the address and a photograph of the convicted paedophile was held to be highly offensive to an objective, reasonable person, standing in the shoes of the plaintiff. The judge recorded his difficulties, noting that to apply this test he had to become something between a convicted paedophile and the 'man in the street'.<sup>59</sup> *Rogers* also looks problematic because the plaintiff was a man who had confessed to murder.

I believe these concerns to be overstated and the examples used to be wrongly based. In fact, it is possible to deal with the mixed test by treating each plaintiff as an ordinary human being in extraordinary circumstances. This is what the House of Lords did in *Campbell*.<sup>60</sup> There, Naomi Campbell, supermodel, was treated as a person with an extraordinary career, but human like anyone else in suffering from a medical condition which required treatment.

Further, when cases like *Brown* and *Rogers* are used to illustrate the difficulties of the mixed test, what the judges or commentators appear to be raising once again is the culpability of the plaintiff – it is somehow felt to be abhorrent to have to stand in the shoes of a convicted sex offender or a man who made an extraordinary murder confession. I have argued above that culpability is not relevant except in relation to the public interest defence. What these examples illustrate is that the subjective element of the test is absolutely essential and that all plaintiffs are entitled to have their viewpoint taken into account. Thus, even the convicted paedophile is entitled to be treated as a human being attempting to rehabilitate himself, rather than simply as a fictitious reasonable person. I believe the mixed approach expresses a view of privacy as a human right which is available to all, even those who are outcast from society, or who otherwise live lives out of the ordinary.

## Remedies and privacy

### *Injunction*

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<sup>57</sup> Professor J Burrows, QC, Law Commissioner, 'The Tort of Privacy Post-Hosking and Post-Andrews', an address to LexisNexis Media Law Conference, 7 March 2007, 2.(b).

<sup>58</sup> *Brown v AG* [2006] NZAR 552.

<sup>59</sup> *Ibid*, paras [80]-[81].

<sup>60</sup> *Campbell*, n. 3 above, para [99].

As noted previously, prior restraint is available for privacy claims in New Zealand, and is the most logical remedy, since it is arguable that privacy, once gone, cannot really be restored. In spite of this, the Court of Appeal in *Hosking* took care to emphasise that the primary remedy is to be damages, but that injunctive relief may be appropriate also.<sup>61</sup> There exists an impression that injunctions in privacy are easier to obtain than for threatened defamation. However, in New Zealand, prior restraint of free expression in privacy has been accepted as requiring a much higher threshold than normally applied to injunction applications. The *Hosking* Court determined that as in defamation, prior restraint is only to be available where there is clear and compelling evidence of most highly offensive intended publicising of private information and there is little legitimate public concern in the information.<sup>62</sup>

There has been little case law since *Hosking* to test this standard, but there are some grounds for concern. I am aware of at least two successful applications which were unfortunately unreported and in which the files were sealed, therefore preventing analysis of the approach taken to the relief sought. But a reported claim for an interim injunction perhaps bears out concerns noted in *Hosking* about the adoption of a less stringent approach to interim restraint pending determination of claims.<sup>63</sup> In *Brash v John and Jane Doe*,<sup>64</sup> Then Opposition Leader Don Brash successfully applied ex parte for an interim injunction restraining persons unknown from communicating the contents of emails belonging to Mr Brash which may have come into their possession. The order required all copies of the emails to be given into the custody of the Registrar of the High Court by persons served with a copy of the order, and reserved leave to any defendant to apply to the Court for rescission or variation.<sup>65</sup> These proceedings were highly unusual and arose after Mr Brash became aware some of his private emails had been leaked and were rumoured to be about to be published in a book. Mr Brash submitted in his application that he was distressed at the possible commercialisation of the emails and that his position would be untenable as those who might wish to communicate with him in future would lack confidence to do so. The order was probably challengeable, for the reason that although the judge referred to a previous New Zealand intellectual property case where unknown defendants had been the subject of an injunction,<sup>66</sup> that case did not involve the media as potential parties. Mackenzie J simply applied the ordinary tests for applications for interim injunctions – whether there was a serious question to be tried and whether the balance of convenience favoured the granting of the injunction. Mr Brash had pleaded four possible causes of action – conversion, copyright infringement, breach of confidence and invasion of privacy. The judge thought there was a serious question to be tried in relation to breach of confidence and possibly privacy. The Court did not require the applicant to proceed on notice because it accepted that would cause undue delay and prejudice.

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<sup>61</sup> Above, n. 2, paras [149]-[150].

<sup>62</sup> Ibid, para [158], applying the test in *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129 (CA).

<sup>63</sup> Ibid, para [155].

<sup>64</sup> Unreported, High Court, Wellington, CIV-2006-485-2605.

<sup>65</sup> *Brash v John and Jane Doe* Interim Injunction and Related Orders, 16 November 2006.

<sup>66</sup> *Tony Blain Ltd v Splain* [1993] 3 NZLR 185.

What is wrong with the order is that its impact on the media and freedom of expression was not considered. *Hosking* requires that a Court has to go further than applying the ordinary tests, and instead look to the plaintiff to show clear and compelling reasons why the injunction should be granted. In my view, this should also be done in the context of a Bill of Rights analysis, whereby the limits imposed on freedom of expression by granting the application must be 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'<sup>67</sup> The Court might have done this by hearing from the media as a clear potential defendant in the *Brash* case. Media interests had been recognised about a week earlier by Mr Justice Eady in the United Kingdom in an application to vary a 'John Doe' order he had made previously on privacy grounds.<sup>68</sup> That judge indicated that interested media parties should have been given notice of the application. The High Court in the *Brash* case did not consider the English decision, which is not surprising given the urgency of the hearing. However, the *Brash* decision is generally defective in any event because it contains no reference to freedom of expression issues or the Bill of Rights.<sup>69</sup>

In contrast to this, the *Rogers* case involved an application for a permanent injunction, and the judgments in the Court of Appeal at least were certainly more protective of freedom of expression in the prior restraint context. Delivering judgment for himself and Justice O'Regan, Justice Panckhurst found that the process of evaluation of the interests involved might not alone determine the appeal. What was determinative was the prior restraint context. The judge accepted that the threshold for pre-publication restraint was very high. He concluded that given the low-level privacy interest and the high-level public interest in the videotape's contents, this was not an appropriate case to restrain publication. Justice William Young, the President of the Court, doubted there was a reasonable expectation of privacy in the video, and used the Bill of Rights to tip the balance in favour of freedom of expression, especially in the prior restraint context.<sup>70</sup> He concluded that Mr Rogers was seeking to protect his reputation in advance, and therefore thought a defamation action would be available to him if TVNZ subsequently got it wrong.<sup>71</sup> In the Supreme Court,<sup>72</sup> a majority of Blanchard, Tipping and McGrath JJ allowed Television New Zealand to broadcast the videoed confession of Mr Rogers. That decision does not contain a substantive discussion of the tort of privacy, however. The majority avoided dealing with the privacy tort by simply referring to it as set out in *Hosking*, because the parties in *Rogers* accepted the existence of the tort in that form.<sup>73</sup> Only one judge, McGrath J, applied

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<sup>67</sup> New Zealand Bill of Rights Act 1990, s 5.

<sup>68</sup> See *X & Y v Persons Unknown* [2006] EWHC 2783 (QB).

<sup>69</sup> The private broadcaster, CanWest Mediaworks, indicated that it intended to challenge the order. However, Mr Brash asked the Court to withdraw the order as soon as it became clear that an author, Mr Nicky Hager, was intending to publish a book which contained information from emails provided by members of Mr Brash's party. Mr Brash stated that this book was a surprise to him and was not the target of the injunction: Press Release, New Zealand National Party, 6 December 2006. Mr Brash resigned as Leader of the National Party following the publication of Mr Hager's book.

<sup>70</sup> *Ibid*, at [125].

<sup>71</sup> The other judges also took this view, though with less emphasis: *ibid*, at [98].

<sup>72</sup> *Rogers v Television New Zealand* [2008] 2 NZLR 277.

<sup>73</sup> *Ibid*, paras [63] and [99].

any real formula as set out in *Hosking*.<sup>74</sup> However, all three of the majority concluded that Mr Rogers had no real expectation of privacy because the videoed confession was produced for a public court process where anyone could have attended, including the media.<sup>75</sup> Two judges touched on the approach to prior restraint. Tipping J endorsed the view that the position is broadly analogous to that in defamation, so that prior restraint should be difficult to obtain.<sup>76</sup> However, Elias CJ, in the minority, thought the analogy with interlocutory restraint in defamation was imperfect and needed to be treated with caution. The Chief Justice was prepared to recognise a different approach based on an investigation of the circumstances of the particular case and all interests involved, both public and private.<sup>77</sup> For Chief Justice Elias, the argument that privacy once gone is gone, was a compelling reason to support restraint, in contrast to defamation, where the alternative of damages can still be effective.

As with many aspects of the privacy tort, the approach to prior restraint in New Zealand remains unresolved. However, in the light of the final comments I make in this paper, the issue may become largely academic in the long run. In the meantime, it would seem sensible for applications for prior restraint in the privacy context to be treated with caution, particularly those which are made *ex parte*, and with full consideration being given to potential harm to the interests involved in each case, including in every case, to freedom of expression.

### *Damages*

The principles for identifying and quantifying damages in privacy are not well developed.<sup>78</sup> Witzleb notes that although defamation and privacy share the common root aim of preserving human dignity, the purposes of compensation in defamation and privacy may not be the same. Compensation in defamation is to provide special loss obviously enough, such as loss of employment, but general damages are also available as solace for hurt and distress, and to repair reputation and to vindicate the plaintiff to the world at large.<sup>79</sup> The latter two aims correct the falsity in defamatory statements, a feature which is missing in statements which breach privacy. In privacy there can be some degree of solatium but restitutio is unavailable. The harm in privacy cases was identified in *Hosking* as humiliation and distress, and personal injury and economic loss are not required,<sup>80</sup> although clearly the latter, if there is evidence to support it, is recoverable. In *Mosley*, influenced by the background of European human rights law, Mr Justice Eady identified the purpose of damages in privacy claims as connected to personal dignity, autonomy and integrity.<sup>81</sup>

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<sup>74</sup> Ibid, paras [98] – [106].

<sup>75</sup> Ibid, paras [48], [63], and [104].

<sup>76</sup> Ibid, para [66].

<sup>77</sup> Ibid, para [38].

<sup>78</sup> See Dr Normann Witzleb, ‘Monetary remedies for breach of confidence in privacy cases’ (2007) 27 *LS* 404, 450.

<sup>79</sup> Ibid, and see Burrows and Cheer, *Media Law in New Zealand*, (5<sup>th</sup> ed, 2005), 57.

<sup>80</sup> See n. 2 above, paras [126]-[128].

<sup>81</sup> See n. 1 above, paras [214]-[217].

Damages in the United Kingdom may include distress, hurt feelings and loss of dignity, as well as vindication for infringement of a right.

It is sometimes said that greater damage flows from defamation than breach of privacy. But it is not necessarily the case that unwanted disclosure of true facts will *always* cause less damage than publication of false ones. The reputation of 'X', elected politician, may well be damaged or destroyed by the publication of false facts. But the effect of publication of true facts about 'X's' sexual behaviour, which, although perfectly legal, a majority of 'ordinary folk' find abhorrent,<sup>82</sup> may just as seriously diminish X's reputation. In my view, invasion of privacy has effects which are analogous to those which are compensated in the 'shun and avoid' cases in defamation.<sup>83</sup> The invasion attracts a remedy in privacy because people think less of the plaintiff in spite of the fact that he or she has done nothing wrong. Sometimes the effects can be as serious as those flowing from defamation, although probably not as often. Therefore, the approach to damages in privacy should remain flexible to take account of the level of seriousness involved in each case.

Flowing from this, and also recognised in *L v G*, for example, the nature of the defendant's behaviour should sound in damages, as in defamation. Though both aggravated and punitive damages remain the subject of considerable debate in private law<sup>84</sup> and in defamation in particular,<sup>85</sup> consistency requires that compensatory damages for breach of privacy reflect any element of defendant behaviour which aggravated the loss to the plaintiff,<sup>86</sup> and if that behaviour was malicious and contumelious, then exemplary damages, intended to punish the defendant and in that sense, not dependent on the hurt and distress of the plaintiff at all except in a parasitic sense, should be appropriate.<sup>87</sup> It must be acknowledged that this argument was in fact rejected in *Mosley*. In that case, Justice Eady expressed a strong initial view that exemplary damages are anomalous in civil law, and likened them to a quasi-criminal remedy for which he could see no pressing need.<sup>88</sup> He ultimately went on to exclude exemplary damages as inapplicable to privacy claims in the United Kingdom because there such claims have developed in the context of breach of confidence, a branch of equity, rather than a tort like defamation.<sup>89</sup> Justice Eady would not extend the remedy, of

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<sup>82</sup> Conversely, publication of false or true facts may have no, or indeed, a positive effect, on the careers of some rock stars and other celebrities who embrace both true and false reputations.

<sup>83</sup> See *Youssouf v MGM* (1934) 50 TLR 580.

<sup>84</sup> New Zealand recently rejected the concept of exemplary damages in contract: see *Paper Reclaim v Aotearoa International* [2006] 3 NZLR 188.

<sup>85</sup> See eg: Tipping J in *AG v Niania* [1994] 3 NZLR 106, 111-112; *Television New Zealand v Quinn* [1996] 3 NZLR 24, and the United Kingdom Law Commission in (1997) LC No 247.

<sup>86</sup> Although, as identified by Tipping J, aggravated damages have not been well-conceptualised in the common law and might be better off discarded altogether: *AG v Niania* [1994] 3 NZLR 106, 111-112.

<sup>87</sup> In *L v G* [2002] DCR 234, Judge Abbott was prepared to recognise an element of aggravation or a need to punish because Mr G had behaved contemptuously and exploitatively of Ms L in publishing the photos of her. However, damages were not argued on that basis and so the award of \$2500 was compensatory only: *ibid*, 250.

<sup>88</sup> See n. 1 above, para [173].

<sup>89</sup> *Ibid*, [197].

which he clearly disapproved, into an area of the law where it had never applied. Furthermore, he also thought such damages were alien to European Convention law. The judge was forced to acknowledge, however, that at least one English judge has categorised privacy as a tort,<sup>90</sup> and that New Zealand authority prior to the development of our tort, goes the other way.<sup>91</sup> Again, I would argue in this area that similarities between defamation and privacy are so strong in New Zealand as to justify the availability of this remedy for both, and since privacy has developed as a tort in this jurisdiction, there are no technical reasons why this cannot occur. However, as in defamation, exemplary damages should be regarded as rare, and levels should remain modest.<sup>92</sup>

As to quantification of damages, it has been suggested by a United Kingdom commentator that the size of awards in defamation should not serve as a guide because the awards in that jurisdiction are high, do not cover the same ground, and because juries are involved in defamation cases.<sup>93</sup> It has not, as yet, been accepted that defamation awards in New Zealand are too high,<sup>94</sup> with the largest jury-awarded figure to date of \$675,000 being made in 2000 to pop icon Ray Columbus,<sup>95</sup> although figures from \$100,000 to \$200,000 are more common. The awards can, as in the *Columbus* case, include elements for aggravation and punishment. So far, only two New Zealand District Court invasion of privacy cases have resulted in damages awards being paid – *L v G*,<sup>96</sup> decided prior to *Hosking*, involved an award of \$2500 which appeared to reflect the lack of identification of the plaintiff, and *Brown v AG*,<sup>97</sup> where the award of \$25,000 against the police certainly reflected an additional element of vilification suffered by the plaintiff.<sup>98</sup> These levels, which are more modest than those commonly awarded for defamation, are certainly appropriate for privacy awards, because although I have argued above that it may be necessary to quantify an element intended to repair serious damage to public reputation in some privacy cases as well as to make good personal distress and humiliation, the repair involved will generally not reach that required to mend damage to reputation by false statements. It would appear, then, that awards up to \$30,000 would not be unreasonable in New Zealand in standard invasion cases.

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<sup>90</sup> Ibid, [181] –[182] and [184], referring to Lord Nicholls in *Campbell v MGN* [2004] 2 AC 457.

<sup>91</sup> Lord Cooke in *Aquaculture Corp v New Zealand Green Mussel Co* [1990] 3 NZLR 299, 301.

<sup>92</sup> *Television New Zealand v Quinn* [1996] 3 NZLR 24.

<sup>93</sup> Witzleb, see n. 78 above, 452.

<sup>94</sup> Though rather old, the leading case on this is *Television New Zealand v Quinn* [1996] 3 NZLR 24.

<sup>95</sup> *Columbus v Independent News Auckland Ltd* Unreported, High Court Auckland, CP 600/98, 7 April 2000, and see cases discussed in Burrows and Cheer, n. 79 above, 64.

<sup>96</sup> See n. 87 above.

<sup>97</sup> See n. 23 above.

<sup>98</sup> Levels in the United Kingdom appear to be modest also: See for example the leading case *Campbell v MGN Ltd* [2004] 2 All ER 995 where Naomi Campbell was awarded £2500 for humiliation and distress and a further £1,000 aggravated damages for a subsequent article belittling the privacy claim. See also *Douglas v Hello!* [2006] QB 125 where the Douglases were awarded £3750 for distress. See Witzleb, n. 78above, 451.

However, it is important to maintain flexibility in approach, and so any court should be guided consistently by relevant factors in quantifying damages for invasion of privacy. In defamation, the established factors a court considers are the plaintiff's existing reputation, the defendant's conduct and state of mind at the time of and subsequent to the publication, the extent of the publication, the nature of the defamatory statement, the plaintiff's conduct and any relevant statutory requirements.<sup>99</sup> In privacy, the factors which suggest themselves are the plaintiff's involvement in public life (whether voluntary or involuntary, and the relevance of any zone of privacy the plaintiff has sought to maintain), the defendant's conduct and state of mind at the time of and subsequent to the publication, the extent of the publication and of identification, the nature of the invasive statement, any relevant statutory provisions, and the fact that privacy, once gone, cannot be restored immediately by payment of money. It is appropriate also that plaintiff behaviour should mitigate damage, as existing bad reputation can do in defamation.<sup>100</sup>

The analysis set out above has attempted to describe the tort of privacy in its current form in New Zealand, and also to suggest ways in which it might be made fairer and more consistent. I now turn to examine the defence of public interest or legitimate public concern, with a similar aim in mind.

#### Defence of legitimate public concern

After some doubt about the matter,<sup>101</sup> *Hosking* clarified that this element is for the defendant to make out and not the plaintiff.<sup>102</sup> Gault and Blanchard JJ also noted that the defence ensures freedom of expression is taken into account<sup>103</sup> and that it means the judiciary has the pragmatic function, disliked intensely by the media, of determining what should and should not be published.<sup>104</sup> By the time *Andrews* was decided, the High Court was referring to the defence as one of legitimate public concern and there it summarised a number of useful points about the New Zealand position. First, the defence covers matters properly within the public interest, not simply of general interest.<sup>105</sup> This clearly covers matters referred to in the United Kingdom breach of confidence cases such as public health, economy and safety, the detection of crime, and national

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<sup>99</sup> See Burrows and Cheer, n. 79 above, 61.

<sup>100</sup> In *Mosley*, Justice Eady took into account defendant behaviour up to and following the breach, plaintiff responsibility for his own actions, the levels of awards in personal injury and defamation cases, and the fact that once gone, privacy cannot be restored. The award of £60,000 was to mark the unlawful intrusion and provide solatium: see n. 1 above, paras [222]-[231].

<sup>101</sup> See *P v D* [2000] 2 NZLR 591.

<sup>102</sup> *Hosking v Runting* [2005] 1 NZLR 1, paras [129], [257], [259].

<sup>103</sup> *Ibid*, para [130].

<sup>104</sup> *Ibid*, para [132].

<sup>105</sup> *Andrews*, Unreported, High Court, Auckland, 15 December 2006, CIV 2004-404-3536, para [81].

security generally.<sup>106</sup> In New Zealand, the decisions of the BSA are also of assistance, although by no means definitive. They show that broadcasts dealing with accountability of public figures alleged to have acted incorrectly, inconsistently, or illegally, the apprehension of criminals, misbehaviour of public servants or failure of government departments, and public health issues, will almost always be matters of public interest. Other BSA decisions have concluded that the death of children, child molestation, and road safety are matters of public interest. Media discussion of government policy also appears to be covered by the defence, as are discussion of the resignation of political candidates one month before a general election, and allegations of professional and sexual misconduct by a prominent doctor standing in local body elections.<sup>107</sup>

Allen J went on to say in *Andrews* that courts should permit a degree of journalistic latitude so as not to destroy the context of a story.<sup>108</sup> Third, he noted that the legitimate public concern necessary will rise or fall depending on the level of invasion of privacy<sup>109</sup> and fourth, if there is intrusiveness, it should not be disproportionate to its relevance to the story.<sup>110</sup> *Andrews* illustrates just how much judgment and balancing is involved in assessing the defence. Although it was unnecessary to the judgment in *Andrews*, Allan J stated he would have upheld a defence of legitimate public concern. This was because he thought the reality programme had a serious underlying purpose as well as a certain level of entertainment.<sup>111</sup> It was about fire fighters as rescue teams and the public had an interest in the cost of road accidents and the functioning of those teams.<sup>112</sup> The judge would have given a degree of latitude to the makers of the programme to allow them to report on the work of the fire fighters, so he thought it did not matter that the tale could have been told without identifying the plaintiffs. Furthermore, the level of invasion of privacy, had it been upheld, was low because of the use of first names and pixilation in the programme, the lack of reference to drink-driving and the sensitive treatment of the plaintiffs, and therefore public concern did not have to be high to outweigh it.<sup>113</sup>

Once again *Mosley* is useful in relation to this element of the tort. Since Mr Mosley had a very strong expectation of privacy about his S and M activities carried on in a private place, a clear and strong public interest in the disclosures had to be demonstrated by the *News of the World*. The newspaper argued that the sadistic sexual behaviour had a Nazi and concentration camp theme, in which the participants mocked the humiliating way the Jews were treated and parodied Holocaust horrors. The judge concluded that there would be public interest in such a theme because Mr Mosley was accountable to the F1A, where he had to deal with many races and religions as its

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<sup>106</sup> *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344 at 376.

<sup>107</sup> See U. Cheer, 'Privacy and the public interest', [2005] *Privacy Law Bulletin* 145, 147.

<sup>108</sup> *Andrews v TVNZ*, above, n. 105, paras [82]-[83].

<sup>109</sup> *Ibid*, para [84].

<sup>110</sup> *Ibid*, paras [89]-[90]. Here, the treatment of intrusiveness suggests that the tort is about more than informational privacy.

<sup>111</sup> *Andrews*, n. 105 above, para [91].

<sup>112</sup> *Ibid*, para [92].

<sup>113</sup> *Ibid*, paras [93]-[94].

President, and he had in the past spoken out about racism in the sport. However, after subjecting the facts of the S and M sessions to close scrutiny, Mr Justice Eady concluded they did not support any real Nazi theme to the activities.<sup>114</sup> The newspaper argued in the alternative that the general depravity and adultery it exposed supported a public interest defence. This was also rejected, the judge holding that the behaviour shown and described did not fall into any of the categories of public interest previously recognised in the UK such as exposing criminal activity or public hypocrisy, nor did it meet the higher standards set by European jurisprudence, of contributing to a debate of general interest.<sup>115</sup> Therefore, it seems clear that disclosure of minor criminal activity (such as smoking ‘a spliff’)<sup>116</sup> or of behaviour which can only be judged in a moral sense, will be difficult to justify in the public interest.

The *Mosley* case hints at significant development of this element of the tort and perhaps of the tort generally. In my view, the conversation about the place of public interest in the New Zealand privacy tort has in fact barely begun to take place. The public interest question, where the clash between freedom of expression and privacy is always engaged, is probably the most difficult aspect of privacy for the courts, and the emerging jurisprudence is tentative. In most cases, there is reference to the need to carry out a ‘balancing exercise’. This is an ordinary feature of the task of judging and is often interpreted by the media as allowing judges to become arbiters of taste. However, this was rightly rejected in *Hosking*, where Gault P and Blanchard J, in the majority, stated:<sup>117</sup>

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.

The question which must be addressed is what is the role of freedom of expression in the privacy tort? The constitutional arrangements in New Zealand and the United Kingdom are quite different as regards rights since the passage of the United Kingdom Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990. We have a Bill of Rights which contains a right of freedom of expression,<sup>118</sup> but not a right of privacy, while the European Convention contains both in Articles 10 and 8. Our Bill cannot be used to strike down inconsistent legislation but contains provisions which impact on statutory interpretation.<sup>119</sup> Under the Human Rights Act, English judges are

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<sup>114</sup> *Mosley*, n. 1 above, paras [122]-[123]. The defendant was not helped when its main witness, Woman E, the participant it had promised to pay to secretly film Mr Mosley, was unable to give evidence in the case.

<sup>115</sup> *Ibid*, para [131].

<sup>116</sup> *Ibid*, para [111].

<sup>117</sup> *Hosking v Runtig* [2005] NZLR 1, at para [132].

<sup>118</sup> New Zealand Bill of Rights Act 1990, s 14.

<sup>119</sup> See Rishworth et al, *The New Zealand Bill of Rights* (2003, OUP), 1; Joseph, *Constitutional and Administrative Law in New Zealand* (2<sup>nd</sup> ed, 2001), 1017.

required to interpret English law so as to take account of the European Convention and decisions made by the European court.<sup>120</sup>

However, in both jurisdictions, there is no statutory requirement to carry out a human rights or bill of rights analysis in relation to actions between private citizens.<sup>121</sup> New Zealand's Bill was intended to have only vertical effects: it applies to the three branches of Government and bodies exercising public functions,<sup>122</sup> and thus in general protects private citizens from the state.<sup>123</sup> In spite of this, although there is ongoing disagreement,<sup>124</sup> the New Zealand judiciary appears to accept it must take account of the rights in the Bill somehow when resolving disputes between private citizens and when developing the common law.<sup>125</sup> Because this process does not produce directly enforceable rights, the horizontal effect is usually regarded as weakly or strongly indirect.<sup>126</sup> It is given content in two ways: by arguing that judges are simply bound by the Bill as the judicial arm of the state, or by arguing that judges are implicitly required to take account of the values expressed in the Bill of Rights. The judiciary often appears to endorse or use both approaches.<sup>127</sup> For example, Tipping J, in the majority in *Hosking*, affirmed the values approach, by requiring judges to give appropriate weight to the rights in the Bill when developing the common law, instructing them to use the values in it to inform the process.<sup>128</sup> However, he also attached

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<sup>120</sup> *A v B* [2003] QB 195, 202, *Campbell v MGN Ltd* [2003] QB 633, 658. Just what this means as yet is unclear. See Gavin Phillipson, 'The 'right' of privacy in England and Strasbourg compared', *New Dimensions in Privacy Law* (2006, Andrew Kenyon and Megan Richardson eds), 185, cf *Murray v Express Newspapers* [2007] EWHC 1908 (Ch).

<sup>121</sup> Justice Eady in *Mosley* clearly recognised a horizontal effect of the European convention on English private law, applying *Campbell*: see n. 1 above, para [126].

<sup>122</sup> The New Zealand Bill of Rights Act 1990, s 3.

<sup>123</sup> See Rishworth, 'Human Rights', (2005) (1) NZLRev 87.

<sup>124</sup> *Ibid* and see Andrew Geddis, 'The Horizontal Effects of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runtig*', (2004) 4 *New Zealand Law Review* 681.

<sup>125</sup> Various approaches seem to have been accepted in the United Kingdom also – see eg: Jonathon Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble,' [2003] *Cambridge LJ* 444; Gavin Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the Human Rights Act', (2003) *Modern Law Review* 726, *McKennitt v Ash* [2005] EMLR 10, para [49], *Murray v Express Newspapers plc(2) Big Pictures (UK) Limited* [2007] EWHC 1908 (Ch), para [18], and see Phillipson's view of *von Hannover* in 'The 'right' of privacy in England and Strasbourg compared', *New Dimensions in Privacy Law* (2006, CUP, Andrew Kenyon and Megan Richardson, eds) 184, 185.

<sup>126</sup> Jane Norton, '*Hosking v Runtig* and the Role of Freedom of Expression', (2004) 10 *AULR* 245, 249.

<sup>127</sup> See for example, a leading defamation case on the defence of qualified privilege, *Lange v Atkinson* [1997] 2 NZLR 22, 32 where Elias J supported both approaches, and *Lange v Atkinson* [1998] 3 NZLR 424, at 465-467, 474. *Lange v Atkinson* [2000] 3 NZLR 385 added nothing to this approach but indirectly affirmed it. See also Randerson J in *Ransfield v The Radio Network* [2005] 1 NZLR 233, at para [69].

<sup>128</sup> *Hosking v Runtig* [2005] 1 NZLR 1, para [229].

some significance to the fact that it is the judicial branch of government which must undertake this exercise.<sup>129</sup>

I consider that the argument of Rishworth and others that indirect horizontality in the common law is not only inevitable, but desirable,<sup>130</sup> is compelling. The common law develops incrementally, and for it to do so without taking account of the values in the Bill of Rights in some way would be to ignore a profound form of public interest,<sup>131</sup> would produce distorting effects within constitutional law, and would also be seriously out of step with other common law jurisdictions.<sup>132</sup> Therefore, I argue that in every privacy case, at the very least, some sort of application of s. 5 of the New Zealand Bill of Rights Act should be openly articulated to balance freedom of expression and privacy and the relative public interests which exist in both.<sup>133</sup> Section 5 requires that the rights and freedoms contained in the Bill may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In privacy cases, therefore, the process should not just be an amorphous, fact-specific approach to legitimate public concern, but one that tests the value of privacy both descriptively and normatively, and contrasts it with the right that is freedom of expression. By this I mean that a more principled approach is required which does not focus on whether it is the plaintiff who deserves the protection of the tort, or the defendant who deserves the freedom to publish, but which is more outward-looking and investigates the public interest on both sides as well. I have discussed ways in which this might be done elsewhere,<sup>134</sup> and simply note here that while we may be tentative about privacy, we are currently only somewhat less tentative about freedom of expression.<sup>135</sup> It is thus appropriate that privacy and freedom of expression be considered together, and in an open-minded fashion, taking account of the political and social values we wish our laws to reflect.

## Conclusion

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<sup>129</sup> Ibid. Gault P and Blanchard J, also in the majority in *Hosking*, preferred to avoid the complex question of horizontality altogether, relying on international obligations to justify upholding the existence of a privacy tort: *ibid*, paras [111] – [114]. Geddis notes that the minority in *Hosking* would have given the rights in the BORA more direct effect, treating them as presumptively disposing of the issue of whether a privacy tort should be recognised by answering in the negative: Andrew Geddis, ‘The Horizontal Effects of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runtig*’, [2004] *NZLRev* 681,704-705.

<sup>130</sup> Rishworth, n. 119 above, 104.

<sup>131</sup> See Philip Joseph, *Constitutional and Administrative Law in New Zealand*, (2<sup>nd</sup> ed, 2001), 1031-1032.

<sup>132</sup> See Jane Norton, n. 126 above, 250-252, and Rishworth et al, n. 119 above, 104-105. This is so in spite of the differing constitutional arrangements in those jurisdictions.

<sup>133</sup> See ‘The Future of Privacy: Recent Legal Developments in New Zealand’, (2007) 13 *Canta LR* pp 169-202.

<sup>134</sup> *Ibid*.

<sup>135</sup> See Rishworth, n. 123 above, Norton, n. 126 above and Geddis, n. 124 above.

I have also examined elsewhere how forms of privacy outside of tort are increasingly influencing the law, such as in *Brooker v Police*,<sup>136</sup> a recent Supreme Court decision dealing with the constitutional impact of freedom of expression on the interpretation of an offence of disorder. Mr Brooker had protested outside the house of a female police officer whom he believed had abused police powers in relation to him. Mr Brooker was arrested for loitering with intent to intimidate, but the charge was substituted in the lower court with behaving in a disorderly manner.<sup>137</sup> Mr Brooker represented himself throughout in this appeal against his conviction and fine of \$300. The majority of Elias CJ, and Blanchard and Tipping JJ allowed the appeal and set aside the conviction, largely because primacy was given to freedom of expression. However, two judges in the majority accorded considerable weight to privacy, though did not find it engaged in this case. But the minority of McGrath and Thomas JJ would go even further and elevated a right to privacy in one's home above any free speech rights being exercised by Mr Brooker. There are indications that our judges are also considering privacy more broadly in other contexts as well, such as search and seizure,<sup>138</sup> and search of court records.<sup>139</sup> These cases demonstrate that aspects of privacy are arising for consideration more regularly in cases outside of the ordinary tort claim, and that the judiciary are prepared to consider its broader aspects, and consider its features as a right or value in the law.

I believe the existing tort of invasion of privacy is proving not to be confinable, and should not be confined, as set out in *Hosking*, to informational privacy. I think that in the future it will embrace loss of control over accessibility and is likely to admit intrusive behaviour in the form of invasion of seclusion. I am on record as suggesting privacy should be accorded substantive, and where appropriate equal, weight with freedom of expression as a starting point in a more formal and transparent balancing process where the defence of public interest is engaged.<sup>140</sup> Mine is an optimistic thesis which does not see these forms of development as a threat to legal coherence or chilling of freedom of expression as long as the balancing process is an even one.

Therefore, it is intriguing to see hints in *Mosley* of a possible future form this interest might take. There, Justice Eady raised the possibility of having regard to the concept of 'responsible journalism' in the privacy tort and said:

There may be a case for saying, when "public interest" has to be considered in the field of privacy, that a judge should enquire whether the relevant journalist's decision prior to publication was reached as a result of carrying out enquiries and checks consistent with "responsible journalism".<sup>141</sup>

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<sup>136</sup> [2007] 3 NZLR 91.

<sup>137</sup> Under s 4(1)(a) of the Summary Offences Act 1981.

<sup>138</sup> See LC 97 *Search and Surveillance Powers* June 2007, paras 2.1 – 2.18.

<sup>139</sup> *TVNZ v Mafart and Prieur* [2006] 3 NZLR 534, and *Rogers* in the Supreme Court: *Television New Zealand v Rogers* [2008] 2 NZLR 277.

<sup>140</sup> See n. 133 above.

<sup>141</sup> *Mosley*, n. 1 above, paras [140]-[141].

This test, borrowed from defamation law, suggests journalists could claim a public interest defence in privacy whether they get their facts right or not, so long as they can demonstrate responsible behaviour. If it is to be applied to the privacy tort, significant distinctions between defamation and privacy begin to disappear. The orthodox understanding has been that defamation provides a remedy for untrue statements while privacy provides a remedy for true intimate statements. Justice Eady's approach would take the emphasis off the truth or untruth element in each tort and put it instead on the public interest defence based on responsible journalism. If these torts move closer together in this fashion, what do we have then? I would suggest a form of rights-based jurisprudence which is a claim for loss of autonomy, dignity and integrity, based on either publication of true or untrue facts, (or intrusions such as secret filming), which may be defended on the basis of public interest. The latter will be clearly satisfied if the material contributes to an important public debate or the functioning of a democracy, and the journalism involved is responsible. The publication of untrue facts will probably attract higher damages. Whether this metamorphosis will occur, whether it will occur in New Zealand, and if so, how long it will take, are the tantalizing questions I must leave for another day.