

Celebrity Privacy after Hosking v Runting: Entertaining the Public with Private Lives

BRIDGET CARNACHAN*

I INTRODUCTION

When Samuel Warren and Louis Brandeis wrote about the “right to privacy” in their landmark 1890 article,¹ it is unlikely that they could have foreseen the extent to which their thesis would ring true in later years. When they acknowledged that “instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life”² they could not have imagined the pervasive technology that was to come, in the form of high-speed internet, digital cameras, telescopic lenses and pxt-capable cellphones. The proliferation of news and media industries, the ascent of tabloid journalism, and the increasing “celebritisation”³ of society have brought personal privacy concerns to the forefront of legal debate. Society places great store on personal privacy⁴ yet thrives on publicity. It condemns the media for intrusion one day and chases the whiff of scandal the next. In an era of increasing “bonk journalism”⁵ with its emphasis on sex and scandal and celebrity faux pas, the essential question is whether, even if a public figure courts media attention, he or she is left with a residual area of privacy which the court should protect.

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¹ Warren and Brandeis, “The Right to Privacy” (1890) 4 Harv L Rev 193.

² Ibid 195.

³ “Celebritisation” is a word invented by the author to describe the increasing emphasis on and awareness of celebrities, being well-known people in modern society.

⁴ In New Zealand, aspects of privacy are protected by the Office of the Privacy Commissioner and the Privacy Act 1993, including Codes of Practice issued under the auspices of the Act such as the Health information Privacy Code 1994. Certain provisions in other statutes also protect privacy such as ss 216A – 216E of the Crimes Act 1961 which make it an offence to use listening devices to monitor a private conversation, s 105 of the Copyright Act 1994 which gives a person who commissioned a photograph or film “for private and domestic purposes” the right not to have copies issued to the public, and the seven privacy principles of the Broadcasting Act 1989.

⁵ Scraton, Berrington and Jemphrey, “Intimate intrusions? Press freedom, private lives and public interest” (1998) 3(5) Tolley’s Communications Law, 174-182, 177.

The question was in part answered in 2004, a milestone in the development of privacy law. Appellate courts delivered two major judgments that will impact on common law protections of personal privacy in New Zealand: the Court of Appeal's decision in *Hosking v Runting*⁶ and the House of Lords' decision in *Campbell v MGN*⁷ in the United Kingdom. These cases consider different factual situations and follow different judicial paths, but they both deal with the wrongful disclosure of private information and the underlying result is the same. Both courts were willing to recognize that celebrities, even those who court the limelight, retain some expectation of privacy that warrants protection. Thus underlying the issue of privacy law and the protections that should be afforded to celebrities is a constitutionally significant debate between the competing considerations of freedom of expression and personal privacy.⁸ The question is whether this conflict of interest can be resolved.

II THE COMMON LAW

Celebrity Privacy in New Zealand

Privacy law in New Zealand has been 19 years in the making.⁹ It culminated on 25 March 2004 when the Court of Appeal in *Hosking* by a majority declared that invasion of privacy as a stand-alone tort has a valid place in New Zealand law.¹⁰ The case is particularly relevant to this article as Mr Hosking, a television news presenter at the time, was a

⁶ [2005] 1 NZLR 1.

⁷ [2004] 2 All ER 995..

⁸ Although the Bill of Rights Act 1990 s 14 protects the right to freedom of expression, there is no corresponding right to privacy. The White Paper, *A Bill of Rights for New Zealand*, 1985 [10.145], stated that it would be inappropriate to attempt to entrench a right that was not fully recognized and was in the course of development. However, the scope of the right to be free from unreasonable search and seizure in s 21 has been considered in light of "reasonable expectations of privacy". Huscroft and Rishworth (eds), *Rights and Freedoms* (1995) 306.

⁹ A potential tort of invasion of privacy was recognised or considered in the following cases: *Tucker v News Media Ownership* [1986] 2 NZLR 716; *Bradley v Wingnut Films* [1993] 1 NZLR 415; *Marris v TV3 Network Limited* (Wellington Registry, CP 754/91, 14 October 1991); *TV3 Network Services v Fahey* [1999] 2 NZLR 129; *P v D & Independent News Ltd* [2000] 2 NZLR 591; *L v G* [2002] NZAR 495.

¹⁰ This was a momentous decision as Randerson J in the High Court (reported at [2003] 3 NZLR 285) had expressed a preference for New Zealand law to develop the breach of confidence action as has happened in the United Kingdom. Randerson J's judgment was criticized as placing the development of the tort of invasion of privacy in reverse. See Tobin, "Privacy: one step forward, two steps back!" (July 2003) NZLJ 256.

celebrity.¹¹ He sought an interim injunction to prevent publication of a photograph of his twin daughters¹² taken in a public street.

1 *The Majority judgments*

In a lengthy judgment, Gault P and Blanchard J canvassed material privacy decisions from New Zealand and other jurisdictions, highlighting the international movement towards increasing concern for human rights and the development of tort liability from reprehensible conduct to protection of identified rights.¹³ Significantly, the judgment clarified that the court sees breach of confidence and privacy as two different matters, steering New Zealand away from the complex United Kingdom alternative where judicial conservatism has discarded a stand-alone tort of invasion of privacy in favour of an artificially enhanced breach of confidence action.¹⁴

Drawing on the United States experience and influenced by Prosser's third formulation of the tort,¹⁵ Gault P and Blanchard J outlined a tort of invasion of privacy that they considered to be consistent with international conventions and the Law Commission's proposal,¹⁶ and workable in light of the relevant competing values.¹⁷ The tort as proposed was narrowly drawn and has two fundamental requirements:

- (i) the existence of private facts in respect of which there is a reasonable expectation of privacy; and

¹¹ The Hoskings had conducted several interviews with magazines about the pregnancy and their use of IVF treatment. After the twins' birth, the Hoskings agreed to a photograph of the twins being published in a pictorial book where they were identified by their first names. *Hosking*, supra note 6, 6.

¹² The privacy rights of children as distinct from adults are not the focus of this paper. In her critique of the case, privacy law expert Katrine Evans suggested that balancing privacy and freedom of expression when children are involved should result in non-publication where consent has been deliberately circumvented, and there is no legitimate public concern to justify the photography. Evans, "Was Privacy the winner on the day?" (May 2004) NZLJ 181, 182.

¹³ *Hosking*, supra note 6, 6 and 5.

¹⁴ Tobin, "Yes, Virginia, there is a Santa Claus: the tort of invasion of privacy in New Zealand" (2004) 12 TLJ 95, 101 As Tobin notes, their Honours in *Hosking* observed that in English law there are now two distinct versions of breach of confidence: the traditional version based upon breach of confidence as outlined in *Coco v Clark* [1969] RPC 41, 47, and the second which gives a right of action for the publication of personal information in which the subject had a reasonable expectation of privacy irrespective of any burden of confidence, but only where that publication was likely to be highly offensive to a reasonable person.

¹⁵ In Prosser and Keeton, *The Law of Torts* (5 ed, 1984) 859-860, William Prosser formulated four torts. The third of these deals with the public disclosure of private facts about the plaintiff.

¹⁶ New Zealand Law Commission, *Protecting Personal Information From Disclosure Preliminary Paper 49* (NZLC, PP49, February 2002).

¹⁷ *Hosking*, supra note 6, 32.

- (ii) publicity given to those private facts is considered highly offensive to the objective reasonable person.

Their Honours stated that it was not possible to prescribe all boundaries of the cause of action in a single decision, and were only concerned with wrongful publicity given to private lives. Their formulation deals with the publication of information that is distressing or harmful – “highly offensive to the objective reasonable person”. The test confirms that the offensiveness focuses on the publicity rather than the private fact itself.¹⁸

Their Honours highlighted Prosser’s identification of a public figure’s lower expectation of privacy through seeking publicity, and acknowledged that a voluntary public figure has no right of privacy in relation to their public appearances, agreeing that as their public profile increases, their right to privacy will be reduced but not extinguished.¹⁹ Consequently, celebrities may find that their families will also experience a lessening in their reasonable expectation of privacy. *Hosking*, however, was not a suitable case to set celebrity privacy parameters.²⁰

Blanchard J did, however, confirm that legitimate public interest was a defence.²¹ Such a defence confines the scope of privacy protection so that it does not exceed such limits of freedom of expression as can be justified in a free and democratic society.²² Unfortunately, the majority did not clearly explain what ‘legitimate public concern’ should mean. Instead, Gault J referred to the approach in the American Second Restatement of the Law of Torts, which states:²³

[T]he line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake and with which a reasonable member of the

¹⁸ Tobin, *supra* note 14, 103.

¹⁹ *Hosking*, *supra* note 6, 33.

²⁰ The photographs taken of the Hoskings’ daughters did not disclose private facts and were unexceptionable: the children were with their mother who was shopping in a public place. The photos were not offensive in any way, and could not be described as objectionable to persons of ordinary sensibilities. In fact, counsel for the Respondent pointed out that a shopping centre of a busy Saturday morning before Christmas is the last place one would seek solitude or seclusion. See Tobin, *supra* note 14, 104.

²¹ *Hosking*, *supra* note 6, 35. This clarification brings the tort of invasion of privacy into line with actions for breach of confidence and defamation. In commentary on *P v D*, Rosemary Tobin strongly advocated that the public interest be a defence to the tort rather than a factor for the court to consider. Tobin, “The New Zealand Tort of Invasion of Privacy” (2000) 5 (4) *Tolley’s Communications Law*, 129, 133.

²² Tobin, *supra* note 14, 104.

²³ Sumpter and Graham, “IP round-up: *Hosking v Runting* – New Zealand’s new privacy tort” (May 2004) *NZIPJ* 290, 292.

public, with decent standards would say that he had no concern.

This approach advocates considering each individual case according to community norms, values, and standards.²⁴

Moreover, when freedom of expression is a relevant consideration, the issue of remedies is fraught with conflicting objectives. Damages are said to be the primary remedy in a breach of privacy case, yet in many situations damages will not be an adequate remedy from the perspective of the complainant as the reason for taking action is automatically thwarted by publication – the privacy has been lost and the damage has been done. The respondent and media interveners were concerned about the impact of any tort of invasion of privacy on press freedom, particularly on the prior restraint of the media.²⁵ However, the majority focused on the importance of balancing contemporary values, considering whether the limitation of a right affirmed by the Bill of Rights – such as freedom of expression – was reasonable and demonstrably justified in a free and democratic society.²⁶ This means that the more value to society the information imparted has, the greater is the task of proving that the limitation is reasonable and justified.²⁷

As a result, the majority held that an award of damages would be the primary remedy for an invasion of privacy, and an injunction would only be available where there is compelling evidence of intended highly offensive publication of private information in light of little legitimate public interest concerning the information.²⁸ Certainly injunctions can be seen to contravene the fundamental notion of freedom of expression and have serious effects when timing of publication is critical. While this approach has been criticized,²⁹ section 14 of the Bill of Rights Act continues to be of central importance in New Zealand and the courts will undoubtedly be careful when undertaking a balancing exercise in any action against the media for invasion of privacy.

Justice Tipping delivered a concurring judgment. His Honour also cautioned that freedom of expression should not be invoked merely to boost circulation or ratings when that commercial objective has a

²⁴ Tobin, *supra* note 14, 105.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Hosking*, *supra* note 6, 40.

²⁹ Evans, *supra* note 12, 183.

substantial adverse impact on the personal dignity and autonomy of individuals, and serves no legitimate public function.³⁰

2 *The Dissenting Judgments*

Both Keith and Anderson JJ focused their pro-media judgments on the Bill of Rights Act and the importance of freedom of expression. Justice Keith refused to accept a separate cause of action for giving unreasonable publicity to private facts. His Honour reviewed the varied protections of personal privacy already available through criminal and other legislation,³¹ and concluded that the proposed ill-defined tort would have a chilling effect on freedom of expression.

Similarly, Anderson J emphasized the semantic imprecision of a tort that provides a remedy for publication that is “highly offensive to an objective reasonable person”. In doing so he considered the difference between values and rights where freedom of expression is a right and privacy is a human value, and questioned “whether an affirmed right is to be limited by a particular manifestation of a value”.³²

3 *The Impact of Hosking*

As yet, the impact of the Court of Appeal’s decision in *Hosking* is unclear. In light of Anderson J’s dissent, it has been touted as having a ‘chilling effect’ on the media and as creating an ‘ill-defined threat to publishers’.³³ However, in reality the judgment only confirms what many commentators had long believed: that there is a tort of invasion of privacy in New Zealand which, in appropriate circumstances, covers the publication of private facts.³⁴ Whether an individual can find a remedy for unreasonable intrusion into their solitude or seclusion is yet to be tested.³⁵

Consequently, the formulation of the tort and the defence of legitimate public interest require judgment and a balancing exercise, where publishers may have to examine their material pre-publication to ensure that it is not “highly offensive to the objective reasonable person”,

³⁰ *Hosking*, supra note 6, 40.

³¹ *Ibid* 51. See also Anderson J at 64.

³² *Ibid* 64.

³³ Editorial (April 2004) NZLJ 97.

³⁴ Tobin, supra note 14, 106.

³⁵ *Ibid*. Tobin suggests that the reasons that persuaded the Court to adopt the publication-of-private-fact tort would apply equally to the intrusion-into-solitude version.

and where truth of something is not enough.³⁶ The requirement of “publicity” is based on the requirement in United States jurisprudence, in which “publicity” means that the matter must be communicated to the public at large, or to so many persons that it must be regarded as substantially certain to become one of public knowledge.³⁷ This would suggest that the tort will relate predominantly to the media and mass publication, rather than material disclosed to only a few people.

Moreover, the high threshold of material being “highly offensive” would seemingly protect against sensationalistic tabloid articles of salubrious details of a celebrity’s life, rather than preventing publication of legitimate public interest stories. In this sense, the tort may simply keep the media clean, rather than imposing a great restriction on them, and indeed given New Zealand’s lack of titillating tabloid media, the iciness of the ‘chilling effect’ is doubtful. It is clear, however, that celebrities in New Zealand will, in circumstances where the elements of the tort are met, have a cause of action against the media for invasion of privacy.

Celebrity Privacy in the United Kingdom

Celebrities in the United Kingdom have tried, often unsuccessfully, to restrict a sensation-loving media from printing the salacious details of their private lives. In dealing with these cases, the British courts have preferred to expand the breach of confidence action to encompass breaches of personal privacy, rather than defining a stand-alone tort of invasion of privacy. *Campbell v MGN Ltd* is testimony to this. Following the lines of other privacy cases in the United Kingdom, the House of Lords recognized privacy interests through the expanded breach of confidence action.

The plaintiff, Naomi Campbell, is an internationally famous supermodel who has advanced her career through enormous publicity and media attention. In February 2001, the British *Daily Mirror* tabloid discovered that she was receiving treatment for a drug addiction and it published articles about this. The first story contained the cover title ‘Naomi: I am a drug addict’, and featured pictures of Campbell standing on the street outside her treatment centre with fellow group members whose faces had been pixillated.³⁸ Inside the newspaper, the story outlined Campbell’s efforts to rehabilitate herself and gave further

³⁶ *Hosking*, supra note 6, 21.

³⁷ Sumpter and Graham, supra note 23, 294.

³⁸ *Campbell*, supra note 7, 1000.

information about the type and frequency of Campbell's treatment. The pictures were taken covertly from a concealed parked car, and the article itself contained factual inaccuracies. Subsequent to publication, Campbell claimed damages for breach of confidence and compensation under the Data Protection Act 1998. In the High Court, Morland J upheld Campbell's claim and awarded a modest sum to the celebrity in damages. The Court of Appeal discharged the judge's orders. However, the majority of the House of Lords³⁹ found in Campbell's favour.

1 *The Majority Opinions*

Lord Hope's opinion centred on the fact that, although Campbell had exploited her status as a celebrity, the anonymity of her Narcotics Anonymous (NA) treatment was crucial to its success. He made no distinction between attendance at an NA meeting and treatment for a condition administered by a medical practitioner, where assurance of privacy is essential. Lord Hope referred to the New Zealand case of *P v D* in which Nicholson J applied an objective test. Lord Hope also considered articles 8 and 10 of the European Convention on Human Rights (the Convention) - article 8 lays down the right to privacy, while article 10 enshrines the right to a free media. The effect of the Human Rights Act 1998 (United Kingdom) was to incorporate these articles into English law and it is the incorporation of these provisions that has led to the expansion of the breach of confidence action in England. His Lordship reiterated that neither article has pre-eminence over the other, but that they require balancing considerations of freedom of expression against personal privacy in each case.

Baroness Hale also considered the balance to be struck between article 8 and article 10 of the Convention. She followed the approach taken in *In re S*⁴⁰ where the court held it is first necessary to look at the comparative importance of the actual rights being claimed in an individual case, then at the justifications for interfering with or restricting each of these rights. In doing so, the court advocated a test where the proportionality of interfering with one right has to be balanced against the proportionality of restricting the other.⁴¹ Her Ladyship stated that what was an ostensibly trivial case was on closer examination about important personal information relating to Campbell's physical and mental health, for which her NA therapy was vital. Her Ladyship opined that the fact

³⁹ Comprising Lord Hope, Baroness Hale and Lord Carswell.

⁴⁰ [2003] WLR 1425.

⁴¹ *Campbell*, supra note 7, 1033.

the photos taken revealed Campbell outside an NA meeting, in the company of others who were part of her group, tipped the scales in Campbell's favour.

Taking a similar line to the other two majority law lords, Lord Carswell disagreed with the distinction that the Court of Appeal had drawn between details of a course of treatment at NA and other health information. Rather, he held that publication of details of a course of treatment at NA and photos surreptitiously taken depicting Campbell outside her treatment centre went beyond publication of the fact that she was receiving therapy. In Lord Carswell's view, it was this extra information on top of the accepted disclosure of the fact that Campbell was attending NA, that weighed towards an interference with the appellant's privacy. Lords Nicholls and Hoffman dissented.

2 *The Impact of Campbell*

Immediately after the release of the House of Lords decision, the media in the United Kingdom labelled the case as having 'major repercussions for the way tabloids cover the lives of celebrities' through the introduction of a 'back door privacy law'.⁴²

However, a more recent decision has dampened speculation that the courts in the United Kingdom have developed a blanket law of privacy and highlighted the fact-specific nature of the outcome in *Campbell*. Former MP and Olympic gold medallist Sebastian Coe lost a court battle almost a month after the House of Lords' opinion was released, to prevent two tabloid papers revealing details of an extra-marital affair. In this case, the High Court ruled that freedom of the press and free speech outweighed Mr Coe's right to privacy.⁴³ Justice Fulford was not persuaded that the *Campbell* ruling should be extended from the granting of a right to privacy in connection with medical treatment, to granting privacy in respect of an illicit affair.⁴⁴

United Kingdom and New Zealand law are now essentially in the same position. The tests adopted by the respective courts are the same in all but name. The result is that privacy interests will be protected in New

⁴² Gibson and Cozens, "Campbell ruling 'sets privacy precedent'" *Media Guardian*, United Kingdom, 6 May 2004, <<http://media.guardian.co.uk/site/story/0,14173,1210884,00.html>> (at 30 September 2005)).

⁴³ Dyer, "Coe ruling keeps a limit on privacy rights" *Media Guardian*, United Kingdom, 31 May 2004, <http://media.guardian.co.uk/site/story/0,14173,1228296,00.html?_rss> (at 30 September 2005).

⁴⁴ *Ibid.*

Zealand through a tort of invasion of privacy and in England under an expanded breach of confidence action.

III RESEARCH

In light of the decisions in *Campbell* and *Hosking*, the author planned to interview New Zealand celebrities to ascertain their opinion about celebrity privacy and the extent to which they believed their personal lives should be protected from the public eye. The author also sought to interview journalists.

The author selected participants for the study based on certain criteria. The ‘celebrities’ were to be people who were generally considered to have a public image in New Zealand through involvement in television, sport and society. They included those having a role in local New Zealand television productions, television presenters, those having a role in television news, and those who were well-known as members of a national sports team. The journalists approached were to be high profile journalists, editors, or columnists, who wrote for well-known publications.⁴⁵

The topics discussed with the celebrity interviewees included: what it means to be a celebrity; the individual’s personal experiences as to invasions of privacy; whether the individual had ever taken legal action because their privacy was invaded; their personal feelings on having a photo taken of them in public without their consent; whether they considered there is a difference between a public figure who courts publicity, and one who does not; how to define a ‘private fact’; how to define what constitutes the ‘public interest’; the nature of the media in New Zealand; whether they felt that there were adequate privacy protections in New Zealand; and whether there should be statutory guidelines or a statutory code of ethics for the media in New Zealand.

The topics discussed with the journalists included the nature of ‘celebrity’ in New Zealand; the meaning of private facts and the public interest; New Zealand’s tabloid-style publications; the treatment of celebrities who court the limelight; privacy protections for celebrities; the

⁴⁵ Of 36 public figures approached, 13 agreed to participate in the study. Eight of the 13 were ‘celebrities’, one was a celebrity agent, and four were journalists. For the sake of anonymity, each celebrity participant has been given a letter A-I in lieu of their name. The journalists have been given a letter J-M.

Press Council; and whether they believed celebrity privacy to be a question of law or ethics.

Celebrities

1 What it means to be a celebrity

As the author expected, the celebrities interviewed had similar opinions about the nature of being a celebrity and the workings of the media in New Zealand. They all agreed that having a public role in New Zealand society dictates a lesser degree of privacy than that accorded to an ordinary citizen. All of the celebrity interviewees stated that publicity and public attention is part-and-parcel of being in the public eye, and that people who work in entertainment need media and public attention for their profile.

B, a well-known sportsperson, did not enjoy being in the public eye outside of their sport and considered that often the media were more interested in their private life than his/her sporting achievements. C is against the attitude that celebrities ‘bring attention to themselves’ by virtue of their profession or position but tolerates public attention because C earns part of their living from being in the media. D finds it hard to reconcile the differing expectations of New Zealand society, where on the one hand New Zealanders expect public figures to be ordinary people, but on the other still feel that they have some right to them.

As an agent for celebrities, I understands the concept of celebrity well. In I’s opinion, people in New Zealand have more respect for celebrities than do people in other countries, such as the United Kingdom or United States. E believes that an entertainer or actor is nothing without the public and that those who want to work in the entertainment industry must be attention-seekers by nature. In F’s opinion, being a celebrity in New Zealand is totally unlike being a “proper celebrity” due to the country’s small population. As F says:

Even A-list celebrities in New Zealand can’t be too famous because there is only one degree of separation here – people know celebrities from school days or know their family from way-back, and they won’t hesitate to bring such a person down-to-earth.

2 The individual's personal experiences as to invasions of privacy

Each celebrity interviewed relayed their personal experience vis-à-vis the media in New Zealand. None of them had ever experienced a great invasion of privacy, but they had all felt offended by the actions of certain media at some point in their public career. They did express concern at the control the media attempts to exert over public figures and celebrities' relative disempowerment with regards to the factual accuracy of non-consensual articles written about them.

A rarely does media interviews with women's magazines, in order not to set a precedent whereby magazines feel they have a right to publish regular stories: "In my case, I learned that if you're going to sup with the devil, you need a really long spoon. If you start playing with them, and then don't feel like it, they'll nail you." A believes that the media's job, when it comes to celebrity figures, is to keep the public interested – "they keep you waxing and waning in popularity". A recalls one instance where a woman's magazine did an article about A's marriage break-up. The magazine took a photo of A on the bedroom balcony talking to A's ex-spouse at one time, and another photo of A talking to A's then partner at another time, and juxtaposed them in an article. A found the article amusing, despite the fact that it was somewhat misleading.

B has had one unfortunate experience with a New Zealand woman's magazine. B and B's partner went to a pacific resort for a holiday. On their return to New Zealand, they discovered pictures of them on their intimate vacation published in a magazine that had been taken by another guest of the resort without B's consent or knowledge. Although there was nothing offensive about the nature of the photographs, B was upset first that they had been taken and secondly that they were printed in a magazine with a large circulation, making what was a private vacation for B a commercial success for the magazine.

3 Whether the individual had ever taken legal action

None of the celebrities interviewed had ever taken a media organisation to court. However, they all claimed that they would be prepared to do so if appropriate circumstances arose.

A has never taken legal action against the media. Sometimes certain coverage has made A cringe, and has been embarrassing, but it has not required legal action. In A's mind, "you need to learn to pick your battles". There have been times when D has felt affronted,

embarrassed and infuriated about what a journalist has written, but D believes that to do something legal about it would be to make a bigger deal of it than it deserves. Similarly, E has never taken legal action because “nothing that’s touched me has ever really hurt me...yet”. In E’s mind, a better course of action is to give an interview to a rival publication degrading the offensive media organisation, or to refuse access to the offensive organisation:

The media and celebrities have a symbiotic relationship – they feed off each other – so if you cut off the food supply, that medium will suffer. It’s a power relationship, and often finding the balance is the difficult part.

4 Their personal feeling on having a photo taken of them in public without their consent

All celebrities bar two expressed little concern about having photos taken of them in a public place, accepting it as a consequence of being well known in society. To A, a person taking a photograph of A in public is no bother – “the longer the lens the better...if I don’t know they’re there – great”. If A is in a public place, A has no problem with it. As A states, there are certain places you go when you’re a public figure, and you know you will be photographed, so A’s advice is “to put your slap on”. A would, however, draw the line if someone attempted to use long-lens technology to photograph A in the bathroom or in an intimate situation in a private place. H does not take issue with people or the media photographing H in public, but does feel that the women’s magazines who sport tabloid-style photos do aim to take unflattering photos of H. At one point, H was so mortified by the “gruesome” pictures that were repeatedly published that H “ricocheted into the surgeon’s office” to have minor cosmetic surgery.

C, however, does not think that taking a photograph of a person in a public place is acceptable. In C’s experience, it is intrusive to see photos published and to think back to where C was at the time and what C was doing or thinking, and to realize that someone was watching. For that reason, C clearly differentiates between a photograph taken randomly without consent, and a consensual article in a magazine:

As part of that consent, you have the right to portray yourself in the way you want to be portrayed. Some people say that that is media manipulation, but it’s not really. It’s the

difference between allowing yourself to be photographed in a given situation and someone just taking the liberty to do so.

5 Whether there is a difference between a public figure who courts publicity, and one who does not

The interviewees themselves distinguished between celebrities who court the limelight and celebrities who try to keep out of the media. A clearly believes that celebrities, particularly those involved in film, television, and radio, where their art is to entertain or inform, cannot survive without a loyal public following. Thus publicity is crucial to an entertainer's career. For this reason, A does think that a person who opens themselves up for media attention should expect to be targeted more by the media. B believes there is a difference between a public figure who courts the media and someone who is in the public eye through achieving in a sporting arena, who reluctantly becomes a celebrity. In B's opinion, once a public figure starts giving themselves to the public, then they probably cannot stop. Similarly, C acknowledges that if a celebrity promotes him or herself in public and actively solicits media attention, then the media probably have open slather on their actions.

G, however, believes that it is hard to make a distinction legally between a celebrity who courts the limelight and one who does not. Publicity is, for many people in the public eye, contractually part of their job. G does believe that those who court media attention are often in a better position by virtue of the relationships they form with different media that allow them more control over how they are portrayed. Attempting to stay out of the spotlight can, in G's experience, make a public figure an easy target for media who criticize the person's inaccessibility.

6 How to define a 'private fact'

All the celebrities interviewed agree that trying to ascertain a standard definition of what constitutes a 'private fact', and hence something worthy of protection, is a difficult if not impossible task. They all agreed that what one person considers 'private' is totally subjective, depending on their personal experiences, personalities, proclivities and sensibilities.

B thinks the concept of a 'private fact' is a foggy one. B believes anything on private property, or to do with intimate details about a person, are certainly private. C thinks that a reasonable expectation of privacy should be determined by the surrounding circumstances. In C's

view, C's house is off limits and intimate details about C's life should generally remain private. However, C believes it becomes more difficult to draw a line when a public figure is in a partially private, partially public place, such as a gym or movie theatre, where people are excluded through non-payment, yet the place is not wholly private. C believes that children of public figures should be left alone.

To E, there are certain things that E is happy to talk about – such as a health condition that E has suffered – which E knows other people may find too sensitive to discuss. E thinks that there are certain things that are generally private, such as an individual's sexual proclivity and activity, family relationships, and intimate details, but there is a grey area where a person's sensibilities will determine whether they consider the information to be private. In H's mind, all things should be kept private unless they are of consequence to the public, or unless a public figure divulges so much to the media that they lose the right to complain about their privacy being invaded. H thinks private facts are circumstantial, and agrees that any definition is hard to formulate when it is a subjective issue.

Although G agrees that defining what constitutes a 'private fact' is difficult, G offers to classify them as "facts that apply to non-professional life that are of little consequence to the public". When considering this issue, G disagrees with H and questions whether once a public figure discusses an element of his or her private life, this necessarily gives the media free reign on all private facts about them. G believes that there is certainly a boundary, and that discussing family or a certain situation in one particular interview should not then open up those topics to ongoing scrutiny.

7 How to define what constitutes the 'public interest'

None of the interviewees felt that information about their lives, unless related to their professional roles, was of legitimate public interest in the literal sense, but accepted that the public may be interested in aspects of their personal life. B acknowledges that in today's society, where there are so many different parts to the media, defining what is newsworthy is complex. B feels that nothing B does outside of sport is of public interest, but concedes that people may be curious about B's day-to-day life. Similarly, C believes that if it is left to the media to define what is in the public interest, then everything will be caught by that.

D believes that it is difficult to ascertain what is really in the public interest, but believes that if a celebrity shows some hypocrisy,

exhibits dangerous or criminal behaviour, or is seriously morally corrupt, then the public should be aware of that. However, D does not believe that information that has merely prurient interest and is of no consequence to the public should be published. E realizes that if a public figure discusses a certain topic at one stage, or is involved in some issue at one point, then there is likely to be continuing public interest in any similar behaviour later on. Similarly, F believes that if F opened up an aspect of F's life and discussed intimate details of it, then F would consider further information on that subject to be in the public interest, particularly if it revealed F to be a hypocrite.

G believes that the media would purport to argue that anything they print is in the public interest based on the principles of supply and demand. In G's experience, public figures need to take a pragmatic approach to the public's interest in their affairs. Often there is interest in certain events in a public figure's life, such as his or her wedding or the birth of his or her child. For that reason, G believes it is better to satisfy that interest by giving an arranged interview than to withhold information, which simply exacerbates the media's desire to 'steal' it through cobbling together sources of information. G accepts that the 'public interest' in today's society probably means anything the public is interested in.

8 The nature of the media in New Zealand

Generally, the media in New Zealand is considered to treat celebrities well by international standards. However, the celebrities interviewed expressed concern at an increasingly sensationalistic style of journalism, and particular criticism was made about the *Sunday Star Times*' "About Town" supplement and the gossip column written by Bridget Saunders.

A explained that in New Zealand, if a public figure does not do arranged articles with women's magazines then they cobble together gossip and paraphrase. Certainly, A recognizes that "you don't want to be rude to the media. If they don't like you, they'll nail you". A also claims to know other public figures who will sell stories – untrue stories – to make money, because these magazines are prepared to pay for celebrity fodder.

B agrees that the New Zealand media are generally good when it comes to celebrities. Despite this, B agrees that the media build a person up one minute, and drag them down the next, and for this reason does not read tabloid magazines or get concerned at their portrayal of B. D's only reservation about women's magazines in New Zealand is that they do not

allow control over the cover line of a story. Generally, stories about public figures in these magazines are paid for and are organized along contractual lines where the celebrity retains some control over the text and pictures used. However, D accepts that entering into such a contract and being remunerated for it warrants relinquishing complete control over how the story is marketed to the public. In D's experience, the media often misquote public figures on the cover of magazines or add a sensational tag line to a standard article which can be slightly offensive to the public figure, but is something that a celebrity has to accept if he or she involves themselves in the process.

E is also very critical of the gossip columnists who produce tabloid columns about public figures in New Zealand. The lack of fact checking concerns E because, as E sees it, the media construct the image of public figures that the public then adopts, even if it is based on untruths and falsities. I, as an agent for celebrities, related some experiences of clients. In one particular situation, a client of I was in a movie with an international actress and a magazine had been sold the rights to do a story about the two people. However, another magazine did a 'scoop' and pieced together inaccurate information. F acknowledges the growing tabloid media in New Zealand, but does not believe that it fits well with New Zealand's generally laid-back attitude to celebrities.

9 Whether they felt that there were adequate privacy protections in New Zealand

Generally, the celebrities believed that there should be greater privacy protections for both public figures and members of the public. Although the celebrities interviewed accept that public figures have a lesser expectation of privacy than ordinary citizens, they do feel that even a public figure deserves some privacy and that the outcome of *Hosking* is a step towards recognizing this.

In D's opinion, the tort outlined in *Hosking* is a step in the right direction, as it is only private information that is published causing great offence that a public figure is likely to be concerned about in any event. Contrary to this, E thinks generally privacy protections in New Zealand are adequate. E does think that the outcome of the *Hosking* decision is positive for public figures in New Zealand, because it suggests that celebrities are not public property and that they will have a cause of action in certain circumstances.

F states that the law exists to protect the vulnerable and defenceless. F believes that the tort formulated in *Hosking* should give

celebrities in New Zealand adequate privacy protections, but does not believe that well-paid celebrities can ever be described as vulnerable, and does not think they should use the law to “boost their own sense of self and ego”. G is interested to see how the tort of invasion of privacy will be applied in future cases. In G’s opinion, the *Hosking* case was not a good one for testing privacy given the factual circumstances of the case, but G is pleased that the tort may mean that the media will need to check that what they publish about a person is not highly offensive.

10 Whether there should be statutory guidelines or a statutory code of ethics for the media in New Zealand

All the celebrities interviewed are strongly in favour of statutory guidelines or some form of regulation for the print media in New Zealand, which they feel is currently unfettered. This does not mean, they insist, that freedom of expression should be constrained, but that the media should make sure that their reporting is accurate.

D is strongly in favour of some statutory ethical guidelines for the print media, not only to standardize what they publish to an extent, but also to give public figures and the general public some idea of what they can expect from media organisations. In D’s opinion, the strongest cause of action in New Zealand is to refrain from giving work to media that offend:

The celebrity community in New Zealand is so small that if a magazine makes a big mistake they will suffer by not getting stories from other public figures. This precludes a lot of publications wanting to get offside with anyone.

In G’s opinion, the Press Council in its current form is a toothless organisation. Guidelines or regulations to improve the quality of what the print media publish are in G’s view a good idea. G feels that there need to be teeth at a primary level, to ensure that the courts are a forum of last resort.

In contrast, F believes that formulating a general statutory code of ethics or guidelines would be too difficult, and questions how such standards would be formulated. As F is not bothered by anything F reads or watches, F thinks that formulating standards for the print media that would be acceptable to all involved would be virtually impossible. F does, however, advocate an organisation to which people can complain, and F believes that the Press Council fulfils this role adequately.

Journalists

1 The nature of celebrity

As expected, the journalists interviewed consider the issue of celebrity privacy from an opposing perspective to the celebrities themselves. They all agreed that celebrities should expect to be targeted by the media due to being in the public eye.

M is an editor of one of the women's magazines in New Zealand. In M's view, celebrities and the media are co-dependent:

Sports stars, actors, entertainers, and politicians rely on public support to get a profile – we provide something the market wants which is coverage of people's public profiles. A public profile helps celebrities to get a key role in a soap, all A-listers in Hollywood need a public profile to get their hire fees and contracts.

In L's view, celebrities are celebrities and they should by virtue of that expect that they will receive publicity. L does not, however, believe that all celebrities are fair game for any attack simply because they are well known. Having a public persona necessarily reduces an individual's expectation of privacy, but it does not erode it.

2 Private facts and the public interest

The journalist interviewees agreed that in the modern media, the line between what is 'news' and what is 'entertainment' has blurred. With the exception of one interviewee, the journalists agreed that public interest is dictated by the market.

In M's view, things that are of public interest and that are interesting to the public are one and the same thing:

There is a lot of crossover with public figures... Things that are of public interest may be things to do with public works, what's happening in government, rate hikes, and the like – that stuff is of public interest but not necessarily very interesting to the public. But when it comes to people, you can't distinguish the two.

In J's view, public figures are well-known generally because they "set themselves up as heroes". Public figures are influential people, and if

someone is a hypocrite or falsely claims moral fortitude, then in J's view the public has a right to know about it. J also believes that New Zealand morality is quite different to that evident overseas where there is a bigger market for salacious gossip.

K believes that it is a question of degree whether a private fact can be brought into a public domain. In K's view, if the information relates to standards of people, events they are involved in, and places they go, then it is legitimate to report about it. However, K would draw the line at revealing any information to do with an individual's sexual relationships or family. In K's opinion, journalists have no greater or lesser rights than other members of the public, and therefore should not feel that they have the right to expose aspects of a public figure's private life unless there is a public interest element to justify that action.

Interestingly, L doubts that if L's publication intruded into a public figure's life to the extent that they could make out a cause of action in invasion of privacy, L could succeed on a defence of legitimate public interest. In exercising editorial judgment, L accepts certain articles may offend certain celebrities, but L tries not to offend members of the public whose reaction is, in L's opinion, the best way to draw the line as to whether something should be published. When it comes to ascertaining whether something is a 'private fact', L believes there are two elements to consider: the facts used to tell a story, and then the way that story is told. L's publication may reveal information that is personal to a public figure, but L is careful to ensure it is done in such a way that it will be acceptable to the general public.

3 New Zealand's tabloid-style publications

The journalists agreed that tabloid-style publications in New Zealand meet a market for such material. Although New Zealand media is generally more restrained than its overseas counterparts, there is an increasing demand for 'celebrity' information.

As an editor, M describes M's position as 'the gatekeeper of the brand':

We create our magazine for certain readers. Editors are in the best position to make decisions about content because readers are very vocal and if they don't like something, they let you know. I would not include certain material that UK mags would print, and often I buy photos just to take them off the market so that no one else can publish them – photos

that I think would undermine the industry. We have a self-regulatory system.

In K's opinion, women's magazines and tabloid publications generally reveal information in which there is a prurient interest, and such publications usually use those public figures who exploit the publicity machine for their own benefit. L cites the increasing tabloidisation of New Zealand papers as responsible for the "ferocious circulation battle" that is taking place, with the relaunch of the Weekend Herald and the tabloid-style *Sunday Herald* in a "dumbed-down version" to attract younger readers.

4 *Celebrities who court the limelight*

The journalists agreed that celebrities who court the limelight are usually those who 'sell' better than others, but that the celebrities targeted by the media were usually those in whom the public had an over-arching curiosity due to some fact such as their physical appearance, talent, role, behaviour or attitude. As J states:

If you're a celebrity you get all the benefits – you get to go to all the best parties and look wonderful. So you have to take the bad with the good. If you don't want to be photographed looking messy in public, don't go out looking like that.

J is against the idea of celebrity control, and refers to the *Douglas v Hello!* case as an outrageous example of a situation where celebrities were trying to hold up the notion of having total control over the images presented of them.

In L's view, the public has a conspicuous interest in some celebrities, due to their role, family life or personal relationships, and they are the celebrities who 'sell'. Whether those celebrities 'court' the media is, to a degree, irrelevant. There are other celebrities, however, who L cites as using the media to advance their publicity. In several situations, certain public figures have used coverage, positive or negative, in L's publication to broker a contractual and remunerated deal with a woman's magazine.

5 *Privacy protections for celebrities*

As anticipated, the interviewees did not think that New Zealand needs greater privacy laws. They unanimously agreed that the law should not

intervene to increase privacy protections for celebrities, a group of people typically less deserving of such protection in any event. They all expressed concern about the *Hosking* decision, but until the tort of invasion of privacy as formulated is tested before the courts, they agree that its reach à propos freedom of expression is yet to be seen.

J does not believe greater privacy laws are required because J thinks that everything is a matter of judgment and taste. In J's opinion, if the law starts to interfere with the privacy of public figures, then it will become impossible to draw the line as to when something is of public concern and when it is not. It contravenes fourth estate principles about freedom of expression. Similarly, L believes that the current protections for celebrities' privacy are sufficient. L's publication has brokered many out-of-court settlements with public figures who have been offended by certain information published about them and L has never yet been involved in litigation for such a complaint.

6 *The Press Council*

The journalists interviewed have divergent views over the New Zealand Press Council (NZPC). Two of the interviewees believe that the self-regulated NZPC is an effective and sufficient body to oversee the print media in New Zealand. However, the other two journalists interviewed disagreed with this, describing the NZPC as "toothless" and criticizing self-regulation as a form of overseeing the standards of the profession. J bemoans the Press Council's lack of power, where its self-regulation means that "the referees are also players in the market".

No magazines in New Zealand belong to the NZPC. In M's opinion, "there would be no advantage in any regulatory system – we already have strong defamation and contempt of court laws in New Zealand".

In K's opinion, however, the NZPC does a good job as a point of final call once a complainant has contacted the publication directly. K approves of the voluntary system of membership and does not think that there need to be tighter regulation standards for the New Zealand media. L is also in favour of the Press Council. L's publication is a member of it and they have run adjudications from the Council in several cases. L is sincere when it comes to the decisions of the Press Council and believes that all newspapers in New Zealand take their recommendations seriously. In L's opinion, the NZPC operates better than its British counterpart, primarily because it also offers a mediation service. It is a

good forum for people to complain to, and in L's view is far preferable to complaining to some other form of more stringent authority.

7 Celebrity privacy – a question of law or ethics?

The journalists agreed that editorial judgment and journalistic ethics are the greatest protectors of celebrity privacy. M believes that the system of self-regulation is the best system - "it's a matter for editors and publishers". J also believes that it is a question of ethics and that all information that makes its way into the public arena should be scrutinized by editors who make judgment calls that are appropriate in the circumstances. J does, however, criticize the fact that there is no Code of Ethics governing the press in New Zealand, and no guild for journalists.

K agrees that there is a taste element in any publication that dictates its content. It is a judgment call whether or not to print certain information. L believes that the public in New Zealand are the best measure of whether the media have invaded a celebrity's privacy, because they are generally turned off by information that is prurient or salacious. For this reason, L maintains that many media know a lot of information about public figures that they would never publish, simply because it would not be well received by their market. In this way, L thinks that editorial judgment according to public opinion is more decisive in respecting a celebrity's privacy than legal protections will be.

IV CONTENTIOUS ISSUES

Looking at the common law positions in the United Kingdom and New Zealand, and the participants' opinions, the author has identified certain contentious issues which remain unresolved, and which will no doubt be at the fore of consideration in future celebrity privacy cases.

1 What constitutes a private fact?

Both academics and the celebrity participants have identified that personal or private information is difficult to define.⁴⁶ Certain matters, such as behaviour or personal or family circumstances, will be private. Other facts, such as criminal convictions, ownership of land, marriage or

⁴⁶ Burrows and Cheer, *Media Law in New Zealand* (5 ed, 2005) 252.

divorce, are clearly public.⁴⁷ However, privacy considerations could also govern information about a person, the disclosure of which he or she may reasonably expect to control.⁴⁸

The notion that a publication invades privacy if it reveals ‘private facts’ is based on two propositions. First, it is assumed that information that is in the public domain should be excluded from privacy protections.⁴⁹ Second, it is assumed that a publication can be reduced to facts that are either ‘public’ or ‘private’. Yet as the author’s study reveals, ‘public’ and ‘private’ are not mutually exclusive categories, but are matters of degree existing on a continuum. Private information is generally considered to be that which should be kept quiet, but this classification may differ from person to person and culture to culture. As the law in New Zealand stands, it can be a breach of privacy to publish private facts about a person that a reasonable person would find it offensive to publish.⁵⁰ What is essentially prohibited is the publication of things about a person that a reasonable person would say is not the public’s business. Yet when it comes to celebrities, it is questionable whether the same rules apply – whether what is ‘private’ for the ordinary citizen is also a private matter for a prominent person. The division between what is necessarily public and what is necessarily private is unclear.

The Press Complaints Commission in England uses a test of reasonable expectations, where a private place is considered to be one in which people might reasonably expect to be free from intrusion.⁵¹ Yet what constitutes a reasonable expectation is again open to interpretation. The New Zealand Law Commission has identified that such an expectation may be inherent in the nature of the information.⁵²

As discussed in *Hosking*, the United States *Second Restatement on the Law of Torts* notes that voluntary public figures have no right of privacy in relation to public appearances or activities. Lord Woolf CJ stated in *A v B*:⁵³

⁴⁷ Ibid.

⁴⁸ New Zealand Law Commission, *supra* note 16, 19. This is a similar definition to that given by Professor Wacks which is that “personal information” consists of those facts, communications or opinions that relate to the individual and which it would be reasonable to expect him to regard as intimate or sensitive and therefore to want to withhold or at least to restrict their collection, use or circulation. Wacks, *Personal Information Privacy and the Law* (1993) 26.

⁴⁹ Paton-Simpson, “Private Circles and Public Squares: Invasion of Privacy by the Publication of ‘Private Facts’” [1998] MLR 318, 319.

⁵⁰ Burrows and Wilson, “Media Law”, New Zealand Law Society Seminar booklet, April 2003, 41.

⁵¹ Code of Practice <<http://www.pcc.org.uk>> (at 30 September 2005).

⁵² New Zealand Law Commission, *supra* note 16, 19.

⁵³ [2003] QB 195, 207-208, at 11 (xii), per Lord Wolf CJ

[W]here an individual is a public figure he is entitled to have his privacy respected in the appropriate circumstances...The individual, however, should recognize that because of his public position he must expect and accept that his actions will be more closely scrutinized by the media.

The celebrity participants themselves acknowledged that being a celebrity necessitated a lesser expectation of privacy, but they also felt that there were certain things in their lives that should be respected as private. They felt that a simple definition of what is a 'private fact' is impossible, due to the subjectivity of such a consideration.

Undoubtedly, location is relevant when determining how much privacy a person can reasonably expect. Generally, people cannot expect the same degree of privacy in public places as they do in the comfort of their own homes. When celebrities go outside, they are aware that they are subject to public scrutiny to an extent, and need to behave accordingly. As with all private facts, the difference between a public and private place is a matter of degree. The term 'public place' usually includes any place, whether publicly or privately owned, to which the public has access.⁵⁴ A difficulty arises when places that are publicly accessible are 'private' in the sense of being secluded. In *Theakston v MGN*⁵⁵ Ouseley J held that a brothel, where anyone could come and go, was not a private place.⁵⁶ There has been concern raised about gym patrons using pxt-capable phones to take photographs of celebrities while they exercise or change, leading to many gyms in the United Kingdom, Australia and now New Zealand banning such phones on their premises.⁵⁷ Whether a gym is in fact a private place for the purposes of privacy is debatable. Indeed, an element of a reasonable expectation of privacy in public places is due to the fact that most people are anonymous when amongst strangers, yet this is lost by celebrities.⁵⁸

Another element in the public/private debate is that often what occurs in public is fleeting and impermanent, but reasonable expectations of privacy in such a situation can be violated by someone making a permanent record of what has been revealed only briefly.⁵⁹ Although

⁵⁴ Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000) 50 *University of Toronto Law Journal*, 305-346, 321.

⁵⁵ [2002] EMLR 398.

⁵⁶ *Ibid* 419.

⁵⁷ Squires, "Phones banned in changing rooms", *The New Zealand Herald*, Auckland, New Zealand, 13 June 2003.

⁵⁸ Paton-Simpson, *supra* note 54, 305-346, 326.

⁵⁹ *Ibid* 328.

generally, it is not considered to be an infringement of privacy to be photographed or written about in a public place,⁶⁰ and the celebrity participants in the author's study conceded that photographs in public places are incidental to having a public profile, there are arguments against this. There are three ways that photographs or videotapes are said to intensify an invasion of privacy. First, intrusive scrutiny of a situation can occur when temporal limitations would otherwise make this impossible.⁶¹ Second, a permanent record of a situation may reveal information that would not otherwise have been noticed in a fleeting observation, and the tabloid newspapers capitalize on this in their celebrity photo pages.⁶² Third, a photograph permits the dissemination of an image to a much larger and different audience than the subject was aware of or intended.⁶³

It seems that the best way to ascertain whether something is largely public or private is to follow the reasonable expectations test. Assessing a reasonable expectation should include a subjective component and should take place within the context of each case, weighing the value of the person's privacy in the relevant circumstances against competing interests. When assessing the degree and extent of an intrusion, factors to consider are location, the status of a person and the kind of information that is disclosed. While the status of a person is particularly significant when assessing whether certain facts are public or private, it cannot be said that prominent people necessarily waive all rights to privacy when they appear in public places, although they may have a lesser expectation of privacy than an ordinary citizen would. Again, it is a matter of degree to be assessed in each circumstance.

2 *What constitutes the "public interest"?*

Inspection also reveals the hazy differentiation between something that is of 'public interest' and something that is merely 'interesting to the public'. While the essence of a privacy complaint is that truly private facts have been made public, the defendant in a case may argue that publication is justified because the public has an interest in the truth being revealed.⁶⁴ Therefore, public interest is often used as a defence to justify the appropriation of material for stories that satisfy readers'

⁶⁰ Burrows and Wilson, *supra* note 50.

⁶¹ *Theakston*, *supra* note 55, 328.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Burrows and Cheers, *supra* note 46, 254.

prurient curiosity. It is material that Tipping J in *Hosking* advised that a defence of public interest advanced from commercial objectives will give way if it seeks to protect the publication of material that has a substantially adverse impact on an individual's dignity and autonomy.⁶⁵

In the United Kingdom, debate over the 'public interest' peaked in the 1980s when tabloid media began exploiting the lives of anyone in the public domain, particularly the royal family. In response to the increasing tabloidisation of the British print media, the government set up the Press Complaints Commission in the early 1990s and its Code of Practice safeguarded personal privacy, specifically 'intrusions and enquiries into an individual's private life' without his or her consent, unless legitimate public interest could be established.⁶⁶ The four cornerstones of public interest were held out as being crime/misdemeanour, serious anti-social conduct, public health/safety issues and misleading the public.⁶⁷

In *Campbell v Frisbee*⁶⁸ supermodel Naomi Campbell sought damages for an interview published in *News of the World*, given by the defendant, with whom Campbell had entered into an oral contract for the provision of services. Summary judgment was given against the defendant in respect of her disclosure of information about the claimant's private life, stating that the defendant had breached her obligation of confidence. The judge then went on to consider public interest and held that though the public have an understandable and legitimate interest in certain information, for the defence of public interest to override an obligation of confidence the information must go beyond being interesting to the public - there must be a pressing public need to know.⁶⁹ In *Francome v Mirror Newspapers Ltd*,⁷⁰ Sir John Donaldson also stressed that public interest should be distinguished from the interests of the press. The British approach, however, has traditionally been that disclosure of information is legitimate whenever public interest in publication outweighs the public interest in confidentiality.⁷¹

Certainly in New Zealand, there is still no clear definition of what lies within the public interest. Some journalists believe it is an arbitrary question, to be determined on the facts of each particular story. They argue that what is 'newsworthy' is a matter for editorial judgment

⁶⁵ *Hosking*, supra note 6, para 258.

⁶⁶ Scraton, Berrington and Jemphrey, supra note 5, 178.

⁶⁷ *Ibid.*

⁶⁸ [2002] EMLR 31.

⁶⁹ *Ibid.* 30.

⁷⁰ [1984] 2 All ER 408.

⁷¹ Ries, "Confidential Information and the Media" (1999) 15 QUTLJ, 126-134, 130.

rather than applying a strict definition. Some editors argue that what is in the public interest and what is interesting to the public are one and the same thing and that a firm definition of the term 'public interest' would not allow for the crossover of genres of stories that characterize modern media. Although the celebrity participants interviewed by the author did not consider anything outside their profession to be of legitimate public interest, celebrities will find that the public interest defence is easier to raise against them than against ordinary citizens. Yet, the concept of 'public interest' and the vacillation over what it actually means remain at the forefront of the freedom of expression and personal privacy debate.

3 Statutory guidelines for the print media

Aside from the Press Council and the voluntary code of ethics of the New Zealand Journalists' Union, there is little supervision of the activities of New Zealand's journalists. One option would be for the government to introduce a statutory Code of Ethics by which journalists and editors would operate. In the United Kingdom, the Press Complaints Commission has a Code of Practice that binds all national and regional newspapers and magazines. The Code was drawn up by editors and covers the way in which news should be gathered and reported, setting a benchmark for journalistic standards.⁷² The Code recognizes, however, that in certain circumstances there will be a justified exception to adhering to the Code, such as when certain information is demonstrated to be in the public interest.⁷³

It has been submitted that journalists' activities and news material is a matter of ethics, rather than one of law, where enforcement takes place in the court of public opinion. Yet it seems that a statutory code of ethics would be useful, as it would create certainty amongst the profession as to acceptable and unacceptable conduct. For example, a code could preclude objectionable paparazzi activities such as following a person's every move in order to photograph or film them, or listing celebrities' home addresses on a tabloid website.⁷⁴ A code of ethics could also remove the gossip columns that have emerged in mainstream New Zealand publications, which the celebrity participants in the author's study found to be wholly objectionable. Such a code could at least

⁷² Press Complaints Commission <www.pcc.org.uk/cop/cop.asp> (at 30 September 2005).

⁷³ Ibid.

⁷⁴ In 2003, the establishment of a celebrity tabloid website, www.nztabloid.com, caused a furore among public figures and the general public. The website, which was uploaded from an offshore internet server, was disabled after only a few months in existence.

purport to ensure accuracy of reporting in relation to celebrities, a lack of which has been criticized by the celebrities interviewed.

Understandably, the media do not want excessive government control which could restrict freedom of expression, but any body set up to monitor a code of ethics or practice would arguably need non-industry members if it were to be wholly free of any bias towards certain publications. Alternatively, a body comprised of industry and non-industry members (similar to the makeup of the NZPC) would be an option.

V CONCLUSION

With our increasingly tabloid media, fed by society's mounting appetite for celebrity scandal, invasions of privacy are likely to become more of an issue with offended parties looking to the courts for protection. The issue of celebrity privacy is susceptible to shallow analysis, and the catchcry of freedom of expression can too readily discount a public person's dignity and personal autonomy. Prima facie every person in society has an equal entitlement to privacy as a fundamental human right, breaches of which may be justified according to the person's status, behaviour and circumstances.⁷⁵ Asserting that celebrities are less entitled to privacy does not extinguish their right to have a private life. There is a symbiotic relationship between fame and publicity. The fact that some personalities actively pursue publicity - and in doing so open their private life to the public sphere - is likely to mean that they are less entitled to complain that their privacy has been invaded, especially if the information imparted by the media is merely unwanted rather than objectionable.⁷⁶

New Zealand now clearly has a tort of invasion of privacy in relation to publicity given to private information. However, the application of the tort will involve a careful balancing exercise by the courts to reconcile protecting an individual's privacy with freedom of expression. The recognition of the tort is welcomed by the celebrity participants in the author's study, but the uncertain definitions of private information and the public interest remain a concern for both academic commentators and celebrities themselves. Certainly, New Zealand needs

⁷⁵ Chadwick and Mullaly, *Privacy and the Media* A Communications Law Centre Research Paper (October 1997) 4 (Sydney), 22.

⁷⁶ *Ibid* 26.

a code of ethics for the print media. Although it is argued that editors have sole responsibility when it comes to the content of their publication, and that the forum of public opinion is the best means of regulation, a code of ethics would create certainty in the journalism profession as to acceptable and unacceptable conduct. This would certainly be acceptable to the celebrities.