

NEW ZEALAND MEDIA LAW UPDATE
RECENT DEVELOPMENTS: BROADCASTING STANDARDS, THE PRESS COUNCIL,
SUPPRESSION AND PRIVACY

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Introduction

[327] In addition to the defamation, censorship and contempt matters discussed in the previous issue of the *Media & Arts Law Review*, New Zealand has seen noteworthy developments in the areas of broadcasting standards, the Press Council, suppression and privacy. In the area of content regulation, an important decision of the Broadcasting Standards Authority (BSA) involving election broadcasting was appealed unsuccessfully to the High Court by the broadcaster, a celebrity broadcaster was found to have made racist comments about the UN Secretary-General, Mr Kofi Annan which attracted complaints to the BSA and to the Human Rights Commission, while a television broadcast of a lecture for Muslims suggesting the Islamic position on homosexuality was death raised similar issues. The Press Council delivered an annual report which suggested it is upholding more complaints than in previous years.

A Bill to provide for temporary suppression of the names of police officers involved in fatal shootings was dropped, 'clean slate' legislation was passed, and a majority of the Court of Appeal finally decided that a tort of privacy does exist in New Zealand, but it does not cover photos taken in a public street in circumstances where the subjects could have been seen by anybody. A writer in a national magazine was charged with offences under the Postal Services Act 1998 after publishing certain information in a humorous column.

Broadcasting Standards

'Corngate'

An election was held in New Zealand in 2002 and pre-election television coverage gave rise to one of the most prominent decisions of the BSA in July 2003, which was [328] appealed to the High Court. At the time of the general election campaign, a book was published which made allegations the Labour Government had known of an accidental distribution of genetically modified corn. The private television

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broadcaster, TV3, broadcast a special programme on the book, which included an interview with the book's author and the Prime Minister (the incident became known as 'Corngate'). However, the interview with the Prime Minister had been pre-recorded the day before the book was published and she had not been told about the book or its author. By the time the programme was broadcast, the allegations in the book had received wide coverage.²

The BSA held that the interview had not been fair to the Prime Minister, because she had not been advised of the source of the allegations she was asked to comment on, nor had she been advised that the book's author had presented his conclusions on the programme before her. However, the Authority did not find the assertive and challenging conduct of the interviewer (interview techniques) to be unfair. The BSA also found breaches of the balance requirement in the Free-to-Air television code. Balance requires competing arguments to be advanced during the period of current interest to allow viewers to reach informed and reasoned opinions. In this case, significant viewpoints were not advanced during the period to counter the strong effects on accountability and trustworthiness of the Labour government caused by the interview. Impartiality and objectivity were also tested, and the Authority found this had been breached in that the Prime Minister had been treated much more robustly than the interviewer had treated the author of the book. Further, the programme did not refer to a press conference which had been held by the Prime Minister in response to the publishing of the book and to that extent also lacked objectivity. The Authority declined to determine complaints as to accuracy as it did not have scientific expertise required to do this.

Appeal of BSA decisions are akin to seeking administrative review — the appeal must show the Authority acted on a wrong principle, failed to take a relevant matter into account or took an irrelevancy into account, or was plainly wrong.³ The appellant media argued that the decision in relation to fairness and objectivity were plainly wrong. The judge adopted an interpretation of this to the effect that the conclusion of the BSA had to be so extraordinary that the only proper inference is that the power

² The Government lost support at the election and blamed some of this on the Corngate incident.

³ [2004] High Court, Wellington, CIV-2003-485-1655 & 1816 (unreported, 10 February 2004) [7]–[8].

itself must have been misused.⁴ As to balance, the appellant argued that the BSA lacked jurisdiction, had applied a wrong test and had failed to allow TV3 to respond. The High Court referred one aspect of the balance complaint back to the BSA. The party who had made the balance complaint to the BSA had not detailed it. This, the judge held, should not prevent the BSA undertaking a broad review of TV3's performance — the complaints system is, after all, intended to be accessible and non-technical so that ordinary members of the public can take advantage of it. However, in such circumstances, it was most important that natural justice be observed, and this applied so that the BSA should have advised the broadcaster of its intended approach and sought its response.⁵ The judge therefore referred this aspect back to the Authority to reconsider after hearing again from both sides.⁶

However, the High Court found that the BSA had properly reached its decision about fairness and balance in the presentation of programmes, emphasising that the programme itself and its preparation was to be judged, not other material broadcast on the topic. As to impartiality, the High Court also upheld the BSA, finding the context of an election campaign in which serious allegations had been made required a forceful challenge of both accuser and accused to establish an even-handed approach. Any other brief coverage, and the offer of another interview (after the publication of the book had been disclosed) did not fix the lack of impartiality in the original interview. The BSA had reached its [329] conclusion based on a proper analysis of the facts and law. The decision was not well received by the broadcaster.⁷

Homophobia, racism and sexism — what is hate speech?

Celebrity broadcaster, Paul Holmes has interviewed newsmakers on his Breakfast show on the Radio Network station Newstalk ZB for 16 years. On 24 September 2003, at 7.45am, he made comments about the United Nations and its Secretary-General Kofi Annan. Included in the comments were the following:

⁴ Ibid [10].

⁵ Ibid [22]–[24].

⁶ Ibid [28].

⁷ The decision was followed by reports that an irregular communication was made from within TV3 to the High Court alleging that the judge who decided the appeal, Justice Young, had had a connection to the Labour Party some years before: <www.stuff.co.nz>, 12 February 2004. This was picked up by other media: 'Corngate Judge "Red Ron" backs PM', *National Business Review* (Auckland), 13 February 2004.

That Kofi Annan, I've got to say to you, he's been a very cheeky darkie overnight, he's been a very cheeky darkie. It's all very well giving a darkie that Secretary-General job, we'll only take so much I'm sorry (laughter) I'm sorry we will only take so much. We're not going to be told how to live our lives by a Ghanaian and they're a model aren't they on how to live your life, on how to run a country...

In fact, throughout the comments, reference to 'darkie' was made five times. The Radio Network received numerous complaints and responded internally by censuring the broadcaster and taking other 'confidential action'. TRN also sent letters of apology to Kofi Annan from both itself and the host, and the host and the radio station met with leaders in the New Zealand Ghanaian community, and also with the Race Relations Conciliator to discuss staff race relations within the station. Newstalk ZB also made a significant donation to a worthwhile African cause. The host broadcast a radio apology and a voluntary apology on his evening current affairs television programme.⁸ The Authority received 10 complaints and agreed that the comments were a serious breach of programme standards requiring broadcasters to observe current norms of decency and good taste in language, and requiring broadcasters not to portray people in a manner which encourages denigration of or discrimination of any section of the community on account of race.⁹ The Authority considered that whether or not the comments were intentionally racist did not matter — they supported a racist view of the world which the host had later stated in his apology he abhorred. The Authority then considered whether TRN's actions were sufficient and concluded they were swift, comprehensive and reflected the seriousness of the complaints. It therefore declined to uphold the complaints that insufficient action had been taken. It did not uphold complaints that the comments breached the principle requiring the maintenance of law and order, nor those in relation to balance, fairness and accuracy.

In the same programme, the host had interviewed a journalist about the dominance of women in journalism. At one point, Holmes put the question: 'Is it, do you think,

⁸ In this apology, the host stated he was not racist. The apology was itself the subject of a complaint to the BSA on the basis of factual inaccuracy and lack of balance. The Authority declined to determine the complaint as the broadcasting standards could not apply to what was a personal statement: *TVNZ v Hooker*, 2004/011 <www.bsa.govt.nz>.

⁹ *Smith v The Radio Network Ltd*, 2003/174–183. Principles 1 and 7 (Guideline 7a) of the Radio Code of Broadcasting Practice.

making our journalism ignorant and bitchy do you think?’ and later [330] asked: ‘At certain times of the month do the newspapers get particularly judgmental?’ These comments were the subject of a complaint alleging a breach of the standard requiring broadcasters not to portray people in a manner which encourages denigration of or discrimination of any section of the community on account of gender. This complaint was rejected by the Authority, which considered that a high level of denigration was required to constitute a breach.¹⁰ The Authority found the comments had been made during an exchange between the host and an interviewee and were clearly intended to be provocative.

Yet more complaints about the ‘cheeky darkie’ comments were made to the Human Rights Commission, based on s 61 of the *Human Rights Act*, which makes comment unlawful when it is threatening, abusive or insulting and is likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand, on the grounds of their colour, race or ethnic or national origins. The Commission considered that no breach of the provision had occurred.¹¹ The Commission took into account s 14 of the New Zealand *Bill of Rights Act*, which describes a right to freedom of expression, and concluded that there must be serious detriment to society before such right be constrained. Although the statements were offensive, and did breach community standards, they were not unlawful in the sense required by the *Human Rights Act*.

The contrast between the decision of the Human Rights Commission not to uphold complaints and the BSA to endorse the uphold of complaints by the Radio Network arising from the ‘cheeky darkie’ comments is problematic. The decision of the BSA was made after that of the Human Rights Commission and noted that the latter had not considered the comments unlawful under its legislative provisions.¹² The wording under the two relevant provisions is different but may share meaning. Under the Radio Code, broadcasters must not portray people in a manner which *encourages denigration* or discrimination against any section of the community, while s 61 of the *Human Rights Act* makes it unlawful to publish or broadcast threatening, abusive or

¹⁰ Ibid. Clearly, by implication, the ‘cheeky darkie’ comments had met this high standard.

¹¹ Media communication released by the Human Rights Commission, 3 October 2003.

¹² *Smith v The Radio Network*, 2003/174–183, [80].

insulting matter likely to bring into contempt any group of persons ...on the ground of race. Arguably encouraging denigration is analogous to being likely to bring into contempt, and arguably Holmes' words fit either test. While the words were probably not threatening, and perhaps not abusive, they were almost certainly insulting, and so these extra requirements under the Human Rights provision do not explain the different decisions. Both bodies are required to take freedom of expression into account under the *Bill of Rights Act*. The Human Rights Commission did so explicitly, noting that this requirement creates a high threshold before a complaint can be considered in breach of s 61. This appeared to prevent the complaint from being considered by the Human Rights Commission. The Authority, when determining whether the accepted breach was serious, also noted that the threshold in the Guideline must be high to protect the right to freedom of expression.¹³ This, however, did not cause the Authority to question whether the uphold by TRN was correct, nor prevent it from determining the breach was serious, but that TRN's response had been adequate. The different approaches of the two bodies appear irreconcilable.

Four days after Holmes' radio comments, a programme broadcast by Triangle Television between 3 and 4pm on a Monday included a lecture titled: 'Challenges Facing Muslims in the New Millennium'. The lecture was delivered by a Brother Abdullah Hakim Quick, who stated that AIDS is caused by the 'filthy practices' of homosexuals, that homosexuals are dropping dead from AIDs and 'want to take us all down with them', that the Islamic position on homosexuality is 'death', that homosexuals are 'sick' and 'not natural' and that 'muslims are going to have to take a stand [against homosexuals] and it's not enough to call names'. This broadcast was found by the BSA to unlawfully encourage discrimination and denigration.¹⁴ The Authority considered the statements to be 'hate speech', in particular those advocating death and taking a stand were seen as an incitement to violence. The programme could not fall within the exception for genuinely held opinion in factual programmes as it was a sermon and not a factual programme. In all, the comments were [331] an unacceptable tirade against homosexuals and homosexuality. Although the broadcast material more clearly fell within the guideline on this occasion, the Authority made a

¹³ Ibid [68].

¹⁴ *Clayton v Triangle Television Ltd*, 2004/001. Standard 6, and Guideline 6g of the Free-to-Air Television Code.

much fuller statement about the *Bill of Rights* in this decision than it had in the *Holmes* complaints. It stated that the *Broadcasting Act* was a reasonable limit on freedom of expression and that it had given full weight to the relevant freedoms in the Bill when exercising its powers under the Broadcasting Act on this occasion.¹⁵ The broadcaster was ordered to broadcast a statement which included an apology and an explanation of why the complaint was upheld.

Press Council

The 2003 Annual Report of the Press Council shows that complaints received were fewer than previous years — 79 for 2003, compared to 87 for 2002 and 106 for 2001.¹⁶ However, the number of adjudications issued increased (52:48:47), as did the number of complaints upheld. In 2003, the Council upheld 30 per cent (14) of complaints adjudicated and 10 per cent (5) were part upheld. The increase is interesting in light of the obvious sensitivity about the issue noted previously.¹⁷ Three of the five privacy complaints were upheld, as was another on the ground of lack of balance. Perhaps this indicates an increased awareness of privacy issues.¹⁸

The Council regards the matter of its lack of jurisdiction over all of the print media as overcome. The address by one of its members to the Community Newspaper Association reveals that the Council now simply proceeds to adjudication whether an editor responds to the offer to put the publication's side of the story or not.¹⁹ The same address notes the moral force of self-regulation and the power it has to fend off restrictive government and legal regulation.²⁰

¹⁵ Ibid [21].

¹⁶ New Zealand Press Council, *31st Annual Report* (2003) 26.

¹⁷ See (2003) 8(4) *MALR* 317, 319.

¹⁸ New Zealand Press Council, above n 15, 26. Principle 3 promulgated by the Council provides: Everyone is entitled to privacy of person, space, and personal information, and these rights should be respected by publications. Nevertheless the right of privacy should not interfere with publication of matters of public record, or obvious significant public interest. Publications should exercise care and discretion before identifying relatives of persons convicted or accused of crime where the reference to them is not directly relevant to the matter reported. Those suffering from trauma or grief call for special consideration, and when approached, or enquiries are being undertaken, careful attention is to be given to their sensibilities: *ibid* 95.

¹⁹ *Ibid* 16; address by Terry Snow, representative of Magazine Publishers on the Council, to Community Newspaper Association, March 2003.

²⁰ *Ibid* 17.

The decisions are varied, and the key points seen by the Council as arising from them include the desirability of publishing properly worded corrections in appropriate circumstances (the Council commends the practice of publishing readers' correction and clarification daily columns), the need for journalists to clarify with sources what 'off the record' means, and a clarification that the ideal use of quotation marks is to quote directly from a source's words.²¹

Suppression

Police name suppression

Readers of previous updates will recall the saga of Constable A, a police officer prosecuted privately by the family of a young man he shot while on duty.²² Constable A's identity was voluntarily undisclosed by most of the media during the [332] saga, and his present address remains suppressed pursuant to a permanent injunction issued following the trial. Following these events, an Opposition MP, Dr Paul Hutchison, sponsored a private bill providing for temporary suppression of the names of police officers involved in fatal shootings. The MP has now dropped the Police Complaints Authority (Conditional Name Protection) Amendment Bill even though it had passed its first reading and the select committee hearing the five submissions made on it had heard from the Commonwealth Press Union twice.²³ The CPU gave an assurance to the committee that it would seek to have the convention of not identifying police officers in such situations put into writing, perhaps with a code of conduct. The CPU noted at the same time that it did not control its members and it was important that editors would exercise their own judgment.

'Clean slate' legislation

The *Criminal Records (Clean Slate) Act 2004* was passed in May this year. This legislation allows an individual who made a stupid mistake in committing a minor criminal offence to go on with life without a criminal record, or allows individuals to lie legally about their criminal past, depending on what view you take of the reform.²⁴ An individual is deemed to have no criminal record if asked about it, and may answer

²¹ Ibid 10–13.

²² See (2002) 7(4) *MALR* 315, 322; (2003) 8(4) *MALR* 317, 319.

²³ Comment by Paul Hutchison, *NZ Herald*, 8 June 2004.

²⁴ <www.stuff.co.nz>, 12 May 2004, NZPA.

as if they do not have a record, if they are eligible.²⁵ Such a person is also entitled to have their record concealed by government departments and law enforcement agencies.²⁶ A person is eligible if it is 7 years since they were last sentenced for an offence, no custodial sentence has ever been imposed, no mental impairment order has been made, the individual has not been convicted of a specified offence,²⁷ has paid all fines or compensation and is not disqualified from holding a driver's licence.²⁸ It is an offence to unlawfully disclose information required to be concealed — if a person has access to criminal records and discloses the record of an eligible person knowing they cannot do this lawfully under the act, or being reckless as to whether or not this can be done, such person is liable on summary conviction to a fine of up to \$20,000.²⁹ It is also a summary offence to require or request an individual, without lawful authority, to disregard the Act, when answering questions about their criminal record or to require them to disclose or give consent to disclosure of their criminal record.³⁰ Protection is not absolute. An individual must state if they have a criminal record, and so must a government department, law enforcement agency and their employees, in certain circumstances. These are: where the information is needed for the prevention and detection function of a law enforcement agency, or for the administration of sentences by a law enforcement agency, or for functions of the secret service, or where the record is relevant to criminal or civil proceedings, or where the eligible individual has applied for an arms licence, or has applied for a position involving New Zealand's national security, or as a Judge, JP or Community Magistrate, as a member of the police, prison officer, probation officer or security officer, or has applied to act in a role involving the care and protection of children or young people (outside of education), or the record is relevant to an investigation into the ill-treatment or neglect of a child or young person, or the record is relevant to certain government approved historical research.³¹

²⁵ *Criminal Records (Clean Slate) Act 2004* (NZ) s 14. A person may answer the question truthfully if they wish.

²⁶ *Ibid* ss 15–16.

²⁷ This is a varied selection of sexual offences such as rape, incest, procuring young girls, unlawful anal intercourse, as defined in s 4.

²⁸ *Ibid* s 7.

²⁹ *Ibid* s 17.

³⁰ *Ibid* s 18, punishable by a fine of up to \$10,000.

³¹ *Ibid* s 19.

Unfortunately the Act's ambit is uncertain. The Act is intended to affect the behaviour of employers in the main. However, it may affect the media. It seems reasonably clear the media may not put any sort of pressure on an individual when asking them questions about their own criminal record. However, this [333] does not apply to putting pressure on officials who may have access to the criminal record.³² It also seems clear that a person with official access to criminal records must not disclose in breach of the act and this may affect what information the media can have access to in this respect. However, it is unclear whether the law applies when the media do not use official sources of information about criminal convictions. Journalists often use public information like old newspaper reports, and may even interview people who have personal memories of convictions such as relatives, neighbours and friends. If this is interpreted as having access to criminal records, the duties imposed by the Act not to disclose may apply. However, the offences are summary and punishable only by way of fine. Although capturing media behaviour does not seem to be the intention of the Act, allowing the media in the alternative to access and use information about criminal records from non-official sources does undermine the scheme somewhat.

Privacy

Photos taken in a public place

The previous update referred to the privacy case, *Hosking v Runting*³³ which arose from photos of celebrity broadcaster Mike Hosking's twin daughters taken by a freelance photographer while they were being pushed in a pram by their mother on a Christmas shopping trip, on a public footpath, in a busy shopping mall. Although it has rejected Hosking's specific privacy claim,³⁴ the Court of Appeal has now, in a 3:2 majority judgment, confirmed that a tort of privacy does exist in New Zealand and attempted to describe the basic form it takes.³⁵ It is clear that the division in the judgment reflects sharp and strongly held differences in the Court.

The majority give two judgments — a joint judgment of Gault P and Blanchard J, delivered by the former, and a separate judgment by Tipping J. The minority of

³² Although, criminal offences may then be relevant, such as bribery: see Pt 6 of the *Crimes Act 1961* (NZ).

³³ [2003] 3 NZLR 385. See (2003) 8(4) *MALR* 317, 323.

³⁴ The magazine involved, *New Idea*, stated after the Court of Appeal decision it did not intend to run the photos.

³⁵ *Hosking v Runting* [2004] Court of Appeal, CA 101/03 (unreported, 25 March 2004).

Keith J and Anderson J each give separate judgments. All judgments appear to recognise that there exist rights deriving from a human need for privacy which are deserving of protection by the law. However, the minority considers that existing legal actions cover the ground and that Parliament should legislate if an actual tort of privacy is to be recognised. The majority wishes, however, to take a clearer path that does not rely on distortions of existing law, and is prepared to recognise the right, call it by its name and then attempt to define it.

The joint judgment of the majority states two fundamental requirements for a claim: (1) The existence of facts in respect of which there is a reasonable expectation of privacy;³⁶ and (2) Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.³⁷ The two judges are then content to see the cause of action evolve through future decisions, but they also make some general comments. Firstly, the recognised action covers wrongful [334] publicity to private lives, it does not deal with unreasonable intrusion into solitude.³⁸ Second, there is no simple test for what constitutes a private fact.³⁹ Third, the concern is with publicity (not facts) which is highly offensive, and the publicity must be highly offensive to the reasonable person. The harm protected against is humiliation and distress, and personal injury and economic loss are not required.⁴⁰ Four, there is a public interest defence, described as a legitimate public concern in the information.⁴¹ Five, limits imposed on free speech by a privacy tort must not exceed those justified in free and democratic society.⁴² The scope of any public interest defence will impact on this balancing exercise.

The judges also considered how the tort might impact on the tort of defamation and concluded that it intruded no more in this area than did the existing tort of breach of confidence. The focus of the tort of privacy is seen by the judges as being on hurt and distress rather than standing in the eyes of others.⁴³ The tort is also seen as being

³⁶ However, after initially stating this requirement, the joint judgment refers only to a requirement for 'private facts'.

³⁷ *Hosking v Runting* [2004] Court of Appeal, CA 101/03 (Unreported, 25 March 2004) [117].

³⁸ *Ibid* [118].

³⁹ *Ibid* [119].

⁴⁰ *Ibid*[126]–[128].

⁴¹ *Ibid* [129].

⁴² *Ibid* [130].

⁴³ *Ibid* [136]–[138].

flexible enough to deal with the special vulnerability of children.⁴⁴ Further, the primary remedy is seen by these judges as being damages, but injunctive relief is recognised as appropriate also.⁴⁵ Concerns about prior restraint were pressed very hard by the media in *Hosking*, and the judges therefore discuss the stringent test requiring exceptional, clear and compelling reasons in New Zealand before injunctions are granted in defamation cases.⁴⁶ They recognise the need for consistency of approach and go on to describe a test for privacy cases which is probably the same: 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.⁴⁷ Gault P and Blanchard J then go on to affirm the finding on the facts of the court below, that the tort of privacy was not engaged on this occasion. The photographs did not show anything that any member of the public could not have seen on the relevant day.⁴⁸

Tipping J agreed with the joint judgment, 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. The judge first states clearly his view that judges are entitled to fill gaps in the law created by societal developments and where not specifically prevented from doing so by Parliament.⁴⁹ Tipping J also expresses clear views about responsible journalism, which he sees as a touchstone used to regulate the competing values of personal reputation and freedom of expression.⁵⁰ After examining the various theories advanced to support freedom of expression, Tipping J concludes that it is perfectly valid for the courts to formulate an appropriate free-standing tort of privacy, subject to a defence which protects freedom of expression when privacy values are outweighed.⁵¹ He emphasises, however, that it is entirely possible for privacy values

⁴⁴ Ibid [145]. Which it clearly is not in *Hosking* itself. The privacy principles of the Broadcasting Standards Authority go further in this respect.

⁴⁵ Ibid [149]–[150].

⁴⁶ Ibid [151]–[155]. *TV3 Network v Fahey* [1999] 2 NZLR 129. See (1999) 4 *MALR* 191; (2000) 5 *MALR* 278.

⁴⁷ Ibid [158].

⁴⁸ Ibid [164]. The judges did not close the door to the possibility of a successful action for privacy in relation to activity on public streets, however, citing cases such as *Peck v United Kingdom* (2003) 13 BHRC 669 as an example. However, they do, in the main, posit a requirement for private facts as part of the tort, which appears to preclude such a possibility.

⁴⁹ Ibid [226]–[228].

⁵⁰ Ibid [231].

⁵¹ Ibid [236].

to outweigh freedom of expression on occasion.⁵² After concluding that privacy values justify the [335] existence of a tort, the judge goes on to state the relevant indicia. For Tipping J, the first ingredient is that the plaintiff must show a reasonable expectation of privacy in relation to the information the defendant has published or wishes to publish.⁵³ This can arise from the character of the information or the manner in which the defendant obtained it, or both.⁵⁴ The judge does not require a high degree of offence, although he recognises that in most cases, the expectation is unlikely to arise without it. However, Tipping J would settle for substantial offence and harm, which is a lesser test than his fellow judges.⁵⁵ He then goes to add a defence that the information must be a matter of legitimate public concern, equating this with the iniquity defence in breach of confidence.⁵⁶ Finally, Tipping J echoes his fellow judges in stating damages as a primary remedy, but allowing the possibility of injunction, again stating a lesser test than they do, where likely outcome is clear and the effect severe.⁵⁷ Once again, this judge makes comments which express his views about media behaviour, by positing that freedom of expression should not be allowed to justify the purely commercial (but legitimate) imperative of boosting circulation or ratings, where this is done for no legitimate public purpose and substantially interferes with privacy. The judge then finds that Mr and Mrs Hosking had no reasonable expectation of privacy in relation to the photos of their children in this case.⁵⁸

Keith J, in the minority, delivers a passionately opposed judgment. Although he agrees with the outcome in this case, he does not agree that a separate tort of privacy exists in the common law of New Zealand.⁵⁹ His reasons break down into freedom of expression concerns, a belief that established specific legal provisions are adequate and were the result of deliberate decisions not to establish a general right of privacy, and a view that the tort is not demonstrably justified as required by s 5 of the *Bill of*

⁵² *Ibid* [237].

⁵³ *Ibid* [249].

⁵⁴ This means a public fact could be the subject of a reasonable expectation of privacy. Although Gault P and Blanchard J posit the same initial requirement, they go on to speak only of private facts. Tipping J's approach might allow privacy in relation to activity in public places, whereas that of Gault P and Blanchard J seems unlikely to.

⁵⁵ *Ibid* [256].

⁵⁶ *Ibid* [257].

⁵⁷ *Ibid* [258].

⁵⁸ *Ibid* [260].

⁵⁹ *Ibid* [175]–[176].

Rights.⁶⁰ Keith J concludes that a broad obligation to respect privacy has not been accepted in New Zealand law, and notes that few other Commonwealth jurisdictions have done the same.⁶¹ He then examines the American experience of the tort to determine whether it is demonstrably justified. The judge notes the conclusions of one author that costly and time-consuming litigation in that jurisdiction has produced only rare and unpredictable awards of damages.⁶² Therefore Keith J sees the tort both as unnecessary and of little use. He fears it would have a chilling effect by its very ill-defined existence, and concludes it should not be recognised in New Zealand law.

Anderson J agrees with Keith J in the minority, but adds a short separate judgment to explain his view that privacy is in the nature of a value only which should not trump the right of freedom of expression. This judge is suspicious of formulations of privacy, seeing them as vague and unconvincing, at one stage rather unfairly describing the right as a situation where 'a reasonable person would [336] be wounded in their feelings by the publication of true information of a personal nature which does not have the quality of legally recognised confidentiality'.⁶³ Anderson J considers that the harm is not deserving of protection, that even if it is, the current law provides sufficient protection, and that the new tort will have an unacceptable chilling effect.⁶⁴

The arguments of the majority are compelling, even though their comments on the tort are strictly obiter. New Zealand has had a privacy tort for 10 years prior to this judgment, though only declared at High Court level, so it is incorrect to suggest a new tort has simply been sprung on the nation or the media. It is clear that apart from decided cases,⁶⁵ other disputes have been settled in that period 'in the shadow of the law', and the previous manifestation of the tort was workable, at least as workable as the law of negligence and estoppel, for example.

⁶⁰ Ibid [222].

⁶¹ Ibid [203]–[207].

⁶² Ibid [216]. The author is Professor D L Zimmerman in a 20 year old article: (1983) *Cornell Law Review* 291.

⁶³ Ibid [267].

⁶⁴ Ibid [270]–[271].

⁶⁵ *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* [1986] High Court, Wellington, CP477/86 (unreported, 20 October 1986) per Jeffries J; *News Media Ownership Ltd v Tucker* [1986] CA172/86 (unreported, 23 October 1986). See (2000) 5 *MALR* 280, and (2002) 7(4) *MALR* 324.

Further, neither judge in the minority makes convincing arguments as to how cases such as *Peck* and *Venables v News Group Newspapers Ltd*⁶⁶ might be dealt with in New Zealand without an overarching law of privacy, although they seem to accept that some sort of right deserved protection in those cases.⁶⁷

The majority in *Hosking* was right to seek to avoid the contradictory distortions of the law which have appeared in the United Kingdom as the judges there have hacked about the law of confidentiality to make it fit the skeleton of privacy. The New Zealand judiciary, and increasingly also, that in the United Kingdom, accepts the validity of a right based on privacy. Our Court of Appeal is prepared to describe that right directly. In doing so, the Court has not departed from the basic elements of the tort as previously established in New Zealand to any great degree. The majority has adopted the phraseology of the English confidentiality cases in speaking of an expectation of privacy. However, this does not appear to add anything much to the previous elements required: The public disclosure of private facts where the matter made public would be highly offensive and objectionable to a reasonable person of ordinary sensibilities, subject to the nature and extent of legitimate public interest in having the information disclosed.⁶⁸

The majority in the Court of Appeal has also settled a number of issues which were previously in doubt, by making it clear that it is the publication of private facts which must be offensive, not the facts themselves, and by clarifying the public interest element as a defence rather than a component of the tort itself required to be established by the plaintiff. Where some doubt now remains is in relation to the differences between the joint judgment and that of Tipping J, who appeared to favour a lesser standard than high offensiveness. Further, the matter of when injunctions issue is of some concern, because Tipping J posited a less strict test than applies in defamation law. As stated previously,⁶⁹ apart from one District Court claim for

⁶⁶ [2001] 1 All ER 908.

⁶⁷ Keith J suggests the *Bill of Rights* would protect in a *Venables* fact situation, because it affirms a right to life: s 8. However, the *Bill of Rights* is not supreme law in New Zealand. And in a *Peck* situation, Keith J suggests vaguely that there may be an argument that the local authority which disclosed the CCTV footage of the attempted suicide was acting outside its powers: [201]. Anderson J does not deal with *Venables*, and makes no suggestion as to *Peck*, although he implies the law of confidence, as developed in the UK, is suitable: [271].

⁶⁸ *P v D* [2000] 2 NZLR 591

⁶⁹ See (2003) 8(4) *MALR* 317, 324, n 31.

damages,⁷⁰ previous actions in New Zealand have all involved applications for [337] injunctions at High Court level. This discrepancy should be resolved as soon as possible, since the possibility of an injunction can have a serious chilling effect on the media.⁷¹

Postal Services offences

Some obscure offences in the *Postal Services Act* have been pressed into service against a writer for a national magazine.⁷² The writer inherited a postal box number belonging to a previous recipient, and as a result, received and apparently accidentally opened mail that was not his own. This may not have attracted any attention except that the writer, known for making up material for his regular humorous column on aspects of life in New Zealand, wrote a column around the opening of this mail, and disclosed not only the content of some of it, but also the name of the intended recipient. The latter pressed charges under the *Postal Services Act*, which prohibits the wilful opening of mail without excuse, by a non-addressee,⁷³ and the divulging of information in such mail without reasonable excuse.⁷⁴ The offences are punishable by a fine of up to \$5,000 or a sentence of up to 6 months in prison. The outcome of this dispute is currently unclear, but it appears a freedom of expression argument might feature in relation to divulging by publication. However, in reality, the legal concerns were privacy related or possibly defamation. When individuals cannot afford to bring full-blown tort actions, they may resort to other possibilities. These offences are rarely used, and, prior to this example, I would have said they would even more rarely impact on the media.

⁷⁰ *L v G* [2002] DCR 234.

⁷¹ See also Katrine Evans [2004] NZLJ 181.

⁷² *NZ Herald*, 10 February 2004.

⁷³ *Postal Services Act 1998* (NZ) s 23.

⁷⁴ *Ibid* s 20.