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PRYING RESPONSIBLY: DEFAMATION, BREACH OF CONFIDENCE, PRIVACY AND THE DEFENCE OF QUALIFIED PRIVILEGE

LLM RESEARCH PAPER
LAWS 582: MASTERS LEGAL WRITING

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

2004

Abstract

This paper explores the defence of legitimate public concern as it applies to the media in the context of actions in defamation, breach of confidence and the recently affirmed tort of invasion of privacy. The potential for uncertainty and subsequent chilling of free speech under current approaches to determining the public interest in a publication is outlined. The paper argues that the defence of legitimate pubic concern should be aligned across these three actions to provide greater legal certainty. The defence of qualified privilege derived from defamation is examined and its potential applicability to breach of confidence and privacy canvassed. It concludes that qualified privilege should be extended to cases involving breach of confidence and invasion of privacy, and that this approach accommodates adequately the underlying interests at stake in these cases while also acknowledging the importance and responsibilities of the media within contemporary society.

Statement on Word Length

This paper, excluding headers, footnotes and quotations, consists of approximately 12,400 words.

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I A NEW CHALLENGE TO FREEDOM OF EXPRESSION

Following the Court of Appeal's recent determination in *Hosking v Runting*[1] that actions in invasion of privacy may be brought in this country, media organisations are now faced with a new potential limitation to their claimed right to freedom of expression, and a new challenge in the consideration of whether to publish information which they believe to be in the public interest.

In its formulation of the tort of invasion of privacy, the majority of the Court of Appeal also expressly recognised a defence to the tort whereby matters of 'legitimate public concern' may be published free from liability. This defence they termed analogous[2] to the public interest defences afforded to defendants to actions in defamation and breach of confidence; those of qualified privilege and the so-called iniquity defence respectively.

But having not been called upon to decide on the facts of that case, involving the surreptitious photographing of the celebrity plaintiffs' children in a public street, whether there was indeed a legitimate public concern in the publication of the children's images, the factors determining the availability of the defence remain, for would be publishers at least, perilously ambiguous. This ambiguity is compounded by the fact that the extent of the parallel defences in defamation and breach of confidence are also far from certain, and not currently aligned in such a manner that the analogy to privacy situations is a straightforward one.

What is clear is that under each of defamation, breach of confidence and privacy, potentially justifiable limitations may be placed on the media's (or any other individual's) right to freedom of expression, unless the disclosure of the information can itself be justified by a demonstrable public interest, in the courts words a legitimate public concern, in receiving the relevant information. Without

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1 *Hosking v Runting* (25 March 2004) Court of Appeal CA101/03.
2 *Hosking v Runting* (25 March 2004) Court of Appeal CA101/03, para 135 per Gault P and Blanchard J.

clear guidance as to the subject matter to which legitimate public concern attaches, it is also clear that freedom of expression faces another, this time unjustifiable, limitation; the chilling of free speech that comes with uncertainty of legal liability.

This paper will argue that with the advent of common law privacy protection, it is timely that the public interest defences to these three causes of action be aligned so that they can truly be considered analogous. This alignment will allow for cross-referencing of precedent across the actions, and present the media with a clearer test for whether the publication of a matter is indeed a matter of legitimate public concern.

The approach advocated by this paper is one which recognises both the importance of the media as the conduit of important information within modern society and the context in which editorial decisions are made, but which also recognises that with the power and freedom enjoyed by the media comes a responsibility not to trample over competing rights. This approach is the defence of qualified privilege as outlined in the House of Lords decision of *Reynolds v Times Newspapers*,[3] though tailored to fit within the New Zealand context.

To advocate this approach successfully, and to justify granting the media this privileged position under the law, strength needs to be drawn from the public interest values underpinning freedom of expression. It will then be necessary to examine the context under which freedom of expression and the rights with which it comes into conflict are assessed by the courts. Following that, the defence of qualified privilege as it has been held to apply in cases of defamation will be explored, before examining its potential applicability to actions in breach of confidence and invasion of privacy.

In order to be a convincing formula for the determination of legitimate public concern in cases involving media disclosures, qualified privilege should meet two

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3 *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609 (HL).

key criteria. It will need to have scope for the recognition of other public interest values inherent in the protection of confidences and privacy, while also affording more certainty than alternative means of determining where the balance of the public interest lies.

A Freedom of Expression

The interests upon which the asserted right to freedom of expression rest have been widely recognised and discussed by numerous observers, though with variance as to the significance to be accorded to each. In one of the seminal assessments of freedom of expression, Professor Thomas Emerson categorised the public interests underlying the right to freedom of expression into four fundamental interests: as a means of insuring individual self fulfillment; an essential process for advancing knowledge and discovering truth; a means of ensuring participation in societal decision making; and a method of ensuring a more adaptable and hence stable community.[4] In *Hosking v Runting* Tipping J, referring to the work of Rishworth, Huscroft, Optican and Mahoney[5] noted three theoretical bases upon which freedom of expression was founded: the marketplace of ideas theory; the maintenance and support of democracy theory; and the liberty theory. The overlap between Emerson's four interests and the three theoretical bases espoused by Tipping J is clear, with Emerson's third and fourth categories combined into the maintenance and support of democracy theory.

The Marketplace of Ideas theory assumes that open discussion and the free exchange of ideas and criticisms is a necessary condition for the advancement of collective knowledge and discovery of truth. The best test of truth it has been said "...is the power of the thought to get itself accepted in the competition of the market."[6] By allowing the expression of contrary views, society as a whole is

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4 Thomas Emerson "Toward a General Theory of the First Amendment" (1963) 72 Yale LJ 877, 879.
5 Paul Rishworth and others *The New Zealand Bill of Rights Act* (Oxford University Press, Auckland, 2003).
6 *Abrams v United States* (1919) 250 US 616, 631 per Holmes J.

afforded the opportunity to reject or modify any views that it considers to be erroneous, and thus advance its collective knowledge. It is a potent theory, though not without qualification. Acceptance of the theory assumes that social priority be given to the search for knowledge, and also assumes that when both truth and falsity are articulated, the truth will prevail. As has been pointed out by Frederick Schauer,[7] in some circumstances additional propositions can retard knowledge as well as advance it. Just as truth might be found amongst these propositions, so might it be lost.

The Maintenance and Support of Democracy theory sees freedom of expression as a means of ensuring participation by the population at large in societal decision making. Through this participation is formed the common consensus by which the sovereign population in a democracy governs itself, and by which stability is achieved through the maintenance of a necessary balance between change and consensus. Under this theory it is argued that any abridgement of the right to hear and consider views relevant to the purposes of self government abandons the fundamental democratic principle of consent of the governed, a consent that is only fully operative if it is fully informed.[8] Of further significance under this theory is the notion of democratic governments as servants of a sovereign people. This, it is argued, compels the recognition of the public's right to inspect and criticise the actions of their leaders or those that perform governmental functions.[9]

The Liberty theory asserts, in the words of Tipping J, that it is for "the ultimate good of society for citizens to be able to say and publish to others what they want."[10] Through the manifestation of thoughts, opinions and beliefs, expression facilitates the mental exploration and development of ideas integral to the autonomy and dignity of the individual. A restraint upon an individual's ideas or their ability

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7 Frederick F Schauer *Free Speech: A Philosophical Enquiry* (Cambridge University Press, Cambridge, 1982) pp 25-34.

8 Edward Bloustein "The First Amendment and Privacy: The Supreme Court Justice and the Philosopher" (1974) 28 Rutgers L Rev 41, 51.

9 Schauer, above, 46.

10 *Hosking v Runting* (25 March 2004) Court of Appeal CA101/03, para 234 per Tipping J.

to express those ideas is thus a restriction on that person's liberty and an affront to their dignity. As Tipping J noted, this is the broadest and potentially most problematic of his three theories: "The Liberty theory rests on the ultimate public good; but the full flowering of the theory undoubtedly has the capacity to harm the public good."[11]

There are thus strong public interest values that lie beneath the arguments in favour of freedom of expression, but also some equally valid public interests that would argue in favour of its curtailment. To complicate matters further, these competing interests may overlap on a variety of levels, meaning that they seek to achieve the same wider public interest goals, albeit through different means. For example the dignitary and autonomic interests evident in the liberty theory of freedom of expression may in some instances be better served by protecting the privacy or personal space of an individual to develop the ideas, thoughts and beliefs that are later manifested through their expression. Likewise the marketplace of ideas theory might be weakened if ideas that are ultimately of public benefit are not developed because the shelter and incentive to do so, such as financial returns, are threatened if during its development, the idea can be communicated to all and sundry. Equally the claim that freedom of expression enhances participation in a democratic society may be reversed in as much as people would be more willing to participate in public affairs if they knew this did not give the media licence to publish embarrassing details about their private lives or otherwise face slurs on their reputation.[12] Without the protection of reputational interests, or those in confidence or privacy, participation in the public domain might well be open only to the perfect, the conformist or the shameless.

B The New Zealand Context

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[11] Hosking, above, para 234 per Tipping J.

[12] E Paton-Simpson "Human Interests: Privacy and Free Speech in the Balance" (1995) NZULR 225, 233.

In this country, the competition between the interests underpinning the right to freedom of expression and those interests that may be harmed through the exercise of that right takes place in the context of the New Zealand Bill of Rights Act 1990. Under the Act, the right to freedom of expression is affirmed by section 14 of the Act which states that: "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."

This right however, does not provide an absolute licence to the media to publish what it sees fit. Section 5 of the Bill of Rights prescribes that all rights contained in the Act may be limited, provided that such limitation can be "demonstrably justified in a free and democratic society." It is a position that accords with this country's collectivist or communitarian ethic,[13] a position shared generally with our Commonwealth counterparts but which stands in contrast to the elevated status granted to freedom of expression in the United States. Thus the right to freedom of expression may be curtailed to the extent appropriate to ensure that other rights of value to our society, a free and democratic society, are accommodated, be they founded in legislation or the common law.[14]

The protection of an individual's right not to have their reputation sullied unjustly, or to prevent personal information or information which they have imparted to another in confidence from being disclosed to others, have long been recognised as justifiable limitations upon the media's exercise of it's right to freedom of expression. As was noted by Elias J in *Lange*, the fact that freedom of expression is given explicit recognition in the Bill of Rights, whereas the competing rights are not, is not indicative of any greater weight attaching to the former. The inherent dignity of the individual that lies at the heart of the protection afforded through

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[13] P T Rishworth "Defamation, Racial Disharmony and Freedom of Expression" in Grant Huscroft and P T Rishworth *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 174, 174.

[14] *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1997] 2 NZLR 22, 32 (HC) per Elias J.

defamation, breach of confidence and privacy actions, is the fundamental value underpinning our Bill of Rights.[15]

There is thus a fundamental tension between the right accorded to each individual to express and receive information on any subject and in any form[16] and those rights which seek to place a restriction upon the publication of information due to the effect that publication would have upon an individual or group about whom it is concerned. Significant public interests are vested in these competing rights. In the absence of any universally applicable formulation of the public interest,[17] the determination of whether a particular publication should be permitted or restrained requires the striking of a balance between the competing values.

It cannot therefore be argued that the media's right to freedom of expression should go unfettered. Some have attempted to argue that the media has a duty to publish that which the public is interested in, and that through the market place they have the best and most direct mechanism for testing the degree of public interest in a matter.[18] Such an argument, however, ignores any idea of the legitimacy or reasonableness of the interest and the value that the media's right to freedom of expression has against the rights and interests of others. The justification for giving any interests legal consideration is that they are more or less reasonable wants, according to standards which it is the business of the judge or legislator to elicit from the bulk of demands coming forward."[19] Logically, the courts are the appropriate forum for such determinations.[20] The argument also ignores the well

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15 *Lange v Atkinson and Australian Consolidated Press NZ Ltd*, above, 31 per Elias J. Support for this contention is drawn from the decision of the Canadian Supreme Court in *Hill v The Church of Scientology of Toronto* (1995) 126 DLR (4th) 129, 163 per Cory J and from the International Covenant on Civil and Political Rights.

16 *Solicitor General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (CA).

17 See Glendon A Schubert *The Public Interest: A Critique of the Theory of a Political Concept* (Greenwood Press, Westport (Conn.) 1982) 220: "…our investigation has failed to reveal a statement of public interest theory that offers much promise either as a guide to public officials who are supposed to make decisions in the public interest, or to research scholars who might wish to investigate the extent to which governmental decisions are empirically made in the public interest."

18 F Zimmerman "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort" (1983) 68 Cornell L Rev 291, 353.

19 R Pound "A Survey of Social Interests" (1944) 57 Harv LR 1, 39.

20 See *Reynolds v Times Newspapers* [1999] 4 All ER 609, 624 (HL) per Lord Nicholls; See also *Hosking v Runting* (25 March 2004) Court of Appeal CA101/03, para 132 per Gault P and Blanchard J.

documented decline of the public service ethos in modern media and an increased emphasis on celebrity, fashion, human interest and lifestyle features. Increasingly the predominance of commercial forces and competition for advertiser revenue has seen entertainment gain favour over information.[21]

The legislature and judiciary have frequently acknowledged that freedom of expression must accommodate other values and that this accommodation must endeavour to strike the right balance between the competing interests. The key questions are how under defamation, breach of confidence and privacy these interests can be accommodated, how the unique position held by the media should inform this accommodation, and at what stage of the inquiry this balancing exercise should occur.

The courts have adopted as the touchstone to this balancing exercise the determination of legitimate public concern in the matter being published. This touchstone recognises that there is a greater social utility in making those matters known than in withholding them to protect another's rights. However to date there is still a significant degree of ambiguity as to how this determination is made, and whether this determination is alone sufficient to properly accommodate the competing values and acknowledge the context in which they have come into conflict.

C The Need for Certainty: Chilling Free Speech

While it is obvious that protecting the rights of others will justifiably limit the media's right to freedom of expression in some circumstances, if there is a significant degree of uncertainty over the types of publications that will attract legal liability, the result would be an unjustifiable limitation on freedom of speech. Publishers fearful of potential lawsuits will be reluctant to publish information that

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[21] See generally L Gorman and D McLean *Media and Society in the Twentieth Century: A Historical introduction* (Blackwell Publishing, Maiden (MA) 2003); James Curran and Jean Seaton *Power Without Responsibility: The Press and Broadcasting in Britain* (5ed, Routledge, London, 1997).

is not clearly afforded section 14 protection. Information of public interest which may, following judicial proceedings, be afforded protection from liability, may not reach the public due to the fear that the Court's balancing exercise will weigh in favour of the complainant after taking into account considerations not foreseen by the publisher. Financial implications will then drive decisions over whether to publish certain material, undermining the public interest driver of what matters the media should be circulating to its audience. Arguably a media organisation will be more likely to accept the risk of legal costs and potentially hefty damages, if the material it publishes is likely to offset these through increased circulation and revenue. Such pragmatism would serve to further encourage the rise of sensationalism over public interest reporting.

D A Dazzling Uncertainty: The Campbell Litigation

The litigation in the United Kingdom following the Mirror's publication of an article and accompanying photographs describing Naomi Campbell's battles with drug addiction provides a prime example of the type of uncertainty that pervades this area of law. There, the trial judge's finding in favour of the supermodel,[22] was overturned by the Court of Appeal,[23] whose decision was similarly overturned in the House of Lords by a mere 3:2 majority.[24]

The subject matter of the publication was at the marginal end of most people's understanding of legitimate public concern. Baroness Hale, who in the House of Lords decision found in favour of the supermodel summed it up best: "Put crudely, it is a prima donna celebrity against a celebrity-exploiting tabloid newspaper."[25] However throughout the course of the litigation the public's interest in being informed of Ms Campbell's drug addiction was acknowledged by the Courts and conceded by her Counsel. This accepted public interest stemmed from her previous

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22 *Campbell v MGN Ltd* [2002] EWHC 499 (QB).
23 *Campbell v MGN Ltd* [2003] 1 All ER 224 (CA).
24 *Campbell v MGN Ltd* [2004] 2 All ER 995 (HL).
25 *Campbell v MGN Ltd* [2004] 2 All ER 995, para 143 (HL) per Baroness Hale.

public statements that she, unlike many in the fashion industry, did not take recreational drugs.

For Lord Nicholls and Lord Hoffman, the acceptance of the public interest in having the public record put straight was decisive. Lord Nicholls found that the Mirror's publication of additional information, which was at issue before the court, namely the fact that Ms Campbell was receiving treatment at Narcotics Anonymous, the details of the treatment, and photographs leaving a Narcotics Anonymous meeting were of "such an unremarkable and consequential nature" that they should not be considered separately from the information that could be properly disclosed.[26] Lord Hoffman was of the opinion, shared by the Court of Appeal, that following a finding of legitimate public concern, editorial latitude must be given: "It is unreasonable to expect that in matters of judgment any more than accuracy of reporting, newspapers will always get it absolutely right. To require them to do so would tend to inhibit the publication of facts which should in the public interest be made known."[27]

Lords Carswell and Hope, and Baroness Hale, in allowing Ms Campbell's appeal, instead considered the additional information published by the Mirror separately from that which had been accepted could be disclosed. Considering the question of whether the supermodel's right to privacy provided sufficient justification for the limitation on the Mirror's exercise of freedom of expression, their Lordships were primarily influenced by the need for anonymity and confidentiality for the success of her treatment for drug addiction.[28] Lord Hope went further, noting the offense caused to Ms Campbell by the knowledge that she had been secretly followed and photographed.[29] The fact that the Mirror's article painted the supermodel's battle with addiction in a sympathetic light was irrelevant.[30]

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26 *Campbell* (HL), above, para 26 per Lord Nicholls.
27 *Campbell* (HL), above, para 63 (HL) per Lord Hoffman.
28 *Campbell* (HL), above, para 95 per Lord Hope; paras 144-146 per Baronness Hale; para 165 per Lord Carswell.
29 *Campbell* (HL), above, para 98 per Lord Hope.
30 *Campbell* (HL), above, para 156 per Baroness Hale.

The majority decision is not entirely unreasonable on the facts of the case and the approach adopted therein. As was noted by Lord Hoffman, different people will have different views on what is necessary or proportionate to publish in any given circumstance.[31] The problem however stems from the fact that under the approach adopted by the majority, the media are left in the invidious position of second guessing individual judges' assessments of where the balance of the public interest lies, including the necessity of each and every aspect of their publication. Given the divergence of judicial opinion in this case alone, it is difficult to see how the media could, under such an approach, comfortably predict its fortunes in any litigation involving the balancing of the public interests in free speech against those in protecting privacy.

The argument that more certainty is provided to both complainants and media defendants alike through a defence of qualified privilege, rests on the assumption that once a legitimate public concern in a matter is established, the question becomes one of whether the media defendant has exercised responsibility during the process of publication. This removes the need for the courts to assess the public interest served by the disclosure of individual elements of the publication. Instead these elements should contribute to the finding of whether the action has been prima facie established. The media defendant would then be required to establish that the matter was one of legitimate public concern and counter a claim by the plaintiff that they had not reported on it in a responsible manner. Should they fail to do so, few would argue that they should not be held to account.

To accept this proposition requires an acceptance that the media deserves to be conferred with this privilege.

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[31] *Campbell* (HL), above, para 59 per Lord Hoffman.

D The Media in Society

In contemporary society, the media represents the pivotal means by which information is communicated to the public. The courts have long recognised the fundamental importance of the role of the media in society.[32] The recognition of the constitutional importance of the media in the communication of information and comment on political matters dates back to its classification as the 'fourth estate' of government by Lord Macaulay in the early nineteenth century and has been frequently acknowledged since. Through the media the causes of self government and social decision making are advanced.[33] As Lord Nicholls noted in *Reynolds* "without freedom of expression by the media, freedom of expression would be a hollow concept."[34]

The media's importance as the public's primary information source has also received legislative recognition. The Defamation Act 1992 confers qualified privilege, commonly known as reporters' privilege, on reports of the proceedings of a range of organisations, including Parliament, the courts, local authorities and various community associations; press conferences and other public meetings.[35] This shows an acceptance that the information contained in these types of reports is of legitimate concern to the public and the reporting of it is in the public's best interests. The courts have been prepared to accord liberal interpretations to this privilege and the bodies to which it applies.[36]

Despite not being expressly conferred on the media this privilege is, by the very nature of the way that information is disseminated in society, of most relevance to the media. Indeed in contemporary society the degree of exposure required for

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32 See for example *Schering Chemicals Ltd v Falkman Ltd & Elstein* [1981] 2 WLR 848, 865 (CA) per Lord Denning.

33 Bill Kovach and Tom Rosenstiel *The Elements of Journalism: What Newspeople Should Know and the Public Should Expect* (Crown Publishers, New York, 2001) 19: "...by telling the truth... the public have the information they require to be sovereign."

34 *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609, 622 (HL) per Lord Nicholls.

35 See Defamation Act 1992, sch 1, part 2.

36 John F Burrows and Bill Wilson *Media Law* (New Zealand Law Society, Wellington, 2003) 8.

information to cause damage to a person's reputation, or otherwise intrude on confidence or privacy interests, can almost only be achieved through the media.

The privilege is conferred upon 'fair and accurate' reports, and is limited by sections 17 to 19 of the Act, dictating that the privilege will not be conferred in circumstances where the publication of the report is prohibited by law, the report or matter is not one of public interest to the recipients, a complainant's explanation or contradiction was inadequately taken account of, or the publisher took improper advantage of the occasion of publication. Such limitations are consistent with the concept of journalistic responsibility as enunciated by the courts.

Any assessment of the exercise of journalistic responsibility will, however, only be triggered by a finding that the matter about which the publication is made is one of legitimate public concern. It is argued that by aligning the test for legitimate public concern across the actions of defamation, breach of confidence and invasion of privacy, the greater body of precedent available will provide a modicum of certainty in identifying those matters that can properly be considered to be of legitimate public concern.

There are other valid reasons behind the argument for such an alignment. There is considerable potential for overlap across actions in defamation, breach of confidence and invasion of privacy. Should the method of ascertaining the public interest in a particular publication differ depending on the action, complainants would have the opportunity to pursue the cause of action most likely to result in a finding in their favour. There is also potential for a single publication to bring about claims under a combination of these actions. In *P v D*,[37] P brought an action under breach of confidence and privacy. The claim in breach of confidence was denied due to there being no evidence of the information being disclosed to the defendant through a relationship of confidence. The claim in privacy however was upheld. In *Hosking*, contributing to Anderson J's reluctance to introduce a tort of invasion of

[37] *P v D* [2000] 2 NZLR 591 (HC).

privacy was the fear that a person aggrieved by a publication may be able to gain injunctive relief for the publication of true material that would otherwise be denied in a defamation case following a plea of truth.[38]

The injury caused by an alleged invasion of privacy will in many be inextricably tied to the lowering of the complainant's standing in the eyes of others, the very crux of a defamation action.[39] If different approaches are taken under defamation and invasion of privacy, complainants will be afforded an easier route to prevent publication of matters, which, under a well-established justification in defamation, would be permitted.

II DEFAMATION AND QUALIFIED PRIVILEGE

Defamation protects a person's reputation against unjustifiable attack.[40] The public interest value in the protection of reputation is tied fundamentally to the protection of the dignity of the individual; the respect (and self respect) that arises from full membership in society.[41] The recognition and protection of reputation is a means by which members of society show deference to the individual dignity of other members of society. In the House of Lords, Lord Nicholls expressly recognised that the protection of reputation is not simply a matter of the dignity of the individual concerned in the particular case, and concluded that its protection is conducive to the public good: "[Reputation] also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for."[42]

Qualified privilege enables the maker of a prima facie defamatory statement of fact to escape liability in defamation, without needing to establish the truth of the

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38 *Hosking v Runting* (25 March 2004) Court of Appeal CA101/03, para 270 per Anderson J.

39 *Sim v Stretch* [1936] 2 All ER 1237, 1240 (HL) per Lord Atkin

40 John F Burrows and Ursula Cheer *Media Law in New Zealand* (4 ed, Oxford University Press, Auckland, 1999) 8.

41 Robert Post "Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 Calif L Rev 691, 740.

42 *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609, 622 (HL) per Lord Nicholls.

statement. The basis of the privilege is the common convenience and welfare of society.[43] The privilege is defeated if the plaintiff can prove that the defendant was motivated by ill will or took improper advantage of the occasion of publication.[44] In general, the privilege arises in circumstances where there is a common interest in a communication, or where there is a duty to communicate and a corresponding interest in receiving the communication arising out of legal, moral or social circumstances.[45] If the reciprocal interest and duty are established then the matter can properly be considered one of legitimate public concern, meaning that disclosure to the general public of alleged statements of fact in relation to that matter is privileged.

The breadth of subject matter to which this qualified privilege defence may attach is currently clouded by an inconsistency in its application between the New Zealand Court of Appeal and what was until recently, this country's highest court, the Privy Council.

In Lange v Atkinson[46] our Court of Appeal overcame its previous reluctance to attribute qualified privilege to widespread publications by reason solely of there being a public interest in the matter communicated[47] and that certain political statements made to the general public may attract privilege.[48] The House of Lords decision in *Reynolds v Times Newspapers* cited with approval in the Privy Council decision of *Bonnick*[49] had previously accepted that qualified privilege could attach to any matter of legitimate public concern. It also laid down that the responsibility shown by the publisher in light of the circumstances of the publication, was to be

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43 *Toogood v Spyring* (1834) 149 ER 1044, 1049 per Parke B.

44 Defamation Act 1992, s 19(2).

45 *Adam v Ward* [1916-17] All ER 157, 170 (HL) per Lord Atkinson.

46 *Lange v Atkinson* [1998] 3 NZLR 424 (CA).

47 See *Truth (NZ) Ltd v Holloway* [1960] NZLR 69, 83 (CA) per North J and *Templeton v Jones* [1984] 1 NZLR 448, 460 (CA) per Cooke J.

48 *Lange*, above, 428 per Blanchard J: "generally-published statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to be members, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities." In *Lange v Atkinson* [2000] 3 NZLR 385 (CA): the attribution of qualified privilege was held to be subject to 6 considerations listed at pages 390-391 and 400.

49 *Bonnick v Morris and others* [2003] 1 AC 300 (PC).

considered in the assessment of whether the requisite duty and interest exist.[50] In *Reynolds* convincing arguments were put forward as to why qualified privilege should not be accorded to limited categories of subject matter such as political discussion,[51] and as noted media law commentator John Burrows has pointed out, "logically it is not easy to see why in New Zealand we should not also extend the privilege this far."[52] Part of the reluctance of the Court of Appeal to embrace a broader formulation of legitimate public concern, might have been attributable to a fear of opening up qualified privilege to an unknown, and potentially dubious calibre of subject matter. There is no doubt that the Court of Appeal in *Lange v Atkinson* felt its formulation more appropriate to this country's social context and the dynamics of our media industry, noting that the United Kingdom had observed the worst excesses of tabloid journalism.[53]

In order for the qualified privilege defence to be of use in cases involving an alleged breach of confidence or privacy, the wider formulation of its ambit as used in the United Kingdom would need to be adopted in this country also. Our Court of Appeal's fears, while understandable, would be ameliorated to a large extent if qualified privilege was the defence established across all three causes of action,

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50 *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609, 626 (HL) Lord Nicholls sets out a non-exhaustive list of considerations to be taken into account in determining whether a media defendant had exercised their duty to publish properly so as to be conferred with a qualified privilege relating to statements of fact: "(1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (2) The nature of the information, and the extent to which the subject matter is a matter of public concern. (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. (4) The steps taken to verify the information. (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. (8) Whether the article contained the gist of the plaintiff's side of the story. (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication, including the timing."

51 Reynolds at 640 (HL) per Lord Cooke 'there are other public figures who exercise great practical power over the lives of people or great influence in the formation of public opinion or as role models. Such power or influence may indeed exceed that of most politicians. The rights and interests of citizens in democracies are not restricted to the casting of votes. Matters other than those pertaining to government and politics may be just as important in the community; and they may have as strong a claim to be free of restraints on freedom of speech...

52 John F Burrows and Bill Wilson *Media Law* (New Zealand Law Society, Wellington, 2003) 10.

53 *Lange v Atkinson* [2000] 3 NZLR 385, 398 (CA).

thereby allowing a far vaster body of precedent to help in the determination of the type of situations in which a legitimate public concern could properly be found.

Even if a *Reynolds* type approach to legitimate public concern were to be followed in this country, our statutory scheme would necessitate a different approach to the question of whether the qualified privilege has arisen or has in fact been abused by the defendant. As was discussed by the Court of Appeal in *Lange*, section 19 of Defamation Act 1992 dictates that in New Zealand the occasion of privilege and its misuse are separate enquiries; the former being a matter for the judge, and the latter for the jury, to determine. While this may have a structural impact, it should not present a significant problem for standardising the determination of legitimate public concern through the reciprocal interest and duty test in this country. It was noted by the Court of Appeal, these two aspects must be viewed together when determining whether in combination the law is striking a proper balance between the competing interests.

Rt Hon Justice Tipping succinctly identified the distinction in an article commenting on journalistic responsibility.[54] In the United Kingdom qualified privilege exists when words in question are responsibly written or spoken on a subject of legitimate concern to their addressees. In the New Zealand context, an occasion of qualified privilege exists when the words are written or spoken on a subject of legitimate concern to the persons to whom they are addressed. The privilege will, however, be lost if the publication was predominantly motivated by ill will towards the complainant or if improper advantage of the occasion of privilege was taken. For a true alignment to take place, this approach would also be required of a qualified privilege defence to breach of confidence or invasion of privacy.

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[54] Rt Hon Justice Tipping "Journalistic Responsibility, Freedom of Speech and Protection of Reputation – Striking the Right Balance Between Citizens and the Media" (2002) 10 Waikato LR 1, 7.

A Accommodating the Competing Rights

In *Reynolds* and *Bonnick* it was recognised that in defamation the balance between freedom of expression and protection of reputation is appropriately struck through the establishment of legitimate public concern and the exercise of journalistic responsibility. A defence of qualified privilege formulated along these lines recognises the values underlying both freedom of expression and protection of reputation and provides a reasonably simple formula for the accommodation of these two interests. The starting point is the position of the media as free to publish any information in any form. If this publication is likely to lower the complainant's standing in the eyes of others, and the veracity of the facts are unable to proved by the communicator of that information, the values inherent in reputation are given legal protection through their liability in defamation. If however, the matter can be identified as being of legitimate public concern by way of the reciprocal duty and interest test, and provided that the publisher has exhibited due care in the exercise of its duty to publish, then the limitation on freedom of expression sought by the complainant cannot be demonstrably justified. If the reciprocal duty and interest arise on the facts of a case involving a widespread publication by a media defendant, the balance must lean in favour of freedom of expression and the greater social good.

B Accommodating the Practicalities of Journalism

In its exploration of the factors to be considered when determining whether a publisher has exercised its journalistic responsibilities, the House of Lords observed that in other professions, the law demands the exercise of reasonable care and skill in all the circumstances, and that the media should be no different. This observation in *Reynolds* builds on Tipping J's recognition of the same in *Lange* in which he questioned "...whether the public interest in freedom of expression is so great that the accountability which society requires of others, should not also to this extent be

required of the news media."[55] The expectation that the media exercise reasonable care and skill in its publication is an appealing one, with which few would disagree. The Court of Appeal in *Lange* made clear that failure to give responsible consideration to the truth or falsity of the publication, as required by the nature of the subject matter and breadth of intended audience, would be sufficient to show that the duty of care had not been exercised.[56] The list of factors that contribute to the assessment of whether journalistic responsibility has been exercised, as outlined by Lord Nicholls in *Reynolds*, provides editors with a much easier forum for the assessment of potential liability than second guessing the weight a judge may or may not attribute to the public interest values that they and potential complainants may put forward.

The considerations espoused by Lord Nicholls are similar to the statutory limitations to privilege found in sections 17, 18 and 19 of the Defamation Act 1992, and share much with the duties that the media industry expects of itself. The New Zealand Press Council, established in 1972 as an independent forum for the resolution of complaints against the press, has issued a statement of principles to guide the determination of such complaints. Echoing the considerations of *Reynolds*, the principles outline publishers' responsibilities to provide accurate, fair and balanced information that does not mislead its readers. A duty of care to ensure that sources are well informed and that information provided is reliable; to respect the privacy of the individual, particularly children or those in situations of shock or grief; and to distinguish fact from comment or opinion are also expressly stated.[57]

Similarly, the Broadcasting Standards Authority, established in 1989, is charged with encouraging the development and observance of broadcasting standards consistent with statutory requirements and approved codes of practice. Invariably these codes are consistent with expectations of accuracy, fairness and balance,

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55 *Lange v Atkinson* [1998] 3 NZLR 424, 477 (CA) per Tipping J.
56 *Lange v Atkinson* [2000] 3 NZLR 385, 401 (CA).
57 New Zealand Press Council <http://www.presscouncil.org.nz/principles.htm> (last accessed 27 September 2004).

respect of the individual's privacy, good taste and decency and protection of children.[58]

The factors that thus contribute to a finding that media responsibility has, or has not, been exercised are thus familiar to editors and broadcasters alike, and set a behavioural threshold no higher than that which the media expects of itself.

Given their familiarity with such principles and standards, editors operating in a market where news and other information date very quickly are much better placed to know if they have done all they can to substantiate and ensure balance in material that they publish, than whether elements of their publication weaken its public interest value. As was noted by Lord Hoffman in *Campbell* "the practical exigencies of journalism demand that some latitude must be given. Editorial decisions have to be made quickly and with less information than is available to a court which afterwards reviews the matter at leisure."[59]

C The Offer of Certainty

The concept of journalistic responsibility as enunciated in *Reynolds* grants a greater degree of certainty not only to litigants, offering as it does a checklist of actions that the media might be expected to comply with in the exercise of its qualified privilege, but also to the judges before whom such cases arise. Without it, there is potential for the weight of public interest values to be coloured by the judges' own value systems and importance they place on the individual publication before them. This, as was argued by counsel for *The Times* in *Reynolds*, would not only involve an unpredictable outcome, but would put the judge in the role of censor which in a free society ought to be occupied by the editor. The judge's position is infinitely more clear if his or her role is to establish whether the media defendant has exercised due care.

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[58] Broadcasting Standards Authority <http://www.bsa.govt.nz/broadcastingact.htm> (last accessed 27 September 2004).

[59] *Campbell v MGN Ltd* [2004] 2 All ER 995, para 62 (HL) per Lord Hoffman.

That is not to say the balancing exercise of the courts becomes a simple task, however, as the establishment of legitimate public concern through the reciprocal duty and interest test, is still lacking in, and potentially beyond, definitional precision. However as has been discussed previously and will be explored further in this paper, if this same test for legitimate public concern is also utilised in breach of confidence and invasion of privacy actions, then a clearer picture of the circumstances giving rise to a reciprocal duty and interest will emerge from a much larger body of precedent.

D Exercising Responsible Journalism

Under New Zealand's defamation legislation, the onus of proving that the duty to publish has not been exercised responsibly falls on the plaintiff. The courts will then face what should be a reasonably simple and objective inquiry into the information gathering practices and degree of care exercised by the defendant. The considerations set down by Lord Nicholls in *Reynolds* and mirrored in the Press Council principles and Broadcasting Standards Authority's codes, will be the key indicators of whether the media has shown due care in the exercise of its duty to communicate.

In essence these considerations can be reduced to the following three basic questions:

Has the defendant taken reasonable steps to ensure the accuracy of the information? What will be reasonable will depend on the gravity of the information published, but should consider the steps taken to verify the information and check the credibility of sources if these are thrown into doubt by the plaintiff.

Is the publication balanced? This can be put into question by a plaintiff and determined by the court on the basis of the information that has been published.

Key considerations will be whether competing versions of events have been expressed, whether the plaintiff's point of view has been acknowledged or indeed whether the plaintiff was given the opportunity to comment.

Is the publication fair? Again able to be objectively determined on the basis of the information published, fairness will be evident in the tone and timing of the publication. Publications that are overtly critical, derogatory, or timed to maximise humiliation of the subject, will be denied the protection of qualified privilege. Indeed they are objective indicators of a motivation of ill will towards the plaintiff, which under the subjective test required by common law malice, can be extraordinarily difficult to establish.

The failure to satisfy these three key considerations will be considerably easier for the courts to objectively assess than the vagaries of a 'balancing of public interests' exercise.

Can these concepts of legitimate public concern and journalistic responsibility be applied to breach of confidence and privacy actions without compromising the acknowledgement of the competing public interests?

III APPLICATION TO BREACH OF CONFIDENCE

Structurally, there is alignment between the iniquity defence to an action in breach of confidence and the qualified privilege defence. To establish that there has been a breach of confidence, a complainant is required to prove that the information has a necessary quality of confidence, that they imparted that information in circumstances importing an obligation of confidence, and that there has or will be an unauthorised use of that information to the complainant's detriment.[60] A

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[60] *Coco v A. N. Clark(Engineers) Ltd* [1969] RPC 41, 47-8 (HCJ) per Megarry J. This was endorsed by the New Zealand Court of Appeal in *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515 (CA). Note that following the decision of the Court of Appeal in *Hosking*, it is clear that in New Zealand a relationship of confidence and the imparting of information as part of that relationship are required for the action to succeed.

defendant may however escape liability provided that they are able to establish that they have "just cause or excuse"[61] for breaching that confidence. The common law's recognition that the confidentiality of a matter may be outweighed by the public interest in it was first enunciated in *Gartside v Outram*[62] in which Wood V. C. famously asserted that: "there is no confidence as to the disclosure of an iniquity."[63] In *Initial Services v Putterill*[64] Lord Denning extended the meaning of iniquity to any misconduct, committed and in contemplation, of such a nature that the disclosure is justified in the public interest. Thus as with actions in defamation we see a circumstance whereby freedom of expression may be curtailed by a competing interest in the protection of confidences, with a forum under "just cause or excuse" in which the competing public interests may be balanced against each other. The result of this balancing exercise will establish whether it is appropriate that a public interest defence is afforded to the defendant. Though Wood VC's dictum gives the impression that iniquitous communications do not attract the protection afforded to confidences, it has subsequently been more accurately characterised as a defence to breach of confidence, rather than an aspect for consideration during the complainant's establishment of the cause of action. There are thus structural similarities between the iniquity defence and qualified privilege.

Conceptually there is also a similarity between the identification of legitimate public concern through the reciprocal duty and interest test. In *Initial Services* Lord Denning, in his extension of the iniquity defence, saw it as merited on the grounds that "no private obligations can dispense with the universal one which lies on every member of society to discover every design which may be formed contrary, to the laws of society, to destroy the public welfare."[65] The concepts of interest and duty are both recognised here; the interest stemming from the public welfare and duty arising from the universal obligation to make known any threats to that welfare.

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61 *Fraser v Evans* [1969] 1 QB 349, 361(CA) per Lord Denning MR.
62 *Gartside v Outram* (1856) 26 LJ Ch 113.
63 *Gartside v Outram* (1856) 26 LJ Ch 113, 116 per Wood VC.
64 *Initial Services Ltd v Putterill and Another* [1968] 1 QB 396 (CA).
65 *Initial Services Ltd v Putterill and Another* [1968] 1 QB 396, 405 (CA) per Lord Denning MR.

In principle, it would seem that there is little to stand in the way of applying the qualified privilege defence to actions in breach of confidence, but does the identification of legitimate public concern combined with the exercise of journalistic responsibility provide adequate protection to the public interest values underlying the protection of confidences?

The public interest values inherent in the protection of confidences, like reputational protection have a primary focus of preserving individual autonomy. At its heart is the belief that an individual or other legal entity has the right to control access to information about itself that is imparted in confidence. Added to this is the recognition of the importance of candour and trust in specific relationships such as those between lawyer and client, and doctor and patient.[66] In relationships of this ilk, full disclosure of information is required to achieve important social ends such as full and appropriate legal representation or accurate diagnosis and treatment of medical conditions. If a party was unsure as to whether others outside the relationship of confidentiality were able to access the information communicated within the relationship, the disincentive to freely communicate would be a weighty one.

The fundamental values underpinning breach of confidence are then individual autonomy, and the recognition of the importance of candour and trust in certain relationships. The former values could easily be required to give way to those equivalent values as they arise under freedom of expression in circumstances where a legitimate public concern has been established. This can be justified on the basis that there is greater social utility in the responsible publication of matters that are deemed to be of legitimate public concern than in the protection of the individual's autonomy.

But what of the latter values of candour and trust in relationships; does the fulfilment of the reciprocal interest and duty test and exercise of responsible

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[66] See *W v Egdell* [1990] 1 Ch 359 (CA); *X v Y* [1988] 2 All ER 648.

journalism accommodate adequately the public interests in protecting the confidential nature of these relationships? Arguably it can within the duty limb of the dual test. The interest in receiving the information will not change simply because the information was disclosed within a relationship of confidence, what could change is that the person or media organisation communicating the information will conceivably not have a duty to disclose it.

Breach of confidence, and for that matter defamation, actions are littered with situations where, having noted the value to the public of receiving the relevant information, the courts have considered that bodies other than the media were the appropriate forum for the disclosure of the information.

In *British Steel v Granada*[67] the House of Lords found that while the public were entitled to be legitimately interested in the poor financial performance of a nationalised industry, this interest was best served by the financial disclosure requirements of the Iron and Steel Act (UK) 1975 rather than by disclosure through the media. In *Francome v Mirror Group Newspapers*[68] the UK Court of Appeal found that although there was a legitimate public interest in the information that showed the plaintiff, a jockey, had intentionally breached the rules of racing, it was "...impossible to see what public interest would be served by publishing the contents of the tapes which would not equally be served by giving them to the police or the Jockey club."[69]

The courts have also made it clear that the media is unlikely to be vested with a duty to publish allegations of criminal wrongdoing. If a matter is *sub judice* such a publication will incur liability in contempt of court if it is likely to impede the impartial administration of justice.[70] In *Vickery v McClean*[71] where a qualified

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67 *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 (HL).
68 *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892 (CA).
69 *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892, 898 (CA) per Sir John Donaldson MR.
70 *Gisborne Herald Co Ltd v Solicitor General* [1995] 3 NZLR 563 (CA). At 575 Richardson J stated that an editor would be prudent not to publish material that could be found in contempt rather than rely on a public interest defence.
71 *Vickery v McLean* (22 June 2000) Court of Appeal, Auckland, CA125/00.

privilege to publish defamatory material was denied, Tipping J summed up the Court's aversion to allegations of criminality being made through the media thus:[72]

> ...that could only encourage trial by media and associated developments which would be inimical to criminal justice processes. Society has mechanisms for investigating crime and determining guilt or innocence. It is not in the public interest that these mechanisms be bypassed or subverted.

These issues are also evident in the list of considerations pointing to the exercise of responsible journalism as outlined in by Lord Nicholls in *Reynolds*. If however, they are given due recognition in the determination of whether the reciprocal duty and interest exist, it need not be considered at that later stage.

In New Zealand the Protected Disclosures Act 2000 also provides a legislative indication that the media will not be the appropriate avenue for the disclosure of information, of interest or concern to the public, which has been obtained through a relationship of confidence. As will be discussed later in this paper, the Act permits the disclosure of information related to serious wrongdoing that would otherwise be considered confidential through an employer-employee relationship. However the Act also prescribes the manner in which these protected disclosures may be made, none of which include the media.[73]. Thus it might be assumed that the media may only be able to publish such an allegation of serious wrongdoing, and be availed of a public interest defence to a breach of confidence action, once any prescribed or more appropriate avenues of disclosure and investigation of a matter of legitimate public concern have been exhausted.

This statutory and judicial recognition that a media duty does not inevitably flow from the public's legitimate interest in particular information, allows considerable room for the protection of trust and candour in relationships through qualified

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[72] *Vickery v McLean* (22 June 2000) Court of Appeal, Auckland, CA125/00, para 19 per Tipping J.

[73] Protected Disclosures Act 2000, ss 3 and 10. These list the appropriate authorities to whom protected disclosures may be made, including Ministers of the Crown and, in the public sector, the Ombudsman.

privilege, particularly given that the onus of establishing the requisite duty and interest rests upon the media defendant.

IV APPLICATION TO INVASION OF PRIVACY

Similarly the structure of tort of invasion of privacy offers a public interest defence of legitimate public concern as the appropriate arena for the balancing exercise between freedom of expression and privacy interests to take place. In affirming the existence of the tort of invasion of privacy, the Court of Appeal also clarified the confusion that followed the decision in *P v D*[74] over whether the legitimate public concern in the matter comprised one of the elements of the cause of action or if it stood as a defence. It confirmed that legitimate public concern stood as a defence to a prima facie invasion of privacy.[75] Thus as set out in the joint judgment of Gault P and Blanchard J a legitimate public concern in the information may enable publication in situations where the complainant has established the fundamental requirements for a successful claim of invasion of privacy: the existence of facts in respect of which there is a reasonable expectation of privacy, and publicity given to those private facts that would be considered highly offensive to an objective reasonable person. Tipping J preferred the formulation of a single element in the establishment of the plaintiff's claim, namely that it is actionable in tort to publish information or material in which the plaintiff has a reasonable expectation of privacy, with the defence that material constituting a matter of legitimate public concern justifies publication in the public interest.

The element of reasonableness in both of these formulations provides an objective element to control the subjective expectations of the individual. Tipping J noted that the expectations might arise from the nature of the information or the circumstances in which the defendant came into possession of it, or both. It is important to note

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74 *P v D* [2000] 2 NZLR 591 (HC).

75 *Hosking v Runting* (25 March 2004) Court of Appeal CA101/03, para 129 per Gault P and Blanchard J: "… it is more conceptually sound for this to constitute a defence, particularly given the parallels with breach of confidence claims, where public interest is an established defence."

that neither of these considerations involves either the status of the individual within the public eye, or any other matters that are properly examined under the assessment of the defence of legitimate public concern, as other judges have shown a tendency to blur the line between these two inquiries. In *A v B and C* Lord Woolf referred to the fact that figures of public note needed to 'expect and accept' a higher degree of scrutiny by the media,[76] while Randerson J considering *Hosking* in the High Court echoed these sentiments.[77] In *Campbell* also it is evident that Lord Nicholls at least considered that Ms Campbell's previous public statements meant she was unable to establish that a breach of confidence had occurred.[78]

Drawing support from Tipping J's statements in *Hosking*, and the correct characterisation by that Court of legitimate public concern as a defence to the action, it is submitted that it is within that defence that the competing interests in freedom of expression and privacy are assessed. This would also accord with the commonly held view that public figures, like everyone else, are entitled to have their privacy protected, and gives a greater foundation than simply their notoriety, for permitting the information to be disclosed. It would also make more obvious the alignment with defamation and breach of confidence.

However, having failed to vest the Hoskings' with a reasonable expectation of privacy in relation to the photographs taken of their children,[79] the majority of the Court of Appeal was able to decide in favour of the defendant without reference to any legitimate public concern in the photographs. The Court's discussion of legitimate public concern is very much limited to the ideas of proportionality. As Tipping J noted, "the greater the invasion of privacy the greater must be the level of public concern to amount to a defence", and that "no verbal formulation can hope to

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76 *A v B and C* [2002] 2 All ER 545, para 11(xii) (CA) per Lord Woolf.

77 *Hosking v Runting* [2003] 3 NZLR 385, 416 (HC) Randerson J :"the reasonable expectations of privacy of [public figures] will necessarily be lower since it is inevitable the media will subject celebrity figures such as Mr Hosking to closer scrutiny"

78 *Campbell v MGN Ltd* [2004] 2 All ER 995, para 24 (HL) per Lord Nicholls.

79 The factors supporting this finding were that the subjects were photographed in a public place and that the photos, showing only the subjects' appearance did not contain anything that the reasonable person would find highly offensive.

do more than lay out the principles to be applied in the individual case."[80] Gault P and Blanchard J's judgment, in acknowledging the question of proportionality, pays particular regard to an article examining the emerging right of privacy in the United Kingdom by Gavin Phillipson.[81] The main thrust of Phillipson's article is that privacy and freedom of expression are rights of equivalent status, and that the issue of proportionality must be reflected in the assessment of how the facts of the particular case or disclosure contribute to the values underlying freedom of expression and privacy advanced by the litigants. This view accords with that earlier espoused by Elizabeth Paton-Simpson[82] in what she termed the contextual approach. Under the contextual approach, the rights asserted by both parties are measured by the extent to which they are connected to the interests underlying those rights. In the context of media publications this would require an examination into how the particular instance of disclosure contributes to the primary public interests in freedom of expression, against how the restraint would contribute to the public interests underlying the protection of privacy.

Can an approach based on a reciprocal duty and interest test, and responsible journalism, provide sufficient accommodation to the interests underlying the right to privacy?

It is said that privacy is drawn from the fundamental value of personal autonomy. It might best be defined as a condition of limited accessibility of information known about an individual, attention paid to an individual, or physical access to an individual.[83] At its root is the protection of independence, dignity, and the human spirit.[84] The individual autonomy afforded by privacy enables independent thought, diversity of views, and sheltered experimentation and testing of ideas before

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80 *Hosking v Runting* (25 March 2004) Court of Appeal CA101/03, para 257 per Tipping J.

81 Gavin Phillipson "Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act" [2003] MLR 726.

82 E Paton-Simpson "Human Interests: Privacy and Free Speech in the Balance" (1995) 16 NZULR 225.

83 Ruth Gavison "Privacy and the Limits of the Law" (1980) 89 Yale LJ 421, 428.

84 S D Warren and L D Brandeis "The Right to Privacy" (1890) 4 Harv L Rev 193, 196; see also John D R Craig "Invasion of Privacy and Charter Values: The Common Law Tort Awakens" (1997) 42 McGill L J 355, 357

making them public.[85] By protecting an individual's privacy, their dignity is retained by shielding that which they do not want known about themselves from the knowledge of others and upholds autonomy by allowing them to control the dissemination of that information.

Unlike defamation, in which qualified privilege deals with matters that may not be able to be substantiated as facts and in which truth is a complete defence, privacy is not concerned with the truth of the disclosure, but the harm caused by the disclosure of that truth. The situation is more akin to that of breach of confidence than defamation. It might therefore be argued that even if the matter is one of legitimate public concern, the exercise of reasonable care by a media defendant that publishes information concerning that matter, will not be sufficient to provide adequate protection to competing privacy interests. No matter how diligently the information is sourced, verified and reported, the publication of that matter will still harm the individual that is the subject of the publication.

While there is strength in this argument, the filter of the reciprocal duty and interest test will still in most cases reduce the likelihood of distressing private revelations filling the pages of our newspapers, provided that it is in this ambit of the qualified privilege defence that those privacy interests are recognised. The further requirement that journalistic responsibility be exercised, will also go some way to ensuring that any harm done by the publication of that information is minimised through its examination of circumstances of publication including the tone of the article and whether the complainant has been offered an opportunity to comment. The alternative requires a judicial assessment of individual aspects of the publication and how these contribute to or detract from the competing rights of freedom of expression and privacy. Such an approach risks an uncertain outcome coloured by the intrinsic value that the judge assigns to the publication in question.

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[85] Alan F Westin *Privacy and Freedom* (Bodley Head, London, 1970) 34.

A Qualified Privilege in Privacy Actions: An Argument Once Tried

During the Campbell litigation the argument advocated in this paper that following the establishment of a legitimate public concern, a media defendant is free to publish material that may override a counterclaim to privacy through the exercise of a proper degree of journalistic care, was presented to the UK Court of Appeal.[86] Counsel for *the Mirror* attempted to draw the analogy between the public interest justification for publication of confidential material and qualified privilege. Support for this analogy was drawn from South African[87] and United States[88] case law, however the Court of Appeal failed to be persuaded by the argument. It distinguished the cases referred to by counsel on the grounds that they were both argued under the head of privacy rather than an expanded breach of confidence. The Court also signalled that its reluctance to accept counsel's argument stemmed from the fact that the expanded breach of confidence and the *Reynolds* formulation of the qualified privilege defence were still at a developmental stage.

It is not surprising that the Court of Appeal were not comforted by the cases referred to by counsel, although they do offer examples of judicial support for using the qualified privilege defence in privacy cases. The court in Van Vuuren v Kruger made only a very general comment to the effect that the principles determining justification to an invasion in privacy were shared with those of the law of defamation[89]. *Bichler*, in which the majority of the Appeal Court judges found that the same conditional privilege applied to defamation and invasion of privacy, was not only decided under Massachusetts state law, but also under a constitutionally protected right to privacy that encompasses both the right to withhold embarrassing private facts from public view and the right, akin to that protected by defamation actions, not to be placed in a false light.[90]

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86 *Campbell v MGN Ltd* [2003] 1 All ER 224 (CA).

87 *Jansen van Vuuren and Another NNO v Kruger* [1993] (4) SA 842.

88 *Bichler v Union Bank and Trust Co* (1984) 745 F 2d 1006.

89 *Jansen van Vuuren and Another NNO v Kruger* [1993] (4) SA 842, 850 per Harms AJA "To determine whether a prima facie invasion of the right to privacy is justified, it appears that, in general, the principles formulated in the context of a defence of justification in the law of defamation ought to apply."

90 See The Restatement of Torts (Second) (1977) 383.

Interestingly despite their rejection of *the Mirror*'s argument the Court of Appeal held that, provided publication of confidential information was justified in the public interest, a journalist had to be given reasonable latitude as to the manner in which that information was conveyed to the public.[91] The Court also determined on the facts that the detail given in the article and accompanying photograph were "a legitimate, if not an essential, part of the journalistic package"[92] required to show the public that they had previously been deceived by the supermodel. This despite the fact that the article contained some erroneous, though minor, statements of fact. Thus it can be argued that the Court of Appeal effectively accepted the argument that they had, just moments earlier, expressly rejected. Indeed the Court's acceptance of journalistic latitude without the commensurate requirement of journalistic responsibility derived from qualified privilege, is conceptually a weaker position than that put forward by counsel for *the Mirror*.

The argument that qualified privilege should not be imported into the tort affording protection of privacy interests due to the developing state of the law, can also be disregarded, given that the *Reynolds* privilege is now firmly established, at least in the United Kingdom. As has been argued in this paper it now offers invaluable guidance to our emerging tort of privacy.

B The Question Of Remedies

Another counter argument to extending the qualified privilege to cases involving breach of confidence and invasion of privacy is that the standard required for the granting of injunctions is higher in defamation than is appropriate in breach of confidence and privacy cases. Traditionally under defamation proceedings an injunction will fail if the defendant pleads qualified privilege unless the plaintiff can satisfy the court that the defence will fail. The Court of Appeal in *TV3 v Fahey*[93]

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91 *Campbell v MGN Ltd* [2003] 1 All ER 224, para 64 (CA) per Lord Phillips.
92 *Campbell v MGN Ltd* [2003] 1 All ER 224, para 62 (CA) per Lord Phillips.
93 *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129.

has also stated that any prior restraint of freedom of expression required clear and compelling reasons and the passing of a much higher threshold than the arguable case standard. This presents a sizeable hurdle for plaintiffs to overcome should they wish to prevent publication.

In breach of confidence and privacy cases, the argument runs that once publication is allowed, the confidence or privacy in the material is automatically lost and cannot be redressed by damages. The lower arguable case standard has traditionally been applied to applications for interim injunction in breach of confidence law for this very reason.[94] While it questionable whether damages are a truly adequate remedy for reputational injury also, the Court in *TV3 v Fahey* noted that an injunction would be granted in circumstances where harm was not reparable by an award of damages.

There is thus potential for the adequate protection of confidence and privacy interests through injunctive relief within the existing approach under defamation, although perhaps a greater accommodation of interests could be achieved by assessing the basis of the reciprocal duty and interest claim and exercise of responsible journalism at an interlocutory stage.

V LEGITIMATE PUBLIC CONCERN: RECIPROCAL INTEREST AND DUTY

If we accept then that the *Reynolds* type of qualified privilege can be incorporated into actions in breach of confidence and privacy, what certainty does that afford to the question of whether material might be published on the grounds that it relates to a matter of legitimate public concern.

To establish that there is a legitimate duty in disclosing, and interest in receiving a particular communication in the face of a prima facie established claim in

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[94] See Katrine Evans "Was Privacy the Winner on the Day" [2004] NZLJ 181, 183.

defamation, breach of confidence or privacy, the communication must evidence at least one of the public interest values that underpins freedom of expression other than the liberty theory. The essence of the protection afforded to responsible publishers of matters of legitimate public concern, as evidenced by these theories, is that through their communication the public will be disposed with the resources with which to make decisions that will affect their individual or collective lives. These values will not always be present, or where they are, to the same degree, in the publication of information or material on a particular subject. In order for clear principles to emerge surrounding the weight to be given to these values, it will be necessary to assess how the courts have to date assessed these values in their various determinations of those matters that constitute matters of legitimate public concern.

A Legitimate Public Concern: What the Courts Have Said

A number of cases have recognised that discussion of political matters is properly considered to be of legitimate public concern. In *Reynolds,* the publication at issue was the discussion of the events surrounding the resignation of Albert Reynolds from his post as Irish Prime Minister. In that case while the subject matter was considered to be "undoubtedly of public concern", the allegations of fact made in the publication were held to be defamatory due to the failure of the article to mention Mr Reynolds' view of the events. Thus the Times were found not to have exercised journalistic responsibility. In *Lange v Atkinson*, the publication at issue questioned the capacity and performance of a Member of Parliament and former New Zealand Prime Minister. In both the High Court and Court of appeal, the matters discussed were considered to be of public concern. In the High Court, Elias J stated that the common law had recognised that freedom of political speech and the exchange of information that might influence the exercise of the public's electoral rights were necessary for the public welfare, and that comment upon the official conduct and suitability of those exercising powers of government were

essential to the proper operation of a system of representative democracy.[95] The Australian High Court decision *in Lange v Australian Broadcasting Corporation*[96] which also examined the qualified privilege defence to an action in defamation, found support for this same proposition in the Australian Constitution. The Court also noted, quoting McHugh J's statement in the earlier case of *Stephens v West Australian Newspapers Ltd*[97] that the quality of life and freedom of Australian citizens were highly dependent on the exercise of functions and powers vested in public representatives and officials and that therefore that information concerning the exercise of these functions were of legitimate interest to the general public.

The Courts' findings that these various forms of political discussion were matters of legitimate public concern demonstrate an obvious link to the theories of the marketplace of ideas and support and maintenance of democracy. The weight attached to freedom of expression relating to political matters also demonstrates two other key aspects determinant in the finding of legitimate public concern; the breadth of audience that has an interest in, and has the potential to be tangibly affected by, the exercise of governmental powers.

These same elements are present in a number of cases concerning the exercise of functions by government officials. In the Privy Council decision in *Bonnick*[98], the plaintiff was the managing director of a Government-owned company with a monopoly over the import of basic foods into Jamaica. He claimed that an article in a national newspaper that appeared to link the termination of his employment with questionable contracts entered into for the importation of milk powder were defamatory. The Court held that the activities of the company and the competence of its management were matters of considerable public concern due to the fact that its import business affected the cost of living of everyone in Jamaica. Similarly in the breach of confidence case of *Lion Laboratories* the UK Court of Appeal held

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95 *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1997] 2 NZLR 22, 33 (HC) per Elias J.
96 *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 (HCA).
97 *Stephens v West Australian Newspapers Ltd* (1994) 124 ALR 80 (HCA).
98 *Bonnick v Morris and Others* [2003] 1 AC 300 (PC).

that the competent functioning of breathaliser equipment was an issue of public concern raising as it did "serious questions that affect the life, and even the liberty, of an unascertainable number of Her Majesty's subjects..."[99] In *British Steel v Granada*[100] the public were held to be entitled to be legitimately interested in the poor performance a nationalised industry. This finding was reached due to the effect of the industry's performance had on the public purse. Discussion of the failings of the National Security Service, even of another country, have similarly been held to be a matter of legitimate public concern.[101]

A number of cases have also concluded that information concerning wrongdoing will also be considered a matter of legitimate public concern. In breach of confidence and defamation actions the public concern in the identification of fraud,[102] other criminal activities[103] and public misrepresentations,[104] has received recognition by the courts as matters of public concern, though as has been discussed previously, with reservations about the appropriate forum for the disclosure of this information. In such circumstances there is both a breadth of public interest in the identification and prevention of acts that are contrary to the laws that society operates under, and potential for tangible harm to be suffered by a significant proportion of the public were they to fall victim to such wrongdoing.

The protection of the public from harm is a significant factor in a number of other circumstances in which a legitimate public concern has been found to rest in publications issued to the public at large. In *Hubbard v Vosper* Lord Denning found that the potential harm caused by the practices of the Church of Scientology was such that legitimate public concern was sufficient to outweigh any confidentiality

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99 *Lion Laboratories Ltd v Evans and Others* [1985] QB 526, 546 (CA) per Stephenson LJ.

100 *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 (HL).

101 *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 179 (CA) per McMullin J, in which it was held that the New Zealand public had a legitimate interest in information regarding the failings of the British Security Service, due to the strong links with its New Zealand counterpart.

102 *European Pacific Banking Corporation v Television New Zealand Ltd* [1994] 3 NZLR 43 (CA); *Gartside v Outram* (1856) 26 LJ Ch 113.

103 *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892 (CA).

104 *Initial Services Ltd v Putterill and Another* [1967] 3 All ER 145 (CA).

surrounding those practices.[105] In *Distillers Co.*[106] information that sought to cast light on the release of the thalidomide drug that caused countless birth defects, was considered of public concern, although the timing of the release of the information was pivotal to a public interest defence not being afforded in that particular instance. *Tillery Valley Foods v Channel Four*[107] is another recent case in which public health and safety was a key determinant in the establishment of legitimate public concern. The disclosures related to the plaintiff company's poor hygiene practices in the preparation of frozen meals for supply to, amongst others, public hospitals. There the public interest in the allegations made by the defendant was so obvious that it was conceded by counsel for the plaintiff.

B Legitimate Public Concern: Legislative Clues

Further guidance as to the types of subject that may be considered of legitimate public concern can be found in the Protected Disclosures Act 2000. The purpose of the Act, as set out in section 5, is to promote the public interest by facilitating disclosure and investigation of serious wrongdoing in or by an organisation, and protecting employees that make these disclosures on the basis and in the manner provided by the Act. Protection of persons making such disclosures is required to counter any liability that the person may otherwise face through breach of confidence or contract. Section 3 of the Act defines serious wrongdoing as variously: unlawful, corrupt or irregular use of funds or resources of a public sector organisation; or a serious risk to public health or safety or the environment; or a serious risk to the maintenance of law, including prevention, investigation and detection of offences and right to a fair trial; or any act that constitutes an offence; or oppressive, improperly discriminatory, grossly negligent conduct or gross mismanagement by a public official.

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105 *Hubbard v Vosper* [1972] 2 QB 84, 96 (CA) per Lord Denning: "…there is good ground for thinking that these [Scientology] courses contain such dangerous material that it is in the public interest that it should be made known." See also *Church of Scientology of California v Kaufman* [1973] RPC 627.

106 *Distillers Co. (Biochemicals) Ltd v Times Newspapers Ltd* [1975] 1 QB 613 (QB).

107 *Tillery Valley Foods v Channel Four Television and another* [2004] All ER 133 (Ch).

These categories of wrongdoing bear a close resemblance to the types of information deemed to be of legitimate public concern by courts considering defamation and breach of confidence. The undercurrent running through all of these categories is that the matter about which the disclosure is, or is sought to be made, has a tangible effect on a broad section of the public. Provided that this interest of the public is established upon these grounds, a media defendant would seem to have a duty to make disclosures to the public on those matters in which they have a legitimate interest.

C Invasion of Privacy: A Different Category of Subject Matter?

But to what degree are these matters apparent in an action involving a complaint alleging invasion of privacy? In *Hosking* Tipping J was of the opinion that the marketplace of ideas theory, i.e. the advancement of knowledge and discovery of truth, was unlikely to be of relevance to the exercise of freedom of expression in cases involving privacy.[108] While he did concede that concerns relating to the maintenance of the democratic process may arise, the predominant value underlying freedom of expression in these cases he opined would be the liberty theory. This he considered to be the weakest foundation for freedom of expression to be taken into account in the balancing exercise and determination of proportionality.[109] Does this mean that at best, the legitimate public concern defence will be merely a bit player in privacy actions?

The determination of the public interest in disclosures of the private affairs of figures with public prominence have come before the courts under other causes of action. The New South Wales Supreme Court was called upon to determine the public interest in the extra-marital affairs of a prominent sportsperson in the case of *Chappell v TCN Channel Nine.*[110] While the Courts' disdain for the "sleazy gutter journalism" exhibited by the defendant is palpable throughout the judgment, Hunt J

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108 *Hosking v Runting* (25 March 2004) Court of Appeal CA101/03, para 233 per Tipping J.
109 *Hosking*, above, para 235 per Tipping J.
110 *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153.

following *Mutch v Sleeman*[111] laid down two circumstances in which the private behaviour or character of a public figure could be of public interest: (a) because it has some bearing upon their capacity to perform their public activities; or (b) because they make it such a matter themselves. Under such circumstances the marketplace of ideas theory, and depending on the public activities of the individual, the maintenance of democracy theory, are activitated. On the facts of that case because neither of these circumstances was found to exist, the defendant was not availed of a public interest defence to the plaintiff's claim of defamation.

In the United Kingdom, where Hunt J commented such disclosures had been raised to an art form by certain tabloids, a number of cases have arisen in which statements of fact regarding a person of high public profile's private life have been published to the general public. These cases have generally involved persons who have attained a degree of celebrity status unrelated to the performance of any official public duties. In *Woodward v Hutchings*[112] the plaintiffs were a group of popular singers whose excesses, and in one instance, sexual antics were revealed by their former manager. In identifying a public concern in the receipt of this information, Lord Denning noted that the group had presented to the public at large an image of a particular lifestyle which the disclosed facts would correct in the minds of the public. In *Campbell* it was acknowledged, even by their Lordships that denied the Mirror a public interest defence, that due to Ms Campbell's previous public denials of drug use, the public had a legitimate interest in the revelation that she did in fact have a drug problem. In *A v B and C*[113] Lord Woolf went further, finding that there was a public interest in the extra-marital affairs of a professional footballer, even though he had not courted publicity or previously brought the subject of his family life to the attention of the public; that conduct which in the case of private individual wound not be the appropriate subject of comment can be so in the case of a public figure.

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111 *Mutch v Sleeman* (1928) 29 SR (NSW) 125.
112 *Woodward v Hutchings* [1977] 2 All ER 751 (CA).
113 *A v B and C* [2002] 2 All ER 545 (CA).

The decision in *A v B and C* stands on dubious foundations if the rules set down in *Chappell* with its link to the marketplace of ideas and maintenance of democracy theories provide the justification for the private lives of public figures being matters of public interest. In the New Zealand High Court decision of *P v D*[114] Nicholson J, in a brief assessment of legitimate public concern, considered there to be no public interest in the plaintiff's previous psychiatric troubles or institutionalisation. Nicholson J found on the facts that the matter did not impact on the performance of the plaintiff's public activities, nor had his mental health been brought to the public's attention previously. This finding accords well with the law as proposed in *Chappell* which it is argued, should form the basis of the recognition of legitimate public concern in matters pertaining to individuals that would otherwise receive the protection of the law.

The question of how the media's duty arises in these circumstances can be addressed if recognition is also given to the importance of the media in supporting the public's decision making on social and moral matters. It is said that modern media fills a void in the proliferation of this type of information that has been brought about by large populations and anonymous and impersonal lifestyles.[115] The interest in the private lives of others and the way in which the lessons learned by others shape our own behaviour, reflects the universal human interest in the way we live, and the less intimate communities that typify modern society. As was noted by Lord Woolf in *A v B and C*[116] public figures play a significant role in shaping societal norms, they set examples (as well as the fashion), they endorse products, they live lives that many aspire to. If this is accepted, then provided that there is justification for the public to be concerned in the relevant of their private lives, there can be found a corresponding duty on the media to communicate it.

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114 *P v D* [2000] 2 NZLR 591 (HC).

115 F Zimmerman "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort" (1983) 68 Cornell L Rev 291, 333.

116 *A v B and C* [2002] 2 All ER 545 (CA).

VI THE QUALIFIED PRIVILEGE FORMULA

The principles that determine the media's qualified privilege to publish fact and comment on a matter of legitimate public concern, to be considered following the prima facie establishment of an action in defamation, breach of confidence or invasion of privacy, can thus be summarised as follows:

The privilege will arise in circumstances where there is legitimate public concern in the matter being published to the extent that the audience receiving the information has a legitimate interest in receiving the information, and the publisher of that information has a corresponding duty to communicate it.

Given the potential reach of the media, the interest of the audience will be legitimate where it arises from a broad, if not the entire, section of the public; and where the interest displays direct reference to the marketplace of ideas or maintenance and support of democracy theories, or is to protect the audience from harm. The interest can extend into the private lives of individuals provided that the matter either affects the capacity of the individual to perform their public functions, or it is a matter that has been brought into the public domain by the individual themselves.

If the interest is so established, the media, through its role as the primary communicator of information to the public, will then have a duty to provide to them information concerning that matter, provided that there are no other appropriate avenues for the disclosure of that information.

The qualified privilege arising from that reciprocal interest and duty may be lost if the publication was motivated by ill will towards the plaintiff, or if responsible journalism, as evidenced through the steps taken to ensure accuracy, balance and fairness in the publication, is not exercised.

A The Impact on Campbell

If such an approach had been adopted in *Campbell* the decision would have been far easier for the House of Lords to agree upon. There is little doubt that the information contained in the article, even if broken down into its constituent parts, would have been sufficient to establish a prima facie finding of invasion of Ms Campbell's privacy. The article disclosed private information about her that the objective reasonable person would find offensive; the fact of her drug addiction and treatment, and the location and admittedly erroneous details of her counselling sessions at Narcotics Anonymous. The issue of the accompanying photographs is less clear, as in themselves they did not convey any information that could be termed offensive, but through the accompanying narrative they also conveyed the fact of her treatment.

Having established a prima facie invasion of her privacy, the next question should have been whether there was a legitimate public concern in that information. The court held, correctly, that the public were entitled to receive the information due to Ms Campbell's public profile and the fact that she had made previous public statements to the effect that she did not take recreational drugs. The public's interest in the private behaviour of a public figure was thus triggered because, under the approach outlined in *Chappell*, she had made it a matter of public interest herself. The media's duty to communicate the information existed through its place as the conduit of information of interest to the public and the absence of a more appropriate avenue for the disclosure of the information. The existence of this duty is further strengthened by the fact that her previous denials, the record of which the Mirror was setting straight, had been issued through the media.

The final question of whether the Mirror had exercised journalistic responsibility in the preparation and publication of the article would also, it is argued, be able to be made out by the defendant. There is no question as to the fact that Ms Campbell was attending Narcotics Anonymous and therefore was a drug addict. The very fact

that she was photographed exiting a counselling session substantiated this. While there were some errors in fact regarding the history and frequency of her attendance at these sessions, these were minor details within the bigger picture of the disclosure of her addiction and treatment. Taken as a whole, and in the deadline context of publication, the information was essentially accurate.

The original publication could also not be considered unbalanced or unfair. As was noted by their Lordships, the tone of the publication was sympathetic and supportive. Ms Campbell's spokeswoman had been approached for comment, although none was given. The articles published following the commencement of legal proceedings were far less balanced, however by this stage the information of her addiction and treatment were already public knowledge and the critical statements comment.

Thus under a qualified privilege approach, the Mirror should have escaped liability. However, had the critical element of Ms Campbell's prior public denial's not been present, the reciprocal interest and duty would not have arisen, and regardless of the degree of responsibility shown by *the Mirror*, her claim against them would have been upheld.

VII CONCLUDING COMMENTS

The author has argued that an approach that offers qualified privilege to media organisations in cases of defamation, breach of confidence and privacy allows for sufficient accommodation of the public interests at stake. It also offers all concerned a far greater degree of legal certainty than exists currently, particularly in regards to our developing tort of invasion of privacy.

There will inevitably be potential for grey areas to emerge within the determination of the reciprocal interest and duty and the exercise of journalistic responsibility in relation to particular publications. The presumption that matters of public import

are made known and expectation that the media ensures accuracy, balance and fairness in any publication, are, however, uncontentious. Indeed without these the media's credibility is undermined, and its communications will cease to be believed or heeded, be they true or false, important or trivial.