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Under the spotlight: Private lives of public people in Germany and New Zealand

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**UNDER THE SPOTLIGHT:
PRIVATE LIVES OF PUBLIC PEOPLE
IN GERMANY AND NEW ZEALAND**

RESEARCH PAPER

CENSORSHIP AND FREEDOM OF EXPRESSION (LAWS 520)

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ABSTRACT

This paper analyses primarily the legal framework related to the publication of photographs of and reports on the private lives of celebrities and their children both under German and New Zealand law. The analysis focuses on statutory and common law and provides a comparative work.

The competing rights are the freedom of expression and the right to privacy. It is unlikely that something that takes place in a public place gives rise to legal liability. Celebrities are expected to deal with robust persistence on the part of the media that might otherwise be unacceptable.

This paper suggests that as far as the position of adults is concerned the approach taken by New Zealand courts is preferable and no new general tort of intrusion is needed. Current limitations imposed by German law are not reasonable and the freedom of expression is not adequately guaranteed. This paper also suggests that New Zealand courts should reconsider children's special position and adopt a pro-children approach.

The text of this paper (excluding abstract, table of contents, footnotes, and bibliography) comprises 16348 words.

Public figures-Privacy Law-Germany-New Zealand

I. INTRODUCTION

News, gossip and paparazzi. The fight between celebrities and the media, especially photographers, is constant. Their relationship can almost be described as a love-hate relationship. Celebrities need the media, either to promote their new album, or film, or fashion collection. However, in their songs famous musicians ask for respect of their privacy.¹ In the name of privacy, some are even prepared to go beyond what is needed. Actors and performers like Seal, Hugh Grant and Jude Law have been caught attacking photographers. Apparently, Jude Law was arrested after the attack (and released on bail later).² These events indicate the nature of this volatile relationship.

The competing rights are the freedom of the press and reporting (as specific forms of the freedom of expression)³ and individual's right to control the use of their image and privacy rights in general respectively.⁴ This paper analyses primarily the legal framework of relevant German law (including the implications of ECtHR's landmark judgement in *Caroline of Hannover v Germany (of Hannover)* on the German approach) and the situation in New Zealand, focusing on both statutory and common law, and provides some comparative aspects.⁵ In particular, the analysis focuses on photographs as "a picture is `worth a thousand

¹ Lindsay Lohan in "Rumors" (2004); Britney Spears in "Piece of Me" (2007).

² Jude Law Arrested over Photographer 'Attack' [www. telegraph.co.uk](http://www.telegraph.co.uk) (accessed 1 May 2009).

³ For the sake of convenience, this paper refers only to the freedom of expression in general unless a reference to the freedom of the press or reporting is necessary.

⁴ This paper does not address the rights of celebrities' companions in general but limits the analysis to the position of children.

⁵ Issues of criminal law will not be addressed. This paper does not address the publication of false or misleading facts either.

words' because it adds to the impact of what the words convey; but it also adds to the information given in those words."⁶

While it is important to differentiate between something that happens in a private place ("door-stepping"),⁷ and something that takes place in a public place, which is unlikely to give rise to legal liability, generally speaking, celebrities are expected to deal with "robust persistence on the part of the media that might otherwise be unacceptable."⁸

This paper concludes by suggesting that the current limitations imposed by German law are not reasonable and freedom of expression is not adequately guaranteed. It appears to be that, generally speaking, celebrities' private lives are overprotected. In contrary, the situation in New Zealand suggests an adequate pro-free speech approach. As a matter of fact, present law and existing avenues provide sufficient protection of celebrities' privacy from the media and so there is no need for a new general tort of intrusion in New Zealand. At the same time, this paper suggests that New Zealand courts should take children's special position into account and adopt a pro-children approach.

⁶ *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457 [*Campbell*], para 155 Baroness Hale.

⁷ Eric Barendt "Privacy and freedom of speech" in Andrew T Kenyon and Megan Richardson (eds) *New Dimensions in Privacy Law. International and Comparative Perspectives* (Cambridge University Press, New York, 2006) 11, 14.

⁸ *Laws v TV3 Network Services Ltd* (6 March 1996) Broadcasting Standards Authority 1996-024 [*Laws*].

II. THE GERMAN APPROACH

Public figures and their private lives have always been at the centre of public discussion, and especially the target of the tabloid press. Only recently the German Federal Court of Justice (FCJ) published its decision in *Andrea Casiraghi v RTL Television (Casiraghi v RTL)*.⁹ Once again, a member of the Grimaldi Family Dynasty had filed a complaint relating to an alleged breach of their privacy rights. Princess Caroline of Monaco (Princess Caroline) has long fought against her private life becoming published and she has fundamentally contributed to the development of celebrities' rights in Europe. Even the German Federal Constitutional Court (FCC)¹⁰ and the European Court of Human Rights (ECtHR)¹¹ heard cases that dealt with photographs showing her private life: "Pure happiness", "Caroline... a woman returning to life", "Out and about with Princess Caroline in Paris" and "The kiss. Or: they are not hiding anymore".¹² The FCC accepted that "the need for protection has increased as a result of developments in camera technology and the availability of small cameras."¹³ However, in this recent case, *Casiraghi v RTL*, the court dismissed the action and took a pro-paparazzi approach.

⁹ *Andrea Casiraghi v RTL Television* (10 March 2009) BGH VI ZR 261/07 [*Casiraghi v RTL*].

¹⁰ See generally: *Caroline II* [1999] 101 BVerfGE 361 (DE) (FCC) [*Caroline II*].

¹¹ *Caroline of Hannover v Germany* [2005] 40 EHRR 1 (Section III, ECHR) [*of Hannover v Germany*].

¹² *Ibid*, para 50 (emphasis added).

¹³ Federal Constitutional Court "Standards of constitutional law applying to the admissibility of photojournalism concerning the private and everyday life of celebrities" (18 March 2008) Press Release No 35/08.

A. *The Individual's Right to Control the Use of Their Image and The Right to Privacy*

1. *Articles 1(1) and 2(1) of the Basic Law for the Federal Republic of Germany*

At the centre of the disputes is the individual's right to control the use of their image. This right is part of the individual's personality rights (*Allgemeines Persönlichkeitsrecht*) protected under the German constitution encompassing, inter alia, the right to control the use of the image (*Recht am eigenen Bild*), the right to privacy (which is not limited to photographs, *Schutz der Privatsphäre*), and the right of informational self-determination (*Recht auf informationelle Selbstbestimmung*).¹⁴ The concept of personality rights was developed through case law. Courts ruled that the rights are based on articles 1(1) and 2(1) of the Basic Law for the Federal Republic of Germany (Basic Law).¹⁵ "The scope of protection provided by the general right of personality of parents is enhanced by articles 6(1) and 6(2) (special protection of family life) of the Basic Law."¹⁶ The pivotal point is that personality rights are important for every individual's well-being. As a matter of fact, even public figures "must be able to enjoy a 'legitimate expectation' of protection of and respect for their private life."¹⁷

Individual's right to control the use of their image and the right to privacy are inevitably linked when it comes to the publication of photographs of public figures. Generally speaking, disputes usually involve photographs of public figures *in private*. Basically, the right to control the use of the image means that every individual has the right to decide whether and under which circumstances a

¹⁴ *Spickmich.de* (23 June 2009) Federal Court of Justice VI ZR 196/08 [*Spickmich.de*], para 28.

¹⁵ *Schacht-Leserbrief* [1954] 13 BGHZ 334, 338 (DE) (FCJ) [*Schacht-Leserbrief*].

¹⁶ *Caroline II*, above n 10.

¹⁷ *Of Hannover v Germany*, above n 11, para 69.

photograph may be taken *and* published.¹⁸ The right to privacy relates both to particular *matters* that are generally deemed to be *private* (diary notes, sexuality, medical history, confidential communication) and “to a physical *space* in which the individual can recover, relax and also let him- or herself go.”¹⁹ This also applies to public figures.²⁰

In addition to the different aspects of personality rights (the right to control the use of the own image, right to privacy), case law also suggests to distinguish between different spheres (degrees) of protection: the sphere related to the social life (*Sozialsphäre*), private life (*Privatsphäre*) and intimate life (*Intimsphäre*).²¹ The social life sphere addresses matters (photographs) related to individual’s environment and their *being in public*, such as their occupation or function. The private life sphere encompasses the individual’s home and family, holidays,²² or illness.²³ The intimate life sphere addresses, inter alia, issues (photographs) related to their sexuality. According to case law publications (photographs) in relation to the intimate life enjoy more protection than publications (photographs) concerning the private life or social life.²⁴ Indeed, the publication of facts related to the intimate life sphere is per se not permissible and unjustifiable.²⁵ In contrary,

¹⁸ *Ernst August of Hannover v Klambt-Verlag GmbH & Cie* (6 March 2007) Federal Court of Justice VI ZR 53/06, para 5; *Das Recht am eigenen Bild (Teil 1)* www.presserecht-aktuell.de (accessed 19 October 2009).

¹⁹ *Caroline II*, above n 10, para 39 (emphasis added).

²⁰ *Ibid*, para 39.

²¹ See generally: *Spickmich.de*, above n 14, para 30.

²² *Oliver Kahn v Gruner + Jahr AG & Co KG* (3 July 2007) Federal Court of Justice VI ZR 164/06 [*Oliver Kahn*], para 13.

²³ *Ernst August of Hannover v Heinrich Bauer Zeitschriften Verlag KG* (14 October 2008) Federal Court of Justice VI ZR 272/06 [*of Hannover v HBZ*], para 20.

²⁴ *Kannibale von Rotenburg* (26 May 2009) Federal Court of Justice VI ZR 191/08 [*von Rotenburg*], para 19; *Spickmich.de*, above n 14, para 31.

²⁵ *Andrea Casiraghi v Burda Senator Verlag GmbH* (23 June 2009) Federal Court of Justice VI ZR 232/08 [*Casiraghi v Burda*], para 7.

generally speaking, social life-related publications are permissible (subject to a strong countervailing interest, such as great harm to the reputation).²⁶

Note that individual's personality rights are not deemed to be absolute rights: "General personality rights are guaranteed only within the framework of the constitutional order."²⁷ Part of that constitutional order are the provisions of the Copyright Arts Domain Act (CADA) and the freedom of expression.²⁸

2. *Article 8 of the European Convention on Human Rights*

In addition, article 8 of the European Convention on Human Rights (ECHR), which contains basic and human rights addressing the signing states (such as Germany and the United Kingdom), also protects privacy rights and family life.²⁹ Article 8 of the ECHR protects the personal sphere and extends to an individual's image.³⁰ The ECtHR accepted that:³¹

The guarantee afforded by article 8 ... is primarily intended to ensure the development, without outside interference, of the personality of each individual in his [sic] relations with other human beings ... There is ... a zone of interaction of a

²⁶ *Spickmich.de*, above n 14, para 31.

²⁷ *Caroline II*, above n 19, para 89.

²⁸ See Part II B Freedom of the Press and Freedom of Reporting and Part II C Limitations under the Copyright Arts Domain Act.

²⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222 [ECHR], art 8; see also: International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171 [International Covenant on Civil and Political Rights], art 17; Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3 [Convention on the Rights of the Child], art 16. The United Kingdom incorporated the ECHR into national law: Human Rights Act 1998.

³⁰ *Of Hannover v Germany*, above n 11, para 50; *Peck v United Kingdom* (2003) 36 EHRR 41 [*Peck*], para 57.

³¹ *Ibid.*

person with others, even in a public context, which may fall within the scope of 'private life'.

3. *Princess Caroline v The Press*

Princess Caroline has long fought against her private life becoming public and challenged the press. Indeed, numerous disputes involving her private life have contributed to the development of public figures' rights. For instance, in March 2007 the FCJ published six decisions involving Princess Caroline and her husband fighting against the publication of photographs.³² She brought also an action against Germany before the ECtHR for an alleged breach of her privacy rights as guaranteed by article 8 of the ECHR.³³ German courts had denied her any protection against the publication of photographs showing the princess in public places, such as at a farmer's market or at a swimming pool. The photographs did not involve "harassment or significant press intrusion"³⁴ or the intimate life sphere but concerned the sphere related to her private life. Although the ECtHR acknowledged the importance of the press, the freedom of expression and the crucial role the press plays in a democratic society when dealing with matters of public interest, the claim was upheld. The court decided that the publication of photographs showing the princess in public places in her daily life infringed her right to privacy under article 8 of the ECHR.³⁵ Indeed, it was accepted that "an individual's private life can include ordinary activities ... which are not public in any sense beyond the fact that they are conducted in a street or

³² (6 March 2007) Federal Court of Justice VI ZR 13/06; (6 March 2007) Federal Court of Justice VI ZR 14/06; (6 March 2007) Federal Court of Justice VI ZR 50/06; (6 March 2007) Federal Court of Justice VI ZR 51/06; (6 March 2007) Federal Court of Justice VI ZR 52/06; (6 March 2007) Federal Court of Justice VI ZR 53/06.

³³ *Of Hannover v Germany*, above n 11.

³⁴ *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446 [*Murray*], para 43.

³⁵ ECHR, above n 29, art 8.

some other public place.”³⁶ This landmark judgement lead to a change of jurisprudence in Germany.³⁷

B. Freedom of the Press and Freedom of Reporting

1. Article 5(1) of the Basic Law for the Federal Republic of Germany

Both freedom of the press and freedom of reporting are protected under article 5(1) of the Basic Law. Basically, the article provides that the “freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed ... there shall be no censorship.”³⁸ In *of Hannover*, the ECtHR held that the freedom of expression is not limited “to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference” but extends to information “that offend[s], shock[s] or disturb[s].”³⁹ Indeed, “journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.”⁴⁰

The freedom of the press includes the right to publish photographs of individuals (requiring, however, the media to consider individual’s personality rights).⁴¹ However, the ECtHR acknowledged that “photos appearing in the

³⁶ *Murray*, above n 34, para 43.

³⁷ *Ernst August of Hannover v Ehrlich & Sohn GmbH & Co KG* (6 March 2007) Federal Court of Justice VI ZR 50/06 [*of Hannover v Ehrlich I*]; *Caroline of Hannover v Ehrlich & Sohn GmbH & Co KG* (6 March 2007) Federal Court of Justice VI ZR 51/06 [*of Hannover v Ehrlich II*] see Part II C Limitations under the Copyright Arts Domain Act.

³⁸ Basic Law for the Federal Republic of Germany [Basic Law], art 5(1).

³⁹ *Of Hannover v Germany*, above n 11, para 58.

⁴⁰ *Ibid.*

⁴¹ *Wer wird Millionär?* (11 March 2009) Federal Court of Justice I ZR 8/07 [*Wer wird Millionär?*], para 14.

tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution.⁴² Media rights encompass the right to report (in an entertaining way) on a celebrity's daily or private life including reports targeting their social circles, especially on persons that are close to them ("infotainment", entertainment press).⁴³ As a matter of fact, "the fact that the press fulfills the function of forming public opinion does not exclude entertainment from the functional guarantee under the Basic Law."⁴⁴ German courts held on several occasions that entertainment "can sometimes even stimulate or influence the formation of opinions more than purely factual information."⁴⁵ The FCC accepted that entertainment can also fulfill important social functions.⁴⁶ The freedom of the press also encompasses the right to advertise the relevant material (as the advertising contributes to the dissemination of the information).⁴⁷

Note that the freedom of the press and reporting is inevitably linked with the public's legitimate interest to be informed. The media is exercising the *public's right to know* given the right to decide on the content of the publication and what is deemed to be of public interest.⁴⁸ In a landmark judgement the FCC held that:⁴⁹

⁴² *Of Hannover v Germany*, above n 11, para 59.

⁴³ *Ibid*, para 54; *Of Hannover v HBZ*, above n 23, para 14; Renate Damm and Klaus Rehbock *Widerruf, Unterlassung und Schadensersatz in den Medien* (3 ed, C H Beck, Munich, 2008), para 191.

⁴⁴ *Caroline II*, above n 10, para 98.

⁴⁵ See generally: *Ibid*.

⁴⁶ *Ibid*, para 99.

⁴⁷ *Marlene Dietrich II* [2002] 151 BGHZ 26, 30 (DE) (FCJ) [*Marlene Dietrich II*]; *Wer wird Millionär?*, above n 41, para 28.

⁴⁸ See generally: *Oliver Kahn*, above n 22, para 8; See Part II C 1 Aspect of contemporary society.

⁴⁹ *Caroline II*, above n 10, para 105.

The kernel of press freedom and the free formation of opinions requires the press to have, within legal limits, sufficient margin of manoeuvre to allow it to decide, in accordance with its publishing criteria, what the public interest demands, and the process of forming opinion to establish what amounts to a matter of public interest [...] entertaining coverage is no exception to these principles.

However, “it is often in the name of a one-sided interpretation of the ... freedom of expression ... that the media invade people’s privacy, claiming that their readers are entitled to know everything about public figures.”⁵⁰

Media rights are not absolute. They “find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour,”⁵¹ such as the provisions of the CADA, personality rights under the civil law or the right to respect for the private and family life under article 8 of the ECHR.⁵²

2. *Article 10 of the European Convention on Human Rights*

In addition to article 5(1) of the Basic Law, the freedom of expression is protected by article 10 of the ECHR.⁵³ It is this right that has to be balanced against individual’s right to protection of the private and family life under article 8 of the ECHR. Both rights are of equal fundamental importance to a democratic society.⁵⁴

⁵⁰ Council Resolution (EC) 1165/98 Right to Privacy www.assembly.coe.int (accessed 1 November 2009).

⁵¹ Basic Law, above n 38, art 5(2); See Part II C 1 Aspect of contemporary society.

⁵² See Part II C Limitations under the Copyright Arts Domain Act.

⁵³ ECHR, above n 29, art 10; see also: International Covenant on Civil and Political Rights, above n 29, art 19.

⁵⁴ Council Resolution (EC) 1165/98 Right to Privacy, above n 50.

C. *Limitations under the Copyright Arts Domain Act*

Neither individual's personality rights nor media rights are deemed to be absolute rights.⁵⁵ The CADA addresses the right to control the use of the image striking the balance between the competing rights at issue.⁵⁶ Sections 22 and 23 of the CADA are deemed to be provisions justifying a limitation of the freedom of expression and personality rights.⁵⁷ Section 22 of the CADA states that generally an individual's consent is needed to *publish* photographs (the personality rights under the constitution are not limited to publishing but extend to *taking* photographs). In contrary, section 23(1) of the CADA provides that in some circumstances, even where no consent is given, it is permitted to *publish* photographs. For instance, it is permitted to publish photographs related to an aspect of contemporary society. However, this does not apply (and the (further) publication of the photographs is not covered by the CADA) where a legitimate interest of the individual concerned is given.⁵⁸

1. *Figures of contemporary society par excellence v relatively public figures*

German case law has always distinguished between figures of contemporary society par excellence (*absolute Person der Zeitgeschichte*) and relatively public figures (*relative Person der Zeitgeschichte*) within the context of aspect of contemporary history and granted different degrees of protection

⁵⁵ *Ernst August of Hannover v Axel Springer Verlag AG* (14 October 2008) Federal Court of Justice VI ZR 256/06 [*of Hannover v Springer*].

⁵⁶ Copyright Arts Domain Act 1907 (DE), ss 22, 23.

⁵⁷ *Of Hannover v HBZ*, above n 23, para 12.

⁵⁸ Copyright Arts Domain Act, above n 56, s 23(2).

according to the classification. An individual considered to be a relatively public figure (the accused, victims) would enjoy more protection than a figure of contemporary society par excellence (members of royal families, scientists, athletes, politicians). According to case law figures of contemporary society par excellence are:⁵⁹

People who [in contrary to relatively public figures] have not only aroused public interest at a certain point on the occasion of a particular historical event but who, on account of their status and importance, attract the public's attention in general and not just on the odd occasion.

In contrary, a relatively public figure is someone that is merely temporarily involved in public affairs. Public's legitimate interest to be informed on aspects of contemporary society involving a relatively public figure is limited to such public affairs which made the individual concerned a relatively public figure (making the context (the event) and aspect of contemporary society the crucial factors).⁶⁰

Generally speaking, according to the earlier approach, a figure of contemporary society par excellence's "right to protection of private life stopped at their front door."⁶¹ "Even if the constant hounding by photographers made [the] daily life difficult, it arose from a legitimate desire to inform the general public."⁶² However, the FCJ accepted that even public figures are entitled to respect of their privacy. "Outside their home, however, they could not rely on the protection of their privacy unless they had retired to a secluded place – away from the public

⁵⁹ *Caroline II*, above n 10, para 106; *Abmahnbar* (25 June 2009) District Court of Frankfurt 2-03 O 179/09 [*Abmahnbar*].

⁶⁰ *Abmahnbar*, above n 59; Arnold Vahrenwald "Photographs and Privacy in Germany" (1994) 6 Ent LR 205, 214.

⁶¹ *Of Hannover v Germany*, above n 11, para 20 referring to *Caroline of Monaco v Hubert Burda Media GmbH & Co KG* (4 February 1993) District Court of Hamburg [*of Monaco v HBM*].

⁶² *Ibid*, para 21.

eye" (*örtliche Abgeschiedenheit*).⁶³ Consequently, the FCJ denied an infringement in relation to photographs showing the Princess Caroline shopping or bicycling in public places and held that the publication of photographs showing the Princess Caroline together with her former partner dining at "the far end of a restaurant courtyard with the clear aim of being out of the public eye"⁶⁴ infringed her right to privacy as the photographs at issue "had been taken secretly and/or by catching unawares a person who had retired to such a place."⁶⁵ The court accepted that:⁶⁶

[I]t was objectively clear to everyone that they [Princess Caroline and her former partner] wanted to be alone and [...], confident of being away from prying eyes, they behaved in a given situation in a manner in which they would not behave in a public place.

Accordingly, the FCC accepted the criterion of a secluded place ("privacy ... is not restricted to the domestic sphere ... seclusion ... is the prerequisite for the protection of privacy outside the domestic sphere")⁶⁷ and stated that:⁶⁸

The criterion of a secluded place takes account of the aim, pursued by the general right to protection of personality rights, of allowing the individual a sphere, including outside the home, in which he does not feel himself to be the subject of permanent public attention – and relieves him of the obligation of behaving accordingly – and in which he can relax and enjoy some peace and quiet ... it does not impose a blanket ban on pictures of the daily or private life of figures of contemporary society, but allows them to be shown where they have appeared in public. In the event of an overriding public interest in being informed, the freedom of the press can even ... be given priority over the protection of the private sphere.

⁶³ Ibid, para 23; contrast: *Of Hannover v Germany*, above n 11.

⁶⁴ *Of Hannover v Germany*, above n 11, para 23 referring to *of Monaco v HBM*, above n 61.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ *Caroline II*, above n 10, para 42.

⁶⁸ Ibid, para 111.

Basically, public figures had to accept to “be photographed at almost any time, systematically, and that the photos are then very widely disseminated even if ... the photos and accompanying articles relate exclusively to details of [their] private [or everyday] life,”⁶⁹ such as photographs related to public figures on their way to the market or on a bicycle.⁷⁰ They had to accept the publication of photographs showing their daily life in public places as “the public ha[s] a legitimate interest in knowing where [they are] staying and how [they behave] in public.”⁷¹

In *of Hannover*, the ECtHR doubted whether distinguishing a figure of contemporary society par excellence from a relatively public figure or the classification itself would be sufficient to protect the individual’s private life and asked for clear criteria.⁷²

Indeed, recent case law suggests a change of jurisprudence.⁷³ It seems that German courts have accepted the need for a general case-by-case decision rather than granting different degrees of protection based on whether the individual concerned is deemed to be a figure of contemporary society par excellence or a relatively public figure. In *Ernst August of Hannover v Heinrich Bauer Zeitschriften Verlag KG*, the FCJ changed the criteria and referred to public figures (*Person des öffentlichen Interesses*), politicians, and ordinary person.⁷⁴ In

⁶⁹ *Of Hannover v Germany*, above n 11, para 74.

⁷⁰ *Ibid*, paras 2-10.

⁷¹ *Ibid*, para 23 referring to *of Monaco v HBM*, above n 61; contrast: *Of Hannover v Germany*, above n 11, para 77.

⁷² *Ibid*, paras 72-75.

⁷³ Christoph Teichmann “Abschied von der absoluten Person der Zeitgeschichte” (2007) NJW 1917.

⁷⁴ *Of Hannover v HBZ*, above n 23, para 18.

Oliver Kahn v Gruner + Jahr AG & Co KG, the FCJ referred in its decision to the *previously* so-called figures of contemporary society.⁷⁵ This new approach is more flexible and has been approved by the FCC.⁷⁶ However, courts' approach has not been uniform. In *Abmahnbar*, a recent decision addressing the question whether a lawyer, based on its work-related popularity, is deemed to be a public figure, the court still applied the old approach and referred to figures of contemporary society par excellence and relatively public figures.⁷⁷

This new approach (giving up the classification) seems preferable. Referring, however, to the criterion of a secluded place and stating that "they behaved [...] in a manner in which they would not behave in a public place"⁷⁸ does not give due regard to the fact that although the individuals at issue might not have been at the centre of the public (or restaurant respectively), they were still in a public place. Although the FCC admitted that it is not the individual's decision to define a place as part of the protected sphere "but the objective characteristics of the place at the time in question,"⁷⁹ there are still difficulties involved. How much seclusion is needed? Is the far end of the restaurant itself sufficient (Princess Caroline and her former partner were sitting in the restaurant courtyard)? What if the lighting of the restaurant is bright and insufficient to provide any kind of privacy? It seems quite clear that the criteria as set out by the FCJ seem to be arbitrary.

⁷⁵ *Oliver Kahn*, above n 22, para 9.

⁷⁶ *Caroline III* [2008] 120 BVerfGE 180 (DE) (FCC) [*Caroline III*].

⁷⁷ *Abmahnbar*, above n 59.

⁷⁸ *Of Hannover v Germany*, above n 11, para 23 referring to *of Monaco v HBM*, above n 61.

⁷⁹ *Caroline II*, above n 10, para 43.

2. *Aspect of contemporary society*

It is lawful to publish (without consent), inter alia, photographs related to an aspect of contemporary society.⁸⁰ Courts have not, however, provided a general definition of what aspect of contemporary society is. Case law suggests a broad interpretation (giving due regard to the importance of the press), encompassing any aspect of general social interest and public importance⁸¹ and which is not limited to historically or politically important events.⁸² The application of aspect of contemporary society is dictated by the legitimate interest of the public. It is widely held that the public has a legitimate interest to be informed and the press has a corresponding right to report on any aspect of general social interest.⁸³ The media has the right to decide what issues are deemed to be aspects of general social interest and worthy of reporting.⁸⁴ Thus, even celebrities' lifestyle or daily life could be relevant for discussing an aspect of general social interest.⁸⁵ "Many people base their choice of lifestyle on their example. They become points of crystallisation for adoption or rejection and act as examples or counter-examples."⁸⁶ The FCC acknowledged, in relation to figures of contemporary society par excellence, that:⁸⁷

The public has a legitimate interest in being allowed to judge whether the personal behaviour of the individuals in question, who are often regarded as idols or role models, convincingly tallies with their behaviour on their official engagements.

⁸⁰ Copyright Arts Domain Act, above n 56, s 23 (1); *Abmahnbar*, above n 59.

⁸¹ *Casiraghi v RTL*, above n 9, para 10; *Abmahnbar*, above n 59.

⁸² *Wer wird Millionär?*, above n 41, para 14.

⁸³ *Ernst August of Hannover v WZV Westdeutsche Zeitschriften Verlag GmbH & Co KG* (6 March 2007) Federal Court of Justice VI ZR 13/06, para 14.

⁸⁴ *Casiraghi v RTL*, above n 9, para 10.

⁸⁵ See generally: *Caroline III*, above n 76, para 60.

⁸⁶ *Caroline II*, above n 10, para 100.

⁸⁷ *Ibid*, para 107.

Before ECtHR's landmark decision in *of Hannover* the FCJ would consider any event an aspect of contemporary society where figures of contemporary society par excellence were the target of news reporting (using the lift, driving a car)⁸⁸ and grant protection only where the individual concerned had retired in a secluded place. The ECtHR ruled that no seclusion is needed when being in public merely for the protection of the privacy (but a case-by-case decision based on whether the publication contributes to a debate of general interest and the public figure has a legitimate expectation of privacy in that particular instance).⁸⁹ It seems reasonable to accept that, for instance, the use of a lift itself is without more not an aspect of contemporary society.

Indeed, the FCJ held on several occasions that for purposes of section 23(1)(1) of the CADA (aspect of contemporary society) a balancing act between the freedom of the press (which is inevitably linked with public's legitimate interest) and the individual's personality rights is needed (where according to the earlier approach section 23(2) of the CADA (legitimate interest) was at the centre of the balancing exercise).⁹⁰ As a matter of fact, according to the approach taken in decisions post-*of Hannover*, not only section 23(2) of the CADA requires a balancing act but also for the purposes of aspect of contemporary society in terms of section 23(1)(1) of the CADA a balancing of the competing rights is needed. Especially in the world of entertainment there is a need to balance the competing rights and, in particular, to respect privacy rights.⁹¹ The ECtHR acknowledged that "photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion

⁸⁸ See generally: Teichmann, above n 73, 1918.

⁸⁹ *Of Hannover v Germany*, above n 11, paras 76-80.

⁹⁰ *Casiraghi v Burda*, above n 25, para 7; *Wer wird Millionär?*, above n 41, paras 12, 15; *of Hannover v HBZ*, above n 23, para 10.

⁹¹ *Of Hannover v Springer*, above n 55, para 13.

into their private life or even of persecution.”⁹² This new approach is more flexible and has been approved by the FCC.⁹³

Case law suggests to strike the balance context-related on a case-by-case decision.⁹⁴ Hence, while a photograph published within one context might not be covered by the provisions of the CADA published within a different context might be permissible. It is necessary to provide a link to an aspect of contemporary society. Thus, photographs ought not to be published merely for the sake of satisfying the public’s curiosity about celebrities’ private lives (severe illnesses,⁹⁵ holidays,⁹⁶ or birthday parties). Photographs can not be evaluated separately but must be seen in context with the accompanying broadcasting reports and articles (which might provide the required contribution to the public opinion and link missing in the photographs).⁹⁷ It is crucial that the broadcasting reports, articles, or photographs are informative and relevant and have some value that contributes to the public opinion or a debate of general interest respectively.⁹⁸ When reporting on politicians the press might exercise “its vital role of ‘watchdog’ in a democracy by contributing to impart[ing] information and ideas on matters of public interest.”⁹⁹ In *of Hannover*, the ECtHR, adopting the legitimate expectation of privacy approach (where German courts used to apply the criterion of seclusion), denied the existence of a corresponding contribution to a political or public debate of general interest in terms of reports and the publication of photographs related to “activities of a purely private nature such as engaging in sport, out walking,

⁹² *Of Hannover v Germany*, above n 11, para 59.

⁹³ *Caroline III*, above n 76.

⁹⁴ *Casiraghi v Burda*, above n 25, paras 7, 14.

⁹⁵ *Of Hannover v Springer*, above n 55.

⁹⁶ *Of Hannover v Ehrlich I*, above n 37; *of Hannover v Ehrlich II*, above n 37; *Oliver Kahn*, above n 22; *Sabine Christiansen* (1 July 2008) Federal Court of Justice VI ZR 243/06.

⁹⁷ *Casiraghi v Burda*, above n 25, para 7.

⁹⁸ *Casiraghi v RTL*, above n 9, para 10; *Of Hannover v Springer*, above n 55.

⁹⁹ *Of Hannover v Germany*, above n 11, para 63.

leaving a restaurant or on holiday”¹⁰⁰ where “the sole purpose ... was to satisfy the curiosity of a particular readership regarding the details of the applicant’s private life.”¹⁰¹

While I accept that the classification itself is insufficient to give due regard to the competing interests involved, I do not do so with the ECtHR’s general approach. The ECtHR seems to be more concerned with the lack of exercising an official function than with the general status of the Princess Caroline itself.¹⁰² In his concurring opinion, Barreto J accepted that public figures are “all those who play a role in public life” regardless of the performance of a function.¹⁰³ “Fame and public interest inevitably give rise to a difference in treatment of the private life.”¹⁰⁴

In *Wer wird Millionär?*, a case dealing with the publication of a photograph of the host of the German version of the television quiz show *Who Wants to Be a Millionaire?* on the cover of a quiz review, the FCJ accepted that even the caption can be relevant for the value of information of a publication.¹⁰⁵ It is crucial whether the press is dealing with the matter of public interest in a serious and relevant way contributing to the public opinion.¹⁰⁶ Generally, it is irrelevant how famous the individual concerned is as it is more about the value of the information. As a matter of fact, even where celebrities with a high degree of fame are at the centre of the reports, the reports have to have some informational value contributing to the public opinion.¹⁰⁷ Where the accompanying text’s only

¹⁰⁰ Ibid, para 61.

¹⁰¹ Ibid.

¹⁰² Ibid, paras 61-75.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ *Wer wird Millionär?*, above n 41, para 18.

¹⁰⁶ Ibid, para 20.

¹⁰⁷ *Oliver Kahn*, above n 22, para 9.

purpose is to justify an arbitrary publication of a public figure's image, a contribution to the public opinion is to deny.¹⁰⁸ As a matter of fact, in *Wer wird Millionär?*, the FCJ held that given the marginal value of information contained in the caption (*Günther Jauch demonstrates with the show Who Wants to Be a Millionaire? how exciting quiz can be*) lacking any other information the high degree of fame of the public figure concerned does not justify the publication. In that instance the only purpose of the text was to publish the public figure's image (without consent). The text (in context with the photograph at issue) conveyed nothing more than the (public) information that the individual concerned is the host of the show and that the show is exciting lacking any contribution to the public opinion. As a matter of fact, section 23(1)(1) of the CADA does not apply where the public figure's photograph is used for promotion purposes only without providing any additional contribution to the public opinion.¹⁰⁹ However, where the press is reporting on a public figure and the work is contributing to the public opinion it is admissible to use the public figure's image for promotion purposes (for instance on the cover).¹¹⁰ This gives due regard to the constitutional guarantee of the freedom of the press and reporting as the advertising is contributing to the dissemination of the information.¹¹¹ However, this does not apply where the use suggests that the public figure is the face of the corresponding product suggesting an identification with the product or a likelihood of association of general nature.¹¹²

It seems that in *Casiraghi v RTL* the court was right when deciding that the death of Prince Ranier III of Monaco was an aspect of contemporary society. The media were allowed to discuss within this given context the plaintiff's future role

¹⁰⁸ *Of Hannover v HBZ*, above n 23, para 16.

¹⁰⁹ *Wer wird Millionär?*, above n 41, para 26.

¹¹⁰ *Marlene Dietrich II*, above n 47.

¹¹¹ See Part II B Freedom of the Press and Freedom of Reporting.

¹¹² *Wer wird Millionär?*, above n 41, paras 31-32; *Marlene Dietrich II*, above n 47, para 11.

within the principality of Monaco and publish photographs showing the plaintiff in his spare time wearing casual wear.¹¹³

3. *Legitimate interest*

In addition to the required balance of the competing rights (the right to control the use of the image and freedom of expression) under section 23(1) of the CADA for the question whether an issue of contemporary society is concerned at all, section 23(2) of the CADA provides that a legitimate interest of the individual concerned prevents the (further) publication of the photographs requiring an additional balancing test. Case law does not provide a general definition of legitimate interest. Photographs are to be assessed in relation to the accompanying reports. It was held that an individual's legitimate expectation to be not the target of the press is not limited to what happens in a private place.¹¹⁴ For instance, individual's rights hold if the photographs were taken while being in isolated places or at home (using long lens photography),¹¹⁵ dining out and sitting in reserved parts of the restaurant,¹¹⁶ where photographs relate to severe illnesses,¹¹⁷ are used for advertising purposes, or have been manipulated.¹¹⁸ An infringement is also given where the photograph relates to a situation in which the individual can not control their being (at a funeral).¹¹⁹

¹¹³ *Casiraghi v RTL*, above n 9, paras 13-16.

¹¹⁴ See generally: *Of Hannover v HBZ*, above n 23, para 17.

¹¹⁵ *Casiraghi v RTL*, above n 9, para 15.

¹¹⁶ *Caroline II*, above n 10.

¹¹⁷ *Of Hannover v Springer*, above n 55.

¹¹⁸ *Dr Dr S v Verlagsgruppe Handelsblatt GmbH* (14 February 2005) BVerfG 1 BvR 240/04.

¹¹⁹ *Damm*, above n 43, para 289.

Both the FCJ and the FCC accepted that no protection ought to be granted where the publication concerns public figure's own publicly disclosed (intimate) information.¹²⁰ In addition, personality rights do not serve the individual's interest of the commercialisation of their own image or person respectively (to exclusively contract on the publication of private details). Individuals do not have the right "to be portrayed by others only as he or she views him- or herself or only as he or she wants to be perceived."¹²¹

Generally speaking, however, the FCJ seems to apply this provision primarily to notorious paparazzi shots considering the manner the information were obtained (covert photographing or by way of prying) whereas the ECtHR seems to adopt a broader interpretation.¹²² The FCC doubted whether "the mere fact of photographing the person secretly or catching them unawares can be deemed to infringe their privacy outside the home."¹²³

D. The Association of State Media Authorities for Broadcasting and The German Press Council

1. The Association of State Media Authorities for Broadcasting

According to the Basic Law the individual states are responsible for the broadcasting (standards). No central authority or code exists. The Association of State Media Authorities for Broadcasting (*Arbeitsgemeinschaft der Landesmedienanstalten*) coordinates the complaints procedure and forwards the complaints to the respective authority depending on whether public television and

¹²⁰ See generally: *von Rotenburg*, above n 24, para 26.

¹²¹ *Of Hannover v Germany*, above n 11, para 33; *von Rotenburg*, above n 24, para 26.

¹²² See generally: Teichmann, above n 73, 1919-1920.

¹²³ *Caroline II*, above n 10, para 113.

radio (to the broadcaster itself) or commercial television and radio (to the respective state media authority for broadcasting) are concerned.¹²⁴ The broadcasting standards address, inter alia, the protection of minors and the law in general but not privacy rights in particular. In addition, there are different committees and associations dealing with broadcasting standards.¹²⁵

2. *The German Press Council*

The German Press Council (*Deutscher Presserat*, GPC) is an independent self-regulatory body advocating the freedom of the press and dealing with complaints alleging a breach of the principles contained in the Press Code (*Pressekodex*).¹²⁶ Both the print media and online publications providing a journalistic and editorial content are subject to the jurisdiction of the GPC.¹²⁷ The Press Code contains 16 principles (responsible journalism, research standards) and protects, inter alia, privacy rights of individuals. An interference with privacy rights of public figures might be justified in the name of a legitimate public interest (depending on the context).¹²⁸ In addition, section 9 of the Press Code protects the individual's dignity (appropriate selection of photographs). For instance, the GPC held that the publication of the name and the photograph of a minor killing 15 people at a school (a public figure given the circumstances of the crime) does not infringe privacy rights.¹²⁹ The press is expected to publish the

¹²⁴ Programmbeschwerde www.programmkritik.de (accessed 11 November 2009).

¹²⁵ Association of State Media Authorities for Broadcasting in Germany www.alm.de (accessed 11 November 2009).

¹²⁶ The German Press Council www.presserat.de (11 November 2009).

¹²⁷ Complaints Procedure of the German Press Council, s 1.

¹²⁸ Press Code, principle 8(2).

¹²⁹ Pressemitteilungen 2009 www.presserat.info (accessed 11 November 2009).

corresponding reprimands. Compensation can not be awarded.¹³⁰ There is no right to appeal but complainants might apply for a review.¹³¹

E. Children's Position

Note that a “child has his [sic] own right to respect for his [sic] privacy distinct from that of his [sic] [famous] parents.”¹³² German courts have for a long time protected children's privacy rights (under articles 1(1), 2(1) and 6(1)(2) of the Basic Law)¹³³ regardless of the need of a sphere of seclusion in public places and accepted their special position: “children need special protection because they still have to develop into responsible persons.”¹³⁴ In its landmark decision in *Caroline II*, concerning, inter alia, photographs of Princess Caroline paddling with her daughter or comforting her son, the FCC accepted that “this need for protection extends as well to the protection of children from threats posed by the interest of the media and the consumers of media images of children.”¹³⁵ However, no protection is needed where the parents deliberately decide to attend public events together with their children exposing them to the media environment or where their children are at the centre of corresponding functions.¹³⁶

¹³⁰ Complaints Procedure of the German Press Council, s 15; Press Code, principle 16.

¹³¹ Complaints Procedure of the German Press Council, s 16.

¹³² *Murray*, above n 34, para 16.

¹³³ See also: International Covenant on Civil and Political Rights, above n 29, art 17; Convention on the Rights of the Child, above n 29, arts 16, 40(2)(vii), ECHR, above n 29, art 8.

¹³⁴ *Caroline II*, above n 10, paras 45-47; see also: *Charlotte Casiraghi I* (28 September 2004) Federal Court of Justice VI ZR 302/03.

¹³⁵ *Caroline II*, above n 10, para 45.

¹³⁶ See generally: *Ibid*, para 47.

In addition, on many other occasions German courts stated that, generally speaking, children's rights outweigh, such as where the media published photographs of Princess Caroline's baby taken in a public place.¹³⁷ Children of famous parents are also entitled to a space free of surveillance by the media (in public places) necessary for the free development of their own personality.¹³⁸ In *Charlotte Casiraghi*, the FCC held that the protection is not restricted to negative publications and accepted that photographs of Princess Charlotte Casiraghi with her mother Princess Caroline which were taken at the opening night of the ballet *Oeil pour oeil* in Monaco and included the caption *The same sensual mouth ... the same proud look* infringed the child's rights.¹³⁹ Note that at the centre of the dispute was not the photograph itself (as Princess Charlotte Casiraghi participated deliberately at the public event) but the caption. The content was held to be inappropriate to be attributed to a child. Courts accepted that even children of famous parents, like any *ordinary* children, have the right to be accompanied by their famous parents in public places without being the target of the press merely because of the presence of their parents or the sake of satisfying public's curiosity.¹⁴⁰ As a matter of fact, children are entitled to a private and everyday life with their famous parents outside their home and domestic sphere respectively without any media intrusion.

It seems, however, that the FCJ has recently adopted a slightly different approach. In *F and H Beckenbauer v Hubert Burda Media GmbH & Co KG*, Franz Beckenbauer, a famous former soccer player and coach, and his wife sought to protect their children (five and nine years old) from any media intrusion regardless of the context of (future) photographs for the time their children are

¹³⁷ *Alexandra of Hannover v Gong Verlag GmbH & Co KG* [2004] 160 BGHZ 298 (DE) (FCJ).

¹³⁸ *Charlotte Casiraghi II* (14 February 2005) Federal Constitutional Court 1 BvR 1783/02.

¹³⁹ *Ibid.*

¹⁴⁰ See generally: *Names suppressed* (31 March 2000) Federal Constitutional Court 1 BvR 1454/97, para 4.

under age.¹⁴¹ The FCJ, however, denied the existence of a general right to prohibit the taking of photographs of children (*Generalverbot*). The importance of the freedom of expression requires a balancing of the competing rights based on a case-by-case decision (regardless of whether the children involved are under age). The court acknowledged that children need a different degree of protection than adults but denied to accept that a balancing exercise is redundant wherever children are the target of the press, and especially where future photographs are concerned and the context of their publication is not known yet. There might be instances where publications involving children are justified by a legitimate public interest. As matter of fact, a general prohibition of the publication of photographs which might last many years is not a justified limitation of the freedom of the press.

F. *Quo Vadis Freedom of the Press and Freedom of Reporting?*

Recent developments are not convincing and limit media rights in an arbitrary and unjustifiable manner (the publication of a photograph showing Princess Caroline on a public street during her holidays related to an article on letting her holiday villa was held to be of general public interest given the current economic downturn: “Even the rich and beautiful live economically.”)¹⁴² The ECtHR’s approach in *of Hannover* might be due to “the campaign of harassment conducted against her [the Princess] by the German media”¹⁴³ and celebrities are often under the spotlight and it is necessary to award them some privacy even in public places, yet, limitations on the freedom of expression ought to be justified. Indeed, instances granting public figures a right to privacy in public must be limited given the fundamental importance of the freedom of expression. I admit

¹⁴¹ *F and H Beckenbauer v Hubert Burda Media GmbH & Co KG* (6 October 2009) Federal Court of Justice VI ZR 314/08 and VI ZR 315/08.

¹⁴² *Caroline III*, above n 76, paras 102-106.

¹⁴³ *Murray*, above n 34, para 59.

that a public figure's dinners or holidays are, without more, not issues to be considered aspects of contemporary society. But I am reluctant to accept that reports and photographs involving corresponding matters infringe a public figure's right to privacy. Although German courts accept that the work of the infotainment press is covered by the freedom of expression and that in principle, the quality of reports is irrelevant, it seems that the courts are not giving due regard to the fact that recent developments could possibly interfere with the work of the tabloid press and impact the institution tabloid press. The entertainment press is, by definition, supposed to entertain and to satisfy public's curiosity (at least to some degree). It seems doubtful to require within this context a contribution to a debate of general interest. In addition, although the current approach includes a general case-by-case decision where media interests are also to be addressed, the German approach is too formalistic and based on casuistry (general personality rights, right to control the use of the own image, right to privacy, spheres of protection, aspect of contemporary society, legitimate interest, ECHR, international instruments).

I must admit that the early approach taken by the courts pre-*of Hannover* is preferable (although the change towards public figures in general seems preferable). The situation was clear: In principle, a public figure's "right to protection of private life stopped at their front door."¹⁴⁴ As accepted by the ECtHR "the criterion of spatial isolation, although apposite in theory, is in reality too vague and difficult for the person concerned to determine in advance."¹⁴⁵ In addition, it is difficult for the media itself to decide ad hoc whether the individuals concerned in that particular instance are surrounded and protected by the sphere of seclusion. However, although the criterion of seclusion gives rise to concern it imposes less limitations on the freedom of the press than the current approach. It

¹⁴⁴ *Of Hannover v Germany*, above n 11, para 19 referring to *of Monaco v HBM*, above n 61.

¹⁴⁵ *Ibid*, para 75.

allows the press to report on public figures in public places (unless the circumstances justify a seclusion).

Being at the centre of the public is *part of the game*. However, the freedom of expression ought to be limited where the individual's life or health is endangered and the surveillance, monitoring and media intrusion assume to alarming proportions (significant harassment and intrusion), such as in the case of the Princess of Wales. The pivotal point seems to be that a public figure can not expect to be treated as an ordinary person. In his concurring opinion in *of Hannover*, Zupančič J hit the mark with his clear-cut statement:¹⁴⁶

[W]ho willingly steps onto the public stage cannot claim to be a private person entitled to anonymity. Royalty, actors, academics, politicians, ... perform whatever they perform publicly. They may not seek publicity, yet, by definition, their image is to some extent public property.

It seems reasonable, however, to accept the need for a special protection for children and to advocate corresponding developments (and to accept corresponding limitations of the freedom of the press).

III. THE SITUATION IN NEW ZEALAND

New Zealand law does not recognise an individual's right to control the use of their image or a general right to privacy but deals with the issues arising in this context mainly under the tort of breach of privacy. In addition, both the standards contained in the Codes of Broadcasting Practice and the principles by the NZPC address privacy rights. The New Zealand Bill of Rights Act 1990

¹⁴⁶ *Of Hannover v Germany*, above n 10, para 96.

(BoRA) does not contain a general right to privacy but the right to freedom of expression.¹⁴⁷

A. *Analysing the Legal Framework*

1. *Privacy Act 1993*

The Privacy Act 1993 deals primarily with the collection and disclosure of personal information, such as the publication of an image. However, the Privacy Act 1993 excludes, “in relation to its news activities,” any news medium¹⁴⁸ based on news media’s “special role in a democratic society.”¹⁴⁹ News activities concern news and current affairs.¹⁵⁰ In *Talley Family v National Business Review*, Bathgate J ruled that ordinary meaning is to be given to news and current affairs: “what is going on or what may happen.”¹⁵¹ Hence, the Privacy Act 1993 does not apply where private lives of celebrities are the target of news reporting.

¹⁴⁷ New Zealand Bill of Rights Act 1990, s 14.

¹⁴⁸ The Privacy Act 1993 applies to Radio New Zealand Ltd and Television New Zealand Ltd in relation to principles 6 (access to personal information) and 7 (correction of personal information), Privacy Act 1993, s 2(1).

¹⁴⁹ *Talley Family v National Business Review* (1997) 4 HRNZ 72 (CRT) [*Talley*]; John Burrows and Ursula Cheer *Media Law in New Zealand* (5 ed, Oxford University Press, Auckland, 2005) 275.

¹⁵⁰ Privacy Act 1993, s 2(1).

¹⁵¹ *Talley*, above n 149.

2. Tort of breach of privacy

(a) In public places

In terms of publication of photographs taken in public places without the consent of the person concerned, the leading case in New Zealand is *Hosking v Runting (Hosking)*, confirming the existence of an independent tort of privacy (the case involved the publication of photographs of the children of a well-known host taken on a public street).¹⁵² However, cases such as *Tucker v News Media Ownership Ltd*,¹⁵³ *Bradley v Wingnut Films*,¹⁵⁴ *P v D*,¹⁵⁵ and *L v G*¹⁵⁶ have contributed to this development.

Basically, the test in *Hosking* was a two-step test.¹⁵⁷ First, “the existence of facts in respect of which there is reasonable expectation of privacy” is required (a test that was also suggested by Zupančič J in his concurring opinion in *of Hannover*).¹⁵⁸ “Private facts are those not known to the world at large, but they may be known to some people, or even a particular class.”¹⁵⁹ In addition, it is necessary that publicity is “given to those private facts that would be considered highly offensive to an objective reasonable person.”¹⁵⁹ Note that also the *manner*, that is the “extent and tone of a publication,”¹⁶⁰ might be relevant for the highly offensiveness test. “Liability is limited to “publicity that is truly humiliating and

¹⁵² *Hosking v Runting* [2005] 1 NZLR 1 [*Hosking*].

¹⁵³ *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716.

¹⁵⁴ *Bradley v Wingnut Films* [1993] 1 NZLR 415 [*Bradley*].

¹⁵⁵ *P v D* [2000] 2 NZLR 591.

¹⁵⁶ *L v G* [2002] DCR 234.

¹⁵⁷ *Hosking*, above n 152, para 117 Gault and Blanchard JJ.

¹⁵⁸ *Of Hannover v Germany*, above n 11.

¹⁵⁹ *Andrews v TVNZ* (15 December 2006) HC AK CIV 2004-404-3536 [*Andrews*], para 28.

¹⁶⁰ *Ibid*, para 51.

distressful or otherwise harmful to the individual concerned.”¹⁶¹ Indeed, in *Hosking*, Gault J noted that “the photographs taken ... do not disclose anything more than could have been observed by any member of the public ... on that particular day.”¹⁶² Hence, “publicity, even extensive publicity, of matters which, although private, are not really sensitive should not give rise to legal liability.”¹⁶³ Note that it was accepted that a defence of legitimate public concern exists (but something that is merely of general interest to the public is insufficient).¹⁶⁴ Generally speaking, case law in New Zealand suggests that “something that happens on a public street is unlikely to give rise to a reasonable expectation of privacy.”¹⁶⁵ As a matter of fact, there are no general restrictions on photographing or writing about what happens *in* a public place.¹⁶⁶ Note, however, that national courts have never expressly adopted the United States approach accepting the loss of privacy rights of public figures based on consent, the “personalities and affairs” involved as public facts, and legitimate public interest.¹⁶⁷

In *Andrews v TVNZ* (and in *Hosking* itself), however, the court accepted that there might be instances where the individual concerned is entitled “to protection from *additional* publicity, although the relevant circumstances arose in public, and were observed, or were observable, by those in the immediate

¹⁶¹ *Hosking*, above n 152, para 126 Gault and Blanchard JJ.

¹⁶² *Ibid*, para 164.

¹⁶³ *Ibid*, para 98.

¹⁶⁴ See generally: *Andrews*, above n 159, paras 80-81.

¹⁶⁵ Private in public and seclusion in company: Some new boundaries in the Law of Privacy www.nzlawyer magazine.co.nz (accessed 13 May 2009); see generally: Burrows, above n 149, 286.

¹⁶⁶ *Hosking*, above n 152; New Zealand Law Commission *Study Paper 19 - Privacy: Concepts and Issues. Review of the Law of Privacy Stage 1* (Wellington, 2008) [NZLC SP19] para 8.66.

¹⁶⁷ see: *Hosking*, above n 152, para 120; contrary: Barendt, above n 7, 17.

vicinity”¹⁶⁸ (mentioning *Campbell v Mirror Group Newspapers Ltd (Campbell)*¹⁶⁹ and *Peck v United Kingdom (Peck)*).¹⁷⁰ It was held that the conversation between a couple (such as the wife’s comments that she loves her husband and her question where she was), immediately after a car accident on a public road and while still being trapped in their car, is deemed to be of private (intimate) nature establishing a reasonable expectation of privacy (although the publication itself was not found to be highly offensive).¹⁷¹

Similarly, the Office of the Privacy Commissioner of New Zealand stated that the public place is not “some kind of hard edged exclusion zone”¹⁷² and suggested to respect, subject to a legitimate public interest, the privacy of public figures and their families: “Public figures are, after all, human beings who have private lives deserving respect ... there should [not] be a reduced expectation of privacy on the part of families of public figures merely through a familial relationship.”¹⁷²

(b) *From public places*

Where, for instance, photographs are taken with a telephoto lens of a celebrity lying naked in their garden, it is likely that the publication of the corresponding photographs (taken *from* a public place) gives rise to legal liability under common law, although it seems that the New Zealand Law Commission

¹⁶⁸ *Andrews*, above n 159, para 31 (emphasis added); see generally: NZLC SP19, above n 166, para 8.66.

¹⁶⁹ *Campbell*, above n 6.

¹⁷⁰ *Peck*, above n 30.

¹⁷¹ *Andrews*, above n 159, paras 65-66.

¹⁷² Submission by the Office of the Privacy Commissioner on the Law Commission’s Issues Paper *Invasion of Privacy: Penalties and Remedies* (NZLC IP14) www.privacy.org.nz (accessed 1 July 2009).

(NZLC), unlike its earlier approach (“covert filming of people in intimate situations, and distribution of the images, will ... *always* constitute an invasion of privacy”),¹⁷³ suggests that the individual concerned might also not succeed in the tort of privacy, where the person “is clearly a person well known to the public” and as their “leisure time may be the subject of legitimate public interest given [their] prominence.”¹⁷⁴ I must admit that I disagree with this latter approach. The majority in *Hosking* clearly accepted the existence of a tort of privacy. In addition, although it might be arguable whether “something that happens *on* a public street is unlikely to give rise to a reasonable expectation of privacy,”¹⁷⁵ generally speaking, it is hard to believe that, for purposes of the work of the tabloid press, there can be a *legitimate* public interest where something happens in a private place (no matter how well known the person might be and the nature of the information). Exceptions might include instances where the individual commits serious offences in their backyard (establishing a legitimate public interest) or it is something that can be seen from a public place (due to a lack of any visual protection or an insufficient fence). “It is not unlawful to photograph [or to film] someone’s private property ... as ... there can hardly be any expectation of privacy in terms of what can actually be seen from the street.”¹⁷⁶

(c) Still lawful to *take* photographs in public places?

In *R v Rowe*, a case concerning the taking (and not the publication) of photographs of high school girls walking down the street, the defendant was convicted under the Summary Offences Act 1981 (offensive behaviour in a public

¹⁷³ New Zealand Law Commission *Study Paper 15 - Intimate Covert Filming* (Wellington, 2004) [NZLC SP15] 13 (emphasis added).

¹⁷⁴ NZLC SP19, above n 166, para 8.104.

¹⁷⁵ Private in public and seclusion in company: Some new boundaries in the Law of Privacy, above n 165 (emphasis added).

¹⁷⁶ *TVNZ v K W* (18 December 2008) HC AK CIV 2007-485-001609 [*TVNZ v K W*], para 62.

place)¹⁷⁷ although, generally speaking, New Zealand case law suggests that “something that happens on a public street is unlikely to give rise to a reasonable expectation of privacy.”¹⁷⁸ Similar to *Hosking*, the photographs revealed nothing more than could have been seen by anyone on that day and nothing seems to be unlawful to take photographs of something that happens in a public place. However, it seems that *time*, *place* and *manner* in this instance (high school girls as the subject of the photographs, covert photographing from a van, voyeuristic behaviour, no legitimate interest) were of essential importance for the decision.¹⁷⁹ The Court held that “the furtive or covert nature of the behaviour spoke for itself.”¹⁸⁰ Interestingly (and odd enough), it seems that the outcome might have been different if the photographer had been a paparazzi (with a legitimate interest in taking photographs) intending to publish the photographs, such as the professional photographer in *Hosking*.¹⁸¹ Paul Roth noted that the decision “indirectly gives people a right to privacy in public places under the criminal law where no similar right exists in similar circumstances under civil law.”¹⁸² I must admit that I do not think that *R v Rowe* gives individuals a general right to privacy in public places. I rather suggest that the decision merely gives individuals a right to be protected from any offensive behaviour in public places - “simply the freedom to use and enjoy the public place.”¹⁸³

¹⁷⁷ *R v Rowe* (18 April 2005) CA 374/04 [*R v Rowe*]; leave to appeal to the Supreme Court was declined: *Rowe v R* [2005] NZSC 40; Summary Offences Act 1981, s 4(1)(a).

¹⁷⁸ Private in public and seclusion in company: Some new boundaries in the Law of Privacy, above n 165; see generally: Burrows, above n 149, 286.

¹⁷⁹ *R v Rowe*, above n 177, para 46.

¹⁸⁰ *Ibid*, para 34.

¹⁸¹ See generally: Paul Roth “Unlawful Photography in Public Places: the New Zealand Position” (2006) 11 PLPR 213.

¹⁸² *Ibid*.

¹⁸³ *R v Rowe*, above n 177, para 22.

(d) The United Kingdom approach

A different approach was taken by English Courts. Note that the English common law does not recognise a tort of privacy, and cases are resolved, for instance, on the tort of breach of confidence.¹⁸⁴

*Campbell*¹⁸⁵ concerned the publication of photographs (and articles disclosing details) of the model Naomi Campbell showing her leaving a meeting of Narcotics Anonymous (her status was described as “a household name, nationally and internationally...her face is instantly recognisable...whatever she does and wherever she goes is news”).¹⁸⁶ The supermodel has always publicly denied being drug addicted.¹⁸⁷ The court upheld the claim. Lord Hope stated that “the question is what a reasonable person of ordinary sensibilities would feel if ... placed in the same position as the claimant and faced with the same publicity.”¹⁸⁸ The test is whether the individual concerned has a reasonable expectation of privacy (“whether article 8 [of the ECHR] is in principle engaged”)¹⁸⁹ taking into account all circumstances of the individual case (consent, nature of published facts, nature and purpose of intrusion, effect on individual).¹⁹⁰ If there is such a reasonable expectation of privacy in respect of the information at issue, the right to privacy and freedom of expression will be balanced (considering, inter alia, the

¹⁸⁴ *Campbell*, above n 6, para 82 Lord Hope, paras 132-133 Baroness Hale; Barendt, above n 7, 12-13; Raymond Wacks “Why there will never be an English common law privacy tort” in Andrew T Kenyon and Megan Richardson (eds) *New Dimensions in Privacy Law. International and Comparative Perspectives* (Cambridge University Press, New York, 2006) 7.

¹⁸⁵ *Campbell*, above n 6.

¹⁸⁶ *Ibid*, para 1.

¹⁸⁷ Mike Hosking and Naomi Campbell develop privacy & confidentiality law www.wiglelaw.com (accessed 25 July 2009).

¹⁸⁸ *Campbell*, above n 6, para 99.

¹⁸⁹ *Murray*, above n 34, para 49.

¹⁹⁰ *Ibid*, para 36.

highly offensiveness of a publication).¹⁹¹ Baroness Hale said: “The activity photographed must be private. If this had been ... a picture of Campbell going about her business in a public street, there could have been no complaint,”¹⁹² and referred to Naomi’s public role.¹⁹³

She makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk.

The court also addressed the importance the way a story is presented and whether the details and photographs contribute to the story: “A picture is ‘worth a thousand words’ because it adds to the impact of what the words convey; but it also adds to the information given in those words.”¹⁹⁴ As a matter of fact, there might be cases, in which “the addition of salacious details or intimate photographs is disproportionate and unacceptable. The latter, even if accompanying a legitimate disclosure of the sexual relationship, would be too intrusive and demeaning.”¹⁹⁵

Interestingly, in *Hosking* itself, Gault and Blanchard JJ mentioned *Peck*,¹⁹⁶ a case concerning the publication of footage and photographs of Peck attempting to commit suicide, and *Campbell*¹⁹⁷ as exceptional cases for the existence of privacy rights of a person photographed in public places.¹⁹⁸ Unlike the situation in *Hosking*, *Campbell* and *Peck* concerned the publication of embarrassing and

¹⁹¹ *Campbell*, above n 6, para 112 Lord Hope; *Murray*, above n 34, paras 27-30, 49.

¹⁹² *Campbell*, above n 6, para 154 Baroness Hale.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*, para 155 Baroness Hale.

¹⁹⁵ *Ibid.*, para 60 Lord Hoffmann.

¹⁹⁶ *Peck*, above n 30.

¹⁹⁷ *Campbell*, above n 6.

¹⁹⁸ *Hosking*, above n 152, para 164.

humiliating facts. Generally speaking, it seems that, at least as far as the position of adults is concerned, the situation in New Zealand and the United Kingdom is similar.

In *Murray v Big Pictures UK Ltd (Murray)*,¹⁹⁹ a case dealing with photographs of JK Rowling's child taken in a public place, though, unlike *Campbell and Peck* but similar to *Hosking*, not concerning the publication of private facts, the court took a different approach than the one related to adults in *Campbell and Peck*, and the claim was upheld (consistent with the approach taken by the ECtHR in *of Hannover*). The court discussed a child's special position and Lord Clarke admitted that "the photographs showed no more than could be seen by anyone in the street but, once published, they would be published to a potentially large number of people."²⁰⁰ As a matter of fact, the position of a child is a different one justifying a different approach.²⁰¹ Children are more vulnerable and do not have a choice when it comes to media attention and their public role. The Convention on the Rights of the Child expressly addresses a child's privacy rights and the right to be protected against any interference.²⁰² However, in *Hosking*, the court did not see the need to address children's special protection: "We cannot see any real harm in it."²⁰³

¹⁹⁹ *Murray*, above n 34.

²⁰⁰ *Ibid*, para 50.

²⁰¹ See generally: Redmond Kirwan-Jones "Hosking v Runtig & Murray v Big Pictures Ltd. Privacy rights of the Child in the UK & NZ 'No harm in it'?" (LLB(Hons) Seminar Paper, Victoria University of Wellington, 2009).

²⁰² Convention on the Rights of the Child, above n 29, art 16.

²⁰³ *Hosking*, above n 152, para 165 Gault P.

B. The Broadcasting Standards Authority and The New Zealand Press Council

1. The Broadcasting Standards Authority

(a) About the Broadcasting Standards Authority

The Broadcasting Standards Authority (BSA) is an independent Crown entity established under the Broadcasting Act 1989.²⁰⁴ The authority ensures the development and observance of broadcasting standards and deals, inter alia, with complaints about alleged breaches of programme standards by broadcasters (television, radio) made under the Broadcasting Act 1989.²⁰⁵ Although the BSA is deemed to be a specialist tribunal offering guidance to the courts in media issues (yet its decisions are not binding),²⁰⁶ the BSA needs to some degree also guidance from the courts (when interpreting the BoRA).

Programme standards (excluding advertisements)²⁰⁷ are subject to section 4 of the Broadcasting Act 1989 (such as broadcasters' responsibility for programmes consistent with the privacy of the individual)²⁰⁸ and the (voluntary) codes of broadcasting practice, such as the Free-to-Air Television Code of Broadcasting Practice (Free-to-Air Television Code) or the Radio Code of Broadcasting Practice (Radio Code) (issued and approved by the BSA according to the Broadcasting Act 1989).

²⁰⁴ Broadcasting Act 1989, s 20.

²⁰⁵ *Ibid*, s 21(1)(a)-(c), (e), (f).

²⁰⁶ See generally: *Andrews*, above n 159, para 96; NZLC SP19, above n 166, para 8.62.

²⁰⁷ Advertising Standards Authority.

²⁰⁸ Broadcasting Act 1989, s 4(1)(c).

Courts have accepted the BSA's reliance on United States' case law due to the lack of extended development of New Zealand authority on privacy law to guide the BSA.²⁰⁹ In *TVNZ Ltd v K W et al*, the court accepted that the reliance on United States' case law on the tort of invasion of privacy is still permissible to interpret the privacy principles contained in the codes of broadcasting practice.²¹⁰

Note that the BSA has only limited power to award compensation (up to \$5000 and only in privacy-related matters) and costs.²¹¹ The decisions of the BSA can be appealed to the High Court (which is then the final decision).²¹² In addition, there is the possibility to file an application for judicial review of a decision of the BSA (this decision of the High Court can be appealed to the Court of Appeal).²¹³

(b) The Broadcasting Act 1989, codes and standards

Programme standards are set out in the Broadcasting Act 1989 and the codes of broadcasting practice. Each code contains standards and corresponding guidelines. Note that the guidelines are not binding but "are included to provide interpretative assistance for broadcasters."²¹⁴ As a matter of fact, "a programme which does not adhere to the letter of a particular guideline may not be in breach, depending on the programme's overall compliance with the relevant standard."²¹⁵

²⁰⁹ *TVNZ v K W*, above n 176; *TV3 Network Services v Broadcasting Standards Authority* [1995] 2 NZLR 720 [*TV3 v BSA*].

²¹⁰ *TVNZ Ltd v K W*, above n 176, para 53.

²¹¹ Broadcasting Act 1989, ss 13, 16.

²¹² *Ibid*, ss 18, 19.

²¹³ Judicature Amendment Act 1972, s 4, 11.

²¹⁴ Free-to-Air Television Code of Broadcasting Practice, introduction.

²¹⁵ *Ibid*.

Both section 4(1)(c) of the Broadcasting Act 1989 and standard 3 of the Free-to-Air Television Code and Radio Code require expressly that programme standards are consistent with “the privacy of the individual.”²¹⁶ The BSA is required to ensure that broadcasters comply with their obligations under section 4 of the Broadcasting Act 1989.²¹⁷ The privacy standard is aimed at protecting the interests of the individual from interferences whereas the remaining standards address primarily community-related interests.²¹⁸ Note that the privacy principles apply only once the material has been broadcast: “Invasive information-gathering alone will not be a breach of the privacy standard.”²¹⁹ For instance, similar to the test in *Hosking*, it is inconsistent with an individual’s privacy to disclose private facts, “where the *disclosure* is highly offensive to an objective reasonable person.”²²⁰ In addition, privacy principle 3(a) protects individual’s interest in solitude or seclusion: “It is inconsistent with an individual’s privacy to allow the public disclosure of material obtained by intentionally interfering, in the nature of prying, with that individual’s interest in solitude or seclusion,” where the *intrusion* is “highly offensive to an objective reasonable person.”²²¹ The relevant factors to be considered for the highly offensive-test include the means of (covert filming and recording) and the motive for the intrusion:²²²

²¹⁶ Broadcasting Act 1989, s 4(1)(c).

²¹⁷ *Ibid*, s 21.

²¹⁸ Claudia Geiringer and Steven Price “Moving from Self-Justification to Demonstrable Justification - the Bill of Rights and the Broadcasting Standards Authority” in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation* (LexisNexis NZ Ltd, Wellington, 2008) 332.

²¹⁹ *Benson v Far North Cable TV Ltd et al* (14 August 2006) Broadcasting Standards Authority 2006-054; Steven Price *Media Minefield: A Journalists’ Guide to Media Regulation in New Zealand* (New Zealand Journalists Training Organisation, Wellington, 2007) 107.

²²⁰ Free-to-Air Television Code of Broadcasting Practice, broadcasting standard 3, privacy principle 1 (emphasis added), reproduced in Appendix B.

²²¹ *Ibid*, privacy principle 3(a), reproduced in Appendix B.

²²² *TVNZ v K W*, above n 176, paras 66, 67 quoting *Shulman v Group W Productions* (1998) 995 P 2d 469, 472 (CA S Ct).

The mere fact that the intruder was in pursuit of a 'story' does not ... generally justify an ... intrusion ... offensiveness depends as well on the particular method of investigation ... At one extreme, 'routine techniques' such as asking questions of people ... could rarely, if ever, be deemed an actionable intrusion ... At the other extreme, violation of well-established legal areas of physical or sensory privacy - trespass into a home or tapping a personal telephone line ... - could rarely, if ever, be justified by a reporter's need to get the story.

In *MacDonald v The Radio Network Ltd*, the BSA stated that prying means "inquiring impertinently into the affairs of another person."²²³ Privacy principle 3 is not limited to the disclosure of private facts, but applies to facts in general.²²⁴ In addition, in *Balfour v Television New Zealand Ltd*, the BSA accepted that privacy principle 3 applies also to "situations where a broadcaster has entered onto a person's land, ... irrespective of whether the occupier was present or shown in the broadcast."²²⁵ "Privacy principle 3 suggests an element of deception ... [which] is not present where cameras are visible, and their presence and purpose are announced."²²⁶ However, generally speaking, there is no interference with privacy principle 3(a) where the (secret) recording, filming, or photographing of the individual occurs *in* a public place ("the public place exemption") or where the "public interest" defence applies.²²⁷

²²³ *MacDonald v The Radio Network Ltd* (6 May 2004) Broadcasting Standards Authority 2004-047.

²²⁴ *Black v The Radio Network Ltd* (21 January 1998) Broadcasting Standards Authority 1999-003 [*Black*]; Price, above n 219, 117; Elizabeth Owen "Why the Public Does Not Need a Tort of Intrusion to Ensure Protection from the Media" (LLB(Hons) Seminar Paper, Victoria University of Wellington, 2009).

²²⁵ *Balfour v Television New Zealand Ltd* (21 March 2006) Broadcasting Standards Authority 2005-129 [*Balfour*].

²²⁶ Price, above n 219, 119.

²²⁷ Free-to-Air Television Code of Broadcasting Practice, broadcasting standard 3, privacy principles 3(b), 8, reproduced in Appendix B (emphasis added).

(i) Public place exemption

Privacy principle 3(b) provides a presumption that no intrusion is given, where the individual concerned is in a public place. As a matter of fact, there are no general restrictions on photographing or writing about what happens in a public place²²⁸ (note that the secret listening of a private conversation in a public place and the broadcast of the information was found to be in breach of the privacy standard).²²⁹ Consequently, in *Davies v Television New Zealand Ltd*, the BSA “has generally accepted that filming people *in* a public place without their consent does not amount to a breach of privacy.”²³⁰ In contrary, where the filming, or photographing takes place *from* a public place, but the material concerns something that happens in a private place, it is difficult to accept that the “public place exemption” applies.²³¹ “The [BSA] does not consider the position where the camera operator was standing is relevant.”²³² However, precedents from the BSA are inconsistent, as in *Wilton v Television New Zealand Ltd*, the BSA stated (after having found a breach of privacy principle 1 justified in the public interest) that “the [BSA] accepts that filming people *in or from* a public place without their consent does not, other than in limited circumstances, amount to a breach of privacy.”²³³ I think that the crucial point is whether something that happens in a private place can be seen from a public place (lack of visual protection, insufficient fence).

²²⁸ *Black*, above n 224; NZLC SP19, above n 166, para 8.66.

²²⁹ *Black*, above n 224.

²³⁰ *Davies v Television New Zealand Ltd* (3 June 2005) Broadcasting Standards Authority 2005-017 (emphasis added).

²³¹ Price, above n 219, 112-113; *Radford v Television New Zealand Ltd* (27 February 2003) Broadcasting Standards Authority 2003-017 [*Radford*]; contrast: *Wilton v Television New Zealand Ltd* (30 September 2004) Broadcasting Standards Authority 2004-117/118 [*Wilton*].

²³² *Radford*, above n 231, para 28.

²³³ *Wilton*, above n 231, para 18 (emphasis added).

(ii) Public interest defence

The public interest defence applies to all privacy complaints and is defined as “legitimate concern or interest to the public.”²³⁴ A “general interest or curiosity to the public” is insufficient,²³⁵ and there is also a difference between “matters which are in the public interest, and matters which are simply of interest to the public.”²³⁶ It is essential that the matter concerns or affects a substantial part of the New Zealand population.²³⁷ Consequently, “the ‘need for pictures’ will rarely, if ever, be enough alone to justify a privacy invasion.”²³⁸ A purely sensational footage lacking any public interest might result in a breach of privacy principles.²³⁹ However, “the character and conduct of public figures ... is likely to be of public interest.”²⁴⁰ The BSA expressly considered the role of public figures, and stated that people “who are experienced in public life and involved in issues of high public interest, can be expected to deal with *robust* persistence on the part of the media that might otherwise be unacceptable.”²⁴¹

²³⁴ Free-to-Air Television Code of Broadcasting Practice, broadcasting standard 3, privacy principle 8, reproduced in Appendix B.

²³⁵ *NM v Television New Zealand Ltd* (27 June 2007) Broadcasting Standards Authority 2007-023; *Drury et al v TV3* (10 October 1996) Broadcasting Standards Authority 1996-130.

²³⁶ *Balfour*, above n 225, para 56.

²³⁷ *Ibid*, para 58.

²³⁸ Price, above n 219, 115.

²³⁹ *Balfour*, above n 225, para 63.

²⁴⁰ Price, above n 219, 115.

²⁴¹ *Laws*, above n 8 (emphasis added).

(iii) Broadcasting Act 1989 v Tort of breach of privacy

Note that any failure to comply with the standards is not subject to civil liability.²⁴² However, in *Andrews v TVNZ*, the High Court acknowledged that section 4(3) of the Broadcasting Act 1989 “does not operate to prohibit the bringing of a proceeding in tort” and that “a strong case in tort ... will in many (if not most) cases also constitute a breach of a provision in an approved code of broadcasting practice.”²⁴³ Such an approach is consequent, as “there is no logic ... which would leave [celebrities] able to sue for breach of privacy occurring in print, but not by way of broadcast,”²⁴⁴ especially given the fact that the BSA has limited power to award compensation (up to \$5000 and costs).²⁴⁵

2. *The New Zealand Press Council*

(a) About the New Zealand Press Council

The print media (including their corresponding websites) are subject to the jurisdiction of the New Zealand Press Council (NZPC).²⁴⁶ The NZPC is an independent self-regulatory body, set up by the industry, dealing with complaints about the editorial content of a publication and promoting the freedom of the press.²⁴⁷ The NZPC provides 13 principles (accuracy, privacy, children and young people, photographs and others) which are much briefer than the standards by the BSA. Although the principles address privacy issues, the NZPC can not award

²⁴² Broadcasting Act 1989, s 4(3).

²⁴³ *Andrews*, above n 159, para 98.

²⁴⁴ *Ibid.*

²⁴⁵ Broadcasting Act 1989, ss 13, 16.

²⁴⁶ Complain www.presscouncil.org.nz (accessed 20 July 2009).

²⁴⁷ New Zealand Press Council www.presscouncil.org.nz (accessed 20 July 2009).

compensation.²⁴⁸ The NZPC “makes findings and expects media against which findings have been made to publish them.”²⁴⁹ Note that, in contrary to the BSA regime, there is no right to appeal a decision and the NZPC requires an “undertaking that, having referred the matter to the Press Council, [the complainant] will not take or continue proceedings against the publication or journalist concerned”²⁵⁰ in order to “avoid the possibility of the Press Council adjudication being used as a ‘trial run’ for litigation”²⁵¹ establishing an exclusivity between references to the NZPC and court proceedings.

(b) The principles

The NZPC acknowledges that the freedom of expression is the most important principle and that “freedom of expression and public interest will play dominant roles.”²⁵² However, according to principle 3 of the Press Council Principles “everyone is entitled to privacy of person, space and personal information, and these rights should be respected by publications”²⁵³ (subject to the public interest of the publication). Generally speaking, celebrities have a “lower expectation of privacy”²⁵⁴ and there is no interference with principle 3, where photographs of public figures *in public places* are taken and published (relating to a current event).²⁵⁵ However, where the publication does not concern

²⁴⁸ Complain, above n 246.

²⁴⁹ NZLC SP19, above n 166, para 8.63; New Zealand Press Council Principles, principle 13.

²⁵⁰ Complaints Procedure www.presscouncil.org.nz (accessed 20 July 2009).

²⁵¹ *Ibid.*

²⁵² New Zealand Press Council Principles, preamble.

²⁵³ *Ibid.*, principle 3.

²⁵⁴ Price, above n 49, 367.

²⁵⁵ *Ibid.*, 365, 371.

the public role, there might be a breach of principle 3.²⁵⁶ Principle 11 requires editors to “take care in photographic and image selection and treatment.”²⁵⁷

3. *Time for a change!*

It is doubtful whether the separate treatment of the BSA and the NZPC is still justified. For instance, the NZPC can not award damages.²⁵⁸ Individuals concerned that lodge a complain with the NZPC are refrained from taking or continuing any proceedings in courts against the publication, such as claiming damages under the tort of breach of privacy.²⁵⁹ Individuals claiming a breach of the privacy standard of the Free-to-Air Television Code seem to be better protected than the individuals challenging a publication in a newspaper. In *Andrews v TVNZ*, the High Court acknowledged that section 4(3) of the Broadcasting Act 1989 “does not operate to prohibit the bringing of a proceeding in tort”²⁶⁰ enabling individuals to lodge a complaint with the BSA *and* to claim damages in courts. There might be instances where the decision whether to publish a photograph in the print media or to broadcast it on television is random. The existence of different regulatory regimes for the broadcast and print media “has historical origins, and dates back to a time when broadcast media needed a warrant to use the airwaves.”²⁶¹ “As the traditional media become less dominant, privacy intrusions will increasingly be carried out for the purpose of putting material on websites rather than printing or broadcasting it. Internet content is,

²⁵⁶ *Complaint v The Dominion Post* (August 2006) New Zealand Press Council 1059; *Ibid*, 367.

²⁵⁷ New Zealand Press Council Principles, principle 11.

²⁵⁸ *Complain*, above n 246.

²⁵⁹ *Complaints Procedure*, above n 250.

²⁶⁰ *Andrews*, above n 159, para 98.

²⁶¹ NZLC SP19, above n 166, para 8.64.

however, largely unregulated.”²⁶² The NZPC deals with websites only where there is a corresponding offline publication. However, the BSA is not responsible for a broadcaster’s website. Hence, in the modern world and digital era we are living in the question is not (or no more) whether the difference between the broadcast and print media is still justified and whether there is a need for a new body regulating the internet, such as *The Internet Standards Authority* or *The New Zealand Internet Council* but whether there should be one common regulatory body, such as a general news authority. The internet is nothing more than another form of publication. Generally speaking, the BSA’s standards and NZPC’s principles address the *content* of the broadcast and publication respectively and are not specific to the *form* of publication. It can also be said that both the BSA’s standards and the NZPC’s principles address similar issues (it is believed that a new body responsible for online publications would adopt similar principles). As a matter of fact, it is not about the medium itself (there is no different degree of breach of privacy rights just because the details have been broadcast and not published in the newspapers). Hence, it seems reasonable to introduce a general news authority providing a comprehensive protection (of privacy rights) under one roof regardless of the medium and form of publication respectively.

C. *The New Zealand Bill of Rights Act 1990*

1. *The freedom of expression*

Section 14 of the BoRA provides that “everyone has the freedom of expression, including the freedom to ... impart information ... of any kind in any

²⁶² New Zealand Law Commission *Issues Paper 14 - Invasion of Privacy: Penalties and Remedies. Review of the Law of Privacy Stage 3* (Wellington, 2009) [NZLC IP14], paras 12.8.

form.”²⁶³ The freedom of expression includes the freedom of the media and consequently the freedom to report on private lives of public people and to publish corresponding photographs.²⁶⁴ The media can decide on “the cases they will cover and the content of that coverage, presumably influenced by such things as viewers’ [and readers’] likely interest and available resources.”²⁶⁵ In *Moonen v Film & Literature Board of Review (Moonen)*, the Court of Appeal accepted that the freedom of expression is “as wide as human thought and imagination.”²⁶⁶ It includes information and ideas “that shock, offend or disturb.”²⁶⁷

2. *Values underlying the freedom of expression*

The most important values deemed to be protected by the freedom of expression are, inter alia, the promotion of truth (“marketplace of ideas”)²⁶⁸ and the importance of the free speech for a democratic society and the “self-fulfilment”²⁶⁹ of the individual.²⁷⁰ It has been accepted, however, that some categories of speech have more value than others and hence some kinds of speech are more protected than others. Scholars and courts distinguish between high-value, mid-value, and low-value speech (such as the disclosure of private facts of

²⁶³ See also: International Covenant on Civil and Political Rights, above n 29, art 19.

²⁶⁴ See generally: NZLC SP19, above n 166, para 8.47; NZLC SP15, above n 173, para 4.58.

²⁶⁵ *TVNZ v Green* (11 July 2008) HC WN CIV 2008-485-24 [*TVNZ v Green*], para 38.

²⁶⁶ *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9 (CA) [*Moonen*].

²⁶⁷ *Browne v Canwest TV Works Ltd* [2008] 1 NZLR 654 (HC) [*Browne v Canwest*], para 49 quoting *Otto-Preminger-Institut v Austria* [1994] ECHR 26, para 49.

²⁶⁸ Geiringer, above n 218, 320.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

celebrities).²⁷¹ “The importance of the value of the freedom of expression ... will be related to the extent of legitimate public concern in the information publicised.”²⁷² It has been accepted that there is a difference between something that is in the public interest and something that is “merely interesting to the public.”²⁷³ For instance, reports on the latest relationship of a public figure are not as valuable for a democratic society as a press release by the Prime Minister of New Zealand.

3. *Limitations on the freedom of expression*

However, the freedom of expression is not absolute.²⁷⁴ “Freedom of expression must accommodate other values which society regards as important.”²⁷⁵ According to section 5 of the BoRA the freedom of expression is subject “to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” As a matter of fact, section 5 of the BoRA sets out “two hoops”²⁷⁶ for a limitation on the freedom of expression to be deemed to be BoRA-consistent: the limitation must be prescribed by law and be reasonably and demonstrably justified. “[T]he loss to the free speech ought not to be greater than the gain for the competing rights and interests served by the speech-limiting law.”²⁷⁷ “The more value to society the information imparted or

²⁷¹ See generally: *Ibid.*, 322.

²⁷² *Hosking*, above n 152, para 132.

²⁷³ *TV3 v BSA*, above n 209, 733; *Hosking*, above n 152, 133.

²⁷⁴ New Zealand Bill of Rights Act 1990, s 5.

²⁷⁵ *Hosking*, above n 152, para 230 Tipping J concurring.

²⁷⁶ Geiringer, above n 218, 317.

²⁷⁷ *Ibid.*, 319.

the type of expression in question may possess, the heavier will be the task of showing that the limitation is reasonable and justified.”²⁷⁸

In *R v Hansen*, the Supreme Court of New Zealand addressed the interrelationship between sections 5 and 6 of the BoRA (section 6 of the BoRA says that wherever an enactment can be given a meaning that is consistent with the rights and freedoms of the BoRA, that meaning is to be preferred) and held that consistency in terms of section 6 of the BoRA means consistency with section 5 of the BoRA (limits imposed must be reasonably and demonstrably justified) placing section 5 of the BoRA at the centre of the analysis.²⁷⁹

Limitations on the freedom of expression that can arise include: the tort of breach of privacy, the Broadcasting Act 1989, codes and standards, and the principles provided by the NZPC.

(a) The tort of breach of privacy

In contrast to the freedom of expression, there is no codification of a general right to privacy.²⁸⁰ The only privacy-related provision is section 21 of the BoRA dealing with unreasonable search and seizure. Consequently, in *Hosking*, Keith J and Anderson P denied the existence of the tort of privacy and held that such a tort “cannot be demonstrably justified as a restriction on the freedom of

²⁷⁸ *Hosking*, above n 152, para 235 Tipping J concurring.

²⁷⁹ *R v Hansen* [2007] 3 NZLR 1 (SC) [*R v Hansen*]; see generally: Geiringer, above n 218, 303.

²⁸⁰ See for international protection: International Covenant on Civil and Political Rights, above n 29, art 17; Convention on the Rights of the Child, above n 29, art 16.

expression.”²⁸¹ However, the majority held that a tort of privacy exists justifying a restriction on freedom of expression.²⁸² Privacy rights “are recognised less directly, but no less significantly, in provisions such as [section 21 of the BoRA] ... that right is not very far from an entitlement to be free from unreasonable intrusions into personal privacy.”²⁸³

Although the BoRA does not explicitly provide a general privacy right, the majority’s approach in *Hosking* is preferable. Accepting that the tort of privacy can justify a restriction on freedom of expression is consistent with section 28 of the BoRA.²⁸⁴ Hence, an image infringing privacy rights could reasonably and demonstrably justify a restriction of media’s freedom of expression. However, whether the limitations placed on the freedom of expression are deemed to be justified limitations under section 5 of the BoRA ought to be assessed on a case-by-case decision. The crucial point is whether privacy values outweigh the values underlying the freedom of expression in the individual case (which is the case where the test under *Hosking* is met). Case law suggests that prescribed by law under section 5 of the BoRA includes the limits imposed by the common law and where privacy values are deemed to outweigh the freedom of expression it will be a reasonable and demonstrable justified limitation.²⁸⁵

In his concurring judgement in *Hosking*, Tipping J addressed the privacy values involved, such as the protection of personal dignity and wellbeing, and accepted that:²⁸⁶

²⁸¹ *Hosking*, above n 152, paras 175-222, 262-271.

²⁸² *Ibid*, paras 77-90.

²⁸³ *Hosking*, above n 152, para 224 Tipping J concurring.

²⁸⁴ New Zealand Bill of Rights Act 1990, s 28; see generally: Burrows, above n 149, 646; NZLC SP19, above n 166, paras 29, 8.13.

²⁸⁵ *Hosking*, above n 152, paras 237, 251-254 Tipping J concurring.

²⁸⁶ *Ibid*, para 238 Tipping J concurring.

Privacy is potentially a very wide concept; but, for present purposes, it can be described as the right to have people leave you alone if you do not want some aspects of your private life to become public property.

Tipping J also accepted that the public has a legitimate right to know, up to a point, certain information about public figures and the line has to be drawn at the “unfair and unnecessary public disclosure of private facts.”²⁸⁷ Hence, where the test for the tort of breach of privacy is not met, requiring a reasonable expectation of privacy and a highly offensiveness of the publication, any limitations on the freedom of expression will be deemed to be unjustified.

(b) The Broadcasting Act 1989, codes and standards

The Broadcasting Act 1989 and the codes of broadcasting practice respectively require that programme standards are consistent with “the privacy of the individual.”²⁸⁸ Both the BSA and the courts accepted on several occasions that not only the requirements contained in the Broadcasting Act 1989 but also the standards contained in the codes of broadcasting standards (imposing limits on the broadcasters on what, when, and how to say something) are limitations prescribed by law.²⁸⁹ The Broadcasting Act 1989 authorises the BSA to issue and approve codes of broadcasting practice.²⁹⁰ Consequently, the standards set out in the respective codes of broadcasting practice are limitations prescribed by law.

The second hoop of the test under section 5 of the BoRA (reasonably and demonstrably justified) requires a proportionality exercise. This balancing

²⁸⁷ Ibid, para 239 Tipping J concurring.

²⁸⁸ Broadcasting Act 1989, s 4(1)(c); Free-to-Air Television Code of Broadcasting Practice and Radio Code of Broadcasting Practice, broadcasting standard 3.

²⁸⁹ See generally: *TVNZ v Green*, above n 265.

²⁹⁰ Broadcasting Act 1989, s 21.

exercise requires an analysis of the values underlying the freedom of expression, the values underlying the privacy standard and the degree to which the corresponding values are engaged in the particular instance.²⁹¹ The BSA held that the limitations imposed by the *Broadcasting Act 1989* itself “are reasonable and demonstrably justified in a free and democratic society.”²⁹²

(i) Values underlying the privacy standard

As already discussed, the BoRA does not protect a general right to privacy per se. However, New Zealand courts have accepted a tort of breach of privacy. Likewise, international law requires a protection of individual’s privacy rights.²⁹³ “The real goal of the privacy standard is to protect individuals from unwarranted harm to their dignity.”²⁹⁴ Indeed, the BSA takes breaches of the privacy standard seriously and, generally speaking, gives children’s special role due regard.²⁹⁵ The BSA has developed a list of privacy principles which are part of the Free-to-Air Television Code and the Radio Code (the limitations involved are prescribed by law in terms of section 5 of the BoRA).²⁹⁶ For instance, privacy principle 6 of the Free-to-Air Television Code and the Radio Code take children’s special need of protection into account by expressly mentioning “children’s vulnerability” and

²⁹¹ Geiringer, above n 218, 319.

²⁹² *Radford*, above n 231, para 30; *McDonald et al v TVNZ* (6 June 2002) Broadcasting Standards Authority 2002-071, paras 100-109.

²⁹³ International Covenant on Civil and Political Rights, above n 29, art 17; Convention on the Rights of the Child, above n 29, arts 16, 40(2)(vii).

²⁹⁴ Geiringer, above n 218, 334.

²⁹⁵ *JB v TVNZ* (22 February 2007) Broadcasting Standards Authority 2006-090; *Commissioner for Children et al v TVNZ* (15 July 1999) Broadcasting Standards Authority 1999-093; contrast: *Department of Child, Youth and Family Services v TV3* (18 September 2003) Broadcasting Standards Authority 2003-107; see generally: Geiringer, above n 218, 333.

²⁹⁶ Geiringer, above n 218, 333.

“child’s privacy.”²⁹⁷ Broadcasters are required to act in the children’s best interest (regardless of any given consent).²⁹⁸ The BSA notes that the privacy principles contained in the codes “are not necessarily the only privacy principles that the Authority will apply”²⁹⁹ and that “the principles may well require elaboration and refinement when applied to a complaint.”³⁰⁰ Given the possible chilling effect on the freedom of speech, however, “the BSA ought to be extremely careful about upholding breaches of privacy that fall outside the ‘privacy principles’ that it has developed.”³⁰¹ I agree with Claudia Geiringer and Stephen Price that when the BSA does so, it ought to apply an extremely high threshold in the name of the freedom of expression.³⁰²

(ii) Balancing the freedom of expression against the right to privacy

The question whether the privacy standard has been breached and the order made in a particular instance are reasonable and demonstrable limitations imposed on the freedom of expression must be assessed on a case-by-case decision (public figure, public place, harm done, type of information published, class of speech, value of information, children’s interest, consent, and time, place and manner of intrusion).³⁰³ Scholars provided a “mental checklist” aiming at assisting when conducting the balancing exercise.³⁰⁴ Relevant factors include the

²⁹⁷ Free-to-Air Television Code of Broadcasting Practice, broadcasting standard 3, privacy principle 6.

²⁹⁸ Free-to-Air Television Code of Broadcasting Practice and Radio Code of Broadcasting Practice, broadcasting standard 3, privacy principles 5-7.

²⁹⁹ *Ibid*, privacy principles.

³⁰⁰ *Ibid*.

³⁰¹ Geiringer, above n 218, 333.

³⁰² *Ibid*.

³⁰³ See generally: *Ibid*, 335-337.

³⁰⁴ *Ibid*, 337-338.

promotion of the objectives underlying the privacy standard if upholding a complaint. Which right prevails is “in every case a matter of degree depending on the relevant *time, place and circumstances*.”³⁰⁵ Generally speaking, the BSA “weigh[s] privacy, and especially children’s privacy, heavily in the balance.”³⁰⁶

(c) The New Zealand Press Council principles

Although the NZPC provides principles dealing, inter alia, with the protection of the privacy of the individual, the NZPC is a self-regulatory body. As a matter of fact, I suggest that the limitations on the freedom of expression resulting from the application of the principles provided by the NZPC are not justified limitations under section 5 of the BoRA. The NZPC’s principles regime is based on self-regulation and so the limitations are not prescribed by law. The privacy-related issues addressed by the NZPC are, however, similar to the privacy principles established by the BSA (which are deemed to be limitations prescribed by law).

4. *The Broadcasting Standards Authority’s and the courts’ approach to the Bill of Rights Act 1990*

The BSA’s approach to the BoRA has not been constant over the years. Generally speaking, the BSA has used a standard clause (“boilerplate”)³⁰⁷ stating that it has given full weight to the provisions of the BoRA and that the decision is

³⁰⁵ *Brooker v Police* [2007] 3 NZLR 91 (SC) [*Brooker v Police*], para 133 (emphasis added).

³⁰⁶ The Broadcasting Standards Authority and the Bill of Rights www.medialawjournal.co.nz (accessed 8 October 2009).

³⁰⁷ Geiringer, above n 218, 297.

consistent with the BoRA.³⁰⁸ Such an unsystematic approach lacks any balancing exercise not giving due regard to the vital importance of the freedom of expression and the impact on the broadcasters. Although it seems that the BSA has accepted the need for a change, recent decisions show an extended analysis of section 5 of the BoRA and the proportionality test,³⁰⁹ its new approach is not a standardised procedure yet. Some decisions include again, especially when making orders in an individual instance, nothing more than the use of a (slightly changed) standard clause.³¹⁰ Courts have criticised the BSA's use of a standard clause lacking any analysis of section 5 of the BoRA.³¹¹

Courts adopted a more systematic approach to the BoRA and are providing a more BoRA-focussed analysis. Decisions show an extended analysis of the competing rights and balancing exercise involved.³¹² However, it was not until 2007 that the Supreme Court of New Zealand provided an extensive interpretation of the relevant BoRA provisions³¹³ (it seems that the Supreme Court overruled the approach taken by the Court of Appeal in *Moonen*).³¹⁴ Courts have always struggled and still do with the interrelationship between and the interpretation of sections 5 and 6 of the BoRA. In *Browne v Canwest TV Works Ltd*, the High Court acknowledged that the “freedom of expression jurisprudence is still in an

³⁰⁸ See generally: *Smith v TVNZ* (26 May 2008) Broadcasting Standards Authority 2008-018 [*Smith v TVNZ*], para 27.

³⁰⁹ See generally: *Pryde v Radio New Zealand Ltd* (27 August 2008) Broadcasting Standards Authority 2008-040; *Commerce Commission v TVWorks Ltd* (2 October 2008) Broadcasting Standards Authority 2008-014.

³¹⁰ *Rw v Radioworks Ltd* (17 February 2009) Broadcasting Standards Authority 2008-111, para 23; *Smith v TVNZ*, above n 308.

³¹¹ *TVNZ v K W*, above n 176, paras 19, 98.

³¹² See generally: *TVNZ v Green*, above n 265, paras 60-63; *Brooker v Police*, above n 305.

³¹³ *R v Hansen*, above n 279.

³¹⁴ *Moonen*, above n 266; see generally: Geiringer, above n 218, 312.

embryonic state.”³¹⁵ This might explain the BSA’s unsystematic and random approach to the BoRA. There has not been much guidance from the courts and often it is a matter of degree.³¹⁶

However, generally speaking, both the BSA and the courts accepted the importance of the freedom of expression. What is needed is consistency: “an explicit identification of the values underlying the freedom of speech, the values underlying the [competing privacy rights], and the extent to which each is implicated in the particular case.”³¹⁷

D. Children’s Position

The current situation between the New Zealand and the United Kingdom approach differs significantly in relation to children’s position in the media (while the approach taken in the United Kingdom is consistent with the situation in Germany). In *Murray*, accepting that a child might have a different reasonable expectation than its famous parents, the English court stated that:³¹⁸

If a child of parents who are not in the public eye could reasonably expect not to have photographs of him [her] published in the media, so too should the child of a famous parent. In our opinion it is at least arguable that a child of ‘ordinary’ parents could reasonably expect that the press would not target him [her] and publish photographs of him [her]. The same is true of David, especially since on the alleged facts here the photograph would not have been taken or published if he had not been the son of JK Rowling.

³¹⁵ *Browne v Canwest*, above n 267, para 28.

³¹⁶ *Brooker v Police*, above n 305, para 133 quoting *Wainwright v Police* [1968] NZLR 101 (CA); see generally: *The Broadcasting Standards Authority and the Bill of Rights*, above n 306.

³¹⁷ Geiringer, above n 218, 316.

³¹⁸ *Murray*, above n 34, paras 14, 46.

Interestingly, the court seems to be concerned with the lack of choice of a child of famous parents to be in the public eye and applies a different approach than the one relevant for adults.³¹⁹ In addition to the *standard* criteria relevant for the test whether an adult has a reasonable expectation of privacy, the test relevant for a child includes the question “how [their private life] has in fact been conducted by those responsible for [their] welfare and upbringing.”³²⁰ It is crucial whether their parents “courted publicity by procuring the publication of photographs of the child in order to promote their own interests”³²¹ or “have taken care to keep their children out of the public gaze.”³²²

Decisions by the British Press Complaints Commission (PCC) pre-*Murray* suggest, however, a different approach. Principle 3 of the Code of Practice (the Code) accepts, inter alia, subject to public interest, that “everyone [including children] is entitled to respect for his or her private and family life” and “it is unacceptable to photograph individuals in private places without their consent” noting that “private places are public or private property where there is a reasonable expectation of privacy.”³²³ In addition, principle 6 of the Code of Practice says, inter alia, prohibiting interviews and photographs affecting children’s welfare, that the press “must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child’s private life” (subject to public interest).³²⁴ Celebrities, such as actress A Kingston, lodged complaints with the PCC alleging a breach of the principles provided by the Code of Practice. The photographs showed their children in public places (public road, shopping mall). The PCC declined to accept that “public roads or pavements were

³¹⁹ See generally: *Campbell*, above n 6; *Peck*, above n 30.

³²⁰ *Murray*, above n 34, para 37.

³²¹ *Ibid*, para 38.

³²² *Ibid*.

³²³ United Kingdom Press Complaints Commission, Code of Practice, principle 3(i)(iii).

³²⁴ *Ibid*, principle 6(v).

places where people [including children] could have a reasonable expectation of privacy"³²⁵ (regardless of the use of long lens photography in such an instance): "[T]he mere publication of a child's image cannot breach the Code when it is taken in a public place and is unaccompanied by any private details or material that might embarrass or inconvenience the child."³²⁶

Interestingly, in *M Donald v Hello! Magazine*, a case (almost identical with the facts in *Hosking* and *Murray*) concerning the publication of photographs of Ms Donald's son sitting in a push-chair which were taken on a public street (the boy's aunt is a famous fashion designer), the PCC held that photographs taken in public places (without revealing any private details) do not affect the welfare of a child and denied a breach of the Code: "The photographs did not concern matters that could genuinely be considered to concern the child's private life or affect his welfare."³²⁷

In *J K Rowling v OK! Magazine*, however, a complaint concerning the publication of photographs of J K Rowling's eight year old daughter at a access restricted-beach, the PCC expressly disapproved the "the use of long lens photography to take pictures of people in places where they have a reasonable expectation of privacy"³²⁸ and stressed "the high level of protection afforded ... to children."³²⁹

Although New Zealand courts seem to be aware of the need to protect children,³³⁰ in *Hosking*, the court did not differentiate between adults and children

³²⁵ *A Kingston et al v Hello! Magazine* (2001) Press Complaints Commission 55.

³²⁶ *Ibid.*

³²⁷ *M Donald et al v Hello! Magazine* (2000) Press Complaints Commission 52.

³²⁸ *J K Rowling v OK! Magazine* (2001) Press Complaints Commission 56.

³²⁹ *Ibid.*

³³⁰ *TV3 Network Services Ltd v ECPAT New Zealand Inc* [2003] NZAR 501, para 43; *Re an Unborn Child* [2003] 1 NZLR 115.

and held that, generally speaking, “it is a matter of human nature that interest in the lives of public figures also extends to interest in the lives of their families” accepting a diminished reasonable expectation of privacy of the family.³³¹ According to *Hosking* the *standard* two step-test “provide[s] adequate flexibility to accommodate the special vulnerability of children.”³³² I must respectfully admit that it is doubtful whether the test under *Hosking* is flexible enough to consider children’s special position. It merely says that where no reasonable expectation of privacy is given (in a public place), the publication does not give rise to a tort of breach of privacy not revealing any flexibility. The court did not see any “real risk of physical harm.”³³³ It seems that the Court of Appeal in *Hosking* adopted the approach taken by the PCC pre-*Murray*.³³⁴

However, privacy principle 6 of the Free-to-Air Television Code and the Radio Code take children’s special need of protection into account by expressly mentioning “children’s vulnerability” and “child’s privacy.”³³⁵ Similarly, principle 5 of the Press Council Principles provides that “[e]ditors should have particular care and consideration for reporting on and about children and young people.”³³⁶ Indeed, the NZPC accepted that “in cases involving children, editors must

³³¹ *Hosking*, above n 152, para 124.

³³² *Ibid*, para 145.

³³³ *Ibid*, para 163.

³³⁴ *Ibid*, para 169.

³³⁵ Free-to-Air Television Code of Broadcasting Practice, broadcasting standard 3, privacy principle 6; see also: *JB v TVNZ* (22 February 2007) Broadcasting Standards Authority 2006-090; *Commissioner for Children et al v TVNZ* (15 July 1999) Broadcasting Standards Authority 1999-093; contrast: *Department of Child, Youth and Family Services v TV3* (18 September 2003) Broadcasting Standards Authority 2003-107; see generally: Geiringer, above n 218, 333.

³³⁶ New Zealand Press Council Principles, principle 5.

demonstrate an exceptional public interest to over-ride the normally paramount interest of the child³³⁷ and held in relation to children of famous parents:³³⁸

The Press Council maintains that a public figure has every right to expect the privacy and self-respect of his or her young children to be protected, especially when there is no demonstrable justification for drawing the young person into the limelight.

The approach taken in *Murray* (children) is consistent with recent developments in Germany (children and adults). *Hosking*, however, was decided before *Murray* (and might have been influenced by the PCC). New Zealand courts might follow the (new) approach in the United Kingdom and reconsider the position of a child.

E. A Need for a General Tort of Intrusion?

The NZLC suggests the introduction of a general tort “of invasion of privacy by intrusion into a person’s solitude, seclusion or personal affairs” to protect individuals from the media.³³⁹ “Intrusion is distinct from disclosure of private facts because an intrusion may or may not reveal private facts ... if it does, the person learning the private facts may or may not disclose them further.”³⁴⁰ Often invasion results from the intrusion, not from the disclosure.³⁴¹ However, although the elements of the tort of intrusion are not clear yet (intentional

³³⁷ New Zealand Press Council *The 35th Report of the New Zealand Press Council* (Wellington, 2007) 12.

³³⁸ *Ibid*, 13.

³³⁹ See generally: NZLC IP14, above n 262, para 11.30 and Owen, above n 224; see also: Submission by the Office of the Privacy Commissioner on the Law Commission’s Issues Paper *Invasion of Privacy: Penalties and Remedies* (NZLC IP14), above n 172.

³⁴⁰ NZLC IP14, above n 262, para 11.2.

³⁴¹ Price, above n 219, 107; Owen, above n 224.

intrusion, solitude or seclusion, reasonable expectation of privacy, highly offensive to an objective reasonable person, public interest),³⁴² it is doubtful whether the tort generally applies in public places.³⁴³ It might be true that media's "increasingly invasive reporting style"³⁴⁴ has contributed to today's increased awareness and invasion of privacy rights and the need for a comprehensive protection of privacy, but most of the situations where intrusion is at issue are already covered by existing statutes, torts, and avenues:³⁴⁵ Harassment Act 1997 ("journalists or photographers who persistently hound people (including by accosting them or contacting them multiple times"),³⁴⁶ Crimes Act 1961,³⁴⁷ tort of privacy (tort of disclosure), tort of trespass (subject to a "sufficient right of exclusive possession of the land concerned"³⁴⁸ and a physical intrusion on the land of the individual concerned),³⁴⁹ tort of nuisance (where a substantial intrusion interferes with the use or enjoyment of the land, such as persistent harassment, surveillance, filming, and taking of photographs),³⁵⁰ and BSA's and NZPC's privacy principles (subject to a story being broadcast or published).³⁵¹

I must admit that there are some existing gaps in the coverage of existing law. Corresponding gaps of protection might refer to situations where the

³⁴² NZLC IP14, above n 262, paras 11.37-11.45.

³⁴³ Ibid, paras 11.44-11.45.

³⁴⁴ NZLC SP19, above n 166, para 8.60.

³⁴⁵ Owen, above n 224.

³⁴⁶ Harassment Act 1997, ss 3, 4, 8; Media harassment www.medialawjournal.co.nz (accessed 20 July 2009).

³⁴⁷ Crimes Act 1961, ss 216A-216F (interception devices), 216G-216N (intimate visual recordings).

³⁴⁸ *Bradley*, above n 154, para 25.

³⁴⁹ Stephen Todd (ed) *The Law of Torts in New Zealand* (3ed, Brookers, Wellington, 2001) 912.

³⁵⁰ *Bernstein v Skyviews Ltd* [1978] 1 QB 479; Owen, above n 53.

³⁵¹ Free-to-Air Television Code of Broadcasting Practice, broadcasting standard 3, privacy principle 3(a); New Zealand Press Council Privacy Principles, principle 3; see also: New Zealand Press Council Privacy Principles, principle 9 (subterfuge).

intrusion occurs through surveillance (*from* a public place), the act at issue is a one-off situation (although the Harassment Act 1997 includes watching and loitering near a person's place of residence the act requires a pattern of behaviour that includes doing any specified act on at least two separate situations within 12 months),³⁵² the individual concerned is not naked or engaged in any intimate activity (the relevant provisions of the Crimes Act 1961 apply only to covert visual recordings, such as a photograph or a videotape, of a place with a reasonable expectation of privacy and where the individual concerned is naked or engaged in intimate activities),³⁵³ and the intrusion does not reveal any private facts or any gathered (private) information are not disclosed (either by means of broadcast or publication in newspapers or magazines and where the tort of breach of privacy or the BSA's and NZPC's privacy principles do not apply). This might be the case where a photographer, for the first time, climbs up a public tree for the purpose of taking a photograph of a well known actress laying in her garden (using telescopic lenses) but not publishing the photographs or simply watches the actress.³⁵⁴ Yet another possible gap might exist where the photographer is not a professional photographer with no intention whatsoever to publish any gathered information (in this instance, however, the individual concerned might lodge a complaint with the Privacy Commissioner under the Privacy Act 1993)³⁵⁵ or where a reporter goes through the rubbish bin (located on a public street) of a public figure for the purpose of obtaining newsworthy information.³⁵⁶

It seems clear that corresponding instances are unlikely and the gaps at issue not serious enough to justify an additional general tort of intrusion. In addition, generally speaking, it can be said that where information on celebrities

³⁵² Harassment Act 1997, ss 3, 4.

³⁵³ Crimes Act 1961, s 216G.

³⁵⁴ See generally: NZLC SP19, above n 166, para 8.102.

³⁵⁵ Privacy Act 1993, ss 66, 67.

³⁵⁶ See generally: NZLC IP14, above n 262, paras 11.19.

has been gathered, the information will be published or broadcast. It seems unlikely that an substantive intrusion, meeting the test for a general tort of intrusion, occurs without a subsequent disclosure of the gathered information. Where the information gathered upon intrusion will not be disclosed, the torts of trespass and nuisance might remedy the individual concerned. In addition, privacy principle 3(a) of the codes expressly addresses the intentional interference, “in the nature of prying, with that individual’s interest in solitude or seclusion” (subject to disclosure). It might be true that:³⁵⁷

There are a number of features of the current media environment that could have implications for privacy ... commercial pressures to report on celebrity gossip, scandal and dramatic events such as accidents or murders may lead to the use of increasingly intrusive methods of gathering material, and more extensive prying into people’s private lives ...

However, generally speaking, commercial pressure means also that there will be a corresponding publication or broadcast of the relevant facts and the tort of breach of privacy and the BSA’s and NZPC’s privacy principles will apply.

In addition, current figures suggest that a breach of privacy standards or principles respectively is not a major concern. Between July 2007 and June 2008 only seven complaints out of 139 complaints lodged with the BSA dealt with the privacy standard (of which four were upheld).³⁵⁸ In terms of the complaints lodged with the NZPC only six complaints out of 43 complaints dealt with an alleged breach of the privacy principle (in 2008).³⁵⁹ Hence, I think that, overall, the coverage of existing law is adequate. As a matter of fact, New Zealand courts have not adopted a corresponding tort of intrusion.³⁶⁰

³⁵⁷ Ibid, paras 12.8.

³⁵⁸ Broadcasting Standards Authority *Annual Report 2008* (Wellington, 2008).

³⁵⁹ New Zealand Press Council www.presscouncil.org.nz (accessed 20 July 2009).

³⁶⁰ See generally: Owen, above n 224.

I rather suggest to adapt existing criminal offences or civil remedies. It seems reasonable to question whether the high threshold under *Hosking* (publication must be *highly* offensive) is still justified due to changes in society's perception of privacy and in light of today's reality television culture (corresponding developments seem to justify a change of the threshold from highly offensive to offensive). In addition, it seems preferable to question the efficiency of BSA's and NZPC's (limited) powers and the lack of an authority or council for online publications are also questionable. As a matter of fact, the BSA has the power to award compensation merely up to \$5000,³⁶¹ and the NZPC has no power at all to award compensation. However, most importantly, the BSA expects public figures to deal with "*robust* persistence on the part of the media that might otherwise be unacceptable."³⁶²

IV. COMPARATIVE ASPECTS

A. The European Context

The approach taken by the New Zealand courts differs significantly from the situation in Germany. Note that German privacy law has been influenced by the ECHR and the ECtHR. In Germany, the ECHR has the status as national law. This means, generally speaking, that the convention is binding for the interpretation of the individual state law but not for the interpretation of the Basic Law. However, the FCC accepted that both national law and the Basic Law has to be interpreted in light of the ECHR.³⁶³ Before the landmark judgement by the ECtHR in 2004 German courts used to apply a pro-paparazzi approach and grant

³⁶¹ Broadcasting Act 1989, s 13.

³⁶² *Laws*, above n 8.

³⁶³ *Görgülü* (14 October 2004) Federal Constitutional Court 2 BvR 1481/04, para 30; "Standards of constitutional law applying to the admissibility of photojournalism concerning the private and everyday life of celebrities", above n 12.

protection in public places only upon seclusion. In *of Hannover*, however, the ECtHR overruled that approach and asked for the application of the legitimate expectation of privacy test and a case-by-case decision. Although the decisions by the ECtHR are not absolutely binding, national courts are obliged to take ECtHR's decisions into consideration and to justify any dissenting opinions. As a matter of fact, case law post ECtHR's landmark judgement shows a different approach, namely a trend towards more protection of public figure's privacy rights (for adults and children)³⁶⁴ whereas New Zealand courts are reluctant to accept privacy in public (neither for adults nor for children).

B. Constitution v Common Law

In addition, while privacy and media rights in Germany are protected by the constitution³⁶⁵ and the ECHR,³⁶⁶ privacy rights in New Zealand are based mainly on common law and merely the freedom of expression is protected under the BoRA. While in Germany the test to be applied seems to require a balancing exercise between the equally protected competing interests (and where acts, such as the CADA, exist addressing the balancing exercise between the competing interests), in New Zealand the starting point seems to be section 14 of the BoRA which is subject to limitations that are prescribed by law and reasonably and demonstrably justified in a free and democratic society, such as the tort of breach of privacy.

³⁶⁴ Damm, above n 43, para 267.

³⁶⁵ Basic Law, above n 38, arts 1(1), 2(1); *Schacht-Leserbrief*, above n 15.

³⁶⁶ ECHR, above n 29, art 8.

C. *Where from here?*

Just a few months after the death of the Princess of Wales the Parliamentary Assembly of the Council of Europe acknowledged that although “people’s private lives have become a highly lucrative commodity for certain sectors of the media ... public figures must recognise that the special position they occupy in society ... in many cases by choice ... automatically entails increased pressure on their privacy.”³⁶⁷ However, the ECtHR held that there is no right to take pictures of public people merely because they are in public places.³⁶⁸ Consequently, the German courts took a pro-celebrity approach and ruled that the protection of celebrities’ private lives does not (no more) necessarily require seclusion (regardless of whether the publication concerns *private* facts).³⁶⁹ The German approach is, however, too formalistic and based on casuistry (general personality rights, right to control the use of the own image, right to privacy, spheres of protection, aspect of contemporary society, legitimate interest, ECHR, international instruments).

It seems that New Zealand courts are not prepared, quite convincingly, to go as far as German courts and the ECtHR ruling that the publication of photographs showing celebrities, for instance, in a restaurant or in public shopping infringes their privacy rights and to accept a general case-by-case approach.³⁷⁰ As a general and preferable rule, given the importance of the freedom of expression, in New Zealand “something that happens on a public street is unlikely to give rise to a reasonable expectation of privacy.”³⁷¹ However, New Zealand courts have accepted that there might be exceptions. “In law, context is

³⁶⁷ Council Resolution (EC) 1165/98 Right to Privacy, above n 50.

³⁶⁸ *Of Hannover v Germany*, above n 11.

³⁶⁹ *Casiraghi v RTL*, above n 9.

³⁷⁰ *Of Hannover v Germany*, above n 11.

³⁷¹ Private in public and seclusion in company: Some new boundaries in the Law of Privacy, above n 165.

everything' ... the same can be said of television and other media broadcasts or publications."³⁷² Indeed, it seems that at the centre of the discussion are the contextual factors *time*, *place*, and *manner* of the intrusion and publication respectively. And as D J Solove said:

[A]ny solution will be far from perfect, as we are dealing with a social tapestry of immense complexity, and the questions of how to modulate reputation, gossip, shame, privacy, norms, and free speech have confounded us for centuries.

D. Children's Special Protection

However, it seems reasonable to accept "the parents' wish ... to protect the freedom of the children to live normal lives without the constant fear of media intrusion" and to object to photographs "taken for the purpose of publication for profit."³⁷³ As accepted in *of Hannover* and *Murray*, the danger involved is that excessive media intrusion might adversely affect the exercise of corresponding activities in the future.³⁷⁴ Consequently, German courts have for a long time protected children from the media. New Zealand courts, however, do not see the need for protection of children when taking photographs of children in public places. However, *Hosking* was decided before *Murray* and New Zealand courts might follow the (new) approach in the United Kingdom (pro-children approach).

³⁷² *Browne v Canwest*, above n 267, para 73 quoting *R v Secretary of State for the Home Department* [2001] 2 AC 532, para 28 Lord Steyne.

³⁷³ *Murray*, above n 34, para 50.

³⁷⁴ *Ibid*, para 55; *of Hannover v Germany*, above n 11, para 57.

E. Celebrity Culture in Germany and New Zealand

The different approaches applied in the respective states might be due to the different celebrity culture. In Europe it seems to have an overwhelming number of tabloid magazines justifying a need for more protection of the individuals concerned. Although even in New Zealand there is a public interest in public figures' daily and private life and an increased emphasis on entertainment press and celebrity gossip ("it seems that the stories that generate the most hits online are often trashy/sleazy ones"),³⁷⁵ New Zealand media seems to be more responsible and prepared to respect individual's privacy rights.³⁷⁶ As a matter of fact, it seems that the different degrees of protection give due regard to the different situations in Germany and New Zealand respectively.

V. CONCLUSION

This paper has sought to show that although some photographs of and reports on public figures raise some concerns, according to the approach taken in New Zealand, "something that happens on a public street is unlikely to give rise to a reasonable expectation of privacy."³⁷⁷ "Generally pictures taken in public are fair game,"³⁷⁸ although "journalism and privacy do not generally go hand in hand."³⁷⁹ Existing law and avenues provide sufficient protection of celebrities' privacy rights as "the mainstream New Zealand media tend to be responsible."³⁸⁰

³⁷⁵ NZLC IP14, above n 262, paras 12.7.

³⁷⁶ See generally: What is the biggest threat to media freedom in New Zealand? www.privacy.org.nz (accessed 25 July 2009).

³⁷⁷ Private in public and seclusion in company: Some new boundaries in the Law of Privacy, above n 165.

³⁷⁸ Mike Hosking and Naomi Campbell develop privacy & confidentiality law, above n 187.

³⁷⁹ What is the biggest threat to media freedom in New Zealand?, above n 376.

³⁸⁰ Ibid; contrast: Kirwan-Jones, above n 201.

Hence, there is no need for a general tort of intrusion in New Zealand. In light of the importance of the freedom of expression the approach taken by the courts in New Zealand (providing some exemptions) is more preferable than the current one taken by German courts and developments in Europe (where adults are concerned). Still, there is a need to address children's special position and to reconsider the approach taken in *Hosking*. Insofar the situation in Germany is preferable. In principle, the relevant factors are *time*, *place*, and *manner* and the key seems to be responsible journalism.

Generally speaking, I think that "compulsions to function in a certain way and ... the presence of the media"³⁸¹ is *part of the game*. N Campbell "has given them stories to sell their papers and they have given her publicity to promote her career."³⁸² Celebrities "cannot ... have it both ways."³⁸³

³⁸¹ *Caroline II*, above n 10, para 40.

³⁸² *Campbell*, above n 6, para 66.

³⁸³ Raymond Wacks "'Private Facts': Is Naomi Campbell a Good Model?" (2004) 1 SCRIPT-ed 420, 432.

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