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IN THE MEDIA'S EYE: PRIVACY RIGHTS OF CELEBRITIES IN NEW ZEALAND, GERMANY AND CANADA

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FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION (LAWS 520)

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'Why are they doing this, do you think?' Coleridge asked.

'Why do you think? To get famous'.

'Ah, yes, of course,' said Coleridge. 'Fame'.

'Fame', he thought, 'the holy grail of a secular age'. The cruel and demanding deity that had replaced God. The one thing. The only thing, it seemed to Coleridge, that mattered any more. The great obsession, the all-encompassing national focus, which occupied 90 per cent of every newspaper and 100 per cent of every magazine. Not faith, but fame.

'Fame', he murmured once more. 'I hope they enjoy it'.

'They won't', Geraldine replied.

Ben Elton[1]

[1] Ben Elton *Dead Famous* (Bantam, London, 2001) 242-243.

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Abstract

In the past two years, the law of privacy experienced some revolutionary developments. In New Zealand the Court of Appeal affirmed the existence of a tort of privacy and determined the relevant requirements for a sucessful claim. In Europe a judgment by the European Court of Human Rights challenged the privacy jurisdiction of the States parties to the European Convention on Human Rights.

In both cases celebrities have initiated the discussions and thus, have been the decisive factor for this paper. Celebrities have increasingly been the subject of the media. Their recognition as a profit generating value led to invasions of their private lives that has called for changes.

This paper will examine the protection provided for celebrities in New Zealand, Germany and Canada. In order to fully understand the approaches taken by the different countries, this paper will introduce the emergence of celebrity and attempt to define celebrity. It will be argued that the influence the right of privacy has on the individual and society justifies limitations on press freedom.

While Germany presently offers the broadest protection for private lives of celebrities, New Zealand favours to give more leeway to freedom of expression. This paper suggests that neither of the perceptions reaches a consummate balance of the rights to privacy and press freedom.

As a result, the paper supports the establishment of a privacy tort in eigth of Canada's common law provinces that are presently without any protection. It will be reasoned why Canada might be obliged to introduce such a tort and the final suggestion pictures a hybrid of the New Zealand and German approach.

Word Length

The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 16.800 words.

Tort of Invasion of Privacy, or
Comparison Privacy Law - New Zealand, Germany, Canada or
Celebrity Rights.

I INTRODUCTION

Press in our society is free and aggressive in its newsgathering function, thus a conflict is inevitable between the interest of individuals in remaining anonymous, and the interest of the media in reporting aspects of people's lives that are deemed newsworthy.

In particular in recent years, the tabloid press has been pushing the boundaries exposing even the most delicate details of private lives of celebrities. In doing so, they challenged public figures to appeal to the law for protection. Recent developments primarily in Germany and New Zealand but partially also in Canada reveal that the courts are prepared to move towards increased privacy protection.

This paper examines the protection presently provided for celebrities in all three countries. It introduces the history of origins including the impact of constitutional documents, defines the parameters (as far as available) and outlines the remedies for privacy intrusions.

Further, the paper argues that a comparison of the "privacy laws" reveals that Germany and New Zealand took quite different approaches in developing and establishing privacy protection. While the former provides for a broad safeguard evolved from case law which goes back to the 1950s, the latter just took the first steps towards increasing protection by clearly affirming the existence of a privacy tort. However, although still in its infancy, the privacy tort definitely lags behind the protection for celebrities exercised in Germany.

Canada on the other hand is still at a starting point and it is hardly predictable how much protection celebrities would enjoy. At least eight of Canada's common law provinces experience developments that heavily resemble those that took place in New Zealand before *Hosking*, namely individual and fainthearted attempts to move towards a privacy tort. It will be argued for the establishment of a tort of invasion of privacy also in Canada since privacy is of immense importance for individuals and society. In terms of celebrity protection, the paper supports a hybrid of the approaches taken in Germany and

New Zealand and outlines under which conditions a fair balance between privacy rights and press freedom can be achieved in Canada.

II CELEBRITY

A The Emergence of Celebrity

By and large, celebrity is a product of modern society. At least three major historical developments are fundamental for the emergence of celebrity. The democratisation of society, the decline in religion and the commodification of everyday life have all led to the formation of today's celebrity culture.[2]

Therefore, the generally accepted function of the celebrity argues Rojek, is to fill in the blank "created by the decay in the popular belief in the divine right of kings, and the death of God."[3] It was during the American Revolution when a shift from the ideology of monarchical power to the ideology of the common man took place and celebrities replaced the monarchy as the new symbols of recognition and belonging.[4]

There are also more radical perceptions concerning the formation of celebrity. On the one hand, there are proponents of the theory that celebrity is the outcome of a development that started in early Roman times when people already experienced the desire for fame.[5] On the other hand, Sckickel[6] supports the understanding of celebrity as a modern phenomenon that emerged not before the beginning of the 20th century.

B An Attempt to Define Celebrity[7]

The different notions concerning the emergence of celebrity can be ascribed to differing definitions of celebrity.

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[2] Chris Rojek *Celebrity* (Reaktion Books, London, 2001) 13.
[3] Rojek, above n 2, 13.
[4] Rojek, above n 2, 14.
[5] See for example Leo Braudy *The Frenzy of Renown: Fame and its History* (Oxford University Press, Oxford, 1986) 10.
[6] Richard Schickel *Intimate Stranger: The Culture of Celebrity in America* (Ivan R Dee, Chicago, 1985) 21.
[7] The word celebrity stems from the Latin term celebrem, which means both fame and being thronged. It is also related to the English word celerity, meaning swift and the French term célèbre, meaning well known in public. See Rojek, above n 2, 9.
In my opinion there exists also a connection to the Latin term celebrare which has connotations with praise, glorify and celebrate.

For Schickel, alleging that "there was no such thing as celebrity prior to the beginning of the 20th century",[8] celebrity separates fame from success and achievement. He refers to Mary Pickford who signed the first million dollar film contract on 24 June 1916 and argues that:[9]

> It was at the moment this deal made headlines that reward began to detach itself from effort and from intrinsic merit, when the old reasonable correlation between what (and how) one did and what one received for doing it became tenuous (and, in the upper reaches of show biz, invisible).

Similar is the concept of the celebrity as "a person who is well-known for their well-knownness".[10] As a result celebrity status is gained not for achieving great things but rather for differentiation of their personality from those of their competitors in the public arena.[11]

Notwithstanding these definitions, there are many individuals emerging from sports, politics, arts, business, film and even academia who, at least at the outset, gain fame for their accomplishments. Thus, special achievements will in the majority of cases be the starting point for becoming a celebrity but they cannot be regarded as a compelling prerequisite.

A further element of celebrity is that the media will pay much greater attention to the private lives than the professional lives of the celebrities. Graeme Turner even suggests that the shift from reporting on the public role to investigating the private lives "map[s] the precise moment a public figure becomes a celebrity."[12]

Rojek treats celebrity as "the attribution of glamourous or notorious status to an individual within the public sphere."[13] since it is generally accepted that royalty, movie stars, television actors, high-ranking politicians, major-league athletes, directors, producers, artists, musicians, authors and journalists as well as gardeners, chefs and

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[8] Schickel, above n 6, 21.
[9] Schickel, above n 6, 47.
[10] Daniel Boorstin *The Image or What Happened to the American Dream?* (Atheneum, NewYork, 1961) 58.
[11] Graeme Turner *Understanding Celebrity* (Sage Publications, London, 2004) 5.
[12] Turner, above n 11, 8.
[13] Rojek, above n 2, 10.

interior decorators with their own television shows and finally, mass murderers or victims of crimes can be deemed as celebrities[14], He argues that both glamour as a favourable and notoriety as an unfavourable recognition form part of celebrity. Thus, the core element of celebrity is the "impact on public consciousness"[15], regardless of the positive or negative tendencies.

Furthermore celebrity can be categorised as ascribed, achieved or attributed.[16] In terms of ascribed celebrity one might think of Caroline of Monacco, Prince Charles or his sons William and Harry. They all have in common the royal lineage that bestows them their status. In contrast, achieved celebrity stems from the effort and success individuals have reached in public competition. Finally, attributed celebrity is characterised as "concentrated representation of an individual as noteworthy or exceptional by cultural intermediaries"[17], notwithstanding special talents or skills. An example for the latter category would be the victim of a serious crime.

Additionally, celebrity represents a commodity in modern society. The definition of Wernick provides that:[18]

> A star is anyone whose name and fame has been built up to the point where reference to them, via mention, mediatized representation or live appearance, can serve as a promotional booster in itself.

While his approach is obviously too narrow, eliding other essential aspects of celebrity, his concept, at least, emphasises that the commercial aspect of celebrity should not be underestimated.[19]

Finally, to create an exhaustive definition of celebrity, one should have regard to the sociological feature of high visibility and the psychological split between private and

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[14] See Richard Hoggart *Mass Media in a Mass Society: Myth and Reality* (Continuum, London, New York, 2004) 82; Rojek, above n 2, 10-11.
[15] Rojek, above n 2, 10.
[16] Rojek, above n 2, 17-18.
[17] Rojek, above n 2, 18.
[18] Andrew Wernick *Promotional Culture: Advertising, Ideology and Symbolic Expression* (Sage Publications, London, 1991) 106.
[19] See W A Van Caenegem "Different Approaches to the Protection of Celebrities against Unauthorised Use of their Image in Advertising in Australia, The United States and The Federal Republic of Germany" (1990) 12 (12) EIPR 452; Jason S T Kotter "Merchandising Celebrity: A User's Guide to Personality Rights" (2002) 16 IPJ Can 1.

public self of the celebrity. In particular the latter, implying that "the human actor presents a 'front' or 'face' to others while keeping a significant portion of the self in reserve"[20], is characteristic for stars.

If one focuses upon the crucial features and if one rejects extreme categoric approaches, a definition of celebrity might read as follows:

A celebrity is a person who

a) achieved or simply got ascribed or attributed fame for whatsoever reason;
b) is therefore attracting more than just short-lived public attention concerning not only their public role but also their private lives;
c) is in terms of his image and name, has a profit generating value and
d) is highly visible within the mass media notwithstanding the fact that he or she may nevertheless withhold or at least try to withhold certain aspects of live from the public eye.

C Conflict of Need for Public Attention and Respect for Privacy

With the aforementioned definition in mind, one becomes aware of the fact that celebrities are mostly products of the mass media. Celebrities live through and by them.[21]

However, a common complaint of celebrities is that there is less and less respect for their private lives. This seems ironic since public attention establishes the basis for celebrity status.[22]

Nevertheless, the complaint is legitimate. Although each nation has its own independent celebrity structure, they all have in common the interest in the private lives of "their" celebrities.[23] To satisfy this increasing interest, almost any kind of media

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[20] Rojek, above n 2, 11.
[21] Van Caenegem, above n 19, 452.
[22] Rojek, above n 2, 20.
[23] See Wikipedia, the free encyclopedia *Defining Celebrity* (last updated 14 May 2005) <http://en.wikipedia.org>. While there is also a class of global celebrities, most individuals will be well known only in certain territories. Interestingly, some subnational entities also have their own celebrity system, such as Quebec.

product covers celebrity issues. In television, internet, print media and especially in woman's magazines, celebrity has become a fundamental component.[24]

Despite the fact that A-list celebrities, mostly through their public relations personnel, have the power to control what is written about them, there remains an area where celebrities cannot escape the public eye.

Magazines like Vanity Fair or People may, in order to generate profit, agree to whatever terms celebrities demanded to get the stars to pose for their covers and editorial articles. But while "the glossy magazines have given up their right to free speech in return for access to celebrities"[25] this barely applies for the everyday appearance of celebrities.[26] Every move is followed by the media, fans or paparazzi regardless whether the celebrity is shopping, running, sunbathing or simply following his or her hobbies. And although most celebrities try to insulate their private lives from public scrutiny they cannot escape the public eye in total.

Thus, the crucial question is, how far does the right of freedom of expression go and how much weight is given to the individual's privacy especially in relation to gossip?

Before turning to the different approaches of New Zealand, Canada and Germany to solve these problems it might be of help to have regard to both a definition of privacy and the influence privacy has on a democratic society and its individuals.

III PRIVACY

A Definition of Privacy

Although modern societies have established a wide range of privacy laws, most of those laws merely provide an indication of what privacy is. A definition of the right to privacy is missing.

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[24] Turner, above n 11, 71.
[25] Toby Young *How to Lose Friends and Alienate People* (Little Brown, London, 2001) 333.
[26] Exemptions would probably be made where a magazine aims for a cover deal with a celebrity. In such case the editors would not want to alienate the celebrity by publishing paparazzi photos.

In fact, the multitude of attempts to define privacy reveals the difficulties affiliated with the subject.

Charles Fried assumed that:[27]

> Privacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves. The person who enjoys privacy is able to grant or deny access to others.

Similar is the attempt of Jourard who suggests that:[28]

> Privacy is an outcome of a person's wish to withhold from others certain knowledge as to his past and present experience and action and his intentions for the future. The wish for privacy expresses a desire to be an enigma to others or, more generally, a desire to control others' perceptions and beliefs vis-à-vis the self-concealing person.

More recently privacy has been devided into three elements. Secrecy, solitude and anonymity were the three spheres Gavison had in mind when he established the connection between privacy and "the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others attention."[29]

However, it seems that it is the broad and almost 120 years old phrase of the "right to be let alone" that Warren and Brandeis[30] took from Cooley's treatise on torts[31] that is both still valid and deemed to cover the concept of privacy best.[32]

B Impact Privacy Has on the Individual

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[27] Charles Fried "Privacy" (November 1967-March 1968) 77 Yale LJ 475, 482.
[28] Sidney M Jourard "Some Psychological Aspects of Privacy" (1966) 31 L & Contemp Probs 307.
[29] Ruth Gavison "Privacy and the Limits of the Law" (1980) 89 Yale L Rev 421, 423.
[30] Samuel D Warren and Louis D Brandeis "The Right to Privacy" (1890) 4 Harv L Rev 193, 195. Their article is deemed to be the first attempt to establish the recognition of a general right of privacy.
[31] Thomas Cooley *Torts* (2 ed 1888) 29 cited in Warren and Brandeis, above n 30, 195.
[32] See Milton R Konvitz "Privacy and the Law: A Philosophical Prelude" (1966) 31 L & Contemp Probs 272, 279.

To understand the importance and value privacy constitutes for the individual, it might be of help to clarify the effects a lack of privacy has on the general well-being of a person. Charles Fried assumed that:[33]

> [P]rivacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable. They require a context of privacy or the possibility of privacy for their existence.

He argues that privacy influences love and friendship in different ways but only the following aspects are relevant for privacy and its invasion by the media.

First, it is crucial that one can be intimate with another to become friends or lovers. And intimacy means sharing one's emotions, beliefs and actions which are not known to everybody due to the right to keep them for oneself. It is by sharing this "exclusive" information and by conferring the right not to share them that "privacy creates the moral capital which we spend in friendship and love."[34] Besides gifts of property or service, it is the shared intimacy that forms the basis for love and friendship. It is hard to imagine that one can be a lover or friend without giving away something of him or herself that is not known to the public. Therefore it is important for every human being, including celebrities, to maintain a sphere where they can express themselves without public cognition.

Secondly, it will be impossible for individuals to share the same level of intimacy with all their friends. The decision to share certain kinds of information with different people will create several degrees of intimacy. Thus, the divulgement of information by third parties, like the media, might destroy the limited degree of intimacy that was created by withholding the respective information.[35]

Besides the effects privacy has on the relations to our fellow men, it is an indispensable value also in terms of mental health and well-being.

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[33] Fried, above n 27, 477.
[34] Fried, above n 27, 484.
[35] Fried, above n 27, 485.

Individuals live in social systems that will provide rules for appropriate behaviour depending on age, sex, family position, job and social class. In order to prevent sanctions deriving from disobedience, men will conform to the system and the provided roles.

But when a person continues to stick strictly to social roles that are "inimical to the needs of his physical organism"[36], he or she will become mentally ill. Therapeutic experience has proved that a private place is the precondition for physical and psychological health. The individual needs a place for solitude where he or she can express and act without fearing external sanctions or feeling "guilt for the discrepancy between the way he appears in public and the way he *is* in private."[37]

This applies even more for celebrities. Since they are omnipresent through internet, newspapers, biographies, television and radio, they cannot hide their private lives from the public eye. The result is that the public self (the self as seen by others) often overlaps or dominates the private self and the celebrities experience identity confusion or even a clinical or sub-clinical loss of identity.[38]

Furthermore, celebrities are often elevated in public esteem. The difficulties arising out of the gap between the public and "real" person often contribute to personal problems. Therefore, celebrities may struggle to be themselves with their families and friends or have poor emotional health causing alcohol or drug abuse.[39]

C Impact Privacy Has on a Democratic Society

Besides the effects privacy has on individuals there is also a remarkable impact it has on society at large. Most of the effects are linked with the importance privacy has to the well-being of the individuals who form part of society.

A lack of privacy is undoubtfully helpful to achieve maximum control over citizens behaviour and might keep society stable. But the longed for stability may not

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[36] Jourard, above n 28, 309.
[37] Jourard, above n 28, 310.
[38] Rojek, above n 2, 11.
[39] Rojek, above n 2, 20; Wikipedia, the free encyclopedia *Defining Celebrity* (last updated 14 May 2005) <http://en.wikipedia.org>.

last since non privacy also means that there is little or no individuality. But it is that individuality that is fundamental since "the cost to be paid for the ends achieved-in terms of lost health, weak commitment to the society, and social stagnation - may be to great."[40] A society whose goal is to endure, must concede its peoples privacy in order to ensure that they will "gladly live - not just for material benefits but for the rich experience of existence that participation in the society affords."[41]

Finally, privacy is indispensable for a societies' substantial progress in art and science. Artists, writers, scientists and performers need solitude to explore and develop new ideas and in order to tap their full intellectual potential.[42] Thus, privacy facilitates diversity, which is essential to any pluralistic, democratic society.

In particular the last-mentioned argument supports the position that "the democratic justification for privacy is similar to that of freedom of expression since both the free formulation of viewpoints, and their free expression, are necessary to democratic political debate".[43]

Nevertheless, due to the conflictive nature of freedom of expression and privacy, both rights will regularly clash. While the media naturally fosters freedom of the press as part of freedom of expression, the individuals (celebrities) will invoke the right to privacy.

In the following chapters this paper will examine how New Zealand, Canada and Germany balance the two legal concepts in particular in relation to celebrities and gossip.

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[40] Jourard, above n 28, 318.
[41] Jourard, above n 28, 311.
[42] Jourard, above n 28, 314.
[43] John D R Craig "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997) 42 McGill LJ 355, 360.

IV LAW OF PRIVACY IN NEW ZEALAND

In New Zealand, there exists a whole collection of pivacy laws.[44] Nevertheless, for the purpose of this paper focusing on the rights of celebrities, only the tort of invasion of privacy, the privacy principles developed by the Broadcasting Standards Authority and specific law covering photographing a person will be of special interest.

A Provisions Concerning Photographs

First and foremost, there is no statute law in New Zealand preventing the taking of photographs of a person without his or her consent.[45] Even publication is not wrongful as long as the requirements for another cause of action are not met, for example defamation.[46]

Exceptions apply for private investigators who commit an offence in taking or using a photograph without prior consent.[47]

Similar provisions can be found in the Copyright Act 1994 and are of importance in cases where celebrities commission photographs. But since any arrangements with newspapers and magazines will mostly be covered by negotiated contracts, section 105 of the Copyright Act 1994[48] will only be of relevance where the celebrity needs to deliver photographs for official documents such as passport or driving licence.

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[44] The non exhaustive list includes the Privacy Act 1993, Harassment Act 1997, Crimes Act 1961, Summary Offences Act 1981, Victims' Rights Act 2002, Telecommunications Act 2001, Radiocommunications Act 1989 and the Criminal Records Act 2004. Although these statutes do not provide an enforceable right to privacy they do adress at least specific privacy issues. In addition, privacy is partly covered by existing causes of action such as trespass, nuisance, breach of confidence, harassment, and intentional infliction of emotional harm. See John F Burrows and Ursula Cheer *Media Law in New Zealand* (5 ed, Oxford University Press, Auckland, 2005) 234-235, 245, 280-289; *Hosking v Runting* [2005] 1 NZLR 1, paras 186-192 (CA) Keith J.

[45] Burrows, above n 44, 286.

[46] Burrows, above n 44, 286.

[47] Private Investigators and Security Guards Act 1974 s 52 (1) (a). This section provides that: (1) Every person who, in the course of or in connection with the business of a private investigator,- (a)Takes or causes to be taken, or uses or accepts for use, any photograph,...without the prior consent in writing of that other person, commits an offence.

[48] Copyright Act 1994. Section 105 (1) provides that: A person who, for private and domestic purposes, commissions the taking of a photograph or the making of a film has, where copyright exists in the resulting work but is owned by some other person, the right-
(a) Not to have copies of the work issued to the public; and
(b) Not to have the work exhibited or shown in public; and
(c) Not to have the work broadcast or included in a cable programme.

Recently, there have also emerged considerations concerning visual records of a person taken in situations involving nudity, partial nudity, or physical or bodily intimacy.[49] Thus, it is recommended that the Crimes Act 1961 should be complemented by new criminal offences containing provisions that making, publishing and possession of a voyeuristic recording are illegal.[50]

But as long as no such statute is enacted, it must be examined whether the tort of invasion of privacy covers the taking of photographs and other intrusions into the private lives of celebrities.

B The Tort of Invasion of Privacy

Although some publications may give the impression that a privacy tort has suddenly appeared from nowhere,[51] this is not so. New Zealand has recognised a privacy tort for at least ten years, developed by several High Court decisions.[52]

The significance of the *Hosking* decision[53] is represented by the fact that, finally, the Court of Appeal unmistakably affirmed the privacy tort. Interestingly, the three judges favouring the existence of the privacy tort[54] are also members of New Zealand's new Supreme Court, which replaced the Privy Council last year. Thus although not in form, the case effectively has the backing of the highest court in New Zealand's court hierarchy.[55]

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[49] See Burrows, above n 44, 286.

[50] New Zealand Law Commission *Intimate Covert Filming* (NZLC SP 15, Wellington, 2004) para 4.15-4.64. Due to such an amendment celebrities would be safe from being depicted while engaged in sexual or an intimate bodily activity such as using a public toilet. Furthermore, visual recording of a person being nude or having his or her sexual organs, pubic area, buttocks, or her breast or underwear exposed would be prohibited.

[51] See Joanne Black "Age of Intrusion" (25 June 2005) *New Zealand Listener*, 14. The article states that the *Hosking* decision "effectively created a new law."

[52] Burrows, above n 44, 250. The first general consideration of a stand-alone common law action for an invasion of privacy took place in 1986 where, in *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 (HC), the litigant sought to prevent the publication of former convictions. Further steps were taken in *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 (HC), *P v D* [2000] 2 NZLR 591and *L v G* [2002] NZAR 495.

[53] *Hosking v Runting*, above n 44.

[54] Gault and Blanchard JJ delivered a joint judgment while Tipping J wrote a judgment of his own. Although he is in general agreement with the former judges, certain variations arise since Tipping J applies to some of the elements lesser standards. The differences between the joint judgement and that of Tipping J will be discussed below.

[55] Andrew Geddis "*Hosking v Runting*: A Privacy Tort for New Zealand" (2005) 13 Tort L Rev 5, 6.

The *Hosking* case was concerned with the publication of photographs of the appellant's children. They had been taken while the twin daughters were pushed in their stroller by their mother in a busy shopping mall. Although the claim was rejected, the joint majority judgement of Gault P and Blanchard J stated two fundamental requirements for a tort of privacy:[56]

> 1 The existence of facts in respect of which there is a reasonable expectation of privacy; and
> 2 Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

Although the tort is obviously in an early stage of development and there is only a very small number of decisions concerning this matter, the next chapters will closely examine the several elements of the tort in order to determine the possible outcome for celebrities.

1 The several elements of the tort of privacy

Before turning to the several elements it should be emphasised that the Court stated explicitly that the privacy tort is concerned only with the "wrongful publicity given to private lives" and not with the "unreasonable intrusion into a person's solitude or seclusion."[57]

(a) A reasonable expectation of privacy

Although all three majority judges agreed that the question of whether a person had a reasonable expectation of privacy forms the first ingredient of the tort, it is only Tipping J who makes an attempt to render this element more precisely when he suggests that "[t]he necessary expectation can arise from the nature of the information or material or the circumstances in which the defendant came into possession of it, or both."[58]

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[56] *Hosking v Runting*, above n 44, para 117 Gault P and Blanchard J.
[57] *Hosking v Runting*, above n 44, para 118 Gault P and Blanchard J.
[58] *Hosking v Runting*, above n 44, para 249 Tipping J.

Tipping J's definition is quite broad and therefore does not exclude a reasonable expectation of privacy only because photographs were taken in a public place.[59] Nevertheless, it will be more difficult for celebrities to succeed with a claim since the Court also noted that:[60]

> The right to privacy is not automatically lost when a person is a public figure, but his or her reasonable expectation of privacy in relation to many areas of life will be correspondingly reduced as public status increases. Involuntary public figures may also experience a lessening of expectations of privacy, but not ordinarily to the extent of those who willingly put themselves in the spotlight.

Therefore, it can be considered certain that even among celebrities different measures will apply – depending on whether or not the celebrity intentionally sought the public.

(b) Public disclosure

Since the objective of the privacy tort is to prevent the widespread publicity of very personal and private matters, any publication in a newspaper, television or radio will fulfil the test.[61]

(c) Offensive and objectionable nature of the publicity

While it was not always clear whether the facts itself or their disclosure must be offensive and objectionable[62] in *Hosking* the Court of Appeal favoured explicitly the latter one by stating that:[63]

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[59] See also Burrows, above n 44, 251.
[60] *Hosking v Runting*, above n 44, para 121, Gault P and Blanchard J.
[61] Burrows, above n 44, 251-252. Due to this element the tort excludes situations where a third person gathers offensive information to keep them for his or her own entertainment rather than publishing it. Therefore, stalkers or aggressive fans would not meet the requirements of the tort though it is questionable whether such conduct is less invasive. Nevertheless, in very serious cases there will probable be an action for trespass and intentional inflicting of mental suffering and emotional distress.
[62] See *Bradley v Wingnut Films Ltd*, above footnote 52, 424. In this decision Gallen J assumed that the facts must be highly offensive and objectionable rather than their publication.
[63] *Hosking v Runting*, above n 44, para 127 Gault P and Blanchard J.

> We consider that the test of *highly offensive to the reasonable person* is appropriate. It relates, of course, to the publicity and is not part of the test of whether the information is private.

Two of the majority judges assume that only publicity highly offensive can meet the requirements for the tort. Therefore, "even extensive publicity, of matters which, although private, are not really sensitive"[64] is not sufficient. Only "publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned"[65] can justify a right of action.

Since the threshold set by the joint judgment is quite high, celebrities are definitely better protected by the standards Tipping J applies. Instead of demanding a highly offensive publication, he lowers the benchmark and suggests that it will only be "necessary for the degree of offence and harm to be substantial."[66] He justifies his lesser standard by arguing that in certain circumstances it might be unduly restrictive to require a highly offensive publicity and that a substantial degree of offence is more flexible.[67]

(d) Private facts

Finally, the publication must concern private facts. Given that any definition of what constitutes a private fact is very difficult, the joint judgment states in general that "private facts are those that may be known to some people, but not to the world at large."[68] Since this is a very broad definition, the Court finds the comments of Gleeson CJ in *ABC v Lenah Game Meats*[69] also cited by the English Court of Appeal in *Campbell*[70], very helpful:[71]

> There is no bright line which can be drawn between what is private and what is not...Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary

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[64] *Hosking v Runting*, above n 44, para 126 Gault P and Blanchard J.
[65] *Hosking v Runting*, above n 44, para 126 Gault P and Blanchard J.
[66] *Hosking v Runting*, above n 44, para 256 Tipping J.
[67] *Hosking v Runting*, above n 44, para 256 Tipping J.
[68] *Hosking v Runting*, above n 44, para 119 Gault P and Blanchard J.
[69] *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199.
[70] *Campbell v MGN Ltd* [2003] 1 All ER 224 (CA).
[71] *Hosking v Runting*, above n 44, para 119 Gault P and Blanchard J.

> standards of morals and behaviour, would understand to be meant to be unobserved.

On the other hand, facts such as criminal convictions[72], ownership of land and marriage or divorce (at least as long the public procedure is concerned) are public facts.[73]

However, there is a large area of uncertainty between what is necessarily public and what is necessarily private and the question of whether there is a private fact will always be case specific.[74]

(e) Public interest

Legitimate public interest is not an element of the tort itself but a defence to it. The burden of proof lies with the defendant.[75] Although the Hoskings tried to persuade the Court that commercially motivated speech of a gossipy nature deserved less protection than political or artistic speech, the Court refused to adopt special categories of speech. Instead, it prefers "an approach that takes into account in each individual case community norms, values and standards."[76] Additionally, the Court states that:[77]

> A matter of general interest or curiosity would not, in our view, be enough to outweigh the substantial breach of privacy harm the tort presupposes. The level of legitimate public concern would have to be such as outweighs the level of harm likely to be caused. For example, if the publication was going to cause a major risk of serious physical injury or death..., a very considerable level of legitimate public concern would be necessary to establish the defence.

Matters relating to public health, economy, safety, the detection of crime and national security are clearly covered by legitimate public concern.[78] In contrast, publicity

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[72] In respect of criminal convictions one should bear in mind that these general public facts can become private again over time, see *Tucker*, above footnote 52.
[73] Burrows, above n 44, 252.
[74] Tobin, Rosemary Tobin "Case Note: Yes, Virginia, there is a Santa Clause: The Tort of Invasion of Privacy in New Zealand" (2004) 12 Torts LJ 95, 109.
[75] *Hosking v Runting*, above n 44, para 129 Gault P and Blanchard J.
[76] *Hosking v Runting*, above n 44, para 135 Gault P and Blanchard J.
[77] *Hosking v Runting*, above n 44, para 134 Gault P and Blanchard J.
[78] Burrows, above n 44, 255.

that "becomes morbid and sensational prying into private lives for its own sake" will definitely not constitute a defence.[79]

(f) Privacy rights of celebrities' children

Although the Court of Appeal decision in *Hosking* deals in depth with the general recognition of a tort of privacy, the starting point was always the privacy rights of the Hosking children.

The main question was whether there should be a difference between celebrity adults and their underage children. The joint judgment of the majority begins with examining the international instruments which bind New Zealand to protect the rights of children.

As a party to the United Nations Convention on the Right of the Child 1989 (UNCROC)[80], New Zealand is subject to Article 16 and 3 of the convention.[81] Although the court accepts that these provisions oblige the state to give special consideration to the rights of children, it nevertheless states that the generally required elements of the tort are sufficient to protect children since the flexibility of the criteria accommodates the special vulnerability of minors.[82]

The judges are of the view that it would be "unrealistic and unnecessary to consider a legal prohibition against the publication of all photographs depicting children without parental consent".[83] In contrast, privacy of celebrities' children is only violated

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[79] *Hosking v Runting*, above n 58, para 135 Gault P and Blanchard J, referring to p 391 of the Restatement of Torts.

[80] The United Nations Convention on the Rights of the Child, UN doc. A/44/49 (1989) (UNCROC) adopted by GA Res. 44/25, annex 44, UN GAOR Supp. (No. 49). The Convention has become the most widely ratified of all human rights treaties, with 192 States Parties. As of 14 September 2004, only Somalia and the United States of America have not ratified the Convention.

[81] UNCROC, Article 16 states that: 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.2. The child has the right to the protection of the law against such interference or attacks. Article 3 states that: 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

[82] *Hosking v Runting*, above n 44, para 145 Gault and Blanchard JJ.

[83] *Hosking v Runting*, above n 44, para 144 Gault and Blanchard JJ.

where a person of ordinary sensibilities would the publication consider highly offensive or objectionable "even bearing in mind that young children are involved."[84]

The further remarks of the joint judgement indicate that a publication amounts to breach of privacy only, if there is a real risk of physical harm caused for instance by kidnapping or other wrongdoing.[85] The pure concern that the wellbeing of the children might be influenced negatively due to a constant fear of media intrusion is not sufficient to outweigh freedom of expression.[86]

(g) Summary: Outcome of the *Hosking* decision for celebrities

Firstly, celebrities do have a right to privacy even if this right can be limited depending on the extent to which they sought the public eye.

Secondly, although the decision notes explicitly that "the law in New Zealand did not recognise a tortious cause of action in privacy based upon the publication of photographs taken in a public place"[87], it does not mean that photographs of a celebrity or their family members cannot attract the privacy tort. As long as the several requirements of the tort are fulfilled, even the taking of photographs in a public street might give a claim.

In *Hosking* the claim was rejected because of both the fact that the photographs of the children did not include any private facts and that an intended publication would not be considered highly offensive. The several elements of the tort need to be fulfilled to grant damages or injunctions whether celebrities themselves or their underage children are involved. The courts do not differentiate between adults and minors as they assume that the tort elements accommodate the interests and needs of both.

However, as the tort of invasion of privacy is relatively new and the *Hosking* decision gives only general statements in terms of the requirements, earlier cases from

[84] *Hosking v Runting*, above n 44, para 165 Gault and Blanchard JJ.
[85] *Hosking v Runting*, above n 44, para 163 Gault and Blanchard JJ.
[86] *Hosking v Runting*, above n 44, para 161-163 Gault and Blanchard JJ.
[87] *Hosking v Runting*, above n 44, 1.

familiar jurisdictions might be of help. They could reveal rough guidelines on circumstances that might constitute a tortious claim also in New Zealand.

C Important Australian and English Cases as Possible Guidelines

In *Bathurst CC v Saban*[88] Young J emphasised that the publication of photographs depicting someone in a situation of embarrassment or humiliation could impose an invasion of privacy. He stated that relief could be granted to a person:[89]

> [W]ho complained that someone had taken a photograph of him in a shockingly wounded condition after a road accident[90]...or that she had been standing innocently over the air vent in a fun house and someone had photographed her with her skirts blown up.

Almost ten years ago in *Hellewell v Chief Constable of Derbyshire*[91] Law J noted that:[92]

> If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would amount to a breach of privacy...

For the question of whether a person is engaged in a private activity, one should have a look at the decisions of *Peck v United Kingdom*[93] and *Campbell v MGN*.[94] The

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[88] *Bathurst v Saban* (1985) 2 NSWLR 704.
[89] *Bathurst v Saban*, above n 101, 708 Young J.
[90] See also *CD v TV3 Network Services Ltd* 2000-141-143 where footage of a car accident was used in a comedy show although the complainant had expressed her wish not to be filmed. She was clearly identified and was shown bleeding from an obvious but apparently superficial injury. The BSA held that the fact of the accident and details of the injuries were public facts and that the accident had occurred and being filmed in a public place. Thus, no private facts were revealed. However, the BSA held that Private Principle (iii), protecting the interest in solitude and seclusion was violated.
Contrast *Convey v TV3 Network Services Ltd* 1996-115, where the Broadcast Standards Authority stated that road accidents are a matter of public interest. Due to that defence the footage of a victim of the accident was held not to meet the requirements for a breach of privcy.
[91] *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473.
[92] *Hellewell v Chief Constable of Derbyshire*, above n 103, 807 Law J.
[93] *Peck v United Kingdom* (2003) 13 BHRC 669 (ECHR).
[94] *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457 (HL). It must be emphasised that in the United Kingdom a common law privacy tort has not been recognised yet. Instead, the English Courts developed the equitable cause of action of breach of confidence to prevent the publication of private information in circumstances like the above. But since the different approaches do not change the general recognition of privacy protection the cases are still a helpful guideline. This is supported by the fact that the aforementioned English cases are also cited and discussed in *Hosking*. See *Hosking v Runting*, above n 44

former case indicated that Mr Peck should have been entitled to remedies since he was filmed on a public street, holding a knife that he had used to attempt suicide. The latter case involved supermodel Naomi Campbell, who recently underwent therapy to overcome drug problems. The Mirror published an article revealing Campbell's addiction; the fact that she was seeking therapy; the fact that the therapy was at Narcotics Anonymous; details of her therapy; and a photograph of her leaving a meeting of Narcotics Anonymous.[95]

It was beyond dispute that all five categories of information were private and protected by Article 8 of the European Convention on Human Rights 1950 (ECHR).[96] Nevertheless, it was accepted by the plaintiff that she could not prevent the publication of both the fact that she was addicted and that she received treatment since she had falsely denied a drug problem in the past. Hence, the complaint was restricted to the fact that she was treated at Narcotics Anonymous, the details of the therapy, and the photograph outside the meeting.[97] The House of Lord held in a three-to-two decision that Mrs Campbell was entitled to remedies as far as NA, treatment details and the photograph were concerned. Their Lordships balanced the right to private life with the right to freedom of expression, provided by Article 10 ECHR. As a result, the majority held that the public's need to know the details of the treatment was lower than the need to prevent a disclosure in order to assure the appellant's recovery.[98]

Because there are only few court decisions in New Zealand concerning the privacy rights of public figures, it might be of help to have a closer look also at cases dealt with by the Broadcasting Standards Authority (BSA) and the Press Council (PC).[99]

It is widely accepted that the BSA and PC have developed considerable expertise in dealing with privacy complaints, using their own privacy principles for guidance.[100]

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para 53 where Gault and Blanchard JJ state that "relevant decisions ...can be important in helping develop the New Zealand jurisprudence" and that " Peck is instructive".

[95] See Arye Schreiber "*Campbell v MGN Ltd*" (2005) 27 (4) EIPR 159.

[96] Article 8 (1) ECHR provides that: Everyone has the right to respect for his private and family life, his home and his correspondence.

[97] Schreiber, above n 95, 159.

[98] *Campbell v Mirror Group Newspapers Ltd*, above n 107, 457.

[99] While the former, under the Broadcasting Act 1989, has jurisdiction to deal with complaints that a broadcaster breached an individual's privacy the latter has no legislative foundation and therefore no legally enforceable power.

[100] See Burrows, above n 44, 257. For the privacy principles of the BSA and PC see Appendices I, II.

Since the privacy principles of the BSA have been affirmed by the High Court[101] and the principles of the PC were at least part of the considerations of the Court of Appeal in *Hosking*[102], it is advisable for the media to be aware of their decisions. Not only do the BSA's privacy principles include the elements of the tort as established in *Hosking*, they are partially even wider and thus relevant to the developing tort of privacy.[103]

D Privacy Decisions of the Broadcasting Standards Authority

Although the BSA has a broad selection of decisions referring to privacy, only three of them concern celebrities and are of further interest.

In the first decision[104] Mr Lee, a gospel minister and former Member of Parliament was shown in an episode of Private Investigators on TV One. The footage included the arriving of Mr Lee for a prayer meeting at a house where a private investigator was in the process of recovering goods from its occupants. The complainant alleged that the broadcast breached his privacy since it was outrageous and very damaging to his credibility and character. Mr Lee claimed a breach of privacy because he was identified and named in the programme although he was not involved in the wrongdoing which led to the filming and his arrival was by sheer chance.

The authority refused to uphold the complaint and stated that:[105]

> [T]he footage was capable of having the pejorative inference drawn by viewers that Mr Lee was, in some manner, tainted by association with the matter being investigated in the item. However, it [BSA] considers that this is not the only possible interpretation. In these circumstances, the Authority is not prepared to conclude ... that the facts about Mr Lee ... were 'highly offensive and objectionable' as required to constitute a breach of Privacy Principle (i).

Another decision concerns Michael Laws, who was an adviser to the New Zealand First political party.[106] Due to the resignation of two candidates from that party one month before the General Election, 3 National News covered the subject. Given that both candidates had criticised the influence of Mr Laws as party adviser, the footage

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[101] See *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720 (HC).
[102] *Hosking v Runting*, above n 44, para 198 Keith J.
[103] See Burrows, above n 44, 257.
[104] *Graeme Lee v Television New Zealand Ltd* 2000-133/134.
[105] *Graeme Lee v Television New Zealand Ltd* , above n 104, The Authority's Findings.
[106] *Michael Laws v TV3 Network Services Ltd* 1996-024.

started with picturing Mr Laws at his front door wearing nothing but his nightgown. The programme continues to state that Mr Laws refused an interview at that time but ansered questions later that day (this interview was broadcasted as well).

Again, the BSA declined to uphold the privacy complaint. The reasons given by the authority are entirely based on principle (vi) which deals with the public interest as defence to a privacy complaint. The BSA emphasised the fact that "the symbiotic relationship between the media and politicians was approaching in mid September a level of intensity" [107] that:[108]

> [I]n this very current issue meant that persistent approaches from the media were not unreasonable, and indeed, were to be expected. The Authority considers that people such as Mr Laws, 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.

Finally, the BSA was concerned with a complaint regarding Dr Morgan Fahey, a City Councillor and a doctor in general practice.[109] TV3 had first screened a programme including accusations of sexual and professional misconduct. As a result, several former female patients contacted TV3 and affirmed the allegations. One woman even wished to confront Dr Fahey face to face. Equipped with a hidden camera, she visited her former doctor at his surgery and confronted him with her accusations.

The BSA held that the allegations of sexual and professional misconduct were private facts which a reasonable person would consider highly offensive and objectionable.

Nevertheless, the BSA repeatedly considered the public interest to provide a sufficient defence stating that:[110]

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[107] *Michael Laws v TV3 Network Services Ltd* , above n 106.
[108] *Michael Laws v TV3 Network Services Ltd* , above n 106.
[109] *William De Hart, Lynda Cameron, P W and P M Cotter v TV3 Network Services Ltd* 2000-108, 2000-109, 2000-110, 2000-111, 2000-112, 2000-13. The complainants filed 2 complaints each. Besides there allegations concerning privacy they also claimed a violation of almost all the Authority Standards G1-G7, G12, G14-G 20 and V16.
[110] *William De Hart, Lynda Cameron, P W and P M Cotter v TV3 Network Services Ltd*, above n 109, The Authority's Findings on Privacy.

> Dr Fahey was a well-known Christchurch identity - a practising doctor who was standing in the Christchurch local body elections as a candidate for mayor - and serious allegations had been made about him. The Authority finds that it justified the invasion of Dr Fahey's privacy, and affords a complete defence to TV3.

E Privacy Principles of the Press Council

With regard to the PC, there have been 36 privacy complaints in recent years, even though, only two concern celebrities.

The first case involved John Burke, the Mayor of Porirua.[111] In 1998 he planned a trip to Israel as President of Sister Cities New Zealand. The Evening Post interviewed Mr Burke in this matter and considered the publication of the article. In the past, Mr Burke's wife had become the victim of offensive letters sent to her while her husband was overseas. That was the reason why Mr Burke asked the reporter not to publish the item.

He also sent a letter to the Evening Post again emphasising why the article could be of harm for him and his family. In return, this letter was abridged and published. Mr Burke alleged an unfair treatment by the Evening Post provoked by the abridgement and publication of the letter to the editor.

The PC denied upholding the complaint explaining that:[112]

> The Council considered that the Evening Post was entitled to publish details of Mr Burke's travel arrangements. As a city mayor Mr Burke is undoubtedly a significant public figure and his trip was newsworthy on an aspect of his duties regardless of how it was funded. The Council had sympathy with his wife's situation but felt that the solution to her problem did not lie with the newspaper.

The second and certainly more distinctive case took place in 2003 when Andrew Beck, a Wellington barrister, filed a complaint against New Zealand Woman's Weekly.[113]

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[111] *John Burke v The Evening Post*, case number 709.
[112] *John Burke v The Evening Post*, above n 111.
[113] *Andrew Beck v NZ Woman's Weekly*, case number 946.

The woman's magazine had run a story focusing on how Mrs Beck deals with both children and legal career after the divorce from the complainant. The article had mentioned Mr Beck several times and caused him to allege a violation of his private life publishing "salacious details" about his former marriage.

Although, the PC refused to uphold the complaint[114], it made a clear statement concerning the responsibilities of the media in dealing with private matters. To begin with, the Council confirmed that though the genre of woman's magazines generally depends "on the personal stories of its readers as well as of celebrities" that it "does not absolve magazine journalists from acting ethically or in the best journalistic traditions".[115] And in its final part of the decision the PC found that journalists must:

> [C]arefully consider who might be affected by the human-interest they feature - in other words, who might suffer collateral damage – and whether anyone else's views might therefore need to be sought. The Council believes this is particularly important where children are involved.

F General Outcome for Celebrities: Summary

The discussed cases are unfortunately only of limited help. *Barthurst CC v Saban* sheds further light on the question what kind of "publicity is truly humiliating and distressful".[116] According to the Australian authority, the disclosure of photos that depict celebrities with their underwear or sensitive body parts exposed would be an invasion. It is very likely that this perception will be adopted by New Zealand's courts since the Law Commission already introduced identical considerations.

In terms of car accidents, mentioned in the same decision, the outcome is less predictable. Interestingly, the New Zealand courts will have to decide this specific matter soon since Mr and Mrs Andrews are suing TVNZ. They both have been involved in a car accident on a motorway and scenes from the road crash were shown in a reality TV show.

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[114] The PC stated that the references in the article were not unduly intrusive.
[115] *Andrew Beck v NZ Woman's Weekly*, above n 113.

[116] This term was used by the joint judgment in *Hosking v Runting*, above n 44, para 126 Gault P and Blanchard J.

Relying on the *Hosking* decision they seek damages for the invasion of their privacy. However, two cases decided by the BSA suggest that the courts will deny an invasion of privacy. In both *Convey v TV3 Network Services Ltd* and *CD of Queenstown v TV3 Network Services Ltd* the BSA held that road accidents are public, not private facts and of public interest. The latter decision was upheld only on the ground of Privacy Principle (iii) which deals with the interest in solitude and conclusion and is definitely not part of the privacy tort.[117]

Nevertheless, since the footage of Princess Diana's fatal car accident provoked extreme public disgust, it is conceivable that the courts apply another standard. They could argue that the disclosure of injuries also concerns information relating to health. As mentioned above, such information would be identified as private.[118]

The *Hellewell*, *Peck* and *Campbell* decisions suggest that the publication of facts concerning the mental well-being such as drug or alcohol abuse, depression, receiving therapy or suicide attempts would be enough reason for a claim.

The BSA decision, assessing the complaint by Mr Lee, indicates that the element of "highly offensiveness" will probably receive a very narrow interpretation. In fact, the BSA assumed that a publication, although it led to humiliation and distress on the part of the complainant, may not fulfil the tort's conditions if the facts could have been interpreted differently by the public (meaning in a way that would not be humiliating or harmful).

Finally, the complaints concerning Mr Laws, Dr Fahey and John Burke reveal that politicians have a much lesser expectation of privacy. Publications of matters that might generally held unacceptable will be lawful because they will usually be of high public interest.

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[117] *Hosking v Runting*, above n 44, para 118 Gault P and Blanchard J.

[118] *Hosking v Runting*, above n 44, para 119 Gault P and Blanchard J

G Remedies Provided for an Invasion of Privacy

Public figures will be most tempted to claim injunctive relief in order to prevent publication. The central argument is that once an item is run by the media it is in the public eye and cannot be rescinded. On the other hand, the media favour granting damages rather than being subject to prior restraints. They argue with the importance attached to freedom of expression.

The joint judgment tends toward the media's concept, ascertaining that the traditional approach has been generally reluctant to grant injunctions and that the current position is that:[119]

> [A]n injunction to restrain publication in the face of an alleged interference with privacy will only be available where there is compelling evidence of most highly offensive intended publicising of private information and there is little legitimate public concern in the information. In most cases, damages will be considered an adequate remedy.

Tipping J agrees in general that damages have priority but lowers the benchmark insofar as he declares injunctions possible "in cases which are both severe in likely effect and clear in likely outcome."[120]

Regardless of which criteria one is about to follow, it is certain that the threshold for injunctions is high and that the courts will be more likely to grant damages unless exceptional circumstances require otherwise.[121]

H Impact of the New Zealand Bill of Rights Act on the Tort of Privacy

It is also of special interest for this paper to examine the *Hosking* decision concerning the question of whether and how the court applied the Bill of Rights Act 1990 in finally establishing the tort of privacy. When discussing such instrument one must be aware of the fact that it's original function is to protect the individual from direct

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[119] *Hosking v Runting*, above n 58, para 158 Gault and Blanchard JJ.
[120] *Hosking v Runting*, above n 44, para 258 Tipping J.
[121] Besides the courts, the BSA has jurisdiction to grant remedies for an intrusion of privacy. However, the authority can grant damages up to $ 5000 only.

interference by the state.[122] The vertical effect implies that the state has to respect the rights bestowed upon the individual by the BORA and must not infringe these claims unless it is justified according to section 5.[123]

In cases like the present one, where only private parties are involved, the main purpose of such instrument, namely balancing the disparity of powers between individuals and the state, has less relevance.

Nevertheless, there are convincing arguments why a human rights instruments may have a horizontal effect, that is to be applied also between private parties.[124]

Maybe the strongest one is that there are occasions imaginable where private actors "have the capacity to infringe upon the human rights of individual persons just as much as a public actor can".[125]

In terms of media, this is comprehensible quite easily. The publication of, for example, a health record by a newspaper or broadcaster can definitely do more harm than the possibility of easy access to such records saved with the Ministry of Health.[126]

In *Hosking*, the judges as far as they discussed the issue at all, took very different views concerning the impact of the BORA when deciding whether to create a new common law tort. This is very unfortunate since no conclusive answer has been given yet to this important question. One reason might be that the BORA is quite new since it was enacted only in 1990. Nevertheless, the broad and detailed discussions in other jurisdictions like the United Kingdom, United States, Canada, France and Germany would have indicated reaching satisfying results faster and easier. That applies even more so, since the judges considered foreign case law, which examines Charter or Constitution values intensively.[127]

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[122] Andrew Geddis "The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runting* (2004) NZLR 681, 682.
[123] Geddis, above n 122, 683.
[124] See generally Geddis, above n 122, 684.
[125] Geddis, above n 122, 684.
[126] Nowadays, the disclosure of such information by public bodies is prohibited by the Privacy Act 1993.
[127] For example *Les Éditions Vice-Versa Inc v Aubry* (1998) 157 DLR (4th) 577 (SCC) and *Katz v United States* (1967) 389 US 347. This cases and their approach will be discussed below.

The joint judgment of the majority addresses the matter in short[128] stating that "developments in the common law must be consistent with the rights and freedoms contained in the Bill of Rights Act" but "are not precluded merely because they might encroach upon those rights and freedoms."[129] As long as the encroachment is justified according to section 5 of the BORA, the courts are free to develop the law. Gault J continues to assume that although freedom of expression is of fundamental importance, it is not an absolute right. Therefore, "it could could not be contended that limits imposed to give effect to rights declared in international covenants to which New Zealand is a party cannot be demonstrably justified in a free and democratic society." [130] Such rights are included in Article 17 ICCPR and Article 16 UNCROC providing for privacy. Resorting to the international treaties is obviously due to the judges' notion that privacy, in contrast to freedom of expression, is not addressed in the BORA.[131]

Although the reasoning reveals that the two judges are prepared to accept a certain influence of the BORA between private parties, they expressly clarify that "the complex question of the extent to which the Courts are to give effect to the rights and freedoms affirmed in the Bill of Rights Act in disputes between private litigants" is not the subject of their judgement.

Tipping J comes from a similar starting point when stating that:[132]

> The Bill of Rights is designed to operate as between citizen and state. Nevertheless it will often be appropriate for the values which are recognised in that context to inform the development of the common law in its function of regulating relationships between citizen and citizen.

But in contrast to the remaining majority judges, he is of the view that not only freedom of expression but also privacy is contained in the BORA. He states that:[133]

> My present point is that the values that underpin s 21 and which are reinforced by New Zealand's international obligations can, by reasonable analogy, be extended

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[128] Only 6 out of 174 paragraphs include statements relating to the impact of the BORA, see para 111-116 Gault and Blanchard JJ.
[129] *Hosking v Runting*, above n 44, para 111 Gault and Blanchard JJ.
[130] *Hosking v Runting*, above n 44, para 113-114 Gault and Blanchard JJ.
[131] Geddis notes that it is somewhat ironically to resort to the international treaties though New Zealand's Parliament had chosen not to act on these commitments and implement privacy into the BORA.
[132] *Hosking v Runting*, above n 58, para 229 Tipping J.
[133] *Hosking v Runting*, above n 58, para 226 Tipping J.

> to unreasonable intrusions into personal privacy which may not strictly amount to search and seizure.

Unfortunately, he too does not state why the rights provided by the BORA should be applicable between private parties.

Keith J and Anderson P, as the minority, consider the impact of the BORA differently. They refuse to recognise a privacy tort since "freedom of expression requires greater justification than that a reasonable person would be wounded in their feelings by the publication of true information of a personal nature".[134] That is mainly due to the fact that privacy cannot be considered protected equally to freedom of expression or as Anderson P puts it:[135]

> An analysis which treats that value [privacy] as if it were a right and the s 14 of the NZBORA right as if it were a value, or treats both as if they were only values when one is more than that is, I think, erroneous.

The minority is of the view that statutory and common law provide already sufficient protection. Should one nevertheless call for an extension, it must be left to Parliament rather than the courts to answer these demands.

V LAW OF PRIVACY IN GERMANY

Unlike New Zealand which has only recently developed its privacy protection, Germany is a few steps ahead. This might be due to two reasons.

Firstly, the enactment of a Bill of Rights occurred more than 40 years earlier than in New Zealand. On the 23rd May 1949 the Constitution of Bonn was adopted of which the Bill of Rights formed a main part.[136] Secondly, the experiences during World War II, in particular violations of human rights and fundamental freedoms by the Nazi regime, led to the enactment of provisions excluding "any possibility of a similar situation ever being repeated."[137]

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[134] *Hosking v Runting*, above n 44, para 267 Anderson P.
[135] *Hosking v Runting*, above n 44, para 265 Anderson P.
[136] Basic Law (23 May 1949).
[137] Wolfgang Heyde *Justice and the Law in the Federal Republic of Germany* (C F Mueller Juristischer Verlag, Heidelberg, 1994) 3.

In this context, of substantial value is article 5 of the Basic Law, protecting freedom of expression:[138]

> 5 (1) Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.

On the other hand, the Basic Law also protects the colliding value of privacy.

A The Recognition of the Right to Privacy

It was the general protection of human dignity and personality which are provided in articles 2 (1) and 1 (1) Basic Law that have been the starting point for German case law to consider privacy issues. Articles 1 and 2 read as follows:[139]

> 1 (1) The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.
> 2 (1) Everyone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code.

The first opportunity that German courts were concerned with privacy matters was in 1954, when the Federal Supreme Court gave its judgment in the *Schacht* decision.[140] The court was concerned with the question of whether or not a general personality right exists.

The plaintiff had set up a foreign trade bank and was the subject of an article published by a newspaper. The item concerned the plaintiff's political activities during the regime of the National Socialists and in the aftermath of the war. The plaintiff's counsel wrote a letter to the newspaper seeking rectification of the article. But instead of carrying out corrections, the newspaper published the counsel's letter under the Letters from Readers column. The plaintiff sought revocation alleging an infringement of his personality rights since the publication of the counsel's letter was not authorised and

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[138] German Basic Law, article 5 (1).
[139] German Basic Law, articles 1 (1) and 2 (1).
[140] *Schacht* BGHZ (1954) 13, 334.

intended only for the editorial staff. Therefore, the question for the court was whether one's personality right prohibits the publication of letters or other private notes without the consent of the writer.

In its reasoning the Federal Court commenced by stating that in the past the German legal system did not contain any provisions providing a general personality right.[141] However, the court continues to state that:[142]

> After the Basic Law recognises the dignity of man (art 1) and the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code (art 2), the general personality right must be regarded as a constitutionally guaranteed fundamental right.

The Federal Court upheld the claim and granted revocation of the letter.

Four years later, the same court confirmed this decision in *Herrenreiter*[143], a case where a show jumper sought damages for the usage of his image in a sexual potency drug advertisement. The court decided in favour for the plaintiff and held that "the general constitutional right to one's personality also possesses validity within the framework of the civil law and enjoys the protection of section 823 (1) BGB (German Civil Code)."[144]

B The Horizontal Effect of the Basic Law

While the Federal Court took it for granted that the personality right is a right protected by section 823 I of the German Civil Code even between private parties, it was not until the Constitutional Court decision of *Luth*[145] that a court explicitly addressed the application of constitutional rights as between private actors. As aforementioned, human rights instruments are generally meant to govern the relationship between the state and its citizens. In line with the general notion, the Constitutional Court affirmed that the main

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[141] *Schacht*, above n 140, 337.
[142] *Schacht*, above n 140, 338.
[143] *Herrenreiter* BGHZ (1958) 26, 349.
[144] *Herrenreiter*, above n 143, 354. Since the case concerned the use of the plaintiff's image, section 823 II in conjunction with section 22 of the Copyright (Art Domain) Act applied as the more specific provision for protection. The court granted compensation for non-pecuniary damage of 10.000 Deutsche marks.
[145] *Luth* BVerfGE (1958) 7, 198.

purpose of the Bill of Rights is to constrain state power.[146] Nevertheless, the court regards it equally right that:[147]

> Far from being a value-free system the Constitution erects an objective system of values in its section on basic rights, and thus expresses and reinforces the validity of the basic rights. This system of values, centring on freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.

In doing so, the Constitutional Court established the principle of *Drittwirkung* or the so-called "indirect effect" of constitutional values. Although the rights guaranteed by the Bill of Rights do not apply directly between private parties, they do inform the application and interpretation of the Civil Code. Of particular importance are insofar the "general clauses" of the Civil Code[148], provisions where the "defendant's actions are to be measured against standards of propriety and reasonableness."[149] The judges state that general clauses:[150]

> [A]llow the courts to respond to this influence [of the value-system of the basic constitutional rights] since in deciding what is required in a particular case by such social commands, they must start from the value-system adopted by the society in its constitution at that stage of its cultural and spiritual development. The general clauses have thus been rightly described as "points of entry" for basic rights into private law.

Thus, it can be said that constitutional rights, namely dignity and liberty, constituted the basis upon which the civil privacy protection was developed.[151]

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[146] *Luth*, above n 145, 204.
[147] *Luth*, above n 145, 205.
[148] Such clauses are sections 138, 242, 826 German Civil Code.
[149] Craig, above n 43, 377.
[150] *Luth*, above n 145, 206.
[151] See Craig, above n 43, 378.

C Private Statutory Protection of Privacy and the Provided Remedies

Section 823 (1) of the Civil Code which protects the right to one's personality reads:[152]

> (1) A person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or **other rights** of another is bound to compensate him for any damage arising there from.

Since the doctrine of the "indirect effect", the term **other rights** includes the right to one's personality.

As it can be inferred from the provision itself, the courts can grant damages for unlawful and culpably infringements of privacy. Furthermore, parties can seek the publication of counterstatements or injunctions according to section 823 (1) of the Civil Code in conjunction with section 1004 Civil Code. Last but not least, section 823 (1) in conjunction with 253 (1) of the Civil Code provides compensation for non-pecuniary damage.[153]

Notably, there is no priority for damages over injunctions. It is up to the plaintiffs to specify which remedy they are seeking and to prove whether the requirements of the relative provision are fulfilled.[154]

D Protection of the Right to Control One's Own Image

The more specific right to control one's own image is a statutory definition of the constitutional right to one's personality in context of the own image.[155] Section 22 of the Copyright (Art Domain) Act states:[156]

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[152] German Civil Code, section 823 (1).
[153] See for example *Herrenreiter*, above n 143. Indeed, non-pecuniary damages can be granted only if two conditions are fulfilled: The infringement of the personality right must be severe and injunctive relief, counterstatement or revocation are not sufficient to compensate the plaintiff, see BGH [1971] NJW 698.
[154] Otto Palandt *Buergerliches Gesetzbuch* (60 ed, Beck, Muenchen, 2001) 902.
[155] Palandt, above n 154, 998.
[156] Copyright (Art Domain) Act, section 22.

> Images and likenesses of a person shall be published only with the consent of the depicted person. If there is any doubt on consent, if the depicted person got paid for the fact that he was depicted, the consent is assumed.

The provision covers images that reveal the identity of the depicted person. It is not necessary that the person's face is visible as long as the identity can be derived from certain characteristics.

1 Exemptions to section 22 Copyright (Art Domain) Act

Section 23 of the Copyright (Art Domain) Act provides for exemptions in the following cases:[157]

> (1) Without consent may be published:
> 1. Images and likenesses of contemporary history;
> 2. Images in which persons are only accessory parts beside a landscape or a location;
> 3. Images or likenesses of assemblies, demonstrations, or similar events in which the person participated.

Under section 23 (2), however, that exception does not apply where the publication interferes with a legitimate interest of the person concerned.[158]

The protection by degrees under these provisions "ensures that they take account of both the need to protect the person being represented and the community's desire to be informed and the interest of the media which satisfy that desire."[159]

Of particular interest for celebrities is the exemption of section 23 (1) no.1 concerning images and likenesses of contemporary history. In this context, two questions are of importance. Firstly, the question of whether every celebrity is subject to this provision notwithstanding the functions he fulfils (appearance at official events or only daily life activities). Secondly, under which conditions section 23 (2) applies, meaning that the celebrity has a legitimate interest in not publishing the pictures.

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[157] Copyright (Art Domain) Act, section 23 (1).
[158] Copyright (Art Domain) Act, section 23 (2).
[159] BVerfG (2000) 14 NJW 1021, 1023.

Since the early 1990s Princess Caroline of Monaco has been trying to prevent the publication of photos about her private life in the German tabloid press. She is a member of the Prince Rainier family and president of certain humanitarian or cultural foundations. Although she represents the ruling family at special events such as the Red Cross Ball, she does not perform any function on behalf of the State of Monaco.[160] The Caroline claims forced the German Courts to consider in detail the protection for privacy that is provided by German law.

E Interpretation of Sections 22 and 23 Copyright (Art Domain) Act

1 Judgment of the Hamburg Regional Court and Court of Appeal

Three series of photos have been subject to proceedings since 1993, depicting Caroline alone going about her daily business, Caroline with her children and Caroline with actor Vincent Lindon and later in 1997, with Prince Ernst August.[161]

The first set of proceedings started in 1993 when Caroline sought an injunction in the Hamburg Regional Court and on appeal in the Hamburg Court of Appeal against the publication of the above mentioned photos. She alleged the infringement of her personality rights, guaranteed by sections 2 (1) and 1 (1) Basic Law and her right to control the use of her own image protected by section 22 of the Copyright (Arts Domain) Act.

Both courts held that Caroline, as a figure of contemporary society "par excellence" *(absolute Person der Zeitgeschichte)* had to tolerate the dissemination according to section 23 (1) no.1 Copyright Act. Although the courts accepted that being followed by paparazzi every day made her life more difficult, they did not assume that her legitimate interest in preventing the publication would outweighs the legitimate desire to inform the general public. Her right of privacy stopped at

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[160] See *Von Hannover v Germany* (2004) Application No 59320/00 (Section III, ECHR) 4. This is of importance since it will become obvious in the course of this paper that politicians enjoy less privacy protection due to their special functions for the state and public.

[161] See *von Hannover v Germany*, above n 160, 5-6 for a detailed list of pictures in the several series between 1993 and 1997.

the front door and therefore, she had to tolerate the publication of pictures that were taken in a public place.[162]

2 *Judgment of the Federal Court of Justice of 19 December 1995*

On appeal, the Federal Court of Justice differed from the former judgments insofar as the pictures of Caroline and Vincent Lindon were concerned.[163] The relevant pictures depicted the Princess and her former partner in a dark corner of a restaurant courtyard. The Court granted an injunction arguing that these photos interfered with Caroline's right to privacy.[164]

The Court commences with defining what kind of images fall within the scope of "contemporary history". Thereafter, the meaning of section 23 (1) no. 1 includes pictures of people who, on account of their status and importance, attract the public attention and are deemed to be newsworthy, so-called figures of contemporary history "par excellence".[165]

Although Princess Caroline is such a person of contemporary history, the judges note that she is nevertheless entitled to respect for her private life. Outside the private home, a figure of contemporary history will enjoy protection as soon as she or he is:[166]

> [I]n a secluded place to which the person concerned retires with the objectively recognisable aim of being alone and where, confident of being alone, behaves in a manner in which he or she would not behave in public.

Since Caroline and her former partner had withdrawn to the far end of the garden restaurant, they had expressed the wish to be away from the public eye.

Concerning the remaining pictures, the court held that the applicant had to tolerate their dissemination, even if they were showing scenes from her daily life and not showing

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[162] See Hamburg Regional Court (4 February 1993) 324 O 537/93 and Hamburg Court of Appeal (8 December 1994) 3 U 64/94.
[163] BGH (1995) 131 BGHZ 332.
[164] BGH, above n 163, 332.
[165] BGH, above n 163, 336.
[166] BGH, above n 163, 339.

her exercising official functions.[167] The public has a legitimate interest in knowing where the applicant was staying and how she behaved in public, be it going shopping, sitting in a café, doing sports or going over other activities of daily life.[168]

3 *Judgment of the Federal Constitutional Court of 15 December 1999*

Princess Caroline appealed to the Federal Constitutional Court alleging that the Federal Court of Justice did not effectively protect her privacy in public places and therefore did not adequately consider her private and family life.

The Constitutional Court held that sections 22 and 23 Copyright Act on which the civil courts based their decision, were generally compatible with Basic Law.[169] The Court assumed that:[170]

> [R]egard must be had, in interpreting and applying sections 22 and 23 of the KUG, not only to general personality rights, but also to the freedom of the press guaranteed by section 5 (1), second sentence, of the Basic Law in so far as the provision in questions also affect those freedoms.

Entertainment is sometimes as important as purely factual information in forming opinions and is "neither negligible nor entirely worthless".[171] This applies also for information concerning people. In particular celebrities embody certain moral values and lifestyles and form role models for many people. This is what explains the public interest in the various ups and downs occurring in their lives. For people acting in the political domain this has always been deemed legitimate but is applicable also in respect of other public figures.[172]

On the other hand, the competing legitimate interest of figures of contemporary history "par excellence" in not publishing certain pictures according to section 23 (2) is satisfied by developing the criterion of a secluded place. The Court held that this criterion provides the individual with a sphere in which she or

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[167] BGH, above n 163, 344.
[168] BGH, above n 163, 343.
[169] BVerfG, above n 159, 1023.
[170] BVerfG, above n 159, 1024.
[171] BVerfG, above n 159, 1024.
[172] BVerfG, above n 159, 1024.

he, even in public places, is not subject to permanent media attention. At the same time it "does not excessively restrict press freedom because it does not impose a blanket ban on pictures of the daily or private life of figures of contemporary society". [173] Therefore, the rights of privacy and freedom of the press are adequately balanced and the publication is lawful.

(a) Privacy rights of celebrity children

The Constitutional Court made one exception concerning the pictures of Caroline and her children. It held that the Federal Court of Justice has not met the constitutional requirements. In contrast, the relevant decision has disregarded "the fact that the right to protection of personality rights of a person in the appellant's situation is strengthened by section 6 of the Basic Law regarding that person's intimate relations with their children."[174] As a result, the Constitutional Court referred the case back to the Federal Court of Justice in order to take into account the right of section 6 (1) and (2) Basic Law:[175]

> (1) Marriage and the family enjoy the special protection of the State.
> (2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent on them. The State community shall oversee the performance of that duty.

As a result, the courts have to balance sections 2 (1), 1 (1) and 6 Basic Law on the one side and section 5 (1) Basic Law on the other side. Since children enjoy special protection within the constitutional frame, the parent-child relationship outweighs freedom of expression and photographs cannot be published without the parent's consent.

4 Judgment of the European Court of Human Rights

Almost 4 years later, a landmark ruling of the European Court of Human Rights challenged the notion of the German jurisprudence.[176]

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[173] BVerfG, above n 159, 1025
[174] BVerfG, above n 181, 1026.
[175] German Basic Law, section 6.
[176] *Von Hannover v Germany*, above n 160. Between the judgments of the Constitutional Court and the ECHR, Caroline instituted a second and third set of legal proceedings in Germany concerning pictures taken and published in 1997. However, the claims were dismissed by the courts, referring to the grounds of

In 2000, Princess Caroline applied to the ECHR arguing that the German court decisions had infringed her right to respect for her private and family life guaranteed by Article 8 of the Convention, which provides:[177]

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The ECHR first refers to the importance of privacy and states that:[178]

> Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life".

The judges then consider the application of the Convention between private individuals. As already mentioned, human rights instruments are generally intended to protect the individual from interference by the state. Nevertheless, the ECHR does recognise that the state may also have the positive obligation to protect privacy between private parties by adopting "measures designed to secure respect for private life".[179]

In determining who is entitled to such privacy protection, "a fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society...and reporting details of the private life of an individual who

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the Federal Court of Justice's judgment of 19 December 1995 and the Federal Constitutional Court's judgment of 15 December 1999.

[177] European Convention on Human Rights, Article 8. Subject to the application have been all published photos excluding the ones depicting Princess Caroline with her children and with Vincent Lindon at the far end of the restaurant since the publication of these pictures was already held inadmissible by German Courts.

[178] *Von Hannover v Germany*, above n 160, 22-23.

[179] *Von Hannover v Germany*, above n 160, 24.

does not exercise official functions."[180] The ECHR states that in the latter case, the individual must be free from intrusions since the pure purpose of satisfying the curiosity of people is not a sufficient reason to interfere with a person's private life. On the other hand, reports concerning matters of political or public debate enjoy the protection of freedom of expression since in those cases the media "exercises its vital role of 'watchdog' in a democracy".[181]

The Court assumes that the current interpretation of section 23 (1) of the Copyright (Arts Domain) Act by German courts:

> [C]ould conceivably be appropriate for politicians exercising official functions. However, it cannot be justified for a 'private' individual, such as the applicant, in whom the interest of the general public and the press is based solely on her membership of a reigning family whereas she herself does not exercise any official functions.

The competing interests are not fairly balanced by the German courts unless the Copyright Act will be interpreted narrowly, covering publications that contribute to a debate of general interest to society only.[182]

F Enforcement of the European Court Judgement in Germany

1 Judgment of the Federal Constitutional Court concerning the binding effect of ECHR decisions

Two weeks after the Caroline ruling of the ECHR went into effect, the Federal Constitutional Court released a judgment concerning the binding effect of decisions of the ECHR.[183]

The German Constitutional Court decided that:[184]

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[180] *Von Hannover v Germany*, above n 160, 26.
[181] *Von Hannover v Germany*, above n 160, 26.
[182] *Von Hannover v Germany*, above n 160, 28-29.
[183] BVerfG (14 October 2004) 2 BvR 1481/04 para 1-72, 47 NJW 3407 (condensed version).
[184] BVerfG, above n 183, para 29.

> The authorities and courts of the Federal Republic of Germany are obliged, under certain conditions, to take account of the European Convention on Human Rights as interpreted by the ECHR in making their decisions.

Nevertheless, the European Convention on Human Rights has only the status of a federal law and is "not a direct constitutional standard of review in the German legal system."[185] Thus, the term of "taking into account" is to be interpreted as:[186]

> [T]aking notice of the Convention provision as interpreted by the ECHR and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law.

No contradiction with the aim of commitment to international law occurs, where legislature does not comply with international agreements in order to prevent the violation of fundamental principles of the German constitution.[187] However, if the courts want to differ from the decisions of the ECHR, they have the duty to justify understandably why they do not follow the international interpretation of the law.[188]

Attention must also be paid to the fact that cases of individual application proceedings under Article 34 of the Convention consider only the two-party relationship between the complainant and the state. Third parties cannot take part in the proceedings and thus, the original proceedings "possibly d[o] not give a complete picture of the legal positions and interests involved."[189]

Finally, the court states that ECHR decisions may encounter national partial systems of law formed by a diversity of case law. The Constitutional Court refers explicitly to the Caroline ruling of the ECHR. It states that in particular in the area of the protection of personality rights, the competing "fundamental rights are balanced by the creation of groups of cases and graduated legal consequences."[190] Provided that such a partial system of domestic law exists, the state bodies must consider the effects that ECHR decisions may have on the national legal system since:[191]

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[185] BVerfG, above n 183, para 32.
[186] BVerfG, above n 183, para 62.
[187] BVerfG, above n 183, para 35.
[188] BVerfG, above n 183, para 50.
[189] BVerfG, above n 183, para 59.
[190] BVerfG, above n 183, para 58.
[191] BVerfG, above n 183, para 47.

> Both a failure to consider a decision of the ECHR and the 'enforcement' of such a decision in a schematic way, in violation of prior-ranking law, may violate fundamental rights in conjunction with the principle of the rule of law.

2 *German jurisprudence in the aftermath of the "Caroline rulings"*

There are at least two decisions displaying the approach of German Courts after the judgments of the ECHR and the Federal Constitutional Court.

The first decision concerned the German business family Otto.[192] One of the Otto brothers faced divorce in the United States. Due to an expected payment of an immense alimony, the Manager Magazin ran a story, revealing the facts of the expected divorce and speculating about the possible impacts for the Otto Group.

In the past, matters such as divorce have always been considered private. Nevertheless, it was admissible to publish divorce related facts since the family's private matters could have an impact for involved businesses or companies. To this extent, the public interest prevailed over the protection of privacy rights.[193]

In contrast, referring verbally to the decision of the Strasbourg judges, the Berlin Regional Court held for the plaintiff and prohibited the publication of the article.[194]

The second decision too, concerned an article ran by the Hamburg Manager Magazin in November 2004.[195] This time the magazine reported about the Merckle group of companies and published along with the article photos of the businessman Ludwig Merckle. The entrepreneur sued the magazine for publishing the pictures and suceeded. The Court, referring to the Caroline judgment of the ECHR, held that "the photo's sole purpose was to satisfy the curiosity of the readership."[196]

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[192] Berlin Regional Court (Landgericht) 27 O 682/04. Onother decision concerned the publication of facts concerning the new partner of the German foreign minister Joschka Fischer. The Court held that the public has a legitimate interest who the new partner of the politician is and dismissed the claim of the woman, see Berlin Regional Court 27 O 842/03.
[193] Palandt, above n 154, 998.
[194] Berlin Regional Court, above n 192.
[195] Hamburg Regional Court (Landgericht) 312 O 308/04.
[196] Hamburg Regional Court, above n 195.

Notably, the pictures were not made by paparazzi but reporters of the Manager Magazine. They took the pictures in an open house event to which photographers and camera teams were explicitly admitted.

G Outcome of the Caroline Rulings for Celebrities in Germany

Although the German government declared that the effects of the ECHR decision on press freedom will remain minimum[197], recent decisions show that the courts grant weight to the Strasbourg orders in determining whether privacy rights have been violated. It seems that German courts hesitate to defy the international interpretation of the right to privacy. One can only speculate about the reasons since the Constitutional Court provided a back-door for German Courts to adhere to the previous developed domestic case law. Two reasons might have deterred the jurisprudence from giving more leeway to the media - the fear to fail to duly consider the decision and the obstacle of an understandably justification in case the Courts would like to differ from the ECHR decision. The press reacted immediately and the publication of photos made by paparazzi decreased considerably since the ECHR decision.[198]

The current position of the German Courts can be summarised as follows. Celebrities enjoy a broad protection of their privacy rights for publications of pictures are admissible only if they contribute to a debate of public interest. Everyday activities cannot be covered in the media as long as the only purpose is to satisfy curiosity of the readership. The threshold is even higher for pictures depicting the children of celebrities. Such publications are not permissible without the consent of the parents unless the children are intentionally thrust into the public eye.

Politicians are the only category of celebrities who face a lower degree of privacy protection. They have to condone the disclosure of almost all facts concerning their private lives including their love lives. As a result, even their husbands, wifes and partners have to accept the disclosure of facts that are related to to the politician.[199]

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[197] see Marina Küchen "Privacy Rights vs. Free Speech" (2004) Global Journalist Magazine, Fourth Quarter 2004.
[198] See Caroline Judgment <http://en.wikipedia.org/wiki/Caroline judgment> (last accessed 16.09.2005).
[199] See Berlin Regional Court, above n 192.

VI LAW OF PRIVACY IN CANADA

In terms of intrusion in an individual's privacy by the media, Canada provides presently only partial protection.[200]

A Privacy Protection for Intrusions by the Media in Quebec

In Quebec, the only Canadian province that uses civil law instead of common law, the development is the furthest in the whole of Canada. Invasion of privacy was first recognised within article 1053 of the Civil Code of Lower Canada, a general delict provision which declared that every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill. In 1957, the Quebec Superior Court applied this provision to an invasion of the plaintiff's private life in *Robbins v CBC*.[201] This decision was the starting point for a series of cases to hold individuals liable for an invasion of privacy under the Civil Code of Lower Canada (CCLC).

Finally, this general recognition was affirmed by giving privacy the status of a right. Article 3 of the Civil Code of Quebec[202] declares that:

> 3. Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy.
>
> These rights are inalienable.

Chapter III, articles 35 and 36 which deal with "respect of reputation and privacy" include similar provisions.[203]

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[200] In almost the same manner as New Zealand, Canada also enacted several laws concerning special areas of privacy. The two federal privacy laws are the Privacy Act 1983 and the Personal Information Protection and Electronic Documents Act (PIPEDA). Although both acts concern the collection, use and disclosure of personal information the former applies only for government departments and agencies while the later sets out the rules for private sector organizations.

[201] *Robbins v Canadian Broadcasting Corporation* (1957) 12 DLR (2d) 35 (QSC).

[202] The Civil Code of Quebec (CCQ) came into effect on 1 January 1994. It replaced the Civil Code of Lower Canada (CCLC) enacted in 1865 which entered into force on 1st July 1866.

[203] See Appendix Three for the wording of the provisions.

Furthermore, due to section 5 of the Quebec Charter of Human Rights and Freedoms, every person is assured "a right to respect for his private life" and section 49 of the Charter declares "[a]ny unlawful interference...entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom." [204]

The codification of the right to privacy led to the emergence of further important case law. One significant decision in this respect is *Les Éditions Vice-Versa Inc v Aubry.*[205] In this case, a woman was photographed sitting on a step in front of a building in a Montreal street. The photograph was taken without the respondent's consent and published in an art magazine.

Although the photograph was taken in a public place, the Supreme Court dismissed the appeal by the photographer and publisher stating that:[206]

> If the purpose of the right to privacy guaranteed by s. 5 of the Quebec Charter is to protect a sphere of individual autonomy, that right must include the ability to control the use made of one's image, since the right to one's image is based on the idea of individual autonomy, that is, on the control each person has over his or her identity.

The judges go on to hold that there is an infringement of the person's right to his or her image "as soon as the image is published without consent and enables the person to be identified"[207] and that "the public nature of the place where the photograph was taken is irrelevant".[208]

Nevertheless, the court also notes that the expectation of privacy can be reduced in certain circumstances and that aspects of the private life of public figures can become matters of public interest.The judges refer expressly to artists and politicians, but also more generally, to all those whose professional success depends on public opinion. [209]

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[204] Quebec Charter of Human Rights and Freedoms, s. 5 and 49.
[205] *Les Éditions Vice-Versa Inc v Aubry*, above n 127.
[206] *Les Éditions Vice-Versa Inc v Aubry*, above n 127, para 52 L'Heureux-Dube and Bastarache JJ.
[207] *Les Éditions Vice-Versa Inc v Aubry*, above n 127, para 53 L'Heureux-Dube and Bastarache JJ.
[208] *Les Éditions Vice-Versa Inc v Aubry*, above n 127, para 59 L'Heureux-Dube and Bastarache JJ.
[209] See *Les Éditions Vice-Versa Inc v Aubry*, above n 127, paras 57-58 L'Heureux-Dube and Bastarache JJ.

Unfortunately, Canadian case law does not shed further light on the handling of celebrities. Apart from the vague term that "the private life of public figures can become a matter of public interest", the judges give no more detailed guidelines concerning the admissibility of publishing pictures taken in a public place.

Therefore, the law of Quebec is, at least in terms of privacy protection for celebrities, far from being methodologically sound and fixed. The interplay of the Quebec Charter and the Quebec Civil Code which displays broad guarantees given to privacy is, due to the generality of the provisions and the lack of relating case law, not very instructive.

B Privacy Protection for Intrusions by the Media in the Common Law Provinces

1 Provinces with a statutory tort of privacy

British Columbia, Manitoba, Newfoundland and Saskatchewan enacted special Privacy Acts providing for a statutory tort of privacy.[210] The wording of the acts is very general and similar in all four provinces. The Acts provide that:[211]

> (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of an individual.
>
> (2) The nature and degree of privacy to which an individual is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a violation of the privacy of an individual, regard shall be given to the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties.

The statutes also include rules concerning the unauthorised use of name or portrait of another person without expressed or implied consent of the individual or some other person who has the lawful authority to give the consent.[212] The publication of pictures

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[210] Privacy Act British Columbia RSBC 1979 c 336; Privacy Act Manitoba RSM 1987 c P125; Privacy Act of Newfoundland and Labrador RSN 1990 c P-22; Privacy Act of Saskatchewan RSS 1978 c P-24.

[211] Privacy Act Newfoundland and Labrador, section 3 as an example for the very similar definitions in all for provinces.

[212] See Privacy Act Newfoundland and Labrador, section 4; Privacy Act British Columbia, section 3; Privacy Act Manitoba, section 3; Privacy Act Saskatchewan, section 3.

without consent is not a violation of privacy where the matter published was of public interest or was a fair comment an a matter of public interest. The public interest is a defence to the statutory tort.[213]

Similar to Quebec, the general wording of the Privacy Act provisions has rarely been subject to interpretation by case law. In terms of privacy protection for celebrities, there are actually no relevant cases. It is almost unpredictable under which conditions Canadian courts would permit the publication of photos concerning the private life of celebrities. That might be the reason why in the *Hosking* decision, the dissenting Keith J stated that the general privacy torts are of "very limited value".[214] Until now, there is also no answer to the question when the publication of celebrity pictures would be justified by the defence of public interest.

However, in case the conditions for a privacy violation are met, the Privacy Acts provide civil sanctions ranging from awarding damages and granting injunctions to ordering the defendant to deliver up to the plaintiff all articles or documents that have come into his or her possession by reason of the violation. At present, it seems that all the remedies are of equal value and damages do not take priority over injunctions.[215]

2 *Provinces without a statutory tort of privacy*

The rest of the eight Canadian provinces do not provide any protection concerning the publication of information as to the private lives of individuals. Unless the facts published are false and defamatory, there is no cause of action providing compensation.

Although the federal Canadian Charter of Rights and Freedoms 1982 provides no special provision protecting the right to privacy, attention should be paid to section 8 of the Canadian Charter.[216] The right to be secure against unreasonable search and seizure contained in section 8 has received a broad interpretation in recent years. The Supreme

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[213] See Privacy Act Newfoundland and Labrador, section 5 (2) (a); Privacy Act British Columbia, section 2 (3) (a); Privacy Act Manitoba, section 5 (f); Privacy Act Saskatchewan, section 4 (2) (a).
[214] *Hosking v Runting*, above n 44, para 219 Keith J.
[215] See Privacy Act Newfoundland and Labrador, sections 6 and 7; Privacy Act Manitoba, section 4; Privacy Act Saskatchewan, section 7. The Privacy Act of British Columbia does not provide explicitly for remedies.
[216] Canadian Charter of Rights and Freedoms, section 8, Part I of the Constitution Act 1982 (Canada Act 1982 (UK), sch B).

Court of Canada followed the prominent United States case *Katz v United States*[217] and held in *Hunter v Southam*[218] that the guarantee against unreasonable search and seizure protected a "reasonable expectation of privacy"[219]. Property has now been replaced by privacy as the value protected by section 8 of the Charter.[220]

Nevertheless, the Supreme Court made it very clear that its decisions relating to section 8:[221]

> [R]ecognize that there is a fundamental difference between a person's reasonable expectation of privacy in his or her dealings with the state and the same person's reasonable expectation of privacy in his or her dealings with ordinary citizens.

Due to this essential difference, individuals cannot rely directly on section 8 of the Canadian Charter when seeking compensation for an invasion of privacy by a third party that is not the state.

Nonetheless, there is still light at the end of the tunnel, for Canadian appellate courts have never expressly denied a stand-alone common law privacy tort that protects privacy matters between private parties. On the contrary, it does seem that the Canadian courts are prepared to recognise a common law tort. The recent developments in Ontario allow the inference that there is an emerging common law right of privacy that "has the real potential to be recognized throughout Canada".[222]

In *Saccone v Orr*[223] the defendant recorded a private telephone conversation with the plaintiff which the defendant later played at a municipal council meeting, although he was told by the plaintiff not to use the recording. In addition, the tape was subsequently published in the local newspaper. The plaintiff claimed no material loss but damages for embarrassment caused by tortious invasion of privacy.

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[217] *Katz v United States*, above n 127. In that case, police had placed a listening device on the outside of a public telephone booth and listened and recorded conversations. The Supreme Court held that the fourth amendment was not confined to the protection of property . In contrast, the fourth amendment protects people, not places.
[218] *Hunter v Southam* [1984] 2 SCR 145 (SCC).
[219] *Hunter v Southam*, above n 218, 159.
[220] Peter W Hogg *Constitutional Law of Canada* (3 ed, Carswell, Scarborough Ontario, 1992) 1055.
[221] *Les Éditions Vice-Versa Inc v Aubry*, above n 127, para 8 Lamer CJC.
[222] Craig, above n 43, 367.
[223] *Saccone v Orr* (1981) 34 OR (2d) 317 (County Court).

Jacob Co. Ct. J held that the law of Ontario recognised a right of action for invasion of privacy and:[224]

> Certainly, for want of a better description as to what happened, this is an invasion of privacy and, despite the very able argument of defendant's counsel that no such action exists, I have come to the conclusion that the plaintiff must be given some right of recovery for what the defendant has in this case done.

As a result, the plaintiff was entitled to damages of $ 500 and costs.

The second case occurred ten years later and regarded a dispute between neighbours concerning an access road.[225] The plaintiffs sought damages for verbal harassment, physical assault and property damage. Besides nuisance, trespass, assault and battery, Mandel J also considered an invasion of privacy. He commenced with the question of whether there is a right to privacy in Canada. And citing the case of *Hunter v Southam*, he assumes that the Supreme Court of Canada acknowledged the existence of such a right.[226] Therefore, he continues, "the next question to be answered is, is there an actionable cause for an invasion of such right in Canada?"[227] And he answers:[228]

> At the stage of pleadings the courts have refused to dismiss actions for invasion of privacy on the basis that it has not been shown that such a right does not exist...In my view such a right does exist.

To hold otherwise would "stultify the common law and its history."[229] In determining whether an invasion of privacy is actionable, the courts have to consider the circumstances of each particular case and the conflicting rights involved.[230] For the case assessed, the campaign of the defendant:[231]

> [C]onstitute[s] a harassment of the plaintiffs in the enjoyment of their property which is of a kind that a person of normal sensitivity would regard as offensive and intolerable and is an invasion of the plaintiff's right of privacy...

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[224] *Saccone v Orr*, above n 223, 321-322, Jacob Co. Ct. J.
[225] *Roth v Roth* (1991) 4 OR (3d) 740 (Ontario Court, General Division).
[226] *Roth v Roth*, above n 225, 757 Mandel J.
[227] *Roth v Roth*, above n 225, 757 Mandel J.
[228] *Roth v Roth*, above n 225, 758 Mandel J.
[229] *Roth v Roth*, above n 225, 758 Mandel J.
[230] *Roth v Roth*, above n 225, 758 Mandel J.
[231] *Roth v Roth*, above n 225, 759 Mandel J.

Finally, in *MacKay v Buelow*[232] the plaintiff sought damages for harassment from her former husband. His continuing attacks included telephone calls day and night, threats to kidnap their daughter and death threats. As a result of the husband's actions, the plaintiff suffered from post-traumatic stress disorder which required a considerable long-term treatment.

Binks J held that there was not only trespass to a person and intentional infliction of mental suffering and emotional stress but also invasion of privacy. In his judgment he relied on the *Roth* decision, but did not give an answer as to which elements must be fulfilled in order to violate the privacy of an individual.

C Outcome for Celebrities in Canada

How much privacy protection celebrities would enjoy in Canada is presently not predictable. Although Quebec and four of the common law provinces enacted provisions concerning privacy, the wording of the norms is general and open for interpretation by the courts. Unfortunately, such interpretation has not taken place in recent years due to a lack of relevant claims.

In the remaining eight common law provinces, even such general provisions are non-existent, with the exception of section 8 of the Canadian Charter that provides for the right to be free from unreasonable search and seizure. In the past, the norm experienced a broad interpretation by the Supreme Court and includes also a reasonable expectation of privacy. That might be the reason for the enthusiastic discussion concerning the recognition of a common law tort, which emerged in recent years.[233]

However, according to the Supreme Court, the importance of Charter values does "require the judiciary to interpret and develop the common law in a manner consistent with the fundamental values of Canadian society enshrined in the Charter."[234] Since privacy stands as both a Charter value and a fundamental value of Canadian society it

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[232] *MacKay v Buelow* (1995) 11 RFL (4th) 403 (Ontario Court, General Division).
[233] See the article of Craig, above n 43.
[234] See *RWDSU v Dolphin Delivery* [1986] 2 SCR 573, 603 (SCC).

might even create an obligation to the courts to protect this value between private parties.[235]

The last part of this paper will argue that the demand for a stand-alone privacy tort is legitimate and that the approaches in Germany and New Zealand can be of help in developing the scope of such a tort. The experience made in the different systems will reveal advantages and disadvantages of certain tort elements and help to establish a privacy protection that balances privacy rights and press freedom in a reasonable manner.

In order to get a picture of how the Canadian courts could develop and establish privacy protection, the following comparison is essential.

VII PRIVACY RIGHTS IN COMPARISON

A Protection of Facts and Images

At present, Germany provides the broadest privacy protection for celebrities. Since the 1990s when Caroline von Monaco challenged German privacy protection, the relevant privacy provisions of the Basic Law, Civil Code and Copyright (Art Domain) Act experienced a detailed interpretation by the German courts.

Although the courts initially hesitated to protect celebrities from intrusions into their private lives, in 1995 the German Federal Court of Justice decided that also figures of contemporary society "par excellence" were entitled to respect for their private life in public places as soon as they had retired to a secluded place. Five years later, the Federal Constitutional Court extended the protection even further. The right to protection of privacy rights is strenghened by Article 6 Basic Law (marriage and family) if a person's intimate relation with their children is concerned. As a result, the publication of pictures depicting the children of celebrities requires the consent of the parents or any other lawful representative.

In June 2004, the European Court held that the publication of everyday activities of celebrities photographed in public places was subject to the prior consent of the person

[235] Craig, above n 43, 371 and see also Geddis, above n 122, 685-687 where the author discusses the reasons why human rights instruments should be of importance also with regard to the private law.

concerned unless the publication was capable of contributing to a debate of general interest to society.

Although this landmark decision was seen by the German Press as the final nail in the coffin concerning press freedom, the German courts seem to feel bound by the decision.

At present, the only remaining possibility for the German press to publish details of the private lives of celebrities is by satisfying a general interest of the public rather than pure curiosity of a certain readership. The question of when such matters of public interest are concerned, must be left to further interpretation by the courts. By now, it seems that photos depicting celebrities wearing fur or crocodile bags could be published without consent since the use of animal coats in the clothing industry have been subject to public debate in recent years. However, both photos and the relating article will need to concern public matters. Otherwise it would be easy to circumvent the requirements of the ECHR.[236]

In contrast, protection for celebrities in New Zealand is less extensive. The New Zealand courts made clear that the publication of facts concerning the private lives of celebrities is in most cases admissible. Only the publication of facts that is truly humiliating or harmful can justify restrictions of the press. A legitimate public interest as a defence to the tort may even justify the publication of such facts.

However, both New Zealand and Germany are in agreement where politicians are involved. Due to their public functions, they have to tolerate publications even the most delicate nature, for instance their love lives.

B Rights of Celebrities' Children

New Zealand does not protect the publication of photographs of children except a real risk of physical harm can be proven. The New Zealand Court of Appeal hold that the established tort elements are sufficient to protect adults and children's rights likewise. In

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[236] Such an evasion would for instance occur if a magazine justifies the publication of photos depicting celebrities in bathing suits, by alleging that the photos contribute to the discussion concerning public exposure, although the article itself only reports on the summer vacation of the concerned celebrity.

contrast, the German Constitutional Court determined that due to section 6 of the Basic Law, the jurisprudence is obliged to give priority to the protection of children. Publication of pictures depicting children alone or with their celebrity parents is admissible only with consent. It seems that due to a lack of a provision protecting for family and childrens rights in the BORA, New Zealand does not consider children's rights to outweigh press freedom.

C Impact of Constitutional Documents

Another distinctive feature is the consideration and application of constitutional documents such as the New Zealand BORA and the German Basic Law to the development of privacy law. While the German Basic Law is the starting point and dominant factor for developing and establishing privacy protection, the New Zealand BORA, if at all, is only an additional rationale to justify the existence of a privacy tort.

The first reason is that in the 1950s the German Constitutional Court has explicitly determined that the Basic Law in its sections 1 (1) and 2 (1) includes the right to privacy. In a second step, the German courts have recognised the horizontal effect of such a right to privacy. They developed the concept of "Drittwirkung" or "indirect effect" where constitutional values have to inform and direct the development of private law. The indirect application of constitutional rights even between private parties is realised by using the general clauses of the German Civil Code as "points of entry" for basic right into private law. Therefore, the right to one's personality included in section 823 (1) of the German Civil Code, and the right for protection of one's image provided by sections 22 and 23 of the Copyright (Art Domain) Act, are the result of interpreting and applying the private law in accordance with the spirit and values of the German Basic Law.

In New Zealand, the majority of the judges in *Hosking* held that the BORA does not provide for a right to privacy. Only Tipping J differed and stated that the right to one's privacy is protected by the BORA, namely by analogy of section 21 providing for the right to be secure against unreasonable search and seizure.

In addition, New Zealand has not yet recognised a general horizontal application of the BORA between private parties.[237] Although *Hosking* has provided a good opportunity for addressing the question of whether and to which extent the courts are to give effect to the rights guaranteed by the BORA, the judges ignored this chance. Despite lengthy justifications for why a stand-alone common law tort should be established in New Zealand, curiously the majority of the court declined to make a definitive statement concerning the application of the BORA between private litigants. In fact, such application is practically absent, bar its consideration by Tipping J determining that the Bill of Rights may inform new developments in the common law concerning the relationship between citizens.[238]

As a result, the establishment of the tort was justified by the general importance of privacy for individuals and the lacuna of its sufficient protection in the New Zealand law system. That is proven as well by the fact that the beginnings of a privacy tort go back to the year 1986. At that time, the BORA was not even in existence.[239]

The BORA was probably even more of an obstacle than a justification for the establishment of a privacy tort.

For the minority judges, the absence of an explicit privacy right and the presence of press freedom in the BORA was indeed the reason to give priority to the latter and deny a privacy tort as a whole. The joint judgment of the majority justified the affirmation of a privacy tort by stating that privacy as a general value is able to resonably limit press freedom. It seems, the two judges struggle with the absence of a privacy provision in the BORA and refer to section 5 probably as a last resort.[240] At present, it is Tipping J's approach that can be deemed to be the most logical and consistent one. In stating that privacy is not only included in the BORA but may also effect the relations between private parties, he is the only judge in *Hosking* who can actually support the upholding of a privacy tort with the existence of the BORA.

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[237] See Geddis, above n 122, 691. He states that the courts had only given obiter recognition to a role for the BORA in cases where a "public" aspect was involved.
[238] See the detailed discussion of the impact the BORA had on the *Hosking* decision in Chapter IV G of this paper.
[239] See Chapter IV C of this paper for the early developments of the tort.
[240] See Chapter IV G for the notion of the joint judgement concerning the BORA impact.

D Provided Remedies

New Zealand's approach to remedies for privacy right violations is strict. Celebrities who face publication of facts or images that fulfil the prequisites for an action, are generally prevented from seeking injunctions. Damages have priority over injunctions unless "there is compelling evidence of most highly offensive intended publicising of private information and there is little legitimate public concern in the information."[241]

In comparison, Germany's remedies of damages, publication of counter-statements and injunctions provided by the general tort provision of section 823 in conjunction with section 1004 Civil Code are of equal value. No distinct priority of damages over injunctions applies. Notably, an unlawful publication can also amount to a criminal offence punishable with fines or even prison sentences up to one year.[242]

E Canada

Canada's approach to privacy protection for celebrities cannot be analysed yet. The norms in both civil law and common law provinces are too general and lack any illuminating interpretation. Eight of the common law provinces do not even have special provisions providing for privacy except the applicable federal norm of section 8 Canadian Charter.

The Canadian Supreme Court has recognised a constitutional right of privacy in section 8 of the Charter, "rooted in individual autonomy and dignity".[243] Up to date, this is the only feature that can be subject to a comparison and it reveals a considerable resemblance with the approaches of the German Constitutional Court and Tipping J in *Hosking*. They all have in common the formulation that privacy is part of the Charter values or constitutional protection.

In particular, Canada's theory of Charter values serves as a starting point for a discussion concerning the recognition of a stand-alone privacy tort in Canada. Thus, the

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[241] *Hosking v Runting*, above n 58, para 158 Gault and Blanchard JJ.
[242] Copyright (Art Domain) Act, section 33.
[243] Craig, above n 80, 371.

last Chapter attempts to argue why Canada should not deny its recognition and how such a privacy tort could look like.

VIII WHY AND HOW CANADA'S COMMON LAW PROVINCES SHOULD RECOGNISE PRIVACY PROTECTION

The Canadian Supreme Court stated that:[244]

> Grounded in a man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order.

Reflecting the quotation, it becomes clear that Canada recognised a constitutional right of privacy for a reason. The impact privacy has on the individual and on a democratic society has been emphasised already earlier in this paper[245] and has obviously also been acknowledged by Canada's highest court.

However, another question is whether the guarantee of privacy in the Canadian Charter leads to the obligation to recognise such a right also in the common law. The answer to that question cannot be given easily. On the one hand, the common law is not subject to Charter scrutiny unless some state action on the part of the legislature or executive is involved.[246] On the other hand, the Supreme Court held that the common law needs to be interpreted and developed in a manner consistent with the values of the Charter.[247]

Therefore, the next question to be answered is, what did the judges have in mind when they formulated the element "interpret and develop in a manner consistent with Charter values"? Two approaches are possible. First, the judges are given a choice whether or not to develop new common law actions. However, once they exercised that choice in favour for new developments, the Charter provides the framework and limits within which the evolution would have to take place. Secondly, already the decision for or against developing new common law actions must take into account Charter values

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[244] *R v Dyment* [1988] 2 SCR 417, 427 (SCC) La Forest J.
[245] See for details Chapter III B and C.
[246] Craig, above n 43, 370.
[247] See *RWDSU v Dolphin Delivery*, above n 256, 603.

and thus, the existence of a right to privacy in the Charter imposes an obligation for the courts to provide for privacy protection.

There are two main reasons why the second interpretation should be preferred. To begin with, the Canadian Charter of Rights and Freedoms is supreme law. Considerable violations of Charter values by domestic law render the relevant provisions void.[248] Thus, Charter rights represent the fundamental values of the Canadian society which to protect and respect is the priority objective. In order to achieve this purpose, the provided rights must be secured not only within the relationship between state and citizen but also citizen to citizen. Since Charter values are not directly applicable between private parties, it is the duty of the judiciary to find alternative ways to provide adequate protection.

Additionally, the astounding conceptual similarities with the German Constitution[249] justify to make use of the German experience. There, it has already been accepted that the supremacy of the Constitution requires the application of the values throughout the whole legal system.[250] Germany, as a typical civil law jurisdiction, achieves its aim by using general clauses of the Civil Code to indirectly transplant constitutional rights into the private law. The equivalent counterpart for the Canadian common law provinces would be to provide for a stand-alone privacy tort.[251]

Provided that the judiciary has an obligation to recognise a tort of privacy, which parameters should form part of the new tort? In reaching a conclusion, one might find it helpful to consider the wealth of experience in foreign jurisdictions.

Although New Zealand's privacy tort is still in its infancy, one can already infer that protection for celebrities is very limited. In fact, restraining merely highly offensive publication of private facts is not enough. As stressed in the beginning of this paper, privacy has an immense impact on individuals and society. In particular for the formation of fundamental relations to family and friends, it is indispensable to provide a certain

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[248] Hogg, above n 220, 124-125. Section 52 (1) of the Constitution Act 1982 provides: The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[249] First, the German Constitution is as well superior law. Secondly, part of this superior system of values is the right to privacy. Thirdly, the right to privacy was not guaranteed explicitly in the constitutional document but has been found to be included in other rights, section 8 Canadian Charter and sections 1 (1) and 2 (1) German Basic Law.

[250] See *Luth*, above n 166.

[251] This applies at least as long as the legislative denies to enact corresponding statutes.

level of privacy. Surveys show that a lack of privacy also diminishes a person's mental health and well-being. Amongst celebrities, the figure of mental illnesses is alarmingly high. Thus, a broader safeguard is desirable for Canada.

In contrast, the German approach to privacy protection for celebrities is generous. Since the ECHR decision, not only pictures depicting celebrities in a secluded place or with their children are prohibited, but all facts and photos that do not contribute to a debate of general public interest. Hence the publication of reports concerning purely the daily life activities of public figures are prohibited.[252] These recent developments have met with harsh criticism. Journalists fear a serious threat to press freedom for the latest trends impose a stringent media privacy law.[253] The term "debate of general interest" is likely to be restrictively interpreted, namely only matters which could be said to engage a pressing public concern are admissible for publication.[254]

Beside the restrictions for the media, a wide protection for celebrities also contravenes the functions that are attributed to celebrities. According to the German Constitutional Court they "embody certain moral values and lifestyles" and "become points of crystallisation for adaption or rejection and act as examples or counter-examples."[255]

As a result, a tort of privacy in Canada should use a hybrid New Zealand/ Germany model. It is worthwile that privacy protection is not as narrow as in New Zealand and not as broad as the ECHR ruling. Taking into account the functions of celebrities and press freedom on the one hand and of privacy on the other hand, a well balanced tort should prohibit publication without consent under the following circumstances.

1. The celebrity, although in a public place, has retired to a secluded place where it was objectively clear to everyone that they wanted to be alone.

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[252] As mentioned above, that does not apply for politicians since also their private lifes can be of public interest due to their public functions.
[253] See Küchen, above n 197; Olswang "*Von Hannover v Germany* A proposal to petition the German Government to exercise its righ under Article 43 of the European Convention on Human Rights to request that the case be referred to the Grand Chamber" <http://www.olswang.com/pdfs/hanover_petition.pdf> (last accessed 23 September 2005).
[254] Olswang, above n 253, 4.
[255] BVerfG, above n 159, 1024.

2. The celebrity acts not in a secluded place but is depicted with her/his children.

3. The celebrity acts not in a secluded place but is depicted with his/her husband or wife, partners or friends (for fundamental relations such as love, frienship and trust are inconceivable without privacy).

4. Only Celebritie's children are depicted (for children need special protection due to their particular vulnerability).

However, as in New Zealand, there should exist the defence of public interest, meaning that the publication is lawful if the level of legitimate public concern outweighs the level of harm likely to be caused. This will mostly apply for politicians.

In summary, publicity is admissible even without contributing to a general public interest as long as the celebrity is not in a secluded place or accompanied by family, partners or friends. Otherwise all everyday activities can be the subject matter of media coverage.

XI CONCLUSION

Celebrities benefit from publicity and thus have to take the good with the bad. However, that does not mean that they have no expectation of privacy. Germany provides presently the widest protection. The publication of facts related to private lives needs to contribute to a public debate. Celebrities' children are completely excluded from media coverage.

In New Zealand, the disclosure of the private lives of celebrities and their children is generally admissible unless the publicity is truly humiliating and harmful. The reason for these differences probably lies in the influence of constitutional documents. In Germany, the superior Basic Law includes the right to privacy and was due to its horizontal application, the starting point for the development of an extensive protection.

In contrast, the NZBORA guarantees explicitly only the right to freedom of expression[256] and the question of whether the Bill of Rights are applicable between private parties has not been answered yet. Thus, privacy protection is the product of a general recognition of privacy as a value rather than the adherence to duties implied by the BORA.

In Canada, five provinces enacted privacy provisions relevant for celebrities. Unfortunately, their wording is general and has not yet been subject to further interpretation. The remaining eight common law provinces do not provide any provisions but seem at least, to be open to accept privacy as a fundamental value that needs to be recognised.[257] In fact, section 8 of the federal Charter includes according to the Supreme Court the right to privacy. It is this recognition of privacy as part of Canada's supreme law that obliges the courts to act. The establishment of a privacy tort is the right way to secure privacy as an unevitable value for society and individual development.

To reach an adequate balance between the competing rights, the media should be allowed to publish facts or pictures of everyday activities except when they relate to family, partners or friends.

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[256] Only Tipping J differed from this general perception and stated that s 21 BORA includes the right to privacy.
[257] See the discussion of recent case law in Ontario.

APPENDIX ONE - PRIVACY PRINCIPLES OF THE PRESS COUNCIL

3. Privacy

Everyone is entitled to privacy of person, space and personal information, and these rights should be respected by publications. Nevertheless the right of privacy should not interfere with publication of matters of public record, or obvious significant public interest.

Publications should exercise care and discretion before identifying relatives of persons convicted or accused of crime where the reference to them is not directly relevant to the matter reported.

Those suffering from trauma or grief call for special consideration, and when approached, or enquiries are being undertaken, careful attention is to be given to their sensibilities.

APPENDIX TWO – PRIVACY PRINCIPLES OF THE BROADCAST STANDARDS AUTHORITY

i) The protection of privacy includes protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.

ii) The protection of privacy also protects against the public disclosure of some kinds of public facts. The "public" facts contemplated concern events (such as criminal behaviour) which have, in effect, become private again, for example through the passage of time. Nevertheless, the public disclosure of public facts will have to be highly offensive to a reasonable person.

iii) There is a separate ground for a complaint, in addition to a complaint for the public disclosure of private and public facts, in factual situations involving the intentional interference (in the nature of prying) with an individual's interest in solitude or seclusion. The intrusion must be offensive to the ordinary person but an individual's interest in solitude or seclusion does not provide the basis for a privacy action for an individual to complain about being observed or followed or photographed in a public place.

iv) The protection of privacy also protects against the disclosure of private facts to abuse, denigrate or ridicule personally an identifiable person. This principle is of particular relevance should a broadcaster use the airwaves to deal with a private dispute. However, the existence of a prior relationship between the broadcaster and the named individual is not an essential criterion.

v) The protection of privacy includes the protection against the disclosure by the broadcaster, without consent, of the name and/or address and/or telephone number of an identifiable person. This principle does not apply to details which are public information, or to news and current affairs reporting, and is subject to the "public interest" defence in principle (vi).

vi) Discussing the matter in the "public interest", defined as of legitimate concern or interest to the public, is a defence to an individual's claim for privacy.

vii) An individual who consents to the invasion of his or her privacy, cannot later succeed in a claim for a breach of privacy. Children's vulnerability must be a prime concern to broadcasters. When consent is given by the child, or by a parent or someone in loco parentis, broadcasters shall satisfy themselves that the broadcast is in the best interest of the child.

APPENDIX THREE- ARTICLES 35+36 OF THE CIVIL CODE OF QUEBEC

35. Every person has a right to the respect of his reputation and privacy.

No one may invade the privacy of a person without the consent of the person unless authorized by law.

36. The following acts, in particular, may be considered as invasions of the privacy of a person:

1) entering or taking anything in his dwelling;

2) intentionally intercepting or using his private communications;

3) appropriating or using his image or voice while he is in private premises;

4) keeping his private life under observation by any means;

5) using his name, image, likeness or voice for a purpose other than the legitimate information of the public;

6) using his correspondence, manuscripts or other personal documents.

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