OLIVER KRALL

THE RIGHT OF PRIVACY IN NEW ZEALAND AND GERMANY: A GENERAL COMPARISON WITH REFERENCE TO THE ASPECT OF (INTIMATE) COVERT FILMING

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FACULTY OF LAW
VICTORIA UNIVERSITY OF
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Abstract:

The aim of this paper is to compare German and New Zealand privacy law. Therefore, the paper introduces the law of privacy in each country; outlines the development and the present status and compares the level of protection achieved in New Zealand with the level of privacy protection in Germany. Emphasis is on the aspect of privacy invasion by (intimate) covert filming. Nevertheless general aspects of privacy law are also illustrated as it will be necessary to establish an understanding for the matter.

The paper contributes to the debate on the need for privacy protection by providing an analysis of the nature of the problem, potential areas of conflict and compatible objectives. Dealing with the enacted provisions and the recent developments in New Zealand case law this paper argues that New Zealand still provides insufficient protection of privacy.

As will be seen, privacy law in Germany is more developed. Due to the lack of adequate provisions and statutes as well as the uncertainty of the case law it is suggested that in specified areas of privacy New Zealand law could use German law as a starting point to consider whether a similar scope should be protected and to develop privacy protection. Nevertheless it is also recognised that some fields of privacy that are not protected under New Zealand law at the moment can still be ignored due to the fact that there are different societies.

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I INTRODUCTION

The aim of this paper is to outline the development and the present status of a right to privacy in New Zealand and to compare it with the level of privacy protection in Germany. Emphasis shall be on the aspect of privacy invasion by (intimate) covert filming. Nevertheless general aspects of privacy law are also illustrated as it will be necessary to establish a understanding for the matter.

Warren and Brandeis already in 1890 noticed the need of a right to privacy when they argued:[1]

> "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast on the columns of the daily papers... Each crop of unseemly gossip, thus harvested, becomes the seed of more, and in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts."

If this were true in 1890 the strong need for privacy nowadays is apparent due to the mass media in the globalised world of today. In fact, the ability of the media to expose information is only likely to be exacerbated as intrusive technology and methods of entrapment evolve.[2] Technical developments in digital shooting and computing have increased the capacity for accessing, gathering, recording, processing and linking image data. With this technology not only the media but also private people become a more apparent threat to the privacy of other people. For example, with the use of mobile phones with built-in cameras it is possible for nearly everybody to make snapshots in multitudinous (private) situations and instantaneously publish them on Internet sites.[3] A recent example took place in Hamilton where a man tried to take pictures with his mobile phone-camera of a woman in a Hamilton ladies' toilet.[4] In the

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[1] Samuel D Warren and Brandeis Louis D "The Right to Privacy" (1890) 4 Harv L Rev 193, 195.
[2] Lawrence M Friedman "The one way mirror: Law, privacy, and the media" (2004) 82(2) WULQ 319. Friedman states: "The technology of intrusion advances more rapidly than the social technology of containment. We have to ask: how can we preserve human privacy, and human dignity, in times when these values are under ceaseless technological attack?" 342.
[3] For example www.buzznet.com.
[4] Helen Prattley "Peeping Tom tried to take pics of woman on toilet" (17 August 2005) National News Story <http://www.stuff.co.nz/stuff/0,2106,3380718a11,00.html> (last accessed 3 September 2005).

same way a neighbour can, from his property, photograph two lovers having a private and intimate conversation in their garden in seclusion and send this picture on the Internet.

The following paper contributes to the debate on the need for privacy protection by providing an analysis of the nature of the problem, potential areas of conflict and compatible objectives. Dealing with the enacted provisions and the recent developments in New Zealand case law this paper argues that New Zealand still provides insufficient protection of privacy. Due to the lack of adequate provisions and statutes as well as the uncertainty of the case law it is suggested that in specified areas of privacy New Zealand law could use German law as a starting point to develop privacy protection.

II COMPARATIVE METHODOLOGY

Much has been written about the correct methodology in comparative works[5]. The aim of this paper is not to assess and discuss different comparative methods. However, some useful comparative principles shall be mentioned briefly. The focus of the paper shall be on the legal protection of individuals in cases concerning their privacy. Starting point of the comparison is the principle of functionability. This principle - simplified - states that only those things are comparable which fulfil the same function. The question whether two legal institutions fulfil the same function has to be approached from the factual situation. It will - referring to the above example - be asked which remedies are available in the different law systems to prevent a newspaper or an internet provider from publishing a picture. The search for these remedies will encompass the entire German and New Zealand legal systems and all sources which affect the law in those systems. As will be seen, the privacy cases provide a very good example for the different approaches of two different legal systems to the same factual situation. Whereas, in Germany, reference will mostly be made to the general right to one's personality, different areas of law, for example defamation or trespass, can play a role in new Zealand. This comparison of specific legal institutions is known as microcomparison.

Microcomparison in many cases only makes sense if it is conducted together with a comparison of the general "spirit and style" of a legal system. The comparison of two legal systems on this "global" level can be referred to as macrocomparison. As will be seen,

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[5] Konrad Zweigert, Kotz Hein *Introduction to Comparative Law* (3ed Clarendon Press, Oxford 1992); John C Reitz "How to Do Comparative Law" (1998) 46 American Journal of Comparative Law 617.

macrocomparison will be important for this work in several respects. First, reference to the function of the legislature and judicature in each legal system will provide an understanding of the development of privacy law in the two countries. Second, unlike the New Zealand legal system, the German Constitution provides for the protection of fundamental rights which, in turn, have a great effect on privacy protection. And last, the remedies available in both, the German and the New Zealand legal system, will - mostly - be found in the law of torts. Reference shall however not be confined to legal provisions. Where appropriate, the impact of - *inter alia* - philosophical, psychological or sociological works on the notion of privacy shall be described. Finally, it will be seen that it is necessary to describe the different historical backgrounds of the two countries which have a major influence on privacy law.[6]

The last question that arises concerns the structure of this comparative work. The aim will be to make as many sections as possible comparative.[7] For example, the relevant New Zealand law for the publication of pictures shall be described in the context of the German privilege as to ones own picture.

III THE GERMAN AND NEW ZEALAND LEGAL SYSTEM

The operation of privacy laws in Germany and New Zealand has to be assessed against the main characteristics of the legal systems in those countries and cannot be understood without the impact of the legislature and judicature. Apart from many similarities, especially in respect to the legislature, an important difference between the legal systems is that in New Zealand - based on the common law tradition - certain court decisions are binding sources of law. The following account shall provide a simplified overview of the two country's legal systems.

A Germany

The German Basic Law is the paramount source of law. All other legal norms have to conform with its principles and values.[8] Placed at its head[9] is a bill of fundamental rights

[6] Reitz as above n 5, principle 5.
[7] Reitz as above n 5, principle 8.
[8] Howard D Fisher *The German Legal System & Legal Language* (3ed London 2002) 19.
[9] Articles 1 – 19 Basic Law

which, as will be seen, plays an important role in German privacy law.[10] Since Germany's legal system is dominated by codes of law, it can be described as a civil law system.[11]

Even if there is no (strict) doctrine of precedent in German law and the judges are not supposed to create law,[12] the judicature is responsible for applying, interpreting and hence developing the law as long as it acts within the limits imposed by the German Constitution.[13]

As will be seen, the German legislature has not had such a great impact on the development of a right to privacy, especially the general right to one's personality, as one might think. There are some legislative provisions that protect aspects of privacy. Federal laws, for example §§ 201 - 204 of the Criminal Code and § 823 II of the Civil Code, protect the secrecy of the spoken word or letters. The central part of German privacy protection, the general right to one's personality, has however been developed by German courts, especially the Federal Constitutional Court (FCC) and the Federal Court. Remedies for individuals are available under tort law.

B New Zealand

Contrary to Germany, New Zealand law is based upon the common law tradition. Therefore, the sources of law are statutes enacted by the Parliament and case law stemming from the courts.

New Zealand courts create law in that, in certain circumstances, the decisions of some courts are binding upon others[14] Many of the principles of the New Zealand law were developed in the English courts and have been - New Zealand being a former colony of the British Empire - adopted and approved in New Zealand courts. Other rules have subsequently been developed by New Zealand courts. As to the relation between the two sources of law, legislation will prevail against case law. Since New Zealand is a democratic society, the Parliament as the representative of the people has the final say. The judges will however still be responsible for interpreting the statutory laws and applying them to concrete situations. As will be seen, there are, already, many statutes that partially and/or incidentally protect privacy

[10] Fisher, as above n 8, 23.
[11] Nigel Foster *German Legal System & Laws* (3ed London 2002) 5.
[12] Foster as above n 11, 4.
[13] BverfG *Soraya* [1973] NJW 891, 892.
[14] The doctrine of precedent.

in some respects, for example[15] the Films, Videos, and Publications Classification Act 1993, the Privacy Act 1993 or the Summary Offences Act 1981.

Additionally, privacy is partially covered by existing causes of action such as trespass, nuisance, breach of confidence, harassment, and intentional infliction of emotional harm.

However, as decision in *Hosking v Runting*[16] shows, it seems so far that decisive steps to protect privacy not only will be taken by the judicature but also by Parliament. Similarly, the law of defamation, for example, can play a role in privacy cases. Much of that law has been developed by the courts.

IV PRIVACY - A LEGAL RIGHT - HISTORY, IDEAS AND SCOPE

The theoretical foundations of privacy have to be read together with (and sometimes cannot be divided from) historical developments in order to understand the discussion of a legal right of privacy. History shows that privacy, even though it has long been subject to intellectual works, has not always been a concept legally acknowledged. It was hardly acknowledged by the monarchies and churchmen of the Middle Ages who were more occupied with the constant battles for and reservation of their power[17] which included the idea of a distinctly public realm and a corresponding delineation of a private sphere.[18] However, at those times, privacy was not an issue of primary concern to the people. Urban life was hardly known and people could enjoy intimacy and solitude merely because of the distance between their houses. A need for (physical and psychological) privacy emerged with the urbanisation of the society and the growth of population of urban centres and their busy city-lives. Correspondingly, the spread of newspapers from the eighteenth century on had an effect on the inquisitiveness of the people which, in turn, led to a development of aggressiveness by, and content of personal nature in, the newspapers. Further, technological inventions - printing, telegraphy, photography - generated fears and were perceived to be potential threats to privacy. Also state

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[15] The non exhaustive list also includes the Privacy Act 1993, Defamation Act 1992, 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 address at least specific privacy issues.

[16] *Hosking v Runting* [2005] 1 NZLR 1 (CA).

[17] Richard F Hixson *Privacy in a Public Society – Human Rights in Conflict* (Oxford University Press, New York 1987) 6.

[18] Raymond Wacks *Privacy Volume I, The Concept of Privacy* (Hong Kong 1993) xi.

authorities increasingly began to demand accounts of individuals' lives and affairs.[19] Therefore, it was especially from the later part of the nineteenth century on that writers began to think of privacy in terms of legal protection.[20] The same privacy concerns as at the end of the 19th century apply (even more) today. Personal information has a (commercial) value that public authorities and business companies are eager to obtain. Permanent intrusions into privacy by the press are part of the modern society. Modern information and surveillance technologies in the information age enable supervision of individuals, the collection and dissemination of a high level of information about individuals and an increase of intrusions into privacy.[21]

In assessing the history of a legal right to privacy, two main justifications for its existence can be found: developments in the society and technological advances that endanger privacy[22] on the one hand, the legal recognition of personal autonomy, self-determination, human dignity and liberty[23] on the other. In 1890, Warren and Brandeis noted that the law had to pay more regard to human emotions and that "recent inventions and business methods call attention for the next step [of developing the law] which must be taken for the protection of the persons, and for securing ... the right to be let alone". They went on to state that instantaneous photographs, mechanical devices and newspapers have "invaded the sacred precincts of private and domestic life".[24] An emphasis on human dignity, on the other hand, can be found in German jurisprudence. "The right to free development of one's personality and human dignity safeguards for everyone the sphere of autonomy in which to shape his private life by developing and protecting his personality".[25]

Much has been written about a legal concept of privacy and its scope of protection. From these sources, it is apparent that the idea of a legal right to privacy is very vague and it is

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[19] Hixson, as above n 17, 8.
[20] Hixson, as above n 17, 6 – 25.
[21] Tim Dixon "Valuing Privacy: an Overview and Introduction" (2001) 24 (1) UNSWLJ 239, 240; Hixson, as above n 17, 27; Simone Davies "Unprincipled Privacy: Why the Foundations of Data Protection are Failing us" (2001) 24 (1) UNSWLJ 284, 285; John B Young *Privacy* (Chichester 1978) 4, 5.
[22] Young, as above n 21, 4,5; Hixson, as above n 17, 27; Jillian Caldwell "Protecting Privacy Post Lenah: Should The Courts Establish A New Tort Or Develop Breach Of Confidence?" (2003) 26 UNSWLR 91, 92.
[23] BGHZ 13, 334; Art. 17 of the International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS; Young, as above n 21, 2; Megan Richardson "Whither Breach of Confidence: A Right of Privacy for Australia?" (2002) 26 Melb U LR 381, 389.
[24] Warren, Brandeis as above n 1, 203.
[25] BverfG *Soraya* [1973] NJW 891, 892.

impossible to develop a unitary definition.[26] Warren and Brandeis define privacy as "a right to be let alone", the German Federal Court of Justice (FCJ) as "a right to be oneself, to belong to oneself".[27] In the legal definitions, much of the theoretical foundations described above are reflected. They all acknowledge that privacy relates to some kind of control or to personal decision-making.[28] Protection against non-consensual aquisition or disclosures of personal information, photographs without consent and intrusions into physical seclusion are located at the core of privacy protection.[29] (Especially the German) parts of this paper will show how a concept as vague as privacy can be put into shape and concrete terms and how it can be balanced against competing legal interests.

V GENERAL INTRODUCTION INTO GERMAN AND NEW ZEALAND PRIVACY LAW

A German law

1 Historical development and constitutional context

The general right to one's personality – as elaborated by the FCC[30] - protects the intimate, personal and secret spheres, personal honour, the right to dispose over the representation of one`s own personality in public, the right of controlling one`s image, the right of the own, spoken word, the right not to be falsely quoted, the right to informational self-determination and the protection against untruths about oneself[31]. This broad protection of privacy cannot be understood without looking at Germany's historical and constitutional background.

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[26] Wacks, as above n 21, xii; Young, as above n 21; Paul Telford "Grosse v Purvis: its place in the common law of privacy" (2003) 10 Privacy Law & Policy Reporter, 66, 68.
[27] BGH *Caroline von Monaco III* [1996] NJW 1128, 1129.
[28] Caldwell, as above n 22, 93. Intimacy, confidentiality, seclusion, solitude, withdrawal from society, self-determination, independence, autonomy in personal and spiritual concerns, secrecy of communication, information about a person, private affairs, realm of a person's own, or, correspondingly, indecent conduct, unwarranted intrusion, unreasonable interference, unwanted publicity, unwarranted appropriation or exploitation of one's personality, surveillance or observation are - *inter alia* - terms employed in connection with a right to privacy see Young, as above n 21, 17 ff.; Graham Greenleaf "The Australian Privacy Charter – a new benchmark?" (1995) 69 ALJ 90; Alan F Westin *Privacy and Freedom* (New York 1970) 11.
[29] Art. 17 of the *International Convenant on Civil and Political Rights,* as above n 23; Caldwell, as above n 22, 93.
[30] BverfG *Eppler* [1980] NJW 2070, 2071.
[31] As to the different classifications of the general right of personality see Matthias Prinz, Butz Peters *Medienrecht – Die zivilrechtlichen Ansprueche* (Beck Muenchen 1999) 65 ff..

There was no general right to one's personality in Germany in the 19th and early 20th century. The German *Reichsgericht*[32] in its jurisprudence consistently neglected the acknowledgment of such a right, holding that the legal system did not provide for it,[33] even though German law provided for other protection of the personality. For example, the Act on Artistic Creation (AAC)[34] from 1907 generally prohibited the publication of a person's picture without his or her consent.[35] The attitude of the *Reichsgericht* was adopted by the Committee that drafted the German Civil Code. The Committee stated that non-tangible values should not be placed at the same level as property interests and that the Civil Code should not provide for a protection of personality rights. Consequently, the individual's personality was not protected sufficiently by the German Civil Code, even though some provisions protected certain aspects of the personality.[36] The first attempts to recognise a broader general right of privacy were hence made by leading academics.[37]

It was not until 1954 that the German Federal Court of Justice acknowledged the existence of a general right to one's personality in its famous *Leserbrief*-decision.[38] In this case, a lawyer required the correction of an article in a journal under the Press Act in the name of his client. The journal printed this request under the heading "Letters from Readers", leaving out parts from which it would have become clear that the letter was not a "Letter from a Reader". The court held:

> "Now that the basic law has recognised the right of a human being to have his dignity respected and also the right to free development of his personality, ..., the general personality right must be regarded as a constitutionally guaranteed freedom having regard to Articles[39] 1 and 2".[40]

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[32] The highest court a that time.
[33] RGZ 79, 398; RGZ 82, 334; RGZ 94, 1; Prinz Peters, as above n 31, 50.
[34] Kunsturhebergesetz.
[35] For a further account of personality protection under German law at that time see B S Markesinis *The German Law of Obligations, Volume II The Law of Torts: A Comparative Introduction* (3ed, Clarendon Press, Oxford, 1997) 65.
[36] For example, § 12 of the Civil Code establishes the right to a name.
[37] Markesinis, as above n 35, 63, 64.
[38] BGHZ 13, 334; BGH *Leserbrief* [1954] NJW 1404, 1405 translated in Markesinis, as above n 35, 376 case 30.
[39] Art. 1 I 1 of the German Constitution: "The dignity of the human being is inviolable."; Art. 2 I of the German Constitution: "Everyone has the right to free development of his personality, insofar as he does not injure the rights of others or violate the constitutional order or the moral law."; translated in Sabine Michalowski, Lorna Woods *German Constitutional Law, The protection of civil liberties* (Hants 1999) 97 and 109.
[40] BGHZ 13, 334; BGH *Leserbrief*, as above n 35, 1405.

The Court thus held that every person has the right to decide whether and in which form his letters or other notes shall be made available to the public and that the publication of such notes without the consent of the author would be an infringement of his personality rights. The lawyer could therefore successfully insist that the journal revoke its statement that the letter of the lawyer was a "Letter from a Reader". In the *Soraya*-decision,[41] the FCC held that the FCJ acted within the German Constitution when it developed the general right to one's personality independently of any legislative provisions. Subsequently, it has approved the existence of the general right to one's personality in several decisions.[42] Further, many decisions concerning the general right to one's personality have been passed by lower courts.[43] The different aspects of the general right of personality have been put in concrete form both by the FCC and the German FCJ. However, this enumeration is not exhaustive and open to future development.[44]

The acknowledgement of a general right of personality finds, as stated, its basis in Article 1 (1) and Artticle 2 (1) of the German Constitution and, in turn, cannot be understood without looking at the historical background and the development of basic rights in German law.[45] Basic rights have been implemented in various previous constitutions. The *Paulskirchenversammlung von 1848* declared the basic rights of the German people, the *Preußische Verfassungsurkunde von 1850* comprised a broad catalogue of basic rights and several constitutions of the Federal States provided for the protection of certain basic rights. However, the legal effect of these rights has been, for various reasons, very confined. They have, for example, not had binding effect upon the legislation and have not applied equally to all citizens.[46] The next, very broad catalogue of basic rights could be found in Articles 109 - 165, of the *Weimarer Reichsverfassung von 1919*[47] This Constitution was however *de facto* invalidated by the seizure of power by the National-Socialists in 1933 and the inconceivable disregard of the human being as such that followed during the time of their power. It was mainly this experience with the continuing and grave violations and disregard of human beings, their life and their dignity by the National-Socialists that influenced the emphasis on

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[41] BverfG *Soraya,* as above n 13, 892.
[42] BverfG *Scientologen* [1997] NJW 2669, 2670; BverfG *Lebach* [1973] NJW 1226, 1227; BverfG *Soraya,* as above n 13, 892.
[43] Prinz, Peters as above n 31, 63.
[44] BverfG *Eppler,* as above n 30, 2071; Prinz, Peters, as above n 31, 62 ff.
[45] See the *Lüth*-decision of the FCC, BverfGE 7, 198.
[46] It would be beyond the scope of this paper to give an exact account of the development of basic rights in Germany. For details see Bodo Pieroth, Schlink Bernhard *Medienrecht – Die zivilrechtlichen Ansprueche* (Beck Muenchen 1999) 8 ff..
[47] Constitution of Weimar; Pieroth, Schlink, as above n 46, 7.

basic rights in the German Constitution of Bonn of 1949.[48] "The memory of the national-socialist background, with its many attempts to discover and revive traditional German values had affected the law in almost all its aspects and was still alive, so the framers of the Constitution deliberately placed at the head of the constitutional text nineteen articles dealing with fundamental human rights."[49] Those basic rights are of paramount importance in the German legal system.[50]

From this historical background, it can be understood why the German FCJ in its *Leserbrief*-decision acknowledged the existence of a general right to one's personality and changed the adjudication of its predecessor, the *Reichsgericht*.[51]

2 *General introduction into the general right to one's personality*

For a full understanding of the protection of the general right to one's personality, some more points have to be stressed. First, it has to be noted that Article 1 III of the German Constitution provides that the "basic rights bind the legislative, the executive and the judiciary as directly valid law" which means that they are operative against state authorities. This paper is however confined to horizontal protection of privacy. It is the so-called problem of the effect on third parties of the basic rights[52] which raises the question of whether and to what extent the basic rights have a secondary effect in the realm of private law.[53] The FCC held[54] that the basic rights - as paramount constitutional law - form an objective system of values, which, via the medium of the general clauses of the German Civil Code, influence the private law of the land and therefore have to be observed also in civil law cases. All rules of the private law have therefore to be construed in accordance with the spirit of the basic rights and have to be interpreted so as to conform with the German Constitution.[55]

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[48] Pieroth, Schlink, as above n 46, 12, 13.
[49] Markesinis, as above n 35, 28.
[50] BverfG *Lüth,* as above n 45; Pieroth, Schlink, as above n 46, 12.
[51] Prinz, Peters, as above n 31, 51.
[52] An exact description of the different legal positions as to this - disputed - problem would go beyond the scope of this paper. The Federal Labour Court (*Bundesarbeitsgericht*) favoures a direct applicability of the basic rights in the relation between individuals, see BAGE 4, 240; BAGE 1, 258 ; Markesinis, as above n 32, 28.
[53] Raimund Youngs *Sourcebook on German Law* (Southampton 1994) 102.
[54] BverfG *Lüth,* as above n 45, 205.
[55] For an exhaustive description of the problem of *Drittwirkung der Grundrechte* see Pieroth, Schlink, as above n 46, 43 ff.

The second point that has to be made is that, as described, the general right to one's personality is derived from the basic rights of the German Constitution. Applying basic rights is however always a balance of interests. Therefore, the general right to one's personality is a *Rahmenrecht*.[56] This means that an intrusion into the scope of the personality right hardly ever is *per se* illegal. The right of personality has to be balanced with other basic rights guaranteed by the Constitution. One of those opposing interests will often be the equally important need to preserve the freedoms of speech, press, broadcasts, arts and science[57] that are protected by the German Constitution.[58]

The balance of interests is of major importance and has to be weighed in every single case, always bearing in mind the equal value that has been given to the opposing legal values. The case-law will only provide useful guidelines but not binding rules.[59] The *Lebach*-decision[60] of the FCC illustrates the complexity of this balance. In that case, the issue in question was whether a documentary movie about a murder of soldiers in which the accomplice was identified with his name could be broadcast.[61] The accomplice sought to restrain the broadcast by relying on his general right to one's personality (the privilege as to the own picture).[62] This had to be balanced against the freedom of broadcasts of the television station.[63]

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[56] Frame right; Prinz, Peters, as above n 31, 63, 64.
[57] Markesinis, as above n 32, 66, 67.
[58] Art. 5 I of the German Constitution: "Everybody has the right freely to express and disseminate their opinions orally, in writing or visually and to obtain information from generally accessible sources without hindrance. Freedom of the press and freedom of reporting through audio-visual media shall be guaranteed. There shall be no censorship"; Art. 5 III 1 of the German Constitution: "Art and scholarship, research and teaching shall be unrestricted"; translated in Michalowski, Woods, as above n 36, 199 and 227.
[59] Markesinis, as above n 32, 66.
[60] BverfG *Lebach,* as above n 42; translated in Markesinis, as above n 32, 390.
[61] See also below.
[62] See §§ 22, 23 of the Act on Artistic Creations.
[63] BverfG *Lebach,* as above n 42, 1226; The court held: "In cases of conflict ... the freedom to broadcast must not be restricted excessively. On the other hand ... the restriction of the freedom to broadcast serves in turn to protect an important concern of the Constitution; the interest of the person affected to prohibit the publication of his likeness or any representation of his person ... is directly enhanced by the constitutional guarantee of the protection of the personality. In solving this conflict it must be remembered that according to the intention of the Constitution both constitutional concerns are essential aspects of the liberal-democratic order of the Constitution with the result that neither can claim precedence in principle. The view of humanity taken by the Constitution and the corresponding structure of the community within the State require both the respect for the independence of individual personality and the guarantee of a liberal social atmosphere; the latter cannot be realized at the present times unless communications are unimpeded. In case of conflict both concerns of the Constitution must be adjusted, if possible; if this cannot be achieved it must be determined which interest must be postponed having regard to the nature of the case and to any special circumstances. For this purpose, both concerns of the Constitution, centred as they are on human dignity, must be regarded as the nucleus of the system of constitutional concerns. Accordingly, the freedom to broadcast may have the effect of restricting any claims based on the right of personality; however, the damage to personality resulting from a public representation must not be out of proportion to the importance of the publication upholding the freedom of communication.

Furthermore it follows from these guiding principles that the required weighing of interests must take into account the intensity of the infringement of the personal sphere by the broadcast on the one hand; on the other hand, the specific interest which is affected by the broadcast and is capable of being thus served, must be assessed and examined as to whether and to what extent it can be satisfied even without any interference - or a less far-reaching interference - with the protection of personality". In the particular case, the court held that the right of the public to be informed about matters in the current public interest would, in cases of grave criminal offences, outweigh the personality right of the (convicted) criminal and that the offenders could be mentioned in coverage. In the circumstances of the case, however, the broadcast of the movie was disproportionate. Since some time had elapsed between the murders and the broadcast, the latter was no longer of topical interest and endangered the criminal's re-socialisation. Hence, he - again - had an interest to be let alone from the public. In consequence, the right not to be identified of criminal offenders will, with time passing by, prevail against the public interest to be informed.

Further, it has to be noted that if statutory law protects the same scope as a particular aspect of the general right of personality, the basic law always prevails and has to be applied. Hence, as will be seen below, the protection of the own picture provided for in § 22 f. of the AAC has to be applied in these cases.[64] Finally, as will be seen, it will in (many) cases be difficult to draw a line between the different aspects of the general right to one's personality and the different aspects might in instances interact.[65]

B New Zealand law

During the last twenty years besides the "classical" torts,[66] a tort of invasion of privacy was recognised in *Tucker,*[67] *Bradley,*[68] and also in *Morgan*[69] and *C v Wilson.*[70] Referring to enacted legislation in the privacy field[71] and US authorities in *Tucker*, a claim for breach of

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[64] Prinz, Peters, as above n 31, 67, 68.
[65] Prinz, Peters, as above n 31, 65.
[66] Causes of action such as trespass, nuisance, breach of confidence, harassment, and intentional infliction of emotional harm.
[67] *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716.
[68] *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415.
[69] *Morgan v Television New Zealand Ltd* HC Christchurch 1 March 1990 CP 67/90.
[70] *C v Wilson and Horton Ltd* HC Auckland 27 May 1992 CP 765/92.
[71] Human Rights Commission Act 1977, Wanganui Computer Centre Act 1976, Crimes Act 1961 and Broadcasting Act 1976.

privacy was accepted as arguable.[72] The existence of the named tort was clearly supported by the case of *Bradley*[73] where Gallen J stated that a tort of privacy formed part of the law, but refused to grant an injunction.[74] Nevertheless, the mere consideration of the application and the fact that Gallen J noticed three actual requirements of this tort showed its existence. In *P v D*, Nicholson J granted an injunction preventing publication of the fact that P had been treated at a psychiatric hospital, on the grounds of invasion of privacy.[75] Additionally, the three step test developed in *Bradley* was extended by adding the fourth premise that "the public must not have a legitimate interest in having the information made available."[76] In *L v G* the court accepted the four elements set out in *P v D* and awarded damages against G for breach of privacy for publishing sexually explicit pictures which he took during his meetings with L as a prostitute.[77] Since *Hosking v Runting*[78] New Zealand common law now provides a remedy in tort for privacy invasion. With this decision, one could suppose that a new era of privacy protection has begun.

Parliament, on the other hand, passed several statutes that do not provide an enforceable right to privacy, however do address at least specific privacy issues.[79] In 1993 Parliament has recognised the right of privacy by the adoption of the Privacy Act 1993 and the Broadcasting Act 1989. However they are both not as comprehensive as the emerging tort. The Privacy Act does not "create tortious rights and duties"[80] and the Broadcasting Act[81] applies only to the

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[72] *Tucker,* as above n 57, 716. The plaintiff had undertaken a publicity campaign to raise funds for a heart transplant. He had criminal convictions, including those relating to indecency. The evidence suggested that publication could cause Tucker grievous physical or emotional harm. An interim injunction was granted but later discharged, because organisations other than the defendants had already revealed the convictions to the public.

[73] *Bradley,* as above n 58, 425.

[74] Gallen J in *Bradley,* as above n 58, 423 applied the first three steps of the test proposed by William Prosser and Keaton *On the Law of Torts* (5ed 1984) 856. The three steps are: (1) That the disclosure of the private facts must be a public disclosure and not a private one; (2) Facts disclosed to the public must be private facts and not public ones; (3) The matter made public must be one, which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.

[75] *P v D* [2000] 2 NZLR 591.

[76] *P v D*, as above n 75, 601 Nicholson J.

[77] *L v G* [2002] DCR 234.

[78] *Hosking v Runting* [2003] 3 NZLR 385 (HC).

[79] These include the Harassment Act 1997, Telecommunications Act 2001, Criminal Records Act 2004, Summary Offences Act 1981, Postal Services Act 1987, Defamation Act 1992, Crimes Act 1961, Victims' Rights Act 2002 and the Radiocommunications Act 1989.

[80] *Hosking v Runting* (HC), as above n 78, 413 Randerson J.

[81] The BSA protects against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities. Therefore the principles developed by the Broadcasting Standards Authority are quite similar to the test developed by Nicholson J in *P v D*, as above n 75, 591.

media. In 2002 the Law Commission published another catalogue of rights, which are covered by the law of privacy.[82]

Furthermore, even if the Bill of Rights Act 1990 (BORA) was passed to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights"[83], it does not give a general guarantee of privacy.[84] Section 21,[85] the right to be secure against unreasonable search and seizure, "affords protection against invasion of privacy in relation to person or property" and section 28 preserves existing rights[86]

Additionally, as will be seen, there are several torts protecting the right of privacy. Causes of action such as trespass, nuisance, breach of confidence, and intentional infliction of emotional harm have existed for a long time and protect certain aspects of privacy.[87] All these aspects can be part of the privacy of a person, but these causes of action are designed to protect other interests. The protection of privacy interests is only a by-product. They do not provide a unique protection of privacy itself and cannot be developed in this way without losing their original shape. Therefore these remedies do not provide sufficient protection of privacy.[88]

C Comparison of the German and New Zealand position

The first obvious difference between German and New Zealand law is the terminology used. Whereas German law generally speaks of "personality rights" or "general right to one's personality", New Zealand law more commonly adopts terms as "privacy protection" or the "tort of invasion of privacy". This however does not necessarily mean that the aim is to protect different situations or values in the different systems. As will be seen, cases that fall within the scope of the German general right to one's personality might well fall within the scope of what is referred to as privacy under New Zealand law. Moreover, three aspects that form the core of the German general right to one's personality (the intimate, personal and secret spheres) might be referred to as "privacy" in English language. As will be seen, the

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[82] New Zealand Law Commission *Protecting Personal Information from Disclosure* [2002] Preliminary Paper 49.
[83] New Zealand Bill Of Rights Act 1990.
[84] *R v Jefferies* [1994] 1 NZLR 290, 302 (CA) Richardson J.
[85] Section 21 of the BORA states: "Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence, or otherwise."
[86] *Hosking v Runting*, as above n 78, 411 (HC) Randerson J; Rosemary Tobin "Privacy: one step forward, two steps back!" (2003) NZLJ 256, 257.
[87] John F Burrows and Ursula Cheer *Media Law in New Zealand* (5ed, Oxford University Press, Oxford, 2005) 173.
[88] Rosemary Tobin "Invasion of Privacy" [2000] NZLJ 216.

terminology "general right to one's personality" might actually be somewhat broader than "privacy", but does not necessarily suggest that it regulates different scopes of law.

It seems the approach taken to develop a general right to one's personality or privacy protection is similar in German and New Zealand law. Most of the aspects of the German general right to one's personality have been developed by courts. They are not, as one might think, codified in statutes or the German Civil Code.[89] Similarly, as to date, it seems that the decisive step in New Zealand to develop a tort of privacy has already been taken by the courts.

At this point, similarities however end. The difference of the historical and constitutional background of the two countries is apparent. The development of the general right to one's personality under German law was a compulsory result of German history - especially the 3rd Reich and the occurring grave violations of human rights - and the fundamental rights provided by the German Constitution. The Constitution acknowledges that privacy is a necessary part of, and its protection derived from, human personality and dignity. It may be stated that fundamental rights and hence privacy protection are inherent in the human personality. Contrary, there is no constitutional basis in New Zealand that provides for the protection of fundamental rights. As the BORA is an ordinary statute and, as such, as section 4 provides,[90] does not override any other statute, the courts are free to decide whether they will grant such protection to individuals. Reference to other common law countries illustrates the importance and impact of fundamental rights for the development of privacy protection. Privacy protection in New Zealand will therefore not be derived from, but granted to, the human being. In this respect, the New Zealand position is similar to the situation in Germany before the enactment of the German Constitution. Nevertheless, as for example seen in *Police v Beggs*[91] and also in *Lange*[92] irrespective of its status the BORA has had impact on the development of the right to freedom of expression in New Zealand.

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[89] An important exception is of course the privilege as to the own picture.
[90] Section 4 of the Bill of Rights provides that: No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights) (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) Decline to apply any provision of the enactment by reason only that the provision is inconsistent with any provision of this Bill of Rights.
[91] *Police v Beggs* [1999] 3 NZLR 615.
[92] *Lange v Atkinson* [2000] 3 NZLR 385.

VI SINGLE ASPECTS OF THE GENERAL RIGHT TO ONE'S PERSONALITY – GERMAN LAW

German courts have worked out a non-exhaustive catalogue of different aspects of the general right to one's personality. Those will be described and compared to relevant New Zealand laws, first to one action that might evolve in New Zealand and directly protect privacy[93] and then to traditional remedies which incidentally provide for privacy protection in some respects.[94]

The discussion will focus on three main points of comparison: first, it will be asked to which extent a relevant law is capable of protecting privacy. Secondly, the means by which this protection can be infringed shall be described. And thirdly, reference shall be made to relevant justifications and defences for the infringements.

A Privacy

The first aspects of the German general right to one's personality that the FCC mentioned in its account in the *Eppler*-decision[95] are the intimate sphere, the personal sphere and the confidential sphere. These three spheres in some way form the core and foundation of the general right to one's personality and can be, taken together, referred to by using the word privacy. They decide in which situations and to what extent an individual enjoys privacy protection. In some cases, they interact and have to be applied together with other aspects of the general right to one's personality. If for example a newspaper wants to publish a portrait of an individual, the lawfulness of that publication will have to be assessed against the principles of the privilege as to the own picture.[96] In deciding this question, it has to be asked in turn whether the portrait has been taken from the individual's intimate, personal or confidential sphere.

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[93] The tort of invasion of privacy.
[94] For example defamation law and breach of confidence.
[95] BverfG 30 as above n 29, 2071.
[96] See below.

1 Intimate sphere

The intimate sphere of a person relates to the most intimate scope of his personality. Its protection is necessary for the development of the individuality which has to be shielded from the public in some respects.[97] All aspects of the sexuality - images, statements and citations - fall within the protection of the intimate sphere. It is prohibited to make or publish nude pictures without the consent of the person affected and it is irrelevant if the person is recognisable or not.[98] In one decision,[99] a picture of a dressed woman was printed next to an article about the awaking sexuality in spring. The heading of this article stated that it was time to have a "quickie" again. The court held that the woman's intimate sphere had been infringed because it had been - in a misleading way - suggested that the woman would live up her sexuality unrestrained.

The protection of the intimate sphere is not confined to the domestic home. In the decision *Telefonsex,*[100] a man had telephone sex with his wife in his office. The FCJ held that an article in a newspaper about this conduct infringed the man's intimate sphere even though he made the phone calls from his office. Furthermore, every person is protected against statements others make about his sexuality, for example about his intimate relation to another person. In a case before the district court of Hamburg, a newspaper reported about a pregnant model. It printed images of six men and speculated in the article on who was the father. The court held that this article was an infringement of the woman's intimate sphere.[101]

The protection of the intimate sphere does not cease because the person affected has not observed secrecy. Hence, a person taking a sunbath naked in a public park does not loose the protection of his intimate sphere.[102] And even if a person consents to the revelation of his intimate sphere in some aspects, he will not be deprived of the protection in general. In the

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[97] BGH *Der Aufmacher II* [1981] NJW 1366.
[98] BGH *Nacktaufnahme* [1985] NJW 1617.
[99] OLG-Hamburg [1995] ZUM 637, 639.
[100] BGH *Telefonsex im Büro* [1988] NJW 1984, 1985; The actual decision was more complicated than this summary suggests. The man actually had been dismissed by his employer because of the telefon-sex and brought a claim against his dismissal before a labour court. The newspaper article reported about the court proceedings. The BGH however still held that it infringed the man's intimate sphere – the information the man had given to the court was not supposed to be given to the public.
[101] Prinz, Peters, as above n 31, 70.
[102] Prinz, Peters, as above n 31, 72.

Pornodarsteller-decision,[103] it was held that a porn-actor does not waive his intimate sphere in general because he acts in porn-movies.

As described, the intimate sphere protects against publication and observation of all intimate acts without consent.[104] It is further necessary for the development of the individual that his intimate sphere is protected against intrusions. Every person thus has a right to be spared from comments as to intimate acts he does not want to hear and a right to be protected against other stalking acts. The protection of the intimate sphere is absolute. This means that a violation can never be justified on the grounds of prevailing public interests.[105] Referring to the German Constitution, the protection of the general right to one's personality, Articles 1 I and 2 I of the Constitution will always and absolutely - without a balance of interests - prevail against other values such as the freedom of speech or press.[106]

2 *Personal sphere*

The personal sphere protects an autonomous scope in which the individual can develop and live up his personality with the exclusion of other persons. In *Caroline von Monaco III,*[107] the FCJ talked of a right to be oneself, to belong to oneself. It is the sector of privacy to which other persons only have access as far as the person concerned allows it.[108] The courts have divided the personal sphere into a domestic sphere, a protected spatial sphere outside the domestic sphere and a non-spatial sphere. The personal sphere always has to be balanced against competing constitutional interests as it is not absolute.

(a) Scope of protection

The domestic home constitutes the classical area protected, regardless of whether the person affected has rented the location or owns the property. The individual is protected from intrusions by other persons and enjoys the freedom to develop his personality without being watched or criticised by the public.[109] They have the right to determine whether others have access to their domestic sphere or whether information about this sphere can be published. It

[103] LG Berlin *Pornodarsteller* [1997] NJW 1155.
[104] Prinz, Peters, as above n 31, 68, 69.
[105] Prinz, Peters, as above n 31, 68, 69.
[106] Article 5 of the Constitution.
[107] BGH *Caroline von Monaco III*, as above n 27, 1129.
[108] Prinz, Peters, as above n 31, 73.
[109] Prinz, Peters, as above n 31, 73.

is therefore unlawful to photograph and publish the interior of a flat without consent of the possessors because they have the right to determine whether and to what extent their personal sphere can be reproduced by another person.[110] The domestic sphere further comprises the garden, balcony, offices and business premises. Therefore, it is unlawful to photograph a person sitting in his garden (not necessarily involved in a private act) with a telephoto lens.[111] It is irrelevant whether coverage about the personal sphere is in pictures or in writing. In a case before the district court of Hamburg, a magazine reported about the interior of a house of a TV presenter. It gave an exact description in words of the bathroom, living room and the furniture. The court held that this coverage was unlawful.[112]

In *Caroline,*[113] the FCJ held that protection of the personal sphere is not confined to the domestic sector and protected a spatial sphere outside the domestic sphere if several conditions are fulfilled. These are that someone:

- has retreated into local seclusion,
- wants in an objectively recognisable way to be alone and
- behaves, trusting in the seclusion, in a way he would not behave in the public.

In this case photographs of Caroline who had retreated with a man in a barely lit restaurant, were taken and published. The court held that, since the princess and her companion in their seclusion no longer appeared to be part of the public and their dinner had an actual "private" character, the photographs taken were an infringement of their personal sphere and hence unlawful. The protection of privacy in this case prevailed against the public interest of a coverage about this dinner and the freedom of press. However, this balance of interests has to be conducted in every single case and even minor deviations can lead to a different result. In other decisions, the FCJ found in favour of the press where, for example, it had published images of the princess that showed her when horse-riding, shopping or cycling. Other courts, again, held that a lonely beach, a hotel or a sauna can fall within the scope of protected spatial sphere outside the domestic sphere.[114] The European Court of Human Rights took a much

[110] OLG Düsseldorf [1994] NJW 1971.
[111] LG Hamburg, *Urteil vom 27.9.1996* – 324 O 392/96 (unpublished).
[112] See Prinz, Peters, as above n 31, 74.
[113] BGH *Caroline von Monaco III*, as above n 27, 1130.
[114] Examples see Prinz, Peters, as above n 31, 76.

wider approach when it stated in the case of *von Hannover v Germany*[115] that even scenes from the daily life thus engaged in activities of a purely private nature such as practising sport, out walking, leaving a restaurant or on holiday can have private character and therefore fall within the scope of protection of Article 8 of the European Convention on Human Rights.

(b) Balance of interests

In contrast to the intimate sphere, the protection of a person's personal sphere is not absolute.[116] It has to be balanced with other constitutionally guaranteed rights, especially the freedom of press and speech and the interest of the public in information.[117] Since the opposing rights mentioned are vested with equal value by the Constitution, the balance of interests has to be conducted differently and might have a unique result in every case, taking into account the special circumstances of that case. Reference can be made to the above description of the *Lebach*-decision.

As a guideline, it can be asked if the public has a real interest in the information about the privacy or if there is a prevailing element of sheer entertainment, curiosity or sensation seeking. In the latter case, the protection of the individual's personality will always prevail.[118] An example for a prevailing public interest in information is the *Sittenrichter*-decision[119] of the FCJ. In this case, a man wrote about other persons, accusing them of behaviour that infringed morals and morality. However, he had been committing adultery for several years himself. A newspaper reported about this case. The court held that the coverage was lawful and stated that the man had to comply with the standards he applied to other persons. Hence, the interest of the public to information prevailed against the man's privacy right.

3 Confidential sphere

The confidential sphere protects communications and documentations. It protects the secrecy of for example telephone calls,[120] diaries[121] or medical certificates.[122] Its scope often overlaps

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[115] European Court of Human Rights Case of *von Hannover v Germany* (Application no. 59320/00) 24. Juni 2004 para 50ff.
[116] BGH *Notfalldienstarzt* [1991] NJW 1532, 1533.
[117] BGH *Der Aufmacher*, as above n 97, 1367; BverfG *Lebach*, as above n 42, 1228.
[118] BGH *Caroline von Monaco III*, as above n 27, 1130.
[119] BGH *Sittenrichter* [1964] NJW 1471, 1472.
[120] BGH *Kohl/Biedenkopf* [1979] NJW 647.
[121] BGHZ 15, 249, 257.

with the intimate and personal sphere. The protection of the confidential sphere is not absolute and it has to be balanced with other constitutional values. In this respect, the same principles as in relation to the personal sphere apply.[123]

B Privilege as to the own picture

In 1907 the AAC, that prohibits the publication of a person's picture without his consent, was enacted.[124] Nevertheless, in 1956 for the first time the FCJ passed a judgment on the privilege as to the own picture based on the AAC.[125] In this case, a motorbike producer created an advertisement with the image of the actor Paul Dahlke without his consent. The actor could successfully claim for the amount of money the company would have had to pay for a licence to use the picture. Since then, the importance of the privilege as to the own picture has been stressed by the courts in many decisions.[126]

The privilege as to the own picture confers the right on individuals to decide if pictures of them are made and published. A making or publication without consent is only lawful if other constitutional values prevail. This right is regulated in § 22 of the AAC and also a part of the general right to one's personality. § 22 of the AAC comprises the publication of images and, as statutory law, is *lex specialis* to the general right to one's personality. However, as § 22 of the AAC explicitly states, it applies only to the publication and not to the making of images. Hence, in assessing the legality of the making of images, one has to refer to the general right to one's personality. This distinction has practical consequences and is not only of theoretical value: the protection provided for by the AAC is broader than the protection of the general right to one's personality. Furthermore, § 22 of the AAC only applies to images on which a person is recognisable. If this is not the case, a person can still refer to the protection of the general right to one's personality.[127]

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[122] BGH *Kassenpapiere* [1957] NJW 1146, 1147.
[123] BGH *Kohl/Biedenkopf*, as above n 120, 647.
[124] Markesinis, as above n 32, 64, 65.
[125] BGH [1956] NJW 1554.
[126] For example BGH *Spielgefährtin* [1965] NJW 2148; BGH *Fußballkalender* [1979] NJW 2203; BGH *Nacktaufnahme*, as above n 98, 1617; BGH *Caroline von Monaco III*, as above n 27, 1128.
[127] Prinz, Peters, as above n 31, 67, 68.

1 *The making of images of persons*

An individual is protected by his general right of personality against the making of pictures.[128] The courts have developed several groups of cases in which the making of images is held to be lawful or unlawful.

It will generally be lawful to make an image for the purpose of giving evidence to assert one`s legal interests. This interest, balanced against the personality right of the person affected, will mostly prevail against the interest of the privilege as to the own picture[129] because an image taken for the purpose of evidence will generally be provided to a court and is not aimed to be made available to the public. Thus, the personality right of the person will not be affected as much as if the image was published. For example, the district court Hamburg held that it was lawful to make a picture of an employee who had told his employer that he was sick, in a shopping mall if that picture was aimed to serve as evidence in a labour law process.[130] However, the personality right of the portrayed person might still prevail. In its *Videoaufzeichnung*-decision,[131] the FCJ held that it was unlawful to permanently record a public way to a private property and the people who entered that property on video, because the neighbour wanted to prove that those portrayed were tossing rubbish on his grounds. It is further lawful to make an image of a person if that image would be permissible according to § 23 of the AAC or if the persons affected consents to the picture.

On the other hand, it is generally unlawful to secretly make photographs in another person's personal sphere if the person affected is not aware of the picture. In these cases, the general right to one's personality will generally prevail against other values protected by the German Constitution. In its *Vor unserer eigenen Tür*-decision,[132] the FCJ held that it was unlawful to photograph a person (who was not aware of the photographer) at his entrance door even though the picture was intended to illustrate a newspaperstory about the person affected. It is further irrelevant whether or not the photographer himself has entered into the personal sphere of the person affected or makes the picture from a distance.[133]

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[128] Prinz, Peters, as above n 31, 534.
[129] OLG Schleswig [1980] NJW 325.
[130] OLG Hamburg [1991] AfP 473.
[131] BGH *Videoaufzeichnung* [1995] ZUM 719, 721.
[132] BGH *Vor unserer eigenen Tür* [1966] NJW 2353, 2354.
[133] There are special laws concerning the making of images of demonstrations, court proceedings and military institutions. An exact description of these legal issues would go beyond the scope of this paper.

(a) The publication of portraits of persons

The AAC only regulates the privilege as to the own picture and does not provide for any rules as to the property right in the film and images. This means that the photographer might well be the lawful proprietor of a film with an image of a person. However, he might not be in the legal position to also use and publish that image. This latter question has to be assessed on the basis of the AAC.[134] In assessing whether the publication of a portrait is permissible, one has to ask whether the person affected is recognisable, whether his portrait has actually been published, whether he has given the consent to the publication and, if not, whether his portrait could have been published.[135]

The term "portrait" has a broad meaning. As the legal history of the AAC shows, the picture of a dead body falls within its scope. A portrait comprises all forms of representation of individuals such as photographs, photomontages, drawings, caricatures or illustrations on coins as long as the individual is recognisable. This question does not necessarily need to be answered solely regarding the facial features of the person portrayed. Other circumstances can be taken into account. In its *Fußballtorwart*-decision,[136] the FCJ held that a goalkeeper of a football team was identifiable on a picture because of his haircut, body and football jersey even though his face could not be seen. The court also found that it would be enough to identify a person if his name is mentioned in the subtitle to a picture. It is not necessary that the person on the picture has actually been recognised by another person. It suffices if he gives reasons to believe that he could potentially be recognised by another person.[137]

The protection of the privilege as to the own image only applies if the portrait has actually been published. According to § 22 of the AAC, publication either means dissemination or exhibition of the portrait. In order to disseminate the portrait, it will be necessary that the maker places the portrait at the disposal of third parties, for example, by printing it in a newspaper or publishing it on a Internet site. It will further suffice for a publication if the

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[134] Prinz, Peters, as above n 31, 544.
[135] According to § 23 or § 24 of the AAC.
[136] BGH *Fußballtorwart* [1979] NJW 2205.
[137] BGH *Fußballtorwart*, as above n 136, 2205.

maker shows the picture to a third party without disposing of the control over it, for example the portrait is broadcast or the maker shows it to friends.

(b) Freedom of publication

§ 23 of the AAC provides - subject to the balance of interests in § 23 II of the AAC - for exceptions to the general rule that a person's portrait can only be published with his consent.

§ 23 I number 1 of the AAC provides for freedom of publication if a portrait is of contemporary history. It applies if the public, due to special circumstances of contemporary history, has a justified interest in a pictorial representation of a person. Those circumstances can be all occurrences of contemporary history without limitation to for example political issues. The term "portrait of contemporary history" is defined as a picture that shows a "personality of contemporary history". In interpreting the term "contemporary history", the FCJ has worked out a differentiation between persons who are "relatively a personality of contemporary history" and persons that are "absolutely a personality of contemporary history".[138]

A person who is absolutely a personality of contemporary history is a person who, due to his or her office, achievements or performances, is in the focus of the public eye and has an outstanding importance for the public life. Because of this status, the public has a legitimate interest in participating in the persons life and thus in a pictorial portrait of that person. The outstanding position must result from the significance of the person him or herself; a special interest of the media in a particular person will not render that person absolutely a personality of contemporary history.[139] Examples from the courts' jurisprudence for persons who are absolutely a personality of contemporary history are sportsmen, for example soccer player Franz Beckenbauer[140] or tennis player Boris Becker,[141] musicians, for example Bob Dylan,[142] politicians, for example German Chancellor Willy Brandt[143] and other prominent persons, for example Princess Caroline of Monaco.[144] Such persons must generally put up with a

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[138] Prinz, Peters, as above n 31, 565.
[139] BGH *Wiederholungsveröffentlichung* [1996] NJW 985, 986; BGH *Caroline von Monaco III*, as above n 27, 1129.
[140] BGH *Fußballkalender*, as above n 126, 2203.
[141] OLG Frankfurt [1989] NJW 402.
[142] BGH *Bob Dylan* [1997] NJW 1152.
[143] BGH *Abschiedsmedaille* [1996] GRUR 195.
[144] BGH *Caroline von Monaco III*, as above n 27, 1129.

publication of their portrait, even if the portrait concerns aspects of their personal sphere.[145] They thus generally have to accept the publication of portraits that show them in a cafe, restaurant or at sports.[146]

On the other hand, "relatively a personality of contemporary history" means a person who is in the public eye not by virtue of his office or achievements but because of a connection to an occurrence of contemporary history that the public has a legitimate interest in. It is only permissible to publish portraits of a person who is a "relatively a personality of contemporary history" taken in the context of the occurrence of contemporary history.[147] If a person helps another person who has been injured in a car accident, the portrait published may only show the person in the actual act of help. It would not be permissible to publish a picture of the helping person that has been made in another context.[148] Examples of people who are relatively a personality of contemporary history are soccer players from the German *Bundesliga.*[149] (Suspected) criminal offenders can be relatively persons of contemporary history. It affects the core of the personality if a person is described as a (suspected) offender. This aspect has to be fairly balanced against the freedom of the press in every single case, since it is the press`s task to also inform about criminal proceedings.[150] Spouses of persons of contemporary history are relatively personalities of contemporary history themselves if they appear in public with the person of contemporary history.[151]

§ 23 II of the AAC, again, provides for a balance of interests. This provision emphasises that publications of portraits of persons of contemporary history have to be assessed against the constitutional background of the AAC. In constitutional terms, there is a presumption that the publication is lawful and freedom of press will prevail against the privilege as to the own picture if a person is of contemporary history. The publication can however still be unlawful and the personality rights of that person prevail against other constitutional values in special circumstances. Publications of portraits of the intimate sphere of a person are, irrespective whether that person is absolutely or relatively a personality of contemporary history, without exceptions unlawful.[152] Further, even someone who is absolutely a personality of

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[145] BGH *Bob Dylan*, as above n 136, 1152.
[146] BGH *Caroline von Monaco III*, as above n 27, 1129.
[147] BGH *Spielgefährtin*, as above n 118, 2149.
[148] Prinz, Peters, as above n 31, 572.
[149] BGH *Ligaspieler* [1968] NJW 1091.
[150] BverfG *Lebach*, as above n 42, 1227.
[151] OLG Hamburg [1991] AfP 437.
[152] BGH *Nacktaufnahme*, as above n 98, 1618.

contemporary history can rely on the protection of his personal sphere in special circumstances and does not, in this characteristic, lose the protection of the personal sphere. In *Caroline,*[153] it was held that people, whether absolutely a personality of contemporary history or not, have an inherent right to be themself and to belong to themself. This right can in special circumstances outweigh the freedom of the press.

Finally, a publisher cannot rely on the freedom of publication if the publication does not serve freedom of press and the public interest in information and instead serves only his own business interests. It is often difficult to distinguish between these interests - a newspaper, for example, is published because the publisher wants to inform the public as well as he wants to receive remuneration. The test applied is that a publisher cannot rely on the freedom to publish if the publication merely serves his economic or business interests.[154] Examples of mere economic interest are portraits used in a publicity brochure[155] or in a newspaper advertisement.[156] As an exception to this rule, the FCJ held that advertisements for newspapers, journals and books can be placed with a portrait of a person without his consent. The constitutionally protected freedom of press also provides for a protection of the publicity for these materials.[157] Further, it is unlawful to sell a portrait of another person if that picture is the actual object of the purchase.[158] A similar situation occurs if the portrait of a person is used on merchandising products. In its *Nena*-decision,[159] the FCJ held that it was unlawful to sell products with a portrait of pop star Nena without her consent.

To sum up, in German law publication of an image of another person without his or her consent for commercial purposes will never be covered by freedom of publication,[160] whether that person has a commercially saleable reputation or not. Freedom of publication refers to interests of the public in contemporary history. The commercial use of a photograph will not be able to satisfy such an interest.

As a further exception to the general rule that the publication of a person's portrait is only permissible with his consent, § 23 I number 2 of the AAC provides that a person's image can

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[153] BGH *Caroline von Monaco III*, as above n 27, 1129.
[154] BGH *Abschiedsmedaille* [1996] NJW 593, 595.
[155] AG Frankfurt [1996] NJW 531.
[156] BGH *Talkmaster* [1992] NJW 2084.
[157] BGH *Fußballkalender*, as above n 126, 2204.
[158] BGH *Ligaspieler*, as above n 149, 1091.
[159] BGH *Nena* [1987] GRUR 128.
[160] With the exception of advertisements for the press.

also be published if the focus on the picture is not on the person, but on the landscape or locality around. The test is whether the aim of the picture taken is to record the landscape or locality and whether the person just happens to be on the picture. The landscape or locality must have a formative influence on the picture.[161] § 23 I number 3 of the AAC provides that pictures of assemblies, gatherings and other meetings may be taken without the consent of the participants. The reason for this exception is that the public interest in information about these assemblies will generally prevail against the personality rights of the persons affected.

VII PRIVACY PROTECTION IN NEW ZEALAND

A Evolving form of action – The tort of invasion of privacy

1 Scope of protection

In *Hosking* the majority of the judges decided in favour of a tort of privacy. In this case Hosking and his wife applied for an injunction to prevent a magazine from publishing photos of their twin daughters being pushed in their stroller by Mrs Hosking as she walked down a public street. Gault and Blanchard JJ set out two fundamental requirements which have to be satisfied for a successful claim for interference with privacy:[162]

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

Additionally, as a defence the nature and extent of legitimate public interest in having the information disclosed is relevant.

Nevertheless, Gault and Blanchard JJ also stated that "[t]here is no simple test for what constitutes a private fact", but in many cases the test will be analogous to the 'private fact' test employed in the established action of breach of confidence.[163] Tipping J held, that there must be a reasonable expectation of privacy arising from the nature of the information or

[161] BGH *Familie Schölermann* [1961] NJW 558.
[162] *Hosking v Runting*, above n 16, 2 Gault an Blanchard JJ.
[163] *Hosking v Runting*, above n 16, 32 Gault and Blanchard JJ.

material itself or the circumstances in which the information where gathered, or both.[164] In defining the scope of protection more precisely the court referred to Gleeson CJ in *Lenah* who stated that there is no bright line between what is private and what is public:[165]

> 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 standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct which would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private."

A man in his underpants in his bedroom could serve as an example for what could be considered as private.[166] Lenah's activities[167], on the other hand, were not private in that sense and were concerned more with the protection of its commercial interests in business goodwill.[168] Therefore, it did not have a cause of action.

The court in *Lenah* also stated that in deciding whether an act is private or not, one has to bear in mind that privacy is "a legal principle drawn from the fundamental value of personal autonomy".[169] The foundation of much of what is protected is human dignity.[170] Therefore, private is something in the nature of the information itself that its disclosure would be considered offensive to others. Especially intimate and sensitive information fulfils this criterion.[171] With regard to covert filming the court in *Hosking* noted the hurt or harm that could be caused by wide publicity of intimate, private information and stated that "[t]he intrusiveness of the long-range lens [...] and the willingness to pay for and publish the

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[164] *Hosking v Runting,* above n 16, 60 Tipping J.
[165] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 para 42.
[166] *ABC v Lenah*, as above n 165 para 54; This example is however clearly given in a breach of confidence-context.
[167] Lenah was a company stunning, slaughtering and exporting possums to Asian countries. Unknown persons trespassed on the company's premises where they positioned video cameras that recorded the work in the factory. A video tape was processed to the ABC which intended to broadcast it. Lenah applied for an interlocutory injunction to prevent the broadcast which was granted by the Full Court of the Supreme Court of Tasmania in an appeal. The High Court allowed an appeal by the ABC and dismissed the decision of the Full Court. One issue in question was whether Lenah could rely on protection of privacy in order to obtain the injunction.
[168] *ABC v Lenah*, as above n 165 para 54; David Lindsay "Protection of privacy under the general law following ABC v Lenah Game Meats Pty Ltd: where to now?" (2002) 9 Privacy Law & Policy Reporter 101, 105.
[169] *ABC v Lenah*, as above n 165 para 54 para. 125.
[170] *ABC v Lenah*, as above n 165 para 54 para. 43.
[171] New Zealand Law Commission *Intimate Covert Filming* [2004] Study Paper 15, 22.

salacious are factors in modern society of which the law must take account."[172] In *Bathhurst* the court held that it would be possible to give relief to someone photographed in a shockingly condition or a women "standing innocently over the air vent in a fun house and someone had photographed her with her skirts blown up."[173]

In *Tucker* the court asserted that public facts can, over time, become private ones.[174] This is also suggested in principle (ii) of the Broadcasting Standards Authority (BSA) privacy principles.[175] Nevertheless the requirement for private facts makes it difficult to establish actions in a public area that might result in an intrusion of privacy. The BSA in several decisions[176] decided that conventional filming and photographing in public places does not usually invade private facts. Nevertheless, exceptions to this general rule are involuntary and intimate situations that occur in public places. They still can remain private. In this respect the court in *Bradley*[177] held that the mere fact that something took place in a public area does not automatically mean that it can be widely publicised especially if it was no matter of public concern.

With respect to public disclosure the BSA has required in several decisions that a person is identifiable not only by a limited number of people such as family and close friends.[178]

To adjust what is offensive to the societal norms which prevail at the time of the action the court stated that "the concern is with publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned [...] determined objectively, by reference to its extent and nature, to be offensive by causing real hurt or harm."[179] Tipping J disagreed with

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[172] *Hosking v Runting*, above n 16 , 30 Gault and Blanchard JJ.
[173] *Bathhurst City Council v Saban* (1985) 2 NSWLR 708. Also the English court in *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473 stated that "[i]f 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. This example was clearly given in a breach of confidence-context.
[174] *Tucker v News Media*, as above n 57, 716.
[175] Principle (ii) of the BSA privacy principles states: 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.
[176] See Burrows, as above n 87, 259.
[177] *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415, 424.
[178] See Burrows, as above n 87, 261.
[179] *Hosking v Runting*, above n 16, 34 Gault P and Blanchard J.

the rest of the majority and stated that a lesser substantial level of offensiveness would suffice as opposed to a high level.[180]

Furthermore a defence based on public interest was identified by the court as they held that a publication is justified when there is legitimate public concern in the matter.[181] This defence may exist if the plaintiff is a public figure or if information is in the field of public health, economy, or safety, the detection of crime, or national security generally is concerned.[182] Nonetheless, the court also considered that 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."[183] Such a defence will not apply to publications for merely prurient interest.[184] Distinguishing matters of legitimate concern from those of general interest and curiosity the court held:

> "The line is to be drawn when publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards would say that he had no concern."[185]

On the other hand, it has to be taken into account whether the person affected sought publicity or seclusion.[186] Privacy further will have to be balanced against other legal interests such as freedom of speech and other community norms, values and standards.[187] Those interests have to be acknowledged in every case and weighed against each other.

Finally, there is an interim injunction available but the threshold has been set very high as there has to be "compelling evidence of most highly offensive intended publicising of private information and [...] little legitimate public concern in the information."[188] Nevertheless, in most of the cases of intimate covert filming this threshold is likely to be crossed.[189]

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[180] *Hosking v Runting*, above n 16 , 62 Tipping J.
[181] *Hosking v Runting*, above n 16, 35 Gault P and Blanchard J.
[182] Burrows, as above n 87, 255.
[183] *Hosking v Runting*, above n 16, 33 Gault P and Blanchard J.
[184] *Hosking v Runting*, above n 16, 36 Gault P and Blanchard J.
[185] *Hosking v Runting*, above n 16, 36 Gault P and Blanchard J.
[186] Lindsay, as above n 168, 107; Burrows, as above n 87, 256.
[187] *Hosking v Runting*, above n 16, 36 Gault P and Blanchard J; *ABC v* Lenah, above n 165 para 41.
[188] *Hosking v Runting*, above n 16 , 40 Gault P and Blanchard J.
[189] Law Commission, as above n 171, 22.

2 *Comparison*[190]

As in Germany, reasons given by the New Zealand judges for the need to recognise a right to privacy are the protection of human dignity and personal autonomy. Only the German legal system protects those values as legal rights. It seems to be likely that actions that fall within the German intimate sphere would be covered by a New Zealand right of privacy. For example, the publication of a nude picture, a telephone sex conversation or other aspects concerning a person's sexuality would, applying Judge Gleeson's principles, be activities "which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved". Those situations are similar to the man in underpants in his bedroom described by Gleeson CJ.

Although at first glance, the issue of privacy protection in New Zealand seems to be solved, there are still remaining questions. This is also indicated as the decision was passed by a narrow three-to-two vote.[191]

Firstly, difficult problems arise in relation to the application of the BORA. The BORA does not protect against an invasion of privacy itself, whereas in section 14 it does include a specific protection for freedom and speech.[192] With the new tort of invasion of privacy, the courts could decide cases in favour of privacy which is not even recognised by the BORA.[193] Nevertheless, that privacy is not protected by the statutes as such, does not prevent the courts from developing a common law action for invasion of privacy. However the Courts are faced with interpreting the scope and application of the BORA and the Privacy Act 1993. In *Hosking* the court held that the rights and freedoms in the BORA must "inform"[194] the development of common law and that the development is "not precluded merely because they

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[190] In comparing the German and New Zealand position, it always has to be born in mind that, as described, much of the New Zealand privacy protection - if it exists or will exist at all - is still vague and will be shaped only in the following years. At this stage, the comparison will have to rely very much on assumptions and presumptions as to the decisions of the New Zealand judges in the described cases.

[191] Majority: Gault P, Blanchard J and Tipping J; Minority: Keith J and Anderson J.

[192] New Zealand Bill of Rights Act 1990, s 14. Section 14 includes the freedom to seek, receive, and impart information and opinions of any kind in any form.

[193] The Judges of the Court of Appeal were unanimous upon the deliberate omission of privacy within the BORA as well as within other statutes, though the interpretation of the reluctance differs. According to Tipping J, Parliament would have made the restriction clear if it wished a no-go area for the Courts. Keith J placed the opposite interpretation on the statutory background. From his point of view, Parliament deliberately excluded the news media from its scope in order not to combine the law with the recognition of a general tort preventing the public disclosure of private facts. This argument can be supported by the fact that the NZBORA places more emphasis on rights of freedom of expression in section 14. See *Hosking v Runting*, above n 16, 26, 50, 51, 55.

[194] *Hosking v Runting*, above n 16, 55.

might encroach upon those rights and freedoms. It becomes a matter of whether such common law encroachment meets the test of a reasonable limit on the applicable right or freedom which is demonstrably justified in a democratic society in s 5."[195]

Secondly, other questions arise when considering the two requirements as conditions for a successful claim of interference of privacy. The first requirement is a "reasonable expectation of privacy".[196] It needs to be clarified whether these expectations rely on the past level of media intrusion or are independent of such a consideration. In this respect differences might arise in the protection of what is referred to as the domestic part of the personal sphere in Germany. Whereas the court in *Hosking* clearly refers to the people themself, their activities in the private sphere or their character, German law seems to take a broader approach, for example when it provides for protection against coverage (in pictures or writing) about the interior of a flat without the consent of its possessor. Further, it is unlikely that "normal" acts in the domestic sphere[197] will fall within the scope of privacy in New Zealand. Further, it is likely that those acts will not satisfy the "highly offensive" test. On the other hand, if the courts maintain using the BSA principles and decisions as a useful guidance to develop the scope of the tort it might be that the approach of privacy protection gets closer to the German approach. Especially in respect of (intimate) covert filming, intrusive filming and recording and any form of prying practice is covered by principle (iii) of the BSA.[198] Therefore, in several BSA decisions filming with a hidden camera and/or without knowledge of the complainant was held to breach privacy principle (iii), as well as the mere filming of an unoccupied house without the owners permission.[199]

As one of the second requirements, the publicity of the facts should be "highly offensive". What is meant by this still remains ambiguous. Tipping J prefers "the qualifier to be a substantial level of offence rather than a high level of offence".[200] This leads to future uncertainty and provides the future courts with a new task of interpretation. Furthermore it is not clear from which perspective the offensiveness test should be conducted. In *P v D*[201] it was the view of a reasonable person apprised of all facts, in *L v G*[202] it was a reasonable

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[195] *Hosking v Runting*, above n 16, 31.
[196] *Hosking v Runting*, above n 16, 1.
[197] For example the eating and living habits of an individual.
[198] Burrows, as above n 87, 264.
[199] Burrows, as above n 87, 264, 265.
[200] *Hosking v Runting*, above n 16, 62 Tipping J.
[201] *P v D*, as above n 75, 601 Nicholson J.
[202] *L v G*, as above n 77, 248 Judge Abbott.

person putting him or herself in the shoes of the plaintiff and in *Hosking*[203] it was the viewpoint of a reasonable plaintiff.

Furthermore, contrary to Germany, as the court assumes the public disclosure of the private facts, situations where third persons gather offensive information to keep them for their own purposes rather than publishing them are not included in the tort.[204]

Furthermore, it is not clear whether the tort should provide redress for emotional distress only or whether damages to reputation should be included. In *L v G* the court held that any "loss of the personal shield of privacy" which affects one's individual dignity, integrity, freedom or independence constitutes an invasion of privacy irrespective of a relationship to issues of perception and identification by those members of the public to whom the information is disclosed.[205] The Court of Appeal in *Hosking* held that "the disclosure of the private facts must be a public disclosure, not a private one."[206] This requires "that the matter must be communicated to the public at large, or to so many persons that it must be regarded as substantially certain to become one of public knowledge. An action will not succeed if the alleged disclosure was to only one or two people."[207]

Further, it will be interesting to assess cases in which German law provides for privacy protection outside the domestic sphere when a person has retreated recognisably into local seclusion. In reading the judgment in *Hosking*, no indication can be found that these situations shall be excluded from privacy protection. It is argued that much of privacy protection is derived from human dignity and personal autonomy. These values will not cease once the domestic home is left. It might therefore well be that New Zealand law also acknowledges that seclusions that are worthy to protect can take place beyond the domestic sphere.

This leads to the comparison of the last part of the German personal sphere - private information taken from a "non-spatial" sphere. Some examples described above - for example. health, relationships or finances - are an exact match of the examples Gleeson CJ gives in his judgment.[208]

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[203] *Hosking v Runting,* above n 16, 35 Gault P.
[204] Andrew Geddis "Hosking v Runting: A privacy tort for New Zealand" (2005) 13 Tort L Rev 5, 8.
[205] *L v G*, as above n 77, 246 Judge T M Abbott.
[206] *Hosking v Runting*, above n 16, 21 Gault P and Blanchard J.
[207] *Hosking v Runting*, above n 16, 21 Gault P and Blanchard J.
[208] See also Caldwell, as above n 22, 93.

Even though German law prohibits all intrusion, coverage, discussion or other publication of intimate facts, it seems to be centred on the publication of private information. Following *Hosking* an New Zealand right of privacy will be likely to inhibit intrusions into privacy and the disclosure of private acts. The acknowledged methods by which these violations can be committed seem to be the same in both legal systems. Examples are photographs, publication in writing or physical intrusion into seclusion if publicised or private facts are concerned.

A difference arises in another respect. As described, the protection of the intimate sphere is absolute in Germany. However, it seems that a defence based on the public interest and a balance against other interests[209] might apply in all New Zealand privacy cases. In that respect, the indicated scope of New Zealand privacy protection seems to be more similar to the German personal sphere. The protection of the personal sphere always has to be balanced against other rights guaranteed by the German Constitution. This approach is more similar to the indicated defence on the public interest and balance against other legal interests in New Zealand.

Furthermore, New Zealand privacy law will protect individuals from unconsented publications of their portraits in a considerable number of cases in which the German privilege as to the own picture is applicable when the person portrayed is involved in a private act. It will be seen whether New Zealand privacy law will provide for the same broad protection as German law. There is a main difference between the German privilege as to the own picture and a New Zealand right of privacy. The decisive point in assessing the lawfulness of the publication of a picture in New Zealand seems to be whether the person in that picture is involved in a private act or not. Contrary, the German AAC - as a first step - acknowledges that every person has the right to decide whether a picture of his is to be published and that a publication is generally only lawful if he has consented. No element of privacy is necessary. Freedom of publication without consent exists only if one of the exceptions of § 23 of the AAC is applicable.[210]

To summarise, it was shown that a comparison of German and New Zealand privacy law is partially based on assumptions. Whereas the German legal system has developed privacy protection in a period of about 50 years, there are hardly any authorities that can be found in

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[209] For example freedom of speech.

[210] Whether the exceptions stated there and interpreted by the courts will, in similar ways, be established in New Zealand - for example based on a public interest defence or freedom to political expression - has to be seen.

New Zealand law. Consequently, the German system of privacy protection is much more complex than the New Zealand. Further, the balance of different interests has often been exercised by German courts. It will be more difficult to conduct this balance of interests in New Zealand because there are no binding constitutional values as in Germany that can serve as a guideline. Cooper J in *Andrews* stated that "as the tort develops, numerous issues will arise and need to be resolved in accordance with policy, and just outcomes for particular factual circumstances."[211] All this needs to be determined on the basis of facts determined by the courts as cases come to light.

B Torts directly or indirectly related to privacy protection

Breach of confidence has its origins in the UK and, over the years, has been developed there as a means to protect privacy.[212]

1 Breach of confidence

In New Zealand the courts have acknowledged the existence of a tort of privacy as it is "a more appropriate vehicle for redressing the publication of sensitive personal information" than breach of confidence[213] From their point of view the remedy of breach of confidence is not applicable when an action solely is based on the publication of personal and private information without any confident relationship between the parties. Breach of confidence "require[s] an element of trust or something equivalent [...] between the parties."[214] Referring to the case *Peck v UK*[215] Keith J was not prepared to recognise a confidential relationship or communication between the parties only because of the fact a private situation is photographed. Therefore it seems as if in New Zealand the law on breach of confidence is to be confined to cases where, for example in employment cases, one party to a relationship confides information to the other.[216] Nevertheless, as the scope of protection might be similar and the test what is private will be analogous to the 'private fact' test employed in the

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[211] *Andrews v Television New Zealand Ltd* HC AK CIV 2004-404-3536 [2005] para 21.
[212] See *A v B* [2003] QB 195, 202; *Attorney General v Guardian Newspaper (No 2)* [1990] 1 AC 109; *Hewell v Chief Constable of Derbyshire* [1995] 1 WLR 804; *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444, 453; see also Daniel Stewart "Protecting Privacy, Property, and Possums: Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd" (2002) Vol 30 No 1 Fed Law Rev 177, 195; Richardson, as above n 21, 382.
[213] Burrows, as above n 87, 215.
[214] *Hosking v Runting*, as above n 16, 49 Keith J.
[215] *Peck v United Kingdom* (2003) 36 Eur Court HR 41, 719.
[216] Burrows, as above n 87, 216; Law Commission, as above n 171, 45.

established action of breach of confidence,[217] the requirements of the tort are mentioned briefly.

The elements of a breach of confidence are that there (1) must be information that has a necessary quality of confidence, (2) the information must have been imparted in circumstances importing an obligation of confidence and (3) there must be an unauthorised use of that information to the detriment of the party communicating it.[218]

Confidential information is such that is not public property and public knowledge[219] whereas it does not need to be absolute secret.[220]

The information must further have been imparted in circumstances giving rise to an obligation of confidence between the parties. Traditionally, this condition was met if there was a confidential relationship or communication between the parties.[221] Such relationships can be personal, for example a relationship of marriage.[222] If third parties know about the confidential nature of the information, they will also be under an obligation of confidentiality.[223] The subsequent development, especially in the UK, shows that such obligations were further imposed constructively by the courts in equity - even where no confidential relationship between the parties existed - in two situations: first, an obligation was construed if information was obtained by improper means and, secondly, if the information had a private character. In *Attorney General v Guardian Newspaper,*[224] it was held that a duty of confidence can arise when confidential information comes to the knowledge of a person (that can also be a third party) in circumstances where he or she has notice that the information is confidential with the effect that it would be just to preclude him from disclosing the information to others. In that respect, it will also suffice if the defendant can infer from the circumstances through which the personal information was obtained that the information is confidential, for example if the information was improperly or

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[217] *Hosking v Runting,* above n 16, 32 Gault P and Blanchard J.
[218] *Attorney-General,* as above n 212, 109; *Coco v A N Clark (Engineers) Ltd* (1969) RPC 41.
[219] For example in the public domain; see *Saltman Engineering Co Ltd v Campbell* (1948) 65 RPC 203, 215.
[220] *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, 28; Stewart, as above n 212, 194.
[221] *Saltman Engineering,* as above n 219, *213.*
[222] *Argyll (Dutchess) v Argyll (Duke)* [1967] 1 Ch 302.
[223] *Malone v Commissioner of Police for the Metropolis (No 2)* [1979] 1 Ch 344, 361; Stewart, as above n 212, 195.
[224] *Hewell,* as above n 212, 809.

surreptitiously obtained.[225] In *Hewell,*[226] it was held that it amounts to a breach of confidence to take images of another engaged in a private act with a telephoto lens. In *A v B,*[227] it was held that a duty of confidence may arise whenever the defendant "either knows or ought to know that the other person can reasonably expect his privacy to be protected".[228] In such cases, the law of the UK protects what could be called a right to privacy.[229]

Finally, the use or disclosure of the personal information must be unauthorised.[230] Importantly, every third party that receives information as a result of another's breach of confidence may be liable for using or disclosing it, or restrained from doing so, once the third party has actual or constructive notice of the breach.[231]

B Recognised forms of action

1 Defamation law

(a) Scope of protection

The law of defamation seeks to protect individual reputation against unjustifiable attack and often involves a balance between competing demands as for example freedom of speech.[232]

The cause of action in defamation law is a defamatory statement, or, more precisely, a defamatory imputation. A defamatory imputation (by words, photographs, video, illustrations or other means) is one which is likely to injure the reputation of the plaintiff by exposing him to hatred, contempt or ridicule, [233] or which would tend to make the plaintiff shunned or avoided[234] or which has the tendency to lower him in the estimation of others.[235] Furthermore,

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[225] *Lord Ashburton v Pape* [1913] 2 Ch 469, 475; *Franklin v Giddins* [1978] QdR 72; *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 ; *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444, 453; see also Stewart, as above n 212, 195.
[226] *Hewell,* as above n 212, 804.
[227] *A vB,* as above n 212, 202.
[228] *A vB,* as above n 212, 202; *Hewell,* as above n 212, 804.
[229] *A vB,* as above n 212, 202; *Hewell,* as above n 212, 804; see also Richardson, as above n 21, 383.
[230] *R v Department of Health; Ex parte Source Informatics Ltd* [2001] QB 424: It is not clear whether detriment of the plaintiff is a necessary element of the action, see Caldwell, as above n 22, 112.
[231] *Johns v Australian Securities Commission* (1993) 178 CLR 408, 460, 474.
[232] Burrows, as above n 87 , 10.
[233] *Parmiter v Coupland* (1840) 6 M & W 105, 108.
[234] *Morgan v Lingen* (1863) 8 LT 800.
[235] *Sim v Stretch* [1936] 2 All ER 1237, 1240; The meaning of defamation has to be assessed from the view of an ordinary reasonable person, not being unusually suspicious or unusually naive. It can stem from the express

a defamation can only occur if the disparaging statement is made to someone other than the person defamed. This requirement is known as publication.[236]

A number of cases decided under defamation law have tackled the question of privacy protection. Looking at these decisions someone has to bear in mind, that

> "the gist of the [tort of invasion of privacy], unlike defamation, is not injury to character or reputation, but to one´s feelings and peace of mind. The gravamen of the action is unwarranted publication of intimate details of the plaintiff's private life which are outside the realm of legitimate public concern, or curiosity."[237]

In the English case *Garbett*,[238] a photograph of the plaintiff was placed in a magazine next to the photograph of a nude woman. The court held that this arrangement raised an innuendo which lowered the plaintiff's reputation and was therefore defamatory. Also in the New Zealand case *Taylor*[239] the defendant was sued for defamation for publishing a photograph of the plaintiff with one of her grand-daughters in a book that might be called largely a manual of sex instruction. Similarly in other cases publishers have been sued, or threatened with suit for the unthinking choice or placement of a photograph next to an article on an unsavoury topic.[240] Nevertheless, in New Zealand as a general rule, the mere publication of pictures of people in amusing situations or attitudes[241] is not defamatory.[242] Also in *King*[243] the court held, that the mere covert nature of filming and the so-called entrapment of the plaintiff were neither sufficient to support a duty of care in negligence nor defamatory.[244]

Nevertehless, examples that are most significant in the privacy context like the Australian case *Ettingshausen*[245] are rare. In this case pictures of the famous rugby player Ettingshausen naked under the shower were published. The court found that the mere publication of the

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statement itself or can "hide" behind an apparently innocent statement. Such a hidden, secondary meaning is generally known as an innuendo. Also a defamatory statement does not necessarily need to be false, see John G Fleming *The Law of Torts 1998* (9ed The Law Book Company Limited, Sydney) 589; Burrows, as above n 87, 37; *Lewis and another v Daily Telegraph Ltd; Same v Associated Newspapers* [1963] 2 All ER 151, 154.

[236] John G Fleming *The Law of Torts 1998* (9ed The Law Book Company Limited Sydney) 593.

[237] *L v G*, as above n 77, 241 T M Abbott J.

[238] *Garbett v Hazell, Watson and Viney* [1943] All ER 359.

[239] *Taylor v Beere* [1982] 1 NZLR 81.

[240] Burrows, as above n 87, 30.

[241] For example on the beach, at a sports event or in the street.

[242] Burrows, as above n 87, 19.

[243] *King v TV3 Network Services Ltd* [2003] CA 221/02 at 11-14.

[244] However, the court held that it could have relevance to qualified privilege in the defamation area, *King*, as above n 230, 13.

[245] *Ettingshausen v Australian Consolidated Press Ltd* [1991] 23 NSWLR 443.

photograph was capable of subjecting the entirely blameless plaintiff to more than a trivial degree of ridicule and was therefore capable - without any moral blame - of defaming the plaintiff on this ground alone.[246]

At common law there are several defences where the plaintiff will not succeed in a defamation action because the right to his reputation is less important than the right of other persons to speak their mind or to convey information.

Firstly, there is a defence of truth.[247] Nevertheless, as a camera footage is not used in a misleading way defamation is not going to occur at the stage of taking pictures as things caught on a film are usually true. Nevertheless, true statements that are not defamatory are actionable under the tort of privacy if they relate to private matters that make it offensive to publish them.[248]

Furthermore a qualified privilege exists when "an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it."[249] This requirement is actually designed for the protection of privacy and not reputation and a reason why the law of defamation can operate as privacy law in certain circumstances but not in the case of covert filming.[250]

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[246] *Ettingshausen*, as above n 245, 449; The court stated that "there is a shape between the plaintiff's legs which [...] is certainly capable of being interpreted as his penis". Therefore, a defamatory meaning of this publication could be established on two grounds. One was the imputation that the photograph suggested that Ettingshausen was a person who gave his consent to the taking and publication of a photograph of him naked under the shower. Considering especially his position as a coach for young rugby players, he could be morally blamed for consenting to such a photograph. Hunt J, after considering whether the photograph conveyed such an imputation, left the question open and decided that the issue was one for the jury. However, he found for Ettingshausen on another ground, see *Ettingshausen*, as above n 245, 444.

[247] This defence was known as justification and was renamed under section 8 (1) of the Defamation Act as truth. It is applicable where the proceedings are based on all or any of the matter contained in a publication and the defendant proves that the publication taken as a whole was in substance true or was in substance not materially different from the truth. Additionally the defence of truth will succeed if the imputations published were true or not materially different from the truth, see see section 8 (3) (a) and (b) Defamation Act 1992; Burrows John "Review: Media Law" 2002 NZLR 217, 230; A defamatory statement can further be lawful if it falls within on category of what the law recognises as absolutely privileged statements or if it is a matter of public interest where everybody has the right to express his honest opinion.

[248] Burrows, as above n 247, 230.

[249] *Adam v Ward* [1917] AC 309, 334 Lord Atkinson.

[250] Fleming, as above n 222, 610-614; To be privileged, the disclosure of the information must be seen as more vital than the interest of third parties in their reputation, see Burrows, as above n 87, 89; however, the person making the statement must do so in good faith and without any improper motive. Examples of where qualified privilege will arise are reports of court proceedings, statements made at meetings of public bodies, and statements made in the investigation of crimes, see Burrows, as above n 87, 89; *Lange*, as above n 88, 385; *Lange v Australian Broadcasting Corporation* (1997) 71 ALJR 818.

A defamatory statement can further be lawful if it falls within on category of what the law recognises as absolutely privileged[251] statements or if it is a matter of public interest where everybody has the right to express his honest opinion.[252]

(b) Comparison

This description shows that the New Zealand law of defamation might well provide an effective remedy in cases that fall within the German concept of privacy. Especially when a person's sexuality and thus his intimate sphere is concerned in Germany, it is likely that a publication lowers a person in the estimation of others and thus is defamatory in New Zealand. For example, the inferences in *Garbett* and *Taylor* can be compared to the German case described above in which the court held that a picture of a dressed woman printed next to an article about the awaking sexuality in spring infringed the intimate sphere of that woman. Further, speculations as to which of six men is the father of child may be defamatory in New Zealand.

In reaching this result, the two legal jurisdictions take a different approach. German privacy law requires that an act must be private, for example fall within the intimate, personal or confidential sphere. Defamation law requires that a statement must be defamatory, for example lower a person in the estimation of others. On the other hand, both remedies provide for a similar justification. An intrusion into privacy[253] can be justified on prevailing grounds of – *inter alia* - freedom of speech or the right of the public to be informed, a defamatory statement can be justified if it is, for example, true. New Zealand defamation law therefore provides for the protection of the individual's privacy if the matter complained is defamatory. On the other hand, the German right to privacy can also be infringed if the information disclosed or published is not defamatory. The publication of a serious love letter, for example, will most likely not lower a person in the estimation of others and hence not be defamatory but might well- as a very personal issue - infringe the author's privacy.

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[251] Absolute privilege applies to judges, lawyers and witnesses in legal proceedings, to MPs for things they say in Parliament, and to statements made by various officials dealing with affairs of state. There can be no liability in defamation for these statements, even if the person making the statement was motivated by malice, see Burrows, as above n 87, 83.

[252] Burrows, as above n 87, 128.

[253] Other than into the intimate sphere.

There are other significant differences between German privacy law and New Zealand defamation law. The aim of defamation law is to protect the individual's reputation in the outer world. This is also an aim of the law of privacy. But privacy is further concerned with the protection of certain spheres (in the inner world) of the individual in which he is to be let alone. It has been said that the law of defamation "protects the individual's good name and reputation in the world, not his or her privacy from the world".[254] Analogously, the law of defamation requires a defamatory statement to be published to the public. Privacy can be infringed if somebody reads the diary, takes a picture of another person or observes him in his flat. In these cases, the person affected will no longer "be let alone".

2 *Trespass to land*

(a) Scope of protection

Trespass can also be a means to protect privacy. Entering or remaining on, or directly causing any physical matter to come into contact with, land in the possession of another (whether of the landlord or a mere tenant) without consent is trespass.[255] Consent can result from an express permission that is not withdrawn or an implied permission.[256] In *TV3 v BSA* the court held that "[p]urposes for which it is known or understood that the occupier would not give consent will be outside the ambit of implication."[257] As the Court of Appeal in *TV3 v Fahey* neglected an implied license of a former patient to enter a doctors surgery for the purpose of covert filming[258] it can be supposed that covert filming under an implied license is nearly impossible.

The land protected extends beyond the surface both above and below. Therefore, an individual's privacy can be protected against physical intrusions by other persons into the land in his possession.[259] Further, a journalist or another person - with the intention to for example take pictures - can be liable in trespass for entering private premises. However, the mere photographing or filming of protected land without entering the land[260] is no physical

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[254] Caldwell, as above n 22, 92.
[255] Stepen Todd *The Law of Torts in New Zealand* (2ed Wellington, Brookers 1997) 460, 461; Burrows, as above n 87, 549, 550.
[256] Todd ,as above n 254, 460, 461; Burrows, as above n 87, 549, 550.
[257] *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720, 732.
[258] *TV3 Network Services Ltd v Fahey*, 135.
[259] Rosalie P Balkin and Davis J L R *Law of Torts* Butterworths Sydney 1991, 118.
[260] For example from adjoining premises, through a fence, from an aeroplane, or from the footpath.

intrusion and thus no trespass.[261] However, under section 30 of the *Summary Offences Act 1981* peeping or peering into a dwelling house or loitering on any land on which a dwelling house is situated, is an offence that can be committed without entering the private premises. In *Lomax* it was held that this section is wide enough to catch not only the deliberate observer but also a seeker after information such as a private detective.[262] As to the fact it is not possible to take a picture while only having a casual glance section 30 is applicable to covert filming. Nevertheless, it is only a criminal offence if the actions are committed at night.[263] Additionally, it is not necessary to be actually present and looking during a covert filming act. Therefore it is possible to set up a camera during the day and depart.[264]

In the context of privacy protection, however, it often is of interest whether the plaintiff can prevent the publication of the pictures taken in the course of a trespass. For this purpose, the remedy of an injunction shall be described in more detail here.

As there is not much authority in New Zealand the law is not well-defined. Therefore the Australian and English law could be a useful starting point to define the law in New Zealand.

In the English case *Service v Channel Four*[265] inappropriate acts of the funeral directors' employees were filmed by a hidden camera. The court held that the mere fact that a picture was obtained by trespass does not itself ground a claim for an injunction. Furthermore the court assumed that the rule preventing the grant of an interlocutory injunction where the claim was in defamation could not be extended to claims based on other causes of action.[266]

In *Lincoln*[267] the defendant went to the plaintiff's premises to collect a cheque owed to her. She was accompanied by a reporter and a TV crew which filmed the premises and rooms of the plaintiff. It was found that she was liable in trespass. A justification in the public interest did not apply. The implied permission to enter the premises was only to those doing business with the firm.[268] The plaintiff further sought an injunction against the publication of the film.

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[261] *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (193) 58 CLR 479; *Moorgate Tobacco Co Ltd v Phillip Morris Ltd (No 2)* (1984) 156 CLR 414; *Bathhurst*, as above n 173, 704, Burrows, as above n 87, 548.
[262] *Police v Lomax* (1967) 12 MCD 151.
[263] The actions must becommitted at night. between one hour after sunset and one hour before sunrise; Burrows, as above n 87, 554.
[264] Law Commission as above n 171, 22.
[265] *Service Corporation International plc. v Channel Four Television Corporation* [1999] EMLR 83, 90.
[266] *Service v Channel Four*, as above n 265, 84.
[267] *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457.
[268] Lincoln, as above n 267, 460.

Young J held that an injunction will be granted if three conditions are met. First, the circumstances must be such to make the publication unconscionable. If the defendant has engaged in criminal wrongdoing, this is an indication for unconscionability.[269] Secondly, it has to be asked whether the plaintiff would suffer irreparable damages (that can not be compensated) through the publication and, thirdly, whether the balance of convenience favours the grant of an injunction. Irreparable damages are such that are impossible of quantification.[270] Because these damages could not be shown in the case of the plaintiff, an injunction was not granted. The same unconscionability test was employed in the *Emcorp*-case.[271]

In the New Zealand case *TV3 v Fahey*[272] Richardson P suggested that

> the court, when considering the grant of an injunction, is required to weigh and balance the competing rights and values at stake. In that assessment the context and circumstances in which the impugned methods were employed, any special public interest considerations for broadcasting the programme, and the adequacy of damages as an available remedy for any wrong proved at trial, are amongst the considerations which must ordinarily be weighed.[273]

These decisions show that the factor determining whether an injunction would be granted was the degree of economic harm and whether damages would be an adequate form of compensation, rather than the infringement of the plaintiff's privacy. Privacy will be protected only as a by-product. Further, only the actual trespasser can be restrained from publishing material, but not a third party in the possession of such material. In *Lenah*,[274] the majority of the court, with Kirby J dissenting, held that an application for an injunction must identify the legal rights sought to be protected and must be in support of a recognised legal cause of action against the defendant. The ABC itself had not committed trespass. The unconscionability of the broadcast was, in itself, not a sufficient basis for relief.[275]

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[269] *Rinsale Pty Ltd v Australian Broadcasting Commission* (1993) Aust Torts Reports 81.
[270] *Rinsale*, as above n 269, 464.
[271] *Emcorp v ABC* [1988] 2 Qd.R. 169.
[272] *TV3 Network Services Ltd v v Fahey* [1999] 2 NZLR 129.
[273] *TV3 v Fahey*, as above n 272, 9.
[274] *ABC v Lenah*, as above n 165, 63.
[275] See also Francis Trindade"Possums, Privacy and the implied freedom of communication" (2002) 10 Torts Law Journal 119; Stewart, as above n 212, 181; Lindsay, as above n 168, 102.

(b) Comparison

In the first instance, the domestic home is protected similarly against physical intrusions by trespass in Germany and New Zealand. The scope of privacy protected by trespass is in some respects similar to German privacy law. The New Zealand tort of trespass protects the classical sphere of German privacy law, the domestic home. On the other hand, except for situations where section 30 of the Summary Offences Act 1981 is applicable, trespass is strictly linked to the possession of land. Contrary, the protection of German privacy extends beyond the domestic home.

The means by which a trespass can be committed also differ from the protection of German privacy law. Trespass only protects against physical intrusions, mere observations from the outside are not prohibited. On the other hand, German privacy law protects against all intrusions as well as observations from the outside and publication of material obtained as a result of observations from the outside. Furthermore, trespass protects on the point of newsgathering where there is a physical intrusion rather than at the stage of broadcasting. In relation to the publication of material, trespass can provide for privacy protection only if the described conditions of an injunction as set out in *Lincoln* are met.

3 Privacy Act 1993

(a) Scope of protection

The personal honour is broadly protected by defamation law in New Zealand.[276] In relation to informational privacy, reference has to be made to the Privacy Act 1993. Section 6 of the Act sets out 12 Information Privacy Principles that operate as guidelines and impose obligations as to the collection, storage, use and disclosure of personal information. This is any information about a person which identifies that person.

Section 2 (1) makes clear that all kind of photographs are documents under the Act. Furthermore, as the Law Commission pointed out in its report on covert filming[277] the use of

[276] Reference can be made to the principles described above.
[277] Law Commission, as above n 171, 18.

hidden cameras is at odds with Principle 3[278] and 4[279]. Nevertheless, a complaint of privacy breach also requires a "significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual"[280] or must have caused or possibly cause "loss, detriment, damage, or injury to that individual".[281]

Finally, the Act applies to public and private bodies. Therefore, state authorities and organisations as well as private institutions, employers and commercial firms are subject to the act. However, no such obligations will be imposed on most media organisations in relation to gathering, preparing, and broadcasting or publishing news for public broadcast.[282] The existence of this important exemption led to the inapplicability of the Act in a decision of the Privacy Commissioner were a television technician had been covertly filmed during his work for a TV consumer programme which was considered as coming within the category of news or current affairs.[283]

(b) Comparison

The Privacy Act protects a very broad area of privacy that is also protected under German privacy law. Nevertheless, it does not protect the personal honour but only personal information and has a lot of weak points, such as the fact that there is no interim injunction available. As most parts of the New Zealand media fall under the abovementioned exemption the Act has "no impact on the media at all and is therefore of little concern".[284] Additionally section 56 provides an exemption for all individuals collecting or retaining personal information for their own use or gratification.[285] Therefore, under the Act, it is possible for the media to covertly film other persons. Contrary, to German privacy law not even the intimate sphere is protected as an absolute one. Indeed, in a 2001 case the Privacy Commissioner held that a commissioned technician having access to the locations which is covertly filming a

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[278] Principle 3: Collection of information from subject: (1) Where an agency collects personal information directly from the individual concerned, the agency shall take such steps (if any) as are, in the circumstances, reasonable to ensure that the individual concerned is aware of [...](2) The steps referred to in subclause (1) of this principle shall be taken before the information is collected or, if that is not practicable, as soon as practicable after the information is collected.[...].

[279] Principle 4: Manner of collection of personal information: Personal information shall not be collected by an agency (a) By unlawful means; or (b) By means that, in the circumstances of the case, (i) Are unfair; or (ii) Intrude to an unreasonable extent upon the personal affairs of the individual concerned.

[280] Section 66 (1) (b) (iii) of the Privacy Act 1993.

[281] Section 66 (1) (b) (i) of the Privacy Act 1993.

[282] Section 2 (1) (b) (xiii) of the Privacy Act 1993.

[283] Casenote 38197 [2003] NZPrivCmr 24.

[284] Burrows, as above n 87, 277.

[285] Law Commission, as above n 164, 20. Nevertheless, it may stop the people from disclosing private information to the media, so it does have an indirect impact on the media.

theatre group in their dressing room breaches Principles 1 and 3.[286] However, the technician did not claim any of the exemptions to section 3, for example the aforementioned section 56.

4 *Films, Videos, and Publications Classification Act 1993*

(a) Scope of protection

Under this Act it is an offence to publish any matter that is objectionable.[287] As defined in section 2 not only any film, book, sound recording, picture, newspaper, photograph, photographic negative, photographic plate, or photographic slide, but also –after the amendment of the Act in 2005 which was intended to confirm the common law in *Goodin*[288]- any disc and electronic or computer file are publications under the Act.

The meaning of 'objectionable' is defined in section 3 of the Act and protects privacy interests in a very broad manner. With regard to (intimate) covert filming there were several decisions under the Act were a publication was considered as objectionable in terms of section 3 (1) and (2) (a) because "it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good" or promotes or supports "the exploitation of children, or young persons, or both, for sexual purposes". These cases include examples in which women were filmed up-skirt with a camera fixed in a shoe, filmed with cameras in bathrooms or a dressing area, and also children filmed with cameras in bedroom walls or hand-held cameras from behind a one-way window in a changing room.[289] In *Living Word* the Court of Appeal determined the scope of section 3 (1) and held that

> "[t]he words used in s3 limit the qualifying publications to those that can fairly be described as dealing with matters of the kinds listed. In that regard, too, the collocation of words "sex, horror, crime, cruelty or violence", as the matters dealt with, tends to point to activity rather than to the expression of opinion or attitude."[290]

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[286] Case Note 18302 [2001] NZPrivCmr 8.

[287] For example, section 123 of the Films, Videos, and Publications Classification Act makes it an offence to make, supply, distribute, display, advertise, or exhibit for supply or in expectation of payment, or deliver to any other person so that they can breach the act, an objectionable publication.

[288] *Goodin v The Department of Internal Affairs* [2003] NZAR 434. The court held that data stored in a computer file or folder or on a computer disk which, by the use of a computer or other machine can be displayed in the form of an image, came within the ambit of the term picture in the definition.

[289] The details of these cases are displayed in the Law Commission Paper, as above n 171, 2, 15.

[290] *Living Word Distributors Ltd v Human Rights Action Group (Wellington)* (2000) CA58/00, para 28.

After *Living Word* the scope of privacy protection was highly confined and materials that are not generally of sexual activity were removed from the powers of the Chief Censor.[291] As a result the Chief Censor concluded in a 2003 case that the mere covertly filming of boys in a changing room of a swimming pool changing in and out of their clothing is not related with matters of sex and therefore is not 'objectionable'.[292]

(b) Comparison

As a result of the *Living Word* decision significant elements of privacy that are protected within the German intimate sphere as absolute privacy rights are no longer protected under this Act. For example, the act is not applicable to computer image files and photographs of naked children or pictures that are the result of covert filming in general as long as they do not involve sexual behaviour.[293] Also some material excluded by the *Living Word* decision is now covered because of an amendment to section 3 of the Act in 2005[294] the main scope of privacy protection is still limited to what is generally regarded as child pornography and pornography in general.[295]

5 *Crimes (Intimate Covert Filming) Amendment Bill*

(a) Scope of protection

In a study paper the Law Commission proposed an amendment of the Crimes Act 1961 to criminalise intimate covert filming.[296] Also an amendment of the Privacy Act 1993 was proposed to make civil remedies available in relation to covert filming.[297] Justice Minister Phil Goff in May 2005 stated that an amendment of the Privacy Act will be considered by Cabinet later 2005 but has not happened yet.[298] On the other side, the Crimes Amendment Bill[299] was unanimously referred to the Government Administration select committee[300] and

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[291] Law Commission, as above n 171, 17; Burrows, as above n 87, 473.
[292] Law Commission, as above n 171, 2, 16.
[293] Law Commission, as above n 171, 17; Burrows, as above n 87, 473.
[294] See section 4 Films, Videos, and Publications Classification Amendment Act 2005.
[295] Law Commission, as above n 171, 17; Burrows, as above n 87, 466.
[296] Law Commission, as above n 171, 25.
[297] Law Commission, as above n 171, 26.
[298] Private Word Issue 54 May 2005, 3.
[299] Crimes (Intimate Covert Filming) Amendment Bill (12 April 2005 No 257-2).
[300] Private Word Issue 54 May 2005, 3.

reported with some recommendations that are "minor and technical in nature".[301] The Bill defines intimate covert filming as "the making of a surreptitious visual record of another person without that person's knowledge or consent and in circumstances that the person would reasonably expect to be private."[302] As intimate visual recordings are defined in section 216 G[303] sections 216 H to J prohibit it to make, possess in certain circumstances, publish, import, export, or sell such recordings. Section 216 JA states that persons which are "exercising or performing any powers, duties, or functions under any enactment" are excluded from an application of the Act. This new law outlaws privacy invasions by covert filming of people in intimate situations and delivers a very clear definition of the covered situations.

(b) Comparision

The main parts that are protected within the German intimate sphere as absolute privacy rights would be covered under this new law. Nevertheless, other parts covered by the German intimate sphere, such as being filmed nude or partly nude if it was done where privacy could not be expected as for example on a beach, are not included.[304] Furthermore, the mere covert observation which also could fall within the German intimate sphere is not covered.

As the filming of people in public or in non-intimate circumstances is also not outlawed under the new law[305] not everything that falls within the German personal sphere is not covered. Finally, unlike in Germany the publication of images falling under the German intimate sphere can not be hindered if the picture was made with consent.[306]

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[301] Crimes (Intimate Covert Filming) Amendment Bill (2 August 2005 No 257-2), 1.
[302] Crimes (Intimate Covert Filming) Amendment Bill (2 August 2005 No 257-2), 1.
[303] Section 216 G Intimate visual recording defined: (1) In sections 216H to 216M, intimate visual recording means a visual recording (for example, a photograph, videotape, or digital image) that is made in any medium using any device without the knowledge or consent of the person who is the subject of the recording, and the recording is of (a) a person who is in a place which, in the circumstances, would reasonably be expected to provide privacy, and that person is (i) naked or has his or her genitals, pubic area, buttocks, or female breasts exposed, partially exposed, or clad solely in undergarments; or (ii) engaged in an intimate sexual activity or (iii) engaged in showering, toileting, or other personal bodily activity that involves dressing or undressing or b a person's naked or undergarment-clad genitals, pubic area, buttocks, or female breasts which is made---(i) from beneath or under a person´s clothing; or (ii) through a person's outer clothing in circumstances where it is unreasonable to do so. (2) In section 216H, intimate visual recording includes an intimate visual recording that is made and transmitted in real time without retention or storage in---(a) a physical form; or (b) an electronic form from which the recording is capable of being reproduced with or without the aid of any device or thing.
[304] Law Commission, as above n 171, 39.
[305] Law Commission, as above n 171, 39.
[306] Law Commission, as above n 171, 39.

6 *Broadcasting Act of 1989b*

The BSA was set up under part three of the *Broadcasting Act of 1989* and has the jurisdiction to deal with privacy complaints. Under section 21 (1) (d) the BSA issued an advisory opinion with seven privacy principles.[307] These principles mirror many aspects of the tort of privacy and in addition cover beside the personal information also public information that has become private over time and intrusion.[308] This wider approach of the privacy principles was accepted in *TV3 v BSA*[309] because the Broadcasting Act had been passed before the tort of privacy evolved and the power to establish standards should not be limited by the new tort.[310] As parts of the principles and BSA decisions are used by the courts to guide the scope of the new tort the applicable decisions are not listed in this separate paragraph because they were mentioned at the respective paragraphs of the paper. This also resulted from the following reasons.

Under part two of the Act, people may complain to the BSA if they consider that a radio or television programme has invaded their privacy or the privacy of another person. Nevertheless, also if the BSA upholds the complaint they have a number of not very strong enforcement powers, such as the power to order the broadcaster to publish a statement such as correction or apology or to order the broadcaster to pay reasonable costs and expenses of up to $ 5000 and also damages up to $ 5000 to the person whose privacy has been breached. In serious cases the BSA has the power to order a broadcaster off air, or not to play any advertising for up to 24 hours. Since 1998 damages were awarded only in two decisions.[311] Additionally, under section 11 (b) the BSA has the power not to determine a complaint. In privacy cases this was exercised in very serious cases where the matters were highly sensitive and personal and the harm to the complainant would have been compounded by the issue of the BSA decision.[312]

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[307] See Appendix.
[308] Burrows, as above n 87, 257.
[309] *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720.
[310] Burrows, as above n 87, 257.
[311] Burrows, as above n 87, 271.
[312] Burrows, as above n 87, 272.

7 *Misappropriation of image*

New Zealand law provides protection against unauthorised use of someone's image without consent in a commercial way within the Fair Trading Act 1986[313], the Advertising standards authority and the tort of passing off. Nevertheless, unlike the German privilege as to the own picture there is no protection against the making of photographs. As the German law on the privilege as to the own picture primarily protects a legal interest of an individual derived from his personality to decide whether a picture of him or her is made and published the aforementioned New Zealand law protects the opportunity for exploiting one's established economic reputation commercially.

In a non-commercial context the court in *Hosking* stated that there is no "cause of action in our law directed to unauthorised representation of one's image."[314] Therefore, New Zealand privacy law will protect the individual from unconsented publications of his portraits in a considerable number of cases in which the German privilege as to the own picture is applicable when the person portrayed is involved in a private act. Nevertheless, there is a main difference between the German privilege as to the own picture and a New Zealand right of privacy. The decisive point in assessing the lawfulness of the publication of a picture in New Zealand seems to be whether the person on that picture is involved in a private act or not. Contrary, the German Act on Artistic Creations – as a first step - acknowledges that every person has the right to decide whether a picture of his is to be published and that a publication is generally only lawful if he has consented. No element of privacy is necessary. Freedom of publication without consent exists only if one of the exceptions of § 23 of the Act on Artistic Creations is applicable.

Also complaints to the BSA or the Press council are likely to be fruitless as private facts have to be invaded. Additionally there is no protection within the Copyright Act 1994 and the Privacy Act 1993.

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[313] See section 9 or 13 Fair Trading Act 1986.
[314] *Hosking v Runting*, above n 16, 32 Gault and Blanchard JJ.

VIII SUMMARY AND CONCLUSION

Even though privacy is one of the most significant human rights, the New Zealand laws do not protect privacy as such. Although the Court of Appeal has recognised a tort of privacy, intrusions into essential areas of an individual's privacy are not covered and important remaining questions are not clarified yet.

The German general right to one's personality is derived from the constitutional protection of the human dignity and personality. Even though it is recognised that it also protects tangible interests,[315] its main rationale and reason is the protection of human dignity. In providing for this protection, German law takes a conceptual approach. The first question that has to be asked in all cases in which an infringement of privacy is alleged - whether concerning images, the spoken word, personal data or other aspects of privacy - is whether an act falls within the scope of privacy protection. It seems that many acts and much information can satisfy this criterion. The crucial point rather is whether the general right to one's personality of the individual, balanced against other constitutional values, for example the freedom of press, prevails. Even though detailed rules (especially in relation to the privilege as to the own picture) have evolved throughout the years, this balance of interests always is - at the end of the day - the decisive factor. Nevertheless, the broad approach of Germany to privacy protection raises the question whether a similar approach is necessary for New Zealand. As both societies are very different and not as many privacy invasions occur in New Zealand as in Germany a narrower approach could be enough.

It will be seen to what extent privacy and thus an aspect of human dignity will be directly protected in New Zealand. Apart from the evolving tort of privacy the recognised causes of action are primarily designed to protect other values and protect privacy only incidentally. For example, defamation law protects a person's reputation in the world, trespass the interest in having one's land free from physical intrusions. Similarly, the ambit of and conditions to establish those recognised causes of action and the defences available differ. Unlike in Germany, there is no uniform balance of interests that has to be struck in every case.

Apart from the evolving tort of privacy the recognised causes of action in New Zealand can protect privacy only in the described instances. Defamation is the closest the law comes to

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[315] BGH *Marlene Dietrich* [2000] GRUR 709; BGH *Der blaue Engel* [2000]GRUR, 715.

protecting privacy, especially when very intimate information is concerned. However, in contrast to privacy protection, it requires both a defamatory meaning and publication. Therefore, at the moment New Zealand law does not protect privacy in several respects in which German privacy law provides for protection. First the individual commonly has no right to decide if, where and how a pictorial portrait of his is published. Secondly, the individual can generally not protect himself against intrusions into his private sphere or against observations. As described, a New Zealand right of privacy will in many instances fill this gap of privacy protection if an act or information has a private character. It might protect much private information, establish a right as to the own picture in a considerable number of cases or protect against other intrusions into privacy.

Coming back to the second example described in the introduction, it was suggested that the lovers would have a legal remedy against the publication of the picture on the Internet only in Germany where their image would be protected by the privilege as to the own picture. Since the lovers are neither an absolutely nor relatively a personality of contemporary history, the publication without consent would be unlawful. In New Zealand, the recognised forms of action do not provide for legal protection. Defamation law is not applicable because the publication does not bear any defamatory imputation. Trespass cannot be established because the neighbour did not enter any premises. Finally, the making of one single picture does not amount to nuisance. Nevertheless, the situation might fall within the amendment of the *Crimes Act* if it can be seen as "an intimate sexual activity" or if a person is "naked or has his or her genitals, pubic area, buttocks, or female breasts exposed, partially exposed, or clad solely in undergarments". On the other hand, also evolving forms of action could provide the lovers with a legal remedy in New Zealand. A right of privacy might apply because the scenery in the garden has a necessary private character. A publication of this picture can well be considered as highly offensive to a reasonable person. If the lovers were not aware of the photographer, the picture would further have been taken surreptitiously.

As described, the recognised causes of action do not sufficiently protect privacy in respects that are not intimate but fall within the "classical" area of privacy protection, for example photographs taken without consent or intrusions into seclusion. Like every developed country, New Zealand has not stopped short of the development of information and surveillance technologies which enable an always increasing number of intrusions into privacy. Mobile phones with built-in cameras are good examples.

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