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PUBLICISING THE LIVES OF PUBLIC PEOPLE - NOTHING TO HIDE, NOTHING TO FEAR?

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“The man who is compelled to live every minute of his life among others and whose every need, thought fancy or gratifications is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass… [S]uch a being, although sentient, is fungible; he is not an individual.”

- E. Bloustein -

ABSTRACT

This essay examines how the right to privacy is protected in Germany and New Zealand and where the weak points of these legal systems are in regard to this right. Especially in context to the competing right to freedom of expression.

In order to access the problems in context with these issues, landmark jurisdiction from Germany, Europe and New Zealand is examined. The outcome is analysed with a view to existing constitutional and federal legislation in the respective countries.

What follows is a comparison of the regulation of the right to privacy in Germany, the European Union and New Zealand. The author comes to the conclusion that,while it does not need to be expressly reffered to in statues or codes, privacy needs to be recognized as a fundamental right in New Zealand, and that its violation should constitute a tort.

The issues addressed will then be evaluated again in the light of the privacy rights of children, the different standards of protection required with regard to the privacy rights of children are highlighted., and a higher standard of protection is favoured.

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I INTRODUCTION

"Privacy is the quietest of our freedoms. We need to listen for it with care"[1]. Unlike all other freedoms privacy is not expressed through any specific action and remains silent even when it is violated. Therefore it is hard to determine when it is infringed upon and where its scope of protection ends.

First of all the range of privacy protection depends on the legal system in which the infringement takes place. Almost every country provides within its legal system an at least slightly different protection of privacy rights based on their notion of the importance of privacy. This varies greatly although one would not suppose that the importance attached to fundamental rights like the right to privacy could be as different as it is in countries like Germany and New Zealand, which both claim to base their society on the values of democracy.

Furthermore, another important factor for solving the problem of the scope of privacy protection is that all specific circumstances of the respective case have to be included in the consideration.[2] Therefore it could be possible to say that at least everything that happens behind closed doors is encompassed by a privacy sphere in every country.

But is it also possible to say that everything that happens outside these doors cannot be private regardless of where we are and what we do? Do we waive our right to privacy and consent to any violation of our right as soon as we leave our home? Or is the crucial factor in this case that we do not have a right to privacy which could be violated and therefore consent is not necessary?

This paper will determine these questions in regard to the approach in Germany, the European Union and New Zealand and will therefore have a closer look at two landmark cases, *Caroline von Hannover v Germany*[3] and *Hosking v Runting*[4]. According to these cases, dealing with the above mentioned issues, it is

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[1] Paul Chadwick "The Value of Privacy" (2006) 5 EHRLR, 497.
[2] N.A. Moreham "Privacy in Public Places" (2006) 65 CamLJ 606.
[3] [2004] ECHR 555.
[4] [2005] 1 NZLR 1 (CA).

moreover crucial to consider who claims for the right to privacy in a public place. In a nutshell both cases state that public persons cannot have and because of their publicity in fact do not have the same expectation of privacy protection like "normal" people. Furthermore it also has to be taken into account what they are doing in public. The questions of whether this approach of the courts is correct, or revision is needed, will be the core of this paper.

Additionally, one of the most essential problems dealing with these issues is not the privacy rights of the public people but rather the infringement of the privacy rights of their children. The courts unfortunately did not attach great importance to this. Unlike their famous parents the children are usually not able to prevent themselves from being put in the limelight. Therefore the decision about their privacy usually remains in their parents hands. Thus the crucial question, which needs to be answered is whether the fact that public people have a lower expectation of privacy in public, regardless of the courts decisions are right or wrong, leads to the same loss of privacy rights for their children.

II PUBLIC PEOPLE

Talking about public people it is necessary to define who public people are. Usually the materials use either the expression "public figure" or "celebrity". In contrast to these phrases public people shall encompass a broader scope of people in the limelight, because[5]

> [a] public figure has been defined as a person, by his accomplishments, fame, or mode for living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a 'public personage'.

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[5] William L. Prosser "Privacy" (1960) 48 Cal L Rev 383, 410; *Cason v Baskin* (1947) 159 Fla 31, 36.

He or she is therefore someone who has brought him or herself into the public eye by their own voluntary efforts[6]. Public people, on the other hand, also include persons who are in the focus of public interest simply and solely because of their origin, for example Caroline of Hanover, who is a member of the royal family of Monaco and because of this a public person from birth.

In addition to this scope of people and this way of becoming famous, there are also people who were caught by the limelight as a result of their behaviour but actually did not seek the public spotlight with their "activities". Criminals for example would in fact be happy to be kept out of the public interest, firstly, because being in the media always implies that they have not been successful with their crime and have been caught.

Secondly, criminals, especially after they have served their sentence, understandably want the crime to be forgotten by the public and to aim for a "normal" life, which is impossible if they are exposed by the media. For instance, in *Tucker v News Media Ownership*[7] the plaintiff had been convicted of criminal offences. The media tried to publicize this issue years later while he was trying to seek donations from the public for heart surgery, which he otherwise could not afford on his own. The question in these cases is whether a fact that used to be public can become private again and by it part of someone's privacy after a period of time.

As including this circle of "public people" would be too wide-reaching, although interesting, this paper will focus for the sake of clarity and brevity on public people encompassing celebrities, royals and their children and excluding criminals, politicians and people who involuntarily gained the public eye.

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[6] William L Prosser above n 5, 410.
[7] [1986] 2 NZLR 716.

III DEFINITION OF PRIVACY

The decision as to whether someone's right to privacy is infringed requires the definition of privacy in order to determine what is protected by this right and in turn whether the scope of application of the respective privacy right is affected.

In regard to the multitude of attempts to define privacy it seems almost impossible to determine what privacy exactly means. Generally speaking everything that is not public is private and therefore part of a person's privacy. But as Gleeson CJ already summarized[8]

> [t]here is no bright line to be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it as such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality and the disposition of the property owner combine to afford.

So it remains obscure what is private and what is not. It seems to be like a fata morgana that never gets any closer no matter how hard you try to reach it. The definition of privacy does not become any easier by taking into account its definition in different legal systems. In fact the values of every society and culture contribute greatly to what is seen as private[9].

Nevertheless, every society at least has an idea of privacy, though this can vary. The basic principle, above all in western societies, appears to be a three-piece form of privacy, which includes the intimacy sphere that is usually

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[8] *Australian Broadcasting Corporation v Lenah Game Meats* [2001] HCA 63, para 42 Gleeson J.
[9] Huff (1980) 55 Wash LR 777, 783.

connected to a closed space, for example the home area[10]. Then there is a restricted public space, for example the office, and the third stage is an open public space[11]. Thus the most practical possibility to define privacy is by the place where someone can be found. Above all because "[p]rivacy is about the individual having control of certain information about himself or herself"[12] and is easier to keep information confidential in a closed space than in public. However, obscurity still remains about the restricted and the open public space. Because it always depends on the special circumstances of each case it cannot generally be said that in these spaces privacy is totally impossible merely because it is more difficult to keep things private. Depending on the activity and the specific conditions of the case, the behaviour in public can also be encompassed by someone's privacy.

However, more generally spoken privacy is also stated as "the right to be let alone"[13]. In regard to the fruitless attempts to define privacy more precisely, the latter description seems to be the most workable characterization of the concept of privacy.

Nevertheless, as already mentioned in the introduction[14] for a public person the scope of privacy is not as wide reaching as it is for a "normal" person, especially in a public place.

Therefore he or she cannot usually claim to be injured in his or her privacy rights if he or she was in public and there has not been any indication that the behaviour is intended to be private. However this is a problem of the privacy rights and not of the person's privacy, and as such will be discussed in the chapter dealing with the privacy rights. Hence privacy cannot be defined apart from this very broad description. The problems with this definition and the scope of the right to privacy must therefore be solved by the courts on a case-by-case basis.

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[10] Hugh Tomlinson *Privacy and the Media* (London, Matrix Chambers, 2002) 22.
[11] Ibid.
[12] John Burrows "Invasion of Privacy" (2006) NZLR 389, 391.
[13] Warren and Brandeis "The Right to Privacy" (1890) 4 HarvLR 193.
[14] See Introduction page 2.

IV RIGHT TO PRIVACY

Following this mostly unsatisfying definition of privacy, it is inevitable to have a look at the statutes and cases dealing with privacy in order to determine to which degree the New Zealand, German and the European legal systems protect the possible wide range of privacy and where they differ.

A Germany

In Germany a lot of statutes deal with the protection of privacy, for example the KUG, the German Civil Code and the Basic Law for the Federal Republic of Germany (BL). For the sake of clarity therefore this chapter starts with an overview of the statutes.

1 German Basic Law (BL)

In the German legal system the right to privacy is codified in the Basic Law. It is part of the right to the protection of personality rights which is guaranteed under section 2(1) of the BL by stating "[e]very person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law"[15]. This section has to be read in conjunction with section 1(1) BL, which says that "[h]uman dignity shall be inviolable" and that"[t]o respect and protect it shall be the duty of all state authority."[16]

Furthermore, two landmark cases dealing with the right to privacy are the "Caroline-cases"[17]. In short, these cases deal with the possible infringement of her right to privacy, because magazines published photographs showing Caroline of Hanover in scenes from her private life taking place in public but without consent. Within these cases it was very important to keep in mind that the

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[15] See Appendix 1 article 2(1) BL.
[16] See Appendix 1 article 1(1) BL.
[17] See Hamburg Regional Court (4 February 1993) 324 O 537/93 and Hamburg Court of Appeal (8 December 1994) 3 U 64/94, BGH (1995) 131 BGHZ 339, BVerfG (2000) 14 NJW 1021.

children of the clamaint, depicted on some of the pictures, are also affected. Thus the right of family protection of Caroline has to be taken into account as well. This right is enshrined under section 6 of the BL by guaranteeing that "[m]arriage and the family shall enjoy the special protection of the state"[18] and furthermore "[t]he care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty."[19]

The high valuation of these rights and their importance was also recognized by the Justices of the Federal Constitutional Court in the "Caroline-case" by concluding that[20]

> featuring the applicant with her children had infringed her right to the protection of her personality rights guaranteed by sections 2 (1) and 1 (1) of the Basic Law, reinforced by her right to family protection under section 6 of the Basic Law.

When discussing the right to privacy, it needs to be recognized that there is a further important Basic Right conflicting with the rights of Caroline von Hannover[21]. This is the freedom of expression and the freedom of press, which is guaranteed by section 5 (1) of the BL:

> Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

Whenever two rights are in competition the court needs to evaluate which right has the higher status in the special circumstances. In regard to the

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[18] See Appendix 1 Article 6 (1) BL.
[19] See Appendix 1 Article 6 (2) BL.
[20] *Hannover v Germany* [2004] ECHR 555, I s 25.
[21] *Hannover v Germany* [2004] ECHR 555, I s 24.

right to privacy the competing right usually is the freedom of expression of the media, which wants to publish information about the claimant. The approach in these cases to balance the opposed basic rights will be discussed in more detail in the chapter dealing with these particular cases.

2 *German Civil Code*

The Civil Code (CC) does not protect the right to privacy as extensively as one might assume in regard to the high valuation of privacy by the BL. In fact the CC protects the right to privacy very insufficiently.

Firstly, just one aspect of the right to privacy is protected expressly by providing the right to a name under section 12 CC which states that[22]

> [i]f the right of a person to use a name is disputed by another person, or if the interest of the person entitled to the name is injured by the unauthorized use of the same name by another person, the person entitled may require the other to remove the infringement. If further infringements are to be feared, the person entitled may seek a prohibitory injunction.

Furthermore the right to privacy falls within the broad definition of "another right" under section 823 (1) of the CC, which states that "[a] person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this"[23].

Since the latter provision covers, at least in regard to its wording, all possible infringements of privacy in contrast to section 12 CC which solely protects the right to a name, one could assume that this regulation offers adequate defense against a violation of privacy. But after a closer look on this rule the flaw of this regulation becomes evident, because it only applies where the plaintiff can

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[22] Section 12 German Civil Code.
[23] Section 823 (1) Civil Code.

prove that he or she has suffered damage from the infringement of his or her privacy rights.

3 German Copyright (Arts Domain) Act

At least in regard to the right to one's own likeness another essential statute is the Kunsturhebergesetz (KUG), the German Copyright (Arts Domain) Act which provides further protection. This Act states under its section 22 that "[p]ictures can only be disseminated or exposed to the public eye with the express approval of the person represented". Exemptions to this rule are regulated under section 23. The crucial provision in the Caroline-case is section 23 (1) KUG. According to this the publication of pictures portraying an aspect of contemporary society are exempted from the obligation to obtain the consent of the person concerned within the meaning of section 22 KUG.[24]

Thus the plaintiff does not have to prove any damage, but the defendant has to show that they obtained the consent of the depicted person.

But since all of the above mentioned statutes are basically grounded on the values of the BL this paper will focus on the constitutional protection of privacy. As mentioned above the right to privacy is protected under art 2 (1) in conjunction with art 1 (1) BL. "The connection with Art. 1(1) BL enhances the constitutional protection awarded to personality rights, as the respect for human dignity is the most important constitutional principle"[25]. This is based on the fact that "some aspects of the development of one's personality are so closely linked that they deserve a greater degree of protection than other human behaviour"[26].

By dealing with constitutional rights, it is important to keep in mind that the Basic Rights do not apply directly between private parties as by their nature

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[24] German Copyright (Arts Domain) Act, ss 22, 23. See Appendix 1; See also: *von Hannover v Germany*, ibid. II 1 a) cc).
[25] Sabine Michalowski and Lorna Woods *German Constitutional Law – The protection of civil liberties* (Dartmouth Publishing Company Limited, Ashgate Publishing, Aldershot, Brookfield USA, Singapore, Sydney, 1999), 115.
[26] Ibid.

they are primarily intended to protect the individual from acts or omissions of the state, but not of other individuals. Therefore no one can go to court and claim to be infringed by another private person in their Basic Rights These Rights only "bind the legislature, the executive, and the judiciary as directly applicable law"[27]. However, they can indirectly apply to the interpretation of the Civil Code and other statutes through their "general clauses", for example sections 22, 23 of the KUG[28] and section 823(1) CC. Thus these general clauses are the "points of entry" into private law for the Basic Rights[29] and therefore the only way to apply statutes of the civil law correctly is for the judges to interpret the respective applicable statute on the basis of the values incorporated in the BL. This process is called the indirect effect of constitutional values ("Drittwirkung"). Reference this indirect effect is not necessary if an individual makes not a private but a constitutional claim to the constitutional court. In this case the justices can apply the Basic Rights directly and balance competing rights like the freedom of expression[30] and the right to privacy[31], as here the defendant is not a private person but the state or one of its organs.

These remarks might give the impression that the New Zealand Bill of Rights Act 1990 (BORA) and the BL are quite similar, because both only apply to legislature, executive and judiciary[32]. But, unlike the BL the BORA has no constitutional position and therefore does not affect any other enactments solely because they are inconsistent with the provisions of the BORA[33]. However the important factor is that both legal systems are familiar with the balancing of competing interests when it comes to the balancing of the right to privacy against

[27] See Appendix 1 article 1 (3) Basic Law.
[28] See Appendix 1, ss 22, 23 KUG.
[29] BVerfGE 7, 198 *Lüth.*
[30] See Appendix 1 art 5 (1) Basic Law.
[31] See Appendix 1 art 2 (1) in conjunction with art 1 (1) Basic Law.
[32] See Appendix 1 art 1 (3) Basic Law, s 3 NZBORA.
[33] See s 4 NZBORA.

the freedom of expression[34], although they come to different conclusions by solving almost identical cases[35].

Unlike the Court of Appeal in *Hosking v Runting*[36] the Constitutional Court decided in favour of Caroline's and her children's right to privacy and concluded that it outweighs the freedom of expression in this case, because it is reinforced by their right of family protection[37] under article 6 BL[38].

4 Introduction to the German BL

After this first overview of the German legal system, further comments on the German BL are necessary in order to understand the arguments of the German Courts. Generally speaking the BL, which is the constitution of Germany, is binding for all three powers[39] and thus even the legislature does not have the power to disregard its provisions. Therefore the Basic Rights are guidelines with which all public authorities have to comply with.

As already mentioned above the BL does not apply directly between private parties; consequently a private person cannot claim that he or she has been violated in his or her Basic Right. The only possibility to maintain an infringement of a Basic Right is by making an individual constitutional complaint before the Federal Constitutional Court[40]. However, such a complaint requires among other things that the plaintiff has already exhausted all judicial remedies on a regional and federal level, which have taken the right to privacy and the freedom of expression into account by interpreting the respective relevant provisions in order to make a decision. This requirement presents an obstacle for the access to the Federal Constitutional Court that is hard to overcome in practice.

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[34] *Hosking v Runting* above n 4, BVerfG (2000) 14 NJW 1021.
[35] Ibid.
[36] Above n 4.
[37] BVerfG above n 34, 1026.
[38] See Appendix 1, art 6 BL.
[39] See Appendix 1, art. 1(3) BL.
[40] Michalowski above n 25, 44.

Therefore Caroline prior to making her individual constitutional complaint had to go to the courts on the lower level first.

(a) Hamburg Regional Court and Court of Appeal[41]

The Justices of the Hamburg Regional Court decided that Caroline has not been violated in her right to privacy and justified their decision by arguing that she is a figure of contemporary society "*par excellence*" according to section 23 (1) no 1 KUG and therefore she had to tolerate the publication of the pictures.

The Court of Appeal came to the same conclusion, so that she applied to the Federal Court of Justice for a review of her case.

(b) Federal Court of Justice

The Justices at this court came basically to the same solution except for one point; concerning the pictures of Caroline and Vincent Lindon they made a differing judgment and concluded that figures of contemporary society[42]

> could not rely on the protection of their privacy unless they had retired to a secluded place - away from the public eye - where it was objectively clear to everyone that they wanted to be alone and where, confident of being away from prying eyes, they behaved in a given situation in a manner in which they would not behave in a public place.

In regard to the pictures showing her with Vincent Lindon these requirements are met, because according to the judgment of the justices Caroline and Vincent were in a public restaurant, but they obviously wanted to be left alone by sitting in a hidden place in the rear of the restaurant.

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[41] See Hamburg Regional Court (4 February 1993) 324 O 537/93 and Hamburg Court of Appeal (8 December 1994) 3 U 64/94.
[42] BGH (1995) 131 BGHZ 339.

(c) Federal Constitutional Court

After this mostly unsatisfying passage through the courts Caroline submitted her case to the Federal Constitutional Court, which made a differing judgment concerning the pictures of Caroline's children. The Justices stated that the freedom of press does not solely cover the area of politics but also ranges over mere entertainment as well.[43]

The reasoning for their solution was mainly based on the fact that they found that the decisions of the Federal Court of Justice had disregarded the fact that the right to privacy of the appellant is reinforced by section 6 of the Basic Law regarding that person's intimate relationship with their children. After balancing Caroline's "reinforced right to privacy" against the freedom of expression of the publisher of the magazines the justices concluded that the parent-child relationship supersedes the latter and therefore the photographs cannot be published without the consent of the parents[44].

But in order to get to this conclusion they had to go through several steps to determine the infringement of the right to privacy and a possible justification. The first step involves the determination whether the claimed action has affected the scope of the privacy right in the first place. "This not only guarantees that the individual does not have to disclose embarrassing or detrimental information, but further respects the interest of the individual to keep all personal information to him- or herself"[45]. Within this scope of protection falls, furthermore, the right to decide how to represent oneself in public, including which personal information will be made public and the right to one's own picture and word.[46]

Consequently, the scope of protection of the right to privacy is obviously concerned by the pictures of Caroline. A violation of a Basic Right is defined as "[e]very state action that prevents the citizen from exercising his or her basic right"[47]. In the present case Caroline could not decide about the publication of

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[43] BVerfG (2000) 14 NJW 1021, 1024.
[44] Ibid, 1026.
[45] Michalowski above n 25, 118.
[46] Ibid, 123.
[47] Ibid, 79.

pictures of her nor about her right to her own picture and the way she wants to be represented in public, because the courts dismissed her claims. Therefore the state action in this case lies in the decision of the courts that prevent her from exercising her Basic Right to privacy, thus not taking into account properly when interpreting the respective federal laws.

After affirming that there is a given violation the next question is how possible conflicts with other constitutional interests are to be resolved, since the clash of the right to privacy and the freedom of expression has already been outlined. In order to solve this problem it is necessary to keep in mind that the Constitutional Court distinguishes two different spheres within the scope of privacy rights between which are evaluated on this level.

The first, and also "more important", sphere is the intimate sphere, which is inviolable because of its high connection to the human dignity. But the Constitutional Court acknowledged also a second sphere, the personal sphere. This sphere encompasses an area for the individual within they communicate with others and the right to privacy must therefore be balanced against competing interests.

Since Caroline was in a public place as the pictures were taken she could not claim to be violated in her intimate sphere and consequently the infringement could not be justified. Nevertheless as mentioned above the justification of a violation of the second personal sphere was still possible and given, thus calling for specific requirements to be met.

Firstly the intrusion into the privacy right has to be within the limits of the Basic Right. For the sake of clarity and brevity it suffices to say that some Basic Rights have a statutory reservation and some do not have such a reservation[48]. But in the present case this was not crucial, since in both cases the right can be limited by conflicting Basic Rights of third parties or by other legal values having constitutional status; and here the competing right to freedom of expression was the decisive factor. Thus the right to privacy is limited by the freedom of expression which might therefore justify the infringement of the right

[48] Ibid.

to privacy. But this obviously cannot be enough to deny a claim for the violation of the right to privacy, because otherwise the freedom of expression (or any other Basic Right) could always trump the right to privacy, solely because of its existence. For this reason the limits on a Basic Right also have limits[49]. This means that the limitation of one right, which is in fact the infringement of another right, needs some kind of limit itself. The most important procedure to determine whether a limitation of a right is within its own limits is the proportionality principle.

According to this principle the intrusion of the Basic Right is justified, if it is appropriate, necessary and reasonable to achieve the objective. Consequently, the infringement of the right to privacy can only be justified in the present case, if the limitation of the privacy right by the competing freedom of expression meets the requirements of proportionality[50] (limit to the limit). In order to determine this it needs to be clarified what is meant by these prerequisites. Indeed it has to be kept in mind that the order of these cannot be switched and each of these have to be met for a justification of an injury. This means that if for example the infringement is not appropriate the fact that it would be necessary is no longer of importance and the intrusion cannot be justified.

First of all, as already mentioned, the intrusion has to be appropriate. An intrusion is appropriate if it promotes the objective in any way[51]. However this does not imply that it has to be the means of doing so. Therefore the first step of the scrutiny of proportionality can be affirmed very easily. In the present case, the freedom of expression of the magazines as the objective of the intrusion can only be provided, if Caroline's right to privacy steps back. Thus the infringement is appropriate, since it supports the objective.

Secondly it has to be necessary. This is given if there is no way of achieving this objective that would be less intrusive to the rights of the citizen[52]. In order to meet this requirement the least invasive kind of infringement must be

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[49] Ibid, 81.
[50] Ibid, 83.
[51] Ibid.
[52] Ibid.

chosen. But it has to be said that the infringer has to choose within those possible infringements that are likely to achieve the objective on the same level. There is no other way in the present case to promote the objective to grant the freedom of expression in the same extent other than to publish the pictures of Caroline and by that to infringe her privacy rights.

Last but not least, the intrusion has to be reasonable as well. This means that it must be proportionate with the objective sought to be achieved which depends on an evaluation of the proper balance between means and ends[53]. The determination of reasonableness is the core part of the proportionality principle and requires that the all specific circumstances of the case have to be included in a balancing test.

First of all it is crucial that the infringement is within the personal and not the intimate and therefore inviolable sphere. Furthermore it has to be kept in mind that the pictures were taken in a public place and neither in an obviously private sphere like the home nor in a secluded area. Moreover Caroline is not doing anything which is apparently meant to be a private intimate activity, like for example kissing or hugging someone or anything of that nature.

Nevertheless on the other hand there is no evident justification why the magazines should have the right to exercise the freedom to expression by publishing these pictures if there is no specific higher form of interest given. Since the publication would be an infringement of the right to privacy, it cannot be sufficient to justify this intrusion solely by stating that the infringement takes place in a public sphere which is less protected. Such an interest cannot be seen in this case. Caroline is pursuing her usual daily business and is therefore not in any official function. Thus the interest in these pictures can solely be based on pure curiosity of the readership.

Additionally, as mentioned above and in fact the most important factor, her children are affected by some of these pictures. Consequently, their right to privacy, which will be discussed in further detail later on, is infringed as well as

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[53] Ibid, 84.

the right family protection of Caroline under article 6 BL[54]. So the freedom of expression of the media has to be balanced not only against the right to privacy of Caroline, but also against the right to family protection, which reinforces her privacy rights. Therefore according to this balancing test the infringement is not reasonable and because of this not justified.

B European Union

This high level of protection of these rights is also provided within the European Union by the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) which regulates that "[e]veryone has the right to respect for his private and family life, his home and his correspondence"[55]. Furthermore, the ECHR noted that[56]

> private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings.

The freedom of expression is provided by stating that[57]

> [e]veryone has the right to freedom of expression, this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

Thus both rights, the right to privacy and the freedom of expression, are protected and acknowledged to the same degree under the Convention and had to

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[54] See Appendix 1 article 6(1) BL.
[55] See Appendix 1 article 8(1) Convention.
[56] (2005) 40 EHRR 1 para 50.
[57] See Appendix 1 article 10 (1) Convention.

be balanced in *Caroline von Hannover v Germany*[58]. The approach of the European Court of Human Rights (ECHR) was furthermore similar to the proceeding at the Federal Constitutional Court, because there was no identity of the wording between the relevant provisions of the European Convention of Human Rights and the German Basic Law but rather an identity of the meaning.[59] Both courts commenced by valuating the rights in an abstract way before including the actual circumstances into their consideration before finally balancing the competing rights[60].

1 Ruling of the ECHR

After bringing her just partly successful complaints to the German Courts Caroline went to the European Court to seek for justice and therefore she[61]

> alleged that the German Court decisions in her case had infringed her right to respect for her private and family life as guaranteed by article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

The judges decided "that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the scope of her private life"[62]. Furthermore the decisive factor in balancing the protection of private life against freedom of expression lies in the contribution that the published pictures and articles make to a debate of general interest.[63] The judges did not find such an interest and decided that the applicant

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[58] Ibid.
[59] Andreas Heldrich "Persönlichkeitsschutz und Pressefreiheit nach der Europäischen Menschenrechtskonvention" (Protection of Personality and Freedom of Press according to the European Convention of Human Rights) (2004) 37 NJW 2634.
[60] Sophie-Charlotte Lenski "Der Persönlichkeitsschutz Prominenter unter EMRK und Grundgesetz" (2005) 1 NVwZ, 50.
[61] *Hannover v Germany* [2004] ECHR 555 Facts Procedure 2.
[62] Ibid, para 53.
[63] Ibid, para 76.

was injured in her rights by the German Courts and therefore there had been a breach of article 8 of the Convention.[64]

Consequently, as mentioned above, the wording of the German and European Statutes is slightly different, but the basic proceeding of the German Courts, especially the Federal Constitutional Court, and the European Court are almost identical. Both recognize privacy and freedom of expression as rights and therefore balance them in order to determine which right has to prevail in the respective case according to the specific circumstances.

Thus, the ECHR underlined the importance of the press because they have the role of "watchdogs"[65] for the public. But in regard to the immense significance of the right to privacy and the protection of personality rights, the weight of the freedom of press depends a lot on the contribution of the picture or the article to a debate of public interest[66]. Therefore the ECHR concluded that in the Caroline-case this requirement was not met, because the pictures were just taken in order to satisfy the curiosity of their readership and deserved a restricted protection of the freedom of press[67]. "The press must now demonstrate that publication of private information contributes to democratic debate fort it to be justifiable."[68] Furthermore, just because a public person is part of the public eye or seeks the limelight, does not mean that they automatically lose their right to privacy whenever they are in a public place[69]. It always depends on a determination of the specific circumstances of the individual case and whether the public person has mentioned the respective issue earlier on their own.[70] If they have not brought it into the public eye, then it is hard to argue that he or she has lost the reasonable expectation of privacy. Therefore "[o]ne thing is clear from

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[64] Ibid, para 80.
[65] ECHR (2000) NJW, 1015 (1016).
[66] Ibid.
[67] Ibid.
[68] Angus McLean and Claire Mackey "Is there a Law of Pivacy in the United Kingdom? A Consideration of Recent Legal Developments" [2007] 9 EIPR 389,391.
[69] Mark D. Cole "'They did it their way' – Caroline in Karlsruhe und Straßburg, Douglas und Campbell in London – Der Persönlichkeitsschutz Prominenter in England" (2005) 6 ZRP 181,184.
[70] Ibid.

the *Hannover* case – the mere fact that someone is in some sense a public figure does not mean that she has no right of privacy when in a public place"[71].

Additionally, the ECHR criticised the approach of the Constitutional Court by using the figure of contemporary society in order to determine the scope of privacy protection and reasonable expectation of privacy. Such a distinction is solely sustainable if its requirements are clear. The principle of legal certainty involves that any person can distinguish anytime that he or she is in a situation where they have to expect the shooting and publication of pictures.[72] But this is not granted by using a concept whose requirements are blurry.

2 *Impact on the German Courts*

After the decision of the ECHR the German Courts, especially the Constitutional Court, from now on have to keep this solution in mind by balancing the Basic Rights and take these as an interpretation guide for their own decisions. This rule applies to all decisions although the decisions of the ECHR do not have a direct effect on the German legal system. Unlike the English legal system which incorporated the Convention into their law[73], the provisions of the European Convention of Human Rights are introduced into the German legal systems on a federal state level[74] and not on the constitutional level and are therefore inferior to the BL in the hierarchy of the German statutes, which is above any federal (for example the civil code) or local regulation.

Nevertheless, the Constitutional Court has to take into account the ruling of the ECHR although it is not above the BL and the latter is generally the only guide the Justices have to comply with in finding their decisions. This is valid because, in simple terms, otherwise Germany would breach its duties as member of the European Union to comply with the decisions of the ECHR and their interpretation of the Convention.

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[71] Alastair Wilson and Victoria Jones "Photographs, Privacy and Public Places" (2007) 9 EIPR 357.
[72] ECHR (2004) 37 NJW 2647, 2650.
[73] Section 6 HRA 1998 (UK).
[74] See Appendix 1 article 25 BL, BVerfG (2004) 47 NJW 3407, 3408.

Nevertheless, in contrast to the first impression, the impact on the German Courts is not as far-reaching as one might assume. The decision does not introduce fundamental differences in regard to the present legal doctrine rather than to reposition existing aspects of valuation.[75]

C New Zealand

1 New Zealand Bill of Rights Act 1990 (BORA)

The most important distinction between Germany and New Zealand is that the latter does not have a written constitution. Nevertheless, with the introduction of the BORA, although it does not claim a constitutional status, it is quite similar to a constitution in regard to its wording. But unlike a constitution the BORA is "only" an instrument for interpretation of other provisions without claiming consistency of these provisions. However, it might be at least a good first step in order to regulate the essential rights.

For this the BORA guarantees under section 14 the right to freedom of expression[76] and enshrines by that in fact one of the most important rights of the New Zealand legal system. But interestingly there is no express right to privacy[77] in the BORA.

Nevertheless this is no reason that there cannot be a right to privacy. One main argument for this is in section 28 BORA[78]. Referring to this there is no general requirement that all rights have to be expressly included in the BORA in order to be applicable law. This is also supported by the fact that section 14 of the BORA encompasses the freedom to impart information of any kind in any form[79]. The freedom to impart information has to include the freedom not to impart information, especially if this information deals with personal issues. Otherwise

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[75] Sophie-Charlotte Lenski "Der Persoenlichkeitsschutz Prominenter unter EMRK und Grundgesetz" (2005) 1 NVwZ 50, 51.
[76] See Appendix 1 s 14 Bill of Rights Act 1990..
[77] See *Hosking v Runting* [2005] 1 NZLR 1 (CA), paras 22, 77 Gault and Blanchard JJ.
[78] See Appendix 1 s 28 BORA.
[79] See Appendix 1 s 14 BORA.

this freedom would be worthless and the right would be a duty whenever someone does not want to impart information.

Furthermore the right to privacy is[80]

> recognised less directly, but no less significantly, in provisions such as section 21 of the Bill of Rights, namely the right to be free from unreasonable search and seizure. That right is not very far from an entitlement to be free from unreasonable intrusions into personal privacy.

To put it in a nutshell, there is a right to privacy in New Zealand, though it is not spelt out in the BORA. The sole fact of the omission of a expressly codified right to privacy from the BORA was furthermore not accepted by the Justices in *Hosking v Runting* "as legislative rejection of an internationally recognized fundamental value."[81]

But the important question remaining is whether the right to privacy has a higher value than the freedom of expression under section 14 of the BORA. This needs to be discussed later on within the individual cases.

2 Protection of privacy rights by other statutes?

Additionally, for the sake of completeness, it should be mentioned that there are several New Zealand statutes dealing with privacy issues. Therefore simply speaking, it can be said that the New Zealand legal system at least recognizes privacy rights in the context of torts which are directly or indirectly related to the protection of privacy.

The Privacy Act 1993 could offer a right to privacy or at least a definition what is meant by privacy. But the name is misleading, because this act does not encompass a right to privacy comparable to the German understanding of privacy rights. But this Act "applies mainly to the collection and disclosure of personal information and access to that information. There is no mechanism in

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[80] *Hosking v Runting* [2005] 1 NZLR 1 (CA), para 224 Tipping J.
[81] Ibid, para 92 Gault and Blanchard JJ.

the Privacy Act for obtaining injunctions against publication of personal information …“.[82]

Further protection is provided, for example, by the Defamation Law, the law regulating Trespass to Land and the breach of confidence.

The claim of defamation requires following principles to be met[83]

(1) a defamatory statement has been made;

(2) the statement was about the plaintiff;

(3) the statement has been published by the defendant

However, apart from the difficulties of the tort of defamation in general, the important factor in the context of this paper is that this tort cannot provide any protection to privacy, if the fact that has been published is true. In regard to pictures therefore the depicted person would have to prove that the picture is for example manipulated. Otherwise the picture cannot be false and consequently also not defamatory.

Furthermore the law of Trespass to Land is not very helpful either in the case where the pictures were taken in a public place and therefore the infringer does in fact not trespass the land of the infringed person.

There might sufficient protection by applying the concept of breach of confidence. This is based on the principle that "no person is permitted to divulge to the world information which he has received in confidence"[84]. The crucial elements for a breach of confidence are that[85]

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[82] Atkin and McLaw and Hodge *Torts in New Zealand: Cases and Materials* (4 ed, Oxford University Press, Oxford, 2006), 702.
[83] Stephen Todd (ed), *The Law of Torts in New Zealand,* (3 ed, Brooker's, Wellington, 1997) 16.2.
[84] *Fraser v Evans* [1969] 1 QB 349, 361 Lord Dennings.
[85] *Coco v A.N Clark (Engineers) Ltd* [1969] RPC 41, 47 Megarry J.

> [f]irst the information itself…must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it.

In principle it can be said that the quality of confidence of the information is met if the information is not already in the public domain[86] or if it cannot be accessed easily by the public. Therefore the first question with the present issue is when pictures taken in a public place are not already in the public domain and consequently cannot be qualified as confidential although they might be private. But as noted in *Cadbury Schweppes Inc v FBI Foods Ltd*[87] "[e]quity has set a relatively low threshold on what kind of information are capable of constituting the subject matter of a breach of confidence."

Thus, there can be cases in which private information can be confidential at the same time. Therefore it remains to be seen whether the other requirements are met as well and consequently the breach of confidence provides sufficient protection for privacy infringements so that a separate tort of invasion of privacy would be unnecessary.

The second prerequisite is that the information was disclosed in circumstances importing an obligation of confidence. Usually this implies a contractual relationship, but a breach of confidence may happen also in other relations as well. Therefore the crucial question is whether this requirement can be fulfilled in cases like the Caroline-case. In these cases it is hard to construe a relation at all between the involved persons. And for the sake of brevity this paper will stick to the words of Justice Keith in *Hosking v Runting* stating: "I have difficulty with the application of the law of confidence of situations in which there is no relationship between the parties" and additionally, making the conclusion even clearer, to the argumentation of Justice Sedley noting:[88]

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[86] *Attorney General v Guardian Newspaper (No 2)* [1990] 1 AC 109.
[87] *Cadbury Schweppes Inc v FBI Foods Ltd* (1999) 167 DLR (4th) 577 609-610 Binnie J.
[88] *Douglas and others v Hello! Ltd* [2001] 2 WLR 992, para 126 Sedley J.

> What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognize privacy itself as a legal principle drawn from the fundamental value of personal autonomy.

Consequently, these rules do not give people an instrument for protection against the publication of pictures of themselves. Therefore this paper will focus on the tort of privacy which was applied, although in the end denied, by the Justices in *Hosking v Runting*[89]. Since this is the core case dealing with the right to privacy in New Zealand it will be considered in more detail in the following chapter.

3 *Approach of the Courts*

Similar to the findings above, a right to privacy was recognized in the case *Hosking v Runting*[90]. In this case Mrs Hosking was shopping in Newmarket with her two daughters in a stroller while the photographs had been taken by Mr Runting[91]. He was commissioned by Pacific Magazines to take present-day pictures of the Hoskings[92]. After Mr and Mrs Hosking gained knowledge about the existence of the pictures, they notified Pacific Magazines that they did not consent to the taking or to the publication of the pictures[93].

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[89] *Hosking v Runting* above n 4.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid.

(a) High Court Auckland

The High Court dismissed the application of the Hoskings because no injury was suffered[94]. Mrs Hosking was photographed in a public place and therefore the pictures just showed a situation, which has been open to anyone[95].

(b) Court of Appeal

After their claim failed the Hoskings went on to the Court of Appeal with their primary claim[96]

> that the Court of Appeal should recognize their cause of action preventing the unreasonable publicity of private facts, calling for a development in the common law of New Zealand, reflecting equivalent common law developments in the UK.

In regard to the question whether a tort of privacy exists the Bench decided three-to-two. However, the majority of the Justices dismissed the appeal, although they acknowledged the existence of a general tort of privacy, because they concluded that "there is not a general law of invasion of privacy"[97] and the respective case is not encompassed by the scope of the right to privacy as far as it is provided in New Zealand.[98] Moreover they decided that Mrs Hosking and her girls were not injured in their right to privacy, because they were not shown in any offensive way. An injury of the right to privacy is possible if the matter made public is "one that would be offensive and objectionable to a reasonable man of ordinary sensibilities".[99] This requirement was not met by the pictures subject to this case, since they showed an ordinary situation taking place in public.

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[94] Ibid.
[95] Ibid, para 21 Gault and Blanchard JJ.
[96] *Hosking v Runting* [2005] 1 NZLR 1 (CA).
[97] Ibid, para 7 Gault and Blanchard JJ.
[98] Ibid, paras 7, 8 Gault and Blanchard JJ.
[99] Ibid, para 72 Gault and Blanchard JJ.

Although the justices concluded that an infringement of the right to privacy has to be denied in this case, the important factor is that they granted a right to privacy in general as well as for public people.

However the legal protection of the individual's privacy furthermore cannot be so far-reaching that it would be enough to confirm a tort of invasion simply based on the fact that someone wants the information about him or herself to be kept private[100]. Otherwise the freedom of expression[101] could be undermined very easily depending on the individual's will. Additionally it is necessary to keep in mind that Keith J and Anderson J disagreed with the majority and the recognition of a new tort of privacy. They based their decision on the fact that such a tort would be a limitation of the freedom of expression under section 14 BORA that could not meet the balancing test according to section 5 BORA which requires that the limitation is "necessary" as well as "demonstrably justified in a free and democratic society".

Such a limitation could not be justifiable since it is solely based on privacy values which can always be trumped by the freedom of expression unless "the contrary is indicated by the legislature"[102].

Furthermore, Anderson J stated that "the development of modern communications media, including for example the worldwide web, has given historically unprecedented exposure of and accountability for injustices, undemocratic practices and the despoliation of human rights"[103]. However, in his view a new limitation on freedom of expression requires "greater justification than merely that a reasonable person would be wounded in their feelings by the publication of true information of a personal nature which does not have the quality of legally recognized confidentiality"[104]. He bases this argument on the fact that cases like the Hosking-case "are not about invasion but publication; and

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[100] Burrows above n 12, 391.
[101] See Appendix 1, s 14 NZBORA.
[102] Andrew Geddis "Hosking v Runting: A privacy tort for New Zealand" (2005) 13 Tort LRev 5, 10.
[103] *Hosking v Runting* above n 4 para 267 Anderson J.
[104] *Hosking v Runting* above n 4 para 267 Anderson J.

they are not about competing values, but whether an affirmed right is to be limited by a particular manifestation of a value"[105].

Is this the crucial point? Are we just talking about people who are too sensitive about the pictures which are published about them? Are we claiming for a right which is actually just a value? And even more importantly: do we have to wait for the legislature to start acting, or do we rather have to assume that "[i]f Parliament wishes a particular field to be covered entirely by an enactment, and to be otherwise a no-go area for the courts, it would need to make the restriction clear".[106]

Fortunately the majority granted the possibility of this new tort of invasion of privacy in a public place which requires several elements for the infringement of the right to privacy and moreover concluded by it that this intrusion is a justified limit according to section 5 BORA to the freedom of expression under section 14 BORA. This is above all also somewhat interesting because the Parliament had decided not to include a general right to privacy as part of the BORA when passing it by stating that[107]

> [t]he Bill (like the Canadian Charter) gives no general guarantee of privacy. There is not in New Zealand any general right to privacy, although specific rules of law and legislation protect some aspects of privacy. It would be inappropriate therefore to attempt to entrench a right that is not by any means fully recognised now, which is in the course of development, and whose boundaries would be uncertain and contentious.

Therefore the crucial question remains why the Justices acknowledged a tort of privacy albeit the clear statement of this passage of the White Paper. Though at first glance this quote outlines that there shall be no general right to privacy, a closer look proves this assumption wrong. First of all and as already

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[105] *Hosking v Runting* above n 4 para 266 Anderson J.
[106] Ibid, para 228 Keith J.
[107] Geoffrey Palmer *A Bill of Rights for New Zealand – A White Paper* (Wellington, Government Printer, 1985) para 10.144.

mentioned above, it does not expressly restrict the introduction of new torts of privacy to the legislature.

Secondly, the statement is about 23 years old and what might have been correct at that time does not mean that it is still applicable nowadays especially in regard to the above mentioned decisions overseas. Interestingly the BORA at that time was meant to be enacted on a supreme status in the beginning[108]. "Accordingly, any law made by these bodies which is inconsistent with the Bill will, to the extent of the inconsistency, be of no effect." Nevertheless in the end the status of the BORA is quite different from what it was supposed to be. This becomes evident by having a look at the wording of section 4 BORA that regulates that[109]

> [n]o 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.

Consequently it is obvious that one should not stick strictly to the earlier statements, since time has proven that Parliament does not do this either.

Furthermore, it is important to bear in mind that[110]

> [t]he rights and freedoms included in the Bill are almost all firmly based on the existing law, common law or statute. The Bill reflects widely accepted public policy. And in several areas the Bill sets a minimum standard, leaving Parliament and the courts the opportunity as appropriate to give greater protection.

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[108] Geoffrey Palmer *A Bill of Rights for New Zealand – A White Paper* (Wellington, Government Printer, 1985) para 10.17, Tim McBride and Rosemary Tobin "Privacy in New Zealand Case Law" (1994) 32 PLPR.
[109] Section 4 BORA.
[110] Geoffrey Palmer *A Bill of Rights for New Zealand – A White Paper* (Wellington, Government Printer, 1985) para 3.6.

Thus, the BORA is not meant to be an ultimate regulation but rather to provide a minimum level of fundamental rights. In addition, at that time the right to privacy was not fully recognised and developed, but this does not imply that it cannot be recognised by the courts now. Therefore the judgement of the court in *Hosking v Runting* might show that this right is finally fully recognised and the boundaries of it can be drawn without uncertainty and by that the courts can now give greater protection of privacy.

In order to clarify the assumption of whether the time to introduce a workable tort of invasion of privacy has come, the requirements of this new tort need to be scrutinized. This tort firstly requires a public disclosure of facts in respect of which there is a reasonable expectation of privacy is needed[111]. Furthermore the disclosure must be offensive and objectionable to a reasonable person of ordinary sensibilities and there must be no legitimate public interest in the disclosure. Moreover this case expressly states that the freedom of expression has to be balanced against the right to privacy and by that the principle of proportionality has to be followed[112].

But what exactly do these requirements mean? In order to determine whether the decision of the Justices is correct and provides a further step in regard to sufficient protection of the privacy rights, a closer look on the cases and the above mentioned requirements is necessary.

4 *Requirements of privacy tort*

(a) Reasonable expectation of privacy

First of all a specific type of information must be the subject of publication, which is claimed to violate the right to privacy. As stated above they have to be based on facts that someone can reasonably expect will not be

[111] *Hosking v Runting* above n 4, para 2.
[112] *Hosking v Runting* above n 4, para 235 Tipping J.

published. Unlike the regularly used expression "private facts"[113], this formulation seems to have a wider scope of protection. Therefore not only intimate private personal facts are encompassed, but also all kind facts that someone can reasonably expect will not be published shall be covered.[114] It is also possible that even facts that used to be public can become private again after a while and the concerned person would consequently have a reasonable expectation of privacy in regard to this fact.

Unfortunately it is still not very clear what exactly shall be encompassed by this requirement to the last extent. Nevertheless it is an important step that the Justices did not narrow the scope of application down to "private" facts solely. But still they restricted the tort to "wrongful publicity given to private lives"[115]. Thus their Honours did not constitute a tort that covers an "unreasonable intrusion into a person's solitude or seclusion"[116].

Though it is hard to determine what can reasonably be expected and which facts cannot be expected to be kept private. In regard to public persons it is even more difficult to decide whether a reasonable expectation of privacy is still given, especially when they are in a public place and not in a secluded, obviously private place like their home. The Justices in *Hosking v Runting* solely stated by dealing with this issue that[117]

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

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[113] For example *L v G* [2002] DCR, *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716, *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415, *P v D* [2000] 2 NZLR 591.

[114] John Burrows "Invasion of Privacy" (2006) NZLR 389, 391.

[115] *Hosking v Runting* above n 4, para 118 Gault and Blanchard JJ.

[116] Ibid.

[117] Ibid, para 121 Gault and Blanchard JJ.

But generally speaking it is accepted by the courts that public people lose at least to some extent their right to privacy by seeking publicity[118]. The seeking of publicity should therefore constitute a consent to the waiver of their rights[119]. Furthermore the "personalities of and affairs are already public facts and not private ones". [120]

Nevertheless it remains unclear to which extent the reasonable expectation of privacy diminishes by seeking public adulation. At least it should be possible to argue that the sole fact of being part of the public limelight cannot lead to a complete loss of privacy expectation even in a public place. This has to be based on the fact that only[121]

> [f]ew people would expect that a photograph is being taken of them as they walk down a street (even a public one); in that sense few people intend to give away their privacy right simply by entering a public place.

Public people probably still have to expect to be photographed in a public place, nevertheless this cannot lead to a justification in any case, especially if there is no specific legitimate public interest in the story. But this problem will be discussed later on.

(b) Public disclosure must be offensive and objectionable

Furthermore, the disclosure of the facts must be a public one not a private to met the requirement of this tort. This is quite easily to prove if for example the respective pictures are published in a newspaper. Moreover the disclosure needs to be offensive and objectionable. The problem with this point is that it always depends on the individual person's feelings how he or she feels about the disclosure and whether it is offensive or objectionable or not. Therefore

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[118] *Hannover v Germany* above n 2, *Hosking v Runting* above n 4, Prosser above n 5, 411; *Cohen v Marx* (1949) 94 Cal App 2d 704, 705.
[119] *Cohen v Marx* (1949) 94 Cal App 2d 704, 705, Prosser above n 5, 411.
[120] Prosser above n 5, 411.
[121] Butler and Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) 348.

it is crucial to determine who has the authority to decide whether this requirement is met or not. In the end the courts decide, but even the Justices are not supposed to decide based on their personal feelings rather than on objective criteria which are open to scrutiny. The courts consequently apply the test saying that the disclosure must be offensive and objectionable to a reasonable person of ordinary sensibilities in order to grant the objectivity. Nevertheless, the uncertainty about the decision continues, since the question remains who this reasonable person is supposed to be. By applying the "reasonable person-test" it is important to keep in mind that it needs to be determined what this person "would feel if they were in the same position"[122] as the affected person.

However it remains obscure whether this element of the tort should be applied at all, because it is not convincing to require that someone has to feel highly offended in order to be infringed in his or her privacy rights. The fact that some (private) facts are made public should be sufficient and the highly offensive factor should be included into the balancing test of the competing rights. Why is the mere fact of prohibiting any kind of expression sufficient for an invasion of the freedom of expression is regardless of its content, but the infringement of privacy requires the facts to be "private" and additionally the disclosure to be highly offensive? There is no good reason evident to justify this unfair and imbalanced approach.

(c) Defence of legitimate public concern

"This defence allows for an explicit balancing of the privacy interest of the individual with the public's right to receive information which 'is of legitimate concern to the public'[123]."[124] This phrase does not say what is meant by a legitimate public concern. To meet the requirement of a legitimate public concern mere curiosity in the publication cannot be enough. Otherwise the right

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[122] *P v D* [2000] 2 NZLR 591, para 39 Nicholson J.
[123] *Hosking v Runting* above n 4, para 133 Gault and Blanchard JJ.
[124] Andrew Geddis "Hosking v Runting: A privacy tort for New Zealand" (2005) 13 Tort LRev 5, 8.

to privacy of the respective (public) person could be undermined and infringed too easily. This factor was in the beginning introduced by Justice Nicholson thinking that it might entail anything from "idle curiosity and amusement" to "assessment of character, credibility and competence".[125] But, on the other hand does this specific type of concern basically involve that the publication of facts for pure entertainment are excluded? It is furthermore acknowledged that "[t]he media plays a crucial role in educating, informing and entertaining the community, and any restriction on it threatens this role."[126]

One could therefore stick to the standard argument which is that[127]

> the right to control dissemination of personal information may be trumped by the interest of the public in knowing public, even intimate, facts about politicians, public officials, or celebrities, because the public has a right to know the truth about such people.

But is this "right to know the truth" a legitimate public concern which gives a sufficient justification in the infringement of a public person's privacy? And even more importantly, can this really cover any type of information? One main argument against this interpretation could be that the freedom of speech is not meant to cover[128]

> private gossip, since gossip is not worthy of protection under any clause guaranteeing to free speech. And even if freedom of speech does cover the disclosure of private or personal information, it does not protect it from legal action in every case; the two rights have to be balanced and weighed in the context of the particular facts.

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[125] *P v D*, above n 113, 601 Nicholson J.
[126] Melissa Waterfield "Now you see it, now you don't: the Case for a Tort of Infringement of Privacy in New Zealand" (2004) 10 Cant L Rev 182, 187.
[127] Andrew T Kenyon and Megan Richardson (eds) *New Dimensions in Privacy Law – International and Comparative Aspects* (Cambridge University Press, New York, 2006) 11.
[128] Ibid.

This approach should also be applicable in cases involving public people, although the interest in the publication of their lives might be depending on the circumstances legitimate especially in regard to their possible position as a "role model", because "celebrities embody certain moral values and lifestyles. Many people base their choice of lifestyle on their example. They become points of crystallisation for adoption or rejection and act as examples or counter-examples"[129]. But indeed "it usually won't be enough to argue that celebrities are "role models", and therefore deserve to have their private foibles exposed, unless they have done something truly serious or deceptive".[130]

5 *Justified limitation of freedom of expression?*

It is rather unsurprising that the introduction of a tort of privacy invasion limits the freedom of expression insofar as the publication of private facts can be prohibited if it meets the requirements of this tort. Nevertheless the crucial issue remains whether this limitation is also justified, because some authors might argue that this new tort "will stop some from speaking who otherwise would have"[131]. There is no evidence for this concern, therefore it cannot be the only reason to decline a possible justification of this tort.

First of all it is acknowledged that the rights provided by the BORA "are not absolute"[132]. Therefore also "the right of freedom of expression is not an unlimited and unqualified right and [...] is subject to limitations of privacy as well as other limitations [...]."[133] Thus, the "chilling effect" on speech, regardless of the matter how intense it can be, needs to be weighed against the weight of a right to privacy.

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[129] ECHR (2004) 6 IIC 672, 675.
[130] Steven Price *Media Minefield: A journalist's guide to media regulation in New Zealand* (New Zealand Journalists Training Organisation, Wellington, 2007)262.
[131] Andrew Geddis "*Hosking v Runting*: A privacy tort for New Zealand" (2005) 13 Tort LRev 5, 11.
[132] Butler and Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005), 115, *Hosking v Runting* above n 4, para 113 Gault and Blanchard JJ.
[133] *P v D* [2000] 2 NZLR 591, para 25 Nicholson J.

Even all Justices in the case *Hosking v Runting* agreed in this crucial point and were of the same view, regardless of their opinion as to whether a tort of privacy exists or not, that for this tort to be lawful it must be a reasonable limitation to the freedom of expression. However it needs to be outlined how the determination of a justified limitation of rights should be exercised. Such a limitation is justified if it meets the requirements of section 5 BORA. Although there are points of criticism against the Moonen approach[134], this paper will apply this approach for the sake of brevity and simplicity without further analysis. This states that[135]

> In determining whether an abrogation or limitation of a right or freedom can be justified in terms of s 5, it is desirable first to identify the objective which the legislature was endeavouring to achieve by the provision in request. The importance and significance of that objective must then be assessed. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. A sledgehammer should not be used to crack a nut. The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore, the limitation involved must be justifiable in the light of the objective. Of necessity value judgements will be involved... Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgement which the court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.

It becomes evident by reading this approach that it is almost identical to the German and European approach including that a balancing test requires the consideration of means and ends by taking all aspects of the case into account. In order to make such a balancing act possible, it is essential to start with the

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[134] Butler and Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005), 140.
[135] *Moonen v Film & Literature Board of Review ("Moonen" No 1)")* [2000] 2 NZLR 9, 16-17 (CA), para 18.

importance of the freedom of expression, which is the cause of the infringement of privacy.

The BORA says under section 14 that the freedom of expression includes "the freedom to seek, receive, and impart information and opinions of any kind in any form." However, the wording of this section does not provide further guidance in regard to determining the weight of this right. Some might say in order to clarify and emphasize the value of freedom of expression by stating like Justice Anderson that[136]

> [f]reedom of expression is the first and last trench in the protection of liberty. All of the rights affirmed by NZBORA are protected by that particular right. Just as truth is the first casualty of war, so suppression of truth is the first objective of the despot.

But still, the central factor to determine the value of privacy as the counterpart to the freedom of expression, which is admittedly a very important right. The limit cannot be to ask whether the majority of people care about it or claim for it, because the value of a right becomes evident every time a single person needs protection[137]. This is the reason why rights are regulated, to protect those who cannot protect themselves and the majority of people or the media is not usually the helpless victim. Therefore it is essential to see that searching for the truth and publish ingit is not justified in regard to all information, because it can be outdone by the interest of one person to keep this particular information private.

Furthermore, the question whether the established tort of privacy is a justified limitation of freedom of expression, also in cases including public people, can be answered very convincingly by sticking to the words of Tipping J, because he concluded that[138]

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[136] *Hosking v Runting* above n 4, para 367 Anderson J

[137] See also Butler and Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005), 135.

[138] *Hosking v Runting* above n 4, para 239 Tipping J.

> [i]t is of the essence of the dignity and personal autonomy and wellbeing of all human beings that some aspects of their lives should be able to remain private if they so wish. Even people whose work, or the public nature of whose activities make them a form of public property, must be able to protect some aspects of their lives from public scrutiny. Quite apart from moral and ethical issues, one pragmatic reason is that unfair and unnecessary public disclosure of private facts can well affect the physical and mental health and wellbeing of those concerned. Their effectiveness in the public roles they perform can be detrimentally affected to the disadvantage not only of themselves, but of society as a whole.

Nevertheless the Justices decided in the end that the Hosking family was not affected in their right to privacy. Therefore one cannot help but wonder, did the Justices misjudge the importance of the right to privacy in regard to the special circumstances and therefore conclude wrongly that the freedom of expression of the publisher outweighs the right to privacy in this case?

Sometimes a change in the perspective helps to find an answer to a crucial question. Since the ECHR and the Constitutional Court have similar approaches to this issue[139] and generally a wider scope of protection of privacy rights[140] it might be fruitful to determine whether the Justices of these Courts would have decided differently form the Justices in *Hosking v Runting*[141] did.

D Comparison of the Legal Systems or Hosking in Caroline's shoes..

As outlined in the previous chapter the approaches of the legal systems are quite different, especially New Zealand compared to the others. In order to compare the legal systems it is necessary to have similar circumstances. Since the facts of the cases are slightly different it should be the most effective way to compare the cases by using the approach and the requirements of the German Courts but the facts of the Hosking-case as mentioned above.

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[139] See Chapters A and B dealing with the German and European approach.
[140] See Appendix 1 article 8 Convention for the Protection of Human Rights and Fundamental Freedoms and article 1(1), 2(1) BL.
[141] Above n 4.

First of all, the Constitutional Court would have applied the same provisions to solve the claim of the Hoskings as they did in the Caroline-case. Thus the crucial question which needs to be solved remains whether the Constitutional Court (or in fact the ECHR in addition) would have acknowledged a violation of the right to privacy. As mentioned above the first important distinction between these legal systems is that in comparison to New Zealand, Germany and the European Union have a codified right to privacy which provides protection also in regard to the right to one's own picture. But for the sake of clarity this paper will focus solely on the differences and therefore will not repeat the single steps of the scrutiny of an infringement of a basic right.

One could possibly argue in the line with the Court that Mrs Hosking and her children might be a figure of contemporary society like Caroline of Hanover, because she tried to drag herself into the limelight in order to advance her husband's career. But since the ECHR recently decided that the German Courts have to change their procedure in cases involving public people and to apply elements which are clearer than the concept of figures of contemporary society[142], it cannot be applied in this comparison either.

However, apart from the fact that Mrs Hosking might be a public person, the German and European approach still would have acknowledged a right to privacy even in a public place. Therefore the specific circumstances and especially the distinctions to the Caroline-case have to be considered.

Caroline was not photographed during an official event neither was Mrs Hosking, thus the factor of newsworthiness cannot be affirmed. Furthermore it does not become evident why showing Mrs Hosking while she is shopping should be of more legitimate public interest than Caroline. Additionally it has to be kept in mind that Mrs Hosking was, like Caroline, also photographed with her children. These pictures do not contribute to a debate of general interest at all consequently Mrs Hosking was also infringed in her right to family protection[143].

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[142] Sophie-Charlotte Lenski "Der Persönlichkeitsschutz Prominenter unter EMRK und Grundgesetz" (2005) 1 NVwZ, 50, 52.

[143] Article 8(1) Convention for the Protection of Human Rights and Fundamental Freedoms, article 6 (1) BL.

This reinforces the right to privacy[144] and outweighs the freedom of expression[145] of the publisher, since no circumstance is given that would allow a different conclusion by applying the factors which were of importance to the ECHR.

Consequently, the Hoskings would have been successful by taking their claim to the Constitutional Court or the ECHR. But does that mean that New Zealand has to be wrong in the approach not to codify a right to privacy (yet)? Just because other jurisdictions decide what is right for them, does not have to include that everyone doing it differently has to be wrong.

Thus still the question remains:

E Do we need a right to privacy in New Zealand?

Answering this question require scrutinizing the benefits and opportunities which might be provided by granting a new tort or right to privacy and whether these are more desirable than actually the protection of the freedom of expression to the last extent. Unlike the freedom of expression which is obviously a very important right the importance of privacy is not as evident.

Nevertheless, privacy is at least definitely a justified limitation on the freedom of expression. But this does not have to imply that there is a need to codify it as well, although "New Zealand is unusual in not protecting a general right to privacy through BORA"[146]. Within the balancing test of justified limitations values can be taken into account, therefore since privacy is at least acknowledged as an important value in this matter, this could be sufficient protection of privacy issues. Regulating an actual right to privacy would emphasize it even more by attributing it the same weight like the freedom of expression. Therefore in order to follow this approach and introduce such a statute a very good argumentation and justification is required.

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144 Article 2 (1) in connection with article 1(1) BL.

145 Article 10(1)Convention for the Protection of Human Rights and Fundamental Freedoms, article 5(1) BL.

146 Butler and Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005), 345.

First of all the development of the media has to be regarded with concern, since already in 1980 the necessity for a right to privacy was being argued because[147]

> [t]he 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.

As already mentioned in the context of the German BL and the justified limitations on freedom of expression in New Zealand, privacy is very closely linked to human dignity. This is acknowledged to be one of the most, or actually maybe the most important right a person has regardless of the legal system[148].

Moreover, it is essential to be aware of the fact that the freedom of expression and privacy do not always exclude each other rather than give people a basis to exercise the other one. Therefore one can say that[149]

> [o]n the one hand, privacy is not just the right 'to be let alone' – the classic Warren and Brandeis view[150] - but includes private interchanges and shard experiences within the non-public communities. On the other hand, expression is not simply about what goes on in public arenas; freedom of expression includes choices as to mode, timing, location, audience – whether public or

[147] Warren and Brandeis "The Right to Privacy" (1890) 4 HarvLR 193, 195.
[148] See article 1(1) BL, which expressly codifies human dignity, Melissa Waterfield "Now you see it, now you don't: the Case for a Tort of Infringement of Privacy in New Zealand" (2004) 10 Cant L Rev 182, 187, 215, Stephen Todd *The Law of Torts in New Zealand* (4ed, Thomas Brooks, Wellington, 2005) 744, Edward Bloustein "Privacy as an aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 NYO LRev 962, *Campbell v MGN Ltd* [2004] UKHL 22, para 50 Nicholls J.
[149] Andrew T Kenyon and Megan Richardson (eds) *New Dimensions in Privacy Law – International and Comparative Aspects* (Cambridge University Press, New York, 2006) 4.
[150] Warren and Brandeis "The Right to Privacy" (1890) 4 HarvLR 193.

private – and even the choice not to speak at all if expression is understood as a freedom connected to liberty and autonomy.

Furthermore the continuing search for truth can be attributed to both, privacy and free expression[151]. Therefore the argument, as mentioned above, that limiting the freedom of expression would be similar to suppress the truth cannot be affirmed to the last degree. Moreover privacy gives the individuals the space to develop new ideas and their personalities within the chosen seclusion unimpaired from the pressures of society.[152] Thus, following this the individual can participate in debates after building his or her opinion in their private sphere and in turn exercise their freedom of expression.

Consequently, it is essential to ensure a right to privacy in order to simultaneously grant the basis for the freedom of expression.

F Special Problem: Children's Privacy Rights

In order to emphasize the urge of a right to privacy, it is necessary to have a look on a special problem by dealing with the privacy rights of public people. This is the infringement of the privacy rights of their children, because they are immediately affected by refusing a right to privacy to public people, since "[i]t is a matter of human nature that interest in the lives of public figures also extends to interest in the lives of their families."[153]

But for the sake of brevity this paper will focus on the children of public people solely, because unlike other family member they cannot help themselves or be completely separated from the infringement of their parent's privacy.

In Germany the Basic Rights are applicable for every person regardless of age. Therefore children are encompassed by the protection provided by the BL.

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[151] See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) 307-8.
[152] Ruth Gavison "Privacy and the Limits of the Law" (1979) 89 Yale LJ 421, 448; Andrew T Kenyon and Megan Richardson (eds) *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press, Cambridge, 2006) 31.
[153] *Hosking v Runting* above n 4, para 124 Gault and Blanchard JJ.

The fact that their parents have to claim on behalf of them and until a certain age children are not even aware of their possible rights does not change the ability to have these rights. Otherwise also persons lacking mental capacity could not have privacy rights either, because they are not able to exercise them. Above all the BL and in fact all other statutes are codified especially for helpless people like children or persons lacking mental capacity, who cannot defend themselves. This basic principle of a constitutional state would be completely undermined if the rights were not applicable to these people. Therefore the applicability of Basic Rights for minors does normally not depend on an age limit rather than on the nature of the Basic Right[154]. This principle applies to all Basic Rights "which an individual can have by the mere fact of existing"[155], for example, human dignity under article 1 BL, right to life and bodily integrity under article 2 BL. In contrast to this legal capacity is required "for rights than can only be exercised in the context of legal transactions"[156], like for example the freedom of profession under article 12 BL.[157]

As the Right to Privacy is not expressly regulated in New Zealand, there is also no regulation whether it is applicable to children or not. But according to the meaning of the Right to Privacy there is no reason evident as to why it should not be applicable to children.

But the essential question which needs to be answered is whether the children lose their right to privacy to the same degree that their famous parents do.

As already outlined above it is accepted by the courts that public people lose at least to some extent their right to privacy by seeking publicity[158] and therefore the seeking of publicity constitutes the waiver of their privacy rights[159].

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[154] Michalowski above n 25 ,70.
[155] Ibid.
[156] Ibid.
[157] Ibid.
[158] *Caroline von Hannover v Germany* above n 3, *Hosking v Runting* above n 4, Prosser above n 5 411; *Cohen v Marx* (1949) 94 Cal App 2d 704, 705.
[159] *Cohen v Marx* (1949) 94 Cal App 2d 704, 705, Prosser above n 5, 411.

However it remains obscure why persons who did not seek the adulation of the public should be treated in the same way. This circle does not solely comprise people like Caroline of Hanover as one might assume, since she did not choose to be in the public eye rather than being part of it because of her descent.

In fact it involves especially the children of public parents regardless of why they are in the limelight, because the children never decided to seek publicity on their own. Therefore the usual above mentioned justification for the infringement of privacy rights does not fit. This "special position of children" was also recognised by the Justices in *Hosking v Runting* and it was mentioned that it "must not be lost sight of"[160], but they concluded in the end that an infringement of the privacy rights of the children was not given, therefore they did not need to justify an infringement if they already deny the existence of a violation of privacy.

However a justification is not needed if the children's privacy rights are actually not infringed by pictures taken in public places. As already mentioned the German BL is very strict in regard to privacy rights especially in cases where children are involved and find that the children's and parents privacy rights outweigh the freedom of expression and therefore the violation of the privacy rights in these cases cannot be justified[161].

Therefore it is crucial to determine whether the position of the Justices in New Zealand towards the children's right to privacy is justifiable as they mainly base their decision on the voluntary seeking of publicity by the parents, which is exactly the main distinction between them and their children, who did not do so. It might be also decisive whether the parents tried to keep their children out of the public[162] or "used" them to stay in the public interest[163]. In *Hosking v Runting* the Hoskings discussed the fact that they have troubles in conceiving children in several magazine articles including the IVF treatment. But after the birth of the twin girls they declined further interviews as well as to take pictures of them.

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[160] *Hosking v Runting* above n 4, para 123 Gault and Blanchard JJ.
[161] BVerfG (2000) 14 NJW 1021.
[162] *Murray v Big Pictures Ltd* [2008] EWCA Civ 446, para 14 Sir Anthony Clark MR.
[163] *Hosking v Runting* above n 4, paras 9, 10 Gault J.

1 Violation of right to privacy

But firstly it needs to be determined whether the privacy rights of the children are infringed by publishing pictures of them. This requires the public disclosure of facts in respect of which there is a reasonable expectation of privacy. This expectation might be lost in cases where the parents have already consented to the publication of pictures of their children. If not, the expectation of privacy is reasonable also in public places, because the children are a part of the private life of the public people that have nothing to do with their publicity. Indeed this way of argumentation takes it for granted that the right to privacy of the parents is infringed and does not say anything about the children's privacy rights. But if the publication of the pictures of the children infringes the right to privacy of their parents then it consequently also includes the violation of the privacy rights of the child, which is in fact affected. However, an infringement also requires that the publication would be highly offensive and objectionable to a person of ordinary sensibilities. Talking about a child it is hard to determine who this person could be. Depending on the age of the child there will be no awareness of any invasion into their "privacy which does not involve some direct physical intrusion"[164]. Therefore it has to be an objective view[165] of the matter taking into account whether the parents have tried "to keep their children out of the public gaze"[166].

If the parents have done so then there has been a reasonable expectation of privacy even in a public place especially when there was no possibility to notice that they are being photographed. Finally the existence of a legitimate public interest in the disclosure in cases involving children should be connected to high requirements. In fact children of public people who have been kept out of the limelight are not newsworthy at all[167] and therefore an infringement of their right to privacy can never be outweighed by the freedom of expression.

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[164] *Murray v Big Pictures Ltd* above n 32 , para 37 Sir Anthony Clark MR.
[165] Ibid.
[166] Ibid para 38 Sir Anthony Clark MR.
[167] Butler and Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis, Wellington, 2005) 349.

Furthermore it might be possible to argue in the same fashion as in *Hosking*, who claimed that the photographs would increase the danger of their children being abducted. Nevertheless, the Justices dismissed this argument since they did "not see any substantial likelihood of anyone with ill intent seeking to identify the children from magazine photographs"[168] and furthermore they could "not see the intended publication increasing any risk that might exist because of the public prominence of their father"[169], because the photos[170]

> do not disclose anything more than could have been observed by any member of the public in Newmarket on that particular day. They do not show where the children life, or disclose any information that might be useful to someone with ill intent. The existence of the twins, their age and the fact that their parents are separated are already matters of public record.

Apart from the argument of whether the publication of the pictures might increase the likelihood of kidnapping it is not out of question that the privacy rights of the twins can still be violated. Even though they have a public father and their parents gave interviews about the medical treatment in advance that does not necessarily lead to a lower expectation of privacy for the children. Given the circumstances in the Hosking-case, it was not evident why the children are newsworthy and the public should have a legitimate interest in the pictures, besides mere curiosity. Furthermore one cannot argue that the twins in regard to their age could even expect to be photographed secretly.[171]

In addition, the decision of the Court of Appeal in *Hosking v Runting* is incomprehensible in regard to article 17 International Covenant on Civil and Political Rights (ICCPR) and article 16 United Nations Convention on the Rights of the Child (UNCROC), since the justices mentioned these provisions in their conclusion but apparently without further consideration. Both rules are almost

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[168] *Hosking v Runting* above n 4, para 163 Gault and Blanchard JJ.
[169] Ibid.
[170] Ibid, para 164 Gault and Blanchard JJ.
[171] See Butler and Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) 349.

identical apart from the point that the latter is applicable for children only by stating that[172]

> 1. [n]o child shall be subjected to arbitrary or unlawful interference with her or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
> 2. The child has the right to the protection of the law against such interference or attacks.

Thus, the privacy rights of children are expressly codified and have by that a special position and deserve higher protection. Consequently the Justices did not serve justice in their conclusion by almost disregarding the special needs of children. Just mentioning the importance of something[173], apparently does not necessarily mean that the following decision will live up to the expectations.

2 *How to avoid infringement?*

In regard to children, provided that they are not an essential part of the story and therefore not newsworthy, a general demand of masking[174] or pixelating their faces should be a workable as well as a sufficient protection of their privacy. In contrast to that, one could also assume that it would be workable to treat children differently depending on their age. A baby for example is not even aware of its privacy, and therefore the theory might arise that no protection is needed since the infringement cannot be "felt". But the problem with children is that the injury will become evident later on and not by the time the infringement takes place. This depends especially on the point in time when this child will recognize the infringement. Every child should generally have the possibility to seek publicity or not, regardless of who their parents are. But this is made impossible if it is already in the limelight. Because the effects on the development of a child are not foreseeable, even remedies are not enough for possible emotional

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[172] Article 16 UNCROC.
[173] *Hosking v Runting* above n 4, para 123 Gault and Blanchard JJ.
[174] Peter Highton "Protection of Children's Privacy" (2006) NZFamLJ 147, 149.

consequences of publications at any age[175]. Furthermore one could argue that a little child unaware of its rights needs even higher protection from intrusions, because he or she cannot react at all to protect themselves and thus the government has the obligation to grant this protection extensively.

Therefore it might be a good idea to improve the protection of the children's privacy rights by applying the Privacy Principles (PP) by the Broadcasting Standards Authority (BSA) also in other cases involving the media. PP 6 regulates that[176]

> [c]hildren's vulnerability must be a prime concern to broadcasters, even when informed consent has been obtained. Where a broadcast breaches a child's privacy, broadcasters shall satisfy themselves that the broadcast is in the child's best interests, regardless whether consent has been obtained.

Consequently the child's best interest has to be taken into account even if consent has been obtained. One might argue that it would be a too high an obligation for the newspaper, for example, if they would have to determine the child's best interest in every case. But since it is workable for broadcasters (at least in theory) it should be worth a try for other areas of media as well. It should be even easier for newspapers rather than for broadcaster, because they have to decide pictures they want to publish anyway before they print and distribute them. In contrast to this, broadcasters could for example have difficulties if they want to make a live-broadcast.

Furthermore, in regard to the wording one could assume that the publication has actually to be good for the child. In fact the broadcasters apply this rule in the sense that the broadcast must not be negative for the child[177].

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[175] Peter Highton "Protection of Children's Privacy" (2006) NZFamLJ 147, 149; Katrine Evans "Was privacy the winner on the day?" (2004) NZLJ 3; generally considering damages as an adequate remedy: *Hosking v Runting* above n 4, para 158 Gault and Blanchard JJ.

[176] BSA Privacy Principle 6.

[177] New Zealand Broadcasting Standards Authority *Real Media, Real People: Privacy and Informed Consent in Broadcasting in New Zealand* (Dunmore Press Limited, Wellington, 2004), 39.

Additionally, this factor is criticized as too unpractical, because it remains unclear how the best interest should be demonstrated[178]. But still this cannot be a reason to lower the requirements of this threshold. Otherwise any burden of proof could be put aside just because it was not convenient for the obliged person. However, it would be too much to expect the publisher tocome up to this task all alone. Therefore to grant this interest the publisher or broadcaster should consult a child's advocate[179] or a social worker who is trained to cope with this delicate issue as a neutral third party[180]. As the consequences of the broadcast or publication and their effects on the child are not foreseeable to the last extent the child's best interest should not be assumed to be given universally and the threshold for a justification of an infringement should be very high.

G Can we do it? – Yes, we can!

So, the important question is, how should we do it or how can we improve the existent privacy tort? As already outlined above, there are several areas within the requirements of the tort needs improvement. First of all, the valuation of privacy should be revisited to such extent that it should be clearly codified as a right rather than just a value. In doing so the approach in cases like *Hosking v Runting* would be and actually should be completely reversed – but hopefully in a positive way.

Similar to the German procedure – and as well like the approach of the ECHR- the starting point would be the right to privacy and not the freedom of expression of the infringer. Following from there it should be acknowledged that (almost) every behaviour in relation to the protected spheres of privacy, such as the right to one's own picture for example, that is not covered by the consent of the (depicted) person, is a violation of privacy even in a public place and even if

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[178] Ibid, 44.
[179] See BSA 1999-093.
[180] New Zealand Broadcasting Standards Authority *Real Media, Real People: Privacy and Informed Consent in Broadcasting in New Zealand* (Dunmore Press Limited, Wellington, 2004, 84.

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it is a public person. Thus the scope of reasonable expectation of privacy should be much wider than that which is granted by now by the New Zealand courts.

Then the next step would involve that the requirement of the highly offensive disclosure should be deleted completely. Even Justice Tipping was not to sure about this element by suggesting that "the qualifier should be a substantial level of offence rather than a high level offence"[181] and in the end it is a too high burden of proof for the claimant and furthermore can be taken into consideration within the balancing test. If the information, which is disclosed, would be too trivial, then the media would still have the possibility to argue that their freedom of expression outweighs the just slightly touched right to privacy of the affected person. Consequently, the improvement of the tort of privacy invasion includes a shift of the focus of determination away from the question whether there is a right to privacy at all and how can it be infringed, to the crucial element which is the balancing of the clashing rights by including the specific circumstances of the respective case. Furthermore,[182]

> [t]he tort's infancy can, in fact be viewed as an advantage. It offers the New Zealand courts an opportunity to shape the law in a principle fashion, informed by the jurisprudence of the more experienced BSA, and avoiding the pitfalls of the American tort.

At the end of the day the aim is not "that one right should win and the other should lose" but "to recognise both tot the maximum in any given situation".[183]

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[181] *Hosking v Runting* above n 4, para 256 Tipping J.

[182] Melissa Waterfield "Now you see it, now you don't: the Case for a Tort of Infringement of Privacy in New Zealand" (2004) 10 Cant L Rev 182, 205.

[183] Katrine Evans "Hosking v Runting balancing rights in a privacy tort" (2004) 28 PLPR, (http://www.austlii.edu.au/au/journals/PLPR/2004/28.html last accessed 5 August 2008)

V CONCLUSION

Privacy is the quietest of our freedoms and one of the significant basics for a working society. As outlined in this paper it enables the people to be on their own or with a self-chosen circle of other persons in order to build an opinion or personality they want to express. Following this they can exercise their freedom of expression in the most fruitful way. It is therefore one of the most important and essential tasks of a legal system to ensure that these fundamental rights are sufficiently provided. In regard to the findings of this paper the New Zealand legal systems does not yet live up to their high responsibility. This becomes more obvious when examining the privacy of a child, because then this rights becomes even quieter. Therefore children's privacy requires the statutes and courts to pay more attention to this concern and to be more considerate and thoughtful to grant sufficient protection for children. Even though it might be the child of a public person, it is disappointing that it is not valued more highly and protected by law than the freedom of expression in New Zealand. To grant the essential freedoms and rights to those who cannot protect themselves is the most important role of a legal system. In regard to these findings the courts in New Zealand do not come up to this task of dealing with the special needs of children's privacy rights. Unlike the German Constitutional Court and the ECHR they do not see the sensitivity of this delicate issue. Therefore it might be advisable to take the German approach as an example to improve at least the privacy rights of children.

The first important step has already been taken by affirming the existence of a tort of invasion of privacy in *Hosking v Runting*[184]. However it seems that the details of this fundamental right are not yet figured out to the last extent by the courts and "[u]nfortunately the case leaves at least as many questions unanswered as it settles."[185] Therefore it is likely and desirable that the courts will elaborate the privacy tort further within the future cases by taking the

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[184] Above n 4.

[185] Andrew Geddis "The Horizontal Effects of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runting*" (2004) NZLRev 681, 704.

experiences of overseas jurisdictions into account[186], which grant a higher scope of protection of privacy especially in regard to children.

Unfortunately, when talking to the people in New Zealand it seems that the importance they attach to the right to privacy is very low or almost not existent[187]. Hence, as shown above it is almost impossible to provide a strict line between what is encompassed by it and what is not. But the essential factor is that people should start thinking and consequently also caring about their own privacy. Hereby they would also improve their understanding of the importance of a right to privacy of other people including those in the limelight. Even though the expectation of privacy of public people especially in a public place is lower than of "normal" people, this cannot mean that everything they do can be published by the media. By seeking the public gaze they do not waive their right to privacy to the last extent. It always depends on the type of information they already have brought into the public eye on their own. Therefore one could argue that public people want the publicity and that any publicity is good publicity. So, why should we care at all, if celebrities claim about a violation of their privacy after seeking the limelight? First of all, because we can, and secondly, because celebrities do not sell their whole intimacy and privacy to the world by publishing a specific part of their life.

Giving the consent once (or even several times) does not lead to a standing invitation to an infringement of their private sphere. It is similar – although an odd comparison – to a prostitute that of course consents to have sex for money because it is her profession. But nevertheless nobody would expect her to have waived away her right to decline to have sex with someone, even if she had no "reason" for the refusal. It is "basically the same" with public people. Consenting to pictures or other publications about them does not include the waiver of privacy rights in general for the future although it is usually their profession (in regard to actors or singers for example) and they put themselves

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[186] *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, *Caroline von Hannover v Germany* [2004] ECHR 555, BVerfG (2000) 14 NJW 1021.

[187] Author's personal experience by conversations with New Zealanders.

into the public gaze voluntarily. The publication of this specific part of one's life does not encompass infringements to all other areas of their life by the media[188].

So, why not try something new and begin to protect the rights of those who care about their privacy? There might be the fear that[189]

> [o]nce 'privacy' is elevated to the status of a legal principle directly enforceable by the courts, it is hard to see why any invasion of privacy – in the sense of an intrusion upon an individual's 'right to be left alone'[190] – should not be actionable,

since the Justices Gault and Blanchard expressly left it open that it is possible to expand this tort in this way[191]. But does this necessarily mean something bad? Every part of one's privacy deserves protection and should therefore be included into the tort of invasion of privacy. Whether it will outweigh the freedom of expression (or any other competing right) in the end, depends on the solution of the balancing test[192]. The time has come to increase the awareness of the significance of privacy in order to change its existence in the background of people's minds.

It is certain that the press will suffer no harm and will not lack of stories, because unfortunately they are always a lot of people around – especially "future-celebrities-to-be" - , who do not care at all, as long as they are part of the glamorous world of celebrities and paparazzi. And even though some authors might argue that developing a new tort of privacy by the courts might be like placing "the judicial cart before the legislative horse"[193], the New Zealand legal

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[188] Mark D Cole "'They did it their way' – Caroline in Karlsruhe und Straßburg, Douglas und Campbell in London – Der Persönlichkeitsschutz Prominenter in England" (2005) 6 ZRP 181, 184.

[189] Andrew Geddis "*Hosking v Runting*: A privacy tort for New Zealand" (2005) 13 Tort LRev 5, 12.

[190] Warren and Brandeis "The Right to Privacy" (1890) 4 HarvLR,193.

[191] *Hosking v Runting* above n 4, para 118.

[192] Katharina von Bassewitz "Hard times for paparazzi: Two Landmark Decisions concerning Privacy Rights Stir up the German and English Media" (2004) 6 IIC 642, 653.

[193] Andrew Geddis "*Hosking v Runting*: A privacy tort for New Zealand" (2005) 13 Tort LRev 5, 13.

system can be glad that some Justices have at least finally started seeing this "horse" at all.

VI APPENDIX 1: RELEVANT STATUTES

A SECTIONS 3, 4, 5, 14, 21, 28 OF THE NEW ZEALAND BILL OF RIGHTS ACT 1990

(3) Application

This Bill of Right applies only to acts done –

(a) By the legislative, executive, or judicial branches of the government of New Zealand; or

(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

(4) Other enactments not affected

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.

(5) Justified limitations

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

(14) Freedom of expression

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and options of any kind in any form.

(21) Unreasonable search and seizure

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

(28) Other rights and freedoms not affected

An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

B ARTICLES 1, 2, 5, 6, 25 OF THE BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY

Article 1 [Human dignity]:

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) […]

(3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.

Article 2 [Personal freedoms]:

(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

(2) […]

Article 5 [Freedom of expression]

(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) […]

Article 6 [Marriage and the family; children born outside of marriage]

(1) Marriage and the family shall enjoy the special protection of the state.

(2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.

(3) […]

Article 25 [International law and federal law]

The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.

C SECTIONS 22, 23 OF THE GERMAN COPYRIGHT (ARTS DOMAIN) ACT

Section 22

1 Pictures can only be disseminated or exposed to the public eye with the express approval of the person represented. […]

Section 23

(1) Without the by section 22 required approval can be disseminated or exposed:

1. pictures relating to contemporary society
2. […]

D ARTICLES 8, 10 OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 1950

Article 8

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

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall no prevent States from requiring the licensing of broadcasting, television of cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial

integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

E PRIVACY PRINCIPLES BY THE BSA

1. It is inconsistent with an individual's privacy to allow the public disclosure of private facts, where the disclosure is highly offensive to an objective reasonable person.

2. - 4.) (…)

5. It is a defence to a privacy complaint that the individual whose privacy is allegedly by the disclosure complained about gave his or her informed consent to the disclosure. A guardian of a child can consent on behalf of that child.

6. Children's vulnerability must be a prime concern to broadcasters, even when informed consent has been obtained. Where a broadcast breaches a child's privacy, broadcasters shall satisfy themselves that the broadcast is in the child's best interests, regardless whether consent has been obtained.

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