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1 INTRODUCTION

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RECONCILING PRIVACY AND FREEDOM OF EXPRESSION

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## I INTRODUCTION

"That the individual shall have full protection in person and in property is a principle as old as the common law." So began Samuel Warren and Louis Brandeis their seminal 1890 article, "The Right to Privacy."<sup>1</sup> To what extent the current law does and how far it ought to protect the privacy of the individual is an issue which jurisdictions around the world continue to grapple with. All are united in at least the recognition of the importance of some form of protection of privacy of the individual. It is enshrined in article 12 of the Universal Declaration of Human Rights, article 17 of the International Covenant on Civil and Political Rights (ICCPR) and article 8 of the European Convention on Human Rights.

Likewise, freedom of expression is considered a fundamental human right. It was described in the White Paper to the New Zealand Bill of Rights Act 1990 (NZBORA) as of "central importance in a democratic state."<sup>2</sup> It is also of key note in the ICCPR (art 19) and the Universal Declaration of Human Rights (art 19), and one need not search long to find international jurisprudence committed to its safeguard.

It is a rare society which attempts to guarantee rights in any absolute form. There are very evident tensions between freedom of expression and privacy, which must be addressed and balanced in law. The disputed territory of the two rights will be the focus of this paper. The recent High Court of New Zealand case, *Hosking v Runting*<sup>3</sup> (*Hosking*) is the latest development in New Zealand privacy law. Mrs Marie Hosking had little idea when setting out with twin daughters, Bella and Ruby, to do Christmas shopping in December of 2002, that she would be at the forefront of legal development in the courts of this country.

I will review privacy law as it stood prior to *Hosking*, both in New Zealand and overseas, and then briefly outline the High Court decision. It is important to note that the decision is currently on appeal, and so this will not be the final word on the case. The paper will then turn its attention to the right to freedom of expression, expressed clearly in New Zealand rights legislation and case law. I will address the role or lack thereof that freedom of expression played

<sup>1</sup> Samuel Warren and Louis Brandeis "The Right to Privacy" (1890) 4 Harvard LR 193.

<sup>2</sup> New Zealand Bill of Rights Act 1990 White Paper (1985), 79.

<sup>3</sup> *Hosking v Runting* (11 February 2003) High Court Auckland CP 527/02.

That the individual shall have full protection in person and in property is a principle as old as the common law. So began Samuel Wilson and Louis Brandeis their seminal 1900 article, "The Right to Privacy". To what extent the current law does and how far it ought to protect the privacy of the individual is an issue which justifications around the world continue to grapple with. As we noted in at least the recognition of the importance of some form of protection of privacy of the individual, it is enshrined in article 12 of the Universal Declaration of Human Rights, article 17 of the International Covenant on Civil and Political Rights (ICCPR) and article 8 of the European Convention on Human Rights.

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# Privacy

It is a rare society which respects a citizen's right in an absolute form. There are very evident tensions between freedom of expression and privacy, which must be addressed and balanced in law. The disputed territory between the two will be the focus of this paper. The recent High Court of New Zealand case, *Attorney-General v. MGN Ltd* (2002), is the latest development in New Zealand privacy law. Mr Justice Gault has said that when sitting out with two daughters, Jodie and Kelly, to do Christmas shopping in December of 2002, that she was in the forefront of legal development in the courts of this country.

I will review privacy law as it stood prior to *Attorney-General v. MGN Ltd* in New Zealand and overseas and then briefly outline the High Court decision. It is important to note that the decision is currently on appeal, and so this will not be the final word on the case. The paper will then turn its attention to the right to freedom of expression, expressed clearly in New Zealand rights legislation and case law. I will address the role of law to test that freedom of expression played

<sup>1</sup> Samuel Wilson and Louis Brandeis, "The Right to Privacy," (1900) 4 Harv L Rev 135.  
<sup>2</sup> New Zealand Bill of Rights Act 1990, s 14(1).  
<sup>3</sup> *Attorney-General v. MGN Ltd*, [2002] 3 NZLR 1 (HC).

in getting the law to this point, the impact the law has on freedom of expression, and the role that the right should play in any future developments.

### A *The Facts of Hosking*

Mrs Hosking had taken her twin daughters shopping in the Auckland suburb of Newmarket shortly before Christmas. Without her knowledge at the time, a photographer, Simon Runting, saw her and took photographs of her pushing the children in a baby stroller. A few days later, a representative from *New Idea* magazine telephoned Mrs Hosking to inform her that *New Idea* had purchased the photographs and intended to publish them in the Christmas edition of the magazine. Mrs Hosking let it be known to the publishers that she strongly opposed the publication of the photographs and expressed her concern about the risk to the children's safety if the photographs were published. A material fact of the case is Mr Hosking's celebrity status. Additionally, Mr and Mrs Hosking had on several occasions sought exposure through the media for Mr Hosking's career. This had included comment on their marriage and the IVF treatment the couple had received to conceive the children. The Hoskings had also consented to photographs of the children being published in a pictorial book put together by Anne Geddes in 2002.<sup>4</sup>

Mr and Mrs Hosking then issued proceedings against the photographer and the magazine publisher (Pacific Magazines NZ Limited) alleging that the taking of the photographs, or their publication without consent, amounted to a breach of their children's right of privacy. The Hoskings sought an injunction to restrain the defendants from publishing or taking photographs of the children until they had become adults.<sup>5</sup>

Two parties were granted leave to intervene in the proceeding, ACP Media Limited (ACP) and the Commonwealth Press Union (CPU). ACP is the largest magazine publisher in New Zealand with a total of 42 titles and eight websites. It produces 12 magazines broadly similar in concept to *New Idea*.<sup>6</sup> It thus has a strong interest in the proceedings. CPU in New

<sup>4</sup> *Hosking v Runting*, above, 2 Randerson J.

<sup>5</sup> *Hosking v Runting*, above, 2 Randerson J.

<sup>6</sup> *Hosking v Runting*, above, 6 Randerson J.

Zealand is the central organisation representing the interests of newspaper editors and publishers in matters relating to press freedom in New Zealand. It sought leave to intervene because of the importance and topicality of the issues of privacy for citizens who become the subject of media attention.<sup>7</sup>

The issue for the court to decide was whether the facts disclosed a cause of action in breach of privacy under New Zealand law.

## II PRIVACY LAW

### A New Zealand Case Law

Prior to *Hosking* New Zealand had a body of judicial authority cautiously accepting the existence of the tort of breach of privacy by a public disclosure of private facts as forming part of the common law in New Zealand. The most significant New Zealand authorities are outlined below.

*Tucker v News Media Ownership Ltd*<sup>8</sup> (*Tucker*) was the first case to recognise a potential cause of action for the tort of breach of privacy. Mr Tucker, a prospective heart transplant patient sought an interim injunction against publication in New Zealand of the details of his convictions for sex offences involving children. The Court of Appeal in an appeal against the granting of the injunction in that case accepted that the existence of such a tort in New Zealand was not settled and therefore represented a serious question to be tried. The fullest consideration of the matter was given by McGechan J in the High Court, who said:<sup>9</sup>

I support the introduction into the New Zealand common law of a tort covering invasion of personal privacy at least by public disclosure of private facts...

While the American authorities have a degree of foundation upon constitutional provisions not available in New Zealand, the good sense and social desirability of the protective principles enunciated are compelling... I observe that the need for protection whether through the law of tort or by statute in a day of increasing population pressures and computerised information retrieval systems is becoming more and more pressing.

<sup>7</sup> *Hosking v Runting*, above, 7 Randerson J.

<sup>8</sup> *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716.

<sup>9</sup> *Tucker v News Media Ownership Ltd*, above, 731 McGechan J.

The injunction was eventually discharged as its continuance was considered futile having failed to restrain publication by other organisations.

In *Bradley v Wingnut Films Ltd*,<sup>10</sup> Gallen J heard an application for an injunction to restrain the defendant from publishing images of the plaintiff's family tombstone in the Karori Cemetery in its horror film "Brain Dead." The judge expressed further cautious support for the existence of the tort in New Zealand. He applied the test for public disclosure of private facts from Prosser's well-known American text,<sup>11</sup> requiring three elements to be satisfied before a breach of privacy could be established:<sup>12</sup>

First, ... the disclosure of the private facts must be a public disclosure and not a private one... Secondly, the facts disclosed to the public must be private facts and not public ones... The third requirement is that the matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.

In the event, neither the second nor the third elements could be satisfied on the facts, and so the case was dismissed.

In *P v D*<sup>13</sup> Nicholson J granted a permanent injunction restraining publication of an article regarding P's past psychiatric health difficulties. P was a public figure on account of occupational activities. His Honour applied the same three factor test from *Bradley* and noted a fourth "public interest" consideration: "the public must not have a legitimate interest in having the information made available."<sup>14</sup> The four factors were then applied to the factual circumstances of the case. It was found that the first three requirements were satisfied and that "legitimate public interest in having the information disclosed [was] minimal."<sup>15</sup> If the information was allowed to be published there would be a breach of the plaintiff's privacy.

Finally, Judge Abbott awarded damages of \$2,500 in *L v G*<sup>16</sup> on the grounds that the tort of breach of privacy had been made out with respect to an advertisement that had been published of the plaintiff's genitals. The photos, which were intended for private use, were held to disclose

<sup>10</sup> *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415.

<sup>11</sup> *Prosser and Keeton's Handbook of the Law of Torts* (5 ed, United States, 1984) 856.

<sup>12</sup> *Bradley v Wingnut Films Ltd*, above, 423 Gallen J.

<sup>13</sup> *P v D* [2000] 2 NZLR 591.

<sup>14</sup> *Prosser and Keeton's Handbook of the Law of Torts* (5 ed, United States, 1984) 857.

<sup>15</sup> *P v D*, above, 602 Nicholson J.

<sup>16</sup> *L v G* [2002] DCR 234.

a private fact which was publicly disclosed, the fact was highly offensive and objectionable to a reasonable person of ordinary sensibilities, and there was held to be no legitimate public interest whatever in respect of the publication of the photograph.<sup>17</sup>

There are also numerous Broadcasting Standards Authority (BSA) complaints regarding privacy. *TV3 Network Services Ltd v BSA*<sup>18</sup> was the first time the High Court had the opportunity to comment on the privacy principles which the BSA had developed based on the American tort, and their application.<sup>19</sup> The acts complained of were surreptitiously filming a woman on her own property and revealing that she had been an incest victim. Although Eichelbaum CJ's decision did not relate to tort it did endorse the principle that the protection of privacy includes protection against the publication of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.<sup>20</sup>

It should also be noted that the common law has traditionally protected privacy interests indirectly also. This has been done, for example, through the torts of trespass, nuisance, equitable breach of confidence, defamation, passing off, harassment, malicious falsehood and intentional infliction of emotional distress.<sup>21</sup> As Warren and Brandeis asserted, the legal doctrine behind artistic and intellectual property law are grounded in the right to privacy.<sup>22</sup> This is because intellectual property law confers rights to control or prevent the distribution or publication of ideas, manuscripts or works of art. This control extends beyond a mere property right to the commercial value of the items.

### **B New Zealand Statutory Authority**

Parallel to these judicial developments in the area of privacy, many statutes in New Zealand protect the interest, or an aspect of it, in some way.<sup>23</sup>

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<sup>17</sup> *L v G*, above, 248 Abbott J.

<sup>18</sup> *TV3 Network Services Ltd v BSA* [1995] 2 NZLR 720.

<sup>19</sup> Rosemary Tobin "The New Zealand Tort of Invasion of Privacy" (2000) 5(4) Communications Law 130, 130.

<sup>20</sup> *P v D* [2000] 2 NZLR 591, 599 Nicholson J.

<sup>21</sup> Stephen Todd (ed) *The Law of Torts in New Zealand* (2 ed, Brookers, Wellington, 1997) 911.

<sup>22</sup> Samuel Warren and Louis Brandeis "The Right to Privacy" (1890) 4 Harvard LR 193, 195.

<sup>23</sup> Todd, above, 925.



The Privacy Act 1993 applies to personal information and covers both public and private bodies. However, it does not apply to the media in relation to gathering, preparing, and disseminating news, observations on news, or current affairs.<sup>24</sup>

The Broadcasting Act 1989 is another example of legislative protection of an aspect of privacy. Section 4 requires the development of a Broadcasting Code, including respect of privacy issues. The Broadcasting Standards Authority also plays a role in this area.

Intervention to prohibit various kinds of intrusive conduct can also be found in the Crimes Act 1961, Summary Offences Act 1981, Postal Services Act 1987, Harassment Act 1997 and Victims of Offences Act 1987, among others.<sup>25</sup> There are also restrictions on the reporting of Court proceedings,<sup>26</sup> and limits on searching Court records in respect of "personal matters".<sup>27</sup>

Notably absent from the selection of examples of legislative privacy protection above, is a right to privacy provided for in the Bill of Rights Act 1990. Privacy has however been protected under New Zealand's obligations at international law since 1978, when it ratified the ICCPR. Article 17 of the Covenant states:<sup>28</sup>

- Article 17**
- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence nor to unlawful attacks on his honour and reputation;
  - (2) Everyone has the right to the protection of the law against such interference or attacks.

The NZBORA White Paper records the deliberate omission of privacy as a guaranteed right. In its comments on section 21, the right to be secure against unreasonable search and seizure, it is observed that it would be inappropriate to attempt to entrench a full privacy right that is not by any means completely recognised, which is in the course of development, and whose boundaries would be uncertain and contentious.<sup>29</sup>

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<sup>24</sup> Privacy Act 1993, s 2.

<sup>25</sup> Todd, above, 925.

<sup>26</sup> See Burrows *Media Law in New Zealand* (4 ed, Brookers, Wellington, 1999) 235-244.

<sup>27</sup> See Burrows *Media Law in New Zealand* (4 ed, Brookers, Wellington, 1999) 253.

<sup>28</sup> International Covenant on Civil and Political Rights, art 17.

<sup>29</sup> New Zealand Bill of Rights Act 1990 White Paper (1985).

In *R v Jefferies*<sup>30</sup> Richardson J noted the difficulties associated with privacy law: "The nature and significance of a privacy value depends on the circumstances in which it arises... It is not surprising that there is no single readily identifiable value applying in all cases."<sup>31</sup>

Although there is no right to privacy in the NZBORA the courts have nonetheless seen privacy as a rationale behind section 21, the right to be secure against unreasonable search and seizure.<sup>32</sup> In *R v A*<sup>33</sup> Richardson J stated that "[r]estraints on search and seizure reflect an amalgam of values: property, personal freedom, privacy and dignity."<sup>34</sup> Of course, this is arguably more akin to a property right, and was intended only to recognise privacy interests in the search and seizure context.<sup>35</sup>

It may be argued that Parliament has recognised that privacy is an appropriate area for the courts to deal with by not legislatively overturning the privacy cases. On the other hand, the potential significance of such a piecemeal approach to the development of privacy protection on the part of the legislature could be seen as indicative of the protection they consider necessary. Most notably, treatment of privacy by Parliament is in distinct contrast to legislative expression of the freedom of expression. This point will be developed more fully later in this paper.

### C Overseas Case Law

In one form or another, the right of privacy is recognised in virtually all jurisdictions in the United States.<sup>36</sup> The law of privacy, with hundreds of cases on the books, comprises the invasion of four different privacy interests of the plaintiff. William Prosser<sup>37</sup> outlined the distinct privacy torts: intrusion upon the seclusion or solitude of another, public disclosure of private facts, publicity that places another in a false light, and appropriation of another's name or

<sup>30</sup> *R v Jefferies* [1994] 1 NZLR 290.

<sup>31</sup> *R v Jefferies*, above, 302 Richardson J.

<sup>32</sup> Also noted in the New Zealand Bill of Rights Act White Paper (1985).

<sup>33</sup> *R v A* [1994] 1 NZLR 429.

<sup>34</sup> *R v A*, above, 433 Richardson J.

<sup>35</sup> See also *A-G v Otahuhu District Court* [2001] 3 NZLR 740.

<sup>36</sup> See for example *Carr v Watkins* [1962] 227 Md. 578, 177 A.2d 841; *Truxes v Kenco Enterprises Inc.* [1963] 80 S.D. 104, 119 N.W. 2d 914; *Fergerston v Hawaiian Ocean View Estates* [1968] 50 Hawaii 374, 441 P.2d 141.

<sup>37</sup> William Prosser "Privacy" (1960) 48 Cal. LR 383.

likeness for one's own advantage.<sup>38</sup> While the United States is looked to as having the most developed privacy law, the courts have not always been consistent in their application of the categories, and analysis of their decisions reveals that the protection of privacy has not been as uniform as sometimes supposed.<sup>39</sup> Because of the pre-eminence given freedom of speech through the First Amendment, the effect of the law has been watered down to a large extent. As one academic has noted, when expectations of freedom of speech collide with expectations of privacy, "privacy almost always loses."<sup>40</sup>

One such example is *The Florida Star v B.J.F.*<sup>41</sup> in which it was held that imposition of civil damages on a newspaper for publishing a rape victim's name was in violation of the Federal Constitution's First Amendment. Likewise in *Cox Broadcasting Corp. et al v Cohn*<sup>42</sup> "pure expression"<sup>43</sup> succeeded over a cause of action for invasion of privacy through the public disclosure of the name of a rape victim.

Common law jurisdictions have generally been slow in recognising a separate tort of breach of privacy.<sup>44</sup> There is however, a recent trend towards some form of recognition of the right. This trend has been stimulated in part by media invasions of individual privacy and in part by the growing influence of modern human rights jurisprudence.

In Canada a common law tort broader in scope than that recognised thus far in New Zealand has been endorsed, in cases such as *Roth v Roth*.<sup>45</sup> Endorsement of this tort, through *Hunter v Southam Inc*,<sup>46</sup> *R v Dyment*<sup>47</sup> and *Godboul v Longueuil (City)*<sup>48</sup> has been based on the assertion that the Canadian Charter right to be free from unreasonable search and seizure amounts to an embodiment of the right to privacy.

<sup>38</sup> "Privacy, Photography and the Press" (1998) 111 Harv. L. Rev. 1086, 1087.

<sup>39</sup> Bedingfield (1992) 55 MLR 111; Anderson "The failure of American privacy law" in Markesinis (ed) *Protecting Privacy* (Oxford University Press, New York, 1999) 139-167.

<sup>40</sup> Anderson "The failure of American privacy law" in Markesinis (ed) *Protecting Privacy* (Oxford University Press, New York, 1999) 139, 140.

<sup>41</sup> *The Florida Star v B.J.F.* [1989] 491 U.S. 524.

<sup>42</sup> *Cox Broadcasting Corp. et al v Cohn* 420 U.S. 469.

<sup>43</sup> *Cox Broadcasting Corp. et al v Cohn*, above, 469 White J.

<sup>44</sup> Stephen Todd (ed) *The Law of Torts in New Zealand* (2 ed, Brookers, Wellington, 1997) 911.

<sup>45</sup> *Roth v Roth* (1991) 4 O.R. (2d) 317.

<sup>46</sup> *Hunter v Southam Inc* [1984] 2 SCR 145.

<sup>47</sup> *R v Dyment* [1988] 2 SCR 417.

<sup>48</sup> *Godboul v Longueuil (City)* [1997] 3 SCR 844.

In *Les Editions Vice-Versa Inc v Aubry and Canadian Broadcasting Corporation*,<sup>49</sup> the Supreme Court of Canada upheld a right to recover damages where the respondent's photograph, taken in a public place, was published in an arts magazine. The right to privacy guaranteed by section 5 of the Quebec Charter was strongly relied on. It was held that an infringement would arise as soon as the image was published without consent, provided the person was identified.<sup>50</sup>

Traditionally in Australia since *Victoria Park Racing and Recreation Grounds v Taylor*<sup>51</sup> it has been thought that there was no right to privacy. However *Church of Scientology v Woodward*<sup>52</sup> and more recently *ABC v Lenah Game Meats Pty Ltd*<sup>53</sup> have cast doubt on that position. In *Lenah* comments by Gleeson CJ<sup>54</sup> and in the joint judgment of Gummow and Hayne JJ<sup>55</sup> suggest that the High Court of Australia would give effect to a right of privacy similar to that protected by the New Zealand tort prior to *Hosking* through an extension of the breach of confidence action.

The English position is very similar to that of Australia, and has become particularly relevant in New Zealand post-*Hosking*. Traditionally it was thought that there was no common law tort protecting privacy. This was made very clear in *Kaye v Robertson*.<sup>56</sup> In 1996 Lord Hoffman reiterated in the House of Lords in *R v Brown*<sup>57</sup> that "English Common law does not know a general right of privacy."<sup>58</sup> However, the equitable breach of confidence action was extended to circumstances where no confidential relationship existed in *A-G v Guardian Newspapers (No 2)*.<sup>59</sup> The incorporation of the European Convention on Human Rights into domestic law by the Human Rights Act 1998 has acted as a catalyst for judges to give more overt recognition to privacy rights.

<sup>49</sup> *Les Editions Vice-Versa Inc v Aubry and Canadian Broadcasting Corporation* [1998] 1 SCR 591.

<sup>50</sup> *Hosking v Runtig* (11 February 2003) High Court Auckland CP 527/02, 34-35 Randerson J.

<sup>51</sup> *Victoria Park Racing and Recreation Grounds v Taylor* (1937) 58 CLR 479.

<sup>52</sup> *Church of Scientology v Woodward* (1982) 154 CLR 25.

<sup>53</sup> *ABC v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1.

<sup>54</sup> *ABC v Lenah Game Meats Pty Ltd*, above, 12 Gleeson CJ.

<sup>55</sup> *ABC v Lenah Game Meats Pty Ltd*, above, 32 Gummow and Hayne JJ.

<sup>56</sup> *Kaye v Robertson* [1991] FSR 62.

<sup>57</sup> *R v Brown* [1996] AC 543.

<sup>58</sup> *R v Brown*, above, 557 Lord Hoffman.

<sup>59</sup> *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109.

The most recent UK privacy cases, *Hellewell v Chief Constable of Derbyshire*,<sup>60</sup> *Douglas v Hello!*,<sup>61</sup> *Wainwright v Home Office*,<sup>62</sup> *A v B plc*<sup>63</sup> and *Campbell v MGM Ltd*,<sup>64</sup> all demonstrate a trend towards developing the action for breach of confidence to protect privacy interests.

By way of illustration of the application of this action, in the judgment of Lindsay J in *Douglas v Hello!*,<sup>65</sup> delivered on 11 April 2003, he found for the plaintiffs in breach of confidence. The case concerned a magazine publishing surreptitiously obtained photographs of the wedding of Michael Douglas and Catherine Zeta-Jones. His Lordship found that the photographic representation of the wedding reception had the necessary quality of confidence about it. The event was clearly private in character, and so the circumstances, therefore, imported an obligation of confidence owed not only by the photographer but also by the publishers who were prepared to pay well for the photographs.<sup>66</sup> As was made clear in the Court of Appeal decision, a duty in confidence may arise from the nature of the subject matter or from the circumstances, there is no longer reliance on a relationship.

*A v B*<sup>67</sup> is another example of the development in UK law. In this case, a prominent footballer had adulterous relationships with two women who then both sold their stories to a national newspaper. In order to prevent his wife from learning of the adultery, the claimant sought an interim injunction restraining the newspaper from publishing the stories. In the event, the interim injunction was not allowed. The case was addressed solely in terms of breach of confidence. Lord Woolf reiterated that "the need for the existence of a confidential relationship should not give rise to problems as to the law."<sup>68</sup> He also further stated that "if there is an intrusion in a situation where a person can reasonably expect his privacy to be respected then that intrusion will be capable of giving rise to liability for breach of confidence."<sup>69</sup>

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<sup>60</sup> *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804.

<sup>61</sup> *Douglas v Hello!* [2001] 2 All ER 289.

<sup>62</sup> *Wainwright v Home Office* [2002] 3 WLR 405.

<sup>63</sup> *A v B plc* [2002] 2 All ER 545.

<sup>64</sup> *Campbell v MGM Ltd* [2003] 1 All ER 224.

<sup>65</sup> *Douglas v Hello!* [2001] 2 All ER 289.

<sup>66</sup> *Hosking v Runting* (11 February 2003) High Court Auckland CP 527/02, 12 Randerson J.

<sup>67</sup> *A v B plc* [2002] 2 All ER 545.

<sup>68</sup> *A v B plc*, above, 554, Lord Woolf.

<sup>69</sup> *A v B plc*, above, 554, Lord Woolf.

In *Peck v The United Kingdom*<sup>70</sup> (*Peck*), the European Court of Human Rights expressed profound doubt of the efficacy of the United Kingdom action for breach of confidence. Mr Peck had been filmed in a public street by a surveillance camera operated by a local authority. He was in a depressed state and later attempted to commit suicide with a knife. The Council later disclosed photographs from the film of Mr Peck to news media organisations which published them without adequately concealing Mr Peck's face.<sup>71</sup> It was considered unlikely that his claim would have succeeded in breach of confidence. The High Court in *Hosking* however, notes that development since this case, such as that in *A v B*,<sup>72</sup> may render a different outcome.<sup>73</sup>

#### D *The High Court Decision in Hosking*

After a lengthy consideration of the authorities, legislative context and principles concerned, Randerson J concluded in *Hosking* that the Court would not recognise a tort of invasion of privacy which would provide a remedy for the public disclosure of photographs of the Hoskings' children taken while they were in a public place. His Honour effectively rejected an independent tort for the invasion of privacy in light of the New Zealand legislative context, developments in overseas jurisprudence, a preference for development of law by parliament, and the view that existing remedies are "likely to be sufficient to meet most claims to privacy based on the public disclosure of private information."<sup>74</sup> The avenue identified for the development of law concerning privacy rights is through an action for breach of confidence. This is in line with both Australian and British developments. His Honour concluded:<sup>75</sup>

I see no reason why our courts should not develop the action for breach of confidence to protect personal privacy through the public disclosure of private information where it is warranted. In doing so, it should be informed by the recent developments in the United Kingdom and elsewhere while taking into account New Zealand law and conditions.

Although, as outlined below, breach of confidence has traditionally been used in the context of some form of established relationship between parties, the Court noted the increasing flexibility of the action.

<sup>70</sup> *Peck v The United Kingdom* Application no. 44647/98, 28 January 2003.

<sup>71</sup> *Hosking v Runtig* (11 February 2003) High Court Auckland CP 527/02, 26, Randerson J.

<sup>72</sup> *A v B plc* [2002], above.

<sup>73</sup> *Hosking v Runtig*, above 28 Randerson J.

<sup>74</sup> *Hosking v Runtig*, above, 37 Randerson J.

<sup>75</sup> *Hosking v Runtig*, above, 50 Randerson J.

## E Breach of Confidence

The traditional equitable action of breach of confidence is based around the important commercial principle that "No person [shall be] permitted to divulge to the world information which he has received in confidence."<sup>76</sup>

The elements of the action were formulated in *Coco v AN Clark (Engineers) Ltd*<sup>77</sup> as follows:<sup>78</sup>

First, 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 unauthorised use of the information to the detriment of the party communicating it.

The detriment requirement has always been somewhat uncertain. Some statements of principle in the cases omit any mention of detriment,<sup>79</sup> while others include it. As Megarry J admits:<sup>80</sup>

I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could be fairly called a detriment to him, as when the confidential information shows him in a favourable light but gravely injures some relation or friend of his whom he wishes to protect... I wish to keep open the possibility of the true proposition being in that wider form.

In recent years, the English Courts have also relaxed the requirement that an action of breach of confidence can be successfully pleaded only where there exists a relationship between two or more persons where one party to that relationship conveys information in confidence to another. This relaxation was most significantly acknowledged in *A-G v Guardian Newspapers (No 2)*,<sup>81</sup> where the scope of the potential action was widened considerably. Justice Randerson notes in *Hosking* the willingness of Australian and United Kingdom authorities to find a duty of

<sup>76</sup> *Fraser v Evans* [1969] 1 QB 349, 361.

<sup>77</sup> *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.

<sup>78</sup> *Coco v AN Clark (Engineers) Ltd*, above, 47 Megarry J.

<sup>79</sup> *Coco v A. N. Clark (Engineering) Ltd*, above, 48, Megarry J.

<sup>80</sup> *Coco v A. N. Clark (Engineering) Ltd*, above, 48, Megarry J.

<sup>81</sup> *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109.

confidence arising from the nature of the material or from the manner in which it has been obtained.<sup>82</sup> The reformulated breach of confidence action has thus been extended to cases involving such indirect means of obtaining information such as telephone taping<sup>83</sup> and surreptitious photography.<sup>84</sup>

It has been contended that actions in breach of confidence or through a stand-alone tort of breach of privacy may realistically be distinguished in name only. Justice Laws in *Hellewell v Chief Constable of Derbyshire*<sup>85</sup> was prompted to comment:

...the law [will] protect what might reasonably be called a right of privacy, although the name accorded to the action would be breach of confidence.

Similarly Sedley LJ asserted in *Douglas v Hello! Ltd*:<sup>86</sup>

[The plaintiffs] have a right of privacy which English law will today recognise and, where appropriate protect. To say this is in my belief to say little, save by way of a label, that our courts have not said already over the years.

There is however, significant academic thought which disputes the existence of only cosmetic differences between the claims.<sup>87</sup>

In terms of definition, it has been posited that breach of confidence, at its most conservative, can adequately accommodate only one aspect of the developing tort of breach of privacy – the public disclosure of private facts. The doctrine will not always provide a remedy where there is a mere pure intrusion into one's privacy, without the gathering of any actual information which may be disclosed to others. Such a shortcoming of this form of privacy protection may be evidenced in *Peck*<sup>88</sup> As outlined above, the European Court of Human Rights

<sup>82</sup> *Hosking v Runting* (11 February 2003) High Court Auckland CP 527/02, 26, Randerson J; See Professor Burrows and Ursula Cheers *Media Law in New Zealand* (4 ed, Brookers, Wellington, 1999) 157.

<sup>83</sup> *Francome v Mirror Group Newspapers* [1984] 2 All ER 408.

<sup>84</sup> *Shelley Films Ltd v Rex Features Ltd* [1994] 2 EMLR 134; Bridget K Murphy "Developments in the Law of Invasion of Privacy in New Zealand and England: *L v G, A v B*" (2002) 9 AULR 1031, 1037.

<sup>85</sup> *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, 807 Laws J.

<sup>86</sup> *Douglas v Hello!* [2001] 2 WLR 992, 1001, Lord Justice Sedley.

<sup>87</sup> See Murphy, above.

<sup>88</sup> *Peck v The United Kingdom* Application no. 44647/98, 28 January 2003.



expressed profound doubt of the efficacy of the United Kingdom action for breach of confidence. It was concluded.<sup>89</sup>

[T]he Court is not persuaded by the Government's argument that a finding by this Court that the applicant had an "expectation of privacy" would mean that the elements of the breach of confidence action were established. The Court finds it unlikely that the domestic courts would have accepted at the relevant time that the images had the "necessary quality of confidence" about them or that the information was "imparted in circumstances importing an obligation of confidence."

*Hosking* also notes that the United Kingdom case of *Campbell v MGN Ltd*<sup>90</sup> may identify another significant gap in the law in this respect. The case highlights the distinction between the public disclosure of confidential information and an intrusion into privacy which does not involve the disclosure of private facts.<sup>91</sup> Once again, an action in breach of confidence would not be successful.

Upon the analysis, there is supposedly an absence of difference in the New Zealand context. *Hosking* has only moved us from the narrow privacy protection of public disclosure of private facts to breach of confidence. Therefore, is the difference between breach of confidence and public disclosure of private fact one in name only?

Fenwick and Phillipson, in their article "Confidence and Privacy: A Re-examination"<sup>92</sup> note that the redefinition of breach of confidence sits uneasily with the traditional conception of the doctrine because of the juridical basis upon which the action rests. Breach of confidence is founded upon the integrity of confidential relationships as a matter of equity.<sup>93</sup> Interests lie in encouraging candour in (particularly commercial) relationships, enforcing undertakings of confidentiality, and perhaps to a lesser extent, recognising an individual's autonomy to determine who should learn about them.<sup>94</sup> In contrast, only the autonomy interest underlies a privacy action. The focus is on the information itself and its control, not the relationship through which the information has come to hand.

<sup>89</sup> *Peck v The United Kingdom*, above.

<sup>90</sup> *Campbell v MGN Ltd* [2003] 2 WLR 80.

<sup>91</sup> *Hosking v Runtig* (11 February 2003) High Court Auckland CP 527/02, 26, Randerson J.

<sup>92</sup> Fenwick and Phillipson "Confidence and Privacy: A Re-examination" (1996) 55(3) Cambridge LJ 447.

<sup>93</sup> Bridget K Murphy "Developments in the Law of Invasion of Privacy in New Zealand and England: *L v G, A v B*" (2002) 9 AULR 1031, 1040.

<sup>94</sup> Daniel Laster "Commonalities between Breach of Confidence and Privacy" (1990) 14 NZULR 144.

Despite the difference in the origins of the actions, significant development of breach of confidence has been the result of recent case law. A relaxation of the requirement of detriment and of a relationship of confidence between the parties has in practice resulted in an action with potentially enormous coverage. The standard articulated in *A v B*<sup>95</sup> is simply that the plaintiff has a reasonable expectation of privacy in the given circumstances. Such an enlargement of the action of breach of confidence may have severe consequences for the right to freedom of expression, despite what the origins of the action may suggest. Breach of confidence and the right to freedom of expression will be addressed later in this paper.

### III FREEDOM OF EXPRESSION

Leading counsel for the appellants began his address to five Court of Appeal judges in *Hosking* on 12 August 2003, with the following claim: "This, your Honours, is not a freedom of expression case."<sup>96</sup>

I submit that such a misguided statement is wholly characteristic of where much legal analysis in New Zealand breach of privacy cases has been lacking. Any such case necessarily entails close consideration of the impact of the exercise of any privacy right on the right to freedom of expression. *Hosking* could not *not* be a freedom of expression case.

The following analysis will address the role the right to freedom of expression ought to play in such analysis. One must address the applicability of the NZBORA, the legislative and common law landscape in support of the right to freedom of expression, the potential danger of judicial legislation, and how rights ought to be balanced in cases as they arise.

#### A *The Bill of Rights Act 1990*

Since passage of the NZBORA, the starting point for a discussion of freedom of expression in New Zealand is section 14 of that Act, which provides as follows:

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<sup>95</sup> *A v B plc* [2002] 2 All ER 545.

<sup>96</sup> *Hosking v Runting* in the Court of Appeal, 12 August 2003.

#### 14 Freedom of expression

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

As previously noted, the right to freedom of expression was described in the White Paper to the NZBORA as of “central importance in a democratic state.”<sup>97</sup> It is also of key note in the ICCPR (art 19) and the Universal Declaration of Human Rights (art 19).

Section 14 was drafted to cover the various forms expression might take and the various forums in which the freedom might be exercised, including written and oral communications, newspapers and electronic media, and public and private gatherings. Indeed, in *Moonen v Film and Literature Board of Review*<sup>98</sup> (*Moonen*) the Court of Appeal described the right as being “as wide as human thought and expression.”<sup>99</sup>

The White Paper to the NZBORA<sup>100</sup> outlines why it is that this right is considered of such “fundamental importance”.<sup>101</sup> It discusses four “grand purposes” of the right: individual fulfilment through self expression; democratic self government; advancement of knowledge and the revelation of truth; and the achievement of a more adaptable and hence a more stable community.<sup>102</sup>

Section 3 of the NZBORA establishes those parties to whom the Act applies:

- 3. Application** – This Bill of Rights applies 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.

<sup>97</sup> New Zealand Bill of Rights Act 1990 White Paper (1985) 79.

<sup>98</sup> *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9.

<sup>99</sup> *Moonen v Film and Literature Board of Review*, above, 9 Tipping J.

<sup>100</sup> New Zealand Bill of Rights Act 1990 White Paper, above, 79.

<sup>101</sup> *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 WLR 848, 865 Lord Denning.

<sup>102</sup> New Zealand Bill of Rights Act 1990 White Paper, above, 79.

The New Zealand courts have repeatedly recognised that, even where Governmental action is not involved, the values expressed in the NZBORA are of fundamental importance to the development of the common law. Elias J observed in *Lange v Atkinson*.<sup>103</sup>

In my view, the New Zealand Bill of Rights Act protections are to be given effect by the Court in applying the common law. ... The application of the Act to the common law seems to me to follow from the language of section 3 which referred to acts of the judicial branch of the Government of New Zealand... The New Zealand Bill of Rights Act 1990 is important contemporary legislation which is directly relevant to the policies served by the common law.

The application of the NZBORA to the common law may potentially be seen in two different ways. One view is that through its express mention in section 3(a) of the Act, the judicial branch is obliged to develop the common law so as to ensure it is consistent with the Bill of Rights. This is the preferred interpretation of such academics as Andrew Butler,<sup>104</sup> who cite support from numerous cases including *Baigent's Case*<sup>105</sup> and *Lange v Atkinson*<sup>106</sup>, as quoted above. An opposing view is however expressed by Paul Rishworth.<sup>107</sup> He views the NZBORA's influence on the common law as resting on a more fundamental proposition. Where there is an inconsistency between the common law and legislation, it is orthodox that the common law must give way. Therefore legislation ought also to have an influence on the development of the common law. "This is the paradigm of common law development; it is axiomatic that it applies in the case of a quasi-constitutional instrument such as the Bill of Rights."<sup>108</sup> A more thorough exploration of the importance of a NZBORA-consistent common law is provided later in this paper.

## **B The Legislative and Common Law Landscape**

It has already been noted that unlike its protection of freedom of expression as a guaranteed right, the NZBORA contains no express protection of privacy. In addition, the discrete areas of privacy protection that Parliament has seen fit to enact would lend support to the

<sup>103</sup> *Lange v Atkinson* [1998] 2 NZLR 22, 46, Elias J.

<sup>104</sup> A. Butler "The New Zealand Bill of Rights and Private Common Law Litigation" [1991] NZLJ 261.

<sup>105</sup> *Simpson v Attorney General (Baigent's case)* [1994] 3 NZLR 667.

<sup>106</sup> *Lange v Atkinson* [1998] 3 NZLR 424.

<sup>107</sup> Paul Rishworth et al. *The New Zealand Bill of Rights* (Oxford University Press, United Kingdom, 2003) 100.

<sup>108</sup> Rishworth, above, 101.

argument that Parliament's intent is not to have a fully fledged right to privacy in operation as it would be an affront to the important right to freedom of expression.

The Privacy Act 1993 is significant in indicating the views of Parliament. It does not contain a general right of privacy akin to the rights that would be conferred by a tort of privacy. Parliament also made the deliberate decision, after careful consideration, to exempt the *news medium in its news activities* from the Act entirely.<sup>109</sup> It struck what it considered the appropriate balance between the competing rights.

In moving the introduction of the Bill into the House, the Hon. D. A. M. Graham, the Minister of Justice, noted:<sup>110</sup>

"... This Bill will have far-reaching consequences. It attempts to strike a balance between the freedom to use information and the rights of individuals to their privacy"

It also appears that during the preparation of the Bill a proposal was put to the Minister of Justice, the Rt. Hon. Geoffrey Palmer, for a blanket statutory tort. That was rejected by the Minister of Justice at the time.<sup>111</sup> However, it must be noted that *Hobson v Harding*<sup>112</sup> considered whether the Privacy Act expressly precluded the development of a tort of privacy and concluded that it did not. The Act does however point towards the intentions of Parliament in this area.

Parliament's preference for discrete interventions is also noted and commented on by the Law Commission in its preliminary discussion paper, *Protecting Personal Information From Disclosure*.<sup>113</sup> The Court of Appeal in *Hosking* clearly notes and prefers the actions of Parliament in assuming the role of legislating and not the courts.<sup>114</sup>

It is also particularly important to note the treatment of the news media in New Zealand legislation regarding privacy. The role of the media in enabling the right to freedom of

<sup>109</sup> Privacy Act 1993 s 2(1).

<sup>110</sup> 3850 NZPD 3851.

<sup>111</sup> Referred to in the Law Commission Preliminary Paper 49, *Protecting Personal Information From Disclosure*, February 2002.

<sup>112</sup> (1994) 1 HRNZ 342.

<sup>113</sup> Law Commission Preliminary Paper, *Protecting Personal Information From Disclosure*, February 2002.

<sup>114</sup> *Hosking v Runtig* (11 February 2003) High Court Auckland CP 527/02, 56-57 Randerson J.

expression to be effectively exercised is fundamental. The mere fact that it is free speech in trade ought not to denigrate the right in any way. This means that the media need not only be protected against extensive legislating on the part of the courts but needs to be able to accurately predict what can be published so that freedom of speech is not chilled and that interlocutory injunctions are not routinely granted when privacy rights are asserted because of uncertainty about the nature of the tort.

Interestingly, ACP Media Limited went as far as to submit in the alternative in the High Court that the Courts should not develop a tort of privacy that would affect the news media in its news gathering activities.<sup>115</sup>

This submission relied on the current "legislative landscape" in New Zealand. It was argued that these points apply with possibly even more force in relation to the news media. As Tipping J said in *Lange v Atkinson*,<sup>116</sup> in considering whether a principle of reasonableness could be introduced into defamation:

...while the Parliamentary decision not to enact such a defence does not inhibit a proper common law development of qualified privilege, such a development could hardly include ingredients which Parliament has decided not to adopt in a parallel context.

ACP contended that this would indeed be the position if a tort of privacy was held to impose obligations on the defendants.<sup>117</sup> The Privacy Act imposes obligations which mirror at least some of those a tort of privacy would be likely to impose. As noted above, Parliament has made a deliberate decision to exempt the news media from these obligations when it is engaged in news activities.

The Privacy Information Bill 1991 when introduced, covered the news media. In submissions to the Justice and Law Reform Committee, the Department of Justice took the view that the inclusion of the media in the Bill was compatible with the right to freedom of expression under section 14 of the NZBORA.<sup>118</sup> However, in the reporting back of the Bill to the House,

<sup>115</sup> Submissions on behalf of Intervener ACP Media Limited in *Hosking v Runting* (11 February 2003) High Court Auckland CP 527/02, 26.

<sup>116</sup> *Lange v Atkinson* [1998] 3 NZLR 424, 475 Tipping J.

<sup>117</sup> Submissions on behalf of Intervener ACP Media Limited, above, 28.

<sup>118</sup> Longworth and McBride *The Privacy Act – A Guide* (GP Publications, Wellington, 1994).

the Committee noted that the press was in a special category as far as the print media was concerned and recommended that the media not be included within the Bill.<sup>119</sup>

Markesinis notes the argument that a right to privacy has the potential to inhibit investigative journalism. Public control of central and local government would be jeopardised.<sup>120</sup> He cites a leading article of *The Times* on 28 November 1989, in which a forceful argument was made on behalf of the news media:

Many a crooked alderman would sleep easier in his bed, knowing the press was barred from making the enquiries that might bring the disgrace he deserved... The rights of journalists – to ask questions, state facts, express opinions – are in essence no different from the rights of the citizenry at large. They rest on an identical perception of what it means to be free. Held inalienably by journalists and non-journalists alike, they constitute the right to freedom of speech itself. If that is curtailed, it is curtailed for everyone, and that would be to the detriment of democracy.

The point is a pertinent one, which ought to be adequately addressed in the New Zealand courts.

The common law's awareness of the importance of freedom of expression is also evident through rules regarding prior restraint of freedom of expression. Rules regarding prior restraint in a defamation context are over 100 years old and serve to uphold the right to freedom of expression under the law. In *A-G v British Broadcasting Corporation*<sup>121</sup> Lord Scarman placed the test for prior restraint of free expression at a very high level:

[T]he prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference of freedom of speech and should only be ordered where there is a substantial risk of grave injustice.

In essence, circumstances must be quite exceptional, for instance it must be clear that an alleged defamation is indeed untrue and that a right has been infringed, in order to warrant an injunction rather than leaving a complainant with a remedy in damages.<sup>122</sup> President Richardson in the Court of Appeal case of *TV3 Network Services Ltd v Fahey*<sup>123</sup> stated that “any prior

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<sup>119</sup> Longworth and McBride, above.

<sup>120</sup> Markesinis “Our Patchy Law of Privacy – Time to do Something about It” *Modern Law Review*, 807.

<sup>121</sup> *A-G v British Broadcasting Corporation* [1981] AC 303, 362 Lord Scarman.

<sup>122</sup> William Akel “The Rush to Privacy” (2000) NZLJ 263.

<sup>123</sup> *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129.

restraint of free expression requires passing a much higher threshold than the arguable case standard."<sup>124</sup>

It is concerning that little attention has been paid to such an established part of the common law, designed to ensure protection of freedom of expression. There is concern on two levels. First, the rule is evidence of a clear emphasis on freedom of expression throughout legislation and the common law which has not been given adequate weight in New Zealand privacy analysis. Secondly, it poses a difficulty for the courts when a conflict between privacy and the operation of the prior restraint rule arises. Plaintiffs would be encouraged to make a claim in breach of privacy even in a case primarily concerned with defamation, so as to easily be awarded an injunction rather than having to pass a much higher threshold standard or have recourse only to damages. The closing oral submissions of the appellant in *Hosking* in the Court of Appeal on 14 August 2003 purported to respond to this very point.<sup>125</sup> Unfortunately, counsel had little response to make. It was simply noted that no conflict arose in the case at hand and that when such a conflict did arise it would have to be dealt with by the court.

### *C Breach of Confidence and the Right to Freedom of Expression*

There is much academic debate as to the comparative merit of the protection of privacy through actions of breach of confidence or through the development of an independent tort. The corollary of such questioning, which I wish to address, is the comparative effect of such actions on the right to freedom of expression.

Earlier in this paper, the differing foundations of breach of privacy and breach of confidence were outlined in some detail. Whereas a privacy action focuses on the nature of the information itself, breach of confidence is traditionally based on the relationship through which the information has come to hand. Such opposing juridical bases to the actions raise very different concerns regarding the right to freedom of expression.

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<sup>124</sup> *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129, 132 Richardson P.

<sup>125</sup> *Hosking v Runting* in the Court of Appeal, 14 August 2003.



The law has always treated with deep suspicion any claims to property rights in information, and with good reason. Such claims go to the very heart of the value of the right to freedom of expression in a liberal society. We value the freedom of individuals to have access to knowledge, to act in order to discover facts, to disseminate without inhibition such information to others, and we rely on the rigor of a free press as a cornerstone of democracy. Property rights in information offend the very basis of investigative journalism and restrict the circulation of ideas, developments and opinions in society.

Intellectual property law serves as evidence of the conviction of the law in this regard. Through copyright, the law allows the protection of the *expression* of ideas, but not the ownership of the ideas themselves. The only exception may be found in statute, through the registration of patents, conferring a statutory monopoly on the use of information subject to substantial qualifications. The property right is limited in time and requires full disclosure of the information. Indeed, trade secrets are usually only able to be *indirectly* protected through a breach of confidence action.

Additionally, an analogy can be drawn between relationships of confidence and the law of obligations. The law is reluctant to impose positive duties on citizens, without voluntary assumption. One chooses to partake in a relationship in which instances of confidence may arise, and thus ought to be bound to maintain them. The right to freedom of expression is voluntarily foregone, in return for the perceived benefits of the relationship. No such deliberate and informed waiver of the right exists in the case of an action for breach of privacy. Any encroachment on the right to freedom of expression is thus much more difficult to justify.

A claim which asserts a quasi-property right in information, and imposes involuntarily assumed obligations, is of more severe consequence to freedom of expression than one which at its origins is concerned with the relationship between two parties, and the assurances which ought to accompany it.

However, as previously introduced, actions for breach of confidence have undergone substantial reshaping in modern case law, largely abandoning reliance on a relationship and

paying little attention to detriment. Breach of confidence, as articulated by Lord Woolf in *A v B*, is in a form almost unrecognisable to that of its former self:<sup>126</sup>

The need for the existence of a confidential relationship should not give rise to problems as to the law ... A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected... The range of situations in which protection can be provided is therefore extensive.

The extent of the growth of the action is evidenced by the fact that although the European Court of Human rights considered that the elements of the breach of confidence action were not satisfied in the factual scenario of *Peck*,<sup>127</sup> this conclusion may now be inaccurate. A reasonable expectation of privacy will suffice to establish a claim. Indeed, Randerson J notes:<sup>128</sup>

It may be doubted whether the courts of the United Kingdom would now come to the same conclusion in Mr Peck's case. Although he was undoubtedly filmed in a public place, the overall circumstances might well persuade a domestic court that he had a reasonable expectation of privacy and that a duty of confidence arose on the part of the local authority not to publicly disclose the relevant material without taking appropriate steps to mask the claimant's identity.

There is some evidence to suggest that this may not be the express intention of the UK courts. The English Court of Appeal in *Wainwright v Home Office*,<sup>129</sup> in fact purported to limit claims by use of actions in breach of confidence as opposed to a general tort of breach of privacy. However, the 'reasonable expectation of privacy' test of *A v B* is in practice very wide and may inadvertently allow in factual situations which would not have traditionally qualified as private fact. The Court's reference above to a potential difference in the conclusion reached with regard to *Peck* is evidence of this enlargement.

The result of such stretching of the action is alarming in the New Zealand context. It would appear that by *Hosking*, New Zealand has moved from a narrowly defined tort of privacy,

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<sup>126</sup> *A v B plc* [2002] 2 All ER 545, 554 Lord Woolf.

<sup>127</sup> *Peck v The United Kingdom* Application no. 44647/98, 28 January 2003.

<sup>128</sup> *Hosking v Runtig* (11 February 2003) High Court Auckland CP 527/02, 28-29 Randerson J.

<sup>129</sup> *Wainwright v Home Office* [2002] 3 WLR 405.

namely the public disclosure of private facts, to an almost all encompassing tort of breach of privacy.

By way of illustration of its extent, let us consider examples of factual scenarios. I submit that it is logically impossible to conceive of a case of public disclosure of private fact which would not also be covered by a swollen breach of confidence. Anything that the courts were willing to classify as a private fact, is something about which one would have a reasonable expectation of privacy. Thus *P* would have succeeded under breach of confidence as he/she had a reasonable expectation of privacy regarding his/her past psychiatric difficulties. *L* also had a reasonable expectation of privacy regarding the photographs taken of her genitals.

In the reverse, one can foresee instances which are clearly not public disclosure of private fact, now falling within the realm of breach of confidence. *Peck*<sup>130</sup> is the prime example of such an instance, where there was an intrusion into a person's privacy, without the gathering of any actual information which may be disclosed to others. Cases of surreptitiously obtained photographs, not taken in public places, which do not obtain any piece of information, or at least no private information, are good examples of this species of cases.

I submit that this is a disturbing development in New Zealand privacy law for the right to freedom of expression. Far from narrowing claims by adopting an already existing remedy, the net for privacy actions has been cast wider. This is particularly concerning given the lack of context for such an expansion. While, as the court in *Hosking* notes,<sup>131</sup> New Zealand is a party to the ICCPR which protects arbitrary or unlawful attacks on privacy, there is no statutorily protected right of privacy. The legislature has also indicated a piecemeal, selective approach to privacy protection. In contrast, an express right of privacy in UK law, through the Human Rights Act 1998, was the very motivation for expanding breach of confidence:<sup>132</sup>

Article 8 [of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950] operates so as to extend the areas in which an action for breach of confidence can provide protection for privacy. It requires a generous approach to the situations in which privacy can be protected.

<sup>130</sup> *Peck v The United Kingdom*, above.

<sup>131</sup> *Hosking v Runting* (11 February 2003) High Court Auckland CP 527/02, 50 Randerson J.

<sup>132</sup> *A v B plc* [2002] 2 All ER 545, 550 Lord Woolf.

A swollen breach of confidence will be a significant encroachment on the section 14 NZBORA right to freedom of expression in New Zealand. A greater challenge will be posed to the right, as a greater number of fact situations will qualify for relief. Whether this is justified under a section 5 of the NZBORA is a question yet to be addressed in the New Zealand courts. It also raises valid concerns about the rights consistency of the common law and its relationship with the NZBORA. This is a consideration which this paper will now turn to.

#### *D Judicial Legislation*

Judges play an important role in both applying and developing the law. Cases frequently arise in the courts containing factual scenarios which the courts have not been faced with before. Sometimes such cases will be easily resolved by drawing analogies with past case law whereas in other situations whole new rules will need to be articulated.

A particular problem is encountered when such judicial legislation potentially conflicts with statutorily protected rights. Whereas the legislature is somewhat restrained by section 7 of the NZBORA, which makes it a requirement for the Attorney-General to report to Parliament where a Bill appears to be inconsistent with the same,<sup>133</sup> the judiciary is left outside of such a process.

To what extent is the common law required to be consistent with the NZBORA? The White Paper commentary said the NZBORA would apply to "relevant parts of the common law" because it is "formulated by the courts" and is "a result of state action."<sup>134</sup> As has been observed above, many cases have now adopted<sup>135</sup> the view that the common law is thereby rendered subject to the Bill of Rights. Paul Rishworth provides extensive discussion of this in his text, *The New Zealand Bill of Rights Act*.<sup>136</sup> He notes that while the NZBORA cannot be held to apply to "wholly private conduct", an element of indirect horizontality is not only inevitable but

<sup>133</sup> Noted as significant by Judge Moran in *Police v Hall* [2001] DCR 239 at 249.

<sup>134</sup> Paul Rishworth et al. *The New Zealand Bill of Rights* (Oxford University Press, United Kingdom, 2003) 102.

<sup>135</sup> See *R v H* [1994] 2 NZLR 143; *Duff v Communicado Ltd* [1996] 2 NZLR 89.

<sup>136</sup> Rishworth, above.

desirable under a bill of rights.<sup>137</sup> There is intense debate as to what the extent of such horizontality ought to be. The NZBORA was, in principle, designed to regulate the actions of the state towards private citizens. Rishworth records that in cases<sup>138</sup> concerning proceedings for injunctions against private persons or bodies to restrain expression, the NZBORA has been invoked without question. The cases indeed have a public element, in that what is at stake is the public's right to know. As such, it is appropriate that the NZBORA guides judicial discretion when limits are sought to be imposed by private citizens invoking the common law.<sup>139</sup>

Aside from the existence of a 'public element', legal justification for such application of the NZBORA may exist on two main grounds, outlined previously. Either one views section 3(a) as expressly binding the judiciary to ensure common law consistency with the NZBORA, or application of the doctrine of parliamentary supremacy and basic common law method requires the influence of the NZBORA.

The question is then to what extent the common law should be created or altered to reflect statutorily protected rights. Rishworth concludes that this should be an *informative* process, whereby a bill of rights can and ought to be invoked in common law adjudication as an interpretive aid: "Judges considering common law do so within the paradigm of common law reasoning, and in light of all principles and values that they find persuasive, including (when relevant) those located in the Bill of Rights."<sup>140</sup>

Such an approach appears very reasonable and indeed obvious for the court. This author only fears that such analysis, in practice, leads to only token regard being given to the NZBORA. This is a concern, when a thorough *Moonen* analysis may in fact require quite a different conclusion.

### *E A Moonen Analysis*

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<sup>137</sup> Rishworth, above, 104.

<sup>138</sup> See *Attorney-General for England and Wales v Television NZ Ltd* CA 274/98, 2 December 1998.

<sup>139</sup> Rishworth, above, 106.

<sup>140</sup> Rishworth, above, 107.

In this section of the paper, I first outline the role of sections 4, 5 and 6 of the NZBORA and the assistance provided by the Court of Appeal decision in *Moonen*. I also outline the attention paid to the right to freedom of expression in New Zealand privacy cases to date. *Moonen* is then applied to the newly formulated breach of confidence, using previous factual scenarios. It is important to note the impact of the reverse onus demanded by a rights-centred approach, and also how the various parts of the *Moonen* test can provide guidance to the court in a privacy case. Finally, the section concludes with specific recommendations as to how protection of privacy through breach of confidence can gain a greater degree of consistency with the right to freedom of expression.

### 1 *Moonen*

As with all rights in the NZBORA, the right to freedom of expression is not absolute. There are times when other values are seen as prevailing.<sup>141</sup> Indeed, this is recognised to varying extents in all jurisdictions. Even the origins of the right in New Zealand law, namely the Universal Declaration of Human Rights and the ICCPR, envisage limits. In the NZBORA context, inconsistent 'enactments' will still prevail by dint of section 4 of the Act. However, the idea of reasonable limitations is reflected in section 5, and its interaction with sections 4 and 6:

By section 4, a Court shall not hold any provision of any enactment to be in any way invalid or ineffective, or decline to apply any provision thereof by reason only that the provision is inconsistent with any provision of the Bill of Rights.

By section 5, (which is subject to section 4) the protected rights and freedoms may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

By section 6, where an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred.

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<sup>141</sup> *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9 (CA).

For guidance on the approach to, and application of these sections one must refer to the Court of Appeal decision in *Moonen*.

## 2 Case Law

Prior to *Hosking* there had been very little analysis of the role that freedom of expression ought to play in privacy cases. While it must be acknowledged that some cases were pre-NZBORA, even prior to enactment, freedom of expression was recognised as an important right by the courts.<sup>142</sup> Due consideration of the right to freedom of expression has however been notably lacking in privacy cases to date.

*Tucker*<sup>143</sup> was one such case heard before the passage of the New Zealand Bill of Rights Act 1990, but in deciding whether, in the interests of overall justice, the injunction should continue, the Court noted in a cursory manner the importance of the right of freedom of expression.<sup>144</sup> It was stated that while there was a degree of risk to the plaintiff's life and health, this had to be balanced against the defendant's right to publish and the public's right to information.<sup>145</sup> No further analysis on the point occurred.

Gallen J went further in *Bradley v Wingnut Films Ltd*<sup>146</sup> stating:

I note ... that there is a constant need to bear in mind that the rights and concerns of the individual must be balanced against the significance in a free country of freedom of expression. I note also the difficulty in formulating bounds which will ensure that both concerns are appropriately recognised.

Once again, other than basic recognition, the right was not fully engaged with.

In *P v D*,<sup>147</sup> I submit that it was not sufficient to simply state, as Nicholson J did, that the section 14 right was "subject not only to limitations such as indecency and defamation, but also

<sup>142</sup> See *Solicitor-General v Radio Avon Ltd and Another* [1978] 1 NZLR 225, 230.

<sup>143</sup> *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716, 719.

<sup>144</sup> Rosemary Tobin "Invasion of Privacy" (2000) NZLJ 216.

<sup>145</sup> *Tucker v News Media Ownership Ltd*, above, 719.

<sup>146</sup> *Bradley v Wingnut Films Ltd* [1993] 1 NZL 415, 516 Gallen J.

<sup>147</sup> *P v D* [2000] 2 NZLR 591.

to rights of privacy".<sup>148</sup> The Judge was required to perform the appropriate legal analysis in order to determine whether such limitation was indeed warranted.<sup>149</sup> After clarifying the four elements of the tort, his Honour decided that he had provided "the appropriate balance for deciding between the right of freedom of expression and the right of privacy in cases of public disclosure of private facts."<sup>150</sup>

*L v G*<sup>151</sup> simply clarifies the test in *P v D*,<sup>152</sup> and recognises the right to freedom of expression and the corresponding right of the media to publish information. The Court also notes that the right is not absolute and cites the section 5 allowance for "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>153</sup> There is however, no actual section 5 analysis undertaken.

I submit that a *Moonen* analysis is vital in the context of claims of breach of privacy. As Randerson J in *Hosking* notes, where any limitations are proposed to the NZBORA, either by statute or through development of the common law, the approach adopted should reflect the principles established by the Court of Appeal in *Moonen*.<sup>154</sup> However, his Honour then simply repeats the requirements of *Moonen* and concludes: "The development of the law of confidence would need to take these matters into account."<sup>155</sup>

A further point must be noted about the acknowledgment of *Moonen* in the High Court in *Hosking*. First, it is noteworthy that Randerson J acknowledges the applicability of the *Moonen* test to limitations to rights presented by statute or by development of the common law.<sup>156</sup> *Moonen* itself is framed in only legislative language. It is indeed logical that the common law counts as 'law' for purposes of establishing limits upon rights. It has been noted by academics that if it were otherwise, the NZBORA could not be invoked to influence the development of the common law, since the rights and freedoms it protects would have to be

<sup>148</sup> *P v D*, above, 599 Nicholson J.

<sup>149</sup> Rosemary Tobin "Invasion of Privacy" (2000) NZLJ 216.

<sup>150</sup> *P v D*, above, 603.

<sup>151</sup> *L v G* [2002] DCR 234.

<sup>152</sup> *P v D* [2000] 2 NZLR 591.

<sup>153</sup> *L v G*, above, 244 Abbott J

<sup>154</sup> *Hosking v Runtig* (11 February 2003) High Court Auckland CP 527/02, 53 Randerson J.

<sup>155</sup> *Hosking v Runtig*, above, 53.

<sup>156</sup> *Hosking v Runtig*, above, 53.



applied in their absolute form.<sup>157</sup> I would simply add that the *Moonen* test must become of even greater importance in the common law context. Such recognition on the part of Randerson J ought to be applauded.

### 3 Application of the Moonen Test

Having established that the common law and thus a tort of privacy, in whatever form it may take, must allow for consideration of the NZBORA, it must be shown that there is a limit on a protected right before *Moonen* becomes relevant.

The New Zealand Court of Appeal has indicated a preference for the generous interpretation of rights. The view of Lord Wilberforce in *Minister of Home Affairs v Fisher*<sup>158</sup> was approved by Cooke P in *Flickinger v Crown Colony of Hong Kong*:<sup>159</sup> bills of rights require a “generous” interpretation, “suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.”<sup>160</sup>

Such a generous interpretation will mean that it is usually simple to establish a *prima facie* limit on a right. This is particularly so in the case of freedom of expression, where there is no in-built ‘reasonableness’ requirement which may dismiss any claim of limitation of the right at an earlier stage of analysis.<sup>161</sup> Upon consideration of a right to privacy, a conflict with the NZBORA section 14 right to freedom of expression will usually exist. Previous cases have involved situations in which a plaintiff’s claim to protect personal facts or their private realm has conflicted with the defendant’s right to freely publish and disseminate such information. It is of course conceivable, that a plaintiff may suffer “invasion of privacy”, the second of Prosser’s four varieties of the tort, without such invasion ever being “expressed.” An mere invasion may thus not involve freedom of expression at all. The right would be irrelevant to a mere ‘peeping tom.’

<sup>157</sup> Paul Rishworth et al. *The New Zealand Bill of Rights* (Oxford University Press, United Kingdom, 2003) 175.

<sup>158</sup> *Minister of Home Affairs v Fisher* [1980] AC 319, 328-9.

<sup>159</sup> *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439.

<sup>160</sup> *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439, 440.

<sup>161</sup> This may be contrasted with section 21 of the NZBORA: unreasonable search and seizure.

In past cases, any analysis of rights or interests in competition with a right to privacy have been dealt with through "public interest" considerations. As is noted in *L v G*,<sup>162</sup> whether legitimate public interest is a defence to a claim for breach of privacy or whether lack of sufficient public interest is an ingredient of the cause of action was not made clear in previous judgments. Breach of confidence actions have also traditionally had a "public interest" defence available. However, a "public interest" defence will not suffice in a *Moonen* environment. *L v G* provides us with an example of how this factor has been addressed. The appropriate inquiry has been:<sup>163</sup>

Whether there is sufficient public interest in the disclosure of the private information in question to outweigh the right to privacy of the person to whom the information relates, in which respect whether that person is a public figure would be a relevant factor.

In marked contrast, *Moonen* begins with the right purported to be limited by the statutory or common law incursion. The starting point would thus be the right to freedom of expression and the courts would assume the allowance of publication of a person's private facts. The question would then be whether a right to privacy, through a claim in breach of confidence, imposes only such reasonable limits as can be demonstrably justified in a free and democratic society. The onus is thus reversed from that of the classic "public interest" defence. As was stated by Lord Woolf in *A v B*: "Even when there is no public interest in a particular publication, interference with freedom of expression has to be justified."<sup>164</sup> The value that is held paramount is the right to freedom of expression itself and the focus is not on establishing a contrary right and then using freedom of expression as a token means of defence. It is incumbent on the courts to provide a more reasoned basis for the invocation of privacy protection, and to ensure that the burden it establishes on the right to freedom of expression is kept to a minimum.<sup>165</sup>

Thus, if in a given situation there is a *prima facie* limit on the right to freedom of expression, one must address section 5 of the NZBORA and examine whether the limit is reasonable and demonstrably justified in a free and democratic society.

<sup>162</sup> *L v G* [2002] DCR 234, 245 Abbott J.

<sup>163</sup> *L v G* [2002] DCR 234, 245 Abbott J.

<sup>164</sup> *A v B plc* [2002] 2 All ER 545, 553 Lord Woolf.

<sup>165</sup> New Zealand Law Society seminar, *The Bill of Rights – Getting the Basics Right*, Professor Huscroft.

The *Moonen* test, regarding section 5, contains four basic steps:

- (1) identification of the importance and significance of the objective of the law;
- (2) reasonable proportionality between the objective and the limit;
- (3) rational connection between the limit and the objective; and
- (4) as little interference with the right as possible.

In the remainder of this section, I conduct a *Moonen* analysis of the protection of privacy through an action in breach of confidence as supported by the High Court in *Hosking*. I will draw on the fact situations of *Tucker*, *P v D*, *L v G* and *Hosking* where fact-specific examination is required.

(a) Importance and significance of the objective of the law

Without evaluative criteria against which the purpose of the objective of the law can be judged, it is difficult to conclude that law has an insufficient importance or significance.<sup>166</sup> Canadian jurisprudence regarding their equivalent Supreme Court test in *R v Oakes*,<sup>167</sup> indicates that once the objective of the law is identified it is almost invariably considered to be sufficiently important,<sup>168</sup> as the courts are prone to defer to government judgment. In the case of the common law, such deference is not possible, particularly where, as with privacy, the legislature has in fact adopted a limited and incremental approach to the area of law in question.

However, the history of privacy law and well-expressed reasons for its existence would clearly lend support to the importance and significance of the objective of the law. As Rosemary Tobin states, the law seeks to “protect personal autonomy, the right to be let alone, to maintain the personal shield surrounding self and family and to ensure that sensitive personal facts are not published to the world at large.”<sup>169</sup>

Tobin’s description includes a range of aims of privacy law which will come into play to varying degrees in different fact scenarios. The objective of privacy law will always be to

<sup>166</sup> Paul Rishworth et al. *The New Zealand Bill of Rights* (Oxford University Press, United Kingdom, 2003) 184.

<sup>167</sup> *R v Oakes* [1986] 1 SCR 103.

<sup>168</sup> See *Irwin Toy v Quebec (Attorney-General)* [1989] 1 SCR 927.

<sup>169</sup> Rosemary Tobin “Privacy: one step forward, two steps back!” (2003) NZLJ 256, 258.

protect the plaintiff from harm of some form. This may range from the risk of physical harm in *Tucker*,<sup>170</sup> where the public disclosure of Mr Tucker's criminal convictions would likely prevent him from obtaining funding for a heart transplant, to the harm to personal dignity and reputation that would have resulted from the disclosure of personal medical history in *P v D*.<sup>171</sup>

It is significant to point out the harm requirement of both the test for public disclosure of private fact and for breach of confidence. Public disclosure of private fact traditionally required that "the matter made public [is] one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities."<sup>172</sup> Thus, there is some attempt to ensure sufficient importance and significance of the objective of the law. Uncertainty as to this requirement for breach of confidence was expressed in *Coco v AN Clark (Engineers) Ltd*.<sup>173</sup> However, it was expressly approved in *Campbell*.<sup>174</sup> Lord Phillips stated that the publication of the details in question had to be to Miss Campbell's detriment. Additionally, the approach of the High Court of Australia in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd*<sup>175</sup> was supported in that "the requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person or ordinary sensibilities is in many circumstances a useful test of what is private."<sup>176</sup> This point was not paid sufficient attention to in *Hosking*. The focus, as already addressed, was on what one's reasonable expectation of privacy may be. I submit that a detriment requirement is an important aspect of establishing that the purpose of the invocation of privacy law is of sufficient importance in the given circumstances.

(b) Reasonable proportionality between the objective and the limit

In *R v Oakes*,<sup>177</sup> Dickson CJ explains this requirement, which is identical to that of the New Zealand test:

<sup>170</sup> *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716, 719.

<sup>171</sup> *P v D* [2000] 2 NZLR 591.

<sup>172</sup> *L v G* [2002] DCR 234, 245 Abbott J.

<sup>173</sup> *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 48 Megarry J.

<sup>174</sup> *Campbell v MGM Ltd* [2003] 1 All ER 224, 230.

<sup>175</sup> *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 185 ALR, 13.

<sup>176</sup> *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd*, above.

<sup>177</sup> *R v Oakes* [1986] 1 SCR 103.

Even if an objective is of sufficient importance, ...it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve.<sup>178</sup>

As the Court of Appeal of New Zealand has said: "A sledgehammer should not be used to crack a nut."<sup>179</sup>

The identified objective is crucially important in weighing the proportionality of the limit. To be weighed against this is the possible damage to freedom of expression. Freedom of expression and the corresponding freedom of the press are a fundamental part of a democratic society. In *Hosking*, the High Court received submissions from ACP that if the plaintiff's claims were upheld there would be a significant impact on their freedom to publish material on celebrity and lifestyle, which attracts readers, and thus harm the media generally.<sup>180</sup> If breach of confidence could be stretched to public places in the circumstances of *Hosking* there would be a severely deleterious effect on the ability of the media to freely report and photograph. Likewise, in *Tucker* and *P v D* the weighing exercise involved consideration of the cost to investigative journalism and the public's ability to be fully informed about current events.

I submit that it is almost impossible to maintain that the limit to the right to freedom of expression is proportionate to the objective of the law when it involves restriction of publication of public criminal records, particularly when they pertain to a subject in the media spotlight, willingly or not, who is asking for the support of community charity organisations.

*L v G* provides an example of facts which I submit would satisfy this part of the *Moonen* test. Preventing personal embarrassment and loss of dignity to the plaintiff would not have been out of proportion with restricting the defendant's right to freedom of expression in his sexual advertisement.<sup>181</sup> There were no greater repercussions to the media or the public at large.

### (c) Rational connection between the limit and the objective

<sup>178</sup> *R v Oakes* [1986] 1 SCR 103, 139-40.

<sup>179</sup> *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9, 16.

<sup>180</sup> *Hosking v Runting* (11 February 2003) High Court Auckland CP 527/02, 6, Randerson J; Submissions on behalf of Intervener ACP Media Limited in *Hosking v Runting* (11 February 2003) High Court Auckland CP 527/02.

<sup>181</sup> Publication had already in fact occurred and so only compensation rather than an injunction was available to the plaintiff.

Once again, Dickson CJ provides useful comment on this aspect of justification. He states that limitations on rights must be "carefully designed" to achieve the relevant objective, and not be "arbitrary, unfair, or based on irrational considerations."<sup>182</sup> In *Moonen* for instance, the question would have been whether the censorship of the material in question prevented the promoting or supporting of the exploitation of children or young persons for sexual purposes.<sup>183</sup> It must be noted that in general, the rational connection test does not require that cause and effect be directly proven.<sup>184</sup> In other words, it is only necessary that the objective of the law be in some way advanced by the measure chosen.

This will not be difficult to satisfy for an action in breach of confidence. Clearly personal embarrassment or loss of dignity due to public awareness of personal information can be avoided by preventing its publication, as an injunction would seek to do. Even in *Peck*, where no item of information as such was published, the loss of personal dignity suffered by the plaintiff would have been avoided under an expanded breach of confidence action.

However, it must be stated that unlike public disclosure of private fact, which has a focussed and tailored connection with the objective of the law, breach of confidence is a much blunter tool. It is designed to cover a greater range of situations, arguably in the privacy context, and certainly in its traditional role. It is not designed first and foremost to protect the privacy of citizens.

(d) As little interference with the right as possible.

Rishworth has stated that the minimal impairment requirement has been the most important branch of the *Oakes* test to date, and its application has usually determined whether a law stands or falls.<sup>185</sup> One must bear in mind the objectives to be met, what may be considered proportionate and rational in making this assessment.

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<sup>182</sup> *R v Oakes* [1986] 1 SCR 103, 139 Dickson CJ.

<sup>183</sup> *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9, 18.

<sup>184</sup> Paul Rishworth et al. *The New Zealand Bill of Rights* (Oxford University Press, United Kingdom, 2003) 179.

<sup>185</sup> Rishworth, above, 179.

I submit that the swollen breach of confidence action, whether intended by the UK courts or not, may result in overreaching privacy protection, embarking into areas where there ought to be a preference for law developed by parliament. If “reasonable expectation of privacy” is better able to identify circumstances in which there is a legitimate privacy interest then to the extent that that leads to the protection of that interest it must extend the interference with the right. While this may be justified from a privacy perspective, it certainly increases the need for proper attention to be paid to freedom of expression.

I further submit that one way in which it can be assured that there is as little interference with the right as possible is by upholding the detriment requirement of breach of confidence. This will ensure that the right to freedom of expression is not unjustifiably encroached upon where the plaintiff has not suffered any significant harm, as was addressed when considering proportionality.

The remedy to be granted will also be highly influential in reducing the level of interference with the right. Injunctions should be crafted in such a way as to minimise the impact on freedom of expression. Justice Randerson recognised this very point when he said: “any limitation on the guaranteed right may only be the least required to achieve the desired objective.”<sup>186</sup>

In some cases this may lead to a result where both privacy and freedom of expression are vindicated. For example, in the case of Mr Peck, his face and thus his identity added nothing to the story regarding the use of camera surveillance equipment. The message could have been freely conveyed without affecting his right to privacy. There will of course be cases where the mutual enjoyment of both rights is not possible.

#### 4 *Conclusion*

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<sup>186</sup> *Hosking v Runting* (11 February 2003) High Court Auckland CP 527/02, 53, Randerson J.

As the High Court in *Hosking* concludes, the development of the law of confidence needs to take into account the requirements of *Moonen*.<sup>187</sup> The above analysis seeks to make a number of express recommendations to the Court of Appeal with respect to that *Moonen* analysis.

First, the role of a detriment requirement in an action for breach of confidence may be significant in the weighing of the interests involved. It will assist in establishing that the purpose of the invocation of privacy law is of sufficient importance in the given circumstances. This ought to be addressed by the Court of Appeal.

Second, remedies may be of use to the court in reconciling competing rights. A breach of confidence action based upon the plaintiff's reasonable expectation of privacy, has the potential to interfere less with the right to freedom of expression, thus meeting the fourth requirement of the *Moonen* test. The stronger conclusion, however, is that the action of less threat to the right is the more narrowly defined public disclosure of private fact.

Third, it is crucial that express reference be made to the freedom of expression interest in the context of each case. The right must be the starting point, thus reversing the onus of the traditional "public interest" consideration in public disclosure of private fact.

Finally, in terms of a complete *Moonen* analysis, there is one further point to be made. The conclusion of the *Moonen* test, and of the process dictated by sections 4, 5 and 6 of the NZBORA, is that if a limitation is not found to be reasonable and justifiable in a free and democratic society, one must fall back on section 4. Section 4 requires that any "enactment" still be applied regardless of its inconsistency with any provision of the NZBORA. Additionally, the judiciary has not only the power but, on occasion, the duty "to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights."<sup>188</sup> This can be taken as a strong signal to the legislature as to the shortcomings of the law. However, the word "enactment" in sections 6 and 4 has been held to bear the meaning assigned to it in section 29 of the Interpretation Act 1999: "the whole or a portion of an Act or

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<sup>187</sup> *Hosking v Runtig*, above, 53 Randerson J.

<sup>188</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 17.



regulations.”<sup>189</sup> Thus, although statute must be enforced regardless of the outcome of a *Moonen* analysis, the same assurance does not attach to the common law. Having allowed a *Moonen* analysis to apply to judicially created law, it is thus essential that the law is shaped to conform to rights protection standards. The above *Moonen* analysis is of even greater importance when this is recognised.

#### IV CONCLUSION

In terms of the right to freedom of expression, *Hosking* represents both a step forward and a step backwards in rights jurisprudence. Justice Randerson recognises the need for a *Moonen* type analysis in the context of common law development of the right to privacy, however also approves an action potentially much wider than ever before recognised in New Zealand law, and which poses a correspondingly greater threat to freedom of expression.

While in practice there may be little difference between an action in public disclosure of private fact and an action in breach of confidence, as it is represented by Randerson J, public disclosure of private fact ought to be preferred from a rights perspective. Either this action is less of an encroachment on the NZBORA, or *Hosking* simply highlights the need even more for a thorough *Moonen* analysis to be undertaken.

Such a *Moonen* analysis needs to consider the role of the detriment required for an action in breach of confidence and also give due consideration to the use of remedies in balancing rights. It is also vital that the freedom of expression interest in each case is the starting point for the above analysis. This must then be weighed against the corresponding interest in privacy.

The Court of Appeal faces this challenge. Beyond mere analysis of the principles of privacy our society would wish to see articulated in the common law, this paper insists that the panel of five give due recognition to the statutorily enshrined and highly valued right to freedom of expression in New Zealand law. While protection of the right of privacy through the common law is not ruled out by section 14 per se, there must be due acknowledgement of the NZBORA.

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<sup>189</sup> See *Drew v Attorney-General* [2002] a NZLR 58; Paul Rishworth et al. *The New Zealand Bill of Rights* (Oxford University Press, United Kingdom, 2003) 137.

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An appreciation of the legislative and common law landscape in support of the importance of the right is also required.

One possibility not canvassed thus far in this paper is that the Court of Appeal will, on the facts of *Hosking*, avoid entirely the issue of a right to privacy under New Zealand law and its interaction with the right to freedom of expression. The uncertainty that would be the result of such side-stepping would also be a limit to full enjoyment of freedom of expression, creating a chilling effect on a media and public unsure of the extent of their NZBORA rights. This author urges the Court to resolve the issues regarding privacy and give full consideration to the right to freedom of expression in New Zealand law.

Let us hope that the demands of a rights focussed and just society will be met.

- Duff v Commonwealth Ltd* [1966] 1 NZLR 365  
*Fraser v Minister of Justice* [1985] 1 NZLR 285  
*Fraser v Otago Daily Times* [1985] 1 NZLR 285  
*Garner v Garner* (1930) 36 TLR 245  
*Gertels v Ostrau* (1857) 26 L.J. Ch. 113  
*Godbold v Longwell (City)* (1977) 1 SCR 746  
*Hellewell v Chief Constable of Devonshire* [1983] 1 WLR 844  
*Hobson v Harding* (1997) 1 IRNZ 342  
*Home Office v Wainwright* [2001] EWHC 101, [2001] 1 WLR 1000  
*Hosking v Runting* [2003]  
*Hunter v Southam Inc.* [1984] 2 SCR 141  
*Jeffrey v Polka* (1994) 11 CRNZ 303  
*Kaye v Robertson* [1991] FSR 62  
*L v G* [2002] DCR 234  
*Lange v Advertiser* [2000] 3 NZLR 385  
*Les Editions Vice-Versa Inc v Aubry and Canadian Broadcasting Corporation* [1998] 1 SCR 50  
*Mosley v Film and Literature Board of Review* [1981] 1 NZLR 3  
*Myers v DPP* [1965] AC 1001  
*Norwich Pharmaceutical Co v Commissioners of Customs and Excise* [1972] RPC 713  
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*Church of Scientology v Woodward* (1982) 154 CLR 25  
*Coco v AN Clark (Engineers) Ltd* [1969] RPC 41  
*Cox Broadcasting Corp v Cohn* (1975) 420 US 469  
*Donoghue v Stevenson* [1932] AC 562  
*Douglas v Hello! Ltd* [2001] QB 967  
*Duff v Communicado Ltd* [1996] 2 NZLR 89  
*Francome v Mirror Group Newspapers* [1984] 2 All ER 408  
*Fraser v Evans* [1969] 1 QB 349  
*Garner v Garner* (1930) 36 TLR 196  
*Gartside v Outram* (1857) 26 LJ Ch 113  
*Godboul v Longueuil (City)* [1997] 3 SCR 844.  
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*Hosking v Runtig* [2003]  
*Hunter v Southam Inc.* [1984] 2 SCR 145  
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