

MARKUS MOELLER

THE LAW OF PRIVACY – A COMPARISON OF
NEW ZEALAND AND GERMANY

LLM RESEARCH PAPER
(LAWS 520 – MEDIA LAW)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

2003

M693 MOELLER, M. The law of privacy.

LAW

S741
UW
66
693
003

Victoria

UNIVERSITY OF WELLINGTON

*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



LIBRARY

CONTENTS PAGE

I. INTRODUCTION..... 1

II. THE LAW OF PRIVACY IN GERMANY..... 2

A. THE HORIZONTAL IMPACT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS ON THE GERMAN PRIVATE LAW 3

B. THE PROTECTION OF THE RIGHT TO ONE'S PERSONALITY IN THE GERMAN CIVIL CODE..... 4

C. THE PROTECTION OF THE RIGHT TO CONTROL ONE'S OWN IMAGE IN SECTION 22 OF THE GERMAN ACT ON THE COPYRIGHT IN WORKS OF ART AND PHOTOGRAPHY 5

 1. *Exemptions to the general right to control one's own image*..... 6

D. THE CASE OF PRINCESS CAROLINE OF MONACO 8

 1. *Photographs depicting Caroline alone* 9

 2. *Photographs depicting Caroline and Vincent L.* 9

 3. *Photographs depicting Caroline with her children P. and A.* 11

 4. *The rehearing of the case by the German Federal Constitutional Court* 11

III. THE LAW OF PRIVACY IN NEW ZEALAND 12

A. IS THERE A NEED FOR A TORT OF PRIVACY IN NEW ZEALAND 15

 1. *A definition of the term 'privacy'* 17

 2. *The facts of the Hosking case* 20

B. A CRITIQUE OF THE REASONING OF RANDERSON J 20

 1. *The critique of the previous decisions of the High Court*..... 21

 2. *The analysis of the existing remedies* 22

 3. *Invasion of privacy v existing remedies* 23

 (a) Existing remedies 23

 (b) Breach of confidence 24

 4. *The scope of the tort of invasion of privacy*..... 28

 5. *The analysis of the legislative context*..... 30

 6. *Should this tort be developed by the courts* 31

 7. *The analysis of the facts of the Hosking case* 33

C. THE PRIVACY RIGHTS OF CHILDREN 35

 1. *An examination of the privacy of children*..... 37

D.	THE REHEARING OF THE HOSKING CASE IN THE COURT OF APPEAL	40
1.	<i>The argument of the respondents</i>	41
2.	<i>A six-step test for the protection of the privacy of children</i>	41
(a)	The children must be identifiable in the photographs	42
(b)	Absence of the consent of the parents	42
(c)	Assessment without regard to the position of the parents	42
(d)	No reason for the publication in the behaviour of the child	43
(e)	Impact of freedom of speech.....	43
(f)	Assessment in the best interest of the child	43
IV.	CONCLUSION	44

WORD COUNT

This paper contains (excluding abstract, contents page, footnotes and bibliography) 14,961 words.

ABSTRACT

This paper argues for the establishment of a tort of invasion of privacy in New Zealand. This tort shall provide sufficient protection of privacy interests. This protection cannot be achieved by developing the already existing remedies.

Moreover it supports the invention of a six step-test to protect the privacy of children. This test was proposed by the appellants in the *Hosking* case in the Court of Appeal.

Therefore, the paper introduces the German law of privacy and compares the level of protection achieved in Germany and New Zealand. The German law of privacy depends on the right to one's personality and the right to control one's own image. The paper compares this system with the New Zealand system and makes proposals, how this level of protection can be achieved in New Zealand.

I. INTRODUCTION

In the *Hosking* case the question arose whether the New Zealand law provides sufficient protection for privacy interests. While a tort of invasion of privacy seemed to be widely accepted, Randerson J disagreed with this opinion in his judgment. Therefore there is still the question if the New Zealand legal system should provide a special remedy for invasion of privacy. The *Hosking* case is dealing with the privacy of children of celebrities in particular, but one can consider the issue in a broader context and discuss the question how privacy interests should be treated in the New Zealand law.

Nevertheless, the issue of privacy of children is one of particular concern and will be addressed in this paper in detail. The appellants argued for the establishment of a tort of unauthorised invasion of privacy of children by publication of photographs depicting these children. Therefore, they proposed a six-step test. This test shall answer the question under which circumstances the publication of photographs depicting children may be allowed. The key issues of this test are the consent of the parents, the impact of freedom of expression and the best interests of the child.

This paper examines the issue of the protection of privacy in the New Zealand legal system and the question if the proposed six-step test fits in this system. It presents the German law of privacy and the system which protects privacy interests in Germany. In particular, it introduces the case of Caroline of Monaco and the way the protection of privacy of children was developed in this case. It examines the findings of Randerson J in the *Hosking* case in-depth and compares the level of privacy protection in New Zealand and Germany.

The paper argues for the establishment of a tort of invasion of privacy at least by the disclosure of private facts. It disagrees with the opinion of Randerson J that privacy interests are protected sufficiently by the existing common law torts. It does not support the opinion that the existing remedies could be developed in a way that they provide sufficient protection of privacy interests,

since they are designed to protect different interests, which do not cover necessarily all privacy interests. Moreover it recognises that the issue of protection of privacy of children is of particular importance. Thus it supports the proposed six-step test in the context of the publication of private information about children. This six-step test develops the protection of the privacy of children to a degree comparable to the German approach. This paper explains how this test fits in the New Zealand legal framework.

II. THE LAW OF PRIVACY IN GERMANY

The German law of privacy is based on the general right to one's personality. This general right of personality is founded on Article 2 (1) and Article 1 (1) of the German Basic Law.¹ Article 2 (1) states:²

Article 2 (Right of liberty)

(1) Everyone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code.

This general right to the free development of one's personality is to read in context of Article 1 (1) of the German Basic Law:³

Article 1 (Protection of human dignity)

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

Upon the principle of the free development of one's personality and the principle of human dignity the German Federal Court of Justice established the general right to one's personality and held:⁴

Moreover, now that the Basic Law has recognised the right of a human being to have his dignity respected, and also the right to free development of

¹ BVerfG [2000] 14 NJW, 1021.

² German Basic Law, Article 2 (1).

³ German Basic Law, Article 1 (1).

⁴ BGHZ 13, 334.

his personality as a private right, to be universally respected in so far as it does not infringe another person's right or is not in conflict with the constitutional order or morality, the general personality must be regarded as a constitutionally guaranteed fundamental right.

A. *The Horizontal impact of human rights and fundamental freedoms on the German private law*

When the Federal Constitutional Court established the right to one's personality as a constitutionally guaranteed fundamental right, there is still the question in which situations this right applies. As Article 1 (3) of the German Basic Law states:⁵

Article 1

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

This general rule establishes a direct application of human rights and fundamental freedoms on legal relationships between private parties and public authorities. It does not mention an application of these rights to legal relationships between two private parties. This is due to the fact that the human rights that are guaranteed in the Basic Law are established as "defensive rights designed to protect the individual from arbitrary state interference."⁶ Since the significance of these rights as an objective order of values is broader than just a protection against state interference, the application of human rights and fundamental freedoms has to be read in another meaning.⁷ As an objective value order, the basic rights catalogue of the Basic Law applies to all parts of law.⁸

This value order, which has at its centre the dignity of the human personality that freely develops in the social community, is, as a fundamental constitutional decision valid in all areas of law.

⁵ German Basic Law, Article 1 (3).

⁶ Nigel Foster/ Satish Sule *German Legal System and Laws* (3rd ed, Oxford University Press, Oxford, 2002) 205.

⁷ Ingo von Münch *Grundgesetz – Kommentar* (5th ed, Verlag C H Beck, München, 2000) 39.

⁸ BVerfGE 7, 198.

Since the basic rights bind the courts as part of the judiciary, they have to consider these rights in their decision:⁹

The judge is under a constitutional obligation to examine whether the substantive private law provisions he has to apply are influenced by basic rights described in the sense above; if this is the case he has to take account of the resulting modifications of private law when interpreting and applying these provisions.

This rule establishes the so-called Third-Party-Impact of basic rights. This means an indirect horizontal impact of human rights and fundamental freedoms set out in the Basic Law on legal relationships of private parties. The basic rights do not apply directly on these cases, but the courts have to consider basic rights issues when they occur.

B. The Protection of the right to one's personality in the German Civil Code

The right to one's personality, which is based on provisions of the German Basic Law, is also protected in the German Civil Code:¹⁰

Section 823 (Duty to compensate for damage)

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

In this context the right to one's personality is 'another right' and it is therefore protected by section 823, para 1 of the German Civil Code. Besides damages, which can be granted directly on the ground of section 823, para 1, a court can commit the defendant to publish a counterstatement and it can grant an injunction in conjunction with section 1004, para 2 of the German Civil Code.¹¹

⁹ BVerfGE 7, 198.

¹⁰ German Civil Code, section 823, para 1.

¹¹ Palandt *Buergerliches Gesetzbuch* (60th ed, Beck, Muenchen, 2001) p 963.

The fundamental right to one's personality includes two kinds.¹² On the one hand it protects the passive right of a person to be left alone, and on the other hand it protects the active right to make one's own decisions and to choose actions and the way of life independent from influences by other persons. The right to be left alone means a global protection of the private sphere, which includes everyone's right to a private home, which must not be breached by another one. Generally, this passive right to personality protects the person from the disclosure of private facts.¹³ The active right to personality protects the freedom of individuals to decide what they want to do with themselves and their life. This right covers the freedom to make social and economical arrangements, including the economical exploitation of the own personality. Thus, names, spoken words, writings, other artistic works and the control of one's own image are protected by the general right to one's personality against the interference by another one. In the case of a breach of the passive and the active right to one's personality one can sue for damages on the grounds of section 823, para 1 of the German Civil Code or an injunction in conjunction with sec. 1004, para 1 of the German Civil Code.

C. The protection of the right to control one's own image in section 22 of the German Act on the Copyright in Works of Art and Photography

Besides the general tort law provision of section 823 of the German Civil Code the right to control one's own image is protected in section 22 of the German Act on the Copyright in Works of Art and Photography:¹⁴

Section 22 (Right to control one's own image)

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

This provision was invented in 1907 after two photographers used the new technology to make and to publish snapshots of the body of the death Prince

¹² Palandt *Buergerliches Gesetzbuch* (60th ed, Beck, Muenchen, 2001) nos 182.

¹³ Palandt *Buergerliches Gesetzbuch* (60th ed, Beck, Muenchen, 2001) nos 183.

¹⁴ Act on the Copyright in Works of Art and Photography, section 22.

Otto von Bismarck, the founder of the modern German state.¹⁵ After a big public rumour the children of Prince Otto sued the photographers, to destroy the photographs and won.¹⁶ On the ground of this experience parliament invented section 22 of the Act on the Copyright in Works of Art and Photography with its general right to control one's own image. This provision applies generally to all persons and situations under the German law. Therefore everyone in Germany has the right to decide if images depicting him shall be published.

Because of the fact, that all German statutes have to be compatible with the German Basic Law, the right to control one's own image is a normal statutory definition of the constitutional right to one's personality in context of the own image.¹⁷ It has to be interpreted consistently with the fundamental rights of the German Basic Law. The basis for a claim of a breach of section 22 of the Act on the Copyright in Works of Art and Photography is section 823, para 1 of the German Civil Code.¹⁸ In case of the publication of photographs without consent the court can grant damages on the ground of section 823, para 1 of the German Civil Code, and in case of the publication in the future it can grant an injunction in conjunction with section 1004, para 1 of the German Civil Code.

1. *Exemptions to the general right to control one's own image*

Section 23 of the Act on the Copyright in Works of Art and Photography contains exemptions to the general right to control one's own image. The most important exemption concerns persons that are acting in the public domain.¹⁹

Section 23 (Exemptions to section 22)

(1) Without consent may be published:

1. Images and likenesses of contemporary history;

¹⁵ Thomas Lundmark *Princess Caroline in Bismarck's Shadow* <<http://jurist.law.pitt.edu/world/gercor2.htm>> (last access 01. 12. 2003).

¹⁶ Thomas Lundmark *Princess Caroline in Bismarck's Shadow* <<http://jurist.law.pitt.edu/world/gercor2.htm>> (last access 01. 12. 2003).

¹⁷ Palandt *Buergerliches Gesetzbuch* (60th ed, Beck, Muenchen, 2001) p 998. The same function has sec 12 of the German Civil Code in terms of the protection of the right to one's own name.

¹⁸ Palandt *Buergerliches Gesetzbuch* (60th ed, Beck, Muenchen, 2001) p 998.

¹⁹ Act on the Copyright in Works of Art and Photography, section 23.

2. Images in which persons are only accessory parts beside a landscape or a location;
3. Images or likenesses of assemblies, demonstrations, or similar events in which the person participated.

Section 23, para 1 states a statutory regulation of some aspects of public interest and gives regard to the freedom of expression, which is stated in Article 5 (1) of the German Basic Law:²⁰

Article 5 (Freedom of expression)

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

In terms of the first exemption of section 23 it means that there is a legitimate public interest in the publication of images and likenesses of contemporary history. This sort of images includes images of persons, which are acting in the public domain.²¹ These persons are so-called public figures for all purposes.²² Public figures for all purposes are for example politicians, famous artists and authors or members of the high nobility.²³ Generally, celebrities like sport stars and television and movie stars fall under this category. They use publicity to develop their careers. This emerges an interest of a broad public to the life of these persons. Persons that are acting in the public domain must recognise the public interest in their person and therefore they have to accept the publication of photographs depicting them. The freedom of expression, which includes the reporting about these persons, outweighs their right to their own personality to a certain degree.

²⁰ German Basic Law, Article 6 (1).

²¹ BGH [1996] 15 NJW, 985.

²² Thomas Lundmark *Princess Caroline in Bismarck's Shadow*
<<http://jurist.law.pitt.edu/world/gercor2.htm>> (last access: 01. 12. 2003).

²³ Thomas Lundmark *Princess Caroline in Bismarck's Shadow*
<<http://jurist.law.pitt.edu/world/gercor2.htm>> (last access: 01. 12. 2003)

On the other hand there are so-called public figures for limited purposes.²⁴ These are persons that got into the public domain, because of their participation in an extraordinary event, like a natural catastrophe etc, or because of a special behaviour, like a committed crime etc. The public has an interest in these persons in so far as it is connected to the event or the behaviour.

While celebrities are always public figures for all purposes, the classification of relatives of celebrities depends on the facts.²⁵ If these persons participate in the public domain, they are also public figures for all purposes. On certain occasions they can have the status of a public figure for limited purposes, or if they refuse to appear in the public they can have the status of a private person.²⁶

D. The case of Princess Caroline of Monaco

The most recent challenge of the German privacy law system is the case of Princess Caroline of Monaco. It started in 1993; when the defendant published several photographs depicting the princess in two magazines in France and Germany. The articles contained three sorts of photographs: Photographs depicting Caroline alone, photographs depicting Caroline with Vincent L., a French actor, and photographs depicting Caroline with her children P. and A.²⁷ Princess Caroline, who tries to live a private life and who avoids appearing on social or public events, sued the publisher for damages and was not successful at first instance and her appeal failed too. She argued that the publication of the pictures without consent was a breach of section 22 of the German Act on the Copyright in Works of Art and Photography and a breach of her general right to her personality. In 1995 her appeal to the German Court of Justice was partially successful. The court held generally that public persons for all purposes also have a right to their own personality.²⁸ This covers the passive right to be left alone completely. Also a celebrity has the right to a private sphere and home,

²⁴ Thomas Lundmark *Princess Caroline in Bismarck's Shadow* <<http://jurist.law.pitt.edu/world/gercor2.htm>> (last access: 01. 12. 2003).

²⁵ BVerfG [2000] 30 NJW, 2190.

²⁶ BVerfG [2000] 30 NJW, 2190.

²⁷ BGHZ 131, 332, 333.

²⁸ BGHZ 131, 332.

which has to be respected by everyone.²⁹ This means that nobody shall publish facts and photographs, which were taken at the home or in the marked-of surroundings of this home. In terms of the right to control one's own image the court differentiated between the different sorts of photographs and came to the result that the publishing of some of these photographs was a breach of her general right to her own personality, but the publishing of others was not.

1. *Photographs depicting Caroline alone*

Firstly there were photographs depicting Caroline alone on public places like a market place in a small village in France and riding in a forest around that village. These images, which show the Princess in the public domain, are images of the contemporary history because Princess Caroline was classified as a public figure for all purposes.³⁰ Therefore the publication of these photographs without consent is covered by the first exemption of section 23 of the Act on the Copyright in Works of Art and Photography.

2. *Photographs depicting Caroline and Vincent L.*

The second category of photographs depicts Caroline with her then-partner Vincent L. The two pictures were taken in public restaurants. One depicts the couple during a birthday celebration in a group of other persons. The other picture depicts the couple in a dark corner of a garden restaurant. The court said that there is a difference between these photographs. The first one shows Caroline and Vincent on a public place in a public situation. She is surrounded by a number of other persons. Everyone can get access to the restaurant and can see her there. It is a public function in a public place. Therefore the exemption of section 23, number 1 of the German Act on the Copyright in Works of Art and Photography applies.

The second photograph depicts Caroline and her partner Vincent L. without other accompaniment. They are sitting in a dark corner of a restaurant and try to avoid other persons' company. The Federal Court of Justice held that this situation differs significantly from the situation described above, because

²⁹ BGHZ 131, 332.

³⁰ BGHZ 131, 332.

there can be also a private sphere even at places with public access.³¹ If a person shows clearly that she or he wants to be left alone, this person might have this right even in public places. This rule applies also to public figures for all purposes.³² Certainly it is not enough that the person wants to be left alone. She has to choose a public place in which she is actually separated from the general public. The wish to be separated from the general public has to be obvious for other persons. Moreover the person has to behave in a way, which shows this wish. The person must separate itself from a broad public in a way that she or he does not appear as a part of the public any longer.³³

The wish of the person to be left alone has to be balanced against the interest of the public in the publication of the photographs and the knowledge about the depicted footage.³⁴ The value of information of the depicted incident is the most significant criteria in this balancing. The bigger the information value for the public is, the less important is the need for protection of a public figure for all purposes. On the other hand weighs the interest for protection of a public figure for all purposes higher, if there is just a small value of information for the public in the depicted incident.

In the case of the picture depicting Caroline and Vincent L. in a dark corner of a garden restaurant the Federal Court of Justice decided that these requirements were fulfilled. Caroline and Vincent L. were separated almost from any public in this place and behaved obviously in a way expressing that they wanted to be left alone. They tried to separate from a broad public and the photographs were taken out off a long distance. Moreover the Federal Court of Justice said that the value of information of the depicted incident was relatively small.³⁵ The interest of the public in this photograph is curiosity, sensation mongering and mere entertainment. The right of Princess Caroline to her own personality outweighs the public interest in the publication of the photograph and therefore the right to freedom of expression of the publishers. So the court stated that in such a situation the right to one's own personality of a public fig-

³¹ BGHZ 131, 339.

³² BGHZ 131, 339.

³³ BGHZ 131, 340.

³⁴ BGHZ 131, 342.

³⁵ BGHZ 131, 342.

ure for all purposes is protected, even though she or he appears on a public place.

3. *Photographs depicting Caroline with her children P. and A.*

In this context the photographs depicting Caroline with her children are most interesting. The photographs show Caroline and her children on a walk and kayaking on a river. Both Caroline and her children were clearly identifiable. The German Court of Justice held that these activities were in the public domain. Moreover, it affirmed the opinion of the lower courts that the children of celebrities, in this case a member of the high nobility, are public figures for all purposes too.³⁶ The court thought that the public interest in the descendants of celebrities, and of members of the high nobility in particular, is a strong one and needs to be protected. Therefore the court held that the publication of these photographs without consent was covered by section 23 of the German Act on the Copyright in Works of Art and Photography and not an illegal intrusion of the privacy of princess Caroline and her children.

4. *The rehearing of the case by the German Federal Constitutional Court*

On an appeal of the Princess the German Federal Constitutional Court reheard the case.³⁷ It upheld the opinion of the German Federal Court of Justice that Caroline of Monaco is a public figure for all purposes and that the photographs have been taken in the public domain.³⁸ It also upheld the decision of the Federal Court of Justice that the right to one's own personality can apply on celebrities, although they are acting in a public place. Therefore, it agreed with the decision concerning the other pictures. However, it disagreed with the classification of the children as public figures for all purposes. The Federal Constitutional Court did not say expressly why the children are not public figures for all purposes, but it held that children deserve more protection than other persons. This opinion depends on Article 6 of the German Basic Law:³⁹

³⁶ Thomas Lundmark *Princess Caroline in Bismarck's Shadow* <<http://jurist.law.pitt.edu/world/gercor2.htm>> (last access 01. 12. 2003).

³⁷ BVerfG [2000] 14 NJW, 1021.

³⁸ BVerfG [2000] 14 NJW, 1021.

³⁹ German Basic Law, Article 6 (1), (2).

Article 6 (Marriage and the family; children born outside of marriage)

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

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

According to the court the educational rights of the parents and the obligation to protect the children must be taken into account, in context of Article 5 (2) of the German Basic Law.⁴⁰

These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.

Therefore, it is a question of balancing of Article 2 (1), Article 1 (1) and Article 6 on the one side and Article 5 (1) on the other side.⁴¹ The safety of the child and the importance of the parent - child relationship outweighs freedom of expression. Therefore, "children of public figures should not lose their privacy unless they are deliberately thrust into the public eye."⁴² With this statement the German Federal Constitutional Court abolished the exemption of section 23 of the Act on the Copyright in Works of Arts and Photographs in the context of the publication of a photograph of children. If a child is thrust into the public eye, parental consent can be assumed and if the media will report about the child it is covered by section 22 of the same act anyway. After this decision it is nearly impossible to publish a photograph of a child without the consent of the parents.

III. THE LAW OF PRIVACY IN NEW ZEALAND

In New Zealand law there are several torts dealing with the right of privacy. Causes of action such as trespass, nuisance, breach of confidence, harassment, and intentional infliction of emotional harm have existed for a long time

⁴⁰ German Basic Law, Article 5 (2).

⁴¹ BverfG NJW [2000] 14, 1021.

⁴² Thomas Lundmark *Princess Caroline in Bismarck's Shadow* <<http://jurist.law.pitt.edu/world/gercor2.htm>> (Last access 01. 12. 2003).

and protect certain aspects of privacy.⁴³ Besides these “classical” torts, a tort of invasion of privacy was recognised recently in several cases.⁴⁴ In *P v D Nicholson J* established a four-step test for the invasion of privacy by disclosure of private facts:⁴⁵

- (i) That the disclosure of the private facts must be a public disclosure and not a private one.
- (ii) Facts disclosed to the public must be private facts and not public ones.
- (iii) The matter made public must be one, which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.
- (iv) The nature and extend of legitimate public interest in having the information disclosed.

Until Randerson J’s judgment in the *Hosking* case it seemed that a tort of invasion of privacy by disclosure of private facts was widely accepted in New Zealand.⁴⁶

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

The existence of the named tort was also supported by the case of *Bradley v Wingnut Films Ltd*.⁴⁷ In the latter Gallen J denied the application of the tort of invasion of privacy, because the disclosed facts were neither private nor highly offensive or objectionable to a reasonable person.⁴⁸ Nevertheless, the mere consideration of the application of this tort shows its existence.

This existence of a tort of invasion of privacy by disclosure of private facts seems to be not that clear, since Randerson J held in *Hosking v Runtig*:⁴⁹

⁴³ John Burrows/ Ursula Cheer *Media Law in New Zealand* (4th ed, Oxford University Press, Oxford, 1999) 173.

⁴⁴ *Tucker v News Media Ownership* [1986] 2 NZLR 716; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415.

⁴⁵ [2000] NZLR p601.

⁴⁶ *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716, 733

⁴⁷ *Bradley v. Wingnut Films Ltd* [1993] 1 NZLR 415.

⁴⁸ *Bradley v. Wingnut Films Ltd* [1993] 1 NZLR 415, 425.

⁴⁹ *Hosking v Runtig* [2003] High Court Auckland CP 527/02 Randerson J [184].

I have concluded that the court should not recognise such a tort for these broad reasons:

[a] The deliberate approach to privacy taken by the legislature to date on privacy issues suggests that the courts should be cautious about creating new law in this field;

[b] The tort contended for by the plaintiffs goes well beyond the limited form of the tort recognised in decisions of this court to date and is not supported by principle or authority;

[c] Existing remedies are likely to be sufficient to meet most claims to privacy based on the public disclosure of private information and to protect children whose privacy may be infringed without such disclosure;

[d] In the light of subsequent developments, it is difficult to support the privacy cases decided in New Zealand to date;

[e] To the extent there may be gaps in privacy law, they should be filled by legislature, not the courts

This statement sounds quite ambiguous in context of the existence of a tort of invasion of privacy by public disclosure of private facts. On the one hand Randerson J names the recognised tort in other cases and denies the application in the *Hosking* case because this tort does not extend as broadly as the plaintiffs suggested. On the other hand the judge does not want to support the existence of this tort at all and thinks that the existing remedies provide sufficient protection of privacy in New Zealand. So the statement seems to be rather a denial of the existence of the named tort. Another finding of Randerson J supports this opinion:⁵⁰

In the light of subsequent development elsewhere and for the reasons elaborated in this judgement, I would respectfully differ from the conclusions reached in those earlier decisions. Any development of the law of privacy by the courts should build incrementally on existing remedies, particularly the equitable action for breach of confidence.

⁵⁰ *Hosking v Runting* [2003] High Court Auckland CP 527/02 Randerson J [118].

This rather mysterious judgement demands a closer view on the Hosking case and the reasoning of Randerson J.

An in-depth examination of the judgement of Randerson J in the *Hosking* case raises two important questions, which are still unanswered. Firstly: Is there a need for a tort of privacy and does it fit in the New Zealand legal system? Secondly: Does the legal situation provide a sufficient protection of the privacy of children? Unlike the German legal system, the legal system of New Zealand does not provide such a clear and strong framework for the protection of privacy. The protection of privacy in Germany is based on the constitutionally guaranteed right to one's personality, which covers the privacy of a person in a very broad sense. This right to one's personality has to be balanced with another constitutionally guaranteed right, the freedom of expression. The German Civil Code provides causes of action for a breach of privacy and courts are enabled on these grounds to grant damages and injunctions. The Act on the Copyright in works of Art and Photography establishes expressly the right of everyone to control one's own image. Exemptions are only made with public figures for all purposes and public figures for limited purposes. In cases dealing with the privacy of children the constitutionally guaranteed protection of the family and the rights of the parents to bring up their children have to be taken into account. This legal framework provides a strong protection of the right to privacy and the right to privacy weighs quite heavy in a balancing with the freedom of expression.

A. *Is there a need for a tort of privacy in New Zealand*

Although the New Zealand legal system does not provide such a strong framework for the protection of privacy, the assumption that a tort of privacy does not fit in the New Zealand legal system seems not to be as clear as Randerson J supposes. It has to be examined if there is a need for the named tort and to which extent it should be developed.

As Randerson J concedes it is not a question if there are rights to privacy in principle:⁵¹

Undoubtedly, certain rights to privacy do exist. So much is clear from the statutory provisions and common law rights, which currently give effect to discrete aspects of privacy.

This general principle finds support in the English jurisdiction in the judgement of Sedley LJ in *Douglas v Hello! Ltd*.⁵²

Nevertheless, we have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy.

Although Richardson J held in *R v Jefferies* that there is no general guarantee of privacy in the BORA, he acknowledges that there may be rights to privacy in certain circumstances:⁵³

The nature and significance of a privacy value depends on the circumstances in which it arises. Thus privacy values relied on in search and seizure cases under the Fourth Amendment range from security, to secrecy, to the broad right to be let alone.

He does not deny the existence of privacy rights at all, but he says that the content and the extent of the right to privacy depends on the circumstances and has to be interpreted quite carefully. Therefore, the main question is not if there is a right to privacy, but which interests this right to privacy covers and in which way and to which extent these interests should be protected. The need for a right to privacy appears quite clear in context of recent developments in our society:⁵⁴

In modern society several developments have made us more conscious of the value of having a sphere in which we can keep ourselves to ourselves.

The first is the increasing sophistication of modern technology. [...] Sec-

⁵¹ *Hosking v Runting* [2003] High Court Auckland CP 527/02 Randerson J [117].

⁵² *Douglas v Hello! Ltd* [2001] QB 967 (CA) Sedley LJ [110].

⁵³ *R v Jefferies* [1994] 1 NZLR (CA) Richardson J 290, 302.

⁵⁴ John Burrows "Invasion of Privacy" In Stephen Todd (ed) *The Law of Torts in New Zealand* (3rd ed, Brookers, Wellington, 2001) 908.

only, certain sections of the media are becoming increasingly involved in investigative reporting and are sometimes tempted to publicise facts about people, causing humiliation and distress; [...] Thirdly as cities become more populous, and as we are thrust daily closer to people, we come to appreciate more the ability to control access to the things about us, which we regard as nobody's business but our own.

1. *A definition of the term 'privacy'*

To answer the question in which way privacy should be protected and to what extent one has to know what privacy means. According to the statement of Richardson J it seems to be quite difficult to define the term 'privacy', because it appears in various situations and its meaning depends on the given circumstances. This difficulty might be one reason, why the courts were so reluctant in the development of the law of privacy:⁵⁵

The various definitions of privacy in the literature, of which the right to be left alone is only one, are useful to the extent that they reveal the many layers of ambiguity and uncertainty surrounding this idea.

However, is it a sufficient reason not to protect a right, because there are difficulties to find an ultimate definition?

Under the German jurisdiction the right to one's personality is understood in a very broad sense. It protects as well a passive right to privacy against the interference of the private sphere by other persons as an active right to control the appearance of the own personality in relation to other persons.⁵⁶ Nevertheless, the German idea of a right to control one's personality does not provide an ultimate definition either. It is more a general right, which can apply to various cases and situations. Therefore, it is more a blanket clause, which has to be interpreted by the courts in a case-by-case decision. Over the years in which the right to one's personality is accepted in the German law, the courts have developed many categories of cases, which fulfil the requirements of an action for a breach of this right, but there are still new cases decided on the grounds of the right to one's personality, which have not occurred so far. Nevertheless German courts are dealing with the concept of a constitutionally

⁵⁵ Geoffrey Palmer *Privacy and the Law* (1975) NZLJ 747, 748.

⁵⁶ See p 4.

courts are dealing with the concept of a constitutionally guaranteed right to one's personality for almost fifty years, in which they developed an extensive protection of privacy.

Although there are difficulties in defining the term 'privacy' one aspect seems to be accepted quite broadly. Privacy includes "the right to be left alone."⁵⁷ However, the Australian Law Reform Commission proposed a more accurate definition in 1983:⁵⁸

Privacy claims involve a number of aspects:

- that the person of the individual should be respected, ie it should not be interfered with without consent;
- that the individual should be able to exercise a measure of control over relationships with others; this means that:
 - a person should be able to exert an appropriate measure of control on the extent to which his correspondence, communications, and activities are available to others in the community; and
 - he should be able to control the extent to which information about him is available to others in the community.

Although this definition does not cover all possible occasions on which the right to privacy could apply, it names three of the most important issues in context of privacy. Firstly it establishes a personal sphere, which has to be respected by everyone. It includes the right of the person to exclude everyone from this sphere she or he wants to. In a local sense it means, that everybody has the right to a private place that must not be breached by another one. This understanding of privacy is comparable to the German passive right to one's personality. Secondly it recognises the right of every person to control her or his appearance in relation to others to a certain extend. This right covers some of the areas, which are guaranteed by the active right to one's personality in the German law, even though it does not extend as far as the German rights. Lastly the definition names the right of everybody to decide who should receive information about

⁵⁷ SD Warren and LD Brandeis *The Right to Privacy* (1890) 4 Harv L Rev 194.

⁵⁸ Australian Law Reform Commission *Privacy*, report no 22, 1983, [1033-1034].

her or him and which information this should be. This could be called a right to self-determination about the publication of information. Interestingly the New Zealand Parliament has recognised this right by the adoption of the Privacy Act 1993.

The New Zealand Law Commission recently published another catalogue of rights, which are covered by the law of privacy:⁵⁹

- freedom from surveillance, whether by law enforcement or national security agents, stalkers, paparazzi or voyeurs;
- freedom from physical intrusion into one's body, through various types of drugs testing procedures, or into one's immediate surrounding;
- control of one's identity; and
- protection of personal information.

While point three and four are quite similar to the second and third aspect of the definition introduced above, this approach adds a new aspect in the first point. Freedom from surveillance is undoubtedly covered by the right to be left alone, but this version includes expressly the actions of paparazzi, which is very important in the context of media in general and the *Hosking* case in particular. Although this approach does not provide complete definition of the term privacy too, all the approaches show that there is a right to privacy at all. Maybe it is difficult or even impossible to define this right, but without doubt also the New Zealand legal system recognises the individual interest in privacy. Moreover, these rights to privacy have to be protected:⁶⁰

Not one of these difficulties is unique to privacy, nor a conclusive reason for refusing to recognise it as a legal interest worthy of protection.

⁵⁹ New Zealand Law Commission *Protecting Personal Information from Disclosure* [2002] Preliminary Paper 49, p1.

⁶⁰ John Burrows "Invasion of Privacy" In Stephen Todd (ed) *The Law of Torts in New Zealand* (3rd ed, Brookers, Wellington, 2001) 910.

Therefore, the main question is, in which way these privacy interests are protected sufficiently? In the *Hosking* case Randerson J argued that this protection should be guaranteed by a careful development of the existing remedies. This statement has to be examined.

2. *The facts of the Hosking case*

On a busy Saturday morning the plaintiff Mrs Hosking pushed a stroller with her twin daughters along a footpath in Newmarket when she was photographed by the first defendant Mr Runting. He was commissioned by the New Idea magazine, published by the second defendant Pacific Magazines NZ Ltd.. Mrs Hosking did not know that the photographs were taken until New Idea told her about their intention to publish the photographs. Mrs Hosking opposed the publication strongly arguing that the publication could be a serious risk for the safety of the children. This concern based on the fact that her husband Mr Hosking works on TV. New Idea agreed not to publish the photographs until the end of the trial. In the previous year an article about the Hoskings was published in which they disclosed the fact that the twins were procreated in by of in-vitro-fertilization. This article was accompanied by photographs of Mr and Mrs Hosking. Moreover, the Hoskings consented to the publication of in utero photographs of the twins later this year. Leave to intervene was granted to ACP Media Ltd and the Commonwealth Press Union.

B. A critique of the reasoning of Randerson J

Besides his doubts in supporting a tort of invasion of privacy by public disclosure of private facts, Randerson J accepts the existence of rights to privacy in principle. He is interested in another point:⁶¹

But the real question in this case is whether the court should recognise a privacy tort, which would provide a remedy for the public disclosure of photographs of the plaintiffs' children taken while they were in a public place.

He denies the need for such a tort for the broad reasons cited above. Interestingly the judge does not only negate his own question, moreover he doubts the

⁶¹ *Hosking v Runting* [2003] High Court Auckland CP 527/02 Randerson J [117].

existence of a tort of privacy at all. Even though this statement is not a necessary reason in the logic of the findings of his judgement, he articulates this opinion more as an obiter dictum.

So, what are the reasons leading Randerson J to his conclusion? In this context one has to distinguish between the general considerations concerning the right to privacy and the considerations based on the facts of this particular case. In a general context Randerson J reasons his critique of the existence of a tort of invasion of privacy on the fact that parliament did not adopt such a tort, an analysis of the existing remedies and a critique of the previous decisions of the High Court.

1. *The critique of the previous decisions of the High Court*

Randerson J's findings are based on a critique of the previous decisions of the High Court dealing with privacy matters. The main critique on these decisions is founded on the fact that the legal circumstances had changed remarkably after these decisions. So *Tucker* was decided before the enactment of the BORA with its expressly protection of freedom of expression in section 14. The already mentioned cases have been decided without knowledge about the new developments in the law of breach of confidence in the UK. In the opinion of Randerson J the recent English cases show that a pre-existing relationship is no longer necessary for an action for breach of confidence.⁶² Therefore, "a duty to respect confidence may be imposed having regard to the nature of the material which comes into the potential defendant's possession."⁶³ Moreover, the development of a tort of invasion of privacy could not logically ground on the cause of action for intentional infliction of distress, because the intention of the media in particular is not the infliction of distress, but rather the circulation of information.

In his general analysis of a tort of invasion of privacy by public disclosure of private facts Randerson J concludes:⁶⁴

⁶² *Hosking v Runting* [2003] High Court Auckland CP 527/02 Randerson J [177].

⁶³ *Hosking v Runting* [2003] High Court Auckland CP 527/02 Randerson J [177].

⁶⁴ *Hosking v Runting* [2003] High Court Auckland CP 527/02 Randerson J [178].

On the basis of the material before me and for the reasons given, I would respectfully differ from the previous decisions of this court supporting a tort of privacy.

Instead he states that the existing remedies provide enough protection of privacy. If there is a need to do something, he favours the development of the action for breach of confidence as experienced in several English cases. Lastly a gap in privacy law should be filled by legislative action of parliament and not by activities of the courts.

This statement seems to be quite surprising. As aforementioned the whole system of privacy protection in the German law is based on statutes. This is due to the fact that all areas of German law are governed by statutes. The German legal system does not know a common law system. Therefore, all legal provisions have to be made by parliament. In contrast to the codified German law system, the New Zealand legal system is a common law system. This system is characterised by the ability of the courts to develop the common law, if it is necessary. Therefore, the reasoning of Randerson J would make sense in a completely codified legal system, such as the German one, but not in the New Zealand common law system.

2. *The analysis of the existing remedies*

The next issue that Randerson J concerned in his judgement is an analysis of the already existing remedies. As aforementioned there are several torts in the New Zealand legal system dealing with the protection of privacy. In his analysis the judge focuses on the existing action for breach of confidence. Following this reasoning:⁶⁵

Judicial method ordinarily prefers the development of the common law to proceed by building on existing causes of action where that can be achieved in a principled way and without compromising other established legal patterns. 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.

⁶⁵ *Hosking v Runting* [2003] High Court Auckland CP 527/02 Randerson J [158].

Such a development of the action for breach of confidence could be understood as a justified limitation under section 5 BORA to the right to freedom of expression of section 14 BORA. Moreover, the application of the action for breach of confidence in cases dealing with the public disclosure of private facts could avoid problems with the doctrine of prior restraint, which was established in context of defamation law. Randerson J argued that an action for the invasion of privacy would enable a plaintiff to seek for an interim injunction, where she or he were not able to seek this injunction in an action for defamation. This problem would not occur in an action for breach of confidence because these actions would not overlap with defamation action. Otherwise it would be possible to argue a case of defamation on the grounds of the new privacy tort. Moreover, the development of the action for breach of confidence would have the advantage that there is already an established public interest defence. In the opinion of Randerson J these reasons promote the development of the existing action for breach of confidence instead of the creation of a tort of invasion of privacy.

3. *Invasion of privacy v existing remedies*

Randerson J proposes that privacy protection should be developed upon the grounds of remedies already existing in the legal system of New Zealand. He refers particularly to the recent development of the action for breach of confidence in England. However, there are several causes of action dealing with the protection of privacy in New Zealand.

(a) Existing remedies

There are many causes of action in New Zealand law that protect certain aspects of privacy, such as Trespass, Nuisance, Harassment and Defamation. Trespass and Nuisance deal with privacy aspects connected to the property interests of the landlord, Nuisance with privacy interests connected to the dignity of a person and defamation with privacy interests connected to the reputation of a person. All these aspects can be part of the privacy of a person, but these causes of action are designed to protect other interests. The protection of privacy interests is only a by-product. They do not provide a unique protection of privacy itself and cannot be developed in this way without losing their original shape. Therefore these remedies do not provide sufficient protection of privacy.

(b) Breach of confidence

Another tort dealing with the disclosure of private information is the cause of action for breach of confidence. In his analysis Randerson J focused on this tort and its recent development under the English jurisdiction. Indeed Keene LJ held in *Douglas v Hello! Ltd*:⁶⁶

Whether the resulting liability is described as being for breach of confidence or for breach of s right to privacy may be little more than deciding what label is to be attached to the cause of action, but there would seem to be merit in recognising that the original concept of breach of confidence has in this particular category of cases now developed into something different from the commercial and employment relationships with which confidentiality is mainly concerned.

In this case the English Court of Appeal recognised the existence of a right to privacy after the adoption of the Human Rights Act 1998 (HRA). By recognition of several rights set out in the European Convention for Protection of Human Rights and fundamental Freedoms, Article 8 came into force in the English law, adopted by section 1 HRA:

Everyone has the right to respect for his private and family life, his home and his correspondence.

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

On this ground the English courts had to accept the need for protection of these rights. However, the Court of Appeal preferred to develop the existing tort of breach of confidence, than to establish a new tort of invasion of privacy. Therefore, the judges abolished the established requirement of an existing relationship between the involved persons:⁶⁷

⁶⁶ *Douglas v Hello! Ltd* [2001] QB 967 (CA) Keene LJ [167].

⁶⁷ *Douglas v Hello! Ltd* [2001] QB 967 (CA) Keene LJ [167].

Already before the coming into force of the Act there have been persuasive dicta in *Hellewell v Chief Constable of Devonshire* [1995] 1 WLR 804, 807 and *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281 cited by Sedley LJ in his judgement in these proceedings, to the effect that a pre-existing confidential relationship between the is not required for a breach of confidence suit. The nature of the subject matter or the circumstances of the defendant's activities may suffice in some instances to give rise to liability for breach of confidence.

Saying that the tort of breach of confidence gets a much wider scope as known so far, since such a relationship is one of the widely accepted requirements of breach of confidence in New Zealand.⁶⁸

To date, the action for breach of confidence has been limited to situations involving a relationship of confidence including third party receivers with notice of the breach of confidence arising from a relationship.

Moreover the existing remedies including breach of confidence have been regarded as not extensive enough to cover all aspects of a right to privacy.⁶⁹

Certain common law actions do protect privacy interests. These include the actions for trespass, nuisance, breach of confidence, copyright, malicious falsehood, intentional infliction of nervous shock, negligence, and breach of contract. But these actions do not provide a remedy for every invasion of privacy.

Therefore, a new tort of privacy by public disclosure of private facts was regarded as necessary to provide sufficient protection of privacy interests. As shown above the protection of privacy by other remedies is a by-product of the protection of other rights, for example property or reputation. This is quite similar to the tort of breach of confidence. The interest, which is protected by this tort, is confidence. Perhaps this may overlap in several cases with privacy interests, but privacy and confidence are not the same at all. The right to privacy protects a private sphere nobody should interfere with without consent of the

⁶⁸ Katrine Evans *Reverse Gear for NZ's privacy tort: the Hosking decision* (2003) PLPR 61, 62.

⁶⁹ Rosemary Tobin *Invasion of Privacy* (2000) NZLJ, 216.

concerned person. Therefore it is broadly described as the right to be left alone. If the concerned person wants to be left alone, there hardly can emerge confidence, since confidence requires two or more persons:⁷⁰

Confidence: 1 the belief that one can have faith in or rely on someone or something. 2 the telling of private matters or secrets with mutual trust.

Confidence requires a relation of two or more persons. It is hardly to understand that this relation does not have to be a pre-existing relation of confidence as the judges at the English Court of Appeal suggest. Anyway, assuming confidence two or more persons have to be involved. Privacy means exactly that there is just one person involved, the person, which is concerned:⁷¹

Privacy: a state in which one is not observed or disturbed by others.

In a private situation a person tries to avoid the unwanted existence of relationships to others. There should not emerge a relation to other in the private sphere without the consent of the person concerned. While breach of confidence protects the trust in another person, the right to privacy protects the person from the interference of others. While breach of confidence requires a relationship of two or more persons, the right to privacy should prevent the emergence of relationships without the consent of the person concerned. In the case of public disclosure of private facts a cause of action for breach of privacy should prevent the emergence of a relationship between the person concerned and several other persons, which learned about these facts because of the disclosure. This relationship would be based on the knowledge about the disclosed facts. A cause of action for breach of confidence should prevent that a person publishes facts that she or he learned confidentially about another person. Therefore, it already exists a relationship between this person and the person concerned, maybe established by chance. The tort of breach of confidence shall avoid the abuse of this relationship. Therefore, the purpose of protection of the tort of breach of confidence and a tort of privacy are completely different.⁷² Perhaps the effect of an action for a breach of confidence is the protection of privacy interests, but only

⁷⁰ Concise Oxford Dictionary

⁷¹ Concise Oxford Dictionary

⁷² Rosemary Tobin *Privacy: One step forward, two steps back!* (2003) NZLJ 256, 258.

by chance. Since a tort of breach of confidence and a tort of privacy have different purposes of protection a tort of breach of confidence would hardly cover all situations of inflictions of privacy interests.⁷³

After all it is well established that where a matter is in the public domain, it cannot be said to be confidential.

Thus the development of the tort of breach of confidence would have its borders always in the term 'confidence'. Since confidence and privacy are not identical a tort based on confidence would not provide a scope of protection, which corresponds to the wide range of privacy interests.

If the tort of breach of confidence shall cover all privacy interests separated from the concept of confidence, this procedure would interfere with the judicial method explained by Randerson J. This method develops the common law "by building on existing causes of action where that can be achieved in a principled way and without compromising other established legal patterns."⁷⁴ The judge suggests that the tort of breach of confidence can be developed in a way, which covers most privacy interests. As aforementioned the concepts of confidentiality and privacy are quite different and only overlap in some cases. Therefore, the development of the tort of breach of confidence in the boundaries of the concept of confidentiality would not provide sufficient protection of privacy. An extension of the tort of breach of confidence to all privacy interests would abolish the concept of confidentiality and therefore compromise other established legal patterns.

Thus the existing remedies including breach of confidence do not provide a sufficient protection of the wide range of privacy interests. Many of them protect certain privacy interests as a by-product of the protection of the interest they were designed to originally. None of them can be developed in a way, which would cover all privacy interests and even not all of them together provide a sufficient remedy for a breach of privacy in particular. Therefore, there is a need of a tort of privacy in New Zealand. Such a tort at least by the disclosure

⁷³ Katrine Evans *Reverse Gear for NZ's privacy tort: the Hosking decision* (2003) PLPR 61, 62.

⁷⁴ See p 17.

of private facts fits in quite well in the legal system of New Zealand. Although the right to privacy is enshrined in the BORA, it cannot be denied that the law in New Zealand recognises several interests of privacy. These privacy interests have to be protected in an adequate way. The tort of invasion of privacy by disclosure of private facts as introduced above provides this level of protection. Certainly the privacy interests have always to be balanced against freedom of expression named in section 14 BORA. Now, the fact that this freedom is expressly established in the BORA does not mean that it inevitably outweighs the privacy interests of the other party. This has to be decided case-by-case. Step four of the privacy tort dealing with public interest provides a good basis for this balancing.

4. *The scope of the tort of invasion of privacy*

Another interesting question is how wide the scope of this tort should be. This question is connected to the problem what is meant by the expression 'private facts'. Undoubtedly domestic matters such as behaviour in the private sphere or personal or family circumstances have to be regarded as private.⁷⁵ This kind of private sphere builds the core of all privacy interests: A domestic sphere that everyone has to respect and nobody has to interfere with without the consent of the person concerned. This includes occurrences in private places and sensitive private information. More difficult to answer is the question how far this private sphere can reach into the public domain. As the German example shows, also the appearance in public places can be characterised as private in certain circumstances. If the person obviously tries to separate from the broad public, this can fulfil the requirement of privacy. In this question the publication of photographs taken in a public place is interesting. One can argue that these photographs never could be regarded as private facts, because they were disclosed to the public anyway. Randerson J said in this context:⁷⁶

There is no statutory prohibition against the taking of photographs in a public street and, in general, it must be taken to be one of the ordinary incidents of living in a free community.

⁷⁵ John Burrows/ Ursula Cheer *Media Law in New Zealand* (4th ed, Oxford University Press, Oxford, 1999) p 175.

⁷⁶ *Hosking v Runting* [2003] High Court Auckland CP 527/02 Randerson J [138].

This statement is completely right, but it does not address the point of the case. Not the taking of the photographs is the problem, but the intended publication. Now, the publication of photographs without consent of the depicted person is not inevitably an ordinary incident of living in a free community. This shows the German example. The German legal system recognises a right to control one's own image and provides a strong protection of privacy interests. However, German society is still recognised as a free community. The German experience shows that this protection does not inevitably lead to an unacceptable restriction of freedom of expression. A well-developed system of protection has to provide enough exemptions, which give sufficient regard to the public interest and the impact of freedom of expression. The German system acknowledges the public interest in the life of celebrities and established the exemptions for public figures for all purposes and public figures for limited purposes. Moreover, photographs depicting persons just as background may be published without consent. This system establishes a good balance of privacy interests on the one hand and public interest and freedom of expression on the other hand.

Recently, it has been decided that also the publication of a video film taken in a public place breached the plaintiff's right to privacy.⁷⁷ Although this case depends on its extraordinary facts, it shows that photographs taken in the public arena could be regarded as private facts. In the *Hosking* case one could argue that the private information was made public, but only to the number of persons, which were around at this Saturday in Newmarket. This is different to a publication of the photographs in a newspaper and therefore to the whole world. Moreover, this publication establishes a permanent record of the photographs, which the children have to live their whole life with. They have no other choice than to accept the subsequent development. Nevertheless, the prohibition of the publication of the photographs would lead to a kind of a right to control one's image as recognised in the German law of privacy. This right was not known in the law of privacy in New Zealand so far. It will be interesting to see in which way and to what extent the tort of privacy will be developed in this context.

⁷⁷ *Peck v The United Kingdom*, Application no. 44647/98 ECHR 28 January 2003. In this case Mr Peck was filmed in a public place possessing a knife. He was in a depressive state and had attempted suicide right before the video was filmed.

5. *The analysis of the legislative context*

In the legislative context Randerson J pointed out:⁷⁸

In developing remedies to meet perceived needs in 'hard' cases, courts should be careful not to go beyond their proper constitutional role.

Criteria to decide how far a court should go in establishing new remedies are "the statutory context; the availability of existing remedies; the extent to which the new development might impact on established patterns of law; policy considerations; and prevailing community values and goals."⁷⁹ The statutory context is determined by two main statutory complexes. On the one hand there is the way in which the New Zealand Bill of Rights Act 1990 (BORA) deals with matters of privacy and freedom of expression. Obviously the BORA does not mention a right to privacy, while it establishes expressly the freedom of expression in section 14. Randerson J admits "that the section 21 right to be secure against unreasonable search and seizure affords protection against invasion of privacy in relation to person or property, but that is a specific and narrower right than that contended for by the plaintiffs."⁸⁰ This opinion is supported by a judgment of the Court of Appeal:⁸¹

... neither the Bill of Rights nor the International Covenant gives a general guarantee of privacy. And New Zealand does not have a general privacy law. [...] It is not surprising that there is no single readily identifiable value applying in all cases.

Randerson J assumed that the expressly named freedom of expression weighs much bigger than the right to privacy, because the BORA does not provide protection of a right to privacy,

The other important area in the statutory context is the recent legislation of parliament dealing with privacy issues. The most important legislative actions in this context are the Privacy Act 1993 and the Broadcasting Standards

⁷⁸ *Hosking v Runtig* [2003] High Court Auckland CP 527/02 Randerson J [119].

⁷⁹ *Hosking v Runtig* [2003] High Court Auckland CP 527/02 Randerson J [119].

⁸⁰ *Hosking v Runtig* [2003] High Court Auckland CP 527/02 Randerson J [123].

⁸¹ *R v Jeffries* [1994] 1 NZLR (CA) Richardson J 290, 302.

Act 1989. In context of the Privacy Act Randerson J concludes, "It does not create tortious rights and duties."⁸² Moreover, the Act does not establish any general right to privacy, which the plaintiff could rely on. The analysis of the Broadcasting Standards Act focuses on another point. Randerson J admits that the principles developed by the Broadcasting Standards Authority on the grounds of the Broadcasting Standards Act include the protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities. This principle is quite similar to the test developed by Nicholson J in *P v D*,⁸³ but Randerson J emphasises the fact that the Broadcasting Standards Act applies only to the broadcasting media and not to the defendants in the *Hosking* case. While the judge says that neither the Privacy Act nor the Broadcasting Standards Act precludes expressly the development of a common law cause of action on the field of privacy law, his conclusion points out another opinion:⁸⁴

What the Privacy Act and the Broadcasting Act do demonstrate is that Parliament has acted deliberately and carefully to establish privacy protections in these areas and the courts should treat carefully when considering the development of common law rights in related areas.

6. *Should this tort be developed by the courts*

Does the recent legislative activity of parliament really preclude the development of a tort of invasion of privacy by the courts? The reasoning of Randerson J followed the line that parliament recently enacted several statutes dealing with privacy issues, but none of them contained remedies for a breach of privacy.⁸⁵ Therefore, courts should be very cautious concerning the development of new causes of action in this area. In the rehearing of the *Hosking* case at the court of appeal the appellants argued:⁸⁶

The most important principle of the common law is a principle of change, and the common law tradition teaches that the life of the law is response to the human needs.

⁸² *Hosking v Runtig* [2003] High Court Auckland CP 527/02 Randerson J [128].

⁸³ See p 12.

⁸⁴ *Hosking v Runtig* [2003] High Court Auckland CP 527/02 Randerson J [134].

⁸⁵ See p 17.

⁸⁶ *Hosking v Runtig* Court of Appeal 101/03 Appellants submissions, p38.

Indeed one of the main advantages of a common law system is a higher degree of flexibility to deal with new developments in society. In contrast to a codified law system judges, experts in law, shall be able to develop the law if it is necessary. Therefore, not all parts of the law have to be ruled by parliamentary statutes. Nevertheless, courts have to apply statutes of parliament if these have been adopted. Therefore one can argue that parliament did not want to enact a remedy for the breach of privacy. In that case the courts might respect the will of the legislature. It is true that neither the Privacy Act nor the Broadcasting Standards Act provide such a remedy, but does that inevitably mean that parliament was not willing to enact this remedy? As the long title of the Privacy Act says it deals with "the collection, use, and disclosure, by public and private sector agencies, of information relating to individuals."⁸⁷ In this context private sector agencies are of interest in particular. Is a newspaper such a private sector agency? In context of other provisions of the Act it is not. The Act understands private sector agencies in a way of private companies, which usually receive and store personal data of others. This could be a bank, which stores data about their clients or a hospital, which stores data about their patients. The Privacy Act regulates the procedures under which these agencies have to handle this personal information. It does not regulate what happens if somebody receives personal information without the consent of the person concerned. However, this is the issue a tort of privacy is dealing with. Therefore the Privacy act does not contain a decision of parliament not to establish the named tort.

The Broadcasting Standards Act governs the way television operates in New Zealand. The Act's primary focus is programme standards, the establishment of New Zealand On Air and regulation of election programmes.⁸⁸ The purpose of this act is not the regulation of the relation between the media and other private persons, but the way the broadcasting media in New Zealand work and which standards their programmes have to fulfil. It ensures a certain level of quality in the media in New Zealand. So the Broadcasting Standards Act does not deal with the question of remedies in cases of invasion of privacy. Thus it

⁸⁷ Privacy Act, long title

⁸⁸ <<http://www.nzdbc.co.nz/regulatory/>> (last access 01. 12. 2003).

does not contain a decision of parliament against the named tort either. Moreover, the principles developed on the grounds of the Broadcasting Standards Act by the Broadcasting Standards Authority establish nearly the same test as developed by Nicholson J in *P v D*. Certainly these principles apply only to the broadcasting media and not to print media and newspapers. Nevertheless, the existence of these principles shows that the proposed protection of privacy interests is not as unfamiliar for the New Zealand media as Randerson J suggests. Why should freedom of expression have a bigger impact on print media than on broadcasting media? These principles show that freedom of expression does not inevitably outweigh privacy interests. If the broadcasting media have to respect privacy interest, the newspapers have to fulfil the same requirements. Since there is no statute, which shows clearly a denial of the tort by parliament, the fundamental principle of the common law should come into force. This means that courts are entitled to develop the law if it is necessary. As aforementioned the establishment of a tort of privacy is necessary under the contemporary circumstances, because the New Zealand law does not provide sufficient protection of privacy interests.

7. *The analysis of the facts of the Hosking case*

Randerson J did not only conclude that the claim of the Hoskings must fail, because he is not recognising a tort of invasion of privacy by disclosure of private facts. Although he denies the existence of this tort, he concludes that the facts of the *Hosking* case do not fit in the previous decisions of the High court dealing with matters of privacy. This conclusion seems to be a little bit odd. On the one hand the judge denies the existence of the named tort, but on the other hand he proves the existence of this tort by considering the possibility that the facts of the *Hosking* case could fulfil the requirements of the four-step-test introduced in *P v D*.

The conclusion that the *Hosking* case does not fit with the previous decisions depends mainly on three reasons. Firstly the taken photographs did not show private facts at all. They were taken in a public place right before Christmas:⁸⁹

⁸⁹ *Hosking v Runtig* [2003] High Court Auckland CP 527/02 Randerson J [137].

I accept Mr Miles' submission that the Newmarket shopping centre on a Saturday morning shortly before Christmas would be the last place one would seek solitude or seclusion.

The broad public was able to see the children and their mother pushing the stroller. Therefore, the photographs could not be classified as private facts. Moreover, the photographs were neither highly offensive nor objectionable to reasonable person. They show Mrs Hoskings pushing a stroller along a shopping street. Maybe "the faces of the children are visible, but not very prominent."⁹⁰ The photographs are depicting everyday activities, which everyone has seen very often. Lastly, in the opinion of Randerson J, the Hoskings as public figures cannot expect the same degree of privacy as ordinary members of society can.⁹¹

Viewed objectively, as it must be, the reasonable expectations of privacy of such persons will necessarily be lower since it is inevitable the media will subject celebrity figures such as Mr Hosking to closer scrutiny than others and because the public has a natural curiosity and interest not only in the personal lives and activities of the celebrities but also in their families.

Randerson J concludes his judgement in this context:⁹²

I also find that the plaintiffs' case does not fulfil the criteria set out in previous decisions of this court, which have held there is a tort of invasion of privacy arising from the public disclosure of private information.

This finding on the facts of the Hosking case is accompanied by a general conclusion on the issue of a tort of privacy. Given there is a tort of invasion of privacy by public disclosure of private facts, this tort covers the unauthorised invasion of the private and domestic sphere of another person, but does it also apply to the publication of photographs taken in a public place? Randerson J held in this context:⁹³

⁹⁰ *Hosking v Runtig* [2003] High Court Auckland CP 527/02 Randerson J [136].

⁹¹ *Hosking v Runtig* [2003] High Court Auckland CP 527/02 Randerson J [141].

⁹² *Hosking v Runtig* [2003] High Court Auckland CP 527/02 Randerson J [184].

⁹³ *Hosking v Runtig* [2003] High Court Auckland CP 527/02 Randerson J [183].

The plaintiffs' claim must fail since the law in New Zealand does not recognise a tortious cause of action in privacy based on the publication of photographs taken in a public place.

While Randerson J is right in his analysis that the *Hosking* case does not fit with the requirements of the test established by Nicholson J, this fact shows that the New Zealand privacy law has to be developed further on. To ensure a sufficient protection of privacy, in particular of the privacy of children, the common law has to provide a tort, which protects the privacy of children, under certain circumstances even when they appear in public places. As the German law recognises under certain circumstances privacy interests in public places, the New Zealand law should follow in this aspect. Even in these situations privacy interests may outweigh the public interest in the publication of this information.

C. *The Privacy Rights of Children*

Another issue Randerson J raised in his judgement is the question if the privacy of children weighs heavier than the privacy of adults:⁹⁴

Of course, this case relates to the privacy of the children, not to their parents. The question is, does that make a difference.

He acknowledges "that children are vulnerable members of our society and that courts, as well as other public institutions, have to regard to their best interests as a primary consideration."⁹⁵ This statement is founded on the United Nations Convention on the Right of the Child 1989 ('Children's Convention'), adopted by New Zealand in 1993:⁹⁶

2. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

⁹⁴ *Hosking v Runting* [2003] High Court Auckland CP 527/02 Randerson J [142].

⁹⁵ *Hosking v Runting* [2003] High Court Auckland CP 527/02 Randerson J [147].

⁹⁶ Convention on the Rights of the Child, Art 16.

3. The child has the right to the protection of the law against such interference.

The importance of the welfare of children and the duty of state authorities to protect and promote this welfare is supported by another provision of the 'Children's Convention':⁹⁷

1. In all actions concerning children, whether undertaken by public or private welfare institutions courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end shall take appropriate legislative and administrative matters.

Article 16 of the 'Children's Convention' is identical to Article 17 of the International Covenant on Civil and Political Rights 1976 with the only difference that Article 16 applies to both children and adults. Therefore, the judge emphasises the fact that children enjoy the same protection of their privacy as adults. All causes of action dealing with the protection of the private sphere apply completely to children. Moreover, Randerson J notices that the New Zealand Press Council accepted the need for the protection of children in particular:⁹⁸

Editors should have particular care and consideration for reporting on and about children and young people.

Nevertheless, also in cases in which children are involved everything comes down to a balancing with other competing rights, in particular the freedom of speech of the media.⁹⁹

In this case Randerson J held that the freedom of expression enjoyed by the media outweighs the right to privacy of the children of Mr and Mrs Hosking.

⁹⁷ Convention on the Rights of the Child, Art 3.

⁹⁸ Statement of Principles of the New Zealand Press Council, Nr. 5.

⁹⁹ *Hosking v Runting* [2003] High Court Auckland CP 527/02 Randerson J [147].

The main reason for this conclusion is the previous public behaviour in relation to the children. The parents have published information about the IVF-treatment, the names of the children and the fact that they have been born as twins. All this has awakened the public interest. Moreover, the position of Mr Hosking as a TV-star and his way to arouse publicity has created public interest not only in his life, but also in the life of his family. Maybe not everyone is interested in these stories:¹⁰⁰

But it must be recalled that it is not for the court in cases such as this to decide what is appropriate for people to see or to act as some form of judicial censor.

Therefore, the judge concludes that even if he had accepted the alleged right of privacy, it would have been clearly overwhelmed by the freedom of expression. This statement has to be examined.

1. *An examination of the privacy of children*

Although the judgement of Randerson J addresses a lot of issues connected to the law of privacy it deals with the privacy of children in particular. This depends on the facts of the *Hosking* case. Generally, the judge does not recognise a tort of breach of privacy at all. In context of the privacy of children, he says that they enjoy the same protection of other remedies as adults. If he had accepted a general right to privacy it would have been clearly overwhelmed by the right to freedom of expression. The issue seems to be a little bit more complicated.

There is no statutory guaranteed right to privacy in New Zealand, but as aforementioned the New Zealand law recognises several privacy interests. This is supported by the ICCPR, which was adopted by New Zealand in 1979:¹⁰¹

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.

¹⁰⁰ *Hosking v Runting* [2003] High Court Auckland CP 527/02 Randerson J [152].

¹⁰¹ International Covenant on Civil and Political Rights, Art 17.

2. Everyone has the right to the protection of the law against such interference or attacks.

Randerderson J reasoned that the existing remedies provide sufficient protection against this interference and fulfil therefore the obligation set out in Art 17. As aforementioned this opinion is wrong. The existing remedies in New Zealand do not provide protection, which covers all privacy interests. Therefore, the establishment of a tort of privacy is required by Art 17 ICCPR.

The fact that Art 16 of the 'Children's Convention' states exactly the same rights for children emphasises the particular importance of the privacy of children. Randerson J recognises the vulnerability and weak position of children in modern society. He mentions several New Zealand statutes, which dealing with this aspect.¹⁰² This issue must be emphasised. Children are the weakest members of our society. They are not able to decide in their best interests and need time to learn the rules of the game. Therefore, an undisturbed environment is very important, in which the children can develop their intellect and skills. This environment is endangered, if children become part of the public. Perhaps the person is not able to stop this publicity, when she or he is in an age, in which she or he can decide on its own, if she or he wants to be a public figure. There is always the danger of a slippery slope and it is possible that the person is not able to stop a development that started when she or he was not able to decide for her or himself. If the child is not able to decide, this responsibility lies with the parents:¹⁰³

1. State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

¹⁰² For example: the Guardianship Act 1968 and the Children, Young Persons and Their Families Act 1989.

¹⁰³ United Nations Convention on the Rights of the Child, Art 18.

This rule states definitely that the parents have the responsibility for the upbringing and the education of the child. They are acting in good faith and try to achieve the best interest of the child. As long as a child is not able to make own decisions, the parents decide on behalf of the children. One can argue that the provisions of international conventions such as the 'Children's Convention' only address to state authorities and cannot apply to private litigation. Now, Art 18 of the 'Children's Convention' establishes the obligation that State Parties shall ensure the recognition of the rights of the parents. Therefore, the government has to provide a legal framework, in which no one infringes the rights of the parents. If private persons infringe these rights, the government has to ensure that there are effective remedies preventing this infringement. In this case, the New Zealand government is obligated to invent a common law remedy, which provides sufficient protection of the rights of the parents set out in Art 18 of the 'Children's Convention'. This is supported by two other provision of the 'Children's Convention':¹⁰⁴

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Originally the provision establishes protection for the child against the abuse of the parents. Nevertheless, it can be read as an obligation for State Parties to support parents in the protection of their children. If parents are not able to protect their children from one of the abuses named above, the government has to establish effective remedies, which support the parents. In this case the prohibition of the exploitation of the children could apply. The issue of exploitation of children is emphasised by another provision of the 'Children's Convention':¹⁰⁵

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

¹⁰⁴ United Nations Convention on the Rights of the Child, Art 19.

¹⁰⁵ United Nations Convention on the Rights of the Child, Art 19.

Therefore the New Zealand law has to provide an effective remedy for the breach of privacy interests, in particular for the breach of privacy of children.

D. The rehearing of the Hosking case in the Court of Appeal

Therefore, the Hoskings pleaded in a rehearing on the case in the Court of Appeal for the extension of the tort of invasion of privacy to a tort of unauthorised invasion of privacy, which also applies to the publication of photographs of children without the consent of the parents. The appellants argued that there is a gap in the New Zealand law without this extension, because the established causes of action do not cover all possible breaches of privacy. This leads to a breach of New Zealand's international obligations under the 'Children's Convention'.¹⁰⁶

According to the appellants Randerson J failed to weigh the privacy interests of the children in section 21 and section 18 BORA against the free speech interests in section 23.¹⁰⁷ The taking of the photographs was an unreasonable search and seizure of information about the children.¹⁰⁸ The publication of the photographs and the subsequent interest of the media leads to a situation, in which the parents avoid the appearance of the children in the public. According to the appellants this is the only way to protect the children from serious harm and to enable them to live a normal life in the future. This then leads to a breach of the children's freedom of movement.¹⁰⁹

Moreover, the appellants argued that the judgement of Randerson J is a breach of Article 16 and Article 19 and 36 of the Children's Convention. Article 16 protects the privacy of children and Article 19 and 36 prohibit the exploitation of children. The publication of the photographs of the children means an economical exploitation and thus a breach of Article 19 and 36.¹¹⁰

¹⁰⁶ *Hosking v Runtig* Court of Appeal 101/03 Appellants submissions, p4.

¹⁰⁷ *Hosking v Runtig* Court of Appeal 101/03 Appellants submissions, p5.

¹⁰⁸ *Hosking v Runtig* Court of Appeal 101/03 Appellants submissions, p5.

¹⁰⁹ *Hosking v Runtig* Court of Appeal 101/03 Appellants submissions, p11.

¹¹⁰ *Hosking v Runtig* Court of Appeal 101/03 Appellants submissions, p16.

1. *The argument of the respondents*

The respondents argued that the New Zealand legal framework does not provide a legal action such as the appellants proposes. While the NZBORA protects the freedom of expression in section 23, it does not contain a protection of the general right of privacy.¹¹¹ Thus, the impact of freedom of expression clearly overwhelms the right to privacy of the children. The tort of invasion of privacy by the disclosure of private facts does not apply, because the publication does not deal with private facts.¹¹² Moreover these facts are neither highly offensive nor objectionable.¹¹³ The existing remedies fulfil New Zealand's international obligations under the Children's Convention, so there is no need for a new remedy.¹¹⁴

2. *A six-step test for the protection of the privacy of children*

According to their argument the appellants proposed the extension of a tort of privacy in the case of the publication of photographs depicting children. To avoid all inconsistencies with the international obligations and to provide sufficient protection of the children the appellants suggested the invention of a six-step test:

1. The children must be identifiable in the photographs;
2. The photographs shall not be published in absence of the consent of the parents;
3. The case shall be assessed without regard to the position of the parents;
4. There shall be no reason for the publication in the behaviour of the child;
5. The court shall regard the impact of freedom of speech;
6. The case shall be assessed in the best interests of the child.

¹¹¹ *Hosking v Runting* Court of Appeal 101/03 Submissions on Behalf of the defendants, p.6.

¹¹² *Hosking v Runting* Court of Appeal 101/03 Submissions on Behalf of the defendants, p.10.

¹¹³ *Hosking v Runting* Court of Appeal 101/03 Submissions on Behalf of the defendants, p.12.

¹¹⁴ *Hosking v Runting* Court of Appeal 101/03 Submissions on Behalf of the defendants, p.32.

(a) The children must be identifiable in the photographs

The first step ensures that there is an issue at all. If the children are not identifiable in the photographs, there is no problem. Neither the parents would be concerned, nor could one consider the disclosure of private information. If the depicted person is not recognisable, one hardly can say it is private information about a person.

(b) Absence of the consent of the parents

This requirement addresses the right of the parents to bring up their children. It recognises that the parents have the right to decide on behalf of children as long as they are not able to make their own decisions. Moreover, it respects the specific position of children in society. The need for a higher degree of protection of the privacy of children is matched by this requirement. The parents shall decide, which information should be published about the child. This ensures that the parents are able to protect the privacy of their children in a sufficient way. The German Federal Constitutional Court acknowledged the rights of the parents in a similar way holding that the Federal Court of Justice failed to weigh the rights of the parents set out in Article 6 of the Basic Law. In cases of the privacy of children freedom of expression has to be balanced against the privacy interests of the children and the right of the parents to up bring their children. This is underpinned by the provisions set out in the 'children's convention'.

(c) Assessment without regard to the position of the parents

This requirement is of particular concern in the *Hosking* case. Randerson J found that the children of the Hoskings couldn't expect the same level of protection of privacy as anybody else, since Mr Hosking is a public figure. Therefore, there is a legitimate interest not only in the person of Mr Hosking, but also in his family. Following this opinion any relative of a celebrity would be a public figure itself. This concept seems to be a little bit too broad. As aforementioned the German Federal Constitutional Court held that children of celebrities are not inevitably public figures. It still depends on the behaviour of the person itself, if she or he can be described as public figure. If a person avoids the appearance in the public at all, one cannot assess her or him as public figure. In the case of children this assessment has to be handled carefully, because of their

weak position in society. In this context it means that the privacy of the children has to be handled independently from the privacy issues of their parents.

(d) No reason for the publication in the behaviour of the child

This requirement gives respect for the competing right of freedom of expression of the media and recognises a legitimate public interests in the publication of the information. It is quite similar to the concept of a public figure for limited purposes in the German law. If there is a reason in the behaviour of the child or the circumstances the photographs were taken in, there might be a legitimate public interest in the publication of the photographs.

(e) Impact of freedom of speech

This step provides a general basis for a balancing of the competing rights of the involved parties. While Randerson J thought Freedom of expression would always outweigh the privacy interests of the other party, this step provides a case-by-case balancing. This leads to a much better balancing of the named rights.

(f) Assessment in the best interest of the child

The last step regards the importance of the protection of children. It recognises the international obligations established in the 'Children's Convention'. Moreover it is a counterbalance to step two and the right of the parents to decide, which information should be published. The parents shall agree with the publication in the case that the publication is in the best interest in the child. This avoids that parents decide rather in their own interests than in the interests of the child.

Concluding the proposed test provides an adequate remedy for breaches of privacy of children by publication of photographs. This aim cannot be reached by a development of other existing remedies. As aforementioned no existing remedy can be developed in a way that provides sufficient protection of privacy. Privacy interests need a unique protection, which fit to the specific requirements of breaches of privacy. The test emphasises the importance of the private sphere of children and ensure the opportunity for the parents to bring their children up in save and quiet environment. Therefore, it establishes an ef-

fective remedy to fulfil the international obligations of New Zealand. On the other hand it respects the right to freedom of expression enjoyed by the media, but it does not disregard the important issue of privacy at all. It provides a public interest test and a general basis for a case-by-case balancing of the competing rights. Therefore it weighs both privacy interests and freedom of expression in an adequate way. It establishes a well-balanced system of protection of privacy interests and allows in case-by-case decisions exemptions, if there is an important public interest in the information. This test establishes in fact a system, which produces quite similar results as the German approach.

Perhaps this test should be considered in relation to the publication of information of any kind about children, not only photographs. The need for the protection of the children's privacy is the same in case of publication of private information. Since the test provides a good balancing of the competing rights, there is no reason why it should not apply to all cases concerned with the publication of private information of children.

IV. Conclusion

The German law provides an extensive protection of privacy. It depends on the general right to one's own personality. This right is based on a complex legal framework of constitutional rights, tort law and the right to control one's own image. Therefore, this high level of protection is consistent with the German legal system and it provides a sufficient protection of the privacy of children in particular.

Unfortunately the situation in the laws of New Zealand is not that clear. Since *Randerson J's* denial of a tort of invasion of privacy by disclosure of private facts the situation seems to be quite uncertain. Do the existing remedies, breach of confidence in particular provide sufficient protection for privacy interests, or is there a need for a tort of invasion of privacy? Who should establish such a tort: parliament or the courts? Is the privacy of children of particular concern and does it need more protection than the privacy of adults?

The conclusion of Randerson J that in context of the protection of privacy interests the tort of breach of confidence should be developed is definitely wrong. This tort is designed to protect a relationship of confidence. The range of privacy interests is much wider. Also the other existing remedies do not protect all aspects of privacy. Therefore, a tort has to be established, which protects privacy issues in particular. The four-step test developed in *P v D* for a tort of invasion of privacy by public disclosure of private facts is a useful basis for the development of the law of privacy in New Zealand. It will be interesting to see how this issue will be developed in the following years.

In context of the privacy of children the specific importance of this issue must be emphasised. Children need a safe and quiet environment so that they can develop uninterrupted by the interference of others. Therefore, children need a higher degree of protection than adults. While adults are able to decide, in which way they want to appear in the public domain, children are not able to decide that on their own. Supported by the international obligations in the 'children's Convention' the parents have to decide, in which way information about their children should be published. The six-step test proposed by the appellants in the hearing of the Hosking case at the Court of Appeal provides an interesting framework to decide these cases. On the one hand it emphasises the importance of the interests of the children, but on the other hand it respects the right to freedom of expression in two ways. It expressly suggests a balancing of the competing rights and it states a public interest consideration in the step 'behaviour of the child'.

Moreover, a similar test could be considered to treat privacy issues of adults. While the privacy interests of children are of particular importance, also the privacy rights of adults have to be protected sufficiently. The test developed by Nicholson J is just a first step, but it does not cover all privacy interests. Therefore a test should be developed, which depends on the consent of the depicted person. As in the case of children, this test has to provide exemptions in which the photograph may be published without consent, when there is an important public interest in the publication. This public interest can occur in the cases of celebrities, special events and specific behaviour of the person. After

all a test like this would bring the level of protection to a similar level achieved in Germany.

Legislation

Human Rights Act 1998 (England)
Act on the Copyright in Works of Art and Photography (Germany)
Basic Law (Germany)
Bürgerliches Gesetzbuch (Civil Code) (Germany)
Bill of Rights Act 1990 (New Zealand)
Broadcasting Standards Act 1998 (New Zealand)
Children, Young Persons and Their Families Act 1989 (New Zealand)
Guardianship Act 1968 (New Zealand)
Privacy Act 1993 (New Zealand)
Statement of Principles of the New Zealand Press Council
United Nations Convention on the Rights of the Child
International Covenant on Civil and Political Rights

Cases

England

Douglas v Hello! Ltd [2001] QB 987 (CA) Seeley LJ
Pech v The United Kingdom, Application no. 4464/78 ECHR, 28 January 2000

Germany

BGHZ 13, 334
BGHZ 131, 332
BGH [1996] 15 NJW, 985
BVerfG 7, 198 (1958)
BVerfG [2007] 34 NJW, 1021
BVerfG [2008] 30 NJW, 2100

New Zealand

Stanley v Wagon Fibres Ltd [1983] 1 NZLR 411
Hodgson v Hodgson [2007] High Court Auckland CP 42702 Endereson J [2007]
P v D [2000] NZLR 601

BIBLIOGRAPHY

Legislation

Human Rights Act 1998 (England)
Act on the Copyright in Works of Art and Photography (Germany)
Basic Law (Germany)
Buergerliches Gesetzbuch (Civil Code) (Germany)
Bill of Rights Act 1990 (New Zealand)
Broadcasting Standards Act 1998 (New Zealand)
Children, Young Persons and Their Families Act 1989 (New Zealand)
Guardianship Act 1968 (New Zealand)
Privacy Act 1993 (New Zealand)
Statement of Principles of the New Zealand Press Council
United Nations Convention on the Rights of the Child
International Covenant on Civil and Political Rights

Cases

England

Douglas v Hello! Ltd [2001] QB 967 (CA) Sedley LJ
Peck v The United Kingdom, Application no. 44647/98 ECHR 28 January 2003

Germany

BGHZ 13, 334
BGHZ 131, 332
BGH [1996] 15 NJW, 985
BVerfG 7, 198 (1958)
BVerfG [2000] 14 NJW, 1021
BVerfG [2000] 30 NJW, 2190

New Zealand

Bradley v Wingnut Films Ltd [1993] 1 NZLR 415
Hosking v Runting [2003] High Court Auckland CP 527/02 Randerson J [184]
P v D [2000] NZLR 601

R v Jeffries [1994] 1 NZLR (CA) Richardson J 290

Tucker v News Media Ownership [1986] 2 NZLR 716

Journals

Katrine Evans *Reverse Gear for NZ's privacy tort: the Hosking decision* (2003)
PLPR 61

Geoffrey Palmer *Privacy and the Law* (1975) NZLJ 747

Rosemary Tobin *Invasion of Privacy* (2000) NZLJ, 216

Rosemary Tobin *Privacy: One step forward, two steps back!* (2003) NZLJ 256

Warren and Brandeis *The Right to Privacy* (1890) 4 HLR 194

Texts

Australian Law Reform Commission *Privacy*, report no 22, 1983

John Burrows/ Ursula Cheer *Media Law in New Zealand* (4th ed, Oxford University Press, Oxford, 1999)

John Burrows "Invasion of Privacy" In Stephen Todd (ed) *The Law of Torts in New Zealand* (3rd ed, Brookers, Wellington, 2001)

Nigel Foster/ Satish Sule *German Legal System and Laws* (3rd ed, Oxford University Press, Oxford, 2002)

Hosking v Runtig Court of Appeal 101/03 Appellants submissions

Hosking v Runtig Court of Appeal 101/03 Submissions on Behalf of the defendants

Ingo von Münch *Grundgesetz – Kommentar* (5th ed, Verlag C H Beck, München, 2000)

New Zealand Law Commission *Protecting Personal Information from Disclosure* [2002] Preliminary Paper 49

Palandt *Buergerliches Gesetzbuch* (60th ed, Beck, Muenchen, 2001)

Michael Tugendhat/ Ian Christie *The Law of Privacy and the Media* (Oxford University Press, Oxford, 2002)

Websites

Thomas Lundmark *Princess Caroline in Bismarck's Shadow*
<<http://jurist.law.pitt.edu/world/gercor2.htm>> (last access 01. 12. 2003)

<http://www.nztbc.co.nz/regulatory/>> (last access 01. 12. 2003)

LAW LIBRARY

A Fine According to Library
Regulations is charged on
Overdue Books.

VICTORIA
UNIVERSITY
OF
WELLINGTON

LIBRARY

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY



3 7212 00719938 1

AS741

VUW

A66

M693

2003

