W824

WITHY, V. The tort of privacy in New Zealand.

VANESSA WITHY

THE TORT OF PRIVACY IN NEW ZEALAND: IS THE BALL OUT OF COURT?

AN ASSESSMENT OF WHETHER A PRIVACY TORT IS BEST DEALT WITH BY THE COURTS OR BY PARLIAMENT

Submitted for the LLB (Honours) Degree at Victoria University of Wellington

LAWS 489

2004

Word Count: 8, 435

LAW

S741
UW
66
824
04

Victoria
UNIVERSITY OF WELLINGTON
*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*

LIBRARY

CONTENTS

I INTRODUCTION........3

II THE QUEST FOR CERTAINTY FUTILE?........4

A Development of the Tort Formulation........4

B Difficulties with Application........6

C Common Law Protection of Privacy Interests........9

D Conclusion........10

III THE LAW-MAKING FUNCTION OF THE JUDICIARY........10

A Basic Constitutional Concerns........11

B Scope of Judicial Law-Making Jurisdiction........13

1 The political boundary........13

2 Necessity........15

3 Principled foundation........16

4 Principled development........18

5 Reasoning........19

C Conclusion........19

IV HOW SHOULD WRONGFUL DISCLOSURE BE DEALT WITH IN NEW ZEALAND?........20

A The Position in the United Kingdom........20

B The New Zealand Comparison........23

C The Appropriate Approach........26

1 Problems with judicial development........26

2 The benefits of parliamentary intervention........28

D Conclusion........30

V CONCLUSION........31

VI BIBLIOGRAPHY........33

VII TABLE OF CASES........35

VIII TABLE OF LEGISLATION........36

I INTRODUCTION

The Court of Appeal judgment of *Hosking v Runting*[1] was a landmark in tort,[2] effectively confirming the wrongful publicity tort as part of the New Zealand common law.[3] However, concerns aired by the dissenting Judges are illustrative of the wider and more difficult question of whether judicial creativity or legislative intervention is in fact the appropriate approach to this particular area of law. Given Justice Randerson's denial of the existence of the tort in the High Court, and the strong dissenting judgments in the Court of Appeal, this issue remains a live debate. The current significance of this question is further illustrated by the recent Law Commission discussion paper *Protecting Personal Information from Disclosure*, in which comment was invited on the possibility of creating a new statutory tort of privacy.[4]

In this paper, it will be argued that the Court of Appeal should not have confirmed the existence of the tort, but encouraged parliamentary intervention. It is not contended that the protection of privacy interests is unnecessary or unimportant. Rather, it is argued that the creation of a statutory tort would be preferable for the primary purpose of ensuring and guaranteeing certainty in the law.

Firstly, a brief background to the law of privacy will be provided from the time of its first inception in 1986. This will include an assessment of the development of the tort formulation, and the difficulties experienced with the application of the formulation. There will also be a discussion of other methods of protecting privacy interests, methods which nonetheless fall short of providing full coverage of all privacy interests. The purpose of this is to illustrate the continued uncertainty regarding the scope of the tort, a problem which *Hosking* does little to resolve.

The aim of section III is to explain the basic concerns that arise in relation to judicial law making, and the potential dangers associated with it. It will be argued that

---

[1] *Hosking v Runting* (25 March 2004) CA 101/03.
[2] Matt Sumpter and Justin Graham "IP round-up: *Hosking v Runting*- New Zealand's New Privacy Tort" (May 2004) New Zealand Intellectual Property Jnl 290, 290.
[3] Previously this tort was commonly known as public disclosure of private facts.
[4] New Zealand Law Commission *Protecting Personal Information from Disclosure: A Discussion Paper* (NZLC PP49 Wellington, 2003) 24-27.

these concerns do not prohibit judicial law making entirely, but effectively limit that power. As judges are unelected and unrepresentative they must be careful not to invade the political arena, and must ensure that any creativity is approached in the appropriate manner. It is argued that the validity of judicial intervention in the area of privacy law is questionable, particularly given the rather political nature of the issue.

The final part of the paper assumes the courts do have the jurisdiction to develop the law, and seeks to determine the appropriate approach to wrongful publicity in New Zealand. This will include an assessment of the United Kingdom position, and a determination of whether New Zealand common law must necessarily conform to it. It will be argued that the judiciary's refusal to act in the United Kingdom is coupled with the continued parliamentary failure to intervene. The absence of any such explicit refusal in New Zealand renders our local climate completely different, and affirms the ability for judicial intervention. Nevertheless, despite judicial power, the flexibility of case-by-case development frequently comes at the expense of legal uncertainty. This problem is evident in the case of the wrongful publicity tort, and indicates strongly towards a preference for legislative intervention which can provide a more comprehensive definition of the tort formulation.

II THE QUEST FOR CERTAINTY FUTILE?

Eighteen years have passed since the inception of a tort of breach of privacy into New Zealand common law.[5] Since that time, cases raising the cause of action have been few, their facts varied, and their success limited. The tort has developed cautiously and incrementally, and consequently remains ill-defined and of uncertain scope.[6]

A Development of the Tort Formulation

The case of *Tucker v News Media Ownership* saw the birth of a tort of breach of privacy in New Zealand. Viewing the new tort as a natural extension of the

---

[5] *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 (HC).

[6] Evans states that "…the full scope of the tort and the formulation of the test are still open to query": Katrine Evans "Was Privacy the Winner on the Day?" (May 2004) NZLJ 181, 181 ["Was Privacy the Winner on the Day?"].

Wilkinson v Downtown[7] tort of intentional infliction of emotional distress, McGechan J supposed the introduction of a tort of public disclosure of private facts into the New Zealand common law, albeit with caution and hesitation.[8] As McGechan J himself gave little consideration to what the actual formulation of the tort might be, it is of greater assistance to refer to Jeffries J in earlier injunction proceedings where he speaks of "unwarranted publication of intimate details of the plaintiff's private life which are outside the realm of legitimate public concern, or curiosity."[9] It was acknowledged at this early stage that if the tort were accepted as established, its boundaries and exceptions would require much working out on a case-by-case basis.[10]

Due to the stark absence of precedent relating to a civil breach of privacy in New Zealand law, determining exactly what the tort entails has proven problematic in subsequent cases. It has been necessary to draw largely on United States jurisprudence where the tort has developed extensively from the time of the seminal article of Warren and Brandeis.[11] The first real formulation emerged out of *Bradley v Wingnut Films,*[12] in which Gallen J accepted the formulation of three factors propounded by William L Prosser.[13] This initial formulation was the simple public disclosure of private facts that are highly offensive and objectionable to the reasonable person. [14] The case of *P v D* added little other than confusion to the formulation by including legitimate public concern, previously seen as a defence, as an element of the tort.[15]

Following *Hosking*, the tort formulation now consists of two fundamental requirements. Firstly, there must be the existence of facts in respect of which there is a reasonable expectation of privacy, and secondly publicity given to those private facts that would be considered highly offensive to an objective reasonable person.[16]

---

[7] *Wilkinson v Downtown* [1897] 1 QB 57. The New Zealand authority for this case of action is *Stevenson v Basham* [1922] NZLR 225.
[8] *Tucker v News Media Ownership Ltd*, above n 5, 733 McGechan J.
[9] See *Tucker v News Media Ownership Ltd*, above n 5, 732 McGechan J.
[10] *Tucker v News Media Ownership Ltd*, above n 5, 733 McGechan J.
[11] Warren and Brandeis "The Right to Privacy" (1980) 4 Harv L Rev 193.
[12] *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 (HC).
[13] William Prosser and Page Keeton *Prosser and Keeton on the Law of Torts* (5ed, West Publishing Company, Minnesota, 1984) 856-857.
[14] *Bradley v Wingnut Films Ltd*, above n 12, 423-424 Gallen J.
[15] *P v D* [2000] NZLR 591, para 33-34 (HC) Nicholson J.
[16] *Hosking v Runting*, above n 1, para 117 Gault P and Blanchard J.

As to the question of legitimate public concern, it was settled that it should be a defence rather than an element of the tort, although little assistance is given as to the application of this defence.[17] Furthermore, to provide assistance to those with the task of interpreting the law in the future, the majority asserted that a successful claim did not require personal injury or economic loss. Rather, the harm to be protected in wrongful disclosure cases is in the nature of humility and distress.[18]

Although a part of the majority, Tipping J differed from the Gault P and Blanchard J in his formulation of the tort.[19] He preferred that the question of offensiveness be controlled within the need for a reasonable expectation of privacy, claiming that a reasonable expectation would rarely arise unless the publication would give rise to a high degree of offence and consequent harm to the reasonable person. He further commented that there could be times when it may be too restrictive to require a high level of harm, for example if there was a serious lack of public concern. However, in order to ensure that freedom of expression was not unduly limited, it was suggested that the test be a substantial level of harm.[20] This test is patently less stringent than that propounded by the majority, highlighting the fact that the precise appearance of the tort remains controversial, even among members of the same majority.

B Difficulties with Application

Not only has there been difficulty in adequately defining the basic requirements of the cause of action, there has also been uncertainty as to how the requirements should be applied in practice in order to ensure the administration of justice. The requirement that the facts be private is one point of contention. In *Tucker*, the plaintiff was seeking to prevent the publication of past criminal convictions, information that is on the public record. The willingness of the Court to grant an injunction in favour of Mr Tucker suggests that it is possible for public facts to

---

[17] *Hosking v Runting*, above n 1, para 129 Gault P and Blanchard J. The only guidance provided is that the there is a distinction between legitimate public concern and general curiosity, with only the former giving rise to the defence.
[18] *Hosking v Runting*, above n 1, para 128 Gault P and Blanchard J.
[19] Sumpter and Graham, above n 2, 292.
[20] *Hosking v Runting*, above n 1, para 156 Tipping J.

become private over time.[21] However, the Court provided no indication of how this can happen, and how long it would take.

As an extension of this, it has not traditionally been considered a breach of privacy if the alleged breach occurred in a public place.[22] In *Bradley,* however, Gallen J accepted that in some circumstances the fact that something exists or occurred in public does "…not necessarily mean that it should receive widespread publicity if it does not involve a matter of public concern."[23] An example supporting this proposition would be close up photographs taken of an accident victim, or of a woman whose clothes had been disarranged by the wind.[24]

A further important issue arises out of the private fact requirement, and is one that the courts have struggled to pin down in an instructive sense. The issue is the extent to which public figures should have a lower expectation of privacy in relation to their private lives. Gallen J first commented in *Tucker* that someone who was in the public eye might lose a right to privacy, noting it was a concept that was well recognised in United States privacy law. He suggested that this might even apply to an individual who was thrust into the public eye unwillingly.[25] In *Hosking*, the majority further indicated that the families of public figures should also expect less protection, because the legitimate public interest in the public figure is not limited to the individual himself.[26] Commenting that expectations of privacy might be diminished in some aspects of the families' private lives, he leaves the boundaries of this rule widely open for development.[27]

Furthermore, there has been differing opinions over the necessity of identification of the plaintiff for there to be a successful claim. This issue was most

---

[21] Prosser also acknowledges that although the existence of a public record will prove significant, under special circumstances it will not always be conclusive: William Prosser "Privacy" [1960] California Law Review 383, 396.
[22] Prosser, above n 21, 394-395. It is acknowledged that Prosser later accepts that there may be exceptions to this rule: Prosser and Keeton, above n 13, 859.
[23] *Bradley v Wingnut Films Ltd*, above n 12, 424 Gallen J.
[24] See Stephen Todd (ed) *The Law of Torts in New Zealand* (3ed, Brookers Ltd, Wellington, 2001) 923.
[25] *Tucker v News Media Ownership Ltd*, above n 5, 735 McGechan J. This proposition is supported in *Hosking v Runting*, above n 1, para 121 Gault P and Blanchard J.
[26] *Hosking v Runting*, above n 1, para 122 Gault P and Blanchard J.
[27] *Hosking v Runting*, above n 1, para 124 Gault P and Blanchard J.

recently considered by the District Court in *L v G*[28]. Judge Abbot concluded that it was not a necessary requirement, whilst acknowledging that this was an issue that has not been previously considered in privacy literature.[29] The issue had, however, already arisen in *Bradley*.[30] Gallen J commented that the tombstone could not be identified and implied that this factor counted against a breach of the plaintiff's privacy.[31] This particular point in *L v G* has also been the subject of further criticism in subsequent academic writing.[32] The Court in *Hosking* does not settle this point, failing to discuss the issue at all.

The extent of dissemination that must be given to private facts before that will be considered a public disclosure, is another factor that remains undetermined. The majority of the cases that have arisen thus far have involved widespread publication through media agencies, so this has never really been considered extensively. It has been held, however, that disclosure to only one person is not a "public" disclosure.[33]

The degree of intention required, if any, is also an issue that has been completely excluded from consideration. Strangely the issue has been overlooked in all of the relevant cases including *Hosking*. This is particularly surprising, especially given that the underlying liability for defamation has been such a famous aspect of the doctrine.[34] Kalven emphasises that there has also been little discussion of whether privacy is an intentional tort in the books.[35]

---

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

[29] *L v G*, above n 28, 247. Judge Abbot justified his decision by contending that the "…rights which are protected by the tort of breach of privacy relate not to the issues of perception and identification by those members of the public to whom the information is disclosed but to the loss of the personal shield of privacy of the person to who the information relates."

[30] In this case a family tombstone of the plaintiff was shown briefly in the background of a "splatter film" shot in a cemetery. The tombstone was never shown in its entirety and the inscription could not be read.

[31] *Bradley v Wingnut Films Ltd*, above n 12, 425 Gallen J; See also Harry Kalven Jr "Privacy in Tort Law-Were Warren and Brandeis Wrong?" (1966) 31 Law and Contemporary Problems 326, 333. Kalven indicates that identification is a necessary requirement for a successful claim with the following comment, "…some reference to the plaintiff in the mass media without his consent, which reference must involve the use of his name, his likeness, or some recognizable personal detail of his personality or biography."

[32] Katrine Evans "Of Privacy and Prostitutes" [2002] NZULR 71. Evans argues that identification is in fact a key element for what is to be termed a breach of privacy.

[33] *X v A-G* [1994] NZFLR 433.

[34] Kalven, above n 31, 335.

[35] Kalven, above n 31, 335.

As illustrated above, the Court of Appeal in *Hosking* provides little assistance in clarifying any of these issues. It is likely that the new formulation will in fact exacerbate the uncertainty as it has modified the way the tort is to be applied, thus restricting the instructive value of the earlier precedents. The requirement that the information be imparted in circumstances purporting an expectation of privacy is an inherently lose and vague concept, and the majority does not provide any real guidance as to exactly what this means. It is argued, therefore, that application difficulties will only continue.

In light of all this, Kalven's condemnation of the privacy tort (as originally stated by Warren and Brandeis) on the basis that it lacks any "legal profile"[36] regains resonance today in New Zealand. The level of guidance provided by the cases is so scant that its application is largely discretionary and thus unpredictable. The scope of the tort remains tenuous, and as was the situation at its first implementation, requires vast moulding on a case-by-case basis in the future.

C Common Law Protection of Privacy Interests

There are a number of other common law causes of action that may be brought against those who publish sensitive private facts about people, some of which were also argued in the privacy cases mentioned above. These actions include intentional infliction of distress, malicious falsehood, trespass, defamation, breach of confidence, nuisance, copyright, negligence and breach of contract. Nonetheless, these do not prove adequate to protect the wide variety of privacy interests.[37] For example, although defamation does have the ability to protect interests that are akin to privacy interest where the information is also damaging to the reputation, it is a complete defence to defamation to prove that the information published about the plaintiff was true.[38]

---

[36] Kalven, above n 31, 333.

[37] Todd, above n 24, 911; Rosemary Tobin "Invasion of Privacy" [2000] NZLJ 216, 216.

[38] Todd, above n 24, 915.

Breach of confidence has also worked in a number of cases to really protect what are privacy interests,[39] and some committees investigating privacy consider it one of the best avenues for privacy protection.[40] In New Zealand, however, a breach of confidence claim will only succeed where information has been imparted in circumstanced importing an obligation of confidence.[41] The breach of confidence claim failed in *P v D* because the information was not imparted in circumstances importing an obligation of confidence. One of the few deserving privacy plaintiffs, this case illustrates conclusively the need for further protection of privacy interests.

D Conclusion

The New Zealand courts have had time to develop the new tort and build up a body of precedent providing satisfactory guidance and certainty in the law. However, although there is a need for increased privacy protection, case-by-case development has proven highly problematic and slow. Certain important aspects of the law remain undetermined. In the end, the formulation today is no more valuable than it was at the time of *Bradley*, rendering the law unacceptably inadequate.

III THE LAW MAKING FUNCTION OF THE JUDICIARY

The rhetoric regarding the issue of judicial law making is plentiful and varied. The concerns that arise in relation to the issue are based on democratic ideals, which although important, do not have the effect of entirely prohibiting the power. Courts can make law as long as they respect those ideals and do not transcend the bounds of their jurisdiction.[42] It is submitted in this section that the limitations on judicial law-making render debatable the legitimacy of creativity in the realm of privacy. This paper does not intend to resolve the issue, but raise concern over the presupposition of the *Hosking* majority that they had the natural ability to proceed as they did.

---

[39] Todd, above n 24, 916.
[40] See Todd, above n 24, 917.
[41] *P v D*, above n 15.
[42] See *Hosking v Runting* [2003] 3 NZLR 385, para 119 (HC) Randerson J. "In developing remedies to meet perceived needs in "hard" cases, Courts should be careful not to go beyond their proper constitutional role."

A Basic Constitutional Concerns

With the emergence of the strict doctrine of *stare decisis* at the end of the nineteenth century, the formalist or 'declaratory' theory of the judicial function was predominant.[43] Proponents of this theory believed that the function of the judiciary was to interpret the known law, not to make law. As understood by Lord Simonds, "…our first duty…to administer justice according to the law, the law which is established for us by Act of Parliament or the binding authority of precedent…"[44] The rationale behind this theory is a conservative understanding of the constitutional roles of the separate branches of the Westminster system of government.

When voted in by their constituency, the government acquires the law-making mandate as representative government.[45] Legislation enacted by the government gains legitimacy with the passage through Parliament, as it has the approval of the democratically elected officials who are held accountable at subsequent elections.[46] Judicial law-making on the other hand can be seen to undermine this democratic ideal. Judges are not elected or answerable to the public for the decisions they make. This concern is augmented by the fact that judicial composition is not necessarily representative of the public at large, but is merely a reflection of the legal community.[47] There is no way to ensure that judicial decisions are representative of the prevailing current social climate. Furthermore, due to near invincible nature of judicial tenure, judges are not subject to the same public pressure and accountability as the legislature.[48]

---

[43] Brian Dickson "The Judiciary- Law Interpreters or Law makers" (1982) 11 Manitoba LJ 1, 4.
[44] *Midlands Silicones Ltd v Scruttons Ltd* [1962] AC 446, 467-8; See also *Donaghue v Stevenson*, [1932] AC 562, 567 Lord Buckmaster. In Lord Buckmasters view "…the common law must be sought in law books by writers of authority and in judgments of the judges entrusted with its administration."
[45] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 320; BV Harris 'The Law-Making Power of the Judiciary' in PA Joseph *Essays on the Constitution* (Brookers, Wellington, 1995) 265, 271; See also LL Jaffe *English and American Judges as Lawmakers* (Clarendon Press, Oxford, 1962) 20, 31. Jaffe asserts that "[t]he single most significant aspect of a modern democracy is the popular election of the organs which exercise the general lawmaking function."
[46] Joseph, above n 45, 319-320; Morag Mc Dowell and Duncan Webb *The New Zealand Legal System: Structures, Processes and Legal Theory* (3ed, Butterworths, Wellington, 2002) 129.
[47] ILM Richardson "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46, 50-51; Hon Michael Kirby "The Exciting Australian Scene" in BD Gray and RB McClintock *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995) 231, 257-258.
[48] John Bell "Three Models of the Judicial Function" in Rajeev Dhavan, R Sudarshan, and Salman Kurhshid (eds) *Judges and the Judicial Power: Essays in Honour of Justice VR Krishna Lyer* (Sweet & Maxwell, London, 1985) 54, 61; Richardson, above n 47, 50.

The most succinct way to explain these concerns is in terms of the separation of powers and parliamentary sovereignty theories, both of which are primary constitutional doctrines of the Westminster system of government.[49] Separation of powers rests on the notion that all the branches of government are independent of each other, and should not encroach on the specified functions of the others.[50] Simplistically, the functions of the legislature and judiciary are to make law and interpret law, respectively. Thus, the idea of judicial law making can be viewed as a transgression of the separation of powers doctrine. The theory of parliamentary sovereignty provides that the legislature is the supreme law making power, with an unlimited ability to enact or reform any law it so desires.[51] Judicial creation of new causes of action was therefore seen as a usurpation of the supreme law making power of the legislature.

Although this formalist view maintained limited support throughout the century, it is now largely considered outdated and entirely unrealistic.[52] In reality, the judiciary and the legislature are partners in the law making process, and a naive approach based on division of powers obscures that relationship.[53] The very existence of a complex body of legal common law principles is clear evidence that judges have always made law,[54] and the infamous case of *Donaghue v Stevenson* can be seen as a poignant example of how the courts actually create new causes of action.[55] Judicial

---

[49] Geoffery Palmer and Matthew Palmer *New Zealand Government under MMP* (Oxford University Press, Auckland, 1997) 128.
[50] See generally Joseph, above n 45, 236-269; McDowell and Webb, above n 46, 120.
[51] Geoffery Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4ed, Oxford University Press, Auckland, 2004) 156 ["Bridled Power"]; Joseph, above n 45, 475-477; McDowell and Duncan Webb, above n 46, 126- 130.
[52] See for example Lord Reid "The Judge as Law Maker" (1972) 12 JPTL 22, 22. "There was a time when it was thought almost indecent to suggest that judges make law- they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more."; See also Jaffe, above n 45, 13.
[53] Dickson, above n 43, 4; Jaffe, above n 45, 20 and 75.
[54] "How otherwise could the system have expanded to flourish for a quarter of humanity in widely different social conditions and over centuries beginning with the feudal age up to our own time of interplanetary travel, informatics, nuclear fusion, and the double helix?" : Justice Kirby, above n 47, 261.
[55] *Donaghue v Stevenson,* above n 44. In this case the plaintiff succeeded in bringing a claim against a manufacturer who had manufactured a bottle of ginger beer also containing a decomposed snail. Prior to this case, there was only liability when a contract bound the plaintiff and defendant. Yet, Lord Atkin

creativity is essential for keeping the law in tune with the current social climate and promoting the due administration of law, both key functions of the judicial system.[56]

Parliamentary sovereignty is still very much alive, however, and illustrated by the fact that judicial decisions are forever subject to the wrath of the supreme law making power.[57] Any judgment that constitutes an abuse of judicial power can be promptly checked by the passage of legislation to the contrary.

B Scope of Judicial Law-Making Jurisdiction

In the Court of Appeal, however, the *Hosking* majority failed to consider these constitutional concerns in any depth, and proceeded on the premise that the confirmation of the tort was within their judicial power. Although these concerns do not prohibit judicial law-making power, they do impose certain limitations. These limitations are summarised well by White,[58]

> some limitations are intellectual (an obligation to give adequate reasons for results), some institutional (an obligation to defer to the power of another branch of government), some political (a need to avoid involvement in hotly partisan issues), some psychological (a need to recognise the role of the individual bias in judicial decision making).

The following intends to outline the limitations imposed by these constitutional principles, and briefly examine whether they have actually been observed in the privacy context.

1 The political boundary

The constitutional justification for the absence of judicial accountability is the principle of judicial independence. This principle represents a fundamental value of

---

derived the 'neighbourhood principle' from the English common law, thus creating a law of liability for simple negligence.

[56] Richardson, above n 47, 52; *R v Hines* [1997] 3 NZLR 529, 579 (CA) Thomas J; Jaffe, above n 45, 11; P Robson and P Watchman Justice, Lord Denning and the Constitution (Biddles Ltd, Surrey, 1981) 56-57.

[57] Jaffe, above n 45, 19; *R v Hines*, above n 56, 780 Thomas J; Richardson, above n 47, 51.

[58] White *The American Legal Tradition* (Oxford, 1976) 371-372 as cited in Richardson, above n 47, 49.

VICTORIA UNIVERSITY OF
WELLINGTON LIBRARY

the liberal democracy and the rule of law.[59] Being independent from the other branches of government, judges are removed from the political arena allowing them to apply even-handed justice, which in turn maintains public confidence in the body. If the judiciary is seen to be taking political sides, its appearance as an independent adjudicator is imperilled, and its integrity jeopardised.[60] It is therefore generally understood that the courts should take particular care when considering areas of social policy.[61] Social policy decisions can thrust judges into the political arena and jeopardize the appearance of judicial impartiality.

It is acknowledged that there may be some areas of policy that are not so political as to put them outside the scope of judicial involvement. In response to Lord Devlin's view that 'public policy is almost always a closed book', Jaffe asserts that the judiciary has great opportunity to implement and develop those principles that have received the approval of Parliament and the public.[62] Thus, when there is community consensus regarding the issue, judicial lawmaking in policy areas may be appropriate.[63]

It can be said without hesitation that a general consensus that privacy is at least a value that deserves protection. Parliament itself has recognised this with the enactment of statutes including the Privacy Act 1993, the Broadcasting Act 1989 and the Harassment Act 1997. However, whether that value deserves the status of a right, the extent to which that right ought to be protected by law, and its relationship with other rights are controversial issues.[64] Legislative action in the privacy area has been deliberate and particular,[65] and most significantly while freedom of expression is protected by section 14 of the Bill of Rights Act, the right to privacy is excluded. It is

---

[59] Joseph, above n 45, 262-264; Lord Reid considers the principle to be the "first essential" of any judge: Lord Reid, above n 52, 23.

[60] "Bridled Power", above n 51, 297.

[61] Richardson, above n 47, 50; *R v Hines*, above n 56, 539-540; The Court of Appeal also accepted that there may be some areas of social policy that are best left to the legislature, but obviously assumed that this was not a case of social policy beyond the scope of their jurisdiction: *Hosking v Runting*, above n 1, para 5 Gault P and Blanchard J.

[62] Jaffe, above n 45, 75.

[63] It is accepted that judicial activism is not an opportunity for Judges to impose their own personal views, as a judges views carry no greater weight than those of any other citizen: See Bell, above n 48, 60; Jaffe, above n 45, 46-47.

[64] For example, in the Court of Appeal judgment of *Hosking*, Justice Anderson takes the view that privacy is only a value, and thus is not justified in limiting the recognised human right of freedom of expression: *Hosking v Runting*, above n 1, para 264-266 Anderson J dissenting.

[65] *Hosking v Runting*, above n 1, para 203 Keith J dissenting.

outside the scope of this paper to consider the status and extent of protection that should be accorded to privacy interests, however it is submitted that the ambiguity surrounding the issue renders this a deeply political issue.

Additionally, the response to the consultation paper issued in 1993 by the Lord Chancellor and the Secretary of State for Scotland effectively illustrates the diversity in attitudes towards specific civil law protection of privacy interests. Some believed that privacy should be protected as a right in itself as a matter of principle, independent of other causes of action. Others argued that the small number of infringements did not justify legislation, while several feared that intervention would go too far in stifling freedom of expression.[66] Consequently, the Government concluded that there was insufficient public consensus on which to base statutory intervention, and therefore no case had been made out for such a significant development of the law. This leads to the conclusion that if Parliament struggles to obtain sufficient public consensus, the courts have little chance of striking the necessary balance, particularly given their limited facilities.[67] As aptly stated by Lord Reid, "Parliament is the right place to settle issues which the ordinary man would regard as controversial."[68] This is a strong indicator that perhaps for this reason alone, the Court should have left the affirmation of a privacy tort to the Legislature.[69]

2 Necessity

In light of the principle of parliamentary sovereignty, it seems a natural concomitant that judicial intervention should be restricted to cases where the administration of justice requires it.[70] In regard of a privacy tort, both Keith J and Anderson J argue that there is no pressing need in New Zealand law.[71] In their

---

[66] See The Government's Response to the House of Commons National Heritage Select Committee 'Privacy and Media Intrusion" 14-16.

[67] Kirby, above n 47, 293; Lord Oliver "Some Reflections on the Development of the Doctrine of Negligence" in Legal Research Foundation of New Zealand (Auckland University) *Legal Reasoning and Judicial Activism: Two views* (Legal Research Foundation, Auckland, 1992) 29, 33; *R v Hines*, above n 56, 539; Richardson, above n 47, 49.

[68] Lord Reid, above n 52, 23.

[69] See Sumpter and Graham , above n 2, 290. The authors emphasise that "…the minority's view reminds us of the dangers inherent in judicial lawmaking; dangers particularly acute in cases involving fundamental tension between entrenched rights and shifting values."

[70] Sumpter and Graham, above n 2, 294.

[71] *Hosking v Runting*, above n 1, para 215-222 Keith J and para 268 Anderson J dissenting.

opinion, the fact that the tort is rarely invoked illustrates this lack of necessity.[72] However, I would refute the notion that the scarcity of cases represents a lack of demonstrated need.[73] There is no suggestion that because so few cases are brought in trespass or *Rylands v Fletcher,*[74] they should not be recognised as causes of action. The case of *P v D*, perhaps the classic wrongful disclosure case, clearly illustrates that there are privacy interests out there that are incapable of protection under existing the common law.

Nonetheless, it was unanimously agreed by the Court of Appeal in *Hosking* that the appellants claim did not come within the tort formulation. This was obviously not a case in which it was an urgent necessity that the Court recognise the tort in order to ensure the administration of justice. Thus, although there is a need for legal protection, there was no grave need for the courts to assume responsibility to remedy the situation in the context of *Hosking*.[75]

3 *Principled foundation*

If judges conclude they have the jurisdiction in the case at hand to extend the law, that extension must be justifiable as a development on the basis of fundamental principles.[76] That is to say judicial creativity is not an invitation to the judiciary to 'invent completely new' principles.[77] Judges must look to the plethora of principles found or implied in the constitution, statutes, or the common law, and then develop the logical extension of those principles before choosing the appropriate solution.[78]

---

[72] *Hosking v Runting,* above n 1, para 215-216 Keith J dissenting.
[73] It will be argued later the scarcity of cases argued may in fact be due to the uncertainty surrounding the scope of the tort.
[74] *Transco Plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1, para 56 Lord Hobhouse.
[75] "Judicial activism has its place. That place is as a response to a clear need resulting from a lacuna in the law", and in this case "No intervention, discrete or general, was demonstrated to the Court as necessary to protect New Zealand victims of invasions of privacy.": Sumpter and Graham, above n 2, 294.
[76] Lord Oliver , above n , 31; *Myers v Director of Public Prosecutions* [1965] AC 1001, 1021-1022 Lord Reid; Dickson, above n 43, 6; *Hosking v Runting* [2003] 3 NZLR 385, para 119 (HC) Randerson J; This was also acknowledged by the majority in *Hosking*, above n 1, para 4 Gault P and Blanchard J.
[77] Jaffe, above n 45, 73.
[78] At times this can prove quite a difficult exercise and can result in a complete divergence in opinions, as evidenced by the contrasting views of Lord Atkin and Lord Buckmaster in *Donaghue v Stevenson*. While Lord Buckmaster believed that there was no common law principles to support the claim, Lord Atkin was able to derive the principle that "...you must not injure your neighbour..." and thus you "...must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons

This requirement provides protection from usurpation of the legislative law-making function.[79]

As mentioned above, the New Zealand legislature has itself formally acknowledged the need for protection of privacy interests. Additionally, the *Hosking* majority claimed that the tort of wrongful publicity was firmly based on the principles of the common law,[80]

> …we are taking developments that have emerged from cases in New Zealand and in the larger British jurisdiction and recognising them as principled and an appropriate foundation on which the law may continue to develop to continue to protect legitimate claims to privacy.

In *Tucker*, the tort of intentional infliction of emotional distress was proclaimed as the primary common law foundation for this new cause of action.[81] However this cause of action has since been rejected by Lord Hoffman in *Wainwright v Home Office* as a basis for developing a tort of privacy.[82] If this initial source falls short of proving adequate, it is therefore questionable to deem the later cases a principled foundation on which to continue to develop the law. Furthermore, although the United Kingdom equitable remedy of breach of confidence has developed to protect what are essentially privacy interests in many cases, United Kingdom courts have consistently refused to concede that privacy is an independent cause of action.[83] Accordingly, it is dubious whether there is in fact a principled basis on which to expand the law, or whether the court is merely using this as a convenient hook.

---

who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question: *Donaghue v Stevenson*, above n 44, 580 Lord Atkin.

[79] Jaffe, above n 45, 39.

[80] *Hosking v Runting*, above n 1, para 110 Gault P and Blanchard J.

[81] *Tucker v News Media Ownership*, above n 5, 733 McGechan J.

[82] *Wainwright and Another v Home Office* [2003] UKHL 53, para 36-47 (HL) Lord Hoffman.

[83] See *Kaye v Robertson and Another* [1991] FSR 62, para 66 (CA) Lord Glidewell. " It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of persons privacy"; *Wainwright and Another v Home Office*, above n 82, para 35 Lord Hoffman. Lord Hoffman stated "…I would reject the invitation to declare that since at the latest 1950 there has been a previously unknown tort of invasion of privacy."

4 *Principled development*

Should it be found that there is sufficient principle on which to found a new cause of action, the law must also develop in a principled way, providing some definition of rights, duties and general principle.[84] As stated by Lord Reid, "…if we are to prevent the law becoming a jungle you must give our young men some unifying principles which they can understand and use."[85] The articulation of principle not only ensures that the rule can be applied in future cases, thus reducing uncertainty, but it also allows the citizen to conform their behaviour within the boundaries of the rule.[86]

The development of the privacy tort to date has been limited to the third formulation of the Prosser analysis, with the courts attempting to provide some guidance for future application based on the requirements that Prosser himself identified. The implementation of any broad general tort of privacy has quite suitably been left for the legislature should they consider it necessary.[87] Despite this restriction, the tort requirements articulated by the courts have been vague and consistently exclude important considerations that can be highly relevant to privacy claims. This is illustrated by section II of this paper.

Furthermore, the *Hosking* formulation diverged from the previous formulations, and in fact increases the scope for the application of discretionary justice rather than settled principle with its "reasonable expectation of privacy" requirement. As a result, the outcomes of privacy cases largely depend on the facts that arise rather than simple application of clearly articulated principles. As contended by Anderson J, the formulation proposed by the majority may prove easier to state than to apply,[88] and consequently the extent of protection that we can expect from the tort and the obligation we owe each other is unclear. Principled development is therefore debatable.

---

[84] Kirby, above n 47, 244.
[85] Lord Reid, above n 52, 27.
[86] Jaffe, above n 45, 37.
[87] See *Hosking v Runting*, above n 1, para 118 Gault P and Blanchard J.
[88] *Hosking v Runting*, above n 1, para 270 Anderson J dissenting.

4 Reasoning

The requirement that Judges provide adequate reasoning exists to provide further protection against the perils of judicial law-making.[89] If a decision is rationalised in terms of accepted modes of legal reasoning, their choice is justified and the public knows why the choice was made. Most importantly, as is essential to the notions of open justice, the decision can then be criticised effectively.[90] Emotive reasoning will also be illustrative of the judge's sincere belief in their decision. As proposed by Jaffe, a judge should be so convinced by the decision that they are willing to apply the same principle to a later situation.[91]

In relation to the tort of breach of privacy, there has certainly been extensive reasoning provided for the decision to recognise the existence of such a cause of action. The *Hosking* judgment is a notable example of detailed reasoning explaining in full the reasons for their final decision. Their assessment included discussion the experiences of overseas jurisdiction, international conventions, precedent and the legislative landscape. Although the validity of the reasoning is arguable, they have opened the doors for full criticism of what was a landmark decision. Undoubtedly the majority would be more than prepared to apply the decision to a later case, although the ease they would have in doing that remains to be seen.

C Conclusion

An assessment of the appropriate approach to judicial law making tends to suggest that privacy law is an issue that is more appropriately an issue for the legislature. The Bill of Rights Act background indicates that this may be an area of social policy that should not be adjudicated outside of the political realm, while the lack of demonstrated need in *Hosking* exacerbates this concern. Additionally, it is an area in which the courts have struggled to authenticate a principled basis for the introduction of the new tort, and have failed to provide sound principles for future application. This exposes the tort as potentially lacking the constitutional validity necessary to justify the creation of novel causes of action. Nonetheless, having

[89] Richardson, above n 47, 52; Dickson, above n 43, 6.
[90] Harris, above n 45, 278; Jaffe, above n 45, 37-38.
[91] Jaffe, above n 45, 38.

illustrated that there may be a democratic issue involved, the remainder of this paper progresses on the presumption that the courts do have constitutional validity.

IV HOW SHOULD WRONGFUL DISCLOSURE BE DEALT WITH IN NEW ZEALAND?

The purpose of this section is to assess whether judicial intervention is the appropriate approach to the development of a privacy tort, or whether it would be better dealt with by the legislature. Many areas of the New Zealand common law originate from United Kingdom common law, or at least consider it vastly instructive and persuasive. Consequently, it is natural to assess the position of their law of privacy. It will be argued that the reason that the English courts have failed to recognise a tort of breach of privacy is due to the extent of Government investigation and subsequent abstinence. However, the inaction of the United Kingdom courts does not preclude judicial action in New Zealand because our Parliament has remained completely silent in this particular area of law. Despite this, it will be submitted that legislative intervention is the appropriate approach. Only a statutory tort can provide the level of certainty required to guarantee deserving complainants have an accessible legal remedy.

A The Position in the United Kingdom

It has been long established that a general law of invasion of privacy is not recognised by English law, in neither statute nor common law.[92] Although the enactment of the Human Rights Act 1998 placed an obligation on the courts and legislature to protect privacy interests,[93] the Courts have elected to relax the requirements of the equitable remedy of breach of confidence in order to protect what are essentially privacy interests.[94] The development of the tort has in fact lead to the

---

[92] See for example *Kaye v Robertson and Another*, above n 83, para 66 Lord Glidewell. " It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of persons privacy"; *Wainwright and Another v Home Office*, above n 82, para 35 Lord Hoffman. Lord Hoffman stated "…I would reject the invitation to declare that since at the latest 1950 there has been a previously unknown tort of invasion of privacy."

[93] The Human Rights Act 1998 incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. Article 8(1) of the Convention provides that "Everyone has the right to respect for his private and family life, his home and his correspondence."

[94] See for example *Douglas and Others v Hello! Ltd* [2001] QB 967 (CA).

creation of two distinct versions of breach of confidence,[95] one of which is almost analogous to the privacy tort that has now been recognised by the New Zealand Court of Appeal.[96] However, the law nonetheless fails to provide comprehensive coverage of privacy interests,[97] and Judges have not been afraid to express their concern regarding this inadequacy.[98] Without the recognition of an independent breach of privacy, the United Kingdom courts will experience continuous difficulty reconciling their decisions with their duty under the Human Rights Act.[99]

The reason why Judges are confronted with this predicament is due to the depth of government inquiry into protection of privacy interests. Privacy has been topical in the United Kingdom for over 40 years, resulting not only in Committee inquiries, but also several proposed Bills, none of which have been successful.[100] The central concern relating the protection of privacy appears to be the restriction it would place on the right to freedom of expression and freedom of the press.[101] Although acknowledging the ultimate aim as the balancing these two basic rights, a consistent theme emerging is that the enactment of a statutory tort of infringement of privacy

---

[95] See *Hosking v Runting*, above n 1, para 42 Gault P and Blanchard J. The first is the traditional cause of action available in respect of use or disclosure where the information has been communicated in confidence. The second version is available in respect of publication of personal information of which the subject has a reasonable expectation of privacy irrespective of any burden of confidence, but only were the publication is likely to highly offensive or objectionable to a reasonable person.

[96] It was even suggested by Justice Sedley in *Douglas v Hello!* that there is now no need to "…construct and artificial relationship between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy." He was the only judge in this Court to support the suggestion that United Kingdom common law could accept the existence of a breach of privacy tort in its own right: *Douglas and Others v Hello! Ltd* , above n 94, 1001 Sedley J.

[97] See for example *Peck v United Kingdom* (2003) 36 EHRR 42. In this case the European Court of Human Rights concluded that the law of the United Kingdom did not provide adequate remedy for breaches of privacy under Article 8 of the European Convention. The case involved a man who had attempted to commit suicide by slitting his wrists on a public street. A surveillance camera operated by the local council caught footage of the man shortly after the incident leaning against a fence with the knife still in his hand. They sold stills extracted from the footage to the media, which were published in newspapers and on national television. In the publications his face was either unmasked or inadequately masked.

[98] See for example *Kaye v Robertson and another,* above n 83, 70 Bingham LJ. In this pre-Human Rights Act case Bingham J complains that "This case nonetheless highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens."; See also *Douglas and Others v Hello! Ltd* [2003] EMLR 641, 721 (Ch D) Lindsay J. In this post-Human Rights Act case, Lindsay J made reference to the European Court of Human Rights decision in *Peck* and acknowledged that "…where the law of confidence did not operate our domestic law has already been held to be inadequate."

[99] *Hosking v Runting*, above n 1, para 40 Gault P and Blanchard J.

[100] Bills relating to privacy interests were introduced by the following; Lord Mancroft (1961), Alexander Lyon (1967), Brian Walden (1969), William Cash (1987), John Browne (1989). A Privacy and Defamation Bill was also drafted in 1998.

[101] See Report of the Committee on Privacy and Related Matters (1990) Cmnd 1102, 50 [the Calcutt Report]; National Heritage Committee *Privacy and Media Intrusion* (4th Report) (1993) HC 294-I, 5.

would be an unwarranted restriction on freedom of expression. The restriction would be unwarranted because there is no overwhelming case for privacy protection in this manner.[102] It has been consistently believed that protection of privacy interests through alternative means would provide adequate protection to the rights being infringed.

Following the Younger Report, all the reports were concerned with media intrusion, and the preferred method of protection has thus generally been press self-regulation.[103] As expressed by the United Kingdom Government in their response to the National Heritage Select Committee's report, this can probably be explained by a long-standing reluctance to see statutory control of the press.[104] Press self-regulation is the way to ensure the least infringement on press freedom, whilst allowing a method of recourse for the complaints.

Albeit few, there have been instances where statutory protection of privacy interests has been recommended. In his 1993 review, David Calcutt recommended the introduction of a statutory tort of infringement of privacy. His justification was that press self-regulation, advocated by the earlier Calcutt report had failed and that a tort had become the only effective solution.[105] Parliament did not act upon his advice. A like recommendation was made by the Select Committee of the Department for Culture, Media and Sport who considered it necessary in order to fulfil their obligations under the Human Rights Act.[106] The Government rejected the proposal on

---

[102] Report of the Committee on Privacy (1972) Cmnd 5012, 12 and 206; the Calcutt Report, above n 101, 46-53; Privacy and Media Intrusion: The Government's Response to the House of Commons National Heritage Select Committee (1995) Cmnd 2981, 16 and 23; Privacy and Media Intrusion: The Government's Response to the Fifth Report of the Culture, Media and Sport Select Committee (2002-2003) Cmnd 5985, 2; Report of the Committee on Privacy (1972) Cmnd 5012, 206 [the Younger Committee].

[103] Privacy and Media Intrusion: The Government's Response to the House of Commons National Heritage Select Committee, above n 102, 16; National Heritage Committee, above n 101, 6; Privacy and Media Intrusion: The Government's Response to the Fifth Report of the Culture, Media and Sport Select Committee, above n 102, 1.

[104] Privacy and Media Intrusion: The Government's Response to the House of Commons National Heritage Select Committee, above n 102, 1.

[105] Review of press self-regulation (1993) Cmnd 2135, 56-57. He also recommended the implementation of a statutory complaints tribunal.

[106] Select Committee of the Department for Culture, Media and Sport *Privacy and Media Intrusion* (2003) HC 458-I, 43.

the basis that there didn't appear to be any need for Parliamentary intervention,[107] and once again emphasised strong support for press self-regulation.[108]

The effect of the continued governmental consideration of a statutory tort is that the issue is now politically saturated, and completely outside of the realm of the judiciary to develop this tort independently. Any judicial intervention would be a patent interference with Parliamentary intent, and would exceed the constitutional role of the court as discussed above. Thus, irrespective of any attitudes regarding the inadequacy of privacy protection, judges are prohibited from taking the initiative to ensure that protection themselves.

B The New Zealand Comparison

Although the question of whether a statutory tort should be introduced has never been directly considered by the New Zealand Law Commission, the possibility of a judge-made tort did arise in the Law Commission's discussion paper of February 2002. In the report the Law Commission expressed the view that there was no reason why a judge-made tort could not develop side-by side with statutory provisions enacted to protect particular types of personal information or to deal with particular methods of publication.[109] It recognised that this is the path that the New Zealand courts have chosen to take thus far.

Consequently, the New Zealand courts are not faced with the same blatant deterrent as those in the United Kingdom. Nevertheless, there is some force in Justice Keith's argument that the statutory context tells strongly against the existence of the tort, particularly given the specific nature in which privacy has been dealt with and the reluctance of the legislature to impose a broad obligation to respect privacy despite law reform proposals and scholarly calls in commonwealth jurisdictions.[110] At

---

[107] Privacy and Media Intrusion: The Government's Response to the Fifth Report of the Culture, Media and Sport Select Committee, above n 102, 2.

[108] Privacy and Media Intrusion: The Government's Response to the Fifth Report of the Culture, Media and Sport Select Committee, above n 102, 1.

[109] New Zealand Law Commission, above n 4, 24.

[110] *Hosking v Runting*, above n 1, para 185-207 Keith J dissenting. He argues that there is a strong contrast between the landscape of the law in relation to privacy, some of which is "very dense and deliberate", and *Donaghue v Stevenson* where common law authorities and principles completely occupied the field: *Hosking v Runting*, above n 1, para 185 Keith J dissenting.

the real heart of his opposition are the Bill of Rights Act 1990, the Privacy Act 1993, and the Broadcasting Act 1989.

The most problematic issue in the legislative landscape is the exclusion of privacy from the Bill of Rights Act.[111] Sir Geoffery Palmer articulated the reason behind this exclusion were problems of definition and certainty.[112] It is not a necessary corollary from this that privacy is deserved of lesser protection than the right to freedom of expression. It merely indicates that the broad scope of the interest renders it more appropriately to deal with it in a specific manner. Thus, there is no reason why privacy could not be considered a justified limitation under section 5 of the Bill of Rights Act.[113] Keith J persuasively argues that the near complete failure of the tort in the United States and the relevant Canadian jurisdictions indicates that the tort did not qualify as demonstrably justified.[114] However, on the converse, the majority validly contend that it is difficult to argue that a limit imposed to give effect to a right protected in international conventions is not demonstrably justified in a free and democratic society.[115] The validity of such a limit of freedom of expression is further justified when the remainder of the legislative landscape is assessed.

The Privacy Act 1993 is focused on the collection and dissemination of personal information by public and private agencies. The print media are exempt from liability under the Privacy Act,[116] a significant omission considering the fact that activities of the television media are restricted by the Broadcasting Act 1989. To

---

[111] See *Hosking v Runting*, above n 1, para 181 Keith J dissenting.

[112] A Bill of Rights for New Zealand: A White Paper [1985] AJHR A6 para 10.144. This was also the basis of his recommendation against the introduction of a broad statutory right to privacy in New Zealand law: Geoffery Palmer "Privacy and the Law" [1975] NZLJ 747.

[113] Section 5 provides that, "Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[114] *Hosking v Runting*, above n 1, para 210-220 Keith J dissenting. In his argument Keith is influenced significantly by two articles; Harry Kalven Jr, above n 31, and Diane Zimmerman "Requiem for a Heavyweight: A Farewell to [their] Privacy Tort" (1983) 68 Cornell L Rev 291.

[115] *Hosking v Runting*, above n 1, para 114 Gault P and Blanchard J. Article 17(1) of the United Nations International Covenant on Civil and Political Rights provides that "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." Article 16 of the United Nations Convention on the Rights of Children provides "The right to protection from arbitrary or unlawful interference with privacy, family, home, or correspondence, or attacks on honour and reputation."

[116] See Privacy Act 1993, s 2(1): exception (xiii) to the definition of "agency". See also the definitions in s 2 of "new medium" and "news activities".

impose common law obligations on the media from which they have been deliberately exempt under statute could be seen as constitutionally inappropriate.[117]

Although this argument has some strength, it was not necessarily Parliaments intent that the print media be unexceptionally excluded from liability. Comments of the former Privacy Commissioner, Bruce Slane, prove informative on this issue. Indeed, he inferred that the reason for the exclusion of the print media from the Privacy Act was to prevent undue limitation on the right to freedom of expression.[118] His feeling was that because the notion of privacy is difficult to define, it would be dangerous to attempt to create a set of laws governing privacy in relation to print media. Nonetheless, he warned that the press must accept a certain amount of self-discipline and respect for individual autonomy, and a failure to oblige may result in positive action to remedy the situation. Most notably, he said that in theory there was no reason why a tort or statute could not be created, similar to those creating liability in defamation and negligence. The inference that can be taken from this is that there is no legislative intent to preclude the development of the law of privacy through other methods such as tort law.[119]

This is further supported by the fact that there is nothing in the Privacy Act to suggest that it was intended to be a code. Moreover, it was established in *Hobson v Harding* that the Privacy Act did not supplant common law remedies.[120] It is also significant that the Privacy Act enacted after the judgment of *Tucker, Morgan*[121] and *Marris.*[122] It can thus be assumed that the Government was aware of this case and the implications it could have in terms of judicial legal development. If Parliament opposed the possibility of a judge-made tort, expression of that disapproval should have been made at the time the Privacy Act was implemented. If Parliament intends

[117] *Hosking v Runting* [2003] 3 NZLR 385, para 127 (HC) Randerson J.
[118] Bruce Slane, New Zealand Privacy Commissioner "Some views prepared for Law Asia Conference" (Columbo, Sri Lanka, September 1993) in *Privacy Act 1993: A selection of background materials on the Privacy Act 1993 and the Office of the Privacy Commissioner, July 1992-April 1994,* 7; See also (18 Mar 1993) 533 NZPD 14133, 14135, 14137, and 14139.
[119] Slane, above n 118, 7.
[120] *Hobson v Harding* [1995] 1 HRNZ 342, 346-347 (HC) Thorp J.
[121] *Morgan v TVNZ* (1 March 1990) HC ChCh CP 67/90 Holland J.
[122] *Marris v TV3 Network Services Ltd* (14 October 1991) HC WN CP 754/91Neazor J.

an enactment to cover an entire field of law and to preclude judicial development, it needs make that restriction clear.[123]

Hence, it could in fact be argued that the legislature has left the field open for the courts to fill in the gaps. Despite Keith J's arguments to the contrary,[124] Parliament has taken no action that could even be interpreted as precluding the courts from developing a new tort. Thus it is not a necessary concomitant of the United Kingdom preference to extend breach of confidence, that the New Zealand courts are precluded from independently diverting from that lead. The recognition of a separate cause of action would at least provide greater clarity in the law.[125]

C The Appropriate Approach

The final remaining question is whether parliamentary or judicial intervention is in fact the preferable option for a breach of privacy tort. There are certainly advantages to judicial development, however is this an area of law that would benefit from case-by-case development and empirical testing of the law through this process? The experience of the tort to date, and the discussion in part II become highly relevant in this assessment. It is argued that it is through legislative intervention alone that New Zealand can best guarantee the administration of justice.

1 Problems with judicial development

As evidenced in part II, the development to date of the wrongful publicity tort is an illustration of gradual common law development impeding legal certainty and stability. As explained above, the courts have attempted to incrementally refine the tort formulation, yet its precise bounds remain unacceptably contentious. The great disadvantage of this is that it is extremely difficult to predict when a case is going to fall within its scope and succeed in court. This in turn inhibits future development of the cause of action, as development relies on the willingness of complainants to pursue their claim through the court system. Willingness naturally decreases when

---

[123] *Hosking v Runting*, above n 1, para 228 Tipping J.
[124] *Hosking v Runting*, above n 1, para 185-207 Keith J dissenting.
[125] *Hosking v Runting*, above n 1, para 45 Gault P and Blanchard.

outcomes are unpredictable as litigation is a costly exercise, and the "…high cost of legal services is a powerful disincentive to unaided would be litigants. Overall it seems to bear particularly heavily on the individual litigants on private disputes…"[126] Thus, there is an ironic interplay between the need for cases to ensure development, and the scarcity of cases argued due to this very lack of development.

Legal aid could potentially alleviate the problem in part, but with restrictive qualifying criteria, it does not entirely resolve it. As a consequence, the law may become dependent on wealthy plaintiff's who are prepared to suffer the expense of taking a case to litigation. The number of cases that have involved public figures or celebrities in both New Zealand and the United Kingdom so far is already suggestive of such a pattern emerging.[127] Yet, financial capacity is not the only deterrent of taking Court action. Potential litigants must also be prepared to confront the paradox that to protect their privacy they will have to go to the most public forum, the Court.[128] It seems illogical to require someone complaining of a breach of privacy that is highly offensive to the ordinary objective person to stand up and further disclose these private facts to an open courtroom. If the breach was of such a sensitive nature, this would add considerably to the reluctance to complain.

In light of all this, it seems certain that it will be a considerable amount of time before the tort can be defined with any real certainty.[129] If further persuasion is necessary, one need look no further than the growth of this very tort to date. The lack of progress made since its first inception is a striking manifestation of this concern. Judicial decisions should provide reasonable guidance regarding the bounds of the law,[130]and this simply not happening with this tort. As result, judicial development entails a great risk that rights of privacy will be breached and deserving plaintiffs will be obstructed from obtaining true justice.

---

[126] Richardson, above n 47, 46.

[127] For example *Tucker*, above n 5; *P v D*, above n 15; *Hosking*, above n 1; *Kaye*, above n 83; *Douglas*, above n 94; *Campbell v MGN Ltd* [2003] 2 WLR 80 (CA).

[128] Todd, above n 24, 925.

[129] "Was Privacy the Winner on the Day?", above n 6, 184.

[130] Richardson, above n 47, 50.

With the implementation of a statutory tort Parliament would be able to make conclusive decisions concerning the scope of the tort, and provide guidelines for the more fact dependent issues. As regards the definite scope of the tort, legislation could include determinations of whether it is an intentional tort, whether the disclosure must result in identification of the person to whom the facts relate, and confirm whether or not a civil cause of action is limited to individuals or extends to corporate entities.[131] Furthermore, the threshold necessary for the granting of injunctions could be given serious consideration and finally concluded.[132] This would introduce an invaluable degree of clarity to the law.

In terms of guidance, legislation could finally provide some structure pertaining to the balancing exercise between the right to freedom of expression and privacy, in order to allay popular concerns regarding the "chilling effect" privacy could have on freedom of expression.[133] Comment could also be made on the extent of privacy protection that can be expected by public figures, and when someone will be considered a public figure in the sense that information relating to their private lives may be considered within legitimate public interest.[134] As well as public figures themselves, the families of those in the public eye could be informed of the extent to which they are accorded protection.

As well as defining the scope of the wrongful publicity tort, Parliament would also be able to consider whether a privacy tort should be limited to public dissemination of private facts. Prosser's analysis involved four different heads of

---

[131] Corporate entities are excluded from liability under the Privacy Act: Privacy Act 1993, s 2(1): description of "individual". However the issue has not been decided at Common Law: See "Was Privacy the Winner on the Day?", above n 6, 80.

[132] The Court of Appeal in *Hosking* raised the threshold for granting injunctions, a decision which has been criticised by Evans who emphasises the importance of privacy plaintiffs of preventing publication: "Was Privacy the Winner on the Day?", above n 6, 183-184.

[133] Although the importance of freedom of expression has been recognised, none of the privacy tort cases this far have provided any set structure to the balancing process between freedom of expression and privacy. This has been criticised in academic writing including: See Tobin, above n 37, 218. Any limitation on the right to freedom of expression deserves and requires a hard, in-depth analysis and balancing exercise. The leading discussion of section 5 of the Bill of Rights Act which provides a limit the rights contained there in is *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA).

[134] See generally *Hosking v Runting*, above n 1, para 120-121 Gault P and Blanchard J.

privacy,[135] all of which have been incorporated into United States law in varying degrees. Although the majority in *Hosking* states that the only concern in this case is the tort of wrongful publicity, they infer that there may come a time when the court will need to decide whether a tortious remedy should be available for unreasonable intrusion into a person's solitude or seclusion.[136] Such a claim is not completely foreign to New Zealand, as the Broadcasting Standards Authority has clearly assumed that intrusive conduct is within their jurisdiction. Intentional interference with an individual's interest in solitude or seclusion is the third principle of the Authority.[137] Concurrent consideration of this tort would add even greater certainty to the law by precluding the potential for future judicial decisions that would be of retrospective effect.

The value of the legislative process in ensuring the adequacy of the law cannot in itself be understated. The very existence of the complex process is illustrative of the huge benefits it entails. The process engages in a much wider consultative process, and allows for extensive public input a well as extended and detailed debate in Parliament of all the relevant issues.[138] As discussed above, privacy is a rather political area and for this reason, it is preferable that the steps taken to protect it are authorised and supported by the general public. The publicity would also have the benefit of increasing public awareness of the protection of privacy interests under the law,[139] thus effectively increasing access to justice.

Moreover, the legislative process allows for legal certainty to be attained quickly. While the courts may take years to build up a coherent body of principles, Parliament can enact those principles rapidly, providing clear guidelines to which the public can conform their behaviour. This assertion is often countered by the argument

---

[135] Prosser and Keeton, above n 13, 851-866.
[136] *Hosking v Runting*, above n 1, para 118 Gault P and Blanchard J. "First, we emphasise that at this point we are concerned only with the third formulation of the privacy tort identified by Prosser and developed in the United States: wrongful publicity given to private lives. We need not decide at this time whether a tortious remedy should be available in New Zealand law for unreasonable intrusion into a person's solitude or seclusion." It is also acknowledged that any "...high-level and wide tort of invasion of privacy should be a matter for the legislature": *Hosking*, above n 1, para 110 Gault P and Blanchard J.
[137] See *Hosking v Runting*, above n 1, para 105 Gault P and Blanchard J.
[138] See generally Joseph, above n 45, 312-316; "Bridled Power", above n 51, 193-198.
[139] Sir Kenneth Keith "Policy and Law: Politicians and Judges (and poets)" in BD Gray and RB McClintock (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995) 117, 153.

it is inappropriate and inefficient to allow injustices to accumulate until such at time that the legislature finally feels compelled to intervene. The courts have the ability to apply swift justice to the case at hand, and should not hesitate to do so.[140] This appears to be the basis of the justification to take positive action in *Hosking*,[141]

> From time to time...there arise in the courts particular fact situations calling for determination in circumstances in which the current law does not point clearly to the answer. Then the courts attempt to do justice between the parties in the particular case. In doing so the law may be developed to a degree...That is the traditional process of the common law.

Although this argument carries force where there is in fact a pressing need to serve justice in the case at hand, with unanimous agreement that the appellants were outside the scope of the tort, *Hosking* was not such a case. When there is a lack of real necessity, the advantages of the legislative process should not be forfeited and comprehensive legal certainty should be obtained through statute.

Finally, carefully considered legislation has a further advantage in that it can provide a conclusive tort formulation whilst also allowing a certain degree of flexibility in the provision that would allow the courts to ensure the administration of justice. Parliament cannot legislate to cover every possible situation that may arise, and they would not attempt to do so. The courts retain the task of performing the ultimate balancing exercise of competing interests, whilst having the benefit of legislative guidance and direction in doing so. For this reason I would refute Prosser's argument that the risk of a statute being too detailed, or so general that the courts would have to do all the work anyway, renders it preferable that the tort be developed on a case-by-case basis.[142]

D Conclusion

Although New Zealand common law is usually aims to be consistent with that of the United Kingdom, privacy law is an area where the climate in the two countries

---

[140] Jaffe, above n 45, 18.
[141] *Hosking v Runting*, above n 1, para 4 Gault P and Blanchard J.
[142] Todd, above n 24, 176-177.

is significantly different. This justifies a divergence in New Zealand from United Kingdom common law tradition, and recognition of breach of confidence and privacy as two distinct heads of liability.[143] However, judicial development of the tort would have the effect of inhibiting the exercise of the courts primary responsibility of ensuring the administration of justice. Due to the fact that the tort is developing at such a painfully slow rate, worthy plaintiffs are deterred from taking their case to court for fear that they will be unsuccessful. Legislative clarification would mean definite breaches of privacy would become more apparent and therefore greater accuracy in the prediction of outcomes would be possible. As a result, the possibility of legal recourse would become more accessible and appealing. In the end it would provide for a much greater protection of individual rights.

VI CONCLUSION

There exist certain circumstances when it is within the jurisdiction of the court to independently develop or change the law. However when the opportunity for creativity arises it is important that the Court consider whether they have the jurisdiction, the correct approach to that task, and whether the decision would actually be more suited to the legislative process.[144] It has been submitted that the majority did not give the requisite degree of consideration to these factors, and thus made a mistake in affirming the common law tort of wrongful publicity to private lives.

Although it has been illustrated that there are a potential democratic and constitutional concerns in relation to judicial creativity in this particular the area of the law, the real worry relates to how effective it is in ensuring justice is served. The uncertainty plaguing the cause of action is having a profound effect on the development of the cause of action, and thus the ability of the law to protect the rights of individuals.

---

[143] *Hosking v Runting*, above n 1, para 45 Gault P and Blanchard J. The majority considered that "…it will be conducive of clearer analysis to recognise breaches of confidence and privacy as separate causes of action."
[144] *R v Hines*, above n 56, 537 Richardson P and Keith J.

Nevertheless, "even in the limited area of privacy with which we are presently concerned there are acknowledged gaps in the law".[145] Certain privacy interests can fall through the holes of the existing causes of action, and it is therefore imperative that there is some other form of recourse for those who have had their rights infringed. A carefully considered statutory tort could have the advantage of providing a swift, certain, and comprehensive formulation of the tort, while allowing the courts enough flexibility to ensure the due administration of justice in each individual case. Such a tort would not be entirely novel, as certain Canadian states have chosen to effect the implementation of privacy torts at a statutory level.[146] I would therefore strongly recommend that the Government give serious consideration to the enactment of a statutory tort of privacy.

---

[145] *Hosking v Runting*, above n 1, para 109 Gault P and Blanchard J.

[146] Privacy Acts providing for a statutory tort have been enacted in British Columbia, Manitoba and Saskatchewan.

VI BIBLIOGRAPHY

Texts

Bigwood, Rick (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001).

Chen, Mai and Palmer, Sir Geoffery *Public Law in New Zealand* (Oxford University Press, Auckland, 1993).

Denning, Lord *The Discipline of Law* (Butterworths, London, 1979).

Dhavan, Rajeev, Sudarshan, R and Kurhshidm, Salman (eds) *Judges and the Judicial Power: Essays in Honour of Justice VR Krishna Lyer* (Sweet & Maxwell, London, 1985).

Evans, Jim and Aylmerton, Oliver *Legal Reasoning and the Judicial Activism: Two Views* (Legal Research Foundation, Auckland, 1992).

Gray, BD and McClintock, RB (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995).

Jaffe, LL *English and American Judges as Lawmakers* (Clarendon Press, Oxford, 1962).

Joseph, Philip A (ed) *Essays on the Constitution* (Brookers, Wellington, 1995).

Palmer, Geoffery and Palmer, Matthew *Bridled Power: New Zealand Government under MMP* (Oxford University Press, Auckland, 1997).

Prosser, William and Keeton, Page *Prosser and Keeton on the Law of Torts* 5th edition (West Publishing Company, Minnesota 1984).

Robson, P and Watchman P *Justice Lord Denning and the Constitution* (Biddles Ltd, Surret, 1981).

Todd, Stephen *The Law of Torts in New Zealand.*

Young, John B (ed) *Privacy* (Chichester, New York, 1978) .

Zander, Michael *The Law-Making Process* (Butterworths, Wellington, 1999).

Journal Articles

Bernstein, Anita "How to Make a New Tort: Three Paradoxes" [1997] 75 Texas Law Review 1539.

Dickson, Brian "The Judiciary- Law Interpreters or Law makers" (1982) 11 Manitoba LJ.

Evans, Katrine "Of Privacy and Prostitutes" NZULR [2002] 71.

Evans, Katrine "Was Privacy the Winner on the Day?" (May 2004) NZLJ 181.

Hartley, James "Tort of Breach of Privacy in New Zealand" [2000] v. 9 no. 1 Auckland University Law Review 267.

Kalven, Harry Jr "Privacy in Tort Law- Were Warren and Brandeis Wrong?" (1966) 31 Law and Contemporary Problems 326 .

McLachlin, Beverley "The Role of Judges in Modern Commonwealth Society" [1994] Law Quarterly Review 260.

Murphy, Bridget "Developments in the Law of invasion of Privacy in New Zealand and England" (2002) v. 9 no. 3 Auckland University Law Review.

Palmer, Geoffery "Privacy and the Law" [1975] NZLJ 747.

Phillipson, Gavin "Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act" [2003] MLR 726.

Prosser, William "Privacy" [1960] California Law Review 383.

Reid, Lord "The judge as Law Maker" (1972) 12 JPTL 22.

Richardson, ILM "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46.

Sumpter, Matt and Graham, Justin "IP Round-up: Hosking v Runting- New Zealand's New Privacy Tort" (May 2004) New Zealand Intellectual Property Journal 290.

Tobin, Rosemary "Invasion of Privacy" [2002] NZLJ 216.

Tobin, Rosemary "Privacy: One Step Forward, Two Steps Back! [2003] NZLJ 256.

Warren and Brandeis "The Right to Privacy" (1890) 4 Harvard LR 193.

Parliamentary Documents

A Bill of Rights for New Zealand: A White Paper [1985] AJHR A6

Infringement of Privacy (Lord Chancellor's Department/Scottish Office Consultation Paper, July 1993).

National Heritage Committee *Privacy and Media Intrusion* (4th Report) (1993) HC 294-I.

New Zealand Law Commission *Protecting Personal Information from Disclosure: A Discussion Paper* (NZLC PP49, Wellington, 2002).

Report of the Committee of Privacy and Related Matters (1990) Cmnd 1102 [the Calcutt Report].

Report of the Committee on Privacy (1972) Cmnd 5012 [the Younger Committee].

Privacy and Media Intrusion: The Government's Response to the House of Commons National Heritage Select Committee (1995) Cmnd 2981.

Privacy and Media Intrusion: The Government's Response to the Fifth Report of the Culture, Media and Sport Select Committee (2002-2003) Cmnd 5985.

Select Committee of the Department for Culture, Media and Sport *Privacy and Media Intrusion* (2003) HC 458-I.

Review of Press Self-Regulation (1993) Cmnd 2135.

International Treaty Documents

The United Nations Convention on Civil and Political Rights

The United Nations Convention on the Rights of Children

VII TABLE OF CASES

A v B (a company) [2002] 2 All ER 545

Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109

Campbell v MGN Ltd [2003] 2 WLR 80 (CA).

Donaghue v Stevenson [1932] AC 562

Douglas v Hello! [2001] 2 All ER 289

Hellewell v Chief Constable of Derbyshire [1995] 1 WLR

Hobson v Harding [1995] 1 HRNZ 342

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

Hosking v Runting (25 March 2004) CA 101/03.

Kaye v Robertson and another [1991] FSR 62 CA

L v G [2002] DCR 234

Marris v TV3 Network Services Ltd (14 October 1991) HC WN CP 754/91

Midlands Silicones Ltd v Scruttons Ltd [1962] AC 446

Ministry of Transport v Noort [1992] 3 NZLR 260 (CA)

Morgan v TVNZ (1 March 1990) HC ChCh CP 67/90 Holland J.

Myers v Director of Public Prosecutions [1965] AC 1001

Peck v United Kingdom (2003) 36 EHRR 42.

R v Hines [1997] 3 NZLR 529

Stevenson v Basham [1922] NZLR 225

Tucker v News Media Ownership [1986] 2 NZLR (HC) 716.

Transco Plc v Stockport Metropolitan Borough Council [2004] 2 AC 1

Wainwright and Another v Home Office[2003] QB 1334 (CA)

Wilkinson v Downtown [1897] 2 QB 57

X v A-G [1994] NZFLR 4

VIII TABLE OF LEGISLATION

The Bill of Rights Act 1990

The Broadcasting Act 1989

The Privacy Act 1993

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

VICTORIA UNIVERSITY OF WELLINGTON

LIBRARY

AS741
VUW
A66
W824
2004

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY
3 7212 00834587 6