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WHEN PUBLIC FACTS BECOME PRIVATE

UNRAVELLING THE TORT OF INVASION OF PRIVACY'S 'PRIVATE FACT' REQUIRMENT

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I INTRODUCTION

"There is no private life which has not been determined by a wider public life." [1]

George Eliot, 1866.

As a female novelist forced by the prevailing social conditions to create a public identity as a male, none may have known that better than George Eliot, that what is 'private' and what is 'public' is neither absolute nor particularly easy to define.

The same is true in law, and the requirement of facts being 'private' is the complicated stumbling block to New Zealand's developing tort of invasion of privacy. The tort's main elements are generally agreed to be the public disclosure of private facts of an offensive and objectionable nature.[2] Unfortunately what deems a fact 'private' as opposed to 'public' is not yet certain, and problems surrounding the classification of facts are yet to be comprehensively considered in a New Zealand court.

I intend to look closely at this central requirement ("the public disclosure of private facts") and apply that to situations that are ostensibly public. The case law has already signaled that in some situations what appears public may be said to have become private again for the purposes of the tort, for example the criminal convictions in *Tucker v News Media Ownership Ltd*[3], or the previously published information about a woman's past in *TV3 Network Services v BSA*[4]. As stated in Todd: "It would appear then, that public facts may be transformed into private ones. . ."[5]

It is the exact nature of this transformation from public to private that comprises the object of this paper. Therefore I will be considering three different categories of fact, each of which appear at first sight obviously public due to either (1) prior publication in the media, (2) existence on a public record, or (3) by being photographed in a public place. As a fourth category I will consider facts which are generally of a

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[1] Elizabeth Knowles (ed) *Oxford Book of Quotations* (5 ed, Oxford University Press, Oxford, 1999).
[2] *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415, 424 (HC) per Gallen J [*Bradley v Wingnut*]

[3] *Tucker v News Media Ownership* [1986] 2 NZLR 716 (HC) [*Tucker v News Media*]
[4] *TV3 Network Services v BSA* [1995] 2 NZLR 720 (HC) [*TV3 v BSA*]
[5] Stephen Todd (ed) *The Law of Torts in New Zealand* (2 ed, Brookers, Wellington, 1997)

private nature, yet are somehow connected to a public figure thereby obtaining some type of public status.

By considering each category of public status separately I hope to develop an outline for applying to fact situations when deciding whether something could possibly have become 'private' again for the purposes of the tort. The fifth and final part of this paper will examine the difficulty in treating the terms 'public' and 'private' as absolutes, and suggest alternative formulation of the test for breach of privacy.

A Sources

1 New Zealand

As there are so few New Zealand cases dealing with this region of law, I will also be including decisions of the Broadcasting Standards Authority because "other legal developments overlap with and can influence the developing tort."[6] The United Kingdom does not yet recognise a tort of privacy in this form

1 The United States

United States case law is also a helpful comparison particularly because the origins of the tort stem from there.

In a majority of jurisdictions in the United States, invasion of privacy exists at common-law and encompasses four distinct torts: (1) intrusion on seclusion; (2) public disclosure of private facts; (3) false light in the public eye; and (4) misappropriation of a person's name or likeness.[7]

With the Supreme Court of the United States decision in *Cox Broadcasting Corp v Cohn*[8], the question of whether facts on the public record can become private again was thrown into doubt. The central issue was whether the First and 14th Amendments of the United States Constitution prohibited the imposition of tort liability for a public disclosure of the identity of the deceased victim of a rape which was taken from a public indictment. In that case the Court ruled that the Amendments in question

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[6] John Burrows and Ursula Cheer *Media Law in New Zealand* (4 ed, Oxford University Press, Auckland, 1999) 178.
[7] W. P Keeton (ed) *Prosser and Keeton on The Law of Torts* (5 ed, West Publishing Co, St Paul, 1984) 851-865.
[8] *Cox Broadcasting Corp. v Cohn* (1975) 420 US 469, 499

"command nothing less than that States may not impose sanctions for the publication of truthful information contained in official records open to public inspection."[9] *Prosser and Keaton on Torts* indicates that a fact should not receive "widespread publicity if it does not involve a matter of public concern"[10] merely because the information was found on a public record or occurred in a public place.

The United States cases discussed in this paper do not give a statement on the established position of the law in this area, because as illustrated above it is one which varies across State jurisdiction, and academic opinion. The cases still provide a useful point of contrast in this area and give an indication of recent judicial thinking on issues New Zealand courts have not yet addressed. Yet it is important to take note of Jeffries J's forewarning in *Tucker v News Media* that the tort's "boundaries and exceptions will need much working out on a case by case basis so as to suit the conditions of this country."[11]

II PUBLIC THROUGH PRIOR MEDIA PUBLICATION

A New Zealand Case Law

1 Contemporaneous Publication

Tucker v News Media, the first case of its kind in New Zealand in that it allows the possibility of a separate tort of invasion of privacy, covers two fact categories. The criminal convictions which Mr Tucker sought to prevent disclosure of were available both on public record and through prior publication in the media. No final injunction was granted, given that Radio Windy, Radio Pacific, and newspapers in Sydney had been broadcasting the alleged convictions. McGechan J paid particular attention to the nature of the New Zealand media in that "[o]nce the proverbial cat is out of the bag her progeny spread like lightning."[12] Although McGechan J was in agreement with the general principle that courts should not allow the resumption of a wrong simply because other such wrongs have occurred in the meantime, he based his refusal

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[9] *Cox Broadcasting Corp v Cohn* above n 8, 495.
[10] W.P.Keaton, above n 7, 859.
[11] *Tucker v New Media,* above n 3, 733.
[12] *Tucker v News Media,* above n 3, 736.

to allow the injunctions to continue on the basis that this situation required "equalisation vis-à-vis their unrestrained competitors."[13]

Tucker v News Media appears to me to be a case decided on the basis that the prior publication was actually contemporaneous to the case and of news currency at that time, therefore highlighting the futility in attempting to restrain two mediums when one (radio) was able to broadcast the information nationwide.

2 'Slender' Publication

In the case of *TV3 v BSA*[14], TV3 screened a programme dealing with incest which focussed on a man who had been convicted of sexual offences on his five daughters. The girl's mother, Mrs S, had given evidence in court that she too had been a victim of incest two years previously. A weekly magazine published an old photo of Mrs S at that time, but none of the other news publications referred to S by her present name. The TV3 programme showed footage of the reporter attempting to interview Mrs S.

Mrs S complained to the Broadcasting Standards Authority (BSA) that TV3 had failed to comply with its responsibility to maintain the appropriate privacy standards. The complaint was upheld and TV3 appealed to the High Court on the grounds that the information that Mrs S had been a victim of incest was already in the public domain due to the fact there had been prior disclosure in the media and because she had given evidence in court.

The question of interest in this case is whether a magazine article from two years previous prevents someone from claiming a breach of privacy according to the Broadcasting Standards. The BSA originally found that, despite the previous article, the information had become private again, caused by the "continuation of the name suppression order."[15] This case differs from the situation in *Tucker v News Media* where the information was being published elsewhere at the same time and on a nationwide scale, because publication relating to the abuse suffered by Mrs S had been limited. The two previous occasions of publication were a newspaper circulating

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[13] *Tucker v News Media*, above n 3, 736.
[14] *TV3 v BSA*, above n 4.

locally which gave a contemporary report of the court case and a magazine article in a weekly publication, which consisted largely of an old photo of Mrs S and an interview with her eldest daughter. Eichelbaum CJ chose to balance these publications with the fact that several other publications, although covering similar ground relating to the daughters and the court case, did not refer to the mother's own experiences.[16] This was taken as an indication that the suppression order, while covering her daughters, had remained in force.

Therefore, as public identification with the facts to Mrs S were "slender"[17] and name suppression of her daughters in the court case effectively resulted in her identity retaining a significant degree of privacy also, Eichelbaum CJ found no reason why other members of the media should be allowed to "exacerbate any damage by following suit."[18]

To contrast this, although the information in question in *Tucker v News Media* was arguably as equally damaging, it had in fact "obtained widespread notoriety" through the breadth of its publication "so as to make it an exercise in futility"[19] by the Courts to prevent others publishing the same information.

3 Public interest in prior publication

Eichelbaum CJ's sentiments are echoed in *Morgan v TVNZ Ltd*[20] in which a seven year old girl was protected from further media scrutiny in a documentary which covered how she had been forced into hiding in New Zealand. Despite evidence of extensive prior publicity submitted by TVNZ, Holland J found that "the continuation of publication, even by way of repetition of events of this girls' private life, was likely to cause substantial harm to her."[21] It is relevant to note Holland J's finding that subsequent publications in the newspaper had been given "a great deal more prominence than the facts deserve,"[22] indicating that he is bringing in an element of

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[15] *TV3 v BSA*, above n 4, 726.
[16] *TV3 v BSA*, above n 4, 729.
[17] *TV3 v BSA*, above n 4, 730.
[18] *TV3 v BSA*, above n 4, 730.
[19] *Tucker v News Media*, above n 3, 736.
[20] *Morgan v TVNZ Ltd* (1 March 1990) High Court Christchurch CP 67/90 Holland J [*Morgan v TVNZ]*
[21] *Morgan v TVNZ*, above n 20, 4.
[22] *Morgan v TVNZ*, above n 20, 5.

his views on its newsworthiness. By bringing what appears to be a consideration of public interest into his discussion of degree of publication, Holland J is provoking the question of whether judges are finding it easier to deal with the public/private distinction by importing the public interest limb into the analysis.

An assessment of prior breadth of publication is a difficult one, and *Morgan v TVNZ* illustrates the refusal of one judge to allow prior publication to prevent an injunction where a projected programme has the potential to be "social and emotionally detrimental"[23] to a child. This was accompanied by a public interest analysis in which he concluded that "there was no real public interest in the transmission of this programme."[24]

The idea of exacerbating, or continuing damage by publishing facts which were previously given either 'slender' or considerably less media coverage, in order to protect a plaintiff who is in some way vulnerable, is argued once more in the more recent case of *A v TVNZ*[25]. This case involved a young woman who had made false allegations of a sexual offence only one year previously. This case is interesting as unlike the previous two, the central factor was not the smaller scale of the previous publication, but the fact that she had since moved away from the particular area of publication in a deliberate effort to put the past behind her.

A gave evidence that she had experienced weight loss in learning that TVNZ were to make a programme about the man she had made the allegations about, revealing also her identity. However TVNZ tried to distinguish this from the situation in *Tucker v News Media* because "the facts upon which the proposed publication were focused [in *Tucker*] were buried in the past,"[26] whereas here the facts were reasonably recent.

The court found that she had already paid the penalty for her offence, and by having the facts revived now in a different medium, with wider penetration of the public than the medium which published details of her offence at the time, the consequences for

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[23] *Morgan v TVNZ*, above n 20, 3.
[24] *Morgan v TVNZ*, above n 20, 7.
[25] *A v TVNZ Ltd* (25 March 1996) High Court Wellington CP 55/96 Doogue J.
[26] *A v TVNZ Ltd*, above n 25, 7.

her in the place where she now lived could "plainly be considerable and detrimental."[27] The interest in protecting A from being punished twice for her crime is yet another factor which seems to be unrelated to the primary issue of whether its in the public domain or not.

The decision to protect her identity relied also on s139 of the Crimes Act and while the judge agreed that the offence was not buried in the past as in *Tucker v News Media*, it was found that "this is a very young woman who has moved on and by moving on has put the events as effectively in the past as could be done."[28]

5 Conclusion on New Zealand case law

It is difficult to draw any solid conclusions from these four cases, remembering that one of them is really only supposed to be ruling on the ability of the Broadcasting Standards Authority to make and apply the standard.

The most helpful statement of all in this area comes from that case, *TV3 v BSA* in which Eichelbaum CJ observes that in determining whether "information has lost its private character it would be appropriate to look realistically at the nature, scale and timing of previous publications."[29]

This has generally been adhered to in each of the judgments dealing with prior publication in the media, as it is commonly agreed that publication in the form of a 'slender' mention in a weekly woman's magazine (*TV3 v BSA*), or a news report in another area or of much smaller significance to the one proposed (*A v TVNZ* and *Morgan v TVNZ)* is not sufficient to remove the information's 'private character'. *Tucker v News Media* leaves the question open to some extent, however rules out situations where the information has already been disclosed nationwide in one news medium in a situation of current interest, rendering further protection futile anyway.

[27] *A v TVNZ Ltd*, above n 25, 7.
[28] *A v TVNZ Ltd*, above n 25, 7.

B The Broadcasting Standards Authority Decisions

The Broadcasting Standards provide in Principle (ii) for the protection of public facts which have "in effect become private again."[30] Through BSA decisions it has become evident that information previously disclosed in the media may be held to lie in the public domain. For example in *Bowen v TVNZ*[31], an item covering a dispute by neighbours over a noisy parrot appeared in a local newspaper before the Holmes' show about which an unsuccessful privacy complaint was made.

1 Relevant Factors

However previous disclosure as a defence will rely on a number of factors, such as extent, nature and timing of the previous publication. In *Ms P*[32], two of the five daughters who had not assented to be interviewed for the 20/20 item referred to in the *TV3 v BSA* case, complained that their privacy had been breached by the disclosure that they too had been victims of incest. Their complaint was upheld despite prior publication, and it was decided that publication in localised media or weekly as opposed to daily publications may be relevant[33] This reconciles with *Bowen v TVNZ* as the prior publication there was not only contemporaneous, but actually in the couples local media.

In the case of *Earlly v Radio Pacific Ltd,*[34] an eight-year-old murder conviction was not held to be a private fact because it had been widely covered by the media at the time and nothing had occurred to make the events private again. This seems to shift the emphasis, as decisions such as *TV3 v BSA*[35] appear to assume that facts can naturally become private as time lapses.

2 'Retaining' privacy or 'obtaining' it?

This does not fit well with a *Tucker v News Media* fact situation either. The publicity surrounding Mr Tucker's convictions nine years earlier was not considered, nor were

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[29] *TV3 v BSA*, above n 4, 731.
[30] Broadcasting Standards Authority Advisory Opinion Privacy Principles 1996, Principle (ii)
[31] *Bowen v TVNZ* (1997) unreported, Broadcasting Standards Authority, Decision No 1997/032.
[32] *Ms P*(28 April 1994)unreported, Broadcasting Standards Authority, Decision No 1994/021.
[33] John Burrows and Ursula Cheer *Media Law in New Zealand* (4 ed, Oxford University Press, Auckland, 1999) 184-185.
[34] *Earlly v Radio Pacific Ltd* (23 June 1994) unreported, Broadcasting Standards Authority, Decision No 1994/043.
[35] *TV3 v BSA*, above n 4, 731.

any intervening events beside the discovery of the convictions in the weeks preceding. Eichelbaum CJ in *TV3 v BSA* certainly considers the fact situation on the basis that nothing had intervened from the time of the news reporting of Mr Tucker's original court case eight years before, to prevent the information "retaining a significant degree of privacy."[36]

Perhaps it would make more sense if the court looked at it from the perspective of the media interest in the murder conviction over the period of eight years and the extent to which it had remained in public memory through media revival over that period.

This analysis is predominantly concerned with the breadth of publication, but it is valuable to remember that a better reasoning for publication in the situation of murder convictions, may be the magnitude and seriousness of the crime, a consideration in the public interest assessment of a situation.

3. Formulating a test

Ursula Cheer notes in *Media Law in New Zealand* that[37]

> it is not sufficient simply to identify an arbitrary cut-off point as a determining factor in these cases, other factors will be relevant such as the nature of the offence, the public's right to know, the extent and continuation of publicity and the individual's right to put the past behind them.

She also notes that whilst decisions of the BSA depend largely on the specific facts of each issue, where trends have been identified they tend to be consistent with the developing tort.[38]

C United States Case Law

The United States position indicates less privacy protection for a plaintiff whose information has previously been published in the media.

Privacy Law theorist David Elder has summarised the law in this area as providing "substantial protection to subsequent media or non-media republishers of information

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[36] *TV3 v BSA*, above n 4, 730.
[37] Burrows, above n 6, 186.
[38] Burrows, above n 6, 186.

previously published by another media entity."[39] As an illustration of this he cites the case of *Heath v Playboy Enterprises Inc.*[40]

When *Playboy* published a photograph of a minor, Christal Carson (illegitimate granddaughter of Johnny Carson, the late night talk show host) in their "The Year in Sex" issue, her guardian brought an invasion of privacy action against the magazine. Here, prior publication consisted of news reporting at the time of the paternity action three years previously. It was held that "[r]epublication of facts already publicized elsewhere cannot provide a basis for an invasion of privacy claim."[41]

On the basis of the New Zealand approach to cases involving this category of fact, and under a *Morgan v TVNZ* analysis, (the public interest consideration of protecting a minor from unwarranted publication or this scope) Christal's guardian may have had a better chance of success in her claim.

D Category One (Media) Conclusion

So to conclude, it may be helpful to assess whether information, despite being previously published in the media, is still public on the basis of two considerations:

1) The degree of the prior publication. This will include how long ago, (only at the time of the event in the form of news reporting?), in what mode of publication, (a mention in a weekly magazine or an in-depth documentary?), and how widespread publication was (or was it limited to the town in which the event occurred and the plaintiff has since moved away).
2) Balancing the public's legitimate interest in knowing the information against the individual's reasons for protecting their privacy in that situation, or the steps he or she may have taken to put the event behind him or her.

It is important to note here that when the interim injunction was granted in *Tucker v News Media,* Jeffries J regarded the tort of invasion of privacy as a "natural

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[39] David A Elder *The Law of Privacy* (Lawyer Cooperative Publishing, Rochester, 1991) 172.

[40] *Heath v Playboy Enterprises Inc* (1990) 732 F Supp 1145, (SD FLA).

[41] *Heath v Playboy Enterprises Inc,* above n 40, 1149.

progression"[42] from the tort of intentional infliction of emotional distress. Injury to ones "feelings and peace of mind" was therefore at "[t]he gist of the action."[43] Since the case of *Bradley v Wingnut,* the tort encompasses the need for the disclosure (or the facts) to be "highly offensive and objectionable to a reasonable person"[44] Therefore it must be remembered that the standard or interest in protecting privacy must be quite high in order to justify restraining the media's right to freedom of expression. Heart conditions (*Tucker v News Media*[45]), and detrimental weight loss caused by extreme stress *(A v TVNZ*[46]) has been found to be sufficient, whereas mere embarrassment and outrage was not (*Marris v TV3 Network Services Ltd).*[47]

III PUBLIC THROUGH EXISTENCE ON A PUBLIC RECORD

"It is estimated each person has more than 200 separate files containing personal information about him or herself."[48] Public record information is to some degree public "in the descriptive sense that any one of us can look it up. . .however it is also descriptively private to the extent that it remains unknown."[49]

A The Two Extremes of 'Public' on Public Record

In his analysis of the assumption that what is on the public record is 'public' for the purposes of the American tort, WA Parent found that; "What belongs in the public domain cannot without glaring paradox be called private and consequently should not be incorporated within a viable conception of privacy."[50]

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[42] *Tucker v News Media,* above n 3, 731..
[43] *Tucker v News Media,* above n 3, 732 per Jeffries J.
[44] *Bradley v Wingnut,* above n 2, 424 per Gallen J.
[45] *Tucker v News Media,* above n 3, 734 per McGechan J.
[46] *A v TVNZ Ltd,* above n 25, 6 Doogue J.
[47] *Marris v TV3* (14 October 1991) High Court Wellington CP 754/91, 8 *[Marris v TV3]* Neazor J. found the harm suffered by the plaintiffs to be no higher than 'upset and anger' therefore distinguishing it from the facts in *Tucker v News Media*
[48] Burrows, above n 6, 172.
[49] Elizabeth Paton-Simpson "Private Circles and Public Squares: Invasion of Privacy by the Publication of 'Private Facts'" (1998) MLR 318, 326.
[50] W.A.Parent "A New Definition of Privacy for the Law" (1983) 2 Law & Phil 305, 307 in Paton Simpson, above n 49, 326.

However it must also be noted as Stanley Ingbar does in his examination of the subject that:[51]

> There is a very real difference between the disclosure of a personal fact in a dusty public record hidden somewhere in the bowels of a county courthouse and a similar disclosure disseminated through the mass technology of the modern press.

B New Zealand Case Law

It has already been suggested in New Zealand courts that facts which are on the public record have the capacity to become "private over time."[52] Yet there is even less case law in this category to illustrate how this is to operate.

1 Considering convictions

The central case in this category is *Tucker v News Media Ownership*, in which two different High Court judges and the Court of Appeal all considered there was a tenable argument that the publication of a person's criminal convictions from many years earlier could constitute a tortious breach of privacy, even though the accused's name had not been suppressed and it was in open court. Whilst this case may sit better in terms of a category one analysis, it is helpful to view it strictly in terms of the criminal convictions aside from the media publication.

The emphasis in this case seems to be that in the nine years since the convictions, Mr Tucker had gone on to live an ordinary private life and therefore had a right to be left alone and to "live the private aspects of his life without being subjected to unwarranted public disclosure."[53] If this is right, that the outcome turns on the extent to which someone has been accepted back into the community and rehabilitated in the years subsequent, then it would be a difficult test. This sentiment is reinforced in *A v TVNZ* where the ruling is based not only on the small scale of prior publication, but more importantly the idea that A had "moved on" and put the events "as effectively in

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[51] Stanley Ingber "Rethinking Intangible Injuries: A Focus on Remedy" (1985) 73 Cal 2 Rev 772, 848-849 in Paton-Simpson, above n 49, 327.
[52] *Tucker v News Media*, above n 3, 716 per McGechan J
[53] *Tucker v News Media*, above n 3, 731 per Jeffries J.

the past as could be done."[54] It was indicated in the judgment that if TVNZ's projected programme had been proposed within the immediate time frame of sentencing and before A had changed her place or residence "in an effort to put it all behind her"[55] the court would not have granted an injunction. The emphasis again is for the court to look at the "overall justice"[56] of the situation.

C Broadcasting Standards Authority Decisions

It is useful to see how the BSA has dealt with the issue, bearing in mind that Principle (ii) of the Privacy Principles already provides for the possibility of 'public' facts becoming 'private' again in some circumstances. As mentioned earlier, the case of *Earlly v Radio Pacific Ltd*[57] found an eight year old murder conviction not to be private because nothing had occurred to make the events private again since the initial media furor. However, in the later case of *Drury and Daisley v TV3 Network Services Ltd,*[58] twelve years was deemed sufficient to make an allegation of a sexual offence a private matter.

Ursula Cheer disagrees with any attempt to apply an arbitrary cut-off point in cases concerning disclosure of public records such as criminal convictions, and prefers instead a consideration of factors such as "the nature of the offence, the public's right to know, the extent and continuation of publicity and the individual's right to put the past behind them."[59]

Such a case by case consideration of factors may serve to do no more than dress up an entirely subjective outcome, and yet it is far too dangerous to specify nine years as being a suitable time lapse equation in every case. It is unfair to subject news media organisations to such a wavery line of assessment, and equally as unfair to place a blanket number on the years to have lapsed due to the huge variance in both victims rights to air their stories and their perpetrators' rights to lead a life without crime, a

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[54] *A v TVNZ Ltd*, above n 25, 7 Doogue J.
[55] *A v TVNZ Ltd*, above n 25, 5 Doogue J.
[56] *A v TVNZ Ltd*, above n 25, 7 Doogue J.
[57] *Earlly v Radio Pacific Ltd* (23 June 1994) unreported, Broadcasting Standards Authority, Decision No 1994/043.
[58] *Drury and Daisley v TV3 Network Services Ltd* (1996) unreported, Broadcasting Standards Authority, Decision No 1996/130.
[59] Burrows, above n 6, 185.

condition of which may be to remain unjudged and on equal footing away from where people know that part of their past.

Cheer raises the important point of the public's right to know. The defendant may argue as a defence that publication is justified because the public has an interest in the truth being revealed, however 'newsworthiness' is not the test. In *Morgan v TVNZ*, Holland J finds that the fact that other news agencies had given prominence to the facts was irrelevant to a public interest consideration as "it is not for this Court to impose matters of taste on the news media,"[60] only to assess whether the public interest exceeds that of the privacy of the individual.[61] The direction assumed in both *Tucker v News Media* and *A v TVNZ* seems to favour a balancing of interests also.

D The United States Case Law

1 The Rehabilitation Exception

In the United States case of *Melvin v Reid,*[62] a cause of action based on the tort of privacy survived a striking out application notwithstanding that the facts had been made public during a trial seven years previously. The case involved a film which was held to breach privacy when it revealed the name and present whereabouts of a woman who was a prostitute and defendant in a notorious murder trial several years earlier. She had since married and established herself in new social circles where no one knew of her past. So what was once of legitimate public interest, had been transformed by time into a private matter. However as observed by Eichelbaum CJ in *TV3 v BSA*, the case "doesn't really take the matter further than Tucker."[63]

In *Briscoe v Readers Digest Association*[64] the plaintiff's convictions had occurred 11 years earlier and were mentioned as part of a story on truck hijacking. The California Supreme Court held that there may be an exception to the admissibility of public record publication where the person who is the involuntary focus of public interest

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[60] *Morgan v TVNZ*, above n 20, 5
[61] *Morgan v TVNZ*, above n 20, 6.
[62] *Melvin v Reid* (1931) 112 Cal App 285, 297
[63] *TV3 v BSA*, above n 4, 731.

and attention has reverted to the "lawful and unexciting life led by the great bulk of the community."[65] The Court conceded that the names of suspects or offenders of recent crimes were of legitimate public interest protected by the First Amendment.[66] However in cases of long past crimes it was found that the identity of the actor, "usually serves little independent public purpose".[67]

2 The boundaries of the exception

David Elder summarised the exception based on the Californian decisions as being confined to:[68]

1. Long past crimes or events in which the public interest had never wavered.
2. Situations where there is a compelling interest in rehabilitation.
3. Only the identity is protected so it will not apply if republication does not identify the rehabilitated person in his or her present setting.
4. Situations were the convicted person had not voluntarily entered the public forum.

This analysis seems to confirm that the exception is intended only for application to convictions, not all public record information, as Elder goes on to affirm that cases concerning no question of criminality or a rehabilitated criminal "have generally applied a liberal standard of newsworthiness or public interest."[69] The reasoning for rehabilitation arguments can be found in *Briscoe v Readers Digest* as being based on the need to permit rehabilitated individuals to "melt into the shadows of obscurity"[70] in order to effectuate "the great and compelling social interest in rehabilitation."[71]

E Legislating a Time Lapse

In some jurisdictions, a simpler formulation of this exception is the automatic expungement statute. These vary from state to state and are often applicable where the person was a juvenile or has a low-level offence. After a certain number of years,

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[64] *Briscoe v Readers Digest Ass* (1971) 483 P 2d 34, 40.
[65] *Briscoe v Readers Digest Ass,* above n 64, 40.
[66] *Briscoe v Readers Digest Ass,* above n 64, 39.
[67] *Briscoe v Readers Digest Ass,* above n 64, 41.
[68] David A Elder *The Law of Privacy* (Lawyer Cooperative Publishing, Rochester, 1991) 243-245.
[69] Elder, above n 68 , 246.
[70] *Briscoe v Readers Digest Ass*, above n 64, 41.
[71] *Briscoe v Readers Digest Ass*, above n 64,43.

the conviction is written off the public record either automatically or within discretionary guidelines. Nandor Tanczos has introduced a Members Bill which has just been referred to the Justice and Electoral Select Committee. Going by the name of the 'Clean Slate Bill', it applies to people with a conviction for which a sentence of six months or less (or a fine not exceeding $2000) has been imposed. The bill does not apply to any convictions for sexual offences or any convictions imposed against bodies corporate. If that person does not re-offend for seven years after the date of their last conviction, the conviction is automatically 'spent', which means they are not required to reveal any information about their spent conviction for any purpose.

It would have relevance to this category of fact because the bill would also restrict those who can have access to such information rather than actually deleting the information from the record. Whilst police would still be able to bring information before a court when crimes of the same nature are involved, this is one of the few permitted public uses suggesting that if for example a person's conviction was discovered and widespread dissemination was threatened, a judge could easily assess it to be a 'private' fact if the conviction in question was seven years ago and there had been no re-offending. Tanczos has argued the need for the Bill partly on the basis of estimates by John Whitty, (national director of the New Zealand Prisoners' Aid and Rehabilitation Society), that one quarter of all adult males have a criminal conviction, with most falling into the category his bill covers.[72]

F Beyond Convictions - General Public Record Disclosure

1 Court Reports

Each of the cases discussed so far in this part is concerned specifically with individuals wishing to conceal a past conviction, moreover they are facts not only on public record but having been reported in the news many years previously.

It is relevant to contrast them with an important United States case in this area, *The Florida Star v BJF*[73] in which the United States Supreme Court ruled on a situation in which a report identifying BJF by her full name which concerned a sexual assault was

[72] "Cleaning the Slate – Why We Should Wipe Old Minor Convictions" The New Zealand Herald, Auckland, New Zealand, 7 March 2001, 12.

inadvertently left in the Sheriff's Department's press room. Although the facts in question were not on the 'public record,' this is a relevant case as the judge ruled on the basis that they were nevertheless 'publicly available', so the court found no breach of privacy.

A reporter copied the information verbatim, even though she admitted in evidence that she knew she was not allowed to, and the signs in the room made it clear that the names of rape victims were not matters of public record and were not to be published.

On the facts of the case, the information in the pressroom was only 'publicly available' in a very limited descriptive sense in that it was on the court records, and mass publication resulted in the victim receiving threatening telephone calls as well as unwanted attention from fellow workers and acquaintances.[74] She testified that the publicity forced her to move house, change her telephone number and seek police protection.

One of the Court's three main considerations was "the fact that punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act."[75]

White J writing for the three-person dissent in the case claimed that the court majority had effectively "obliterated one of the most noteworthy legal inventions of the 20th century"[76](the tort of the publication of private facts).[77] If wholly private persons such as BJF could not recover, the judge doubted whether there "remained any private facts which persons may assume will not be published."[78]

Elizabeth Paton-Smith in her critique of the case argues that this was a clear instance of privacy protection being denied in a clearly deserving case due to a "lack of consciousness"[79] to the different senses attaching to what is considered public.

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[73] *The Florida Star v BJF* (1989) 491 US 524.
[74] Paton-Simpson, above n 49, 322.
[75] *The Florida Star v BJF* , above n 73, 456.
[76] *The Florida Star v BJF* , above n 73, 2618
[77] Elder, above n 68 , 253.
[78] *The Florida Star v BJF* , above n 73, 2618
[79] Paton-Simpson, above n 49, 322

This case illustrates the potential dangers of applying the 'private fact' requirement too literally and ignoring the overall injustice in widely publishing the identifying information of a rape victim, particularly when the rapist remains unapprehended.[80]

2 Identifying Information

A case which addresses the issue of protecting identifying information from worldwide disclosure over the internet is *The City of Kirkland v Sheehan.*[81] Mr Sheehan operated and published a political internet web site, which contained political information, some of which was critical of law enforcement agencies. The purpose of the site was to demand greater public accountability for police officers and official agencies. The web site included identifying information about Kirkland police officers and city officials, including social security numbers, pay rates, birth months, home addresses, and home phone numbers. Plaintiffs based their claim on invasion of privacy. Unlike criminal convictions, the disclosure of which has generally been considered to be objectionable, the issue here was whether disclosure of identifying information would be highly offensive to a reasonable person.[82]

However the court found that no invasion of privacy can be shown where the alleged 'private' information was in the public domain or a matter of public record before the information was publicised by the defendant. All the facts published on the website about the police officers and city officials had been culled from sources available to the public. "The authors of the web site did not find Plaintiff Markle's social security number by peering through his bedroom window. They found it in federal bankruptcy records."[83]

2 New Zealand's position on identifying information

Considering whether such information would be provided with privacy protection in a New Zealand setting is uncertain. However the BSA has ruled that while a person's name, address, telephone number and appearance are a public fact (*Earnshaw v TVNZ*

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[80] Elder, above n 68 , 253.
[81] *City of Kirkland v Sheehan* (10 May 2001) unreported,(Case No. 01-2-09513-7 SEA)(Washington), Alsdorf J at <http://www.justicefiles.org.htm>
[82] *City of Kirkland v Sheehan,* above n 82, para 50-56.

Ltd[84]), Principle (ii) of the Broadcasting Standards provides now that where the name and address is not necessary for the news item it renders such facts private.

G Category Two (Public Records) Conclusion

To conclude, information on the public record can be only notionally not descriptively public. Therefore it is not difficult to forsee that a reasonable person would object to the disclosure in mass media of details about their bad credit rating, failed marriages, name change and new address or embarrassing evidence about their personal relationships given in open court five years ago. However this in itself doesn't seem to warrant that public record information be given a narrower definition or some type of special exemption in a fact analysis.

There needs to be a middle ground struck between the potential injustice at applying the 'private fact' requirement so restrictively that any information remotely notionally on the public record is automatically excluded from the tort, and on the other hand the uncertainty for media organisations of applying a vague '*Melvin-Briscoe*' exception. One way of deciding whether information which can be found on a public record is a private fact is to consider:

1. The extent something on public record is descriptively public already, (taking into account accessibility, public knowledge at place of publication and time-lapse.)

2. Weighed up against the public interest in having the facts disseminated. (Exceptions for public figures are discussed in the fourth category of fact.)

The emphasis on identifying whether or not the facts contained on public record were either only notionally public or descriptively too acknowledges that a blanket exclusion to all public record information is too broad.

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[83] *City of Kirkland v Sheehan*, above n 82, para 367.
[84] *Earnshaw v TVNZ* (1994) unreported, Broadcasting Standards Authority, Decision No 1994/034.

The requirement that the facts, or disclosure of them be highly objectionable is a better element under which to assess factors such as "moving on"(*A v TVNZ*[85]), or rehabilitation, as one could argue that the objectionability of being identified increases significantly for a plaintiff who has taken obvious steps to lay what lies on record firmly in their pasts.

IV PUBLIC THROUGH OCCURING IN A PUBLIC PLACE

Taking a photograph of a person in a public place or of their property without consent does not constitute publication of private facts (*Marris v TV3*[86])
But the fact that the plaintiff is in a public place "does not automatically determine the issue"[87] as illustrated by an Australian case which dealt with the issue in a slightly different context.

In *Barthurst CC v Saban* Young J thought it might be open for an Australian court to give relief where a person was photographed surreptitiously in an embarrassing pose. [88]

> It would seem to me that it would be. . .open to this Court. . .to give relief to a plaintiff who complained that someone had taken a photograph of him in a shockingly wounded condition after a road accident. . .or that she had been standing innocently over the air vent in a fun house and someone had photographed her with her skirts blown up.

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[85] *A v TVNZ Ltd*, above n 25, 7 Doogue J.
[86] *Marris v TV3*, above n 46, 8.
[87] Burrows, above n 6, 176.

A New Zealand Case Law

1 High standard of harm

Todd observes that if the public activity published is of a personal and embarrassing kind, particularly if its beyond the control of the subject, "it may be less clear if it is public or private."[89]

The case law in New Zealand has never had to specifically address this question in relation to a tort of privacy. In *Marris v TV3* in which a couple were surreptitiously filmed declining to give an interview, it was the "manner and circumstances"[90] of filming which the couple objected to. Because the filming took place from the bushes and the camera was on a public footpath, it was decided that a cause of action "does not arise simply from observation or the taking of a photograph at least from a place where the photographer has a right to be."[91].

In *Marris v TV3,* strong emphasis is placed on the fact that the couple suffered minimal harm, and that no cause of action arises "*simply* from observation or the taking of a photograph" without proving considerable damage. The case may well have been different if what was surreptitiously filmed from the footpath was of a sufficiently objectionable standard such as the couple having sex.

2 Surreptitious filming in the public interest

Diane Fillian Knight, a television journalist for over 16 years, filed an affidavit saying that this approach was "proper" to bring a person's 'embarrassment and discomfort before the public"[92] suggesting that when it is of such public import surreptitious filming of this kind is justifiable.

It seems like a stretch of New Zealand's conception of public interest to find it existing in a refusal to be interviewed. Neazor J discusses the Australian case of

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[88] *Barthurst CC v Saban* (1985) 2 NSWLR 415, 424 (HCA) per Young J.
[89] Todd, above n 5, 966.
[90] *Marris v TV3,* above n 46, 2.
[91] *Marris v TV3,* above n 46, 13.
[92] *Marris v TV3,* above n 46, 4.

Lincoln Hunt (Aust) Pty Ltd v Willesee[93] in which the television reporter and camera team entered the offices of the plaintiff, which was found to be an act of trespass from the moment of entry as their motives were outside the implied licence. Public interest justifications were rejected, with Young J holding that "even if what the defendants were seeking to televise was one of great public interest that would not justify their entry."[94]

This can be contrasted with the extent to which the Target television programme has stretched a public interest justification in filming. Targets producer Vincent Burke argues that they are entitled to surreptitiously film people in their work places, or in someone else's private home because the show "has helped raise the public's awareness about consumer rights."[95] On the *Lincoln Hunt* analysis it would be interesting to see if such a defence would succeed in a New Zealand court even if the subject of filming was in a publicly accessible workplace.

3 Public tombstone, public place?

In the case of *Bradley v Wingnut*[96], the plaintiffs were arguing a breach of privacy among other things due to the fact that their ancestor's tombstone was made part of the action of a particularly gruesome movie. The claim for protection under the tort failed partly on the grounds that the tombstone in question was in a public place, a public cemetery. Gallen J agreed that "there could scarcely be anything less private than a tombstone in a public cemetery."[97] The whole point of a tombstone is a publication to all those who choose to read it of the facts which the inscription is designed to preserve. It was therefore found that it was not the actual tombstone in the film that was being objected to but the association to the activities in the film, more analogous then to defamation than privacy.

However Gallen J went on to state his acceptance that:[98]

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[93] *Lincoln Hunt (Aust) Pty Ltd v Willesee* (1986) 4 NSWLR 457 (SCA) per Young J.
[94] *Lincoln Hunt (Aust) Pty Ltd v Willesee*, above n 94, 461.
[95] Steven Price "Target's Hidden Cameras" Mediawatch Radio Programme, Wellington, New Zealand, 22 July 2001, at <http://www.mediawatch.co.nz/archive.htm>
[96] *Bradley v Wingnut*, above n 2.
[97] *Bradley v Wingnut*, above n 2, 416.
[98] *Bradley v Wingnut*, above n 2, 424.

> it is conceivable that in certain circumstances the fact that something occurred or exists in a public place does not necessarily mean that it should receive widespread publicity if it does not involve a matter of public concern.

If for example, the clergyman had been impaled upon the Bradley's tombstone, rather than it simply being part of the ambience, the situation may have been different.[99] It was also reinforced as in *Marris v TV3* that there is no right to prevent one person from simply photographing another.

B Broadcasting Standards Authority Decisions

Although the New Zealand courts have had little chance to specifically address the question of filming or photographing in public places, there exists a considerably wider scope of fact situations in the BSA decisions on this issue.

In *McAllister v TVNZ*[100] it was decided that the location of the incident is relevant, as conventionally filming, photographing or interviewing in a public place renders facts public not private. However the mere fact something occurs or exists in public does not make it something the public should know about. Ursula Cheer agrees that "involuntary and intimate details can be revealed in public and yet still be seen as private facts."[101] The standard of embarrassment or offensiveness is quite high though as illustrated by the decision in *44/93.*[102] Photographs of the plaintiff's wedding from a former marriage were published for the first time many years after their separation, and his ex-wife had since developed a drug addiction and died in unusual circumstances. The marriage took place in a public place and was found to be very much a 'public' fact although public disclosure was now embarrassing, at the time it was not.

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[99] *Bradley v Wingnut*, above n 2, 424.
[100] *McAllister v TVNZ*(1990) unreported, Broadcasting Standards Authority, Decision No 1990/5

[101] Burrows, above n 6, 184.
[102] Michael Stace *Privacy - Interpreting the Broadcasting Standards Authority's Decisions* (The Dunmore Press Ltd, Palmerston North, 1998) 34.

A further illustration of this is the case in *177/93,*[103] in which a television programme included extracts from an all-male strip revue and featured Mrs H, a member of the audience. The BSA found that the filming had occurred in a nightclub which was open to the public on payment of an admission fee and was therefore a public place. While embarrassing, the BSA found that her attendance there did not amount to an offensive point of fact.

C The United States Case Law

In his overview of this area of the law, David Elder finds that the bulk of United States case law indicates that there is "no liability where the matter publicized is in plain or public view for anyone to see."[104]

1 Expectations of privacy

Whether or not a male strip review really is a 'public place' seems questionable, and the question of qualifying private and public places was raised in a case from the California Supreme Court, *Sanders v American Broadcasting Cos., Inc.*[105] Here the court considered the question of what happens when an employee who knows a conversation in an open office space will be overheard by coworkers, can pursue an invasion of privacy claim if that conversation is recorded by a reporters hidden camera.

The case involved 'telephsychic' hotline workers who were secretly videotaped by an undercover reporter. Werdegar J rejected the notion of privacy as an 'all-or-nothing' concept and described an expectation of limited privacy even in such open settings. "There are degrees and nuances to societal recognition of our expectations of privacy: the fact the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law."[106] The court's ruling was not

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[103] Stace, above n 102, 34.
[104] Elder, above n 68, 167.
[105] *Sanders v American Broadcasting Cos., Inc* (1999). 978 P.2d 67 (Cal)
[106] *Sanders v American Broadcasting Cos., Inc,* above n 105, 69.

meant to imply that investigative journalists necessarily commit a tort by secretly recording events and conversations in offices, stores or other publicly accessible workplaces; however, the court's ruling allows the means of intrusion employed to collect the facts to determine "whether the subjective expectation of privacy was reasonable."[107]

If a "quasi-public"[108]setting can encompass reasonable expectations of privacy in some circumstances, surely this can stretch to apply to public places too.

2 Method of information retrieval

This seems to endorse an assessment in situations such as this to determine to what extent the photographer, or recorder, had to go to in order to obtain the information. If they merely wandered up to a person and took their photo or filmed them in full knowledge of the other person, this would weigh against an assumption of privacy. On the other hand, anything of a surreptitious nature immediately suggests that the person from whom the information is sought may have objected in the first place, or the information itself is of a sufficiently private quality that it can only be gained this way. Under similar reasoning in a recent United Kingdom case, Laws J suggested that if for example a person thinks they are out of sight range and "someone with a telephoto lens were to take from a distance with no authority a picture of another engaged in some private act his subsequent disclosure would amount to a breach of privacy."[109]

D Category Three (Public Places) Conclusion

So to conclude so far, something occurring in a public place, may retain a degree of 'private' character if a number of factors combine to allow it. These include the fact or activity itself must be of an extremely personal and embarrassing kind, capable of being highly offensive and objectionable to a reasonable person if disclosed, and

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[107] *Sanders v American Broadcasting Cos., Inc,* above n 105, 69

[108] Elder, above n 68 ,168.

[109] *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473, 476 per Laws J (The case was actually based on an action for breach of confidence, there is no tort of invasion of privacy in the United Kingdom)

"beyond the plaintiff's control."[110]. The expectation of privacy may assist in proving what has been recorded retains a 'private' character.

In order to synthesise the cases on 'public place' facts, I would suggest that the first consideration is:

(1) whether the subject matter recorded is in itself of a sufficiently personal and embarrassing kind, and

(2) whether the plaintiff can prove they had a reasonable expectation of privacy despite the public nature of the place.

V PUBLIC THROUGH ASSOCIATION WITH A PUBLIC FIGURE

Each of the three preceding fact categories, while not being entirely separate, cover the majority of case scenarios. A category relating to public figures then seems less to me like a separate fact situation, rather a factor which will assist in any public interest consideration

A Public Figure Therefore Public Fact?

From the inception of the tort with the case of *Tucker v News Media,* Jeffries J acknowledged the competing right for the public to be informed, especially when dealing with public figures. The distinction was based on a person who lives an *ordinary* private life having the right to be left alone.[111] While saying this is subject to certain exceptions he fails to name them. However it was proposed that "a person loses a right to privacy by presenting himself to the public eye for evaluation"[112] In this case it was conceded however that Mr Tucker was 'a reluctant debutante' as far as public exposure was concerned so no weight was placed on this.

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[110] Todd, above n 5, 966.
[111] *Tucker v News Media,* above n 3, 731 per Jeffries J.

1 Public interest

In the later case of *Morgan v TVNZ,* the girl involved was hardly a public figure, more the unfortunate recipient of media attention due to the circumstances surrounding a custody dispute over her. Holland J still cautioned that the right to privacy would need to be balanced against the public's conflicting right to be informed.[113] Again in *Bradley v Wingnut* Gallen J voiced the importance in "balancing the rights and interests of the individual against the significance in a free country of freedom of expression."[114]

In *Media Law in New Zealand* the "defence of public interest in publication"[115] is listed as one of the tort's elements, stating that the defendant may argue this as a defence where publication is justified because the public has an interest in the truth being revealed. It was found that 'newsworthiness' is not the test, as it depended on public concern not public curiosity. As an illustration, Cheer [116]cites the case of *Sidis v FR Publishing Corp,*[117]in which the magazine *The New Yorker* exposed biographical details of a domestic nature about an ex child prodigy who decided he wanted to lead a life of anonymity. The facts in question were based on information that he had become an insignificant clerk with eccentric personal habits and "an interest in an obscure Indian tribe."[118] In the case Clark J held that:[119]

> Revelations may be so intimate and so unwarranted in view of the victims position as to outrage the community's notion of decency. But when focused upon public characters, truthful comments upon dress, speech, habit, and the ordinary aspects of personality will not usually transgress this line.

Cheer questions whether such an analysis means that in relation to public figures, the publication of such comments is not offensive because they are not private facts.

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[112] *Tucker v News Media,* above n 3, 735 per McGechan J.
[113] *Morgan v TVNZ,* above n 20, 174.
[114] *Bradley v Wingnut,* above n 2, 423.
[115] Burrows, above n 6, 176.
[116] Burrows, above n 6, 176.
[117] *Sidis v FR Publishing Corp* (1940) 1 3 F 2d 806.
[118] *Sidis v FR Publishing Corp,* above n 117, 807.
[119] *Sidis v FR Publishing Corp,* above n 117, 807.

"The true effect of the judgment appears to be that comments on dress, speech etc. is the sort of information that would not be regarded as private facts, rather than that the disclosure of them is not offensive."[120]

2 The United States

The general direction of the law in the United States in this area as summarised by *Prosser and Keeton* indicates that if a person is in a position where public attention is focused upon them as a person, there is "no liability when they are given additional publicity as to matters legitimately within the scope of the public interest they had aroused."[121] Which seems to suggest that aspects of a persons life which fall within, or relate to their public role are to be considered public facts from the start.

3 The Broadcasting Standards Authority

In his book, *Interpreting the Broadcasting Standards Authority's Decisions,*[122] Michael Stace observes that the disclosure in itself of facts about a newsworthy person, such as the details about a house or car was noted on several occasions by the Authority as being unlikely to amount to a breach of privacy. The facts disclosed had to also be "highly offensive and objectionable to a person of ordinary sensibilities."[123]

Both the decision in *Sidis* and the BSA are saying that the publication of basic facts about public characters will not violate privacy in circumstances where it might have done so had they been ordinairy people.

In *TV3 v BSA*, Eichelbaum CJ thought the BSA was fit to impose the standard in question dealing with 'public' facts becoming private again, and thought that in this setting privacy should also include relief from individuals being harassed with the disclosure of past events having no sufficient connection with anything of present public interest.[124] On Michael Stace's analysis, this does not appear to stretch to 'newsworthy figures' on the basis that past events may have sufficient connection

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[120] Burrows, above n 6, 177-178.
[121] Keeton, above n 7, 860
[122] Stace, above n 102.
[123] Stace, above n 102, 87.
[124] *TV3 v BSA*, above n 4, 729.

with present public interest if they reflect on that figure's ability to perform their public role.

B P v D and the Public Figure

This was of relevance in the recent New Zealand case of *P v D*[125] in which D is a journalist for the *Sunday Star-Times* and "P is a public figure."[126] In the process of investigating P he remembered hearing that they had at some stage been receiving treatment for a psychiatric illness. D approached one source who confirmed that this was a general belief, and that it was also generally believed that P had indeed been in a psychiatric facility and received treatment for a mental condition, and that there was one incident where a police officer came to the assistance of P. After D declined to submit a list of questions for an interview with P, nor the article to be submitted for P's approval prior to printing, P's counsel instituted proceedings for breach of confidence and invasion of privacy.

In the New Zealand Bill of Rights Act 1990, section 14 is a right pertaining to freedom of expression, however it is not an absolute right and the Courts must utilise a balancing act in deciding to balance the freedom of expression and that of someone's privacy. In the case of *Moonen v Film and Literature Board of Review,*[127] the Court of Appeal discussed the New Zealand Bill of Rights Act (NZBORA), implying that nothing short of a total and full analysis of the NZBORA was required if there was statutory authority which would control the final result in the case.
The Court in *P v D* does mention that privacy law requires a consideration of the public interest, and maybe this part could be linked to a NZBORA discussion, however any discussion of the NZBORA in *P v D* is very brief in light of *Moonen.*

In terms of the public interest, the court merely states that any psychiatric background is not relevant to the current performance of P's job. The court does leave it open for the newspaper to re-open the question at a later date if facts regarding the public

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[125] *P v D* 2 NZLR 591 (HC) per Nicholson J.
[126] *P v D*, above n 125, 592.
[127] *Moonen v Film and Literature Board of Review,* [2000] 2 NZLR 9 (CA) per Elias CJ, Richardson P, Keith, Blanchard, Tipping JJ.[*Moonen*]

interest change (perhaps if the person starts showing signs of mental illness, or if P took on a position of public responsibility). But in this situation there was "minimal public interest in disclosure" because P's mental health did not affect P's "occupation, character credibility or competence."[128]

Gallen J's recognition in *Bradley v Wingnut* of the need to bear in mind that the rights and concerns of the individual must be balanced against the right to freedom of expression[129] was emphasised in the case, as was the difficulty in formulating boundaries which would ensure both are appropriately recognised.

A fourth element to the tort was proposed as being the "nature and extent of legitimate public interest in having the information disclosed."[130] The nature and extent of legitimate public interest was seen to vary considerably and ranged from "idle curiosity and amusement"[131] to an assessment of whether the information affected a public individual's "character credibility and composure". Here it was found that while there was public interest in disclosure, legitimate public interest was "minimal."[132]

In the case itself it was found that the facts themselves were private, and disclosure of treatment in a psychiatric hospital would be highly offensive to a person of ordinary sensibilities. In stating the principle, supposedly from *Bradley v Wingnut*, the judge says that the facts themselves must be highly offensive (this is not what Wingnut held), but when applying this standard, concludes that *publication* of the facts would be highly offensive (which is the more logical standard). The discussion is a bit confused but he does not seem to be truly taking a different approach from *Wingnut.*

It is difficult to ascertain any solid guidelines from *P v D*, simply because the nature of the case demands we cannot know the public figure, nor the facts in question, nor can we assess to what extent their past is of legitimate public interest.

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[128] *P v D*, above n 125, 591.
[129] *Bradley v Wingnut*, above n 2, 423.
[130] *P v D*, above n 125, 601.
[131] *P v D*, above n 125, 601.

C A New Zealand Direction?

However in assessing how public figures differ from anyone else, the BSA's fifth privacy principle is a useful insight. "An individual who consents to the invasion of his or her privacy cannot later succeed in a claim for breach of privacy."[133]

Lange v Atkinson[134] is championed as the case which liberalised defamation law, recognising that "[t]he nature of New Zealand's democracy means that the wider public may have a proper interest in respect of generally-published statements which directly concern the functioning of representative and responsible government."[135] For a tort of privacy to in any way restrict publication of the truth in relation to that seems ridiculous. Whilst it is not yet certain how broad the class of people *Lange* relates to, it makes sense that *P v D*'s 'legitimate public interest' standard be viewed in this light.

Surprisingly, the public's expectation of this standard is almost as high as their own. In a Colmar Brunton survey conducted by the BSA, the filming of a member of the public by a hidden camera as he entered a strip club was judged unacceptable by 73.7% of respondents, while 63.7% of people considered the secret filming of a politician in the same circumstances unacceptable.[136]

As regards to all subject matter which does not affect an individual's "occupation, character, credibility or competence"[137], it makes sense in light of principle five of the BSA, and obiter statements made in New Zealand courts which suggest one loses a right to privacy by "presenting himself to the public eye,"[138] that a public figure must prove a higher standard of harm from disclosure.

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[132] *P v D*, above n 125, 602.
[133] Broadcasting Standards Authority Advisory Opinion Privacy Principles 1996, Principle v.
[134] *Lange v Atkinson* [2000] 3 NZLR 385 (CA) per Richardson P, Henry, Keith, Blanchard, Tipping JJ.
[135] *Lange v Atkinson* above n 134, 100.
[136] Sam Maling "Concern About Privacy Tops List in BSA Survey" (1999)>http://www.bsa.govt.nz.html>
[137] *P v D*, above n 125, 601.
[138] *Tucker v News Media*, above n 3, 735.

VI CONCLUSION

The dilemma in defining our developing tort of privacy's boundaries is due in part to the difficulty inherent in extracting the private from the public, or deciding when the public has transformed into the private.

As indicated by the majority of cases discussed in this paper, the idea that public facts and private facts can exist in practice as separate entities is a theoretical fallacy. Fortunately New Zealand courts have already indicated a reluctance to follow the didactic adherence to the public/private distinction as illustrated in the United States case law.

Eichelbaum CJ in *TV3 v BSA* acknowledges that "privacy is not an 'absolute' concept", and therefore requires a "liberal interpretation."[139] Similarly in *P v D*, by regarding each part of the test as a factor rather than a requirement, Nicholson J is favouring a more holistic approach to liability assessment.
I agree with Elizabeth Paton-Simpson's reluctance to treat the terms 'public' and 'private' as genuine opposites, because they are not after all "mutually exclusive categories. . .but matters of degree."[140]

If the difference between the terms public and private is not absolute, rather a matter of degree, I think it is more logical to formulate a test for determining a breach of privacy with this assumption at its nucleus.

Each concluding category analysis in this paper has confirmed that private and public are matters of degree. For facts published previously in the media, the emphasis was on the breadth of prior publication. Public record facts were more fairly assessed, by considering the degree to which they were descriptively public. Lastly for public place facts the importance was in evaluating the degree of expectation of privacy held by the plaintiff.

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[139] *TV3 v BSA*, above n 4, 731.
[140] Paton-Simpson, above n 49, 324.

My suggestion for how to formulate a new way of looking at the 'private fact' requirement, which succeeds in assessing the degree of privacy in the information without relying on an inaccurate public/private dichotomy is this:

1. (a)To what extent is the allegedly private fact already known?
   (To how many people? How long ago? Where? Publicly accessible? Memorable?)

   (b)To what extent would the proposed disclosure extend this knowledge?

2. Will the disclosure of that particular information be highly offensive and objectionable to a person of reasonable sensibilities?

The first part focuses solely on the current knowledge of the fact. The second part retains the objective standard, but clarifies that it looks only at disclosure, because as Ursula Cheer frames it, if disclosure of the information will significantly "expose or embarrass that individual, . . [it] is a good indication that something about it is inherently private."[141]
The public interest element would exist as a defence and incorporate a consideration of whether the facts deserve publication, relevant especially where the information relates to a public figure

In writing that "there is no private life which has not been determined by a wider public life" George Elliot is recognising the obstacle inherent in attempting to define separately, societal concepts which can exist only within degrees of each other.

[141] Burrows, above n 6, 185.

VII TABLE OF CASES

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