

KATHRYN McLEAN

**DR FAHEY'S FIFTEEN MINUTES OF FAME:
ENSURING APPROPRIATE PROTECTION
AGAINST THE NEW ZEALAND MEDIA'S
USE OF HIDDEN CAMERAS**

LLM RESEARCH PAPER

MEDIA LAW (LAWS 533)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

2000

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ABSTRACT

This paper canvasses the current protections available to victims of hidden camera abuses by the media. The basic principles for the appropriate use of hidden cameras already exist within various codes, guidelines and Broadcasting Standards Authority (BSA) decisions. This paper will conclude that to ensure sufficient protection, these principles need to be drawn together into one clear document. Additionally, developments to the tort of public disclosure of private fact and the BSA's ability to grant compensation will ensure effective legal sanctions for the inappropriate use of hidden cameras.

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...positions to such technology from members of the media has been varied: some have resisted this new tool using a variety of means and sometimes a lack of wisdom, others have called for a more cautious approach, and some have even spurred the use of surreptitious recording and hence the downfall of professional journalists.¹ Once caught on film, images have the potential to be broadcast far and wide. Reputations may be ruined, privacy can be invaded. But in defence of the media, some people's actions are extremely unprivate and excessively newsworthy.

In New Zealand, the name of Dr Morgan Fahey has become somewhat notorious in recent years. Dr Fahey's criminal actions have proved to be both unprivate and newsworthy. In 1998, TV3 aired a segment on *20/20* featuring allegations by three women that they had committed professional misconduct. Following the broadcast of the segment, Dr Fahey commenced defamation proceedings against TV3.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 16 322 words.

The segment also provoked "Brenda", a former patient of Dr Fahey's, to approach TV3 with her claim that Dr Fahey had raped her 25 years ago during a consultation. Brenda made an appointment with Dr Fahey in the guise of a patient. She asked for, and received from TV3, camera and sound equipment which she used to record her

¹ Robert Lind, "Gossip" *Auk. Australian Rev.*, March 1993, (7, 18-21).

I INTRODUCTION

*"Men with the muckrake are often indispensable to the well-being of society,
but only if they know when to stop raking the muck."*

Theodore Roosevelt, 1906.

Ignorance is bliss until the muck hits the television screen. Advancing technology allowing surreptitious recording and filming is giving greater access into people's lives. Cameras may be as small as a pen and can peep through a button-hole. The muckrake now has the potential to be so unobtrusive that you may only discover, at the same time as numerous other viewers, that your muck has indeed been raked.

Reactions to such technology from members of the media has been varied: some have relished this new tool using it with gusto and sometimes a lack of wisdom, others have called for a more cautious approach, and some have even spurned the use of surreptitious recording and lament the downfall of professional journalism.¹ Once caught on film, images have the potential to be broadcast far and wide. Reputations may be ruined. Privacy can be invaded. But in defence of the media, some people's actions are extremely unsavoury and excessively newsworthy.

In New Zealand, the name of Dr Morgan Fahey has become somewhat notorious in recent years. Dr Fahey's criminal actions have proved to be both unsavoury and newsworthy. In 1998, TV3 aired a segment on *20/20* featuring allegations by three women who were former patients of Dr Morgan Fahey. They claimed that Dr Fahey had committed sexual crimes against them and that he was guilty of professional misconduct. Following the broadcast of the segment, Dr Fahey commenced defamation proceedings against TV3.

The segment also provoked "Brenda", a former patient of Dr Fahey's, to approach TV3 with her claim that Dr Fahey had raped her 28 years ago during a consultation. Brenda made an appointment with Dr Fahey in the guise of a patient. She asked for, and received from TV3, camera and sound equipment which she used to record her

¹ Robert Lissit "Gotcha!" *Am. Journalism Rev.*, March 1995, 17, 18, 21.

confrontation with Dr Fahey during the appointment. Brenda's mission was fruitful: Dr Fahey effectively admitted his crime against Brenda through his behaviour and by asking for her forgiveness and pleading with her not to hurt his family. Having decided to air the footage obtained by Brenda, TV3 informed Dr Fahey of its intention and allowed him an opportunity to respond. Perhaps unsurprisingly, Dr Fahey's response was to seek an injunction to prevent TV3 from airing the footage. The interim injunction was obtained from the High Court and TV3's application to have it set aside was dismissed.² TV3 was forced to appeal to the Court of Appeal to have the injunction overturned.³

The Court of Appeal's judgment in *Fahey* discusses some of the legal issues raised by the New Zealand media's use of hidden camera footage. Evident in the Court's judgment is the ongoing battle between the media's right to freedom of speech and individuals' rights to reputation and privacy. While finding for TV3 and allowing its use of a concealed camera, the Court was careful to cloak its argument with the warning that "[t]he Courts will be careful to ensure that the rights of others are properly weighed and that the media is not simply provided with an incentive to engage in and benefit from unlawful conduct whenever it claims it is acting in the exercise of freedom of expression."⁴ However, the Court provided little indication of how that weighing exercise is to be performed.

The circumstances surrounding the accusations made against Dr Fahey and his subsequent guilty plea raise a plethora of issues. The object of this paper is to focus on the protections available to the subjects of hidden camera footage. The three sources of protection are: the courts, specialist media statutory bodies, and self-regulation. The principles that should govern the appropriate use of hidden cameras already exist within various codes and guidelines. However, in New Zealand they have not yet been fully and clearly incorporated into the different modes of protection. The New Zealand courts should look to developing the privacy torts, notably public disclosure of private fact, to ensure sufficient protection. The Broadcasting Standards

² *Fahey v TV3 Network Services Ltd* (3 and 4 November, hearing date) unreported, High Court, Christchurch Registry, CP 168/98, Chisholm J. [High Court *Fahey*]

³ *TV3 Network Services Ltd v Fahey* 2 NZLR 129. (New Zealand Court of Appeal). [*Fahey*].

⁴ *Fahey* above n3, 136-137, per Richardson P.

Authority (BSA) has all the principles existing within its various codes and decisions. However, a clear statement of the principles in one document is desirable. Where there is a strong and clear statement of appropriate principles in the law, this will flow through and ensure meaningful self-regulation by the media. The scope of this paper is limited to examining the use of hidden cameras to obtain film images rather than still photographic images. Accordingly, most of the issues discussed involve television broadcast media rather than radio or print media.

Part II of this paper will discuss the rise of hidden camera technology and the media's use of it. A brief history of hidden cameras' role in surreptitious newsgathering will be provided. The wealth of information and experience that has occurred in America concerning surreptitious newsgathering will be drawn upon to illustrate the uses and purposes of hidden cameras from the beneficial through to the scandalous. Following this, the criticism and concerns leveled at the media's use of surreptitious recording will be canvassed. This part will conclude that while many of the concerns with the media's use of concealed recording equipment are justified, hidden cameras do have a valid and beneficial role to play in uncovering the news.

Having established that there is a legitimate role for hidden cameras, the protections currently available to the subjects of hidden camera footage are canvassed in Part III. First, the traditional protections available from the courts are examined. The courts' ability to grant injunctions against hidden camera footage is scrutinised. Secondly, the protections given through specialist media statutory bodies that exist in New Zealand and United Kingdom are considered. And finally, various examples of self-regulation are provided and discussed.

Part IV will focus the arguments on hidden cameras in the New Zealand context. The appropriate principles for the use of hidden cameras are set out and examples of their application provided. An important point from the principles is that a distinction needs to be made between the media's decisions at the stage of newsgathering when the footage is actually obtained and the media's decision to broadcast such footage. Following this, the proposal for incorporating these principles into the protections given by the courts, BSA and New Zealand television networks are laid out. Possible developments in the tort of public disclosure of private fact can ensure effective

protection is provided through the courts. The BSA needs to incorporate all the principles into one document and issue clear guidelines on the media's use of hidden cameras. Television New Zealand's (TVNZ) manual for its journalists is laudable. However, TV3's complete lack of written guidance needs to be improved upon.

II THE USES AND ABUSES OF HIDDEN CAMERAS

A History of Hidden Cameras

The media's use of hidden cameras fits into the wider story of surreptitious newsgathering. Hidden cameras are merely one tool in the belt of investigative reporters. Surreptitious newsgathering may involve lying, spying, using hidden camera technology and going undercover.

'Stunt journalism' was coined as a term almost a century ago following the exploits of Nellie Bly and Upton Sinclair. Bly is famous for her 1887 series in *The New York World* of her ten days undercover as a patient in a mental asylum. Her vivid written reports created a stir and were credited with bringing about changes that improved living conditions in New York asylums.⁵ Upton Sinclair went undercover in 1908 as a meatpacker to investigate Chicago slaughterhouses. He exposed the filthy conditions in slaughterhouses in *The Jungle*.⁶ Sinclair's reporting led to reforms in the industry and generated the Pure Food and Drug Act.⁷ Bly and Sinclair's innovative methods reaped results.

The use of hidden cameras to capture visual images as part of surreptitious newsgathering came in 1928 in Sing-Sing prison. Ruth Snyder had been embroiled in a steamy love triangle and had murdered her husband. The *New York Daily News* wanted a photograph of her execution for their front page. The paper hired a *Chicago Tribune* photographer who strapped a small camera to his ankle to obtain the prized

⁵ Nellie Bly took credit for the changes, although it appears that the movement for such reforms may already have been in place before her story was published. Brooke Kroeger *Nellie Bly: Daredevil, Reporter, Feminist* (1994). In: David Logan "'Stunt Journalism,' Professional Norms, and Public Mistrust of the Media" 9 U Fla JL & Pub Pol'y 151, 152. [Logan "Stunt Journalism"].

⁶ Upton Sinclair *The Jungle* (Heritage Press, 1965).

⁷ Pure Food and Drug Act of 1906, Pub L No. 59-384, 34 Stat 768 (June 20, 1906) (repealed by

photograph of Snyder's execution.⁸

Since these forays, surreptitious newsgathering has continued in the print media passing in and out of vogue at times. The *Chicago Sun-Times* hit a low point in the 1970s when it bought and opened a bar called 'The Mirage' where journalists posed as employees and patrons while hidden cameras were used to catch government officials asking for bribes. The story was rejected for a Pulitzer Prize due to the misrepresentations and entrapment tactics used by journalists. The negative reaction and publicity to the story considerably cooled the American press's enthusiasm for hidden camera reports.⁹

Developments have not been limited to America; the British press is well known for its surreptitious and sometimes intrusive photography. Members of the British Royal Family, most notably the late Princess of Wales, have often been ongoing targets of media attention. Paparazzi photographers have fully utilised the telephoto long-range lens to 'uncover the news'.

As television has burgeoned, so have the uses of hidden cameras. Heavily dependent on visual images, television was the prime medium for developing the uses of hidden cameras. When CBS received acclaim in 1963 for its programme "Biography of a Bookie Joint" which exposed the bookie joints in Boston, television journalists awoke to the benefits of hidden cameras.¹⁰ The newsmagazine show *60 Minutes* premiered on CBS in 1968 and soon became an innovator in the use of such surreptitious tools.¹¹

For the last decade, advances in technology have meant that cameras have become smaller and quieter, they produce a clearer image and are relatively inexpensive. No longer do journalists have to stake out a location from the building opposite and contrive cunning receptacles to disguise a camera in; reduction in size and sound have

Federal Food, Drug, and Cosmetics Act, Pub L No. 75-717, 52 Stat 1040 (1938).

⁸ See: Lissit, above n1, 18 ; Logan "Stunt Journalism" above n5, 153.

⁹ Eleanor Randolph "'Lipstick Camera' Reshapes TV Investigative Journalism, *LA Times*, 14 January 1997, A11. See: Logan "Stunt Journalism" above n5, 154.

¹⁰ Lori Keeton "What is Really Rotten in the Food Lion Case: Chilling the Media's Unethical Newsgathering Techniques" 49 Fla L Rev 111, 115.

¹¹ Logan "Stunt Journalism" above n5, 155.

allowed journalists to carry cameras discreetly on their person.¹² These miniature cameras were first used to notable effect in 1989 in Robbie Gordon's programmes exposing patient abuse in health care facilities and a day care centre. Gordon put ABC's *Prime Time Live* at the forefront of newsmagazine programmes through her use of hidden cameras.¹³

Success for ABC meant competition for other networks and the 1990s has seen an increased use of hidden cameras in America as networks vie for audience ratings. This further chapter in the story of hidden cameras has again brought into focus the issues of privacy and freedom of the media.

B Purposes of Hidden Cameras Stories

The usual justifications offered by journalists for the use of hidden cameras is for the public welfare and public interest. Hidden cameras are especially good at ferreting out 'the bad guy' and exposing what some want kept hidden.

1 Championing the weak

The public welfare may be served in various ways. First, in the footsteps of Nellie Bly, the media may serve to protect the vulnerable by exposing hidden abuses. Armed with hidden cameras the media can champion the weak in their fight against the more powerful. Amanda Millar's report for TV3 on Dr Fahey is a good example of this: Millar provided a voice for the women who had been abused by Dr Fahey and gave them a public forum for exposing the truth. Furthermore, such hidden camera stories can generate change: Amanda Miller's reports on Dr Fahey encouraged many other former patients and victims of Dr Fahey to come forward with their allegations. The police investigation into Dr Fahey was reopened as a result and Dr Fahey was convicted of criminal charges against some of the women.¹⁴ While TV3 chose not to pass a copy of the hidden camera footage to the police, they knew that the police were

¹² Lissit above n1, 18.

¹³ Lissit above n1, 18.

¹⁴ *R v Fahey* (1 June 2000) unreported, High Court, Christchurch Registry, T75-99, Hansen J.

aware of the footage.¹⁵ Indeed, Police investigators subsequently took copies of much of TV3's information on Dr Fahey for use as evidence in the criminal trial, including the hidden camera footage,¹⁶ Amanda Millar's interview with Brenda immediately following Brenda's confrontation with Dr Fahey.¹⁷

Numerous hidden camera stories which have exposed the poor treatment or abuse of patients in care, such as Robbie Gordon's work for *Prime Time Live*, are further good examples of this type of use of hidden cameras. Another New Zealand example is *20/20*'s report alleging misconduct of a Rotorua psychologist, Nick Drury.¹⁸ Donal MacIntyre's programmes exposing abuses of power in the modelling and care workers industries have had considerable impact on audiences. Notably, MacIntyre's programme on the modelling agencies generated much outcry and impelled change in the agencies. Such hidden camera stories can protect the weaker members of society by serving to inform the public and stir public opinion so as to generate change.

Similarly, a 1993 *Prime Time Live* report purported to expose how telepsychics preyed on the vulnerable to make their money. ABC sent a young reporter in undercover to work as a telepsychic using tarot cards. She had a hidden camera the size of a lipstick secreted into her hat and a microphone rigged to her bra. In her three days of work at the Psychic Marketing Group she captured her conversations with other employees as well as general workplace behaviour.¹⁹ The purpose of the story was to expose how psychic hot lines exploited the poor and ignorant and the supposed phoney advice that such hot lines gave out. However, ABC's report was highly controversial and generated one of the biggest hidden camera cases in America: *Sanders v American Broadcasting Companies*.²⁰

¹⁵ Interview with Amanda Millar, 5 August 2000.

¹⁶ *R v Fahey* (11 May 2000) unreported, Court of Appeal, CA 94-00, 135-00, Richardson P, Gault and Tipping JJ.

¹⁷ Interview with Amanda Millar, 5 August 2000.

¹⁸ The allegations in the programme were robustly challenged by Nick Drury and the BSA censured TV3 for aspects of its report: *Drury* Broadcasting Standards Authority, Decision Nos. 1996-130, 1996-131, 1996-132, October 1996. This decision is discussed at greater length later in this paper under Part III "Broadcasting Standards Authority Decisions".

¹⁹ See: Marc Gunther "Hidden Camera, Hidden Agenda" *Detroit Free Press*, 14 May 1995.

²⁰ (1999) 85 Cal.Rptr.2d 909, 20 Cal.4th 907, 978 P.2d 67. (Supreme Court of California). And: *Sanders v American Broadcasting Companies* (1999) WL 1458129. (Court of Appeal, Second District,

2 Consumer Watchdog

The *Sanders* case also illustrates one of the other purposes to using hidden cameras: the media can act as a consumer watchdog. The media can protect consumers' wallets and their health.

Illegal and unsavoury practices by businesses selling goods or providing services to the public can be exposed. TV3's programme *Target* is a prime example of this use of hidden cameras. *Target* has done pieces on whether bar staff water-down drinks, how effective dry-cleaners are at removing stains on silk ties, and exactly how tradespeople who come into people's private homes conduct themselves while on the job. Similarly the BBC programme *Watchdog* reports to the public on consumer issues.

One of the more famous American hidden camera cases, *Desnick v American Broadcasting Companies*,²¹ also fits into this category. In *Desnick*, *Prime Time Live* uncovered practices in an ophthalmologist clinic that unnecessary surgery was being carried out and that a doctor had tampered with one of the machines used to detect cataracts. Dr Desnick, the head of the clinic, had agreed to an interview with the producer provided that no undercover surveillance take place. *Prime Time Live* agreed and got its interview. However, unknown to Dr Desnick *Prime Time Live* then hired seven people to pose as patients and attend the clinic carrying hidden cameras to capture the damaging footage.²²

Protection of consumers also extends to safeguarding the health of consumers. In *Dietemann v Time*²³ magazine reporters used a hidden camera to record Mr Dietemann's medical examination and advice that he administered from his home. Mr Dietemann was charged with practising medicine without a licence.²⁴ Following in the footsteps of Upton Sinclair, *Prime Time Live* exposed the unsanitary conditions

California).[*Sanders*] See also: Gunther above n19.

²¹ (1995) 44 F.3d 1345. (United States Court of Appeals, Seventh Circuit). [*Desnick*].

²² ABC successfully defended itself against all of Dr Desnick's claims in the Court of Appeals, Seventh Circuit decision.

²³ (1971) 449 F.2d 245.

²⁴ Keeton above n10, 121.

at various Food Lion supermarkets. Two producers went undercover, one at the deli and one in the meat wrapping department, to discover that bad meat was repackaged, spoiled food was 'touched-up', and old and new cuts of meat were packaged together for sale.²⁵ This resulted in huge losses for Food Lion as consumers stayed away, and a very large lawsuit for ABC.²⁶

3 Exposing abuse and corruption

Using hidden cameras, the media have informed the public by highlighting issues of considerable public importance. Corrupt public officials have been exposed, as in the *Chicago Sun-Times* Mirage bar story. International human rights issues have been addressed: "The Dying Rooms" showed audiences the appalling conditions in Chinese orphanages²⁷ and Harry Wu's reporting with hidden cameras documented the conditions in China's labour camps and prisons.²⁸ While these stories have some cross-over into the first category of protecting the vulnerable, they also served to inform the public about fundamental human rights and to bring local news to international audiences.

Hidden cameras have also been used to reveal racist practices in American society. In 1991, Joel Grover's report showed racist security guards of a department store targeting black shoppers for no other reason than their being black. He secured footage of a guard following a black person around a store and the guard admitting his reason was because: "I just don't like them." Grover's story informed and educated the public, generated debate and forced the store to enforce regulations requiring equal treatment.²⁹

²⁵ See: *Food Lion, Inc. v Capital Cities/ABC, Inc.*, (1995) 887 F.Supp. 811.[*Food Lion I*]; *Food Lion, Inc. v Capital Cities/ABC, Inc.*, (1996) 951 F.Supp. 1217.[*Food Lion II*]; *Food Lion, Inc. v Capital Cities/ABC, Inc.*, (1996) 951 F.Supp. 1224.[*Food Lion III*].

²⁶ The *Food Lion* litigation resulted in three major court cases, see: above n25. Food Lion sued in trespass, deceit and breach of loyalty.

²⁷ See: Antonia Logue "China's Children" *Irish Times*, 17 September 1996, 11; and, Logan "Stunt Journalism" above n5, 156-157.

²⁸ See: Bill Briggs "Telling the World: Activist Describes China Slave Camps", *Den. Post*, 18 April 1996, E01; and, Logan "Stunt Journalism" above n5, 157.

²⁹ Lissit above n1, 20.

4 Entertainment

Entertainment is also one of the purposes for the media's use of hidden cameras. The popular programme *Candid Camera* often involved use of hidden cameras to capture people's reactions and behaviour who were the subjects of practical jokes. However, hidden cameras are also used within other television shows. The recent New Zealand programme on *Private Investigators* occasionally employed hidden cameras for some of its footage. These sorts of programmes are part of the rash of Real TV shows that have appeared within recent years. Generally, when hidden cameras are used for entertainment purposes, subjects' consent may be obtained in order to broadcast the footage (such as in *Candid Camera*) or otherwise subjects' identities are obscured or hidden (such as in *Private Investigators*).³⁰

C Concerns with Hidden Cameras

1 Invasion of privacy

The main advantage of hidden cameras for journalists is that they give images of areas and people that journalists would not otherwise have access to. However, this carries the very real risk that people's privacy will be disregarded and invaded when hidden cameras are used.

One of the obvious concerns with hidden cameras is that they invade people's private environments. Journalists filmed Mr Dietemann in his own home; doctors' surgeries were filmed in *Desnick* and *Fahey*; and areas of workplaces not normally open to the public were filmed in *Food Lion* and *Sanders*. Furthermore, surreptitious filming can invade people's emotional sense of privacy; most people expect anonymity in their life and may feel violated that their words and actions have been captured on film.

It is becoming clear to many networks that invading privacy pays; shows using hidden cameras yield large ratings. Audiences seem to have developed a fascination for Real TV and there is considerable interest and curiosity in real life scandals as

³⁰ For example, see: Section 9, Chapter 5, BBC Producers' Guidelines. Available at:

entertainment.

2 Negative effects on journalism

There is a threat that hidden cameras will be used as a substitute for hard research when gathering the news. Research can take considerable time and money. Comparatively, hidden cameras are relatively cheap and get immediate results. This may adversely affect the integrity and credibility of the media. The public may lose respect for a media that is viewed as sensationalist and providing cheap entertainment.

3 Misleading information

Poor use of hidden cameras can produce misleading stories. First, hidden cameras by their very nature make a subject appear deceitful and as if they have something to hide. Hidden cameras are commonly used to expose 'the bad guy' and audiences expect that the subject is engaging in some suspicious activity – why else would they be on television after all? There is a natural assumption that the subject of the footage would not otherwise have consented to talk to the media.

Secondly, poor or deliberately deceitful editing can be misleading. For instance, in the *Sanders* case there was some heavy criticism of the editing that took place. Footage that was broadcast included comments from one of the employees that "most of these people's personal lives – the people who work for us – are just a total shambles." He continued on to say that, despite their problems, the psychics had an "uncanny ability" to read people and commented: "They are able to help other people. ... They are a remarkable group of people. I mean, I think they do a lot of good out there, they really do." However, that portion of the conversation was edited out.³¹ This is only one of the examples of the selective editing that took place in *Sanders*.³²

The *20/20* report on Nick Drury was criticised by the BSA for its selective editing. A shot of Mr Drury retreating into his home and closing the door was accompanied by a

www.bbc.co.uk/information/editorial/prodgl/chapter5.

³¹ Gunther above n19, 5H.

³² For other examples see: Gunther above n19, 5H.

voiceover commenting on the elusiveness and lack of cooperation from Mr Drury. In fact Mr Drury had already invited the reporter in and had a conversation with him. Mr Drury was willing to talk to the reporter but had stated that he was not willing to participate in a filmed interview at this stage as the matter was before the Employment Court. The reporter was taping their entire exchange using a hidden camera. The footage at the door that was broadcast was taken from when the reporter was leaving Mr Drury's home following their conversation. The BSA commented that the editing of the tape "was deceptive because it falsely conveyed an impression that Mr Drury was avoiding answering the allegations against him which it appeared were then being put to him."³³ Sometimes the truth may be sacrificed when it gives the story greater impact.

4 *Creating the news*

There is a further concern that media may no longer just report the news, but may resort to creating it. As a visual medium, television requires pictures to dramatise a story. There have been cases of media faking events: *Dateline* faked the explosion of a truck in a report on General Motors.³⁴ In 1993, a New York schoolgirl was given a camera to take into her school with instructions to film any possible discipline problems. The reporters had no knowledge of any existing discipline problem at the school; they merely needed images to dramatise their story.³⁵

Yet a few members of the media may not stop at such 'fishing expeditions'. There is the potential that the media could use entrapment to generate news and capture it all on hidden cameras. For instance, in 1993 a St Louis television station installed hidden cameras and a male prostitute in a downtown hotel room to try and trap a priest into talking about alleged sexual activities of his fellow clergymen.³⁶ Entrapment is not always directly linked to the use of hidden cameras. However, salacious exposés using hidden camera footage get the ratings. Increasing competition within the media leads to one-upmanship and networks will push the

³³ *Drury* above n18, 13.

³⁴ *Logan* above n5, 171.

³⁵ *Lissit* above n1, 19.

³⁶ *Lissit* above n1, 19.

boundaries of methods of newsgathering in the fight for ratings.

5 *Trial by media*

There is also a risk with hidden cameras that the media may usurp the function of law enforcement. To a degree, it has always been part of the media's role to seek out injustice and wrongful actions. Nonetheless, the media must tread carefully when exposing apparently unsavoury behaviour. The media has the ability to accuse and convict within one programme without the due process that underpins the courts.

It is also possible that hidden camera footage could prejudice a criminal trial. This could potentially have been an issue in the criminal charges against Dr Fahey. The national broadcast of the hidden camera footage of Dr Fahey might have prejudiced jurors against Dr Fahey, particularly considering that the footage was ruled inadmissible. In fact, the Solicitor-General chose not to intervene in the injunction proceedings against TV3 indicating that he did not consider that the situation would prejudice a criminal trial.³⁷

D *The Role of Hidden Cameras*

The concerns with hidden cameras are numerous and mostly well-founded. There is considerable scope for abuse by reporters when using hidden camera technology. However, this does not mean that hidden cameras should be banned from use altogether.

There are notable positives in the media's use of hidden cameras. As illustrated previously, stories using hidden cameras can generate change. Robbie Gaskin's coverage of the abuses occurring in veterans' hospitals spurred improvements. Such stories can be so effective because they have visual images. Often the written word does not have the same emotional impact or the wide coverage that visual footage can provide.

³⁷ High Court *Fahey* above n2, 2. See also: *Fahey* above n3, 134.

Hidden cameras can provide indisputable evidence of wrongdoing; Dr Fahey might still be practising were it not for the impetus that the hidden camera footage of him provided. Rarely does wrongdoing take place in open and accessible environments. Surreptitious methods can give journalists and the public access to areas and important information that would otherwise be unobtainable.³⁸

In sum, there are clear benefits to the public and to the media that can be gained from the judicious use of hidden cameras. Hidden cameras do have a valid role to play in the newsgathering process. There are no compelling reasons why hidden cameras should be banned outright from the media's 'tool belt'. The difficulty is in finding the balance between the appropriate and inappropriate use of hidden camera technology by the media. However, this struggle between privacy and newsgathering is one that the media and the law must both engage in and seek to resolve. The resolution needs not only to strike an appropriate balance between these competing rights, but also needs to be sufficiently clear so that the media can act with some certainty so as to minimise the risk of liability. Additionally, such a resolution must also retain sufficient flexibility that it can meet the demands of changing times. A tall order? Definitely. But not one that society should shy away from. Perfection may not be possible but this should not stop an attempt at achieving practical guidelines and effective protections.

III CURRENT PROTECTIONS

A The Courts

A subject of hidden camera footage will turn to the courts primarily for the particular remedies that they can provide. The courts have the ability to order meaningful damages awards. Monetary damages may seek to compensate the plaintiff and, through exemplary damages, to punish the defendant in meritorious circumstances. Additionally, the courts have the unique ability to grant an injunction and prevent broadcast of footage. To obtain such remedies, a subject of hidden camera footage needs to find a legal basis for their claims in statute or common law.

³⁸ Logan "Stunt Journalism" above n5, 161.

1 Statute Law

There is currently no New Zealand statutes that deal directly with the media's use of hidden cameras. However, there are a few Acts which provide a degree of protection to the subjects of hidden camera footage.

New Zealand's Privacy Act 1993 is one of the most comprehensive in the world as it protects all personal information. However, most of the New Zealand media is entirely exempt from the Act. TVNZ is subject to two of the privacy principles in the Act. While any "news medium" is expressly excluded from the definition of "agency" in section 2, the definition of "news medium" has its own exception: in relation to principles 6 and 7, "news medium" does not include Radio New Zealand or Television New Zealand. Principles 6 and 7 ensure access to personal information and the right to correct personal information. Therefore, subjects of hidden camera footage may apply to TVNZ for copies of relevant footage and may have their concerns about the truth of the information recorded. It is unlikely that the privacy principles could be used to force TVNZ to destroy footage. They certainly could not be used to prevent broadcast.

There are no specific provisions that render the use of hidden cameras a criminal offence. However, the Crimes Act 1961, sections 216A-216E, declares it an offence to use listening devices to monitor private conversations and to disclose any information that was obtained from such conduct. Section 30 of the Summary Offences Act 1981 makes it illegal to "peep or peer" into a dwelling-house at night-time. Section 29 provides a statutory parallel for trespass by rendering it an offence to be found on private property without lawful excuse.

In sum, there is very little in New Zealand statutes which gives protection the subjects of hidden camera footage taken by the media. This could be partly explained by the fact that the advent of the media's use of hidden cameras is relatively very recent in New Zealand and has not yet caused sufficient problems to warrant legislative intervention and protection. The lack of statute law on the media's use of hidden cameras means that courts must look primarily to the common law to provide protection to subjects of hidden camera footage.

2 Common Law

Most provisions in the common law which give some protection to the subjects of hidden camera footage derive from tort law. Some torts are more useful for attacking the newsgathering stage of using hidden cameras; some are more appropriate to redress the broadcast of such footage.

(a) Trespass

Trespass to land involves an intentional and direct interference with the land of another.³⁹ Trespass protects people's rights to the use and enjoyment of their land. In the situation of surreptitious filming, the tort of trespass would occur at the point of newsgathering where there is a physical invasion of private property, rather than at time of broadcast.

No trespass is committed where the plaintiff consents to the entry on to the land. Consent may be explicit or by an implied licence. Consent may be withdrawn at any time. If already on the land a person must be allowed a reasonable opportunity to leave.⁴⁰ An implied licence allows people to lawfully enter land in a situation where they have a legitimate and lawful reason for being there from which it can be implied that the plaintiff would consent to their being there. For instance, there is an implied licence for a person who has lawful reason to proceed to the door of premises to ask to be admitted to conduct their lawful business.⁴¹ Media defendants who have entered private property to obtain hidden camera footage may try to argue that they have an implied licence to enter. For instance, in *Fahey*, TV3 argued that Brenda had an implied licence as a patient to enter the doctor's surgery.⁴²

In the Australian case of *Lincoln Hunt*⁴³ a television reporter and film crew entered the lobby of a business and proceeded to open interior doors to film other parts of the

³⁹ Stephen Todd *The Law of Torts in New Zealand* (2nd ed, Wellington, Brookers, 1997) 460-461.

⁴⁰ *Robson v Hallet* [1967] 2 QB 939; [1967] 2 All ER 407.

⁴¹ *Robson v Hallet* [1967] 2 QB 939; [1967] 2 All ER 407.

⁴² High Court *Fahey* above n2, 10, per Chisholm J.

⁴³ *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457. [*Lincoln Hunt*].

premises. Young J commented that:⁴⁴

The implied invitation by the plaintiff for the public to visit its premises was limited to members of the public bona fide seeking information or business with it or to clients of the firm, but not to people, for instance, who wished to enter to hold up the premises and rob them or even to people whose motives were to go onto the premises with video cameras ... to harass the inhabitants.

In *Fahey*, the Court rejected any notion that Brenda had an implied license to enter Dr Fahey's surgery.⁴⁵ Chisholm J commented that "TV3 and the former patient knew that she would not be permitted entry into the surgery if the true purpose of her visit was revealed."⁴⁶ This is consistent with the approach in previous New Zealand cases.⁴⁷

A further issue that arose in *Fahey* was whether TV3 could be liable for the trespass that was committed. Having rejected the implied licence argument, it is clear that Brenda did commit a trespass.⁴⁸ However, whether this action could be imputed to TV3 is left unclear from the judgments. In the High Court, Chisholm J commented that because TV3 was aware that Dr Fahey would never have consented were the true purpose of Brenda's visit known, Brenda was an "agent" of TV3.⁴⁹ The Court of Appeal merely noted that "[c]learly TV3 encouraged and facilitated X's [Brenda's] actions."⁵⁰ However, there is nothing in the existing law that would support the notion that Brenda acted as TV3's agent to commit a trespass.⁵¹ Brenda approached TV3 having already decided that she wished to confront Dr Fahey. She asked for

⁴⁴ *Lincoln Hunt* above n43, 460, per Young J.

⁴⁵ *Fahey* above n3, 135, per Richardson J.

⁴⁶ High Court *Fahey* above n2, 10.

⁴⁷ In *TV3 Network Service Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720, 732, the Chief Justice stated that an implied license would not apply in certain circumstances: "Purposes for which it is known or understood that the occupier would not give consent will be outside the ambit of implication." See also the approach in *Marris v TV3 Network Ltd* (14 October 1991) unreported, High Court, Wellington Registry, CP 754/91.

⁴⁸ Technically, Dr Fahey could sue Brenda for trespass. Considering the circumstances, it is extremely unlikely that he would undertake such an action. Were he to bring this action, he would only get nominal damages. Additionally, the courts would almost certainly exercise their discretion as to costs and Brenda would not be required to pay any portion of Dr Fahey's legal costs.

⁴⁹ High Court *Fahey* above n2, 10, per Chisholm J.

⁵⁰ *Fahey* above n3, 135, per Richardson P.

⁵¹ A defendant may be liable if she or he has *directly* caused some other person or thing to enter upon land in the possession of another. To merely encourage and facilitate a person is not sufficient to constitute a trespass in itself; the defendant's act must *directly* cause the entry. See: Todd above n39, 473.

audio recording equipment and was ultimately provided with a hidden camera. It was never TV3's idea or decision to enter Dr Fahey's surgery.⁵² The fact that TV3 helped facilitate Brenda's trespass may be a useful consideration when deciding whether to issue an injunction against TV3,⁵³ yet it cannot justify making TV3 liable for the actual trespass.

Filming or optical surveillance that does not take place on the plaintiff's property cannot constitute a trespass.⁵⁴ Trespass requires that a person enter the property. Therefore, where reporters enter private property without licence, they commit a trespass. Additionally, where a reporter chooses to enter the property with surreptitious equipment to film an encounter, he or she aggravates the degree of trespass that they commit. Entering property is an interference with the plaintiff's use and enjoyment of their land; filming on his or her land is an even worse interference. The fact that filming has occurred during the trespass will be taken into account by the court when assessing the amount of damages to award.⁵⁵

There are some limitations for the victim of unwarranted hidden camera footage who wishes to take an action in trespass. First, trespass attacks the stage of newsgathering rather than the actual broadcast itself. It gives proprietors the ability to order media from their property. However, this will be cold comfort to a proprietor who is unaware of the hidden camera that the journalist carries. Secondly, there are strict rules of standing for trespass. To sue for trespass, a person must either have exclusive possession of the land or be the owner who has a reversionary interest in the land. Having a mere licence to occupy the land is not sufficient.⁵⁶ Thirdly, trespass is limited to an intrusion onto land; it does not protect intrusion into other private zones.

⁵² Interview with Amanda Millar, 5 August 2000.

⁵³ See Part IV, "Injunction Standard", in this paper for further discussion of this point.

⁵⁴ *Lincoln Hunt* above n43, 461, per Young J; *Entick v Carrington* (1765) Howell 19 State Tr 1029, 1066; 95 ER 807; *Hickman v Maisey* [1900] 1 QB 752, 756; *Sports and General Press Agency v "Our Dogs" Publishing Co Ltd* [1917] 2 KB 125; *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 485; *Bathurst City Council v Saban* (1985) 2 NSWLR 704, 706, per Young J.

⁵⁵ *Marris* above n47, 8-9, per Neazor J. See also: RP Handley "Trespass to Land as a Remedy for Unlawful Intrusion on Privacy" (1988) 62 ALJ 216, 216-217.

(b) Intrusion into Seclusion

The United States' common law has developed a tort of invasion of privacy. In 1960, Prosser famously categorised the cases and produced four privacy torts.⁵⁷ The first tort involves "intrusion upon the plaintiff's seclusion or solitude, or into his [or her] private affairs." There are two elements to this tort: there must be an unauthorised intrusion or prying into the plaintiff's seclusion and that intrusion must be offensive or objectionable to a reasonable person.⁵⁸ In the United States, some states require a physical intrusion, while in others the use of hidden electronic devices to record people or events will constitute intrusion.⁵⁹

A tort of intrusion into seclusion would avoid some of the limitations that exist with trespass. Standing would not be so significant an issue: people could potentially sue for hidden camera footage that was taken in the workplace, at a hospital, or at a friend's home. However, this is somewhat hypothetical as the Court of Appeal in *Fahey* rejected Dr Fahey's claim for invasion of privacy, noting that, while broadcasters had obligations under the Broadcasting Act,⁶⁰ there was no civil liability for invasion of privacy.⁶¹

(c) Deceit, Fraud and Misrepresentation

Deceit, fraud and misrepresentation may be relevant to the newsgathering stage. If journalists have lied to obtain hidden camera footage there may possibly be a remedy. For instance, in the *Food Lion* case, two journalists went undercover to expose

⁵⁶ *Hunter v Canary Wharf* [1997] AC 655.

⁵⁷ Prosser (1960) 48 Cal LR 383. Discussed in Todd above n39, 954-955.

⁵⁸ Factors to consider in determining the offensiveness of the intrusion include: (1) the degree of intrusion; (2) the context, conduct and circumstances of intrusion; (3) the intruder's motives and objectives; (4) the setting which was intruded upon; and (5) the expectations of those whose privacy was invaded - Second Restatement of Torts ss652B (1977). Steven Perry "Hidden Cameras, New Technology, and the Law" 14 Comm Law 1.

⁵⁹ Perry above n58, footnotes 55 and 56.

⁶⁰ Section 4 of the Broadcasting Act requires broadcasters to maintain in their programmes standards which are consistent with the privacy of the individual. This is discussed at greater length in the next section of this paper on the Broadcasting Standards Authority.

⁶¹ *Fahey* above n3, 135, per Richardson P. It should be noted that the Court of Appeal's *Fahey* decision predates the decision of *P v D* [2000] 2 NZLR 591 where the tort of public disclosure of private fact was firmly established into New Zealand law.

unsanitary food-handling conditions.⁶² Both lied on their job applications, using false identities, phoney references and fictionalised work histories, in order to get work. Following this, they passed themselves off as employees for several weeks while wearing hidden recording equipment. Food Lion's allegations of trespass, fraud and breach of fiduciary duty were successful.⁶³

(d) Intentional Infliction of Emotional Distress

The tort of intentional infliction of emotional distress may be useful where the stage of collecting the footage or the broadcast of the footage causes severe emotional distress to the subject of hidden camera footage. The tort requires that the defendant has wilfully done an act calculated to cause physical harm⁶⁴ to the plaintiff which results in severe emotional distress.⁶⁵ There are two major hurdles to overcome in suing successfully with this tort. First, proving that a defendant calculated to cause physical harm is a difficult task. The term "calculated" seems to connote something more than just intent. Furthermore, what needs to be calculated by the defendant is physical harm, not just transient distress.

The second major hurdle is proving that the plaintiff has suffered sufficient harm. The New Zealand case of *Bradley v Wingnut Films* states that "it is necessary for the plaintiff to establish something more than a transient reaction, however initially severe. This must translate itself into something physical and having a duration which is more than merely transient."⁶⁶ Gallen J in *Bradley* goes on to state that the shock must have "consequences on his [or her] mental state, outlook and well-being."⁶⁷ There must also be medical confirmation of the hurt suffered.⁶⁸ Therefore, harm sufficient for this tort will involve a recognisable psychiatric illness or emotional distress that is severe enough to produce physical manifestations. Most people who

⁶² *Food Lion* above n25.

⁶³ Amy Singer "Food, Lies and Videotape" [1997] (April) *Am Lawyer* 56, 63. The jury awarded \$1 400 for the breach of fiduciary duty and \$1 each for the trespass and fraud. Additionally, punitive damages of \$315 000 were awarded.

⁶⁴ *Wilkinson v Downton* [1897] 2 QB 57, 58-59. The approach in *Wilkinson* was affirmed in the New Zealand courts in *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415, 420-422.

⁶⁵ *Bradley* above n64, 421.

⁶⁶ *Bradley* above n64, 421.

⁶⁷ *Bradley* above n64, 421.

are the subjects of hidden camera footage, while being upset and angry, will not suffer this degree of harm.

(e) Public Disclosure of Private Facts

Prosser's privacy tort concerning the public disclosure of private facts has had a slow birth in New Zealand.⁶⁹ However, the recent case of *P v D*⁷⁰ has explicitly announced the existence of the tort in this country. *P v D* identifies four elements to the tort:⁷¹ there must be a public disclosure, the facts disclosed must be private, the matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities and the nature and extent of legitimate public interest in having the information disclosed is also relevant.

This tort is likely to be an extremely useful tool to attack the broadcast of hidden camera footage. One of the benefits of hidden cameras is that they can be taken into places where the public do not usually have access, to uncover surreptitious dealings. The matters involved are invariably considered private and sensitive to the defendant. The media's purpose in obtaining such footage is to publicly broadcast it. Therefore, the broadcast of hidden camera footage will regularly involve the public disclosure of private facts which is the very essence of the tort. Whether there is liability for such broadcasts will be determined on the latter two elements of the tort. The element of public interest is intimately entwined with the principle of freedom of the press and is likely to be a key consideration in any hidden camera case.

(f) Defamation

People caught on tape are likely to appear in a defamatory light. Often they have been caught engaging in unsavoury conduct. Furthermore, the fact that surreptitious conduct was employed to capture stories generally indicates that a person is furtive and attempting to hide something.

⁶⁸ *Bradley* above n64, 421.

⁶⁹ Early cases raising the existence of the tort in New Zealand include: *Tucker v News Media Ownership* [1986] 2 NZLR 716, and *Bradley* above n64.

⁷⁰ *P v D* above n61.

Yet, the obvious limitation with defamation is the defence of truth. Quite simply what is caught on tape is usually true. The media commonly use hidden cameras in order to uncover and expose the truth of a situation. However, defamation may be of some use when hidden camera footage is used in such a way as to be misleading. For instance, as in *Sanders* and *Drury*, selective editing may mutate events so as to portray a false impression of a person. Therefore, a potential defamation is likely to occur after the compilation process for a programme. Defamation is not going to occur at the stage of filming; it will become useful only when a person is seeking to prevent or compensate for the broadcast of hidden camera footage.⁷²

A further limitation is the defence of qualified privilege. If a matter is of sufficient public interest, the media may have a duty to inform the public where they have an interest in hearing such information. The recent New Zealand Court of Appeal decision in *Lange v Atkinson* indicates that matters which affect the running of representative government, such as conduct by politicians which affects their role as a Member of Parliament, will be of sufficient public interest to justify nationwide coverage by the media.⁷³ This could provide greater protection to media who capture on hidden camera conduct by a politician which is a matter of public concern. However, *Lange* also indicates that the courts will be prepared to examine the conduct of the media party involved before confirming a privilege.⁷⁴

3 Effectiveness of injunctions as a remedy

While there are a number of torts available to the subject of hidden camera footage, it is something of an issue as to whether they will particularly aid a plaintiff seeking an injunction.

⁷¹ *P v D* above n61, 601.

⁷² Using defamation to seek to injunct hidden camera footage is likely to be rare as most plaintiffs will be entirely unaware of how footage will be used or edited before it is actually broadcast.

⁷³ *Lange v Atkinson* [2000] 3 NZLR 385, 390-391.

⁷⁴ The second stage of qualified privilege analysis involves consideration of whether a defendant was predominantly motivated by ill will or otherwise taken improper advantage of the occasion (section 19 Defamation Act 1992). In determining this a court will consider the defendant's conduct and question whether they acted responsibly. *Lange v Atkinson* above n73, 400-402.

(a) Types of injunction

There are two basic types of injunctions: interim injunctions and permanent injunctions. If a person is fortunate enough to discover prior to broadcast that inappropriate hidden camera footage is likely to be aired, they may be able to apply for an interim injunction to halt broadcast. The obvious advantage of an interim injunction is that it pre-empts broadcast and may prevent damage before it occurs. In practice, once an interim injunction has been awarded, parties often settle rather than proceed to a full trial. In addition, the existence of an injunction against one defendant usually acts to deter anyone else from publishing the injuncted material. Therefore, receiving an interim injunction can be a powerful win for a party. Having been granted an interim injunction, a plaintiff may choose to subsequently go to full trial to seek a permanent injunction to prevent broadcast indefinitely as an addition or an alternative to damages. The key issue that arises with seeking to injunct hidden camera footage is what standard the injunction application should be decided under.

(b) Different standards

Injunctions are usually decided under the regular arguable case approach. This standard comes from *American Cyanamid Co v Ethicon Ltd* which requires a court before issuing an interim injunction to consider whether there is a serious issue to be tried and the balance of convenience to the parties.⁷⁵ However, special considerations come into play when a plaintiff seeks an interim injunction under an action for defamation.

The courts' concern for protecting freedom of expression has resulted in a higher threshold for plaintiffs to overcome to injunct a defamation defendant.⁷⁶ The test was well elucidated by Oliver J in *Bestobell Paints Ltd v Bigg*:⁷⁷

There is an old and well established principle which is still applied in modern

⁷⁵ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. (House of Lords). [*American Cyanamid*]

⁷⁶ *Bonnard v Perryman* [1891] 2 Ch 269, 284. (English Court of Appeal); *Attorney-General v British Broadcasting Corporation* [1981] AC 303, 362, per Lord Scarman. (House of Lords).

⁷⁷ *Bestobell Paints Ltd v Bigg* [1975] FSR 421, 429-430, per Oliver J. (English Court of Appeal). This passage was cited with approval by Cooke P in *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4, 5-6. (New Zealand five-Judge Court of Appeal).

times ... that no interlocutory injunction will be granted in defamation proceedings, where the defendant announces his intention of justifying, to restrain him from publishing the alleged defamatory statement until its truth or untruth has been determined at the trial, except in cases where the statement is obviously untruthful and libellous.

Accordingly, exceptional circumstances will be required before a court will injunct a media defendant for defamation. The New Zealand courts have affirmed this approach in *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd*⁷⁸ and *Auckland Area Health Board v Television New Zealand Ltd*.⁷⁹

(c) Which standard for torts other than defamation?

When seeking to injunct the broadcast of hidden camera footage, a plaintiff may attack the broadcast itself and claim that the broadcast is likely to constitute a defamation or a publication of private fact. Additionally, a plaintiff may attack the newsgathering stage: they could argue that the footage was obtained illegally, such as through trespass, deceit or intrusion, and therefore should not be allowed to be aired. The issue is whether an aggrieved plaintiff can circumvent the higher threshold requirement for a defamation injunction by taking an action on some other head.

The Court of Appeal in *Fahey* considered this point. Chisholm J at the High Court level had applied a standard *American Cyanamid* approach to TV3's appeal against the interim injunction.⁸⁰ Dr Fahey relied on three grounds: interfering with administration of justice relating to existing defamation proceedings; civil contempt; and trespass to land and invasion of privacy.⁸¹ Chisholm J considered there was a serious issue to be tried on the second two heads put forward by Dr Fahey. First, the proposed programme would strike at the very heart of the issues likely to be involved in the defamation proceeding.⁸² Secondly, there was an arguable case that the footage was obtained illegally due to a trespass and invasion of privacy.⁸³ While freedom of

⁷⁸ *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* above n77.

⁷⁹ *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406.

⁸⁰ High Court *Fahey* above n2.

⁸¹ High Court *Fahey* above n2, 5-6, per Chisholm J.

⁸² High Court *Fahey* above n2, 9-10, per Chisholm J.

⁸³ High Court *Fahey* above n2, 14. Chisholm J relied on three cases in arriving at his conclusion:

expression was a factor in determining the balance of convenience, Chisholm J considered that it was appropriate for the injunction to continue.⁸⁴

The Court of Appeal held that Chisholm J had erred in his approach and that the higher threshold for a defamation injunction needed to be met.⁸⁵ Richardson P noted that “[a]ny prior restraint of freedom of expression requires passing a much higher threshold than the arguable case standard.”⁸⁶ On the strength of this statement it appears that the law in New Zealand requires that any application to injunct a media defendant, regardless of whether it is taken under an action for defamation, will attract the higher threshold standard. Richardson P went on to hold that:⁸⁷

The Court has jurisdiction to restrain the publication of defamatory matter but it is exercisable only for clear and compelling reasons. First, where the focus is on the allegedly defamatory matter in the proposed publication which the publisher intends to justify, the circumstances must be exceptional to warrant an injunction rather than leaving the complainant with his or her remedy in damages ... Second, in the case of successive defamations the same principle applies ... [T]he third point ... that where both free expression and other rights and values are raised the Court must seek to accommodate and balance both sets of values. In that situation, too, the same general principle should apply, namely that the jurisdiction to restrain the proposed publication is exercisable only for clear and compelling reasons.

The first two points are the traditional subject of the higher threshold standard. It is the third point that widens the potential ambit of the higher threshold standard to any tort or legal ground that restricts freedom of expression. It was under this third point that the injunction in *Fahey* was revoked.

Dr Fahey’s first two grounds for an injunction, interfering with the administration of justice relating to existing defamation proceedings and civil contempt, were both promptly dismissed by the Court. The third ground, alleging trespass to land and

Lincoln Hunt above n43, *Marris* above n47, *TV3 Network Service Ltd v Broadcasting Standards Authority* above n47.

⁸⁴ High Court *Fahey* above n2, 14-17, per Chisholm J.

⁸⁵ *Fahey* above n3, 132, per Richardson P.

⁸⁶ *Fahey* above n3, 132, per Richardson P.

⁸⁷ *Fahey* above n3, 132-134, per Richardson P.

invasion of privacy, warranted greater consideration. The argument was that the footage to be broadcast may have been obtained illegally by breaching the plaintiff's rights to his property and privacy. Having considered the relevant injunction factors, and apparently conceding that a trespass had been committed, the Court determined that the interim injunction should be set aside.

(d) Particular concern with privacy

Expanding the injunction standard for defamation to other torts is not without its problems. One of the main concerns is the implication for privacy rights. Defamation usually involves a situation where false information is published. There is the potential with defamation that following publication, such information can be proved false and the plaintiff is vindicated and cleared of allegations. Criticisms arguing that vindication is rarely as well publicised as the original defamatory allegations are justified. However, the potential to rectify the situation following a defamation does exist. Comparatively, an invasion of privacy is irrevocable. Once an invasion of privacy is broadcast, there is no means of taking it back. The only possible remedy is to compensate the plaintiff with damages. Whether this argument justifies different threshold standards for an injunction is another matter.

Freedom of expression underlies both torts. In defamation, freedom of expression is on one side of the scales balancing against reputation. Likewise, freedom of expression is also one side of the scales in public disclosure of private fact balancing against privacy.⁸⁸ The rationale behind the higher threshold standard for a defamation injunction, protecting the media's freedom of expression, applies equally to privacy. The media's freedom of speech is threatened when a plaintiff seeks prior restraint, regardless of which tort the action is brought under.

⁸⁸ Nicholson J in *P v D* carefully notes that the four factors for publication of private fact "provide appropriate balance for deciding between the right of freedom of expression and the right of privacy". *P v D* above n61, 601, per Nicholson J. See also: *Bradley* above n64, and *Prosser* above n57.

(e) What will constitute clear and compelling reasons?

There are several factors a court will consider before exercising its discretion to issue an injunction. *Fahey* noted three such factors: the context and circumstances of the newsgathering, public interest concerns, and whether damages will serve as an adequate remedy if an injunction is not granted.⁸⁹

Two recent Australian cases have raised the issue of granting an injunction against footage that was obtained through the trespass of reporters and film crew.⁹⁰ These cases have held that an injunction may be granted where the circumstances of the case are such as to make publication unconscionable.⁹¹ This raises essentially the same considerations as does the first factor in *Fahey*: both allow a court to examine all the factors and circumstances of a case. However, the Australian cases do provide an actual standard that must be met before granting an injunction. This standard is unconscionability. The higher injunction standard requires clear and compelling reasons to overcome favouring the media's freedom of speech. Unconscionability is an appropriate standard to apply; unconscionable conduct will be both clear and compelling.

New Zealand courts may consider adopting the standard of unconscionability from these Australian cases. The Australian cases also consider factors of public interest, prejudice, and adequacy of damages as a remedy when issuing an injunction.⁹² These essentially pair up with the other factors in *Fahey*. The effect of a high injunction standard is that it is going to be very difficult for people to injunct the media's use of hidden camera footage. Many will have to satisfy themselves with monetary damages to compensate them for their losses.

⁸⁹ *Fahey* above n3, 135, per Richardson P.

⁹⁰ *Lincoln Hunt* above n43, and *Emcorp Pty Ltd v ABC* unreported, Queensland Supreme Court, Williams J, 17 October 1986, No. 3983 of 1986; [1986] Australian Current Law 27.1.[*Emcorp*].

⁹¹ *Lincoln Hunt* above n43, 463-464.

4 Problems with protections provided by the courts

There are problems with using the court system which affect the efficacy of the courts' protection. Litigation is expensive. Filing fees and lawyers' costs can be a considerable barrier to some members of society. Legal aid is provided at extremely minimal levels and is not provided at all for defamation actions. Therefore, it is the wealthy who have greater access to the courts. People with better education and resources are more likely to be aware of their legal rights and less intimidated by the judicial process. Furthermore, litigation is rarely expeditious and is often a stressful process for the parties involved.

A key problem with the current protection provided by the courts to the subjects of hidden camera footage is that there are no clear legal principles or guidelines enunciated within the common law. Indeed there is currently no one tort, and certainly no statute, that directly addresses the concerns with the media's use of hidden cameras. In *Fahey*, the Court of Appeal did not take the opportunity available to them to make any *obiter* comments on what constitutes appropriate conduct by the media when using hidden cameras. It preferred to focus on the appropriate standard and considerations for awarding an injunction.

This lack of clear guidance from the courts is understandable considering that the advent of hidden cameras is fairly recent and that the common law is reactive in nature. However, when the appropriate hidden camera case arises, the courts should take the opportunity to lay down clear and consistent standards for the media's use of hidden cameras. The best avenue for incorporating such standards into the common law is through public disclosure of private fact. A proposal for the development of this tort is set out in Part IV of this paper. Court-endorsed standards will set a benchmark for media to assess their conduct by, thus providing better protection to members of the public.

⁹² For an excellent summary of these decisions see: RP Handley above n5, 221.

B Statutory Bodies

Some jurisdictions have established independent statutory bodies that have authority to deal with various aspects of the media. These statutory bodies can provide protection through the various codes and guidelines that they issue. They may also exert a degree of control and protection by adjudicating on complaints about programmes from members of the public. The following two sections outline the statutory bodies from New Zealand and the United Kingdom.

1 Broadcasting Standards Authority

The BSA was established under the Broadcasting Act 1989 to establish and maintain standards for radio and television in New Zealand. Section 21(1) of the Act lays out the various functions of the BSA. The main function of the BSA is to receive and determine complaints from the public and publish its decisions.⁹³ It also has a role to play in encouraging the development and observance of codes of practice for broadcasting.⁹⁴

(a) Privacy Principles

Under section 4(1)(c) of the Broadcasting Act 1989, broadcasters are required to maintain standards that are consistent with the privacy of the individual. The BSA, through its function of issuing advisory opinions in section 21(1)(d), has developed seven privacy principles to guide broadcasters (these are appended to this paper). These principles use many of the same criteria as appear in the two privacy torts: principle (i) and (ii) cover similar ground as the tort of public disclosure of private fact, principle (iii) concerns intrusion into seclusion, and principle (vi) functions as a public interest defence. These principles and the BSA's broad and robust approach to privacy have been endorsed by the High Court in an appeal from one of the BSA's decisions.⁹⁵

⁹³ Broadcasting Act 1989, s21(1)(a) and (c).

⁹⁴ Broadcasting Act 1989, s21(1)(e).

⁹⁵ *TV3 Network Services Ltd v Broadcasting Standards Authority* above n47.

(b) Free-To-Air Television Programme Code

The BSA has had a role in developing the Free-To-Air Television Programme Code which has some provisions relevant to the use of hidden cameras, notably:⁹⁶

G4 To deal justly and fairly with any person taking part or referred to in any programme.

G7 To avoid the use of any deceptive programme practice in the presentation of programmes which takes advantage of the confidence viewers have in the integrity of broadcasting.

There are further general standards requiring truth and accuracy, fairness and balance, and care in the editing process, which may also have some relevance in the uses of hidden cameras.⁹⁷ While nothing in the current Code directly addresses the use of hidden cameras, the BSA has used these general standards with considerable force in its decisions concerning the use of hidden cameras.

(c) Broadcasting Standards Authority Decisions

The decision of *Mrs S*⁹⁸ in 1994 involved a hidden camera issue. A TV3 reporter approached Mrs S at her own home and talked to her at her back door. She was aware she was speaking to a reporter. However, she was unaware that a film crew were hidden on a nearby landfill filming the exchange. While the conversation with the reporter was not a breach of privacy, the additional surreptitious means used to record the exchange resulted in a breach of privacy. The BSA noted that the interview with Mrs S was not of legitimate concern to the public, although there was a human interest element to the story. The BSA held that TV3 had breached the first three Privacy Principles and ordered they pay \$750 compensation to Mrs S.

The next major hidden camera decision, *Drury*, came in 1996. Mr Drury was a psychologist employed by Lakeland Health. TV3 approached Mr Drury to investigate his treatment of a young man who had committed suicide. The man's mother had approached TV3 with her concerns. Mr Drury refused to appear on camera, although

⁹⁶ Free-To-Air Television Programme Code. Available at: www.tvnz.co.nz/links/progcode.

⁹⁷ Free-To-Air Television Programme Code, Standards G1, G6, G19.

⁹⁸ *Mrs S* Broadcasting Standards Authority, Decision No. 1994-1, January 1994.

he was prepared to provide information by telephone, as he considered it inappropriate to comment while he was currently engaged in a dispute with his employer before the Employment Tribunal where allegations of misconduct were at issue.⁹⁹ TV3's reporter and the young man's mother confronted Mr Drury at his home, which also functioned as his office. Mr Drury invited them into his living room to talk. Unbeknownst to Mr Drury, the journalist carried a hidden camera and filmed the entire exchange which was selectively edited and appeared on a *20/20* programme.

The BSA held that the hidden camera footage was unfair to Mr Drury¹⁰⁰ and was also a breach of his privacy. TV3 was ordered to pay \$1 500 compensation to Mr Drury. The BSA noted that while there was public interest in the story, it was insufficient to justify airing the footage when weighed against Mr Drury's right to refuse to comment.¹⁰¹ The footage did not address the questions that underlaid the programme, but merely served to place Mr Drury in a negative light.¹⁰²

The 1999 St Paul's Cathedral decision involved a *20/20* programme which had included footage of Canon Somers-Edgar at a 21st birthday party.¹⁰³ The footage showed Somers-Edgar in an inebriated state making inappropriate sexual comments. While this decision did not directly address the use of hidden cameras, the concerns displayed by the BSA are still relevant. The BSA was highly critical of TV3's treatment of the footage. It disagreed with TV3 that the footage was pivotal to the story, instead concluding that "TV3 decided to broadcast that footage because it had a copy of the tape and wished to expose Canon Somers-Edgar – and because it found publication of the tape's salacious content was irresistible."¹⁰⁴ The BSA criticised the editing because it failed to convey the true situation that had occurred at the party. It was also scathing of TV3's decision not to inform Canon Somers-Edgar and allow him the opportunity to comment on his behaviour. The BSA concluded that TV3, due

⁹⁹ *Drury*, above n18, 15.

¹⁰⁰ A breach of broadcasting standard G4.

¹⁰¹ *Drury*, above n18, 7, 15.

¹⁰² *Drury*, above n18, 7, 15.

¹⁰³ *The Diocese of Dunedin The Very Rev. Jonathan Kirkpatrick* Broadcasting Standards Authority, Decision Nos. 1999-125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, September 1999. [St Paul's Cathedral Case].

to the way they had used the footage, treated Canon Somers-Edgar most unfairly and breached standard G4.

The *Fahey* decision, released in 2000, provides the most recent and pertinent commentary from the BSA on the use of hidden cameras. Following the airing of the 20/20 segment which included the hidden camera footage of Dr Fahey, several viewers pursued complaints to the BSA. The complaint about the use of a hidden camera was one amongst a number that alleged inaccuracies, unfairness, trial by media, and breach of privacy. The BSA declined to uphold any of the complaints.

In *Fahey*, the BSA noted that the use of information obtained using a hidden camera is “an extreme measure and one which must be justified by exceptional circumstances.”¹⁰⁵ The BSA posed that two factors need to be considered when deciding whether justification exists. First, a “legitimate and strong public interest in the broadcast” must be established.¹⁰⁶ Such an interest must outweigh the individual rights of the person who is the subject of the footage.¹⁰⁷ Secondly, a broadcaster must believe that there is no other reasonable way to obtain the information.¹⁰⁸

The BSA considered these conditions satisfied on the facts. There was a legitimate public interest in allegations of serious misconduct against an individual who was both a candidate for public office and a practising general practitioner.¹⁰⁹ TV3 were justified in considering that there was no other way to obtain the information in light of Dr Fahey’s continued denials.¹¹⁰ The BSA also noted the imbalance in power between Dr Fahey and the women who made the allegations, and that without the footage, this would have led to a situation of “‘her word’ against his reputation.”¹¹¹ In addition to consideration of these two factors, the BSA also intimated approval for TV3’s conduct in providing Dr Fahey with a written transcript prior to broadcast, and

¹⁰⁴ St Paul’s Cathedral Case above n102. Available at: <http://203.97.34.114/data/1999/1999-125-137>.

¹⁰⁵ *Fahey* Broadcasting Standards Authority, Decision Nos. 2000-108, 109, 110, 111, 112, 113, 10 August 2000. [BSA *Fahey*].

¹⁰⁶ BSA *Fahey*, above n105, 10.

¹⁰⁷ BSA *Fahey*, above n105, 10.

¹⁰⁸ BSA *Fahey*, above n105, 10.

¹⁰⁹ BSA *Fahey*, above n105, 10.

¹¹⁰ BSA *Fahey*, above n105, 11.

¹¹¹ BSA *Fahey*, above n105, 11.

for their uninterrupted and unedited broadcast of the footage.¹¹²

(d) Protections offered by the Broadcasting Standards Authority

The BSA influences the media's use of hidden cameras by issuing advisory guidelines and by ruling on individual complaints and ordering appropriate sanctions. Broadcasters can consult the Programme Code, the Privacy Principles, and the growing bulk of precedent in the BSA's decisions, most notably *Fahey*, to help them during their decision making processes.

The BSA's complaints and adjudications' process provides a further level of protection. The BSA is open to any member of the public to lay a complaint. The BSA has wide powers to punish broadcasters that have breached the broadcasting and privacy standards. Their powers range from ordering an on-air statement of correction or apology to removing all broadcasting or advertising from the air for up to 24 hours.¹¹³

Additionally, those persons who have been directly wronged by a broadcaster may seek redress for any particular harm that they have suffered. The BSA is a much cheaper alternative to the courts; it costs nothing to lay a complaint. However, the BSA's ability to award remedies is much more limited than the courts. The maximum compensation that a complainant may receive is \$5000 for a breach of privacy.¹¹⁴ Compensation is not awarded for a breach of the broadcasting standards. Those who are the victims of a broadcaster's lack of balance, fairness and accuracy or racism or sexism where there is no breach of privacy will not receive compensation.¹¹⁵ Furthermore, the BSA's ability to provide redress does not include the ability to grant an injunction; this power is unique to the courts. There is a right of appeal to the High Court from any decision by the BSA.

¹¹² BSA *Fahey*, above n105, 11.

¹¹³ See: www.bsa.govt.nz/_overview.

¹¹⁴ See: www.bsa.govt.nz/_overview.

¹¹⁵ For instance, the BSA's decision on Dr Paul Smedley: TVNZ aired a programme which included hidden camera footage of Dr Smedley. The BSA upheld a complaint under the broadcasting standards that Dr Smedley had been treated unfairly, but determined that there was no breach of privacy.

2 *Broadcasting Standards Commission*

The Broadcasting Standards Commission (BSC) was established under the Broadcasting Act 1996. It is the English equivalent to the BSA and has similar functions. Sections 107 and 108 require the BSC to draw up and maintain codes on fairness and privacy, and standards of taste and decency, violence and sexual conduct.

(a) Code on Fairness and Privacy

The Code on Fairness and Privacy contains considerable guidance relevant to the use of hidden cameras. The section on the use of deception states:¹¹⁶

Factual programme-makers should not normally obtain or seek information or pictures through misrepresentation or deception, except where the disclosure is reasonably believed to serve an overriding public interest and the material cannot reasonably be obtained by any other means. Where the use of deception is judged permissible, it should always be proportionate to the alleged wrongdoing and should wherever possible avoid the encouragement of conduct which might not have occurred at all but for the intervention of the programme-maker. Prior editorial approval at the most senior editorial levels within the broadcasting organisation should be obtained for such methods. The programme should also make clear to the audience the means used to obtain access to the information, unless this places sources at risk.

This guards against the concerns of entrapment and providing misleading information.

The Code has a page-long section specifically on the use of hidden microphones and cameras which opens with this statement:¹¹⁷

The use of secret recording should only be considered where it is necessary to the credibility and authenticity of the story, as the use of hidden recording techniques can be unfair to those recorded as well as infringe their privacy.

There are three guiding principles: that surreptitious recording in a public place must

Smedley Broadcasting Standards Authority, Decision No. 1994-30, May 1994.

¹¹⁶ Broadcasting Standards Commission, Code on Fairness and Privacy, Section 13. Available at: www.bsa.govt.nz/_priv_princ.

¹¹⁷ Broadcasting Standards Commission, Code on Fairness and Privacy, Section 18. Available at: www.bsc.org.uk.

be justified by an overriding public interest, that recording devices should not be left unattended on private property unless it is essential to an investigation of considerable importance, and that open and apparent recording of people on private property must be appropriate to the importance or nature of the story.¹¹⁸

(b) *R v Broadcasting Standards Commission, ex parte. British Broadcasting Corporation*¹¹⁹

This very recent case is a judicial review from a BSC decision. The BBC *Watchdog* programme, as part of an investigation into dubious sales practices, used hidden cameras to film purchases by BBC staff at Dixons stores. Previously, Dixons had received several cautions and convictions for selling secondhand goods as new. In 1996 Dixons changed its procedures so as to prevent this occurrence and had been 'clean' since. The *Watchdog* programme was broadcast in early 1997 without the hidden camera footage. The BBC had decided against using the footage as no wrongdoing had been discovered on the film.¹²⁰

Dixons laid a complaint with the BSC claiming that the hidden camera footage was an infringement of the company's privacy and was unwarranted. Dixons argued that the BBC's justification for filming was based on outdated material and that the BBC had engaged upon a 'fishing expedition'.¹²¹ The BSC chose to uphold Dixons' complaint. It noted that the BBC had been informed by Dixons of the improved procedures which therefore warranted further research by the BBC before resorting to secret filming.¹²² The BSC was alarmed at the BBC's attitude "that secret filming was simply a more accurate and reliable method of gathering evidence."¹²³ The BBC sought judicial review of the BSC's decision all the way to the Court of Appeal.

¹¹⁸ Broadcasting Standards Commission, Code on Fairness and Privacy, Section 18. Available at: www.bsc.org.uk. There is no provision for attended surreptitious recording of people on private land; such activity would probably be a trespass.

¹¹⁹ *R v Broadcasting Standards Commission, ex parte. British Broadcasting Corporation* [2000] EMLR 587. (English Court of Appeal). [*R v BSC, ex parte. BBC*].

¹²⁰ *R v BSC, ex parte. BBC* above n119, para. 20-21, per Lord Woolf MR.

¹²¹ *R v BSC, ex parte. BBC* above n119, para. 21, per Lord Woolf MR.

¹²² *R v BSC, ex parte. BBC* above n119, para. 25, per Lord Woolf MR.

¹²³ Part of the BSC's decision quoted in: *R v BSC, ex parte. BBC* above n119, para. 24, per Lord

Being a judicial review application, the Court was limited to examining the process rather than substance of the BSC's decision. It noted that considerations of privacy and bad taste were "matter[s] of personal judgement" and were "not ... area[s] on which the courts are well equipped to adjudicate."¹²⁴ The Court held that the BSC's decision should stand.¹²⁵

(c) Protections offered by the Broadcasting Standards Commission

The BSC, like the BSA, provides protection to the subjects of hidden camera footage by issuing pre-emptive guidance and by adjudicating on complaints. The Code issued by the BSC directly addresses the issue of hidden cameras and provides fairly comprehensive guidelines on their appropriate use. In this sense, the BSC's Code is superior to New Zealand's Programme Code and Privacy Principles. The BSA's decisions need to be considered to ascertain how the standards and protections in the New Zealand Code work.

The BSC deals with complaints from members of the public. It will hold hearings and has the power to require recording of broadcast material and written statements. The decisions are published in the BSC's newsletter, the *Bulletin*. Broadcasters can be required to publish summaries of decisions on-air and in print. Additionally, broadcasters must report any action that they have taken as a result of a decision.¹²⁶ These are not vigorous powers and the BSC is unable to provide redress to wronged persons. In comparison, the BSA can impose meaningful sanctions and provide compensation to individuals whose privacy has been invaded. The BSC's effectiveness ultimately relies on shaming broadcasters within the profession and to the public. Additionally, there is no right to appeal BSC decisions, unlike the New Zealand situation. While parties may seek judicial review of the BSC's decisions, the limitations of judicial review mean that courts are limited to examining the procedure, rather than the substance, of a decision.

Woolf MR.

¹²⁴ *R v BSC, ex parte. BBC* above n119, para. 14, per Lord Woolf MR.

¹²⁵ *R v BSC, ex parte. BBC* above n119, para. 38, per Lord Woolf MR.

¹²⁶ Available at: www.bsc.org.uk.

C *Self-Regulation*

Self-regulation for the media is rarely implemented at an industry-wide level.¹²⁷ There are too many divisions within the media: broadcast, print and radio. Furthermore, within these media divisions there is often fierce competition for audience ratings; relationships are rarely sufficiently amicable to effect joint initiatives for self-regulation. Accordingly, most self-regulation is within private media organisations – these may be the actual networks or other private entities such as unions, societies and commissions.

The following three sections outline some examples of self-regulation concerning the use of hidden cameras from the United States, the United Kingdom and New Zealand. Following this, the protection provided by self-regulation is assessed.

1 *United States*

(a) *Society of Professional Journalists*

The Society of Professional Journalists is America's largest journalism organisation. Membership is voluntary and made up of individual journalists rather than media organisations. The Society purports to protect freedom of speech and encourages high standards of ethical behaviour amongst the profession. The Society's Code of Ethics sets out four fundamental goals that journalists should aspire to, and provides detailed bullet points giving more specific guidance under each goal.¹²⁸ There is no mechanism to adjudicate on or discipline breaches of the Code. The portions of the Code that are most relevant to the use of hidden cameras state:¹²⁹

Seek Truth and Report It

- Avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the

¹²⁷ One of the rare exceptions to this is the International Federation of Journalists which is open to all forms of media. Nonetheless it is a private organisation that requires journalist to enlist as members. At present, it has over 450 000 members from over 100 countries. See: www.ifj.org

¹²⁸ These four goals are: Seek Truth and Report It, Minimize Harm, Act Independently, Be Accountable. Society of Professional Journalists Code of Ethics. Available at: www.spj.org/ethics/code.

public. Use of such methods should be explained as part of the story....

Minimize Harm

- ... Only an overriding public need can justify intrusion into anyone's privacy.
- Show good taste. Avoid pandering to lurid curiosity.

The guideline on surreptitious methods of newsgathering was a new addition made during the 1996 revision of the Code. The guidelines that were originally proposed by the Society were considerably more constricting than those actually adopted. The original proposals required that: all other methods to obtain the information had been exhausted, that journalists and news organisations be prepared to commit the time and money necessary to pursuing the story fully, that there be a meaningful, collaborative and deliberative decision making process, and that the information be of vital public interest such as revealing serious failure at top levels or preventing serious harm to individuals.¹³⁰ These guidelines would have potentially removed much of the consumer watchdog function of the media's use of hidden cameras. The Society's membership rejected these proposed guidelines as too restrictive on their conduct and opted for the current guideline which allows members far greater leeway and discretion when using hidden cameras.¹³¹

(b) CBS Network

Most of America's giant television networks have their own internal guidelines to regulate their reporters. The CBS Network is one of America's largest networks and is used here as an example. CBS's internal policy requires that a news division vice president and legal counsel give approval for the use of hidden cameras and that they be used only in those stories where reporters would otherwise have been denied access and the information that is likely to be obtained is an important part of the story.¹³²

¹²⁹ Society of Professional Journalists Code of Ethics. Available at: www.spj.org/ethics/code.

¹³⁰ Logan "Stunt Journalism" above n5, 160.

¹³¹ Logan "Stunt Journalism" above n5, 160-161.

¹³² Lissit above n1, 17.

2 *United Kingdom*

(a) BBC Producers' Guidelines

The BBC Producers' Guidelines are probably the most comprehensive example of self-regulation.¹³³ There is an entire chapter on surreptitious recording, in addition to another chapter solely on privacy. In its statement of general principles for surreptitious recording, the BBC outlines that it will generally use surreptitious recording only to explore matters which raise issues of serious anti social or criminal behaviour and where there is reasonable prior evidence of such behaviour.¹³⁴ The Guidelines note that "surreptitious recording should not be used as a routine production tool, nor should it be used simply to add drama to a report."¹³⁵ The BBC states that it will never engage in 'fishing expeditions' or 'bugging' to obtain information.¹³⁶ It outlines the types of situations where surreptitious recording may be permissible: in public places,¹³⁷ when investigating crime and anti social activity,¹³⁸ for social research of public interest,¹³⁹ or for comedy and entertainment.¹⁴⁰ There are particular requirements and considerations for each of these situations before hidden cameras can be used. All occasions of surreptitious recording must be approved in advance by the relevant Head of Department and a flow chart with all the relevant considerations is provided.¹⁴¹ The BBC also provides guidance on whether to broadcast footage that has been taped by a party other than the BBC.¹⁴² The Guidelines clearly delineate between the decisions to record and to broadcast, and require different considerations at each stage.¹⁴³

¹³³ The BSA has referred to the BBC Producers' Guidelines as a useful guide. Yet it has also carefully noted that it does not consider itself bound by these rules. See: BSA *Fahey*, above n105, 10-11; *Drury*, above n18, 15-16.

¹³⁴ BBC Producers' Guidelines, Section 1, Chapter 5. Available at: www.bbc.co.uk/information/editorial/prodgl.

¹³⁵ BBC Producers' Guidelines, Section 1, Chapter 5.

¹³⁶ BBC Producers' Guidelines, Section 5.1, Chapter 5.

¹³⁷ BBC Producers' Guidelines, Section 3, Chapter 5.

¹³⁸ BBC Producers' Guidelines, Section 5, Chapter 5.

¹³⁹ BBC Producers' Guidelines, Section 6, Chapter 5.

¹⁴⁰ BBC Producers' Guidelines, Section 9, Chapter 5.

¹⁴¹ BBC Producers' Guidelines, Section 2, Chapter 5.

¹⁴² BBC Producers' Guidelines, Section 8, Chapter 5.

¹⁴³ BBC Producers' Guidelines, Section 5, Chapter 5.

The Guidelines also outline complaints procedures and note that "viewers and listeners have a right to expect our programmes to have been made in accordance with these Producer Guidelines. If we have departed from them we will need to explain the reasons why."¹⁴⁴ Therefore, the BBC does not consider its guidelines absolutely binding; there may be meritorious circumstances that justify deviating from the Guidelines.

(b) Press Complaints Commission

The British Press Complaints Commission ratified their Code in 1997. Section 11 of the Code concerning misrepresentation is most relevant to the use of hidden cameras:¹⁴⁵

11. Misrepresentation

- i) Journalists must not generally obtain or seek to obtain information or pictures through misrepresentation or subterfuge. ...
- iii) Subterfuge can be justified only in the public interest and only when material cannot be obtained by any other means.

The Press Complaints Commission regulates the English print media rather than the broadcast media. However, it is useful for illustrating that the key factors of public interest and being unable to obtain the information by any other means are common and basic requirements.

(c) National Union of Journalists

The National Union of Journalists has over 25 000 members throughout the United Kingdom and is the world's largest journalism union.¹⁴⁶ Members of the Union agree to abide by the Union's Code of Conduct. The Code is a one page document and point five is relevant to the use of hidden cameras:¹⁴⁷

¹⁴⁴ BBC Producers' Guidelines, Section 3, Chapter 41.

¹⁴⁵ Press Complaints Commission, Code of Practice. Available at: www.uta.fi/eticnet/uk2.

¹⁴⁶ See the Union's webpage: www.gn.apc.org/media/nju.

¹⁴⁷ Available on: www.gn.apc.org/media/nju.

A journalist shall obtain information, photographs and illustrations only by straightforward means. The use of other means can be justified only by overriding considerations of the public interest. The journalist is entitled to exercise a personal conscientious objection to the use of such means.

This provision in the Code serves to protect not only the subjects of media attention but also individual journalists who may be under pressure to engage in unethical behaviour from their employer.

3 New Zealand

(a) TV3 Network

The TV3 Network has no formal written internal guidelines. Instead, it is reliant on individual reporters being awake to the ethical issues of a situation and acting appropriately. While there is a lack of written guidelines at TV3, Amanda Millar, when considering whether to utilise a hidden cameras in the Fahey story and whether to broadcast the footage that was obtained, was keenly aware of the delicate ethical situation and discussed the issues with her executive producer and legal counsel.¹⁴⁸

(b) TVNZ Network

Television New Zealand has an internal manual for its journalists which has a section on covert filming. The manual states that the use of "cameras involving an element of deception ... is generally discouraged." However, the manual recognises that it may at times be appropriate to use hidden cameras. Journalists must apply for written permission from the Editor in Chief and satisfy certain criteria:¹⁴⁹

- i) there is a prima facie case that the event or activity to be recorded is illegal, or would be widely regarded as anti-social or immoral.
- ii) the disclosure of the material should be seen as being in the public interest.
- iii) the material is indispensable to the story and unobtainable by more open means.

¹⁴⁸ Interview with Amanda Millar, 5 August 2000.

The manual also briefs a few of the decisions of the Broadcasting Standards Authority which are relevant to covert filming.¹⁵⁰

(c) New Zealand Engineering Printing and Manufacturing Union

The former journalists' union has merged into the New Zealand Engineering Printing and Manufacturing Union. The Journalist Code of Ethics, last updated in 1989, is incorporated into the Union's Rules. The relevant sections of this one page document place general obligations and rights on journalists:¹⁵¹

(g) They shall use fair and honest means to obtain news, pictures, films, tapes and documents.

(h) They shall identify themselves and their employers before obtaining any interview for publication or broadcast.

It appears that there is very little room under the Union's Code for any use of hidden cameras. This is unsurprising given the date of the Code. The Code notes that a breach of its standards constitutes a breach of the Union's Rules which may give rise to disciplinary procedures under the Rules. However, this clause has never been invoked to bring disciplinary procedures against any journalist.¹⁵²

Union membership was compulsory until the Employment Contracts Act 1991 altered that requirement. Since 1991, union membership has declined and, while there are no official figures, the estimates are that perhaps a third or fewer of full-time employed journalists are covered by the Union.¹⁵³

¹⁴⁹ Television New Zealand, Journalists' Manual, 89.

¹⁵⁰ At present the manual is a little out of date as it does not feature the BSA's decision on *Fahey*.

¹⁵¹ New Zealand Engineering Printing & Manufacturing Union Inc., Journalist Code of Ethics, Section 50 Rules of Union Handbook, 60.

¹⁵² Jim Tucker "Codes" in Media Ethics Lecture Series, April 1997, paragraph 3.2.2.7. Available at: [www.aut.ac.nz/dept/journ/invest/eth_2.paragraph 3.2.2.7](http://www.aut.ac.nz/dept/journ/invest/eth_2.paragraph%203.2.2.7).

¹⁵³ Tucker above n152, paragraph 2.1.

4 Protection provided by self-regulation

The major benefit of self-regulation is that it can prevent abuses occurring. This is a particularly attractive attribute when dealing with the damage that hidden cameras inflict. If used inappropriately, hidden cameras are likely to breach someone's privacy. Breaches of privacy generally cause irrevocable damage.

However, there are numerous problems with self-regulation as a mode of protection. Self-regulation's is not very good at providing remedies for when abuses do actually occur. While there is some movement towards being accountable for reports such as in the SPJ guidelines, there is little substance to back up this ideal. Additionally, few of the codes and guidelines discussed have any disciplinary action to deal with those who do breach the regulations. If the media is unable to curtail the excesses and abuses of its members and be seen to be doing so, the perception of the effectiveness of self-regulation is severely harmed.

As discussed earlier, the media does not usually act as a single entity. In comparison, the legal and medical professions are reasonably closed industries: both require formal qualifications and admission to be deemed a part of the profession. While tertiary training for journalism is increasingly available,¹⁵⁴ it is not a necessary requirement to enter the industry. Accordingly, the media lacks the cohesiveness of the legal or medical professions. Regulation and discipline are easier to enforce in a cohesive profession. Therefore, it is harder to have effective self-regulation in an industry as diverse as the media.

Self-regulation is heavily reliant on having ethical people in the industry. Reactions and attitudes of peers will often have the greatest impact on controlling journalists' behaviour. The majority of people within the media must therefore have a certain level of shared ethics in order for them to censure others for their lack of ethics. The overwhelming majority of journalists need to desire and espouse ethical standards for their industry. This can be difficult when there are divisions and fierce competition within the media industry.

¹⁵⁴ Tucker above n152, paragraph 3.2.1.

Self-regulation requires wilful participation. For media organisations, there are short-term financial incentives for using hidden cameras; they are relatively cheap and quick and they generate high ratings. The International Federation of Journalists has noted the “growing evidence that excessive commercialisation in media is driving down standards of journalism and undermining public confidence in the “watchdog” role of journalism in democratic society”.¹⁵⁵ Furthermore, there may be incentives for individual journalists to stretch the boundaries in order to scoop a ‘good’ story and impress their boss.¹⁵⁶

The key problem with self-regulation as a means of providing protection to the subjects of hidden camera footage is that the rules are written by the very people who inflict the harm. It is inescapable that any media organisation will have a degree of self-interest when writing their guidelines. For instance, the SPJ’s proposed guidelines were rejected by its own members: they refused guidelines that they viewed as too constricting on their actions. Media organisations, while writing their own guidelines, can ensure they give their journalists a fair degree of leniency and flexibility whilst appearing to maintain “ethical” standards. The fact that many of the codes are quite vague in their guidance attests to this; vagueness allows considerable leeway. For example, the concept of ‘public interest’ is rarely defined any further and can therefore provide considerable scope for a journalist to justify using a hidden camera.

A degree of vagueness in guidelines on the media’s use of hidden cameras is inevitable because situations are so dependant on their particular facts and circumstances. However, many of the guidelines are too vague to be any real use to a journalist who is trying to determine if he or she is authorised to use a hidden camera in a particular situation. From the examples given above, the BBC Producers’ Guidelines alone stand out as providing comprehensive and detailed regulation. There may be a reluctance in some media quarters to commit to paper guidelines that are too specific because of the threat that these guidelines could be used against the

¹⁵⁵ “Ethics of Journalism” Resolution, 23rd International Federation of Journalists Congress, 3-7 May 1998. Available at: www.ifj.org/ifj/congress.

¹⁵⁶ Tucker above n152, paragraph 2.4.

media by aggrieved individuals.¹⁵⁷ However, a media organisation that is supposedly committed to self-regulation, yet unprepared to articulate clear guidelines and publicly stand by them, cannot be justified in arguing that self-regulation is the most appropriate method of controlling the uses of hidden cameras and providing protection.

In sum, self-regulation is a desirable mode of protection as it will prevent some abuses occurring. However, it is not infallible. For instance, consider the BBC's *Watchdog* case: the BBC has the most comprehensive guidelines that explicitly state that "fishing expeditions" will not be condoned, yet Dixon's claim against the BBC was for exactly such a situation. Therefore, it is necessary that self-regulation be backed up by effective sanctions from both the courts and statutory bodies.

IV THE FUTURE FOR HIDDEN CAMERAS IN NEW ZEALAND

A The Principles

1 Summary of the principles

The various codes and guidelines of statutory bodies and media organisations already contain the basic principles for determining the appropriate use of hidden cameras by the media. This paper seeks to outline a basic summary of these principles only.¹⁵⁸ There are two stages of decision-making when using hidden cameras: newsgathering and broadcast.

(a) Newsgathering

When a journalist is deciding whether to use a hidden camera, there are two key factors which he or she must consider. First, journalists must ask whether there is a sufficient public interest to justify the use of a hidden camera. They must consider

¹⁵⁷ Tucker above n152, paragraph 2.4.

¹⁵⁸ It is not the purpose of this paper to provide a set of comprehensive guidelines for New Zealand. This task is best carried out amongst the BSA, the Broadcasting Council, and New Zealand's television networks. If the reader is looking for a good example of fair and comprehensive guidelines, they need look no further than the BBC's guidelines.

whether the public interest outweighs the rights of the individuals involved. Some guidelines indicate that illegal or anti-social behaviour may provide sufficient public interest. Secondly, journalists must ensure that there is no other way to obtain the information than by using a hidden camera.

Having decided to use a hidden camera, journalists must be conscious of their conduct during the newsgathering process. Even though a journalist may have satisfied both of the above factors, their poor conduct in using a hidden camera could negate their original justification. For instance, a journalist's research must be thorough and demonstrate that, in the particular circumstances, there is sufficient grounds to warrant the use of a hidden camera. Being fraudulent or deceitful in obtaining a story may constitute unfair treatment of the subject. Calculating to cause physical harm to a subject is unacceptable. Committing a gross and unjustified invasion into someone's private space will harm the integrity, and potentially the legality, of footage. Essentially, journalists must always look to treat their subjects fairly.

(b) Broadcast

Once the footage has been obtained, a journalist needs to decide whether he or she is now justified in broadcasting the footage. A journalist needs to ask whether there is sufficient public interest in the footage to justify broadcast; the footage must have yielded information or conduct that warrants being broadcast. It is not appropriate to use footage merely to illustrate a story; it should be essential to the story.

In addition to this decision, journalists also need to remain aware of their conduct and continue to exercise care. The manner in which footage is dealt with, including the editing of footage, should not be misleading. It will be appropriate in most cases to allow the subject an opportunity to comment on the footage, as was done in *Fahey*.

2 *Application of the principles*

(a) *Fahey*

There was a notable public interest in *Fahey*: Dr Fahey continued to practise as a doctor despite numerous claims of sexual misconduct against him, and he was (at the time of the original story) in the running of local body politics. Additionally, there was no other way of obtaining this type of information. Dr Fahey refused interviews, refuted all claims and made allegations that the women were mentally imbalanced. TV3's conduct was laudable: there were separate considerations for whether to use the camera and then whether to broadcast, they informed Dr Fahey prior to broadcast, and the editing was extremely fair. In sum, *Fahey* is an exemplary example of the appropriate and positive use of a hidden camera by the media.

(b) *Sanders*

In this case ABC were investigating telephone psychics. There was a public interest in exposing a practice that preyed on vulnerable consumers. Yet whether this justified exposing certain individuals so thoroughly is questionable. Paul Highland, who was a tarot card reader featured in ABC's story, claimed that the programme caused him to resume heavy drinking. He died of alcohol poisoning not long after the case finished.¹⁵⁹ It could be argued that there was no other way of obtaining the necessary inside information than by going undercover. However, that did not necessarily warrant broadcasting hidden camera footage: comments from employees could have been written on the screen rather than necessarily broadcasting the original footage or the employees faces could have been pixilated to prevent identification. Furthermore, the conduct of ABC was less than appropriate: the undercover work involved lying and spying and the editing of the footage was extremely unfair.

¹⁵⁹ Gunther, above n19, 1H, 6H.

(c) *Target*

New Zealand's consumer watchdog programme *Target* commonly uses hidden cameras in its stories. Usually, the public interest in stories about vacuum cleaners, taxis and dry-cleaners is fairly tepid. Individual employees are often shown during broadcast and the service of the company attributed to them. Do innocent people who serve in a shop really deserve to get their face plastered on national television? Therefore, while there is a degree of public interest in uncovering poor service to consumers, this does not necessarily outweigh the privacy rights of the individuals involved.

It is often difficult for *Target* to argue that there is really no other way of obtaining the information. Often the shots are not necessary to the purpose of the story but merely illustrate it. While shots of store fronts are not objectionable, footage is most commonly of the individual employees. In *Target's* favour, if critical comments are to be made, they always ensure that the company (not the individual employee) is informed and given an opportunity to respond prior to broadcast.

(d) *Food Lion*

The widespread unsanitary food-handling practices at Food Lion stores threatened the health of many consumers and probably did provide a sufficient public interest. It is possible that such information could have been obtained without using hidden cameras by examining food bought from the stores and speaking to past and current employees. Yet, it is also conceivable that there was no other way to obtain such uncontrovertible evidence of the actual conduct of Food Lion employees behind the scenes. What ultimately sunk the defendant in *Food Lion* was the perceived unfairness of the programme which involved deceit and breach of loyalty in going undercover as store employees.

B The Courts

At present, none of the torts exist in such a form that allows a court to examine all the principles regarding the appropriate use of hidden cameras. While all of the torts can be used to protect subjects of hidden cameras, their usefulness depends heavily on the particular facts of each case. The preferable way to incorporate the principles into the common law is through the development of the privacy torts, notably public disclosure of private fact.

1 Public Disclosure of Private Fact

The first two elements of the tort requiring that the disclosure be public and the fact be private are clearly necessary. They are basic elements to the tort. More interesting is the third element:¹⁶⁰ that the matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.

The phrasing of the third element in *P v D* makes it appear that it is the matter or facts that are disclosed, rather than the manner of disclosure, that must be highly offensive and objectionable. However, Nicholson J's treatment of this element in *P v D* applies the element to both the matter and manner of disclosure. Applying the element to the facts, Nicholson J noted that it "is on the basis of what a reasonable person of ordinary sensibilities would feel if they were in the same position, that is, in the context of the particular circumstances."¹⁶¹ Realistically, "the context of the particular circumstances" involves both the matter disclosed and the manner in which it is disclosed. It makes sense that the element should allow examination of both. The way in which something is published is key to whether a reasonable plaintiff will be offended. Furthermore, a fact, such as personal correspondence, can be unobjectionable in itself, but any reasonable person in the plaintiff's position would be dreadfully offended by the public disclosure of it. Essentially, the third element functions as a reasonable fortitude test to exclude the overly-sensitive plaintiff. The test asks: would a reasonable person in the plaintiff's position be highly offended by the public disclosure of the particular private facts. It is not necessary that both the

¹⁶⁰ *P v D* above n61, 601

matter and manner be objectionable. What is at issue is that in all the circumstances (matter and manner) would a reasonable person be offended.

The public interest element in *P v D* is perhaps the most interesting. It is interesting for the fact that Nicholson J turned the matter of public interest from its usual role as a defence to an element of the tort. There has been criticism that this erroneously alters the burden of proof: it is more appropriate that the defendant, rather than the plaintiff, bears the responsibility for proving the public interest of their broadcast.¹⁶² However, this criticism may be somewhat overstated. In practice, the plaintiff will raise the issue and assert that there was not sufficient public interest to justify disclosure. The defendant will need to respond to the plaintiff's assertion and ultimately it will still be for the defendant to justify why they have infringed on someone's privacy. Additionally, the way Nicholson J phrased the element was to describe it as a relevant factor and not a required element that the plaintiff must prove, thereby seeking to provide a holistic approach to the tort.

The fourth factor is also interesting as a point of development for the tort to deal with the abuses of hidden cameras. According to the principles, journalists must demonstrate that they are justified in their use of a hidden camera and their broadcast of the footage. They must also ensure that their conduct has not been so unreasonable as to negate that justification. Public interest is part of establishing the justification for the use of a hidden camera and the broadcast of its footage. To best incorporate these issues into the tort of public disclosure of private fact, a defence of justification should be established. The defence should require defendants to prove that they had sufficient justification for using the hidden camera and for airing the footage. It should also require defendants to demonstrate that their conduct was not so unreasonable that publication was no longer justified. Therefore, *P v D*'s fourth element needs to return to its role as a defence and become a relevant issue within the wider defence of justification.

Recent developments in the law of defamation indicate that it can be appropriate for the courts to examine defendants' conduct. In *Lange*, the Court of Appeal established

¹⁶¹ *P v D* above n61, 601.

that defendants' conduct is relevant to a section 19 analysis for determining whether a defendant has negated a qualified privilege.¹⁶³ Qualified privilege will not protect a defendant who has behaved recklessly. While section 19 is the mechanism used in *Lange*, it is not crucial to justifying courts' decisions to examine defendants' conduct. Overseas jurisdictions have seen fit to introduce a reasonableness element into the defence of qualified privilege without having to rely on the existence of a "section 19".¹⁶⁴

Therefore, the New Zealand courts examine defendants' conduct when protecting individuals' reputations against the media's freedom of speech. Why should they not examine conduct when protecting individuals' privacy against the media's freedom of speech? To ensure that the courts provide effective protection to the subjects of hidden camera footage, it is plainly desirable that courts should examine defendants' conduct as part of a defence of justification. Therefore the element of public interest needs to be incorporated into a defence of justification. Such a defence will allow courts to examine public interest and defendants' conduct in a holistic manner.

2 *Intrusion into seclusion*

It is possible that New Zealand courts could choose to introduce the tort of intrusion. Yet there would be many hurdles to overcome before such a major change would be undertaken. First, adopting the tort would have much wider impact than on just the media's use of hidden cameras; amongst others, it could affect employers, private investigators and police. Secondly, under our current law trespass and public disclosure of private facts will provide protection for most situations that would be covered by intrusion. It would require extremely compelling facts, impervious to both trespass and public disclosure of private facts, to impel a court to even consider adopting the tort. For instance, if journalists filmed hospital patients¹⁶⁵ or people at a

¹⁶² Rosemary Tobin "Invasion of Privacy" [2000] NZLJ 216, 218.

¹⁶³ *Lange v Atkinson* above n73, 400-402

¹⁶⁴ For instance, see: *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010, (House of Lords); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

¹⁶⁵ The case concerning Gordon Kaye is an interesting example: Kaye was a famous actor who was in a terrible accident and suffered brain injuries which necessitated time in hospital. Two members of the tabloid press managed to enter Kaye's room and proceeded to "interview" Kaye and take photographs. As the English law stood at the time, there was no protection for Kaye. Now that the European

funeral and did not actually publish the information, the courts might consider intrusion as an appropriate remedy.

C Broadcasting Standards Authority

1 Proposed Code of Practice

There is already sufficient provision within existing New Zealand protections to satisfy the above guidelines. However, it is scattered amongst various decisions and codes. It would be preferable to see the existing principles clearly stated within one document.

A new Code of Practice for free-to-air television is currently being developed by the Television Broadcasters' Council to lay before the BSA for its approval. The proposed guidelines directly address the issue of the media using hidden cameras: principle five requires broadcasters to deal justly and fairly with people. Guideline 5b which provides commentary on principle five states:¹⁶⁶

Contributors and participants in any programme shall be dealt with fairly and shall, except in circumstances in which the public interest otherwise requires, be informed of the reason for their proposed contribution and participation and the role that is expected of them. Programme makers should not obtain information or gather pictures through misrepresentation or deception, except where the disclosure is reasonably believed to serve an overriding public interest and the material cannot be obtained by other means.

The proposal is laudable: it could however provide better guidance. First, the terms "misrepresentation or deception" are quite vague. It could simply state that the following considerations apply to any use of hidden cameras or surreptitious recording. Secondly, it does not attempt to give direction as to what will constitute

Convention of Human Rights is part of English law there is some privacy protections available (Article 8 provides privacy rights). Trespass was redundant as Kaye was on hospital property rather than his own property. Yet in New Zealand, while trespass would be redundant, public disclosure of private facts could be used if the information was published. *Kaye v Robertson* [1991] FSR 62 (English Court of Appeal).

¹⁶⁶ Television Broadcasters' Council *Draft Free-To-Air Television Code of Broadcasting Practice*.

“an overriding public interest”. It does not state that the public interest must outweigh the rights of the individuals affected by the footage. Indeed it could suggest that illegal or anti-social and immoral conduct is likely to give rise to a sufficient public interest. Thirdly, it does not state that separate decisions need to be made at the points of newsgathering and broadcast because different principles apply at each stage. Fourthly, it could note that inappropriate conduct by a journalist while gathering the footage or preparing it for broadcast, could negate the journalist’s original justification for using a hidden camera. If these changes were incorporated into the draft Code, it would provide a signal document for all broadcasters to follow.

2. *Providing Remedies*

The BSA’s ability to provide redress is limited. While the BSA is able to order meaningful punishment against a broadcaster, its power to award compensation is capped at \$5000 for breaches of privacy and is non-existent for breaches of the broadcasting standards. It is unable to issue any form of injunction.

It could be argued that the BSA should be able to award compensation to individuals who have been wronged by a broadcaster’s breach of the broadcasting standards. It seems rather inconsistent and unfair that they can compensate only for breaches of privacy. For instance in hidden camera cases, while it is more likely that there will be a concurrent breach of privacy and broadcasting standards, it is possible that footage might not breach privacy, but would cause harm by being unfair, inaccurate or unbalanced.¹⁶⁷ It seems unfair to distinguish between such situations and award compensation in one and not the other. Providing wider access to compensation should not allow a complainant to ‘double dip’ and seek compensation for breaches of privacy and broadcasting standards; compensation should be awarded as a lump sum (capped at \$5000 taking into account all breaches).

Consequently, at present the BSA will be the more appropriate avenue where an incident is relatively minor and the harm suffered does not require a large compensation award. A victim of inappropriate hidden camera footage may also

¹⁶⁷ For an example of such a case see: *Smedley* above n115.

choose the BSA for its being inexpensive, less stressful and less time-consuming than the court process.

D Self-Regulation

TVNZ's current internal manual is extremely good. However, it does fail to highlight that distinct decisions need to be made at the time of newsgathering and the time of broadcast. The fact that TV3 has no internal written guidance is not fatal. If journalists within TV3 are sufficiently aware of the broadcasting standards and the BSA's decisions (notably *Fahey*) on the use of hidden cameras, then there is little need for guidelines that merely parrot the existing standards. Nonetheless, it certainly would do no harm were TV3 to develop an internal practice manual for its journalists. It is easier for journalists to access ethical requirements if they are clearly laid out in one document than scattered through various BSA decisions. The manual could also include procedural guidelines, such as telling journalists whom to consult and obtain approval from, which can better ensure ethical behaviour.

Ultimately, written guidelines are no use unless the principles and ethics that underlie them are inculcated into the culture of a broadcasting network. They will be hollow words on paper unless backed up with ethical practice. At present, the New Zealand media is a relatively well-behaved and ethical profession. Yet the written ethical standards of a profession will remain strong only as long as the people within the profession practise integrity. A good way of promoting ethical conduct and ensuring meaningful self-regulation is to espouse clear principles on the appropriate use of hidden cameras and back this up with effective legal sanctions from both the BSA and the courts.

V CONCLUSION

A range of protections against the unwarranted use of hidden cameras already exist. Remedies are available from the courts and the BSA. Journalists needing direction in their decision making can find guidance in various codes, principles and BSA decisions. However, the existing New Zealand protections can be improved. First, it is desirable that clear written guidance is laid down, bringing all the relevant

principles together in one document which has the approval of the BSA. Secondly, it is difficult at present for the courts to examine all the relevant issues in hidden camera cases. Establishing a justification defence to public disclosure of private fact would ensure that the courts can scrutinise all the basic principles for the appropriate use of hidden cameras. Thirdly, the BSA's ability to grant compensation should be widened to allow compensation for breaches of the broadcasting standards. The result would be effective legal protection for the victims of hidden cameras abuses. Such strong legal sanctions from the courts and the BSA would have a twofold effect: the threat of legal sanction can improve the quality of self-regulation and effective remedies are available for when self-regulation fails. The Fahey story has demonstrated that a little muckraking in appropriate circumstances can produce great results. Nonetheless, in the hands of unscrupulous journalists the muckrake can be a dangerous weapon. It is time that New Zealand ensured that there are sufficient protections against inappropriate uses of the muckrake.

- iv) The protection of privacy, which includes the right to control the disclosure of information of particular relevance about one's private life, is a fundamental principle of the Broadcasting Act and the Broadcasting Standards Act.
- v) The protection of privacy includes the right to control the disclosure of information by broadcasters, which covers the right to control the disclosure of information in a number of an individual's private life, including information which is of a private nature, which are public in nature, but which are of a private nature, and which are subject to the "public interest" test.
- vi) Discussing the matter in the "public interest" is a defence to an action for breach of privacy or interest to the public. The defence is an individual's right to privacy.
- vii) An individual who consents to the disclosure of information about their private life, which has occurred in a claim for a breach of privacy. Children's privacy is a particular concern to broadcasters. When consent is given by the child or the parent or someone in loco parentis, broadcasters should ensure that the broadcast is in the best interest of the child.

APPENDIX

The Privacy Principles of the Broadcasting Standards Authority:

- i) The protection of privacy includes protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.
- ii) The protection of privacy also protects against the public disclosure of some kinds of public facts. The "public" facts contemplated concern events (such as criminal behaviour) which have, in effect, become private again, for example through the passage of time. Nevertheless, the public disclosure of public facts will have to be highly offensive to a reasonable person.
- iii) There is a separate ground for a complaint, in addition to a complaint for the public disclosure of private and public facts, in factual situations involving the intentional interference (in the nature of prying) with an individual's interest in solitude or seclusion. The intrusion must be offensive to the ordinary person but an individual's interest in solitude or seclusion does not provide the basis for a privacy action for an individual to complain about being observed or followed or photographed in a public place.
- iv) The protection of privacy also protects against the disclosure of private facts to abuse, denigrate or ridicule personally an identifiable person. This principle is of particular relevance should a broadcaster use the airwaves to deal with a private dispute. However, the existence of a prior relationship between the broadcaster and the named individual is not an essential criterion.
- v) The protection of privacy includes the protection against the disclosure by the broadcaster, without consent, of the name and/or address and/or telephone number of an identifiable person. This principle does not apply to details which are public information, or to news and current affairs reporting, and is subject to the "public interest" defence in principle (vi).
- vi) Discussing the matter in the "public interest". Defined as of legitimate concern or interest to the public, is a defence to an individual's claim for privacy.
- vii) An individual who consents to the invasion of his or her privacy cannot later succeed in a claim for a breach of privacy. Children's vulnerability must be a prime concern to broadcasters. When consent is given by the child, or by a parent or someone in loco parentis, broadcasters shall satisfy themselves that the broadcast is in the best interest of the child.

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