

S538 SHAYLE - GEORGE, K. "P v D: a judgment showing..."

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"P v D: A Judgment Showing Contempt for Freedom of Expression"

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

1 September 2000

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I submit that because Nicholson J did not undertake a full legal analysis of the issues arising in *P v D* the judgment is automatically questionable.

¹ *Marlborough "Libertine Under Threat" in Newspapers Publishers Association and Commonwealth Press Union Petition: A Need for Balance* (Newspapers Publishers Association of New Zealand Inc. (NPA) and Commonwealth Press Union (New Zealand Section) (CPU), 1977) 6.

² New Zealand Bill of Rights Act 1990 s14.

³ *ibid.*, above nt. 2.

⁴ William Akel "The Rush to Privacy" [2000] NZLJ 263, 263.

⁵ Jack Anderson "New Ruling threatens free speech" *The National Business Review*, 24 March 2000, 1.

⁶ Akel above nt. 263.

I INTRODUCTION

If there was ever a time to suggest the New Zealand Bill of Rights Act 1990 (Bill of Rights) is a "horse with no teeth"¹, now is the time.

P v D finally determines the existence and scope of a new common law tort which has the practical effect of abrogating the Bill of Rights guarantee to freedom of expression.² Despite this, the Bill of Rights is disposed of in one sentence and a "dead American horse"³ is imported into our common law at the expense of our constitutional guarantee.

Due to ongoing uncertainty regarding privacy issues and without the benefit of a crystal ball, many issues arising in *P v D* are unable to be resolved with any certainty, but it is conclusive that where previous courts expressed and exhibited caution in developing the tort, Nicholson J threw caution to the wind, and in his "rush"⁴ to establish a tort of privacy neglected to complete a full legal analysis of the issues.

P v D is a judgment which shows "contempt for the right of freedom of expression",⁵ cutting across the established balance between freedom of expression and protection of reputation".⁶

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¹ Marilyn Ireland "Liberties Under Threat" in Newspaper Publishers Association and Commonwealth Press Union *Privacy. A Need for Balance*. (Newspaper Publishers Association of New Zealand Inc. (NPA) and Commonwealth Press Union (New Zealand Section) (CPU), 1997) 6.

² New Zealand Bill of Rights Act 1990, s14.

³ Ireland, above n1, 9.

⁴ William Akel "The Rush to Privacy" [2000] NZLJ 263, 263.

⁵ Jock Anderson "New Ruling threatens free speech" *The National Business Review*, 24 March 2000, 1.

⁶ Akel above n4, 266.

II BACKGROUND TO P v D

A Facts

In early 1999 the defendant (D), a journalist, was asked by the second defendant, Independent News Auckland Limited (“Independent News”), which publishes the ‘Sunday Times’ weekly newspaper, to prepare a profile on the plaintiff. The plaintiff (P) is a “public figure”⁷ as a consequence of activities and publicity relating to P’s occupation.

D was aware of the public activities of P and had access to a previously published article on P. He deposed that as part of his general knowledge he was aware of suggestions that P had suffered from a psychological/psychiatric problem. He also deposed that while others were aware of this suggestion, it had never been verified nor been published in any previous profiles on P. D spoke to a number of people regarding P, but few people would go on record with their comments. He contacted P’s office to attempt to arrange an interview with P. D was told an interview could be arranged subject to numerous conditions including a guarantee that P would see a draft of the article before it was published and could make any deletions or alterations P wanted.⁸ D could not comply.

In the course of research D was told the name of a psychiatric hospital at which P had been treated and the name of a Policeman who may have come to P’s aid in an emergency situation. D deposed that the source has had no contractual or occupational relationship with P.

⁷ *P v D* (25 February 2000) unreported, High Court, Auckland Registry, CP 126/99, 2.

⁸ *P v D* above n7, 2.

D contacted the named policeman who would not discuss or even confirm the supposed emergency.

D asked a member of P's occupational group about possible "upheavals"⁹ in P's life. That person replied¹⁰

that he was aware of where D was going but he would not go anywhere down that path.

D posted a letter to P declining P's terms for an interview but offering an opportunity to discuss the topic and "how [he had] apparently overcome these matters to be the ... of the high standing that [he is]."¹¹

The matter did not advance further and D did not see completion as being possible unless he spoke with P directly. A draft was prepared, but it was not in a publishable form.

On 25 March 1999 P's solicitors faxed the editor of Sunday Star Times asking for confirmation that information "which would amount to a gross breach of confidentiality and a serious damage of P's privacy"¹² would not be published. They stated their intention to seek an interim injunction preventing publication the following day. They filed an ex parte application for an interim injunction that next day and upon the defendants undertaking not to publish without notice, the proceedings were adjourned with restricted file access orders.

⁹ *P v D* above n7, 3.

¹⁰ *P v D* above n7, 3.

¹¹ *P v D* above n7.

¹² *P v D* above n7.

B Claim and Defence

P alleged that the information that a police officer came to P's aid in a medical emergency and that P had been treated at the unnamed psychiatric hospital could only have been obtained by a breach of confidentiality. P also claimed that publication of the information would infringe P's right to privacy. As a result, P was seeking an interim injunction prohibiting the defendants from printing, publishing or distributing the information until further order of the court. P also sought a declaration by the defendants that publication would be a breach of confidentiality and/or breach of a right to privacy, and that the identity of P and the contents of the Court file not be disclosed until further orders of the court.

The defendants submitted there was no actual information beyond suggestions and no real evidence that publication was likely (and that in fact the evidence there was established the contrary). The defendants also argued that there were a number of factors persuasive against the exercise of the court's discretion to grant an injunction, including the effect of section 14 of the Bill of Rights and the undesirability of imposing prior restraint in the absence of reliable evidence of a breach of a clearly defined obligation or the right of another.

III FREEDOM OF EXPRESSION

A Background

Freedom of expression appears in the European Convention on Human Rights (article 10) and in the International Covenant on Civil and Political Rights (ICCPR) (article 19(2)) which was signed by New Zealand in 1968, ratified 10 years later and affirmed in the Short Title of the Bill of Rights.

It now appears in section 14 of the Bill of Rights which reads

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

This section was recently described by the New Zealand Court of Appeal as being “as wide as human thought and imagination”.¹³

Long recognised as “one of humankind’s most precious rights”,¹⁴ and “of fundamental importance in our society”,¹⁵ the Supreme Court of Canada has stated the purpose of the freedom as being¹⁶

.. to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream.

Its justifications are persuasive on both an individual and societal level. As an individual, restraint on the ability to express oneself is an affront to human dignity, while on a social level, a society which is knowledgeable is more adaptable and thus more stable. Also, as members of a society we need to know facts about our society and the way we are governed in order to exercise our rights in a democracy.¹⁷

¹³ *Moonen v Film and Literature Board of Review* (17 December 1999) unreported, Court of Appeal, CA 42 / 99, 9.

¹⁴ John Burrows “Freedom of the Press under the New Zealand Bill of Rights Act 1990” in Phillip Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995), 286.

¹⁵ *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 WLR 848, 865 per Lord Denning.

¹⁶ *Irwin Toy Ltd v Quebec (Procurer General)* (1989) 58 DLR (4th) 577, 606 per Dickson CJC, Lamer and Wilson JJ.

¹⁷ Burrows, above n14, 286. These concepts were also identified and accepted as the purposes of the right in the White Paper commentary of s14. (Hon. Geoffrey Palmer (Minister of Justice) *A Bill of Rights for New Zealand. A White Paper*. (P D Hasselberg Government Printer, Wellington, 1985) 79).

The incorporation of the freedom of expression in statutory form arguably promises greater protection for freedom of the press.¹⁸ Although it is not explicit, as it is in other jurisdictions for example Canada, section 14 impliedly includes freedom of the press. This was expressly recognised by Thomas J when he stated that section 14¹⁹ ... provides a right for the news media to publish information and a right for the public to receive that information. ... Occasional shortcomings in practice do not impair the right itself and by and large are to be accepted in the interests of securing a free and vigorous press.

B The Applicability of the Bill of Rights to the Development and Application of the Tort of Privacy

Section 3 of the Bill of Rights establishes those parties to whom the Act applies. It states

3. Application - This Bill of Rights applies only to acts done -

- (a) By the legislative, executive, or judicial branches of the Government of New Zealand; or
- (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

As the first tort action developed in the glare of the Act since its enactment there is little guidance as to the extent of the Act's influence in that process. Further it

¹⁸ Burrows, above n14, 286.

¹⁹ *Police v O'Connor* [1992] 1 NZLR 87, 97-99 per Thomas J. Expressly stated to apply to newspapers, television and radio in the White Paper commentary of s14. (Hon. Geoffrey Palmer (Minister of Justice) *A Bill of Rights for New Zealand. A White Paper*. (P D Hasselberg Government Printer, Wellington 1985) para 10.55 -10.57, 80).

is questionable whether it is relevant to the application of the tort in situations like *P v D* where the parties are private individuals, prima facie outside the public law sphere which the Bill of Rights governs. Invariably privacy issues will arise from the actions of a media organisation in relation to a private individual. While it is generally established that certain media institutions and certain actions of those institutions are considered acts in the performance of a public function pursuant to s3(b),²⁰ it is not always the case.²¹

Following *Dolphin Delivery (Retail, Wholesale & Department Stores Union) v Dolphin Delivery Ltd*,²² in which the Canadian Supreme Court held that the term "government" did not refer to the judiciary for the purposes of the Charter, (the implication being that the Canadian Charter does not apply to private law litigation), New Zealand academics advocated for the same approach to be adopted here.²³ The Canadian approach, and the suggestion that New Zealand adopt it, has been criticised,²⁴ the criticism itself gaining judicial support.²⁵ This is due to the substantive contextual differences in the relevant application provisions of the Charter and our Bill, and in light of the approach taken in other comparable jurisdictions.²⁶

²⁰ For example, in *TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 2 NZLR 435 (CA) Cooke P expressed the view that although TV3 is a privately-owned company, as a licensed television broadcaster it exercises broadcasting functions pursuant to duties required by s4 Broadcasting Act 1989.

²¹ For example, in *Television New Zealand Ltd v News Monitor Services Ltd* [1994] 2 NZLR 91 (HC) in which he concluded that the purely private trading functions of a body (for example, recording video copies of television broadcasts) although empowered by statute, such as a state-owned enterprise, are not subject to the Bill of Rights Act.

²² *Dolphin Delivery (Retail, Wholesale & Department Stores Union) v Dolphin Delivery Ltd* (1986) 33 DLR (4th) 176.

²³ Paul Rishworth "The Potential of the New Zealand Bill of Rights" [1990] NZLJ 68; David Paciocco "The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" [1990] NZ Recent LR 353.

²⁴ Andrew Butler "The New Zealand Bill of Rights and private common law litigation" [1991] NZLJ 261.

²⁵ *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1997] NZLR 22 (HC) per Elias J.

²⁶ With regards to the textual differences, the Canadian Charter in its equivalent section, s32, applies its provisions to the Parliament and government of Canada and to the legislature and government of each province. Unlike s3(a) of the New Zealand Bill of Rights, it contains no

Section 3(a) of the Bill of Rights states that the provisions of the legislation apply to acts done by the judicial branch of the government, that is the courts.

Because “the exposition of the common law is a paradigmatically judicial act”, the common law is then a “conscious and deliberate act of the judicial branch of the government of New Zealand”.²⁷ As such, the entire corpus of the common law is caught by s3(a) of the Bill of Rights.²⁸

Although it has not been finally determined, I submit that the provisions of the Bill of Rights Act apply to the acts of the judiciary in developing and applying the common law even in cases of private litigation because

ultimately it is the public element of the judicial function which makes all common law litigation subject to the Bill of Rights, not the public or private identity of the parties to the litigation.²⁹

Therefore, a decision neglecting to give full weight to Bill of Rights considerations is itself in violation of the Act.

mention of the judiciary. New Zealand’s Bill of Rights explicitly states that acts of the judiciary are caught by its provisions. Further, comparing the approach taken in the United States and Irish jurisdictions, it was recognised that even in the absence of a provision similar to s3 the courts are accepted to be part of the government of the state. Case law from these jurisdictions illustrate an explicit acceptance that application of the common law in private litigation is a governmental function. (Approach taken by Butler, above n24.) “The New Zealand Bill of Rights and private common law litigation” [1991] NZLJ 261).

²⁷ Butler, above n24, 261.

²⁸ Butler, above n24, 261.

²⁹ Butler, above n24, 263.

IV *FREEDOM OF EXPRESSION AND THE DEVELOPMENT OF A TORT OF PRIVACY IN NEW ZEALAND*

A *The Status of Privacy in New Zealand Prior to P v D*

Privacy and people's right to it has been protected by New Zealand's obligations at international law since 1978³⁰ but it is not specifically protected by the New Zealand Bill of Rights. However, the Bill of Rights does, in its Long Title, affirm its commitment to its international obligations as contained in the ICCPR. Article 17 of the ICCPR states

- Article 17** (1) No one shall be subjected to arbitrary or unlawful interference with his *privacy*,³¹ family, home or correspondence nor to unlawful attacks on his honour and reputation;
- (2) Everyone has the right to the protection of the law against such interference or attacks.

In Australia (where there is no independent right to privacy) Kirby P has considered privacy interests to be relevant where there are ambiguities in the law by virtue of Australia's ratification of the ICCPR and Article 17 within it.³² Such an approach is consistent with New Zealand's position on privacy and is equally applicable here.

The New Zealand courts have also recognised a privacy interest in s21 of the Bill of Rights, (the right to be secure against unreasonable search and seizure), which has been said to "reflect an amalgam of values: property, personal freedom, *privacy* and dignity."³³ However, this is more akin to a property right and does not protect privacy invasions arising from the unwanted public disclosure of private facts. Section

³⁰ New Zealand ratified the ICCPR (Article 17 of which protects privacy) in 1978.

³¹ Emphasis added.

³² *Carrol v Attorney-General for NSW* (October 1993) unreported, NSW Supreme Court, 21.

28 of the Bill of Rights means that the partial incorporation of a right in the Act does not destroy any wider ambit that a right might otherwise have. This allows for the existence of the latter type of privacy right in other legislation or common law.

However, it has been absent from New Zealand common law until recently, which is in line with other Commonwealth jurisdictions, most notably England³⁴ and Australia³⁵. Other common law causes of action³⁶ have gone some way towards protecting privacy interests but are unable to protect specific privacy invasions, for example the publication of private, true facts.³⁷

The legislature has implemented limited protectional provisions for example, s4 of the Broadcasting Act 1989 which states

4. Responsibility of broadcasters for programme standards - (1)

Every broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with -

³³ *R v A* [1994] 1 NZLR 429, 433 per Richardson J (emphasis added).

³⁴ "This case highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens" *Kaye v Roberston* (1990) IPR 147, 154 per Lord Justice Bingham. There is still currently no common law right to privacy in England, but this may soon change because England has incorporated its international obligations under the European Convention on Human Rights (Article 8 protecting respect for private life) into the Human Rights Act 1998 coming into effect in October 2000.

³⁵ *Australian Consolidated Press Ltd v Ettingshausen* (1991) 23 NSWLR 443 in which a rugby league player brought an action in defamation for the publication of a photo of him naked in a shower. No privacy action was pursued but Kirby P expressed the view that no such action existed in Australia.

³⁶ For example: *Trespass TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720; *Lincoln Hunt v Willesee* (1986) 4 NSWLR 457. Breach of Confidence *Attorney-General (UK) v Guardian Newspapers Ltd* [1988] 1 NZLR 129 (CA); *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804; [1995] 4 All ER 473. Intentional Infliction of Emotional Distress *Stephenson v Basham* [1992] NZLR 225; *Tucker v News Media Ownership* [1986] 2 NZLR 716.

³⁷ Defamation protects unwanted disclosure of facts about a person which will effect the reputation of that person, but truth is an absolute defence to a defamation action in New Zealand, so if the facts are true they are likely to be published as the law stands in New Zealand.

(c) The privacy of the individual; ...

The Broadcasting Standards Authority (BSA) provides guidelines to broadcasters in the form of seven privacy principles which have been affirmed, on review, by the High Court. While this provision pertains only to broadcasting, it will have implications for print media as BSA decisions will become relevant in the evolution of the privacy tort³⁸. For example, a decision of the authority was referred to in the *Bradley* case, and Eichelbaum CJ in the High Court approved the authority's approach³⁹. In *P v D* the latter case assisted in Nicholson J's assessment of the status and ambit of the privacy tort as it existed in New Zealand. The print media, through the Press Council, have strengthened its own procedures to go some way towards meeting requirements of the Privacy Act which illustrates a general awareness of privacy issues.

A more specific piece of privacy legislation is the Privacy Act 1993. The Act applies to personal information⁴⁰ and covers both public and private bodies. However, the Act does not apply to the media in relation to gathering, preparing, and disseminating news, observations on news, or current affairs⁴¹. This distinction was argued for by the Privacy Commissioner who recognised that the media could not function without it.⁴² It has been suggested that the Privacy Act has no impact on the media at all⁴³ and this appears to be the courts' view also.⁴⁴

³⁸ John Burrows and Ursula Cheer *Media Law in New Zealand* (4ed, Oxford University Press, Auckland, 1999) 178.

³⁹ *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720; (1995) 1 HRNZ 558, on appeal from *Mrs S* BSA 1/94.

⁴⁰ "Personal Information" is information about any live person who is identifiable - *L v N* Decision 11/97.

⁴¹ Privacy Act 1993, s2 - "Agency" and "News activity".

⁴² Burrows and Cheer, above n38, 189.

⁴³ Burrows and Cheer, above n38, 190.

⁴⁴ *C v TV3 Network Services Ltd* BSA Decision 39-40/98

Over a period of around fifteen years the New Zealand Courts have been developing and considering the existence and scope of a privacy tort. Full judicial consideration and analysis has been slow probably because previous cases raising privacy issues have been interlocutory and because claims based on the tort are being settled out of court.⁴⁵ Also, probably because they have involved the pleading of multiple causes of action⁴⁶.

B Judicial Preference for Established Torts

Prior to *P v D* the Courts noticeably preferred providing a remedy pursuant to a pre-existing cause of action (where possible), rather than demonstrate a firm commitment to a tort of privacy by finding on the basis of it.⁴⁷ As a result, cases raising privacy issues involve multiple alternative causes of action in order to increase the likelihood of success.

In *P v D* the plaintiff also pleaded breach of confidence. This tort is well established in New Zealand common law.⁴⁸ In his analysis of the tort Nicholson J adopted the three-pronged approach stated by Megarry J (as he then was) in *Coco v AN Clark (Engineers) Ltd*.⁴⁹ He took the traditional approach to the relationship

⁴⁵ Burrows and Cheer, above n38, 178.

⁴⁶ For example in *Tucker v News Media Ownership* [1986] 2 NZLR 716 the plaintiff pleaded two causes of action. The first was based on the tort of intentional infliction of emotional distress, and the second was based on the tort of invasion of privacy as it was constituted in the USA at that time. In *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 the plaintiff pleaded five causes of action namely Intentional Infliction of Emotional Distress, Privacy, Malicious Falsehood, Trespass and Defamation.

⁴⁷ *A v Television New Zealand Ltd* (25 March 1996) unreported, High Court, Wellington Registry, CP 55/96 where in a similar factual situation as in *Tucker v News Media Ownership* [1986] 2 NZLR 716 Doogue J issued an injunction preventing the publication of the plaintiff's name on the basis of "overall justice".

⁴⁸ *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515.

⁴⁹ That first, the information itself must have the necessary quality of confidence about it. Second, that the information be imparted in circumstances importing an obligation of confidence. Third, that there is an unauthorised use of the information to the detriment of the party who originally communicated it *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47.

requirement, considering it to be the essence of the cause of action, when judicial trends indicate a relaxation of this requirement. It has been suggested that in appropriate cases where the information is, by its nature, obviously private and confidential it alone may be sufficient even in the absence of a relationship.⁵⁰ Medical information arguably inherently confidential information. While there is no common law privilege covering communications between doctor and patient, New Zealand has adopted a position whereby medical practitioners are accorded a limited statutory privilege.⁵¹ The medical information regarding P's mental well being is arguably analogous to information accorded this privilege. Therefore, it was open to Nicholson J to follow recent trends and allow the injunction on the basis of the tort of breach of confidence. Instead, "P's confidentiality argument failed and the privacy punch connected".⁵²

Finding on the basis of pre-existing torts where possible accords with the courts' express caution in developing and applying a tort of privacy in New Zealand. Nicholson J threw caution to the wind in his obvious willingness to assess the tort's position in New Zealand common law, but, respectfully, did so without full legal analysis.

⁵⁰ Stephen Todd (ed) *The Law of Torts in New Zealand* (2ed, Brookers, Wellington, 1997) 961. For example Lord Goff used the example of an obviously confidential document being blown out an office window onto a street where a passer-by happened upon it; *A-G v Guardian Newspapers Ltd (No2)* [1990] 1 AC 109, 281; [1988] 3 All ER 545, 658-659. This approach was also taken in a later (again English) case in which it was suggested that the disclosure of a photograph of a person engaged in a private act, taken with a telephoto lens, would amount to a breach of confidence; *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, 807; [1995] 4 All ER 473, 476 per Laws J.

⁵¹ Recognised by Beattie J in *McDougall v Henderson* [1976] 1 NZLR 59 referring to Evidence Act 1908 s 8 then in force, now Evidence Amendment Act 1980 s 32.

⁵² Anderson, above n4, 1.

C The Evolution of the New Zealand Tort of Privacy

In *Tucker v News Media Ownership Ltd*, the first case in which privacy was considered by the New Zealand courts, McGechan J agreed with statements made by Jeffries J in earlier injunction proceedings, that "...the right to privacy ... may provide the plaintiff with a valid cause of action in this country".⁵³ However, he makes it clear that his support is given with "caution and hesitation"⁵⁴ warning that privacy may in fact not amount to an "independent right capable of protection by tort action, it is certainly a factor which can be taken into account where appropriate by a Court exercising such a judicial duty as determination of overall justice"⁵⁵.

In the other reported New Zealand case, *Bradley v Wingnut Films*, Gallen J was prepared to accept "that such a cause of action forms part of the law of this country" which is particularly significant given the proceedings in the case were final and not interlocutory. However, the case was not determined on the basis of the tort and Gallen J reiterated "its extent should be regarded with caution".⁵⁶

Two unreported interlocutory proceedings are also relevant to the evolutionary process of the tort. Following an acknowledgment of the comments of McGechan J in the *Tucker* case supporting the introduction of a privacy tort, Holland J expressed his view that public interest may in some cases exceed that of privacy of the individual.⁵⁷ Two years later, Williams J granted an interim injunction on the basis of the *Tucker*

⁵³ *Tucker v News Media Ownership* [1986] 2 NZLR 716, 732.

⁵⁴ *Tucker v News Media Ownership* above n53, 733.

⁵⁵ *Tucker v News Media Ownership* above n53, 735.

⁵⁶ *Bradley v Wingnut Films* [1993] 1 NZLR 415, 423.

⁵⁷ *Morgan v Television New Zealand Limited* (1 March 1990) unreported, High Court, Christchurch Registry, CP 67/90, 6.

case, preserving the position where application for name suppression is likely under the Criminal Justice Act 1985.⁵⁸

D The Constitution of the New Zealand Tort of Privacy

P v D has finally confirmed privacy's existence and determined, to a degree, the ambit of the tort. Nicholson J accepted the elements propounded by the American jurist William L Prosser, and applied by the American courts, as pertaining to the public disclosure of private facts.

First, there must be a public disclosure of facts. Second, the facts disclosed must be private facts. And third, the matter made public must be one which would be offensive and objectionable to a reasonable person of ordinary sensibilities.⁵⁹

There is a degree of ambiguity as to the requirements of this third element. On its construction it is difficult to determine whether the facts themselves must be 'offensive and objectionable' or whether it is the disclosure of those facts which must be of that nature. Prosser himself associated the requirement with a "mores" test, by which liability follows from "publicity of those things which the customs and ordinary views of the community will not tolerate".⁶⁰ This suggests the facts themselves need to be offensive. An assessment of the application of the requirement in American jurisprudence does little to resolve the ambiguity. In *Barber v Time*⁶¹ the Supreme Court of Missouri suggested liability accrues where the limits of decency are exceeded.

⁵⁸ *C v Wilson and Horton Ltd* (27 May 1992) unreported, High Court, Auckland Registry, SP 765/92.

⁵⁹ William L Prosser "Privacy" (1960) 48 Cal L Rev 383.

⁶⁰ Prosser, above n59, 397.

⁶¹ *Barber v Time Inc* (1942) 159 SW 2d 291.

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These limits are exceeded where intimate details of the life of one who has never manifested a desire to have publicity are exposed to the public ...

This suggests liability where publication is offensive. However, comments in *Sidis v F-R Pub. Corporation*⁶³ suggest that both the nature of the facts and publication must be offensive.⁶⁴

Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency.

In New Zealand, privacy principles based on the American tort of privacy are applied by the Broadcasting Standards Authority and have had judicial endorsement.⁶⁵ They require the facts themselves to be highly offensive and objectionable to a reasonable person.

With no discussion of the ambiguity Nicholson J applies the element on the basis that *publication* of the information is offensive in the circumstances, satisfying the tort and finding there to be a breach of privacy.

E The Role of Public Interest in the Tort of Privacy

Nicholson J established the New Zealand tort of privacy to encompass the three factors discussed above as propounded by Prosser, and adopted by Gallen J in the *Bradley* case, but added a fourth factor involving an assessment of the "nature and extent of legitimate public interest in having the information disclosed".⁶⁶

⁶² *Barber v Time Inc* above n61, 293

⁶³ *Sidis v F-R Pub. Corporation* (1940) 113 F 2d 806.

⁶⁴ *Sidis v F-R Pub. Corporation*, above n63, 809.

⁶⁵ *TV3 Network Services Ltd v Broadcasting Standards Authority* above n39.

⁶⁶ Much like truth is a defence to a defamation action in New Zealand.

The public interest is often an integral consideration when balancing the enforcement of tort law with censorship issues.⁶⁷ It is established that “there is a wide difference between what is interesting to the public and what is in the public interest to make known”.⁶⁸ This distinction is alluded to by Nicholson through his language, accepting only “legitimate”⁶⁹ public interest as being worthy of overriding other competing values. It has also been accepted that “newsworthiness” does not equate with ‘public interest’ as the media are “vulnerable to the error of confusing the public interest with their own interest”.⁷⁰ Others hold the alternative view that the press has a legitimate role in determining what the public interest is⁷¹, and that it should definitely not be defined by the courts. The courts are certainly not strangers to determining whether despite being information obtained by unlawful behaviour it should be published the courts must weigh “the public interest for and against publication.”⁷²

Due to the cursory assessment of the public interest in *P v D* it is unclear exactly what type of enquiry Nicholson J envisaged when incorporating the factor into the requirements of the tort.

⁶⁷ For example, Breach of Confidence (*Lion Laboratories Ltd v Evans* [1985] 1 QB 526 (CA); Defamation (*Australian Consolidated Press Ltd v Ettingshausen* (1991) 23 NSWLR 443); Trespass (*TV3 Network Services v Broadcasting Standards Authority* above n39).

⁶⁸ *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1168 per Lord Wilberforce.

⁶⁹ *P v D* above n7.

⁷⁰ *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892, 898 per Sir John Donaldson MR.

⁷¹ The view of Grant Huscroft, Constitutional and Human Rights law specialist and Senior Law Lecturer at Auckland University expressed in Anderson, above n4, 7; Also, a radio authority has defined the public interest issue in this way, “News is about things that have some significance to listeners, so if a thing is truly private, it’s not news” in Al Morrison “Privacy: What About Public Good?” in Newspaper Publishers Association and Commonwealth Press Union *Privacy. A Need for Balance*. (Newspaper Publishers Association of New Zealand Inc (NPA) and Commonwealth Press Union (New Zealand Section) (CPU), 1997) 25.

⁷² *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1202 per Lord Fraser.

In the *Tucker* case issues of public interest were raised, but as an element of the process in which detriment to the plaintiff was balanced against freedom of expression. In *Morgan v Television New Zealand*⁷³ the court described the public interest as a "limitation"⁷⁴ on a right to privacy. In *TV3 Network Services Ltd v Fahey*⁷⁵ the Court of Appeal considered the public interest an integral aspect of the balancing of competing values, notably freedom of expression and privacy. This was also the approach taken by Robertson J in *Beckett v TV3 Network Services Ltd*⁷⁶ when weighing the same competing values.

This type of balancing exercise by the courts, has been coloured by rules governing the prior restraint of media which have evolved in the common law over a hundred years. Nicholson J ignored this tradition, resulting in a judgment which "cuts across the established balance between freedom of expression and protection of reputation".⁷⁷

F Public Interest and the Prior Restraint of Freedom of Expression

For a hundred years courts commonwealth jurisdictions have applied common law rules governing prior restraint of the media. The rules reflect the recognition by the courts of the importance of freedom of expression and also illustrate the caution exercised in providing a remedy censoring issues of legitimate public interest. These rules were expressly anticipated by the drafters of the Act as limits on freedom of

⁷³ *Morgan v Television New Zealand Limited* above n57.

⁷⁴ *Morgan v Television New Zealand Limited* above n57, 6 per Holland J.

⁷⁵ *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129

⁷⁶ *Beckett v TV3 Network Services Ltd* (18 April 2000) unreported, High Court, Whangarei Registry, CP 10/00.

⁷⁷ Akel, above n3, 266.

expression⁷⁸ and were applied by the Court of Appeal recently when balancing competing rights, one being freedom of expression.⁷⁹

As long ago as 1891 the English Court of Appeal warned that it was necessary for the court to exhibit

exceptional caution in exercising the jurisdiction to interfere by injunction .. leaving free speech unfettered ..⁸⁰

This approach is arguably more applicable today as a result of the statutory guarantee of free expression in the Bill of Rights.

The New Zealand Court of Appeal applied this approach as recently as 1998 in a judgment in which Richardson P stated that “any prior restraint of free expression requires passing a much higher threshold than the arguable case standard”,⁸¹ adding that “.. it is a jurisdiction exercised only for clear and compelling reasons.”⁸²

In fact, the High Court has followed such principles in a judgment subsequent to *P v D* stating⁸³

The Court for good reasons of policy and principle have been most cautious in all cases which seek prior restraint. ... high standards ... must necessarily be demanded, before the Court will act as a censor on legitimate public debate and interest about an issue of serious concern.

⁷⁸ “The freedom .. is obviously subject to important limits imposed by the law .. the various means of limitation [include] censorship in advance, .. injunctive relief in advance ... Those laws anticipate a threat to some other interest (such as in personal reputation), and control speech for that reason.” Hon. Geoffrey Palmer (Minister of Justice) *A Bill of Rights for New Zealand. A White Paper*. (P D Hasselberg Government Printer, Wellington 1985)79-80.

⁷⁹ *TV3 Network Services Ltd v Fahey* above n75.

⁸⁰ *Bonnard v Perryman* [1891] 2 Ch 269, 284 (CA?).

⁸¹ *TV3 Network Services Ltd v Fahey* above n75, 132.

⁸² *TV3 Network Services Ltd v Fahey* above n75, 136.

⁸³ *Beckett v TV3 Network Service Ltd* above n76, 9 per Robertson J.

Nicholson J ignored this common law tradition without justification, again failing to develop the tort and its remedies in light of the specific New Zealand common law context, itself developed to accommodate the fundamental right to freedom of expression.

G Public Interest and Protection of Reputation in Defamation Proceedings

Because a privacy claim (alleging public disclosure of private facts) will invariably be brought in order to protect a subject's reputation in society it is relevant to compare the courts' approach to public interest considerations in defamation proceedings, an action brought to protect the same interests.

New Zealand has adopted a specific position with regards to defending injunction proceedings aimed at restraining the publication of facts arising from defamation proceedings. If a proposition is true, then it is not subject to any requirement that it be in the public interest as well.⁸⁴ This position recognises that "a person is entitled only to the reputation his or her behaviour deserves",⁸⁵ and is an approach favoured by the Court of Appeal because of its apparent consistency with s14 of the Bill of Rights Act.⁸⁶ It would be anomalous to require different things of a defendant in a privacy action where that defendant is also defending the right to publish true facts. An early The Court of Appeal only a year prior to *P v D*, in a judgment delivered by Richardson P, stated⁸⁷

While the question of .. invasion of privacy is analytically a separate issue, it is, in substance, very much bound up with the question of truth.

⁸⁴ *Awa v Independent News Auckland Ltd* [1997] 3 NZLR 590.

⁸⁵ Todd (ed), above n50, 907.

⁸⁶ *Lange v Atkinson* above n25, 436.

⁸⁷ *TV3 Network Services Ltd v Fahey* above n75, 136.

If [the publisher] establishes the truth of what is to be published .. in such circumstances, damages would clearly be an adequate remedy.

Nicholson J did not consider particular aspects of the privacy tort in light of their New Zealand context which reflects a recognition of freedom of expression, favouring a direct adoption of the elements from the American model.

H The American Model - the Status of the Tort and the Impact of Public Interest

Nicholson J's direct adoption of the American model of the tort is questionable, particularly in light of the status of the tort in America today. Unrecognised by Nichols J, the tort itself at the time of implementation was limited by the American constitutional right to free speech. New Zealand has imported the tort "virtually stripped of its free speech defence".⁸⁸ In fact, due to the First Amendment protection of free speech, private litigation brought as a result of the publication of private facts is, today, so limited by free speech concerns that it is almost totally unenforceable.⁸⁹

While adopting an American constituted tort, Nicholson J did not follow the approach taken by the American courts when applying the public interest factor in *P v D*. In America there is significantly less protection of privacy of public figures. Legislation in some state jurisdictions affording "little protection to the privacy of newsworthy person whether he be such by choice or involuntarily".⁹⁰ A public figure is someone who by their accomplishments⁹¹, fame or profession have given the public a

⁸⁸ Ireland, above n2, 9.

⁸⁹ see *Florida Star v B.J.F* (1989) 491 US 524. Also Diane Zimmerman "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort" (1983) 68 Cornell L Rev 291; and Ireland, above n2, 9.

⁹⁰ *Time Inc v Hill* (1967) 385 US 374, 465.

⁹¹ An example of this situation is *Sidis v F-R Pub. Corporation* above n63, where a famous child prodigy later sought to live as unobtrusively as possible but the court held there was legitimate

legitimate interest in their affairs.⁹² It would seem then that applying a pure American approach, P would not be protected from the publication of personal details as Nicholson J felt he should be.

A Applicability of the Bill of Rights

The American approach was watered down by McGechan J in the *Tucker* case, by deciding not to place “undue weight”⁹³ on the fact that Mr Tucker had put himself in the public eye, because he was a “reluctant debutante”.⁹⁴ But he also recognised the need to examine the extent to which the subject had put him or herself in the public eye warranting “some degree of examination of his personal background and ‘worth’”⁹⁵. He stated that “[I]t may well be that a person loses a right to privacy by presenting himself to the public eye for evaluation”⁹⁶. While quoting substantial paragraphs from the *Tucker* judgment Nicholson J did not discuss this aspect of it and did not justify his deviation from such an approach. It has been contended since the judgment that the subject is a legal professional⁹⁷ and the brief consideration of public interest issues in the judgment has been suggested to look like “the law looking after its own”⁹⁸.

B Application of the Elements of the Test Established in *P v D*

In *P v D*, Nicholson J accepted that being treated in a psychiatric hospital is a private fact. Also, that disclosure of this fact by the media would be a public disclosure. He considered the objective test less obviously satisfied.

Context is most relevant⁹⁹ in this inquiry and despite increased public awareness and understanding of mental illness disabilities, Nicholson J discounts it as

public interest in publishing details of his lifestyle as a hermit.

⁹² Rosemary Tobin “Invasion of Privacy” [2000] NZLJ 216, 217.

⁹³ *Tucker v News Media Ownership* above n53, 735 per McGechan J.

⁹⁴ *Tucker v News Media Ownership* above n53, 735 per McGechan J.

⁹⁵ *Tucker v News Media Ownership* above n53, 735 per McGechan J.

⁹⁶ *Tucker v News Media Ownership* above n53, 735 per McGechan J.

⁹⁷ Anderson, above n4, 1.

⁹⁸ Anderson, above n4, 1.

V **FREEDOM OF EXPRESSION AND THE APPLICATION OF THE TORT OF PRIVACY**

A **Applicability of the Bill of Rights**

Applying common law is, as previously reasoned,⁹⁹ an act of the judicial branch of government pursuant to s3(a) because it is the “judicial function which makes all common law litigation subject to the Bill of Rights”¹⁰⁰ A view reflected in Thomas J’s suggestion that the freedom both “permeates and shapes the substantive law”.¹⁰¹ Further, in *P v D* section 14 was raised as a defence to the proceedings and so should have been given full weight and consideration in applying the tort.

I submit that in applying the newly established tort of privacy, Nicholson J should have had regard to, and interpreted the elements of the tort in light of, the s14 guarantee of freedom of expression.

B **Application of the Elements of the Tort Established in P v D**

In *P v D*, Nicholson J accepted that being treated in a psychiatric hospital is a private fact. Also, that disclosure of this fact by the media would be a public disclosure. He considered the objective test less obviously satisfied.

Context is most relevant¹⁰² in this enquiry and despite increased public awareness and understanding of mental illness disabilities, Nicholson J discounts it as “idealistic”¹⁰³ to think that publication of such details would not be “highly offensive

⁹⁹ See page 7.

¹⁰⁰ Butler, above n24, 261.

¹⁰¹ *Police v O'Connor* above n19, 99.

¹⁰² Burrows and Cheer, above n38, 176.

¹⁰³ *P v D* above n7, 15.

and objectionable to a reasonable person of ordinary sensibilities". He felt that view "did not take into account actual human emotion and the value which people place on having intimate personal information such as their medical treatment kept private".¹⁰⁴ In a previous decision the Court took into account societal and Parliamentary views toward open adoption procedures in deciding that the disclosure of adoptive parents details to a natural mother did not constitute 'highly offensive' in terms of the tort.¹⁰⁵ At the time of the *P v D* judgment and before, a major Health Funding Authority television advertising campaign alleviated the stigma of suffering from mental illness. A group of high profile figures including politicians, writers, athletes and academics publicly declared they had suffered from a mental illness. The elements of the privacy tort requires a pure objective consideration of the reaction of an ordinary person of ordinary sensibilities (ie. someone who had never suffered a mental illness). However, Nicholson J imports his own subjective element into the test, requiring that ordinary person to be placed in the same position as the plaintiff. Even if this were correct, the high profile subjects of the Health Funding Authority advertising campaign indicate that a person in the same position as P would not perhaps be highly offended by publication of previous mental illness.

Nicholson J proceeds solely on the basis of his acceptance of the contents of P's affidavit in which P emotively conveys the stress and harm which would be inflicted on his family and the devastating effects which would impact on P, should publication occur. He determined publication to be highly offensive without assessing specific contextual factors which were relevant to the facts of the case before him.

¹⁰⁴ *P v D* above n7, 15.

¹⁰⁵ *X v Attorney-General* [1994] NZFLR 433.

C *Applying the Public Interest Element*

Application of the public interest element requires a balancing of the public interest associated with both of the conflicting rights. In *P v D* this equates to a balancing of the public interest in privacy with the public interest in freedom of expression.

It is first necessary to determine the status of each right so as to provide a starting point for the balancing exercise.

D *Privacy - An Existing Right at Enactment of the Bill of Rights?*

Section 28 of the Bill of Rights Act governs the interaction between rights contained in the Act itself and those which exist (and did so prior to its enactment) independent of it.

Section 28 states

28. Other rights and freedoms not affected - An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

Its meaning is not contentious. It expresses that the Act is not an exhaustive list of the fundamental rights and freedoms of New Zealanders.¹⁰⁶ It is particularly pertinent to situations where rights are in conflict and helps to determine the nature of the analysis which will resolve that conflict.

¹⁰⁶

Palmer, above n78, para 10.179, 112.

Where rights are in conflict the courts perform a balancing exercise whereby the importance of each right in light of the other, and of surrounding circumstances. If s28 applies the balancing begins from a point whereby each right is accorded equal status. Where s28 does not apply the right contained in the Bill of Rights will be accorded greater importance in the balancing exercise than the one which does not.

There is no indication in the judgment that Nicholson J turned his mind to s28, even though it has been a legitimate consideration in previous cases (even where not fully examined).¹⁰⁷ The issues raised in *P v D* required Nicholson J to examine the applicability of this section and its implications on the balancing of privacy with the Bill of Rights guarantee to freedom of expression.

E A section 28 Enquiry to Determine the Status of Privacy when Balancing Competing Values

In assessing the potential implications of section 28 it is necessary to determine whether privacy was an existing right at the time of the enactment of the Bill of Rights in 1990.

As has been established, prior to 1990 there was no established common law right of privacy. No cases had been finally decided on that basis and judicial dicta expressed caution and as to its applicability and uncertainty as to its true status in New Zealand as late as 1986.¹⁰⁸ In 1993 the Court held the tort formed part of the law of New Zealand¹⁰⁹ but the case was not finally determined on that basis and there was

¹⁰⁷ For example, *Solicitor-General v Radio NZ* [1994] 1 NZLR 48, 59; and *Police v O'Connor* [1992] 1 NZLR 87, 98.

¹⁰⁸ McGechan J expressed his uncertainty when he stated "Whether or not [privacy] is an independent right capable of protection by tort action, it is .. a factor which can be taken into account where appropriate .." *Tucker v News Media Ownership Ltd* above n53, 735.

¹⁰⁹ *Bradley v Wingnut Films* [1993] 1 NZLR 415, 423.

lingering uncertainty as a result, until *P v D*. This is recognised in the White Paper Commentary of the Bill of Rights which states privacy to be¹¹⁰ a right that is not by any means fully recognised ..., which is in the course of development, and whose boundaries would be uncertain and contentious.

The Privacy Act was not enacted until 1993 and specifically protects the media, and the Broadcasting Act 1989 while containing a protectional provision, could not be considered as establishing a corresponding legal right.

New Zealand ratified the ICCPR in 1978, Article 17 of which, as previously stated,¹¹¹ protects citizens from arbitrary or unlawful interference with their privacy and provides for international law protection against such interference. While of some legal substance domestically in that the legislature, following ratification, has a duty to legislate consistently with its international obligations and the ICCPR provision should inform the courts in their development and application of the common law, it is not capable of creating a right on a domestic level until incorporated into domestic legislation. Even the affirmation in the Long Title of the Bill of Rights does not create a legally enforceable right in domestic courts.

Therefore, it is arguable that section 28 does not apply and therefore does not protect privacy from abrogation by the Bill of Rights guarantee. On this approach, privacy is accorded a lower status than freedom of expression when balancing the competing values.

¹¹⁰ Palmer, above n78, para 10.144, 104.

¹¹¹ Refer page 10.

While it is purely speculative how the courts will interpret such an analysis, it is conclusive that Nicholson J erred in not having regard to the section in the judgment of *P v D*.

F Privacy as a Right Subsequent to P v D - A Further Enquiry as to Status

By confirming that privacy is a tortious action, Nicholson J has finally determined privacy to be a legal right in New Zealand.

It remains, however, a common law right and beyond the potential for a s28 enquiry to determine it as a subordinate right, it is arguably subservient pursuant to the doctrine of Parliamentary Supremacy. While inconsistent legislation is protected by s4 of the Bill of Rights, parliamentary supremacy, the "basic principle of the New Zealand constitutional order, requires that in the case of conflict between a statutory provision and a rule of the common law, the former should prevail."¹¹² This would mean that freedom of expression would automatically trump a tortiously constituted privacy right, prevailing, unfettered, in circumstances such as *P v D*. Again, this is merely speculation, but is an arguable position open to Nicholson J (and future courts) in assessing the starting point of the balancing exercise.

G Balancing Competing Rights - the New Zealand Context

New Zealand courts have considered the relationship between privacy and freedom of expression and have stated¹¹³

... there must, of course, be due regard for freedom of speech. However, freedom [of expression] is not untrammelled. It is to be balanced against other rights.

¹¹² Butler, above n24, 262.

This balancing exercise has been recently comprehensively formulated by the Court of Appeal in *TV3 Network Services v Fahey*.¹¹⁴ They stated¹¹⁵

The court is required to assess the context and circumstances [of the case], any special public interest considerations, .. and the adequacy of damages as an available remedy for any wrong proved at trial.

This approach was applied where the conflicting rights were both contained in the Bill of Rights, but, while prima facie distinguishable from *P v D*, the approach taken by the Court of Appeal has obvious relevance, if only as a point of departure. However, Nicholson J did not mention the judgment.

The Court of Appeal had the opportunity two months prior to the judgment of *P v D* to formulate a step-by-step approach to the assessment of the extent to which, in that case statutory limits, can be allowed to encroach on rights contained in the Bill of Rights.

For direct guidance regarding the balancing of common law and constitutional rights Nicholson J could have examined overseas jurisprudence. In *Shelley v Kraemar*¹¹⁶ the American Supreme Court concluded that a Court could not enforce a restrictive covenant which otherwise met the requirements of the common law, if it was racially motivated, and thus violating the equal protection of the law clause of the 14th Amendment. In Ireland the Supreme Court have often held that common law rules which violate the guarantees of the Constitution are void and of no force and effect. The approach of both these jurisdictions illustrates the fundamental principle

¹¹³ *Solicitor-General v Wellington Newspapers Ltd* [1995] 1 NZLR 45, 57 per McGechan J.

¹¹⁴ *TV3 Network Services Ltd v Fahey* above n75.

¹¹⁵ *TV3 Network Services Ltd v Fahey* above n75, 135.

¹¹⁶ *Shelley v Kraemar* (1948) 334 US 1.

that the common law must give way to fundamental rights enshrined in a higher legal norm.¹¹⁷

An obvious, and initially highly significant, difference between these two jurisdictions and our own is that their Constitutions are entrenched and our Bill of Rights is not. It is arguable, therefore, that the New Zealand position is different as recognised by Gault J in *Simpson v Attorney-General (Baigent's Case)* that¹¹⁸

In the absence of entrenched supreme law there is no imperative to accord greater status to the rights affirmed in the [Bill of Rights] Act.

However, the approach in America and Ireland does accord with the doctrine of Parliamentary Supremacy, where common law must give way to the higher legal norm, legislation.

H A Moonen Analysis

Despite its "central importance in a democratic state" s14 is "obviously subject to important limits imposed by the law".¹¹⁹ This is the approach also preferred by the New Zealand courts.¹²⁰

Only 2 months before *P v D* the New Zealand Court of Appeal in a judgment¹²¹ delivered by Tipping J had established a comprehensive, step-by-step approach to

¹¹⁷ Butler, above n24, 264.

¹¹⁸ *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, 712 per Gault J (dissent).

¹¹⁹ Palmer, above n78, 79.

¹²⁰ "... there must of course be due regard for freedom of speech. However, freedom [of expression] ... is not untrammelled. It is to be balanced against other rights." *Solicitor-General v Wellington Newspapers Ltd* above n113, 57 per McGechan J; "I regard freedom of speech as important ... but by no means the decisive element." *Tucker v News Media Ownership Ltd* above n53, 735 per McGechan J; "This is not a simple case where the right of freedom of expression and speech is clearly paramount" *A v TVNZ* above n47, 5 per Doogue J.

¹²¹ *Moonen v Film and Literature Board of Review* above n13.

evaluating the reasonableness of an encroachment on a right contained in the Bill of Rights.¹²² While *Moonen v Film and Literature Board of Review* was concerned with a statutorily constituted limit, the Court of Appeal's approach is equally applicable to any form of encroachment, arguably including a tort.¹²³

Any tort of privacy is, after all, an abrogation of the right to freedom of expression. ... the extent of the abrogation must in terms of s5 of the Bill of Rights constitute only such reasonable limitation on freedom of expression as can be demonstrably justified in a free and democratic society.

Nicholson J, again, did not mention the judgment, let alone complete the necessary legal analysis. I submit that the Judge was required to complete the appropriate legal analysis or at the very least justify his decision not to do so.

Nicholson J's outcome is inadvertently in line with the type of outcome probably envisaged by the Court of Appeal in the *Moonen* case, in light of the minimal impairment requirement, in that he prevents only publication of facts about the subject's psychiatric treatment and mental well-being. He leaves open the possibility of publication of other facts about the subject and also leaves open the possibility for the publisher to apply to the court for revocation or amendment of the injunction order in the event of a "significant change of circumstances"¹²⁴.

The balancing of two conflicting rights is ultimately a value judgment made by the Court "on behalf of the society which it serves and after considering all the issues

¹²² In developing the test the Court of Appeal were undoubtedly (though not expressly) influenced by the test expounded by the Supreme Court of Canada in *Regina v Oakes* (1986) 24 CCC (3d) 321; (1986) 26 DLR (4th) 200.

¹²³ Tobin, above n92, 218.

¹²⁴ *P v D* above n7, 18.

which may have a bearing on the individual case.”¹²⁵ Whether the outcome reached by Nicholson J was right or wrong is arguable either way, however, it is certain that his approach was cursory and inexplicably vague.

VI CONCLUSION

The status of the tort of privacy in New Zealand was uncertain at the time of the *P v D* judgment and so Nicholson J has effectively created it and decided its ambit. He did so disposing of the Bill of Rights in a single sentence.

As the first tort action developed in the glare of the Bill of Rights since its enactment there is little guidance as to the extent of the Act's influence in that process. However, section 3(a) of the Bill of rights, applying the Bill of Rights to acts of the judiciary, provides that the common law should be developed and applied in light of its provisions. The defendant raised a Bill of Rights defence, immediately pointing to the Act as worthy of full judicial consideration in the determination of the case. Nicholson J directly imported the American model of the tort of privacy, which itself possesses a free speech defence. In his haste to determine privacy as a common law right in New Zealand, he overlooked the obvious import of section 14. I submit that he erred in not doing so.

The judgment overall is significantly lacking in legal analysis. Nicholson J failed to consider the tort's decaying status in America and assess the ability of one of its elements, and he failed to apply the public interest element in light of the approach taken by the American courts. He neglects to assess the tort's impact on long established common law rules of prior restraint, and fails to examine anomalies in the constitution of the tort in comparison with the requirements of a defamation action.

¹²⁵ *Moonen v Film and Literature Board of Review* above n12, 11.

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He applied the tort without considering the impact of section 28 of the Bill of Rights, the implications of the doctrine of Parliamentary Supremacy on the status of a right to privacy, and recent Court of Appeal judgments providing comprehensive guidance as to the balancing of competing rights.

While the outcome reached in *P v D* is not obviously wrong, the inadequate legal analysis undertaken makes the judgment of Nicholson J automatically questionable.

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- A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109; [1990] 3 All ER 543
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