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RIGHTS IN THE BALANCE:

THE RIGHT TO PRIVACY VERSUS FREEDOM OF THE PRESS

A REPORT ON THE STATUS OF PRIVACY LAWS IN NEW ZEALAND

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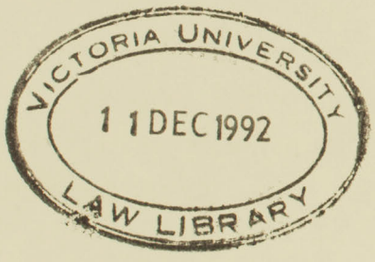

INTRODUCTION

The New Zealand news media has been slower than its counterparts overseas in taking up the indepth reporting style known as investigative journalism. In recent years however the trend has picked up, particularly in television with programmes such as *Holmes* and *Fair Go*. The tabloid press is also ever diligent in its quest to produce the most sensational and scandalous scoop of the week.

Alongside the rise of investigative and tabloid journalism has grown increasing concern that the media are employing methods of investigation, and publishing information, which infringes upon the privacy of individuals to an unacceptable extent. Tabloid television shows and newspapers are not the only targets of such criticism. More mainstream newsgatherers are also accused of going where they are uninvited and unwanted, and collecting material to which they are not entitled. A recent example is coverage of the funerals of the many highly-publicised murder victims that has occurred this year. Many people feel that such vivid pictures are a distasteful intrusion upon the mourner's grief.

It is of course not only in this country, and not only recently, that such concerns have been aroused; every country which boasts a "free" press acknowledges the problem.

The reason for such universal recognition of the problem is that it represents a fundamental constitutional dilemma in democratic societies. Whenever the media wishes to obtain or publish information which the individual it concerns is unwilling to have known, two aspects of the public interest are in conflict; the public interest in maintaining an independent agent of information dissemination, and the public interest in protecting the privacy of the individual. These interests are variously termed freedoms, or rights, but by whatever name there is a general consensus that both are valuable, desirable, and even essential parts of the social framework. Where interests, rights, or freedoms are concerned there are no absolutes - sometimes they will come into direct opposition, and either one must give way or a compromise be reached. When a conflict arises, the difficulty

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lies in achieving an appropriate balance that satisfies the public interest in protecting both.

To deal with conflicts between the media and individuals, various jurisdictions have adopted various solutions. The United States for instance has developed a common law and statutory right to privacy which allows complainants a direct cause of action in breach of privacy.[1] The right has limits beyond which it may not infringe upon freedom of speech which is, of course, Constitutional. At the other extreme, English law does not recognise a right to privacy capable of protection by the common law.[2]

In New Zealand, the Court of Appeal has recognised a need for legal protection of personal privacy[3], and several statutes provide for it within their own context.[4] However, the prevalent attitude appears to be that, if it exists at all, a right to privacy is barely in its infancy in this country. Given this view, it is timely to update its status. Since the Court of Appeal lent its tentative support there have been several cases in which a media defendant has faced a privacy claim,[5] most as yet unreported. In addition, statutory bodies such as the Broadcasting Standards Authority[6] have dealt with privacy claims within their jurisdictions, adding to the growing jurisprudence in the area. It may be that the law is not so underdeveloped. If that is the case it is timely also to assess the quality of its development towards the achievement of the delicate balance of public interests to which law in this area must aspire. The aim of this paper is to assess both the level and quality of development of privacy law in New Zealand. The first step towards that end is an examination of the advanced tort of privacy in the United States, as a model by which to assess New Zealand's achievements. A discussion of a recent United Kingdom case follows, as an example of the

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[1]Below p3.

[2]Below p6.

[3]*Tucker v News Media Ownership Ltd* [1986]2 NZLR 716.

[4]For example the Official Information Act 1982, the Human Rights Commission Act 1977, the Crimes Act 1961, and most importantly for the purposes of this paper the Broadcasting Act 1989.

[5]Below p12.

[6]The Human Rights Commission also has powers of investigation and recommendation regarding matters which may infringe the privacy of the individual.

unsatisfactory consequences which may follow the non-recognition of privacy rights. New Zealand case law in the area is then reviewed, up to and including the very recent case of *Bradley v Wingnut Films Limited*.[7] The approach taken by the Broadcasting Standards Authority in its first case regarding infringement of privacy is also examined, as it deals directly with privacy issues in relation to the media, and provides a useful contrast to the courts' approach in many of the cases. There then follows a brief examination of a line of cases which illustrate one way in which Australian courts have dealt with the privacy problem. They involve situations where media defendants have trespassed in the course of obtaining information, and are widely quoted in New Zealand judgments, and as such are highly relevant to the present inquiry. Finally, an assessment is made of the current status of privacy law in New Zealand, including a graphic representation of the stage it has reached in comparison to the American model.

THE USA - FAIT ACCOMPLI

American privacy law is the best established and developed in the common law world. As such it provides a solid model against which to assess New Zealand developments. Commonwealth courts have traditionally not looked to American law for authority, but in the field of privacy it must be treated as a primary source.

Interestingly, the American right to privacy originated in academic writing rather than judicial or legislative activism. In 1890 the Harvard Law Review published an article entitled "The Right to Privacy" by the esteemed judge Louis D Brandeis and lawyer Samuel D Warren.[8] The authors appealed for the recognition of an independent tort of privacy, which they claimed was the true principle underlying many cited cases in which relief had been granted on some other ground - defamation, breach of confidence, implied contract, or breach of a property right. They

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[7]Unreported, 28 July 1992, High Court Wellington Registry CP.248/92.
[8]Warren & Brandeis "The Right to Privacy" (1890)4 HLR 193.

argued that the time was ripe for reform; the common law had reached a stage where the mental and emotional as well as physical spheres were protected, and property rights encompassed intangible as well as tangible possessions. It was therefore within the bounds of authority to extend protection to "the sacred precincts of private and domestic life". The reason they believed such protection necessary was the degeneration of the press into idle gossip-mongering, which caused mental pain and distress to its subjects and was contrary to the public interest.

Within the year the courts were openly discussing the existence of the right, but it was denied as often as it was accepted. However, in the 1930's the First Restatement of Torts approved a cause of action for "unreasonable and serious" interference with privacy, and the tide began to turn strongly in favour of recognition. Today, rights of privacy are recognised in almost every State, albeit only by statute in some.[9]

The plural "rights" is used advisedly. Prosser and Keeton, in their *Law of Torts*, set out the four distinct torts which are actionable in the United States for breach of privacy. There is no single tort of privacy as such. Two of the four are relevant to the present inquiry. Briefly, the two less relevant are, firstly, appropriation for the defendant's benefit of the plaintiff's name or likeness, and secondly, placing the plaintiff in a false light in the public eye.[10] The other two, discussed below, are most commonly brought against media defendants.

Unreasonable Intrusion

The tort of unreasonable intrusion applies in the context of the media to the gathering of information. It is defined as "an unreasonable and highly offensive intrusion upon the seclusion of another", consisting of "intentional interference with another's interest in solitude or seclusion, either as to his person or to his private affairs or concerns". It applies to eavesdropping and electronic surveillance as well as actual physical intrusion, and may extend to such behaviour as peering into windows and persistent telephone calls. The means used and the purpose of

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[9]*Prosser & Keeton on Torts* (5ed, West Publishing Co, Minnesota, 1984).
[10]Above n9,851,863.

obtaining the information will be relevant as to whether the intrusion is unreasonable or not[11].

Public Disclosure of Private Facts

Publicity given to private information about the plaintiff may be actionable even if it is true and published without malice, subject to certain requirements. The most important is that "the matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities". The other common law requirements are that the disclosure must be a public one, and the facts disclosed must be private facts. The Second Restatement of Torts added a further stipulation that the public must not have a legitimate interest in the information.

It should be noted that although the facts disclosed must be private, protection may extend to matters of public record or which occurred in a public place, but which do not involve matters of public interest.[12]

Limitations on the Actions

Whilst American law will allow recovery for invasions of privacy, it is restricted in its terms. It is of course necessary to contain the scope of any tort, for practical reasons and to meet the ends of justice. The main concern in this area is to protect the media's freedom of speech under the First Amendment to the Constitution, and the associated freedom of information. Limitations have been imposed chiefly for this reason.

The common law requirements for unreasonable intrusion are that there must be some actual intrusion, into something which is and is entitled to be private, which would be highly offensive or objectionable to a reasonable person - "[t]he law is not for the protection of the hypersensitive".[13] Where a media defendant has acted so as to meet all three requirements, it may be liable - so long as it does not so act, it is free to seek out information concerning private individuals. The restrictions placed on the tort thus represent the point at which the privacy

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[11]Above n9, 854.
[12]Above n9, 856-857.
[13]Above n9, 857.

interest gives way to the freedom of information interest. The courts have balanced the competing interests at this point.

The object of gathering information is generally to publish it. In addition to the requirements described in the preceeding section, there is an exception to the tort against public disclosure of private facts, in the form of a privilege granted to the media to publish private information concerning public figures. A public figure may be defined as someone in whose affairs the public has a legitimate interest, by virtue of his or her occupation, lifestyle, or reputation, for example actors, politicians, sportspeople, and adventurers. Public figures are held to have lost their right to privacy to some extent, for three reasons: they have sought and consented to publicity; their affairs are already public; and the press has a Constitutional privilege to inform the public about them. There is therefore no liability when they are given publicity, provided it concerns matters legitimately within the scope of the public interest that they have aroused.[14] Even people who are not celebrities but who have become subject to publicity for some reason, for example by being the perpetrator or victim of a crime, may be subject to the privilege.[15]

Thus the freedom of the media to gather and publish information is afforded extensive protection under American law, even though there are torts and statutes guarding individual privacy. Debate as to where the balance should lie continues and probably always will; the importance of the American system is that it has proven that it is possible to balance the two competing interests. The point of balance may be unsatisfactory to some, but at least the necessity of achieving it is recognised and a solution found.

THE UK - THE OTHER EXTREME

In contrast, United Kingdom law recognises no right to privacy in this context. This was recently confirmed by the English Court of Appeal in *Kaye* v *Robertson and Another*.[16]

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[14]Above n9, 860.
[15]Above n9, 859-860.
[16](1990)19 IPR 147.

The facts of this case were as follows. The well-known actor Gordon Kaye was in hospital recovering from severe head and brain injuries. The defendant was the editor of a sensationalist, at times pornographic, newspaper called the *Sunday Sport*. Journalists from the paper entered Kaye's hospital room despite notices forbidding entry, interviewed Kaye and took photographs of his injuries. Eventually the journalists were forcibly removed, but the defendants made it clear that they intended to publish the story and photographs. Kaye, represented by a next friend, was granted an interlocutory injunction against publication of the article. The cited case is an appeal against that decision.

The plaintiff brought actions in libel and malicious falsehood, on the grounds that the article clearly implied that Kaye had consented to an exclusive interview. Evidence was brought to show that he was in no fit condition to give informed consent, and the defendant should have known this. The effect of publication would be to lower Kaye in the esteem of right-thinking people, and would severely limit the amount other papers would be prepared to pay him for his story. He also pleaded trespass to the person and passing off.

Glidewell, Bingham, and Leggatt LJJ found for the plaintiff on the malicious falsehood ground. Their Honours recognised that the plaintiff's real complaint was breach of privacy, but confirmed with regret that no such action was available. Per Glidewell LJ:

> It is well known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy.[17]

Bingham LJ's strongly worded judgment reflected the other judges' calls for legislative reform, despite the arguments advanced against it:

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[17] Above n16, 150.

> We cannot give the plaintiff the breadth of protection whichI would, for my part, wish. The problems of defining and limiting a tort of privacy are formidable, but the present case strengthens my hope that the review now in progress may prove fruitful.[18]

Leggatt LJ advocated looking to the American system:

> We do not need a First Amendment to preserve the freedom of the press, but the abuse of that freedom can be ensured [sic] only by the enforcement of a right to privacy. This right has so long been disregarded here that it can be recognised now only by the legislature. Especially since there is available in the United States a wealth of experience of the enforcement of this right both at common law and also under statute, it is to be hoped that the making good of this signal shortcoming in our law will not be long delayed.[19]

This passage emphasises the point that in the United Kingdom the issue is not how best to balance the competing interests - the law has not yet reached that point. The issue is whether an interest exists which may be balanced against the freedom of the press. A right of privacy is not available for that purpose. Litigants must therefore attempt to pursue their privacy interests under other more established heads of tortious liability, as the plaintiff did in *Kaye* v *Robertson*; which means that breaches of privacy, however outrageous, may only be remedied if another interest of the plaintiff has also been violated. The judges in this case found this situation highly unsatisfactory. Bingham LJ said:

> This case none the less 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.[20]

In light of such strong language from the Bench, a right to privacy may appear in the United Kingdom in the near future; if it does, it

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[18]Above n16, 154.
[19]Above n16, 155.
[20]Above n16, 154.

seems clear that it will appear not in the law reports, but on the statute books.

NEW ZEALAND

The United States and the United Kingdom are at opposite ends of the common law spectrum of recognition and development of privacy rights. New Zealand's placement on that spectrum is a live question; there seems to be no general consensus that a tort of privacy exists here, despite cases which discuss and approve it, and even grant relief on the basis of it.

Tucker v News Media Ownership Limited

The first and most famous case in the area is *Tucker v News Media Ownership Limited*.[21] The reported judgment is a decision of McGechan J on an application by the defendant to vary or discharge interim injunctions granted against them by Jeffries J in the High Court a month earlier. The defendants had unsuccessfully appealed the earlier decision in the Court of Appeal.

The facts of the case are well known and need only be outlined briefly. Mr Tucker desperately needed a heart transplant. The operation was scheduled in Wellington, but due to Government policy was cancelled shortly before it was due to be performed. He then appealed to the public for funds to enable him to have the operation in Australia. These facts combined had already made him the subject of much publicity, but it was generally of a sympathetic nature. However, while fund-raising was in progress Mr Tucker learnt from the newspaper *Truth* (owned by the defendant) that it had received information concerning his previous criminal convictions, including offences of indecency, which it was interested in publishing. Mr Tucker was extremely distressed by this revelation, and evidence was led to show that the stress caused by publication could severely endanger his already precarious state of health.

At the first hearing, Mr Tucker pleaded two causes of action; intentional infliction of emotional distress or physical damage, and

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[21] Above n3.

invasion of personal privacy. If relief were to be granted for invasion of privacy, it would be the first time the tort was recognised in New Zealand.

Because all three proceedings involved interim injunctions, the first issue in each was whether there was a serious question to be tried. In each case it was found that there was, in respect of both causes of action. In the writer's view this case is somewhat equivocal. All three judgments are couched in cautious terms, at least as to the scope of the privacy tort if not its actual existence. This equivocation is largely nullified in light of subsequent cases which tend to accept that *Tucker* does establish that there is a tort of privacy in New Zealand, although counsel have produced arguments to the contrary.[22] In any case, their recognition of its possible availability at least is a landmark in itself. Jeffries J went furthest. He said:

> In my view the right to privacy in the circumstances before the Court may provide the plaintiff with a valid cause of action in this country. It seems a natural progression of the tort of intentional infliction of emotional distress and in accordance with the renowned ability of the common law to provide a remedy for a wrong.[23]

The Court of Appeal declined to give its view on any of the ultimate legal issues in the case, but agreed that "the allegations raise serious arguable and indeed important and difficult issues". It also indicated that it would consider a defence of justification, particularly in light of the fact that Mr Tucker was appealing to the public for funds, and thus that some investigation of his history may be warranted.[24]

McGechan J had the final say. He expressed support for a privacy tort, but his language implies that he was not prepared to declare its existence outright:

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[22]In particular, see above n7.
[23]Above n3, 732.
[24]Above n3, 732.

> I support the introduction into the New Zealand common law of a tort covering invasion of personal privacy at least by public disclosure of private facts...I do not think it beyond the common law to adapt the *Wilkinson v Downton* principles to significantly develop the same field and meet the same needs. Beyond these expressions of support I will not presently go...[25]

It has been suggested that the Court of Appeal only accepted that there was a serious question to be tried, and did not definitively determine the legal situation.[26] Whether or not McGechan J's determination is interpreted as definitive, he at least went further than the serious question to be tried stage, and considered privacy under the heading of overall justice of the case:

> The protection of personal privacy is entitled to weight. Whether or not it is 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.[27]

By taking this approach, McGechan J found a way of including privacy considerations in the final determination of the case. His finding means that, at the least, a plaintiff may plead invasion of privacy, and if on the facts it exists, the Court may put it into the balance with other interests in the case. Interpretation of this and some of the other cases is complicated by the fact that it concerns an interim injunction application, and thus it can be difficult to distinguish which parts of the reasoning apply to injunction requirements and which to the privacy tort. In any case, this is a significant advancement on the previous New Zealand and current UK positions whereby privacy is not a consideration at all, and plaintiffs can only recover to the extent that they can successfully plead another tort. However, the wording of McGechan J's

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[25] Above n3, 733.
[26] Above n7, 11.
[27] Above n3, 735.

statement ("[w]hether or not it is an independent right capable of protection by a tort action") leaves open the question of whether a litigant may bring an action based solely on the right to privacy, or whether as a threshhold requirement another tort must be pleaded before privacy can be considered. Later cases appear to accept that it can be an independent cause of action, and *Tucker* may be interpreted in that way. These cases will be discussed in due course.

Despite its groundbreaking result, two aspects of the *Tucker* case are disappointing. The first is the inadequate discussion of the nature of the privacy right it supports. Although the judges refer to the American tort of public disclosure of private facts, they do not discuss the requirements of that tort, nor the limits imposed on it. They do mention the public figure concept, in the context that Mr Tucker had placed himself in the public eye to appeal for funds. McGechan J concluded on that point that Tucker was "a reluctant debutante so far as public exposure was concerned", and therefore there would be "some element of unfairness in holding that inevitable situation against him".[28] The Court of Appeal decided that "[n]o view would now be appropriate on that or any other aspect of the ultimate legal issues in the case",[29] which is a fair conclusion in view of the stage of the proceedings. Also, the judges may have felt it inappropriate to discuss any details in the absence of full argument, since obiter dicta can carry great weight in a new area.

However, there was little express discussion as to whether the publication would be highly objectionable to a reasonable person; whether the disclosure was to be public (although that is obvious); or whether the facts to be disclosed were truly private. The last factor is particularly relevant, since the information concerned was publicly available and therefore arguably outside the ambit of the American tort Of course, the court is not expected to use the exact words of the American formulation. Some or all of these elements may be present on the facts and discussed by inference: what is disappointing (although understandable) is that it is unclear which factors the Court

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[28] Above n3, 735.
[29] Above n3, 732.

perceives as being possible requirements of the tort, and which are relevant merely because they are facts in this case.

The general treatment of the vital competing interests issue is also unhelpful to the present inquiry. McGechan J deals with it in some detail, but leaves the right to privacy out of the equation, balancing the freedom of the press against the right to life instead.[30] On the facts the right to life was an issue since Mr Tucker's health was seriously threatened, but as we have seen the right to privacy conflicts with a much broader range of public interests. This approach has caused problems in a later case where the privacy interest was denied because there was no physical threat.[31]

The Court of Appeal acknowledged that "[i]f the tort is accepted as established, its boundaries and exceptions will need much working out on a case by case basis so as to suit the conditions in this country".[32] Their Honours may have preferred to leave the tort free to develop along its own lines rather than setting parameters in the precedent case. Rightly so; it is just that a more explicit discussion would have given better guidance to judges keen to advance the tort in future cases, and perhaps forestalled some of the difficulties and contentions that have arisen.

T v Attorney-General

Despite *Tucker* opening the door to privacy actions, the next did not appear until 1988. In *T v Attorney-General*,[33] the plaintiff sought a permanent injunction against publication of a report concerning the death of her two year old child. The plaintiff had pleaded guilty to the manslaughter of the child. The report was the result of an official inquiry by the Department of Social Welfare. The plaintiff claimed that the circumstances in which she and others had disclosed information to the inquiry team were such that she had assumed that the privacy of the information would be respected. Ellis J found it unnecessary to decide whether breach of privacy was available to the plaintiff

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[30]Above n3, 734-735.
[31]Below n42.
[32]Above n3, 733.
[33](1988)5 NZFLR 357.

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since her claim was successful in breach of confidence. His judgment indicates, though, that His Honour was not averse to granting relief on privacy grounds if breach of confidence was not satisfied. He said:

> If is argued that such a claim goes beyond the scope of the protection afforded a plaintiff on the basis of confidentiality,it could be seen as formulating a general claim to privacy.[34]

Ellis J addressed the competition between interests favouring restraining publication and contrary public interests more comprehensively than the judges in *Tucker* :

> The competing public interest favouring publication can be viewed under several heads. The most general is usually called freedom of the press. In the ordinary course of events, the law assumes that all information can be disseminated privately or publicly and this is much to the advantage of all of us, and a free press in particular has long been recognised as an index of a free society. The general availability of ideas, opinions and information is in general terms of great importance, however as I have already indicated, it must in a case such as this give way to such extent as may be required effectively to retain as private, information about children their parents and families.[35]

These considerations relate to the breach of confidence action, but are relevant also to privacy claims as they go to the heart of the competing interests issue.

This approach appears to reflect the American approach; that there is a presumed right to publish, but it does not extend to purely private information. The judgment also indicates that information which could be legitimately obtained from another source can not be restrained[36], from which it may be inferred that matters of public record would not be protected by privacy laws in New Zealand, contrary to indications in *Tucker*. However, that statement was also made in the context of breach of confidence,

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[34]Above n33, 370.
[35]Above n33, 373.
[36]Above n33, 376.

and Ellis J already indicated that he would be prepared to go beyond that tort's constraints if privacy was in question. This case therefore does not clearly indicate whether or not the American rule that information must be strictly private would apply in New Zealand; nor are any other requirements discussed because the case was not decided on privacy grounds. It can be said that Ellis J would accept a tort of privacy, and that like the *Tucker* judges he sees it developing out of an established action, in this case breach of confidence.

The *Morgan* Cases

These cases affirm that, post *Tucker*, an independent action for breach of privacy is available in New Zealand. In March 1990 Holland J considered two related applications for interlocutory injunctions against the news media brought on behalf of Hilary Morgan, the child at the centre of a much-publicised international custody dispute.

In the first case,[37] an injunction was granted to prevent Television New Zealand screening a documentary news programme concerning the child's plight, despite the fact that she had already been the subject of much publicity, because the potential harm to the child outweighed inconvenience to TVNZ.

As well as invasion of privacy, the plaintiff pleaded an action under the Guardianship Act, which was rejected, and intentional infliction of emotional distress, which was not discussed. Holland J therefore decided the case solely on the basis of breach of privacy. This is borne out in the second case[38] where, in reference to his earlier decision, Holland J states:

> I granted the injunction on the basis that the law of New Zealand recognises some right of privacy of an individual although that right was not legally defined and obviously was subject to some considerable limitation.[39]

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[37] *Morgan v Television New Zealand Limited* Unreported, 1 March 1990, High Court Christchurch Registry CP 67/90.

[38] *In re Mitchell (for Morgan)* Unreported, 15 March 1990, High Court Christchurch Registry CP 93/90.

[39] Above n38, 1.

Further to the point, the sole cause of action in the second case appears to have been invasion of privacy; it is not so stated, but the discussion proceeds on that basis alone. Holland J found an arguable case of breach of the child's privacy rights, and declined the injunction sought only because it would be impracticable[40]. There is no suggestion that breach of privacy is invalid as an independent cause of action.

However, once again these are interim injunction applications, with limited scope for discussing the requirements and limitations of the tort. His Honour did refer to the public interest justification though, deciding that it did not apply as there was no valid public interest in the matter.[41]

It is hopefully not over-ambitious to claim that the *Morgan* cases affirm an actionable right of privacy in New Zealand. Whereas McGechan J was equivocal on the matter Holland J was accepting, but one or two decisions are not always enough to form a precedent, especially when they are injunction applications where time is of the essence and full argument and consideration are not always possible. Further, *Tucker, T v Attorney General,* and the *Morgan* cases all concerned one facet of privacy only, that is, public disclosure of private facts, and all were decided very much on their particular facts. These cases made it difficult to deny the existence of a tort of privacy, but left its boundaries to be defined.

Marris v TV3 Networks Ltd

In *Marris v TV3 Network Limited,*[42] which was heard just a few months after *Morgan,* the privacy claim was admitted but rejected because it was found not to come within the principles of *Tucker.*

The plaintiff, a Dr Marris, objected to the defendant's reporters having entered onto his property without leave or notice and attempted to interview him regarding a patient. Thus his claim was of unreasonable intrusion rather than public

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[40] Above n38, 3.
[41] Above n38, 7.
[42] Unreported, 14 October 1991, High Court Wellington Registry CP No.754/91.

disclosure of private facts, although it was expressed in the pleadings simply as breach of privacy.

Counsel for both parties relied on *Tucker* , both recognising that that case did not concern the aspect of privacy in issue here. Counsel for the plaintiff argued that *Tucker* was limited to unwarranted publication only by its facts; in law, the decision indicated the minimal area of the tort only, and did not determine the extent of privacy rights protected. The defendant did not dispute the existence of a tort of privacy, but submitted that *Tucker* had limited it to public disclosure of private facts, and thus that it was not available in this case.

Neazor J preferred the defendant's submissions. He looked for a sufficient relationship between unwarranted publication and unreasonable intrusion to warrant extending *Tucker* principles to the latter, and was unable to find it. However, it is submitted that in fact the plaintiff's argument is the correct one, in terms of both the American model and the *Tucker* case. The American model does not regard the tort against unreasonable intrusion as an *extension* of public disclosure of private facts; rather, they are separate actions related only in that they protect privacy interests. Of course, New Zealand judges are not bound to follow American precedent but, whilst *Tucker's* case is <u>about</u> public disclosure of private facts, it does not necessarily limit the protection that it advocates to that aspect of privacy. This is illustrated by the passage from McGechan J's judgment quoted earlier:

> I support the introduction into the New Zealand common law of a tort covering invasion of personal privacy *at least* by public disclosure of private facts...*The particular aspect of the general right to privacy relevant* is that which has come to be known as protection from "public disclosure of private facts"...(emphasis added).[43]

His Honour thus recognised that privacy is a *general right*, which has *particular aspects*. It focussed on public disclosure of private

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[43]Above n3, 733.

facts because that was the aspect *relevant* to the case, not because it is the only aspect it was prepared to recognise. It is not the aspect relevant to the *Marris* case. However, the underlying principle of *Tucker* is surely that there is a right to personal privacy which is worthy of protection by the courts. If this general formulation is correct, then that right may be infringed as much by unreasonable intrusion as by public disclosure of private facts.

On the approach he took, Neazor J reached the contrary conclusion:

> There must arise a question in the circumstances of this case whether a tort, however formulated *to protect privacy which is endangered by the publication of information*, would be *extended* to prohibit what is proposed. On the basis of developments to date, I would not be prepared to find that *under this head* the plaintiffs have a case sufficiently arguable as a matter of law to warrant the issue of an interim injunction (emphasis added).[44]

To paraphrase, His Honour is saying that relief for unreasonable intrusion cannot be granted under the head of unwarranted publication. If the two are not treated as distinct, this result is probably inevitable.

The above passage appears in the section of the *Marris* judgment which deals with the privacy claim, and seems to relate specifically to that aspect of the case. However, it is possible that Neazor J's conclusion on the privacy issue was coloured by the trespass to property aspect of the case, so that the limitations placed on the privacy tort by this case are relative only to its particular fact situation and are not intended to be general principles of law. This is plausible as all of the cases in this area are heavily fact-based. Cases of this nature are not uncommon; there is a line of them in Australia which will be discussed presently[45], which may shed some light on the *Marris* approach.

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[44]Above n42, 8.
[45]See below p21.

Even if Neazor J had recognised unreasonable intrusion as a distinct head of liability, the result would probably not have changed. His Honour's main reason for denying the action was that the potential damage to the plaintiff was not serious enough, and so damages would be an adequate remedy. This was the basis on which he distinguished *Tucker*: :

> I agree that there is a considerable difference between what was in issue in *Tucker's* case in terms of disclosure and its possible effects on the plaintiff generally and on his physical health in particular, and what is in issue in this case, which could not I think be put higher than upset and anger on the part of the plaintiffs... [46]

This introduces a difficulty of interpretation. If the element of potential physical harm goes to the ultimate question of whether an interim injunction should be granted then it is a valid and important consideration. It is a general principle that injunctions will be granted against the media only in the most serious situations. Irreparable damage is often the test used, and the existence or degree of potential physical harm is obviously relevant to that.

If, however, it goes to whether or not the privacy claim is supportable, then it is not a valid consideration. It may go to the balance of convenience or the overall justice of the case, but not to whether there is a serious question to be tried. The question should be whether there has been an invasion of privacy sufficient to outweigh the public interest in the information, not what harm subsequent publication would cause the plaintiff. In any case, in no way does a privacy claim depend upon physical damage, actual or potential. In America, the standard is "highly offensive or objectionable to a reasonable person"; the situation need not be life threatening. Other torts protect against physical damage;[47] the tort of privacy is designed to relieve just the kinds of emotional distress of which Dr Marris complained. This was recognised by Jeffries J in the *Tucker* case, when he said "[t]he gist

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[46] Above n42, 8.

[47] For example intentional infliction of emotional distress or physical damage.

of the action, unlike defamation, is not injury to character or reputation, but to one's feelings and peace of mind".[48] Even less is it physical injury. Although the judgment is not clear on this point it is more likely that physical harm is a factor to be weighed in deciding whether or not to grant an injunction, than that it is a requirement of the privacy tort.

Bradley v Wingnut Films Limited

Neazor J's Decision[49]

This recent case is also a decision of Neazor J. The plaintiff applied for an interim injunction to restrain the screening of a "comedy horror" movie called *Brain Dead* , on the grounds that it contained a shot of his family grave, which he claimed constituted a trespass and breach of privacy.

Neazor J denied the privacy claim, reasoning that there would be no disclosure in the sense used in the texts and judgments, a tombstone in a public cemetery is not private, and there was no association between the grave and the plaintiff personally.

Gallen J's Decision[50]

The *Bradley* case recently went to a full hearing before Gallen J in the High Court. This time it was subject to full argument and consideration, with the result that it is the most thorough and comprehensive judgment so far.

Counsel for the plaintiff argued that a tort against unlawful invasion of privacy had been established in New Zealand by the *Tucker* case, and submitted that the requirements described in *Prosser and Keeton on Torts* were to be applied.[51]

Counsel for the defendant, on the other hand, argued that the courts in *Tucker's case* only accepted that there was a serious question to be tried, and that the situation in that case was so extreme that it should not be considered authority for the

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[48] Above n3, 732.

[49] *Bradley v Wingnut Films Limited* Unreported, 15 April 1992, High Court Wellington Registry CP No.248/92.

[50] Above n7.

[51] Above n7, 10,12.

proposition that a tort of privacy exists.[52] In the course of argument all the New Zealand cases to date were canvassed, as was *Kaye v Robertson*. The Court's attention was also drawn to the approach of the Broadcasting Standards Authority. This is the first case in which a thorough examination of the authorities has been undertaken.

Gallen J accepted the tort's existence but expressed caution as to the extent of its development:

> The present situation in New Zealand then is that there are three strong statements in the High Court in favour of the acceptance of the existence of such a tort in this country and an acceptance by the Court of Appeal that the concept is at least arguable. I too am prepared to accept that such a cause of action forms part of the law of this country but I also accept at this stage of its development its extent should be regarded with caution ...[53]

The chief reason for Gallen J's caution was that "while the importance of the rights of the individual should not be understated, freedom of expression is also an important principle in our society";[54] a right to privacy in these cases will always infringe upon freedom of expression and should therefore be regarded with caution. Thus Gallen J addresses the competing interests issue as an integral part of the existence and the development of the tort; indeed he bears it in mind throughout his reasoning and bases his decision upon it:

> I do not think that the second cause of action has been made out and it seems to me that in the circumstances of this case, to accept that the tort was satisfied would be to extend the boundaries of an emerging tort far beyond what is safe and would impose restrictions on the freedom of expression which would alter the balance against such freedom of expression more than could be justified.[55]

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[52] Above n7 11.
[53] Above n7, 11.
[54] Above n7 11.
[55] Above n7, 16.

The reason for this decision was that the requirements that the plaintiff submitted were pertinent were not met; in particular that the grave, being in a public cemetery, was not private, and that the film would not be highly offensive or objectionable to a reasonable person of ordinary sensibilities.[56] These are similar reasons to those given by Neazor J, but the difference is that Gallen J specifically applied the American tests, thus accepting that it is appropriate and correct to use them in New Zealand actions for public disclosure of private facts.

Obviously, this case represents an important step in the development of New Zealand privacy law, in two respects. Firstly, it establishes specific requirements for the tort, and secondly it recognises that the rights competition is of the essence. Also, it contains a direct statement that a tort of privacy does exist in this country. It is to be hoped that more cases will soon arise which, unconstrained by the strictures of an interim injunction application, will consolidate the advances made by *Bradley*.

STATUTORY PROTECTION OF PRIVACY

The Broadcasting Act 1989

In concluding his judgment in the *Tucker* case, McGechan J called for urgent "[l]egislative action on some comprehensive basis determining the extent of the right to privacy and the relationship of that right to freedom of speech".[57]

Statutory protection of privacy is at present piecemeal. Several statutes address the issue, but only within their own scope.[58] It is not proposed to deal with all these enactments here since most are not relevant to the media. The Broadcasting Act 1989 is, however, since it provides for protection of privacy specifically in relation to the media. Section 4(1) states that:

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[56] Above n7 13.
[57] Above n3, 729.
[58] See above n 4.

> Every broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with -
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> ...
>
> (c) The privacy of the individual:

The Act only applies to the broadcast media, and thus not to the press. It does, however, provide fairly effective enforcement measures. If an individual believes his or her privacy has been infringed contrary to section 4(1)(c), he or she may lay a complaint with the Broadcasting Standards Authority ("the Authority"), a statutory body constituted by the Act which has the power to penalise an offending broadcaster, including awarding compensation of up to $5000.

The Authority has considered several complaints under section 4(1)(c). Being unconstrained by the pressures of interim injunction applications, it's approach is somewhat different to that of the injunction cases, at least the earlier ones, and so warrants examination. It will be sufficient in this respect to consider the first complaint, *Re McAllister*,[59] as it sets out the approach clearly and in detail.

The Authority looked directly to American law, then considered its applicability in New Zealand in light of dicta in *Tucker* and the terms of the Broadcasting Act.

By doing so it was able to conclude that the protection afforded by section 4(1)(c) includes protection against public disclosure of private facts. It was precluded from a similar finding in relation to unreasonable intrusion by a statutory interpretation problem which need not concern us here, but was otherwise prepared to accept it.[60]

The Authority went so far so to suggest that New Zealand law may extend the American tort to protect disclosure of public facts, based on McGechan J's "reluctant debutante" exception.[61] It indicated that the test to be applied in such a situation would be the American standard of "offensive and objectionable to a

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[59]Unreported, 3 May 1990, Decision No. 5/90.
[60]Above n59, 8-10.
[61]Above n59, 9.

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reasonable person of ordinary sensibilities", subject to any competing public interest element:

> Logically, it will be more difficult to establish that the disclosure of public facts, rather than private facts, meets the"highly offensive"etc test.[62]

and further:

> Whether a disclosure meets that criterion of offensiveness etc will depend on the circumstances of each case: the protection of privacy cannot be absolute. Therefore, in an inquiry into a complaint that section 4(1)(c) has been infringed, any competing claim of "public interest" in the facts disclosed, as well as any other relevant matter of defence...will need to be examined.[63]

The Authority's approach has much to recommend it. It recognises that the objective is to achieve a balance between individual privacy and the right to know - "[i]f both interests are to coexist, neither can be given its fullest meaning".[64] It proceeds to draw on American law as the richest resource available, but never allows it to dominate New Zealand precedent and notions of privacy. It is an ordered approach, allowing full discussion of potentially available law, it relevance and acceptability in New Zealand, and its applicability to the facts. In that way it efficiently and effectively provides New Zealand with a jurisprudential and practical model for its indigenous privacy law; but a model on which it may build, not to which it must aspire.

THE AUSTRALIAN ALTERNATIVE

The United States and United Kingdom have been cited as polar jurisdictions on the privacy spectrum. The Australian position is akin to the English in that privacy is protected incidentally to other torts; there is no specific action in breach of privacy. Privacy interests have received protection under such

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[62]Above n59, 9.
[63]Above n59, 11.
[64]Above n59, 8.

actions as breach of confidence, nuisance, intentional infliction of emotional distress, and defamation. There is also a small line of cases in which the court has assumed jurisdiction to grant injunctions against the publication of information which has been obtained in the course of a trespass. They involve media defendants and thus the competition between freedom of speech and information interests and privacy interests are directly in competition, in the same way as they were recognised to be in *Kaye v Robertson.* These cases are analogous to the *Marris* situation, and indeed were cited extensively in *Marris* and other New Zealand privacy cases.

The jurisdiction is very limited by the terms of the judgments. They introduce at least one factor, unconscionability, which is not usually present in injunction cases, at least not as an express requirement, although it may generally be an overall justice consideration. The leading case in this line is *Lincoln Hunt Pty Ltd v Willesee and Others.*[65] Young J sets out the requirements for an injunction in that case as follows.

Firstly, the plaintiff must show a prima facie case of trespass. However, an arguable case is not of itself sufficient; it must be clear that irreparable damage would occur to the plaintiff if an injunction were not granted, such that damages would not be an adequate remedy[66]. Given that substantial exemplary damages could be available this is a high standard. Further, the judge must assess whether or not damages would be an adequate remedy without knowing what damages will be awarded at the full hearing if there is one. This is an inherent difficulty where irreparable damages is a test, and will arise in the *Marris* situation also.

The third requirement is that publication must in all the circumstances be unconscionable[67]. The court is clearly drawing on the equitable nature of injunctive relief to allow it wide discretion, both to contain the jurisdiction it has assumed and to grant a remedy should circumstances warrant it.

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[65](1986)4 NSWLR 457.
[66]Above n65 , 464.
[67]Above n65, 463.

The balance of convenience must also favour an injunction.[68] Young J referred to freedom of information, public interest, and personal rights under this head. However, he found it unnecessary to consider balance of convenience issues since he had decided that damages would be an adequate remedy.[69] Thus in Young J's view, competing interests issues are to be considered only after the threshhold tests are satisfied.

Williams J in *Emcorp Pty Ltd v Australian Broadcasting Corporation*[70] took a different approach regarding competing interests issues. He factored freedom of the press and rights against unwarranted intrusion into the unconscionability equation. His Honour granted the injunction sought, because the plaintiff would otherwise suffer irreparable damage and publication would be unconscionable. He balanced the competing interests in the following manner:

> In all the circumstances I have come to the conclusion that because the audio-visual material in question was obtained in breach of the legal rights of the plaintiff it is appropriate for the court to conclude that considerations of freedom of speech which might otherwise operate in favour of the defendants ore overcome. By abusing its right of freedom of speech in the way in which the material was obtained, the defendants are deprived of the right to rely on that as a material consideration.

Such an all-or-nothing solution to the rights conflict may not always be appropriate; however, to meet the very high standards set by *Lincoln Hunt* a strong conclusion is called for.

It should also be noted that both judges rejected the possibility of a justification defence to the trespass action.[71]

These cases raise difficult questions. If there is no privacy right capable of protection, then what does the injunction do? It prevents publication of the information obtained. However, the cause of action is trespass; an injunction purely on that basis could only go to preventing further trespass, which is not in issue. What

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[68]Above n65, 464.
[69]Above n65, 465.
[70](1988)2 Qd.R 169.
[71]Above n65 , 461; above n70, 174.

is the logical connection between an action in trespass and an injunction preventing the publication of information obtained in the course of that trespass? The tort of trespass protects proprietary interests. It is not suggested that the plaintiff had a proprietary interest in the information. What, then, is the interest that an injunction would protect?

Another approach to the problem is to examine the requirements for the granting of the injunction. In addition to a prima facie case, which is to be expected, the plaintiff must show potential irreparable damage and that publication would be unconscionable. Irreparable damage may conceivably consist of numerous factors; for instance permanent damage to reputation or loss of business. It is not so easy to identify what would constitute unconscionable publication. Williams J appears to decide on the basis of rights, in the passage quoted above; if the defendant has infringed the plaintiff's rights it can no longer rely on its own conflicting right of freedom of speech, therefore publication would be unconscionable. But what are the rights of the plaintiff that have been infringed? They cannot be the proprietary rights protected by the tort of trespass, since according to *Lincoln Hunt*, prima facie trespass is insufficient to found an injunction.[72] In that case Young J refers to "the personal and proprietary rights of other citizens".[73] If the proprietary rights cannot found the injunction, it must be the personal rights which can.

It is submitted that the injunctions in these cases are being sought because the information concerned was obtained not only by trespass, but also in breach of privacy (unreasonable intrusion), and because publication would constitute a further breach (public disclosure of private facts), against which an injunction could protect. The personal rights of which Young J speaks, and the rights which override freedom of speech in Williams J's analysis, must chiefly be privacy rights; nothing else makes sense in the context. It would seem that "unconscionable publication" means "publication in breach of privacy". Admittedly, this conclusion involves reading between the lines; it

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[72]Above n65, 464.
[73]Above n65, 465.

does accord with common sense though in that there is clearly a privacy interest in issue in these cases, it is just not explicitly recognised.

CONCLUSION

The object of this inquiry is twofold; firstly, to determine the status of the right to privacy in New Zealand today, and secondly, to assess the nature and quality of the treatment of the competing interests involved. To this end, New Zealand case law regarding privacy has been extensively examined, and the law of other jurisdictions canvassed to provide a basis for comparison. Interim analysis of the strengths and weaknesses of the various approaches have been made, but at this point an overview is needed.

The answer to the first question is more readily evident. The courts are no longer questioning the existence of a right to privacy; in fact they have not done so since the *Tucker* judgment. Even Neazor J, who delivered the most restrictive judgment discussed, proceeded on the basis that *Tucker* had established some form of actionable right. Holland J granted the *Morgan* injunctions for breach of privacy alone, and Ellis J suggested his readiness to do so in *T v Attorney-General* . And of course, Gallen J expressly stated that he accepted the tort's existence.

Despite this general acceptance, the tort of privacy seems to have a curious de facto existence, dwelling in a kind of legal limbo where it is apparently accepted by the courts but still doubted by the writer of at least one recent textbook[74]. Perhaps there have not yet been enough cases; this is possible as only two have been reported[75] and apart from *Bradley* the others are interim injunction applications which have not gone to a full hearing.

The reason is more complex than that though. It is submitted the main reason that judges, in the cases before Gallen J's decision, found it difficult to treat privacy as part of the established common law is that it is a tort in name only, so to

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[74]"In New Zealand, and most of the other Commonwealth countries, there is no separate tort of infringement of privacy" Todd (ed) *The Law of Torts in New Zealand* (The Law Book Company Ltd, Sydney, 1991), 757.

[75]*Tucker* and *T v Attorney-General*..

speak. Despite the growing number of cases it has no real substance; apart from *Bradley*, which is too recent to have yet had any effect, there has been very little discussion of its scope or requirements, of its varying forms or their limitations. It is true of course that the court's jurisdiction in injunction applications is equitable and thus to an extent discretionary, but before long a case will arise involving only damages, and some tests and requirements will have to be developed. The *Bradley* case provides a sound basis for such development; hopefully future cases will consolidate that base.

On the basis of what substance there is, some conclusions can be drawn, if by inference only. Insofar as a tort has been established, it can only be safely said to extend to public disclosure of private facts. *Marris* is the only case involving unreasonable intrusion, and that was denied. Even the Broadcasting Standards Authority was unable to confirm its belief in its existence. That body did discuss it as a separate action, with its own requirements and sphere of operation - unless the courts take that step it is difficult to see it being independently recognised.

Another tentative conclusion is that the public figure concept applies, but perhaps in more limited form than in the United States. Under that system, individuals who have not sought and do not want publicity still come within the privilege if the matter is of public interest. McGechan J's "reluctant debutante" exception would probably not be upheld there, yet it is quoted widely in other judgments here.

Also, matters of public record would appear to be protected, perhaps even if they are of public interest. Authority for this point comes from *Tucker;* Mr Tucker's criminal convictions were on public record, and were arguably of public interest since he was appealing for funds, yet McGechan J was still prepared to find a breach. Such matters would probably not be protected in the United States, although the law is becoming more liberal in this respect.[76] Both these points indicate that the protection provided by the tort of public disclosure of private facts may prove more extensive in New Zealand than in the United States.

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[76]Above n9 , 858.

Beyond these points it remains to say that the tort of public disclosure of private facts, at least, appears to be here to stay. Hopefully the next cases to emerge will take Gallen J's lead in undertaking a full review of the authorities, and discussing requirements and limitations.

To this end the approach of the Broadcasting Standards Authority is to be recommended. It is not suggested that the American approach should be adopted without modification; New Zealand society most likely has different standards and expectations which its privacy laws should reflect. It would however be ill-advised to import the American law piecemeal, without consideration at least of all the aspects, even if they do not become part of New Zealand law. It would be re-inventing the wheel to attempt a gradual build-up of authority when a very effective model is already available and working well. The Authority's decisions take all these factors into account and produce a highly satisfactory result, of which Gallen J, by taking the same approach, impliedly approves.

The most pressing matters to be resolved are the types of privacy tort that will be recognised in New Zealand, and the tests that an action must satisfy. If unreasonable intrusion continues to be unavailable, we may be destined to take either the Australian approach, requiring irreparable damage and unconscionability, or the *Marris* approach requiring an extension of public disclosure of private facts, in respect of that branch of the tort. It is submitted that both cause unnecessary confusion and irrelevant restriction, and should be abandoned forthwith. The better approach is to recognise it as a distinct but related tort with its own limitations, in the American style - again, avoid re-inventing the wheel. The same should be said for the tests to be applied; look to the American and adapt as necessary. In particular a standard needs to be set, by which to test the worth of a breach of privacy claim. The American "offensive and objectionable to a reasonable person of ordinary sensibilities" is a good place to start: it is more explicit than "unconscionable", and the kind of test with which the courts are used to dealing. Gallen J expressed no reservations about using it in *Bradley*.

The starting point of this inquiry was that the fundamental issue underlying the privacy debate is the conflict between the public interests in freedom of speech, the press, and information, and the public (and private) interest in upholding personal privacy. This holds true and has been recognised in the cases and by inference in the Broadcasting Act. It was also said that the ultimate aim of law in this area should be to find a socially acceptable balance between the competing interests, so that each may receive protection up to a point at which it must give way to the other.

This balance has not been satisfactorily achieved in New Zealand as yet; it still has a long way to go before it is fully developed. However, it must be remembered that before 1986 freedom of the press had no competition from privacy at all; the development since then has gone to redressing that situation. It is too much to expect the balance to be fine-tuned just yet. However, it is unlikely that it will be unless the kinds of considerations discussed throughout this paper are systematically addressed.

In their plea for a right to privacy, Warren and Brandeis called in aid "the beautiful capacity for growth which characterizes the common law".[77] A century later Mr Tucker made the same plea, and the common law found an answer. It is to be hoped that New Zealand privacy law reaches a level of sophistication and balance comparable to that which has developed in the United States.

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[77] Above n8, 195.

UNITED STATES REQUIREMENTS*

Public Disclosure of Private Facts

	Highly offensive and objection-able to a reason-able person of ordinary sensibil-ities	Must be public disclos-ure	Facts must be private.	There must be no legiti-mate public interest in the matter.	The public figure concept
TUCKER	Not discussed expressly. arguably present by inference; most people would find publica-tion of their criminal records offensive.	Present on the facts: bound to be a require-ment,	May not be a require-ment; these facts were matters of public record. May be held to have become private through passage of time.	Difficult; was arguably public interest in these matters, since Tucker was appealing for funds. Not decided.	Applies, with "reluctant debutante" exception.
T v ATTORNEY-GENERAL	Not discussed, but present on the facts.	Present on the facts.	Indica-tions that this would be required.	A matter to be given weight.	Not discussed: not present on the facts.
THE *MORGAN* CASES	Not discussed, but probably present on the facts as the informatio n concerned a young child.	Present on the facts.	Present on the facts.	Discussed, and found to be none. At least a matter for considera-tion.	Plaintiff had already received much media attention. Perhaps reluctant debutante.

MARRIS	Not discussed expressly.	Present on the facts.	Not discussed: may not be present on the facts as the matter was already public.	Not discussed in detail; the matters concerned probably were of public interest.	Plaintiff was already a public figure, at least under the US formulation.
1st ***BRADLEY*** CASE	Judge accepted it as present on the facts.	Probably is a requirement as denied because no disclosure in the usual sense.	Probably a requirement as denied on grounds that matter not private.	Uncertain; not present on facts though as publication only a movie.	Not present on the facts.
2nd ***BRADLEY*** CASE	Requirement; denied because not present.	Discussed; accepted as present on the facts.	Requirement; denied on grounds matter not private.	Exception if the public matters are not of public concern, but not sufficiently relevant here.	Not present on the facts.
RE MC-ALLISTER	Applies	Required. Matters here were public facts therefore not protected.	Suggests NZ courts would extend greater protection to public facts than do US courts. Subject to "highly offensive" etc test.	Applies; complaint rejected because matter in the public interest.	Applies. Reluctant debutante exception may apply, but not relevant in this case.

*The Above chart sets out the indications given in New Zealand privacy cases as to the application of the American tort of public disclosure of private facts to the developing privacy laws in this country.

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