H442 HEATON, C. Privacy and the Wilkinson v. Downton tort.

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PRIVACY AND THE WILKINSON V DOWNTON TORT: TUCKER V NEWS MEDIA OWNERSHIP LTD.

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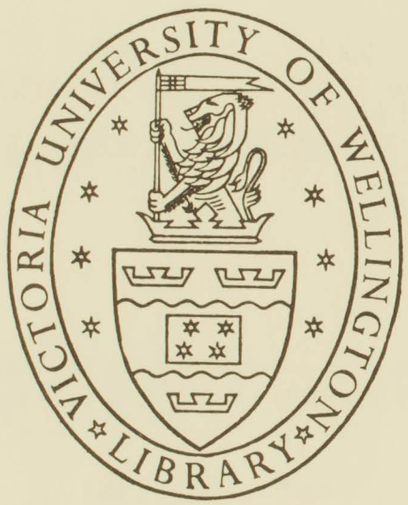
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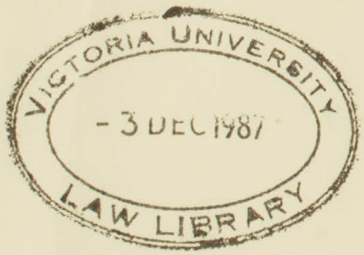
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I INTRODUCTION

In 1986 Desmond Tucker was a controversial figure when he almost became the first recipient of a heart transplanted within New Zealand. It was subsequently decided as a matter of government policy that such operations should not proceed in this country. Mr Tucker and his family sought to raise the costs of an operation in Australia by a public fund-raising appeal. In the publicity which followed the cancellation of the initial operation, rumours about certain past criminal convictions of Mr Tucker began to circulate. The New Zealand Broadcasting Corporation (BCNZ), News Media Ownership Limited (NMOL) and Auckland Star Limited ("Star") all learned of the convictions. The plaintiff applied on an ex parte basis for interim injunctions against the three media defendants to prevent them broadcasting or publishing these details of his private life.

The first cause of action was submitted to be the tort of intentional infliction of emotional distress, based on the principle set out in Wilkinson v Downton[1] and Stevenson v Basham[2] . The second cause of action alleged a tort of invasion of privacy, for which there is no direct New Zealand or English authority. In the High Court[3] Jeffries J. considered the facts of the case raised the issue of privacy in a dramatic form.[4]

> The gravamen of the action is unwarranted publication of intimate details of plaintiff's private life which are outside the realm of legitimate public concern or curiosity.

The judge, in granting an injunction against NMOL, accepted

that the right to privacy might provide the plaintiff with a valid cause of action in this country. Further ex parte injunctions were sought by, and granted to, Mr Tucker against BCNZ and "Star".

On 3 October 1986 McGechan J. discharged all three interim injunctions, partly because their authority had been subverted by the acts of third parties. The alleged convictions had been broadcast over the Wellington area twice by Radio Windy, and elsewhere in New Zealand by Radio Pacific and other independent radio stations. They had also been revealed by a newspaper in Sydney. McGechan J. considered the limited relief granted was achieving nothing. In the course of a full judgment the judge expressed views about the right of privacy in New Zealand. For example, a number of points of law reform were urged. One was that there should be some legislative action determining the extent of the right of privacy and the relationship of that right to the freedom of speech and expression[5]. McGechan J. was of the opinion that the courts are being forced into a position where they must soon create new law as they see appropriate. Tucker v News Media Ownership Ltd. illustrates such a situation. The judge supported the introduction of an invasion of privacy tort into this country, but did 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."[6]

In light of these judicial comments an examination of the principle in Wilkinson v Downton[7] and its relationship to the principles of privacy becomes relevant. It is submitted that the torts of intentional infliction of

emotional distress and invasion of privacy are separate, independent causes of action, but that the former could be developed by courts in New Zealand to provide protection against unjustifiable invasions. The position in the United States where the torts of privacy and of intentional infliction exist side by side will be considered.

II THE PRESENT POSITION OF THE TORTS IN NEW ZEALAND

A Wilkinson v Downton

1. The traditional position

The courts of England and New Zealand have traditionally been fearful that the protection of intangible personal interests would open the floodgates of trivial claims. This is reflected in a statement made by Lord Wensleydale in the House of Lords in 1861: "[m]ental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act causes that alone."[8] Recognition of mental suffering is "parasitic"[9] upon a legally recognised cause of action. Lord Wensleydale, having made the statement quoted above, added "...though where a material damage occurs, and it is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested."[10] For example, an action in trespass (assault) is available against a defendant for purely mental distress such as fright or terror caused by a direct threat of imminent bodily contact with the plaintiff[11] The tort of defamation is available where the defendant causes mental distress (humiliation, wounded pride) to the plaintiff by lowering his or her reputation in the eyes of right-thinking members of society generally[12] However, these actions will not be available if there is no direct threat of bodily contact, or no publication to a third

party. The fact of a recognised tort having been committed provides a guarantee of the genuineness of the claim.

The term "parasitic" is not used by the courts, and was in fact criticised by Lord Denning in Spartan Steel and Alloys Ltd. v Martin & Co. Ltd.[13]. Nevertheless, it is interesting to note that Thomas Atkins Street observed in 1906,[14]

> [t]he treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognised as parasitic will, forsooth, tomorrow be recognised as an independent basis of liability.

At the turn of the century cases appeared in which the only injury alleged to have been suffered was mental distress, or physical harm brought about by mental distress. In Victorian Railway Commissioners v Coultas[15] the Privy Council held that severe health-impairing shock, suffered as a result of a railway employee's negligence in allowing a near collision on a level crossing, was damage that was too remote by reason of the purely mental link. The Privy Council also considered it likely that there would be a flood of trivial or false claims if the action was allowed, and that it was impossible to prove the existence of purely mental distress. The defendant had contended that there had to be "impact"; that is, a contemporaneous physical injury, to prove the genuineness of the claim. This requirement, known as the "impact rule", although not expressly adopted by the Privy Council, was subsequently employed in United States jurisdictions as a convenient safeguard against these potential dangers[16].

2. The Wilkinson v Downton tort

In 1896 Wright J. in Wilkinson v Downton[17] first laid down the principle that if a person wilfully does an act

"calculated" to cause harm to another, and in consequence causes physical harm through mental distress, a cause of action arises in the absence of lawful justification of the act. In so doing the judge created a new tort. Thus, all intentional infliction of bodily harm became actionable in the absence of a privilege[18] . Wilkinson v Downton unified the field of liability for physical injury, and supplemented the intentional wrongs of assault, battery and false imprisonment because liability now followed injury intentionally caused, even if one of the legal ingredients of trespass was lacking. At the same time the court was recognising for the first time that certain conduct (words as well as physical aggression) causing severe emotional distress should not be countenanced. An action could lie for injury by shock sustained through the medium of eye or ear, without direct contact.

In Janvier v Sweeney[19] the principle was applied where private detectives, masquerading as military policemen, addressed threats to the plaintiff in order to frighten her into handing over certain letters. Bankes L.J. said "[i]t is no longer contended that this was not a wrongful act which would amount to an actionable wrong if the damage which the law recognises can be shown to have flowed directly from the act."[20]

The New Zealand Supreme Court granted similar relief in 1922. In Stevenson v Basham[21] a man visited a house occupied by the plaintiffs, and threatened to burn them out if he didn't get possession of the premises. The wife overheard the conversation from the room upstairs, and suffered a miscarriage as a result of the shock. Herdman J. held that the case could be placed upon one of two grounds: "either he [the defendant] was negligent when he uttered

the threat which did the harm, or he wilfully intended to do harm."[22] Whether physical harm was caused by fright or shock brought about either intentionally or negligently, Herdman J. held that the injury must arise from reasonable fear of personal injury. It can be seen that the judge, in incorporating this requirement, restricted the principle from Wilkinson v Downton. This restriction may not have been intended. There was no requirement that the injury must arise from reasonable fear of personal injury in either Wilkinson v Downton or Janvier v Sweeney. In the former case the plaintiff suffered shock as a result of believing something had befallen her husband, not from fear for herself.

Furthermore, a fear of personal injury is not even required in the negligent infliction of nervous shock cases. Although early cases such as Dulieu v White & Sons[23] attempted to confine recovery to persons who were within the area of physical danger and suffered shock through fear for their own safety, this requirement was abandoned in Hambrook v Stokes Bros Ltd[24] and recovery was allowed to persons who suffered shock through fear for the safety of someone else. The relevant risk to the plaintiff is the risk of shock. The Wagon Mound (No 1)[25] states that the test for liability for nervous shock is the foreseeability of injury by shock. McLoughlin v O'Brian[26] held that a mother who suffered shock after seeing her injured family in hospital a few hours after an accident, was owed a duty of care by the driver who caused it.

3. The limits to liability

Even though the courts were giving recognition to claims for protection against mental distress, they still wanted to fix definite limits to liability and to find some

way of guaranteeing the genuineness of claims. Wright J. in Wilkinson v Downton looked to the likelihood and presence of physical consequences as a determinant of liability. That is, the plaintiff's emotional distress must be accompanied by objective and substantial "physical or psychopathological consequences." [27] Mental distress per se is not given independent protection.

4. Developments in the United States

Hickey v Welch [28] was the first American case to raise issues similar to those in Wilkinson v Downton. The defendant threatened and abused the plaintiffs with a pistol as he banked up earth around the toilet in the plaintiff's garden, making it impossible to use. The female plaintiff's neurasthenia (a debility of the nerves causing fatigue and listlessness) was aggravated, causing serious injury to her health. Liability was based by the Missouri Court upon the principle that where the defendant intentionally caused the plaintiff to suffer mental anguish which resulted in some nervous illness, an action lay. America had recognised the new tort.

In the 1930's, a change in emphasis occurred in the United States 29. The courts began to formulate the rule of liability as a question of the likelihood of mental distress, rather than the existence of physical harm. Barnett v Collection Service Co. [30] involved the activities of debt collectors, and is typical of American cases in this area.

> The rule seems to be well-established where the act is wilfull or malicious, as distinguished from being merely negligent, that recovery may be had for mental pain, though no physical injury results....

Today in the United States the Restatement (Second) of Torts defines liability in this way: [31]

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and if bodily harm to the other results from it, for such bodily harm.

The right to recover damages for mental distress alone without consequent physical harm or nervous shock is thus limited in the United States to cases involving "extreme and outrageous" intentional invasions of someone's mental and emotional tranquility. This requirement serves, it is said [32], to ensure the validity of the claim: "...if the enormity of the outrage itself carries conviction that there has in fact been severe and serious mental distress, which is neither feigned nor trivial, bodily harm is not required."[33]

In England, by contrast, the tort has not developed so far, and remains as it was formulated by Wright J. in Wilkinson v Downton. In New Zealand Herdman J.'s[34] formulation of the principle appears to add another limitation. It was submitted earlier [35], however, that the rquirement for fear of personal injury is not good law. The New Zealand Court of Appeal in Tucker v News Media Ownership Ltd.[36] cited Salmond and Heuston's formulation of the tort:[37]

> ...one who by extreme and outrageous conduct intention -ally or recklessly causes severe emotional distress to another is liable for such emotional distress, provided that bodily harm results from it.

It is not clear whether nervous shock is included as "bodily harm". Nervous shock was defined by Lord Denning M.R. in Hinz v Berry[38] as "any recognisable psychiatric illness." It is submitted that "bodily harm" covers nervous shock as well as physical harm.

5. A tort of significance?

Although some writers[39] have commented that the principle laid down in Wilkinson v Downton is of great significance

in that it is capable of being regarded as creating a general theory of liability in tort for all intentional infliction of harm, the principle has seldom appeared in the courts. After Janvier v Sweeney[40] in 1919, the last case in which the principle appears is Bunyan v Jordan[41] . Although the plaintiff did not succeed in that case, Dixon J. (later Chief Justice) of the High Court of Australia made it quite clear that damages for nervous shock are available if a defendant by his act or statement intends to cause nervous shock to a plaintiff and succeeds in doing so.

Perhaps the absence of litigation can be explained by the fact that claims for emotional distress are in many cases met by other actions. For example, if the defendant has committed an act in the nature of an attempted battery, then a plaintiff has an action in assault for emotional disturbance. In addition, legal advisors may be unwilling to suggest that an action is available for the intentional infliction of mental distress. Now, in Tucker , the principle has been resurrected and judicially considered in relation to the right of privacy. Jeffries J. in the High Court[42] accepted that the right of privacy might provide the plaintiff with a valid cause of action in New Zealand: "[i]t 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."[43] McGechan J. also supported the introduction of privacy as a separate tort.[44] Interestingly, both considered that Wilkinson v Downton can be developed by the courts to protect a right of privacy in certain circumstances. This suggests a possible two-step approach to the emotional distress tort which could be taken:

(i) the tort can be used on its own to provide a remedy for mental distress, and

(ii) this in turn provides an avenue for remedying invasions of privacy.

B Privacy in New Zealand

1. The traditional position

A "right of privacy" has not so far been explicitly recognised by the courts of the United Kingdom or Australasia. However, although no commitment has been made to a new head of liability, privacy can be, and has been, incidentally protected. For example, in Prince Albert v Strange[45] Prince Albert and Queen Victoria had made etchings of their children. The defendant had obtained impressions by improper means, and proposed to exhibit them. An injunction was granted on the basis of protecting a property right in the works, but the Lord Chancellor pointed out[46] that a breach of trust, confidence or contract would itself entitle the plaintiff to a remedy.

Another more recent example of our law incidentally protecting privacy is provided by Williams v Settle[47]. The defendant was a professional photographer who had been engaged to take photographs at the plaintiff's wedding. Some time later the plaintiff's father-in-law was murdered and two newspapers published the photos after persuading the defendant to sell them. The plaintiff succeeded not on the basis of an unjustifiable violation of privacy, but for breach of copyright. Exemplary damages for mental suffering were awarded.

Trespass provides a remedy against actual physical intrusions into the plaintiff's territory, but peeping toms who operate from outside cannot be dealt with at law. The

law of nuisance might be helpful, but it has been established for example, that there is no redress against aerial photography for commercial purposes[48] or the building of a platform to gain a view of the plaintiff's racecourse[49]. In the latter case the defendant's activity did not, and was not intended, to interfere with the enjoyment of the plaintiff's land. Despite this, the Australian High Court's dicta seem to go further, and to support an unqualified right to overlook the premises of another, and repudiates any existence of a "general right of privacy"[50]. It is submitted that conduct devoid of any social utility and directed only to provoking annoyance, could be unreasonable interference and a nuisance.

It is in the field of defamation that privacy seems to receive the most incidental protection. For example, in Honeysett v News Chronicle Ltd.[51] the defendants published a photo of Mrs Honeysett in cycling attire, accompanied by a young man who was not her husband. The photo illustrated an article entitled "Unchaperoned Holidays". The plaintiff claimed there was an implication that she had been on holiday with this man, and committed adultery. The court accepted this interpretation - in effect the limited enforcement of a right of privacy. It appears that a blatant invasion of privacy induces the court to be sympathetic towards the suggestion that such implications are present.

In Tolley v J.S.Fry & Sons Ltd.[52] an advertisement had been published showing a caricature of Tolley, a prominent amateur golfer, playing golf with a bar of the defendant's chocolate protruding from his back pocket. The plaintiff argued that the drawing implied that he had agreed that his picture be used for commercial purposes, therefore

prostituting his reputation as an amateur. In the Court of Appeal, Greer L.J. regretfully gave judgment for the defendants on the ground that there was no action available for the invasion of privacy in English law:[53]

> I have no hesitation in saying that in my judgment the defendants in publishing the advert in question, without first obtaining Mr Tolley's consent, acted in a manner inconsistent with the decencies of life, and in doing so they were guilty of an act for which there ought to be a legal remedy.

In the House of Lords[54] his decision was reversed; not because a right of privacy had been created, but because the court fitted the facts into the defamation framework. The court saw possible harm to the plaintiff's "name" as an amateur golfer, although it was not considered how an association with advertising would tend to lower him in the estimation of his fellow men. However, the case is authority for the proposition that unauthorised use of a person's name or picture for commercial purposes can be restrained under defamation law.

It is interesting to compare an American case which in England would have involved defamation, but which was treated in the United States as a privacy issue. In Leverton v Curtis Publishing Co.[55] the defendants had published a picture of the plaintiff as she appeared immediately after being struck by a vehicle in the street. The publication did not concern her accident, but accidents in general. Accompanying the picture was a heading which implied that the plaintiff had been stupid and careless. The last fact would have meant a possible remedy for defamation in England, but in the United States it was held to be an invasion of privacy.

Thus there has been no explicit recognition of invasion of privacy as a tort in itself in England or New Zealand. As illustrated, the courts have moved forward

only where possible within the confines of existing concepts such as nuisance and defamation. In one writer's view[56] this hesitation is partly due to the reluctance of the courts to deal with claims of mental distress, and partly to the difficulty of drawing a line between what should and should not be tolerated in our society. There are values which compete strongly with privacy, and a court dealing with such an issue must determine when an intrusion becomes offensive by prevailing standards of propriety. It is instructive to examine how the United States jurisdictions have grappled with this problem.

III PRIVACY IN THE UNITED STATES

1. Development of the tort

The development of a recognised right of privacy in America stemmed in large part from an academic article written in 1890 by Warren and Brandeis[57]. They argued that existing case law (drawn mainly from England) contained the elements necessary to formulate a general concept of privacy. Existing heads of liability were being used, they submitted, to protect incidental interests of privacy. These interests could logically be isolated from existing remedies and seen as a separate and independent head of liability. They argued that implicit recognition of a right to privacy should be made explicit and expansive. They tried to show that the "new" tort already had roots in common law.

The tort of privacy has flourished in U.S. jurisdictions since the beginning of the century. In 1960 Prosser[58] analysed the privacy decisions to date, and argued that the invasion of privacy is not one tort, but a

complex of four. That is, the law of privacy comprises four distinct kinds of invasion which share the same umbrella name but have little else in common. Prosser's classification has been widely accepted in America. The four invasions may be described as follows:

(1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.

(2) public disclosure of embarrassing private facts about the plaintiff.

(3) publicity which places the plaintiff in a false light in the public eye.

(4) appropriation, for the defendant's advantage, of the plaintiff's name and likeness.

2. Public disclosure of embarrassing private facts

The second category is the most troublesome because it is the most likely to conflict with other interests such as the freedom of speech. It is the main focus of this paper.

The approach the early courts took, especially in regard to the public disclosure of embarrassing facts, is shown by Melvin v Reid[59], a case cited by McGechan J. in Tucker. The plaintiff had been a prostitute, and in 1918 was tried for murder and acquitted. She alleged that she subsequently reformed and married into respectability. In 1925 the defendants made a film based on her early life, mentioning her name and advertising the fact that it was a "true story". The court stated that the right of privacy was absent from the common law, thereby refuting the propositions of Warren and Brandeis. The court grounded recovery in the Californian Constitution which guaranteed (in a provision which no longer exists) the right to pursue and obtain happiness.

Briscoe v Readers' Digest Association Inc[60] was also cited by McGechan J. in his judgment. The defendant wrote an article discussing the hijacking of lorries, and referring to the plaintiff by name in connection with an eleven-year old incident of the same nature in which he had played a part. The plaintiff alleged that after the incident he had become fully rehabilitated and had led a respectable life until the publication of the article which caused even his family and close friends to shun him. Reversing the trial court view that there was no legal cause of action, the Supreme Court Of California said:

> In a nation built upon the free dissemination of ideas, it is always difficult to declare that something may not be published. But the great general interest in an unfettered press may at times be outweighed by other great societal interests. As a people we have come to recognise that one of these societal interests is that of protecting an individual's right of privacy. The right to know and the right to have others not know are, simply considered, irreconcilable. But the right guaranteed by the First Amendment does not require total abrogation of the right of privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other...

As an indication of the balancing process to be carried out, the Supreme Court handed down some points for consideration by the trier of fact:

(1) whether the plaintiff had become a rehabilitated member of society;

(2) whether identifying him as a former criminal would be highly offensive and injurious to a reasonable person;

(3) whether the defendant published the information with a reckless disregard for its offensiveness;

(4) whether any independent justification existed for printing the plaintiff's identity.

It can thus be seen that there are many approaches to the

problem of invasion of privacy in America. The courts are not tied to the mechanical requirements of, for example, an action in defamation or nuisance, but rather are free to look at the principle of privacy behind the remedy. In the last sixty years, a general right of privacy has been recognised in most American states.

IV INVASION OF PRIVACY - AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

It is submitted that in the majority of cases involving severe mental distress, the severity of that distress will be evidenced by either physical injury or nervous shock (that is, what lawyers call psychiatric injury). However, there are of course cases where severe mental distress alone may be caused. For example, an invasion of privacy could well cause great distress.

In the U.K. and New Zealand the Wilkinson v Downton tort presently requires that the defendant's statement or act result in physical injury or nervous shock. In Tucker[61] the disclosure of private facts about the heart patient may have precipitated significant harm to him through stress and upset. Such physical harm would have evidenced the genuineness of his claim. In applying Wilkinson v Downton, the courts would be protecting mental distress insofar as it caused recognisable physical harm. Although the harm suffered results from the infliction of emotional distress, the plaintiff is recovering for that resulting harm and not for emotional distress alone. The cases are of physical harm caused by shock rather than by impact.

It is submitted that in the future the courts could move to protect emotional security per se[62]. If the requirement for injury or nervous shock was relaxed (as it

has been in the United States) mental distress such as grief, humiliation and anger could be remedied as falling within the scope of the principle.

If this development could be brought about, what limits should then be placed upon recovery? Firstly, the act or statement must in fact produce mental distress if it is to be actionable. The courts would have to recognise the distress as significant: that is, it should be substantial and enduring rather than transient. It is difficult to define what amounts to "serious" mental distress; the parameters of liability will be worked out on a case by case basis. However, it should not be necessary for the mental distress to produce physical harm or nervous shock to be "serious". Secondly, the act or statement should be of a kind reasonably capable of causing serious mental distress to a normal human being. Prosser states "[l]iability cannot be extended to every trivial indignity... There is liability [only] for conduct exceeding all bounds usually tolerated by society, of a nature which is especially calculated to cause and does cause mental damage of a very serious kind."[63]

If the Wilkinson v Downton tort progressed in this way, it is possible to see that a cause of action would be available in all cases of intentional, unjustifiable invasion of privacy. The important issue for the courts becomes how to determine whether any particular "invasion" is justifiable or not.

V THE BALANCING OF INTERESTS

1. Justification

Justification is the showing of a sufficient reason, by the defendant, why he did what he is called upon to answer. In the law of defamation the truth is placed in high regard, therefore a true publication is often justified. Where privacy (especially the public disclosure of private facts) is in issue, the basis of the action is the publication of truthful information. Thus, another interest competes with an interest in the truth - the right of the individual to lead a private life.

An American defamation case, Burton v Crowell[64] involved the publication of a picture held to be prima facie actionable, despite the fact that it did not state a fact or an opinion, was obviously an optical illusion, and carried its correction on its face. Judge Learned Hand said,[65]

> The common law has so much regard for the truth that it excuses the utterance of anything that is true (...) The only reason why the law makes truth a defence is not because a libel must be false, but because the utterance of truth is in all circumstances an interest paramount to reputation.

Thus, where the truth does not avail as a countervailing interest there is no defence to the defamation action. Where an interest such as privacy is at issue, the truth cannot automatically be said to be paramount. The judges in Tucker considered this point. Jeffries J. said "if a person's right of privacy has been, or is to be violated, it is no defence that what was or is to be published, is correct or published without malice."[66] McGechan J. remarked[67] that it is a notable feature of the tort of invasion of personal privacy in America that truth is not a defence.

It is submitted that the truth or falsity of a publication is one of the factors to be balanced when considering the defence of justification. It is not reasonable to hold that truth is a defence in defamation and not in the tort of privacy. Firstly, there may be situations when items of information cannot be classified easily as either true or false. Often facts will fall within a grey area where the context gives the wrong impression of the data, or where significant facts are omitted. Secondly, it is easier in theory than in practice to say that defamation protects reputation, and privacy protects emotional security, and therefore truth is a defence only in the former. It is submitted that all the circumstances have to be looked at in each particular case, and the interests to be protected weighed carefully. In some circumstances the truth of the matter will not weigh heavily; for example, if the publication was for no better reason than to satisfy an audience's curiosity. On the other hand, the truth of the facts will be crucial if the defendant had a legitimate reason for publishing them. In an action for the protection of privacy, truth or falsity is not a determining factor. The balancing of interests must go further.

2. The balancing act

It may be instructive to examine some American tort of privacy cases to see what issues arise, and how the courts determine when an unjustifiable invasion has occurred.

In the United States the simple standard that the plaintiff must prove that the defendant committed an unreasonable or unwarranted invasion of his or her right of privacy[68] permits the conflicting policies and interests to be

brought out into the open. The courts have attempted to formulate a clear means of distinguishing between legitimate publications and breaches of the right of privacy - particularly in cases involving media defendants.

In the United States great sanctity is accorded the public interest in freedom of expression and of the press. Although this interest has been and is discussed in relation to the constitutional right to free speech (enshrined in the First Amendment), a limitation on the right to privacy was developed in the state courts early in the career of the tort which was not grounded in the Constitution. This was the "newsworthiness" exception - a product of judicial social policy. To determine what was "newsworthy", a distinction was drawn between private individuals and public figures. In Pavesich v New England Life Insurance Co.[69] it was held that one who seeks public office or claims public approval or patronage, waives his or her right to privacy and cannot restrain any proper investigation. The idea of waiver or consent is often unrealistic. For example, a picture of the plaintiff's wife in Metter v L.A. Examiner[70] was published in connection with a story about her committing suicide. It was held that the victim had willingly become an actor in an occurrence of public interest and had thus waived her right to privacy. It is submitted that the propriety of a consent or waiver defence should be assessed in terms of whether there is an overriding public interest in the free dissemination of information about the event, rather than on the basis of an assertion about the person's intent at the time of invasion.

The courts in America have been described as making a

"naked creative choice", a "decision-making without signposts"[71] This can be contrasted for example with the making of a decision about what is "reasonable". That choice is not made in a vacuum. The courts build upon previous decisions about what is reasonable and make distinctions between them. It is said that the courts are doing more than this in privacy cases. Any issue which involves a limitation of freedom of speech is bound to be controversial. Britton suggests that no body of consistent case law has been developed. There is a lack of logic in the application of the law. The outcome of any case is "a lottery"[72]. The current state of the law of privacy in the U.S. is so fluid that the privacy doctrines have been compared to a "haystack in a hurricane".[73]

In Melvin v Reid[74] the action was allowed on the basis that a publication should not be allowed to prejudice a rehabilitated person. This can be compared with Sidis v F.R Publishing Corp.[75] The plaintiff was a recluse employed in menial work, who had been a famous child prodigy years previously. Efforts to avoid publicity succeeded until an article was published in the "New Yorker" magazine, detailing his personal habits and eccentricities at length. The court denied recovery because the plaintiff had once been a public figure and so his departure from the limelight was of legitimate public interest. This is, in effect, an extension of the newsworthiness exception to a situation where the subject had ceased to be newsworthy until the offending publication. The media are creating their own definition of "news".

Distinctions can obviously be made between Melvin and Sidis, but it is submitted that to a great extent they

would be artificial. The courts have been making, in regard to the privacy cases, a naked creative choice about that in which the public has a reasonable right to be interested. A decision about what ought to be of public interest can perhaps be criticised as unsuitable for a court to have to make.

However, do the courts not undertake this role when deciding what is fair comment upon a matter of public interest in defamation cases? The defence of fair comment is the very essence of the right of freedom of speech. The rhetoric is that all citizens should have a right to openly air their views on matters which concern them. The facts commented upon should be of public interest even though the matter arises in regard to expressions of opinion and not the reporting of facts. If a comment published by the defendant to the public is to be judged fair, then the person or matter commented on must in some way be in the public arena. It is submitted that the question whether or not a matter is in that arena is a more objective one than that of deciding what ought to interest the public - the task the U.S. courts undertake when they determine the balance between the privacy of the individual and the demands of contemporary society.[76]

3. Freedom of speech

The First Amendment of the United States Constitution guarantees freedom of speech and of the press. This provision has been interpreted very widely by the U.S. Supreme Court. The emphasis placed on freedom of speech did not prevent the development of the tort of privacy, but it is inherently limited by these constitutional considerations, as are the fields of defamation and intentional

infliction of mental distress - especially in relation to media defendants. For example, in N.Y. Times Co. v Sullivan[77] an elected official brought a defamation suit. Patently false allegations were made against the plaintiff in a newspaper. With the Constitution firmly in mind, together with the need for discussion of political issues, the Court held that a public official could not succeed in defamation unless he or she could prove that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[78] In effect, the fault requirement was raised. In Falwell v Flynt[79] the court held that the same level of protection should be accorded the defendant in an action for intentional infliction of emotional distress as in a defamation action - and required the defendant to prove knowledge of falsity or reckless disregard of the truth.

Thus one cannot help but notice the negative repurcussions of the Constitution in the U.S. where the extreme to which freedom of speech has been taken has obscured developments made in the protection of privacy and emotional security. The countervailing value placed on protecting public discussion which kept the tort of privacy in check must itself be kept within bounds, or much practical protection will be lost.

In the United Kingdom, too, freedom of speech has been accorded great weight - although the U.K., like New Zealand, has no written constitution. In Re X (A minor)[80] the wardship jurisdiction was used to try to prohibit the publication of a book concerning the ward's deceased father and material which was likely to cause her psychological damage if it ever came to her notice. The Court of Appeal

unanimously held that freedom of speech should prevail. Lord Denning M.R. said that "it would be extending the wardship jurisdiction too far and infringing too much upon the freedom of the Press for us to grant an injunction in this case."[81] Roskill L.J. and Sir John Pennycuick did however consider that it was the courts' clear duty to attempt to balance competing interests, even though in this instance freedom of speech prevailed.

It is interesting to compare the approach taken by a German court[82]. A televison film was made about Lebach, a former accessory to a gang which had carried out an armed robbery on an American military installation in Germany. The plaintiff was not "rehabilitated" in the way, for example, that the plaintiffs in Briscoe[83] and Tucker were. He was, in fact, about to be released from prison for good behaviour. The German Constitution protects both the interests of privacy and of freedom of expression expressly, therefore the Court had to openly consider the seemingly incompatible values. Interestingly, the court stressed factors in favour of the plaintiff; for example, considering the wider interest of "reintegrating the criminal into society." The time and purpose of the publication also weighed in their balance. A legitimate desire to inform the public is more likely to receive protection than a sensational account published some time after the event. The German court was prepared to prohibit the showing of the film.

4. The balancing act in New Zealand

A cause of action which potentially punishes for the publication of true statements must naturally be carefully circumscribed. However, the countervailing value placed on

protecting public discussion must itself be kept within bounds. If the Wilkinson v Downton principle is developed in New Zealand to provide an area of judicial expansion for privacy law, then the courts in this country should, it is submitted, learn from the U.S. experience and ensure their rules for recovery strike an appropriate balance between safeguarding speech and expression, and protecting an interest in emotional security.

There is difficulty in articulating a standard for determining what types of personal information should be protected from public disclosure. The information revealed must be private. Whether a court treats particular facts as private depends largely on the general community's attitude rather than a fixed norm.

In Tucker it was clear that the judges did not consider the plaintiff's past criminal record of legitimate public interest. McGechan J. refers[84] to the "thorny problem" of expunging criminal convictions after a lapse of time, and suggests that a court power to suppress names would have been an effective solution to the case. This is the point made in the Lebach[85] case; it is important for a society that people can rehabilitate without fear of exposure. Mr Tucker had been rehabilitated for nine years. The Court of Appeal did, however, allude to the possible argument that a plaintiff who undertakes a public fundraising drive, whether from choice or not, "may in some circumstances have to accept a certain amount of investigation of his history."[86] This involves considering the interest the public have in being informed about that for which they are being asked to give money. However, McGechan J. did not put undue weight on this "qualification to privacy."[87] He considered it unfair to hold against the plaintiff an inevitable

situation.

Judicial notice was taken of the fact that the plaintiff's condition was such that any stress arising from adverse publication could be lethal. This can be seen as literally a "right to life", and is a powerful consideration weighing against any possible benefit for the public arising from open discussion of important issues. McGechan J. remarked[88] that reading or seeing an adverse media item has not traditionally been known to result in immediate lethal consequences. He added that some risk could be run, as long as the fact that a serious risk area exists is borne in mind.

The judge also regarded freedom of speech as important in Tucker, "but by no means the decisive element which the news media seeks to demand."[89] In balancing the considerations, McGechan J. was moved to discharge the injunctions by the overriding fact that some elements of the media were being restrained and others not, and the law should not engage in futility. Although the injunctions protecting Mr Tucker's private interests were correct when granted, they were subverted by subsequent events.

VI THE RELATIONSHIP OF WILKINSON V DOWNTON TO PRIVACY

1. Salient differences and similarities

The Tucker judgments indicate that the courts in New Zealand may use the law to meet perceived privacy needs.

The torts of privacy and intentional infliction of emotional distress exist side by side in the United States. This fact seems to suggest that the causes of action exist to protect quite different interests of the plaintiff.

There are some obvious differences between the actions. Fault is irrelevant in an action involving invasion of privacy by disclosure of private facts. The basis of the action is the publication of truthful information.

Privacy actions, like those in defamation, require no physical impact on the plaintiff or any physical manifestation of the emotional harm suffered. In the U.S. some courts have recognised the right to recover damages for the intentional infliction of purely mental distress without consequent physical harm or nervous shock. The reason for allowing recovery in such cases is because "the interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refrain from conduct intended to invade it."[90] In England and Australasia, liability is based on the fact that the mental distress caused physical harm.

There are also some prima facie similarities between the torts. Both theories of liability can be said to be aimed at protecting the plaintiff's emotional security and well-being. Defamation, by way of comparison, seeks to protect the plaintiff's reputation.

In addition, both the torts can encompass conduct broader than the mere publication of information. For example, an overly aggressive news-gatherer might conceivably be liable under one or both causes of action.

Finally, neither tort appears to make truth or falsity a necessarily decisive factor. In an action for defamation, truth is an absolute defence.

2. The torts in action

It is the experience in the U.S. that the theoretical distinctions outlined above are difficult to maintain in practice.

There is much overlapping between the torts, together with defamation. For example, plaintiffs often recover for emotional distress when it has been held that an action lies for defamation. Thus in the U.S. there are available to potential litigants three possible causes of action in cases where some violation of privacy is alleged to have occurred: defamation, privacy, and intentional infliction of emotional distress. A single tortious publication may give rise to all three. Mead[91] draws attention to the point that pleading intentional infliction on its own or in combination with defamation and privacy claims may allow plaintiffs to succeed where otherwise they would have been hindered by the technical requirements of those actions. In the recent case of Falwell v Flynt[92] the U.S. Court of Appeals ruled that the Reverend Jerry Falwell was entitled to damages for emotional distress. Larry Flynt had published in his magazine "Hustler" a parody of an advert which implied that Falwell had committed incest with his mother. Falwell sued Flynt under all three causes of action. In the federal court the district judge dismissed Falwell's claim of invasion of privacy. In Virginia the aspect of privacy in issue is governed by legislation[93]. The statute prohibits the use of a person's name or likeness for the purposes of trade or advertising without his or her consent. Falwell's name was not held to be used for the purposes of trade. The jury decided on the other two issues that Flynt had not defamed Falwell because the actual malice standard had not been met, but did intend to inflict emotional distress. An appeal followed. The Court of Appeals decided that intentional infliction is a tort separate from defamation. If one claim falls, the other

can still stand. This case illustrates the growing trend towards pleading all three torts in actions arising from tortious publications.

3. Predictions for the future

In 1962 Wade[94] examined the fields of defamation and invasion of privacy and suggested that the privacy tort would supplant the former, only to be supplanted itself by the tort of intentional infliction of emotional distress.

> [T]here is real reason to conclude that the principle behind the law of privacy is much broader than the idea of privacy itself, and that the whole law of privacy will become a part of the larger tort of intentional infliction of mental suffering. That tort would then absorb established torts like assault and defamation and invasion of the right of privacy and join them together with other innominate torts to constitute a single, integrated system of protecting plaintiff's peace of mind against acts of the defendant intended to disturb it. The development is clearly discerable to the perceptive eye...

Twenty years later Mead[95] carried out an empirical study of relevant case law, and wrote that Wade's theory cannot be proven or disproven. He considered that the close relationship between the interests protected by the defamation, privacy, and emotional distress torts has resulted in some confusion in the U.S. courts about the application of the different theories. His study revealed an increasing association between privacy and defamation law, which supports part of Wade's theory. He also suggests that gaps in the law of privacy might influence use of the emotional distress tort to cover those areas.

VII CONCLUSION

The development of the principles in Wilkinson v Downton extends to and beyond the protection of privacy, and imposes prima facie liability for the unjustifiable infliction of harm. It is submitted that the Wilkinson vDownton tort, as it is recognised in New Zealand, can be extended succesfully to cover invasions of privacy. The tort of privacy itself has been recognised for the first time in this country in Tucker, but suitable common law parameters or legislation will need to be slowly and carefully developed.

Common law expansion of the principles in Wilkinson v Downton will enable courts to consider and carefully balance the interests involved in the controversial area of privacy and freedom of speech. Until such time as a satisfactory statutory scheme of privacy protection can be developed, the New Zealand courts can use and shape existing law to meet perceived privacy needs, without having to import a "ready-made" body of privacy law such as that which exists in the United States.

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Footnotes

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