

THE FUTURE OF PRIVACY RECENT LEGAL DEVELOPMENTS IN NEW ZEALAND

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I. INTRODUCTION

In her book, *Stasiland*, Anna Funder tells how, after the fall of the Berlin Wall in 1989, East Germany was described as the most perfected surveillance state of all time.[1] The East German state had one Stasi (secret police) officer or informant watching every sixty-three of its citizens, which was many more than Nazi Germany or Stalin's USSR.[2] But a surveillance state is incomplete when it relies only on employed agents to spy on ordinary people. The East German regime was one where ordinary citizens spying on their own relatives, colleagues and friends outnumbered Stasi agents two to one. In such a system, privacy all but disappears — it becomes a distant memory, or a strange joke. Where the state has gone so badly wrong, there are no privacy laws which effectively protect the individual from the unremitting gaze of the state, or which empower citizens to protect themselves from the unwanted notice of other citizens. Such states treat their citizens as less than human and encourage them to do the same to each other.

It is no coincidence that the GDR not only controlled and almost eliminated privacy, in part through the agency of its own citizens, but that it did this in conjunction with the most extensive manipulation and restriction of freedom of expression. While often privacy is treated simply as a limitation on free speech, the relationship between the two is more complex than this.[3] The experience of the GDR citizens demonstrates that restriction of both privacy and free speech seriously damages individual autonomy and liberty, leaving in their place powerlessness and fear.[4] While such conditions are destructive of basic humanity in every political system, powerless citizenship is the antithesis of that required for a functioning democracy.

In 21st century New Zealand, where there are many laws protecting aspects of privacy, it is easy to forget what a society with almost no privacy might be like. Funder's *Stasiland* is a chilling record of such a society. The GDR experience demonstrates that laws against unreasonable search and seizure by the state, which essentially protect our liberty, are fundamental. However, more than this, it demonstrates that laws which also empower citizens to cultivate and protect a basic interest in privacy from attack by other citizens are essential also, to augment and complement resistance to attack by the state, and to preserve the full autonomy and humanity of the individual.

Such an introduction would traditionally support an extended examination of state power over individual privacy. However, it is my intention instead in this article to examine the right of

private citizens in New Zealand to sue each other using the tort of privacy. This approach is adopted because although the tort is in an early stage of development, the questions currently being raised about it reveal much about how we think and feel about privacy generally and its place in the liberal democracy we have in this country. In this wide-ranging paper, I investigate the emerging 'shape' of the tort of privacy, in particular the line between what is public and what is private. I then open out the discussion to investigate the place of freedom of expression in the defence of legitimate public concern and to examine the wider context of privacy in New Zealand, including the status of privacy generally, and its increasing manifestation in cases outside the tort. I argue that these treatments are evidence of the emergence of a form of privacy which should influence the development of the tort and perhaps beyond. I conclude that the privacy tort is not and should not be confined to a tort protecting informational privacy, and that it is perhaps metamorphosing into something altogether more important.[5]

II. THE DECISION IN HOSKING

In 2004, the existence of a New Zealand tort protecting informational privacy was finally confirmed in the leading case of *Hosking v Runting*.^[6] Like *Campbell v MGN Ltd*^[7] and the more recent *Murray v Express Newspapers plc*⁽²⁾ *Big Pictures (UK) Limited*,^[8] *Hosking* involved the actual or threatened publication of facts about celebrities which were recorded in public, in the form of paparazzi photographs. Although the New Zealand Court of Appeal rejected the *Hoskings'* specific privacy claim,^[9] in a 3:2 majority judgment it confirmed that a tort of invasion of privacy exists in New Zealand. The two fundamental requirements for a claim were essentially stated to be: (1) The existence of facts in respect of which there is a reasonable expectation of privacy; and (2) Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.^[10]

The recognised action does not deal with unreasonable intrusion into solitude.^[11] Further, there is no simple test for what constitutes a private fact.^[12] The tort concerns itself with publicity (not facts) which is highly offensive, and that publicity must be highly offensive to the reasonable person.^[13] The harm protected against is humiliation and distress, and personal injury and economic loss are not required.^[14] Crucially, there is a public interest defence, described broadly as a legitimate public concern in the information.^[15] Acknowledging our non-constitutional *Bill of Rights*, the Court stated that any limits imposed on free speech by this privacy tort must not exceed those justified in a free and democratic society.^[16] The scope of any public interest defence is therefore intricately bound up in this balancing exercise. Finally, the primary remedy is damages, but injunctive relief has been recognised as appropriate also.^[17] As in defamation, prior restraint is to be available where there is compelling evidence of most highly offensive intended publicising of private information and there is little legitimate public concern in the information.^[18] Having stated the basic requirements, I now turn to examine the question of what can be the subject of the tort in New Zealand.

III. FACTS GIVING RISE TO AN EXPECTATION OF PRIVACY

New Zealand judges maintain a proud tradition of Antipodean pragmatism and lack of artifice. Our courts have avoided the convolutions attached to 'adapting' the equitable doctrine of breach of confidence to recognise a privacy right, as has occurred in the United Kingdom. In *Hosking*, Tipping J, with the majority, concluded that it was perfectly valid for our courts to formulate an appropriate free-standing tort of privacy, subject to a defence which protects freedom of expression when privacy values are outweighed.[19] Nonetheless, like the United Kingdom, we have not been able to escape the inherent difficulty of determining what is private. The Court of Appeal adopted the phraseology of the English confidentiality cases in speaking of an expectation of privacy, and so we continue to look to cases like *Campbell* for assistance,[20] albeit with some caution. But it seems at least clear that the New Zealand courts have accepted the core idea of facts which are inherently private, such as personal relationships and financial matters,[21] and medical conditions.[22] For example, it has been accepted that the expectation can arise in relation to sexual photographs,[23] and information about past treatment for psychiatric illness.[24]

However, determining the status of facts in the penumbra has been much more problematic. In these cases, the facts present as a chimera of both public and private and there appears no principled method of disentanglement.[25] But there has been some judicial progress. It seems a rehabilitated or rehabilitating offender may have a reasonable expectation of privacy in relation to appearance and location or the fact of the previous conviction, even though this information is public or was public at some stage in the past. In *Brown v AG*,[26] the District Court found that although the facts of the plaintiff's conviction and sentence for kidnap and indecent assault of a child were public, he had a reasonable expectation that publicity given in a police flyer about his release would not include a photograph which he had only consented to for use for general police business, or the actual street where he was living. The earlier decision in *Tucker v News Media Ownership*[27] demonstrated that in such contexts once public facts can become private again over time. There, a man who was the focus of a public campaign to raise funds to pay for an essential heart operation was initially able to obtain an injunction preventing publication of past convictions for sexual offending.[28] Perhaps more unusually, in *Television New Zealand v Rogers*,[29] a reasonable expectation of privacy arose in relation to a videotaped murder confession made for the police, even though it had been produced for use in a public trial. This was because the plaintiff had given up privacy rights for the public trial process but not for all time.[30] Further, the tape would have been under the control of the Court during that time, and in any event, it had been ruled inadmissible in the trial and the plaintiff had not had the opportunity to challenge it. Nevertheless, this privacy interest was held to be minimal compared with that arising from inherently private facts.[31] Arguably, in prior restraint cases, the anticipated mode of publication features strongly in the decision about the nature of the facts, and the enquiry merges inexorably into the second step set out in *Hosking*, that of determining whether publication would be highly offensive to a reasonable person.[32]

IV. PUBLIC FACTS CAN BE PRIVATE IN EXCEPTIONAL CASES

As in *Campbell* in the United Kingdom, it has been accepted in New Zealand that in exceptional cases, a reasonable expectation of privacy can arise even though the facts have been recorded in a public place.[33] *Andrews v TVNZ*[34] was one of those exceptional cases.[35] The Andrews' claim for damages arose because they were filmed by a production company for a series commissioned by TVNZ while being rescued by fire fighters following an accident in their vehicle. The accident occurred when the plaintiffs were returning from a party at which they had both been drinking. When tested later, both were found to be over the legal blood alcohol limit. The rescue operation was a complex one because the plaintiffs were trapped and had to be removed using 'jaws of life'. They were unaware they were being filmed and were also unaware edited footage of the incident would be used about a year later in an episode of the television series 'Fire Fighter,' which was broadcast by TVNZ. The programme focussed on the activities of the fire fighters, but also showed the plaintiffs interacting with their rescuers. Although some pixilation was used, parts of the plaintiffs' faces were shown, and statements of endearment made by Mrs Andrews to her husband were broadcast. In a thoughtful judgment, Allan J concluded that the claim failed, but did find that the Andrews had a reasonable expectation of privacy in relation to the broadcast. The judgment makes it clear that private facts do not need to be absolutely secret. In New Zealand, private facts are those unknown to the world at large, but possibly known to some people or a class of people.[36] Further, whether a reasonable expectation exists is assessed at the time of publication, although the passage of time and changed circumstances may impact on the reasonable expectations actually held. Although the event in Andrews took place in public, the footage of intimate and personal conversations between the Andrews did give rise to a reasonable expectation of privacy. This was because in character, the footage went beyond mere observation of the scene, and its extent was prolonged. Allan J concluded therefore, referring to *Hosking*, that in exceptional cases such as *Campbell and Peck*[37] the fact that the event took place in public may not prevent a reasonable expectation of privacy from arising.[38]

Although *Hosking* recognised the possibility of exceptional cases where an expectation of privacy can arise, the specific claim failed in that case because it related to photographs of the *Hosking* children being pushed in their pram in a public street. The Court held that the images did not show anything that any member of the public could not have seen on the relevant day.[39] The judgment was hailed as a victory by the media, which had argued in extremis that allowing the claim would significantly chill its newsgathering activities, in particular because the taking of any photographs in public would require the consent of all whose images were captured, whether as principal subjects or merely incidental participants in the background. This raises the issue of innocuous activities carried on in public.

V. TREATMENT OF INNOCUOUS PUBLIC ACTIVITIES

It is striking that *Hosking* has been followed very recently in the United Kingdom, in spite of the stronger constitutional arrangements which require equal balancing of the freedom of expression and privacy rights,[40] and in spite of the European Court appearing to carve out a greater zone of privacy protecting the mundane and unofficial but public activities of public figures in *von Hannover v Germany*.^[41] In *Murray v Express Newspapers plc*^[42] Patten J in the High Court struck out the claim of the very famous author J K Rowling and her husband seeking to establish a right to personal privacy for themselves and their family when also engaged in the innocuous activity of pram-pushing in a public place. The claim was made on behalf of Ms Rowling's son, but the existence or otherwise of the claimant's reasonable expectation of privacy was acknowledged by the Court as being inextricably bound up in the wishes and actions of his famous parent/s, and thus to be determined in the round.^[43] However, in spite of Ms Rowling's vigorous efforts in the past to keep her children out of the glare of publicity which surrounds her, the claim failed, largely, it appears, because the activities captured by long distance lens were 'ordinary' 'innocuous' and in the nature of 'popping out for a pint of milk'.^[44] Although clearly the English Court was influenced by the fact that the doctrine of breach of confidence has never protected trivial or harmless information,^[45] it is apparent that Patten J shared the fear of the *Hosking* Court that protecting routine public activities would create a monstrous tort, capable of devouring all before it and destructive of a free press — 'it will have created a right for most people to the protection of their image. If a simple walk down the street qualifies for protection, then it is difficult to see what would not'.^[46]

The judge in *Murray* had the opportunity to distinguish *von Hannover* on the grounds that the European court in that case exceptionally protected Princess Caroline while engaged in mundane acts because of the attendant press harassment she had suffered. However, Patten J refused to do this. Instead, he acknowledged that the British press had found the expanded privacy protection bestowed by the European court as naturally challenging.^[47] He concluded that the routine public activity in *Murray* fell outside the *von Hannover* expanded zone of protection because it was just innocuous conduct in a public place which could not raise a reasonable expectation of privacy.^[48] Wisely, there was no attempt to categorise what is innocuous or trivial, and Patten J acknowledged that it 'is a matter of fact and degree in every case'.^[49] However, Patten J stated earlier in the judgment that he thought a distinction could be drawn between family and sporting activities, and something as simple as a walk down a street or a visit to the grocers, the former being private recreation time.^[50] This is of little assistance and should not be used to determine what are innocuous activities because quite convincing arguments can be made the other way. Sporting activities can be extremely public, whether shared by family or not, and shopping is a modern recreational activity often shared by family members and experienced as much more than 'popping out' for the necessities of life. Furthermore, an article which collected together varied information about apparently mundane activities could still reveal essentially private information, such as overall shopping and spending patterns, or frequency of medical appointments. Therefore, attempts to draw lines within public activities can obfuscate and appear doomed to fail. How might this definitional problem be overcome or reduced?

VI. PRIVACY AND INTRUSIVENESS

Even if it is possible to sufficiently identify innocuous activities so as to take them outside privacy protection, the question to be answered is whether this is desirable at all. The answer depends on the reasons accepted within a jurisdiction for protecting privacy. Some cases and commentators refer to universal human rights based values of autonomy and dignity.[51] Others describe political and social ideals which are culture specific, such as a European concept of personal honour which justifies protection from access by mass media, contrasted with an American desire to protect liberty interests, justifying protection from the state.[52] Yet others, such as Moreham, argue in a doctrinal fashion that privacy is necessary to protect against forms of unwanted intrusion,[53] defined as breach of a reasonable desire not to be accessed in the circumstances. Moreham suggests that photographs taken in a public place may support a privacy claim, after location,[54] the nature of the activity,[55] the way the image was obtained,[56] and the extent to which the publication focuses on the plaintiff[57] are taken into account. She concludes it 'does not follow from the fact that people have a greater claim to privacy protection in intimate situations, that disclosures relating to people going about their day to day business [in public] cannot also be intrusive.'[58] On this view, which offers a more principled and rational approach to the problem of public activities, surreptitious filming or photography, even in a public place, breaches a reasonable expectation of privacy because it makes the plaintiff more accessible than she or he actually was, and prevents the plaintiff from adapting his or her behaviour to an unwanted wider audience.[59]

How might this be applied to New Zealand law? I argue that it already has. The Court of Appeal clearly recognised in *Hosking* that in exceptional cases, a reasonable expectation of privacy can arise in relation to facts captured in a public place. However, the *Hoskings* were not successful because the public activities of Mrs *Hosking* and her children were seen as unexceptional. But the Court only gave weight to what the image of the shopping expedition showed, and not to any intrusiveness element, such as that suggested by Moreham. In contrast, New Zealand decisions since *Hosking* appear to have done this. In *Rogers*, (admittedly not an easy fact situation to determine on the grounds of invasion of privacy), it was held that Mr *Rogers* did have an expectation of privacy in relation to the videoed murder confession created for a public court process because, as noted above,[60] the publicity attaching to trial was seen as less than that attaching to national exposure on television. In *Andrews*, also, another 'exceptional' case, the High Court upheld a reasonable expectation in relation to public facts because the footage went beyond mere observation of the accident scene, and its extent was prolonged.[61] Both these decisions appear based on a recognition that the plaintiffs would be or were made more accessible than they otherwise would have liked, and that it was objectively reasonable for a plaintiff in their position to feel this way. If this intrusiveness element had been given more weight in *Hosking*, the increased accessibility arising from threatened publication and the fact that a paparazzi photographer took the photograph might have supported a reasonable expectation of privacy.[62]

As to public activities generally then, I would not take anything prescriptive from either *Murray* or *Hosking*. There has been too much reliance on a simplistic approach focussing on the locational character of the activity. A fairer and more logical approach must be a contextual one in which the mere fact that something occurs in public and further, that it is innocuous, do not necessarily prevent a reasonable expectation of privacy arising. The whole context of the publication or threatened publication must be considered to determine the issue, including any element of intrusiveness arising from collection of the information and the nature of the publication.

The question of identification of the plaintiff is also a problematic aspect of the reasonable expectation determination, and to this element I will now turn.

VII. REASONABLE EXPECTATION OF PRIVACY AND IDENTIFICATION

This issue is largely untouched in New Zealand case law, although it does raise questions which go to the heart of what a privacy tort is about.[63] What is the place of identification in privacy law? It is useful to make comparisons to defamation law, as both actions protect elements of autonomy and reputation. In defamation, a plaintiff must be identified or identifiable, such that an ordinary sensible reader would reasonably identify them as the person who is the subject of the allegedly defamatory statement.[64] To establish liability, there is no need to go further. Of course, a plaintiff may also put forward witnesses who actually did make the connection to support this, but does not have to. Currently, the process is unclear in privacy — it is not a requirement of the plaintiff's case that he or she always demonstrate there is actual or implied identification. However, in *Andrews, Allan J* in the High Court decided that in most cases, a plaintiff will need to show either direct or implied identification in order to succeed.[65] The BSA, in contrast, requires recognition outside the plaintiff's immediate circle.[66]

It is also unclear how identification is related to the publication issue in privacy. In defamation, a plaintiff only has to show that publication was made to one other person, other than the plaintiff.[67] Extent of publication may limit damage, but a plaintiff does not necessarily have to show that the person to whom the statement was published knew the statement was about the plaintiff, or that all the people who saw the publication - perhaps by downloading the information on the Internet, for example - knew it was about the plaintiff. In fact, where identification is found to be potential, rather than actual, there might simply be no evidence before the court on which to do this. Logically, the same should be so in privacy, in particular because there, in contrast to defamation, wide publication is required.[68] The dual question to be asked then would be: was there wide publication and would those who know the plaintiff have recognised him or her on seeing the publication?

However, why should a plaintiff have to be identified or identifiable in privacy law at all? What is the purpose of this requirement in privacy law? In *L v G*, Judge Abbott in the District Court argued from first principles that invasion of privacy is intended to protect a personal shield of privacy, which may be pierced whether an individual is identified by others or not.[69] The Court of Appeal in *Hosking* tried to explain this away by suggesting that *L v G* would have been better dealt with as a breach of confidence case.[70] The Court in *Andrews* ultimately sidestepped the issue by stating that *L v G* was 'of little assistance.'[71] These responses are unsatisfactory. In fact, it is possible to argue that any case involving information relating to a sexual relationship which one party wishes to publish could be covered by breach of confidence. Furthermore, in the United Kingdom it has been recognised that breach of confidence cases involving such sexual relationships are really about privacy. Judge Abbott's concept of a 'shield of privacy' has some attraction and relevance to privacy generally, and requires addressing. This is because it might assist in defining further what sort of autonomy should be protected by a tort of privacy.

Arguably, identification is relevant only if the sole purpose of the tort is to protect some element of autonomy connected to public life. That is so in defamation, a tort which protects individual autonomy over publicly available information. The tort is only complete if others think less of the plaintiff, and in order to do that, they must be able to identify him or her. A reputation is, ipso facto, a wholly public thing, attributed by others to an identified individual. In contrast, the privacy interest aspect of autonomy is partly inward looking. It is about how you want others to see you and also about how you see yourself. In defamation, how you see yourself is unaffected if publication does not identify you. In privacy, it may be. Damage for invasion of privacy can be divided into the damage to your feelings which arises when you find out your autonomous choice about what to do with the information is gone, and further damage when you learn the extent of the breach. Generally, then, wide publication, together with identification, will sound in appropriate compensatory damages. But in the appropriate case, such *L v G*, lack of identification could result in a lesser level of distress and humiliation. In the latter case, low or nominal damages only would be available.

The most obvious objection to allowing claims without requiring identification in every case is a floodgates one. However, this can be met by two ripostes. First, vexatious claims in privacy would be weeded out, because plaintiffs have to put forward some evidence of connection with the claim in order to proceed. Second, tort claims are expensive and time consuming, and are unlikely to be pursued for nominal damages alone, in particular because litigation may have the effect of destroying any element of privacy the plaintiff still retains. The issue of identification is a very complex one, and is not one which can perhaps be answered in isolation. It may be useful at this point to examine the connected issue of damages as a remedy in privacy law in more detail.[72]

VIII. DAMAGES AND PRIVACY

The principles for identifying and quantifying damages in privacy are not well developed.[73] Witzleb notes that although defamation and privacy share the common root aim of preserving human dignity, the purposes of compensation in defamation and privacy may not be the same. Compensation in defamation is to provide special loss obviously enough, such as loss of employment, but general damages are also available as solace for hurt and distress, and to repair reputation and to vindicate the plaintiff to the world at large.[74] The latter two aims correct the falsity in defamatory statements, a feature which is missing in statements which breach privacy. The harm in privacy cases was identified in *Hosking* as humiliation and distress, and personal injury and economic loss are not required,[75] although clearly the latter, if there is evidence to support it, is recoverable.

But it is not necessarily the case that unwanted disclosure of true facts always causes less damage than publication of false ones. The reputation of 'X', elected politician, may well be damaged or destroyed by the publication of false facts. But the effect of publication of true facts about 'X's' sexual behaviour, which, although perfectly legal, a majority of 'ordinary folk' find abhorrent,[76] may just as seriously diminish X's reputation. The standing of successful actress and model 'Y,' always slim and beautiful as contractually required on the red carpet and in the perfume advertisements she appears in, may be very seriously damaged by publication of 'true' photographs showing her without makeup, or on holiday having put weight on, or engaged in unusual sexual behaviour. Invasion of privacy has effects which are analogous to those which are compensated in the 'shun and avoid' cases in defamation.[77] The invasion attracts a remedy in privacy because people think less of the plaintiff in spite of the fact that he or she has done nothing wrong. Sometimes the effects can be as serious as those flowing from defamation, although probably not as often. The approach to damages in privacy should remain flexible to take account of the level of seriousness involved in each case.

Flowing from this, and also recognised in *L v G*, the nature of the defendant's behaviour should sound in damages, as in defamation. Though both aggravated and punitive damages remain the subject of considerable debate in private law[78] and in defamation in particular,[79] consistency requires that compensatory damages for breach of privacy reflect any element of defendant behaviour which aggravated the loss to the plaintiff,[80] and if that behaviour was malicious and contumelious, then exemplary damages, intended to punish the defendant and in that sense, not dependent on the hurt and distress of the plaintiff at all except in a parasitic sense, should be appropriate.[81]

A further element has also, it appears, been recognised in New Zealand. In *Brown v AG*,[82] Mr Brown was awarded a sum of \$25,000 damages to compensate for the effects of publication of the police flyer which identified him as a convicted paedophile. Those effects consisted of general vilification of Mr Brown, involving both verbal and physical abuse, the hounding of Mr Brown in the street identified in the flyer and in new locations he moved to in Wellington, the

receipt by him of hate mail, and his eventual self-imposed 'imprisonment' in his own home. The award in this case compensated Mr Brown for his loss of a right to be left alone to rehabilitate himself. It must

therefore have contained an element to compensate his feelings of fear, insecurity and isolation, as well as distress and humiliation.[83] This indicates that the case was a genuine intrusion on solitude case, rather than one based on informational privacy.

As to quantification of damages, it has been suggested by a United Kingdom commentator that the size of awards in defamation should not serve as a guide because the awards in that jurisdiction are high, do not cover the same ground, and because juries are involved in defamation cases.[84] It has not, as yet, been accepted that defamation awards in New Zealand are too high,[85] with the largest jury-awarded figure to date of \$675,000 being made in 2000 to pop icon Ray Columbus,[86] although figures from \$100,000 to \$200,000 are more common. The awards can, as in the Columbus case, include elements for aggravation and punishment. So far, only two New Zealand District Court invasion of privacy cases have resulted in damages awards being paid — *L v G*,[87] decided prior to *Hosking*, involved an award of \$2500 which appeared to reflect the lack of identification of the plaintiff, and *Brown v AG*,[88] where the award of \$25,000 against the police certainly reflected an additional element of vilification suffered by the plaintiff.[89] These levels, which are more modest than those commonly awarded for defamation, are certainly appropriate for privacy awards, because although I have argued above that it may be necessary to quantify an element intended to repair serious damage to public reputation in some privacy cases as well as to make good personal distress and humiliation, the repair involved will generally not reach that required to mend damage to reputation by false statements. It would appear, then, that awards up to \$30,000 would not be unreasonable in standard invasion cases.

However, it is important to maintain flexibility in approach, and so any court should be guided consistently by relevant factors in quantifying damages for invasion of privacy. In defamation, the established factors a court considers are the plaintiff's existing reputation, the defendant's conduct and state of mind at the time of and subsequent to the publication, the extent of the publication, the nature of the defamatory statement, the plaintiff's conduct and any relevant statutory requirements.[90] In privacy, the factors which suggest themselves are the plaintiff's involvement in public life (whether voluntary or involuntary, and the relevance of any zone of privacy the plaintiff has sought to maintain), the defendant's conduct and state of mind at the time of and subsequent to the publication, the extent of the publication and of identification, the nature of the invasive statement, any relevant statutory provisions, and the fact that privacy, once gone, cannot be restored immediately by payment of money. It is appropriate also that plaintiff behaviour should mitigate damage, as existing bad reputation can do in defamation.[91]

The final question to be addressed in relation to damages is whether the privacy tort should be actionable per se, in the sense that damage would be assumed in cases where humiliation and distress could not be shown. Intentional torts such as defamation, the various forms of trespass, and false imprisonment are actionable per se because the very act of breach is accepted as damaging to the plaintiff's interest.[92] The House of Lords recently considered in a novel claim whether the tort of misfeasance in public office could be actionable per se in the context of a claim by a prisoner against prison officers who had been opening his mail.[93] Although the claim was unsuccessful, largely because the House did not wish to depart from precedent and because alternative remedies existed, it did admit the possibility of change. Their Lordships acknowledged that historical reasons for the different approaches in different torts might have less relevance today,[94] and observed that although it has been argued the primary role of the law of tort is to provide monetary compensation for those who have suffered material damage rather than to vindicate the rights of those who have not,[95] further investigation might well justify a different approach in relevant areas of the law.[96]

The question of making privacy actionable per se is not one of changing the law, but simply whether this feature should be recognised as part of the developing tort. The purpose of making any tort actionable per se today is largely a symbolic one, which sends a message about the value a society attaches to the subject matter of the tort. On this basis, one justification for making privacy actionable per se is that like defamation, invasion of privacy reflects the legitimate and communitarian aim of protecting autonomy as a human good. As with the issue of identification, the argument raised against per se tort status is a floodgates one. The same responses can be made here, that potential plaintiffs are unlikely to risk further loss of privacy for litigation which will probably be more costly than any nominal damages awarded. Further, the current requirements of the privacy tort in New Zealand suggest a successful claim for mere breach will rarely arise because the plaintiff is required to show that publication is or would be highly offensive to a reasonable objective person in his or her shoes. In a mere breach case, it seems unlikely that this element would be able to be made out.

However, this may not be so. The aim of further protecting autonomy by attributing per se status to the privacy tort has some validity and weight. If Y, a fit and attractive naturist, is secretly photographed by Z, while sunbathing nude in Y's backyard, and the photographs published on an Adult website, it is not clear that the effect on Y would be humiliation and distress. Yet it could not be said that Y's privacy has not been invaded in some way. On an orthodox application of the *Hosking* requirements, the nudity and the location support a reasonable expectation of privacy. It might be argued, as it was unsuccessfully in relation to the genitalia of the prostitute in *L v G*,[97] that a naturist can have no privacy associated with nudity. However, even naturists reserve a shield of privacy for themselves since they choose not to sexualise nudity and wear clothes in public places so as not to embarrass others or to keep warm. What Y would claim in this sense is the ability to control access by others, the privacy interest put forward by Moreham and others, which I have supported previously.[98] Y, the naturist, probably would not be able to establish much, if any, distress and humiliation arising from the publication of the photos, but an ordinary reasonable person in a naturist's shoes

would still find publication highly offensive because of the intrusiveness involved — the making of Y more accessible than she or he otherwise would have been, which was recognised in *Rogers* and *Andrews*. Nominal damages would therefore mark and censure the breach, and, if the images were posted on the website maliciously, then punitive damages could follow. This same reasoning could apply to the issue of identification I have discussed previously.

I have mentioned plaintiff culpability briefly in the discussion of damages above. However, plaintiff culpability may also be relevant to a tort of privacy in determining actual liability. I turn now to address the issue of what substantive role plaintiff culpability should play in the tort of privacy. Once again, this discussion reveals further insights into a desirable legal status for privacy.

IX. THE RELEVANCE OF PLAINTIFF CULPABILITY

What is the relevance of plaintiff culpability in relation to establishing a reasonable expectation of privacy? I would suggest none. In this, I disagree with the approach taken in *Andrews*, where Allen J concluded, after examining overseas law,[99] that the morality and behaviour of the plaintiff can be taken into account, with appropriate varying effects on any reasonable expectation of privacy, even to the extent of its total destruction.[100] In my view, the question of culpability should be treated with caution and without presumption, and then only treated in relation to the defence of public interest.

The reason for this stance is that in many cases, it will be wrong, or too difficult, or unfair, to allow blameworthy plaintiff behaviour to destroy an expectation of privacy. This is because apparently culpable acts and breach of privacy often go hand in hand. Distressed people, such as Mr Peck, might well, if feeling suicidal, destroy or steal property as well as attempt to slash their wrists late at night on a public street. Extreme stress, or the results of alcoholism or drug addiction, could result in inappropriate public sexual behaviour which might be an offence as well as distressing and humiliating. In such cases, criminal charges and loss of privacy rights would be utterly inappropriate. It is therefore apparent that extreme care is required in deciding what kind of culpability is relevant. While it is possible to make rational arguments about criminal behaviour, it becomes less obvious why the moral behaviour of an individual should feature in the equation. The approach in the UK cases such as *A v B* and *Theakston*, which attempts to evaluate sexual relationships based on an idealised notion of shared morality, is to be avoided. If we still accept a zone of inherent privacy around sexual activity, then it is of no relevance whether or not the parties involved are married, engaged, living in a long-term defacto relationship or just involved in a friendly one-night stand. It is not the role of judges to rate the acceptability of such liaisons and condemn perceived weakness as culpable behaviour.

So at the very least, a remarkably cautious approach is required for the development of any 'clean hands' doctrine.[101] But I go further, and argue that culpability should be treated as relevant only to the question of the public interest defence, because only in this context can it be appropriately focussed and the evidential burden properly assigned. Although some overlap between the two is often possible, generally the element of reasonable expectation of privacy in any case investigates the character of the material, while the public interest defence allows a defendant to put forward the reasons why that character should not attract protection of the law in that case. To test this, we can turn to the categories of inherently private information. For instance, culpability would not render the financial records of an individual in our society any the less inherently private. However, it might justify disclosure of those records in the public interest, if the wrong-doing is relevant (sexual offending would not be relevant to this issue, but financial wrong-doing would). Wrong-doing will be relevant if it is connected to the information which is of legitimate concern to the public, and privacy should be lost because of that public interest element, not because people who are 'bad' or 'immoral' do not deserve privacy. It is also appropriate that the party that wishes to argue there is relevant wrong-doing has the burden of establishing it, as the defendant is required to do for the public interest defence. These burdens lie naturally together.

In fact, I would argue that *Allen J* appeared to apply such an approach indirectly in *Andrews*. In that case, although the defendant submitted that the plaintiffs were the authors of their own misfortune because they were driving while intoxicated and thus had lost any right to privacy, the judge ultimately rejected this because the filming had not been about those involved in the detection of crime, the road toll and the perils of drinking and driving.[102] The programme was a reality show about the daily activities of fire fighters, and although it had a significant entertainment element, the judge found there would be sufficient legitimate public concern in its content.[103] Therefore, the reason the culpable behaviour had no effect in the case was because it was not relevant to the material in which there was public interest.

Had the broadcast in *Andrews* been about the perils of drink driving, then it seems likely there would be a much higher legitimate public concern in it as a publication, but, on the approach I suggest, the broadcaster would still face the problem of relevance of the footage showing the intimate exchanges between the *Andrews* while being rescued. That would not matter, however, because a court could still hold that a public interest defence was unnecessary because the plaintiff would once again be unable to satisfy the requirement of high offensiveness of the publication. The point I make here by way of summary is that apparent culpability should never disentitle a plaintiff to a right of privacy — but it should validly bolster the public interest in the broadcast, assuming it is significant and relevant to that.

My investigation of these various difficulties associated with reasonable expectation of privacy has suggested areas in which the tort in its current form might be made fairer and more consistent. However, it has also prompted broader consideration of the possible purposes and

extent of such a tort. I now turn to examine the defence of public interest or legitimate public concern, with a similar aim in mind.

X. DEFENCE OF LEGITIMATE PUBLIC CONCERN

After some doubt about the matter,[104] *Hosking* clarified that this element is for the defendant to make out and not the plaintiff.[105] Gault and Blanchard JJ also noted that the defence ensures freedom of expression is taken into account[106] and that it means the judiciary has the pragmatic function, disliked intensely by the media, of determining what should and should not be published.[107] By the time *Andrews* was decided, the High Court was referring to the defence as one of legitimate public concern and there it summarised a number of useful points about the New Zealand position. First, the defence covers matters properly within the public interest, not simply of general interest.[108] This clearly covers matters referred to in the United Kingdom breach of confidence cases: public health, economy and safety, the detection of crime, and national security generally.[109] In New Zealand, the decisions of the BSA are also of assistance, although by no means definitive. They show that broadcasts dealing with accountability of public figures alleged to have acted incorrectly, inconsistently, or illegally, the apprehension of criminals, misbehaviour of public servants or failure of government departments, and public health issues, will almost always be matters of public interest. Other BSA decisions have concluded that the death of children, child molestation, and road safety are matters of public interest. Media discussion of government policy also appears to be covered by the defence, as are discussion of the resignation of political candidates one month before a general election and allegations of professional and sexual misconduct by a prominent doctor standing in local body elections.[110] Allen J went on to say in *Andrews* that courts should permit a degree of journalistic latitude so as not to destroy the context of a story.[111] Third, he noted that the legitimate public concern necessary will rise or fall depending on the level of invasion of privacy[112] and fourth, if there is intrusiveness, it should not be disproportionate to its relevance to the story.[113]

Rogers and *Andrews* illustrate just how much judgment and balancing is involved in assessing the defence. In the former, the Court found that TVNZ could rely on the public interest defence to the tort.[114] This was partly because Mr *Rogers'* privacy interest was low, and hence the degree of legitimate public concern did not need to be high, so that ultimately, open justice considerations required that the public could view the video of the confession the Court of Appeal had previously ruled inadmissible in order to discuss and debate the case.[115] However, Pankhurst J was unsure of the weight of his reasoning here. He recognised that it was a matter of evaluation which might not alone be sufficient to determine the appeal.[116] What was determinative was the prior restraint context. He noted that the threshold for pre-publication restraint was very high. He concluded that given the low-level privacy interest and the high-level public interest in the videotape's contents, this was not an appropriate case to restrain publication.[117]

Although it was unnecessary to the judgment in *Andrews*, Allan J stated he would have upheld a defence of legitimate public concern. This was because he thought the reality programme had a serious underlying purpose as well as a certain level of entertainment.[118] It was about fire fighters as rescue teams and the public had an interest in the cost of road accidents and the functioning of those teams.[119] Allan J would have given a degree of latitude to the makers of the programme to allow them to report on the work of the fire fighters, so he thought it did not matter that the tale could have been told without identifying the plaintiffs. Furthermore, the level of invasion of privacy, had it been upheld, was low because of the use of first names and pixilation, the lack of reference to drink-driving and the sensitive treatment of the plaintiffs, and therefore public concern did not have to be high to outweigh it.[120] Allan J's view of public interest in this case was strongly influenced by a decision of the Californian Supreme Court involving an unsuccessful claim about broadcast footage of a more serious road accident which resulted in the plaintiff becoming a paraplegic.[121] Unfortunately, nowhere in *Andrews* is it acknowledged that the American approach to public interest (or newsworthiness, as it is known in that jurisdiction) has become thoroughly constitutionalised.[122] American privacy law developed in the shadow of a Bill of Rights with supreme status which guarantees primacy to freedom of expression, and hence great latitude is given to the media generally, especially in reporting on the activities of public figures or those in the public eye.[123] This is in contrast to the European approach, illustrated by *von Hannover*, referred to above.[124] *Andrews* also ignores New Zealand's own constitutional arrangements.

The conversation about the place of public interest in the New Zealand privacy tort has in fact barely begun to take place. The public interest question, where the clash between freedom of expression and privacy is always engaged, is probably the most difficult aspect of privacy for the courts, and the emerging jurisprudence is tentative. In most cases, there is reference to the need to carry out a 'balancing exercise'. This is an ordinary feature of the task of judging and is often interpreted by the media as allowing judges to become arbiters of taste. However, this was rejected in *Hosking*, where Gault P and Blanchard J, in the majority, stated:

That this may draw the Courts into determinations of what should or should not be published must be accepted. Such judgments are made with reference to indecent publications and suppression orders and are part of the judicial function. It is not a matter of Judges being arbiters of taste, but of requiring the exercise of judgment in balancing the rights of litigants.[125]

The question which must be addressed is what is the role of freedom of expression in the privacy tort? The constitutional arrangements in New Zealand and the United Kingdom are quite different as regards rights since the passage of the United Kingdom Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990. We have a Bill of Rights which contains a right of freedom of expression,[126] but not a right of privacy, while the European Convention

contains both in arts 10 and 8. Our Bill cannot be used to strike down inconsistent legislation but contains provisions which impact on statutory interpretation.[127] Under the Human Rights Act, English judges are required to interpret English law so as to take account of the European Convention and decisions made by the European court.[128]

However, in both jurisdictions, there is no statutory requirement to carry out a human rights or bill of rights analysis in relation to actions between private citizens. New Zealand's Bill was intended to have only vertical effects: it applies to the three branches of Government and bodies exercising public functions,[129] and thus in general protects private citizens from the state.[130] Although there is ongoing disagreement,[131] the New Zealand judiciary appears to accept it must take account of the rights in the Bill somehow when resolving disputes between private citizens and when developing the common law.[132] Because this process does not produce directly enforceable rights, the horizontal effect is usually regarded as weakly or strongly indirect.[133] It is given content in two ways: by arguing that judges are simply bound by the Bill as the judicial arm of the state, or by arguing that judges are implicitly required to take account of the values expressed in the Bill of Rights. The judiciary often appears to endorse or use both approaches.[134] For example, Tipping J, in the majority in *Hosking*, affirmed the values approach, by requiring judges to give appropriate weight to the rights in the Bill when developing the common law, instructing them to use the values in it to inform the process.[135] However, he also attached some significance to the fact that it is the judicial branch of government which must undertake this exercise.[136]

The question of horizontal effect of New Zealand's Bill of Rights is a fascinating one which cannot be fully explored in this broad paper. However, I consider that the argument of Rishworth and others that indirect horizontality in the common law is not only inevitable, but desirable,[137] is compelling. The common law develops incrementally, and for it to do so without taking account of the values in the Bill of Rights in some way would be to ignore a profound form of public interest,[138] would produce distorting effects within constitutional law, and would also be seriously out of step with other common law jurisdictions.[139] Therefore, in every privacy case, at the very least, some sort of application of s 5 of the New Zealand Bill of Rights Act should be openly articulated to balance freedom of expression and privacy and the relative public interests which exist in both. Section 5 requires that the rights and freedoms contained in the Bill may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In privacy cases the process should not be an amorphous, fact-specific approach to legitimate public concern, but one that tests the value of privacy both descriptively and normatively, and contrasts it with the right that is freedom of expression.[140] By this I mean that a more principled approach is required which does not focus on whether it is the plaintiff who deserves the protection of the tort, or the defendant who deserves the freedom to publish, but which is more outward-looking and investigates the public interest on both sides as well. As to what

methodology might be used, three alternatives can be briefly presented here. Firstly, it might be left to judges to use the Bill of Rights to simply assign the value and weight they see fit to freedom of expression and to privacy. In *Rogers*, for example, William Young P specifically addressed the issue of the New Zealand Bill of Rights Act 1990 and freedom of expression. While not a particularly structured Bill of Rights analysis, William Young P upheld a strong indirect horizontal effect of the Bill because the courts are subject to the Bill.[141] Taking the BORA into account clearly made a difference for this judge. He was prepared to take a very broad view of freedom of expression, affirming Hoffman LJ in *R v Central Independent Television Plc*, where he said:

But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things the government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.[142]

William Young P therefore doubted that the plaintiff even had a reasonable expectation of privacy in the videoed murder confession, and used the Bill of Rights to tip the balance in favour of freedom of expression, especially in the prior restraint context.[143] He concluded that Mr *Rogers* was seeking to protect his reputation in advance, and held that a defamation action would be available to him if TVNZ subsequently got it wrong.[144] While flexible, this open-textured approach to privacy and the Bill of Rights is susceptible to attack because it can produce different results depending on whether the judge can be regarded as 'media-friendly,' and because it rather begs the question of what acceptable limits on freedom of expression might be.

A more structured approach is possible, based on the Canadian-influenced steps suggested by Anderson J in the recent and leading Supreme Court decision on the Bill of Rights, *Hansen v the Queen*. [145] There Anderson J stated [146] that a limitation of an affirmed right or freedom in the Bill will not be demonstrably justified in a free and democratic society unless it

- a) relates to concerns which are pressing and substantial in a free and democratic society; and
- b) is rationally connected to its intended purpose; and
- c) in light of its intended purpose is the least possible impairment; and
- d) is a proportional response to the concerns.[147]

In *Hosking*, Keith J used an approach of this sort, although mostly focussed on (a) above, to conclude that New Zealand had no need of a privacy tort.[148] This approach also has

weaknesses. While lists of questions are useful and transparent, they can become rigidly orthodox and difficult to apply.[149] Further, each inquiry prompted by items in a list requires an exercise of judgment, exposing a mere appearance of objectivity in this sort of approach. Finally, a list of this kind tends to invest rights in the Bill with 'trump' status, thus emptying the balancing process of any real meaning.[150]

An alternative approach might be a method which openly assigns value to speech. In *Hosking*, Blanchard and Gault JJ refused to develop a test based on categories of commercial and non-commercial speech to determine public interest.[151] However, Tipping J, a judge who has developed the idea of media responsibility in the context of defamation,[152] seemed inclined this way, commenting that the legitimate commercial objective of boosting circulation and ratings served no legitimate public function where it substantively adversely impacted on privacy.[153] He went on to recognise a hierarchy of speech under which information which adds to the marketplace of ideas or which allows a democracy to function effectively will be harder to limit by the imposition of other values.[154] This approach, where some speech is potentially 'off-limits,' had fairly definitive results for privacy in *von Hannover*[155] where the European Court of Human Rights, in balancing the protection of private life of a public figure without an official public role against freedom of expression, used a test of whether the published material contributed to a debate of general interest. Thus, photographs showing Caroline *von Hannover* in scenes from her daily life made no contribution to such a debate, and the European privacy right revealed itself to be an extensive one.[156] A similar approach in the United Kingdom protected diary entries of Prince Charles made on a visit to Hong Kong, even though the diaries were circulated to more than 50 people and contained his political views.[157]

A combination of the latter two approaches, without going so far as the European Court of Human Rights, is desirable. Tipping J's approach, mandating open reference to the Bill of Rights, the balancing exercise and freedom of expression, gives a strong steer as to what is the core value worthy of protection in freedom of expression, by adopting two basic free speech arguments — it prioritises speech which adds to the marketplace of ideas or which allows a democracy to function effectively. In such an approach, other speech is not precluded, but may more easily be trumped by privacy. That starting point would then assist in using the questions suggested by Anderson J in *Hansen*, or questions like them, as guidelines only. This approach would also require a sophisticated and generous view of freedom of expression, in which the importance of the media is recognised and protected as much as possible.

However, if balancing is to be done properly, it is necessary to treat privacy in a similarly generous fashion. I do not mean by this that privacy is currently equal in status with freedom of expression — it clearly did not achieve legal prominence as early as the latter. But being ancient or elderly is not what invests freedom of speech with its stature in the law and in western liberal societies. The preceding discussion of aspects of the developing tort of invasion of

privacy has demonstrated that although the tort is referred to by cautious commentators and judges as protecting only informational privacy, it is not, in fact, about some special form of data protection, but rather, about protection of the dignity and liberty of human beings.[158] This explains why privacy is shaking free from the informational straightjacket, and elements going wider than Prosser's first tort,[159] such as loss of choice about accessibility to others, and intrusion on solitude, are being recognised in New Zealand and overseas.

Furthermore, although freedom of expression is a constitutional right in New Zealand, that status is not absolute and was conferred only in 1990, when the New Zealand Bill of Rights Act was passed. We may be tentative about privacy, but we are only somewhat less tentative about freedom of expression.[160] It is thus appropriate that privacy and freedom of expression be considered together, and in an open-minded fashion, taking account of the political and social values we wish our laws to reflect. I will now examine how privacy is otherwise being considered in contexts beyond the privacy tort, and how it is perhaps beginning to outgrow it.

XI. PRIVACY AS MORE THAN A TORT?

Privacy featured strongly in *Brooker v Police*,[161] a recent Supreme Court decision dealing with the constitutional impact of s 14 of the New Zealand Bill of Rights on the interpretation of an offence of disorder. Mr Brooker had protested outside the house of a female police officer whom he believed had abused police powers in relation to him. The protest took place at 9.20am, and consisted of playing a guitar, singing in a normal voice and displaying a placard with messages such as 'Freedom from unreasonable search and seizure'. Mr Brooker was arrested for loitering with intent to intimidate, but the charge was substituted in the lower court with behaving in a disorderly manner.[162] Mr Brooker represented himself throughout in this appeal against his conviction and fine of \$300.

The majority of Elias CJ, and Blanchard and Tipping JJ, allowed the appeal and set aside the conviction, largely because primacy was given to freedom of expression. However, two judges in the majority accorded considerable weight to privacy, though did not find it engaged in this case. Elias CJ thought it was consistent with the right of freedom of expression that restrictions on it may be imposed where necessary to protect interests such as privacy or residential quiet, in accordance with our international obligations. However, in this case, she concluded that the offence of disorder was not designed for that end, but rather to preserve public order.[163] Blanchard J noted that 'the common law has long recognised that men and women are entitled to feel secure in their homes, to enjoy residential tranquillity — an element of the right to privacy. They are justifiably entitled not to be subjected there to undue disturbance, anxiety or coercion'.[164] Although he thought that privacy may be an important consideration in assessing whether the conduct of a defendant has disturbed public order,[165] in finding that even allowing for the fact that Mr Brooker intended to wake the constable in a protest targeted

at her, it would not be a justified limitation of his right of freedom of expression to hold that such a protest, of short duration and during daylight hours, was proscribed by the criminal law.[166] Finally, Tipping J carefully avoided any reference to privacy, and determined the matter as a clash between freedom of expression and a need to proscribe conduct in a public place which is disorderly because, as a matter of time, place and circumstance, it causes anxiety or disturbance at a level which is beyond what a reasonable citizen should be expected to bear.[167]

The minority of McGrath and Thomas JJ would, in contrast, have elevated a right to privacy in one's home above any free speech rights being exercised by Mr Brooker. The minority judgments are interesting, not only because they show how close the decision was, but because they acknowledge and reveal the increasing stature being accorded to privacy generally by some of our senior judiciary. McGrath J applied a balancing process under s 5 of the BORA, and even appeared prepared to extend the concept of privacy beyond informational to interference with solitude. The police woman in Brooker was disturbed while resting in her home, yet although a state official, she was entitled to a private life.[168] McGrath J spent some time establishing the legitimacy of the right of individuals to be let alone in the privacy of their homes, appealing to US case law in support.[169] He considered that the interests of New Zealand citizens in being free from intrusion in their homes was a value close to being as compelling as freedom of speech,[170] and concluded that the detriments to the policewoman's privacy values outweighed Mr Brooker's free speech rights.[171]

Thomas J spent some time developing his theory of what Bills of Rights are for and suggested that they are dedicated charters with the capacity to be cohesive and harmonising agents within the community.[172] For this judge, rights come with responsibilities and are to be exercised responsibly with concern and consideration for others.[173] In examining freedom of expression, Thomas J did not give undue judicial deference to it in the abstract, and saw the judiciary at risk of doing this. He made it clear that courts have to deal with the concrete application of the concept in particular situations.[174] He also appealed to US law to argue that there is a very compelling right or interest in privacy in the home.[175] Using freedom of expression theory, Thomas J concluded that Mr Brooker's protest action did not merit the full protection of the law, because the 'fabric of our democratic and civil society would lose nothing if the right to freedom of expression were required to give way to a reasonable recognition of privacy and the interest of being left alone in the seclusion of the home.'[176]

The minority judgments, and in particular, that of Thomas J, reveal the significant status issues attaching to privacy. All of the judgments variously and sometimes interchangeably refer to privacy as a right,[177] a value,[178] an interest[179] and a consideration.[180] However, it is only Thomas J who was prepared to address the issue of whether privacy is a right or a value directly. Some time ago, Waldron identified a growing mass of contradictory theorising about rights.[181] This essay is not the place for further doctrinal analysis. However, I will attempt to

state a simple observational analysis of the status issues attaching to freedom of expression and privacy which are apparent from *Brooker*.

Currently, freedom of expression may be seen as a constitutional right in New Zealand, as it is contained in s 14 of the BORA. Privacy is not directly referred to in the BORA and so is not privileged by constitutional status. Privacy might be seen as simply a legal right, or even less than that, and therefore freedom of expression appears to have more weight. However, unlike the US Bill of Rights, the constitutional status of freedom of expression is not a form of immunity, because the rights in the BORA are limited by s 5.[182] Therefore, freedom of expression might be limited by other rights and indeed, by legal values.[183] In privacy law, then, the question to be asked is: on what basis can privacy override freedom of expression? One may take a steadfast doctrinal approach and find that an ordinary legal right cannot trump a right contained in the BORA. One could use argumentation to avoid the complex technicalities involved. Or, one could simply ignore the technicalities altogether. In *Hosking*, the Court of Appeal did not address the issue in detail, but did not declare privacy as a right. The joint judgment focussed on declaring the tort and listing its components. Tipping J consistently referred to privacy as a value but also thought that, on appropriately defined occasions, privacy values could outweigh the right to freedom of expression.[184] Anderson J, in the minority, recognised constitutional superiority by comparing the affirmed right of freedom of expression with privacy as a particular manifestation of a value.[185]

The minority judgments in *Brooker* attempt to deal in very practical ways with the difficult theoretical issues surrounding the dichotomy between constitutional and legal rights, between rights and values, and how the law should deal with these. McGrath J did not concern himself with doctrinal analysis of whether privacy is a right or a value. Rather, he used the labels 'right' and 'interest' in almost equal portion to conclude that privacy is a value which, 'in the abstract, is close to being as compelling as freedom of speech'.[186] These conflicting interests or rights were then to be balanced against each other.[187] McGrath J rejected conferring any preferential status on any right or value in the balancing process as he thought to do so would skew the task of balancing and prevent the full recognition of any significance of the competing interests in the particular circumstances.[188] For this judge, the labels used do not appear to have any legal significance and neither does location either inside or outside a constitutional statute. Thus, he even assimilated the process of balancing freedom of expression and privacy with that which occurs in the United Kingdom where the Human Rights Act 1998 requires balancing of arts 8 and 10 of the European Convention of Human Rights.[189]

Thomas J's judgment was almost radically aspirational. It confronted the 'rights/value' problem head-on. He posited a view of privacy as basic to human dignity, and of human dignity as basic to the rights in the BORA.[190] Thomas J argued robustly that privacy is an existing right which can be recognised under s 28 of the BORA.[191] He marshalled evidence to support this existing right from the long title to the BORA, numerous international covenants, English and American

case law, and from his reading of community values.[192] However, he ultimately acknowledged that privacy has not yet been given the status of a full right in New Zealand and so set about to determine the matter in a manner which did not depend on the labels given to the interests involved.[193] Thomas J made it clear he accepts the 'framework of justification' view of s 5 of the BORA described by Andrew and Petra Butler, in which a balance has to be struck between a right in the Bill and a limit outside of it, with the limit always weighted negatively and always on the back foot to the constitutional right.[194] But he held that the justificatory approach is inapplicable to private claims between citizen and citizen. Instead, Thomas J found that competing interests in such cases are to be dealt with without labels, but as equal fundamental values.[195] By taking the balancing outside the justificatory framework Thomas J acknowledged but dextrously avoided the constitutional context and the issues which go with it.

Thomas J's open approach to the rights/values problem is preferable to that of McGrath J, which merely pretends that labels do not matter.[196] However, Waldron has identified the scholasticism which may attach to constitutionalisation of rights,[197] resulting in endless debate and litigation over whether behaviour is an exercise of a particular constitutional right or not ('is pornography speech?' 'is advertising speech?' and so on), and so I also accept the view of both judges in the minority that giving constitutional rights automatic trump status is unduly limiting. But Thomas J's approach, of accepting a justificatory framework to analyse rights and limitations only when the contest is between state and citizen, amounts to sleight of hand. What is 'the contest' referred to by Thomas J? Brooker of course involved the state because it arose from the prosecution of a criminal statute, and because it concerned the interpretation of a criminal statute by judges acting as state officials. Although the actors involved were individual citizens, the other interest identified and considered together with privacy in the case by Thomas and McGrath JJ was public order. Clearly the state may have an interest in public order and in individuals having a right to privacy in their homes. So to suggest the case was only about a contest of interests between citizens, like a defamation claim or privacy tort claim, thus making the BORA irrelevant, is misleading. Furthermore, Thomas J's approach appears to flow from one which rejects an indirect horizontal effect of the BORA in private law claims, which I do not support,[198] in part because it is arguable that there are public interests at stake even in private claims. Therefore, I prefer the alternative approach suggested by Thomas J,[199] impliedly supported by McGrath J, and supported by Tipping J in *Hosking*, of openly recognising that currently privacy is a value but a value which can, on appropriate occasions, trump even the constitutional right that is freedom of expression.

However, I also accept Thomas J's aspirations about privacy becoming a right. As was noted by Keith J in *Hosking*,[200] privacy is protected in myriad ways in New Zealand. He referred to minor statutory criminal and other provisions covering harassment, telecommunications, gathering of information, official information protections, and in particular, the Privacy Act 1993 (which, based on principles of data protection, and a complaints process, does not confer any legal rights).[201] The judge also noted the privacy principles applied by the Broadcasting Standards Authority, and the print media self-regulatory body, the Press Council,[202] as well

as the law of confidence. To this list can now be added the criminal offence of covert intimate filming.[203] However, although Keith J used reference to these other protections to bolster his strong application of the BORA to hold that no pressing need for a tort of privacy exists in New Zealand,[204] I would use such evidence now to suggest that the legal weight accorded to privacy is becoming collectively more substantive and sophisticated, in a manner akin to that for freedom of expression, though of course, not as advanced.

This position is strengthened by the fact that privacy features increasingly in non-tort case law, such as *Brooker*, but in particular in relation to search and seizure, and suppression. In these cases, it appears to clash with principles of open justice and the rule of law, as well as freedom of expression. In my view, these manifestations, as well as the privacy tort case law, indicate the beginnings of a gradual metamorphosis of privacy from an ordinary legal right protected by a tort remedy and a patchwork of other protections, into a broad right of fundamental character which might in appropriate cases weigh equally with freedom of expression. I will now briefly summarise the evidence for this view.

Some judges have made a strong connection between the Bill of Rights and a general concept of privacy by referring to the prohibition against unreasonable search and seizure in the Bill.[205] In *Hosking*, Tipping J stated:

But the Courts should also recognise and give appropriate effect to the values involved in the broad concept of privacy. ... They are recognised ... in provisions such as s 21 of the Bill of Rights, namely the right to be free from unreasonable search and seizure. That right is not very far from an entitlement to be free from unreasonable intrusions into personal privacy. [206]

He went on to extend the values underpinning s 21 by analogy to unreasonable intrusions into personal privacy which became the subject of our tort. Hence, it can be said that a statutory constitutional manifestation of privacy in part influenced the development of our tort.

It has been commented of the search and seizure cases in the past, that 'stirring statements' about individual privacy have not been given sufficient weight in Court of Appeal decisions to render evidence obtained in breach of the BORA inadmissible.[207] However, recent decisions suggest otherwise. Now the right has been called a quasi-constitutional one, to be given real weight.[208] The highest expectation of privacy is recognised in relation to the integrity of the physical person and in particular to intimate integrity.[209] As regards property, residential property has priority.[210] Although it is recognised that a contextual analysis is also required in this area, this is not seen as a licence to constrict privacy.[211] This traditional approach, concerned with protecting against bodily and property intrusions in the nature of trespass, has been identified very recently by the Law Commission as having expanded in modern New

Zealand to encompass any circumstances where there is state intrusion on an individual's privacy.[212] Although the Commission acknowledges that wider and more difficult questions of privacy arise in claims between private citizens, throughout its analysis of search and seizure, the Commission treats privacy as a key human rights value.[213] This cannot be ignored in the private arena.

There are indications that our judges are also considering privacy more broadly in other contexts. An appeal arising from a successful application by a state broadcaster to search court records was fought by French secret agents Alain Mafart and Dominique Prieur on the basis of privacy. The agents attempted to prevent the broadcast of a videotape of committal proceedings in which they pleaded guilty to a charge of manslaughter for their part in blowing up the Greenpeace ship the Rainbow Warrior in Auckland Harbour in 1985.[214] In *Mafart & Prieur v Television New Zealand Ltd*,[215] Hammond J, for the Court of Appeal, appeared prepared to consider a 'false light' type of privacy. In this case, freedom of information prevailed over the agents' privacy, because the Court of Appeal accepted little weight should be attached to the latter. In several thoughtful passages, however, Hammond J pondered the very nature of privacy and humiliation, referring to various learned articles on the topic,[216] and identified synecdoche as a matter of concern, stating:

It is a common and lamentable part of entering the public gaze that the media tends to promote one salient feature of an incident (often glorified as a 30-second sound bite), with unfortunate and unfair results. Not the least is a refusal (or at least a misportrayal) which fails to respect the fact that people may well be different in private than in public.[217]

The judge indicated he would have been gravely concerned if TVNZ had intended to humiliate the plaintiffs by showing the very short piece of film, or even if there had been no such intention, but an incidental effect of this kind.[218] However, he concluded that the appellants had not suffered any significant damage to their privacy interests, and would not do so in the future due to broadcast of the material, even if the video was constantly repeated.[219] Mafart and Prieur had largely destroyed their privacy rights by each publishing a book with a detailed account of the moment when they pleaded guilty to the charge. Those accounts showed no humiliation arising from the moment itself.[220] Furthermore, the public interest in film of what was in New Zealand, a moment of great historical significance, was very strong. While the matter of synecdoche requires detailed analysis outside the ambit of this paper, the Mafart case demonstrates that aspects of privacy are arising for consideration more regularly in cases outside of the ordinary tort claim, and that the judiciary are prepared to consider its broader aspects.

XII. CONCLUSION

I have argued in my examination of the existing tort of invasion of privacy that it is proving not to be confinable, and should not be confined, as set out in *Hosking*, to informational privacy. I have suggested that the tort should embrace loss of control over accessibility as a foundation for a claim. Further, it should expand to admit intrusive behaviour in the form of invasion of seclusion, and should accord privacy substantive, and where appropriate equal, weight with freedom of expression as a starting point in a more formal and transparent balancing process where the defence of public interest is engaged. Mine is an optimistic thesis which does not see these forms of development as a threat to legal coherence or chilling of freedom of expression as long as the balancing process is an even one.

I have therefore also attempted to demonstrate that privacy is not just about the tort and where it might be going. The cases and developments I have discussed tend to show that if privacy is only a 'value', whatever that might be, it is now in transition to a right or something so close to a right that it will eventually make no difference. The appropriate legal ambit of that right is a topic for further examination, but is also one which will be receiving close examination by the New Zealand Law Commission, which announced a comprehensive review of the law of privacy in New Zealand in late 2006. The Review has four stages and will go back to first principles to cover the nature of privacy values, technological change, and international trends, and their implications for New Zealand law.[221]

In looking at the New Zealand situation, one of the questions the Commission will be asking is whether patch-work coverage of privacy is appropriate in New Zealand. The trends identified in this paper, and the arguments presented suggest that if things are left as they are, the judiciary should at least continue develop the privacy tort in ways which recognise the autonomy interests I have identified, and that a more substantive judicial privacy right may eventually develop uniting the various 'rights' 'interests' and 'values' which are emerging from the case law generally. Such continued development must take appropriate account of the BORA and freedom of expression. Other possibilities the Law Commission will probably identify include the passage of a statutory tort,[222] or of a broader statutory legal right, or constitutionalisation of privacy by inclusion in the BORA with all the attendant advantages and disadvantages. The media in particular is ambivalent about this process because although it does not like the uncertainty associated with the privacy tort, it is most suspicious of any form of state regulation, and hence, apprehensive about the possibility of any major overarching statutory reform. Such an attitude overlooks the fact that statutory reform would have to import a requirement that the Bill of Rights (and hence, freedom of expression) be taken account of in every case, which does not always occur as it should at present.

In Stasiland, Funder describes how 'puzzle women' are now employed by the Stasi File Authority office in Zirndorf, a village outside Nuremberg. These women (and some men), are painstakingly reconstructing the 15,000 sacks of shredded and hand-ripped Stasi files, index cards, photos and unwound tapes and film, containing information about every detail of the

lives of East German citizens before the fall of the Berlin Wall, so that those named in the files can have access to them. One young puzzle woman is quoted:

When I find love letters, I think, good grief, they really opened everything — and how many hands did these pass through? How many times were they copied? I'd hate for that to have happened to me. I don't feel too good about seeing them myself when I piece them together.[223]

This woman, living in a liberal democracy, is expressing abhorrence of a state which deprived its citizens of privacy. However, she is also expressing her own understanding of what is private in a free society (such as New Zealand), because she believes that not only should the state not have looked at the love letters, but neither should she, even though there was public interest in her task. Our privacy laws, and the investigation being carried out by the Law Commission, should seek to give effect to that common notion of autonomy.

POSTSCRIPT

On 16 November 2007, when this article was in press, the Supreme Court released its decision in the *Rogers* case.[224] A majority of Blanchard, Tipping and McGrath JJ allowed Television New Zealand to broadcast the videoed confession of Mr *Rogers*. The minority of Elias CJ and Anderson J would have sent the matter back to the High Court for a substantive hearing of the matter because that Court had originally heard the application for injunctive relief without requiring pleadings to be filed and had not been in a position to grant the substantive relief sought.[225]

Both forms of privacy I have discussed above featured in the judgment, although nothing really substantive has been added to the law. The majority avoided dealing with the place of the privacy tort by simply referring to it as set out in *Hosking*, because the parties in *Rogers* accepted the existence of the tort in that form.[226] Only one judge, McGrath J, applied any real formula as set out in *Hosking*. [227] However, all three of the majority concluded that Mr *Rogers* had no real expectation of privacy because the videoed confession was produced for a public court process where anyone could have attended, including the media.[228] This rejects the approach of the Court of Appeal that a reasonable expectation could arise because showing the video on national television would give greater exposure than in the court room.

The Court then dealt with the matter as one involving a hypothetical search of the court record — as if TVNZ had made an application in the normal way to gain access to the video it already had. Here another form of privacy was weighed in the process — this involved consideration

and weighing of Mr *Rogers*' potential loss of dignity, and the vulnerability of Mr *Rogers* trying to fit back into society.[229] No formulaic approach was taken as with the tort, and McGrath J said: 'The relative weight to be given to privacy interests must always depend on all the circumstances, even where they involve a vulnerable acquitted defendant.' [230] In the end, open justice prevailed because of the need to preserve public confidence in the legal system, and the media was entitled to have access to primary sources in order to try and explain why Mr *Rogers* was acquitted in spite of the existence of the videoed confession.[231] The programme about *Rogers* was shown on TVNZ two days later on its Sunday programme. Extracts from the videoed confession were used a number of times in the broadcast, and the full seventeen minute interview was made available on the TVNZ website.[232]

Therefore, the privacy tort is for another day. The minority clearly wanted to look at it again[233] and the position taken by the majority anticipates this also. The status of the other nascent form of privacy and its relationship to the tort, if any, remains completely unaddressed.

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1. A Funder, *Stasiland* (2002) 57.
2. *Ibid* 57.
3. See eg, E Barendt, 'Privacy and freedom of speech' in A T Kenyon & M Richardson (eds), *New Dimensions in Privacy Law* (2006) 11.
4. Funder describes such effects, both physical and psychological, in her book, above n 1.
5. I am not concerned in this paper, to examine the impact of technological developments and privacy. There is an ever-growing body of scholarship on the issue. See eg: D Brin, *The Transparent Society: Will Technology Force Us to Choose Between Privacy and Freedom?* (1999); P Agre & M Rotenberg, *Technology and Privacy: The New Landscape* (1997); A M Froomkin, 'The Death of Privacy?' (2000) *Stanford Law Review* 1469.
6. [2005] 1 NZLR 1. For previous forays into the area, see *L v G* [2002] DCR 234; *P v D* [2000] 2 NZLR 591; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415; *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *Tucker v News Media Ownership Ltd* HC Wellington, Jeffries J, 20 October 1986, CP477/86; *News Media Ownership Ltd v Tucker* CA 172/86, 23 October 1986. See also R Tobin, 'Yes, Virginia, there is a Santa Claus: the tort of invasion of privacy in New Zealand' (2004) 12 *Torts Law Journal* 95, K Evans, 'Was Privacy the Winner on the Day?' [2004] *New Zealand Law Journal* 181.
7. [2004] UKHL 22; [2004] 2 All ER 995.
8. [2007] EWHC 1908.
9. The photographs did not show anything that any member of the public could not have seen on the relevant day. The magazine involved, *New Idea*, stated after the Court of Appeal decision it did not intend to publish the photographs.
10. [2005] 1 NZLR 1, [117]. Tipping J agreed with the joint judgment, with slight variation, but his judgment focussed to a much greater degree on the New Zealand Bill of Rights Act and the balancing of values required by it: see [226]-[260].
11. *Ibid* [118].
12. *Ibid* [119].
13. Tipping J would settle for substantial offence and harm, which is a lesser test than his fellow judges: see [256].
14. *Ibid* [126]-[128],
15. *Ibid* [129].
16. *Ibid* [130]. See New Zealand Bill of Rights Act 1990, ss 14 & 5.
17. *Ibid* [149H150].
18. *Ibid* [158].
19. *Ibid* [236].
20. *Andrews v Television New Zealand* HC Auckland, 15 December 2006, CIV-2004-404-3536, [37].
21. *Television New Zealand v Rogers* [2007] 1 NZLR 156, [49].
22. *P v D* [2000] 2 NZLR 591, [36],
23. *L v G* [2002] NZAR 495.
24. *P v D* [2000] 2 NZLR 591.
25. See E Paton-Simpson, 'Private Circles and Public Squares: Invasion of Privacy by the Publication of "Private Facts"' [1998] 61 *Modern Law Review* 318. Paton-Simpson makes strong arguments that the labels 'public' and 'private' may be used in both a

- descriptive or a normative sense, the two are not mutually exclusive categories, cases cannot be considered in isolation, and privacy may be about more than information.
26. [2006] NZAR 552.
 27. [1986] 2 NZLR 716.
 28. The injunction was not made permanent because the information became public in any event.
 29. [2007] 1 NZLR 156.
 30. Ibid [54] - [55].
 31. Ibid [59]. In this case, the police apparently leaked a copy of the video to the broadcaster before the murder trial was concluded. When the video was excluded and Mr *Rogers* was acquitted, TVNZ sought to broadcast the tape as part of a documentary about the trial. The facts in *Rogers* do not sit easily within the tort of privacy. It may perhaps be a genuine breach of confidence case, although the Court of Appeal did confirm the principles stated in *Hosking*. *Rogers* has been appealed to the Supreme Court and the outcome is awaited.
 32. Ibid. This seems to have been avoided in the United Kingdom, where either of these steps can be used to determine whether information is private: see N Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 Law Quarterly Review 628.
 33. *Hosking v Runtig* [2005] 1 NZLR 1, [164].
 34. HC Auckland, 15 December 2006, CIV 2004-404-3536.
 35. Ibid [41].
 36. Ibid [28].
 37. *Peck v United Kingdom* (2003) 36 EHRR41.
 38. *Andrews v TVNZ* HC Auckland, 15 December 2006, CIV 2004-404-3536, [31]-[41], from the oft-quoted Australian Broadcasting Corporation v Lenah Game Meats [2001] HCA 63; (2001) 208 CLR 199.
 39. *Hosking v Runtig* [2005] 1 NZLR 1, [164], [260].
 40. Articles 8 and 10 of the European Convention on Human Rights.
 41. *Von Hannover v Germany* [2004] EMLR 21.
 42. [2007] EWHC 1908.
 43. Ibid [17].
 44. Ibid [58], [59]. See also Baroness Hale in *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 All ER 995, [154],
 45. *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 48.
 46. *Murray v Express Newspapers plc* [2007] EWHC 1908, [65]. There is no mention in the judgment of the House of Lords in *OBG Ltd v Allan*, *Douglas v Hello! Mainstream Properties Ltd v Young* [2007] UKHL 21, which, on one view, did allow claimants to protect their image using breach of confidence.
 47. Ibid [47]-[49].
 48. Ibid [66]-[69], relying on *Ash v McKennitt* [2006] EMLR 178. The fall-back position of the judge in *Murray*, if the reach of privacy as established in *von Hannover* did, contrary to his finding, extend to innocuous activities in public, was to find he was bound to apply *Campbell* in preference to European law: see [61], [68]. In *Murray*, as in *Hosking*, the

- Court found there were no special reasons, such as Naomi *Campbell's* addiction, why the photograph of the *Murray* family out shopping should become private.
49. Ibid [67].
 50. Ibid [65].
 51. See Tipping J in *Hosking v Runtig* [2005] 1 NZLR 1, [239]: *Campbell v MGN Ltd* [2004] 2 All ER 995, [134] (Baroness Hale), [12] (Lord Nicholls), [50] (Lord Hoffman). See also M Richardson, 'Whither Breach of Confidence: A Right of Privacy for Australia' (2002) Melbourne University Law Review 20; G Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 Modern Law Review 726, 732; G Gomery, 'Whose autonomy matters? Reconciling the competing claims of privacy and freedom of expression' (2007) 27 Law Society A0A; N Witzleb, 'Monetary remedies for breach of confidence in privacy cases' (2007) 27 Law Society A0A, 452, fn 138.
 52. See J QWhitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty', (2004) 113 Yale Law Journal 1151.
 53. See N Moreham, 'Privacy in Public Places' [2006] Cambridge Law Journal 606 and the authors referred to by Moreham at above n 44.
 54. Ibid 621.
 55. Ibid 623.
 56. Ibid 628.
 57. Ibid 632.
 58. Ibid 628.
 59. Ibid 629-630.
 60. [2007] 1 NZLR 156.
 61. HC Auckland, 15 December 2006, CIV 2004-404-3536.
 62. In *Hosking*, the Peck case was recognised as one which would be regarded as exceptional: see *Hosking v Runtig* [2005] 1 NZLR 1, [164]. However, Gomery points out that the breach of privacy in Peck was based on loss of autonomy by over-exposure of Mr Peck's public suicide attempt to the public gaze to an unreasonable and unforeseeable degree through broadcast of the CCTV footage: above n 51, 427.
 63. See Burrows, 'Invasion of Privacy — *Hosking* and Beyond' [2006] New Zealand Law Review 389,410.
 64. Mount Cook Ltd v Johnstone Motors [1990] 2 NZLR 488, 494-496.
 65. *Andrews v Television New Zealand* HC Auckland, 15 December 2006, CIV 2004-404-3536, [52]. The judge referred to decisions of the Broadcasting Standards Authority where identifying factors such as voice, partial depiction of the body, distinctive adornment such as jewellery, and reference to occupation were accepted as sufficient identification.
 66. See J Burrows & U Cheer, *Media Law in New Zealand* (2005) 261. The BSA has not been consistent in this — in *Anonymous v TV3* 2004-106/107, the plaintiff was known only to an immediate circle but the majority found sufficient identification because that group did not know the information disclosed. See also *TV3 Network Services Ltd v ECPAT New Zealand Inc* HC Auckland, 20 December 2002, AP46/02, where, although Fijian children shown in a broadcast about child prostitution in Fiji were identifiable, they were not identifiable to anyone in New Zealand.

67. *Powell v Gelston* [1916] 2 KB 615, 619.
68. *Hosking v Runting* [2005] 1 NZLR 1, [125].
69. [2002] NZAR 495, 507-508.
70. *Hosking v Runting* [2005] 1 NZLR 1, [84].
71. *Andrews v Television New Zealand HC Auckland*, 15 December 2006, CIV 2004-404-3536, [59].
72. Although the majority in *Hosking* promoted damages as the usual remedy, it is clear injunction is the more perfect remedy in preserving privacy, which cannot be actually restored by payment of damages: see *Hosking v Runting* [2005] 1 NZLR 1, [149]-[150]. However, it is not entirely true that privacy, once gone, is gone forever — it may be restored either fully or partially by passage of time, and the cases recognise this: see eg: *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716.
73. See N Witzleb, 'Monetary remedies for breach of confidence in privacy cases' (2007) 27 *Law Society* 404,450.
74. *Ibid* and see Burrows & Cheer, above n 66, 57.
75. *Hosking v Runting* [2005] 1 NZLR 1, [126]-[128],
76. Conversely, publication of false or true facts may have no, or indeed, a positive effect, on the careers of some rock stars and other celebrities who embrace both true and false reputations.
77. See *Youssouf v MGM* (1934) 50 TLR 580.
78. New Zealand recently rejected the concept of exemplary damages in contract: see *Paper Reclaim v Aotearoa International* [2006] 3 NZLR 188.
79. See eg, Tipping J in *AG v Niania* [1994] 3 NZLR 106, 111-112; *Television New Zealand v Quinn* [1996] 3 NZLR 24 and the United Kingdom Law Commission in (1997) LC No 247
80. Although, as identified by Tipping J, aggravated damages have not been well-conceptualised in the common law and might be better off discarded altogether: *AG v Niania* [1994] 3 NZLR 106, 111-112.
81. In *L v G* [2002] DCR 234, 250, Judge Abbott was prepared to recognise an element of aggravation or a need to punish because Mr G had behaved contemptuously and exploitatively of Ms L in publishing the photos of her. However, damages were not argued on that basis and so the award of \$2500 was compensatory only.
82. [2006] DCR 630, [45]-[46]. In this case also, the possibility of aggravated and exemplary damages was recognised, although not in the award itself: see [96].
83. A similar interest had been protected previously by ex parte interim injunction in *Abbott v The Press HC Christchurch*, 13 December 2002 T9-02, where although the name of a constable responsible for shooting a member of the public ceased to be suppressed during his trial for murder, following his acquittal, his address and location remained suppressed.
84. Witzleb, above n 73, 452.
85. Though rather old, the leading case on this is *Television New Zealand v Quinn* [1996] 3 NZLR 24.
86. *Columbus v Independent News Auckland Ltd HC Auckland*, 7 April 2000, CP 600/98, and see the cases discussed in Burrows & Cheer, above n 66, 64.
87. *Z y G* [2002] DCR234.
88. *Brown v AG* [2006] DCR 630.

89. Levels in the United Kingdom appear to be modest also: see, for example, the leading case *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 All ER 995 where Naomi *Campbell* was awarded £2500 for humiliation and distress and a further £1,000 aggravated damages for a subsequent article belittling the privacy claim. See also *Douglas v Hello!* [2006] QB 125 where the Douglases were awarded £3750 for distress. See Witzleb, above n 73, 451.
90. See Burrows & Cheer, above n 66, 61.
91. The issue of plaintiff culpability is discussed further below.
92. For a rare example of a nominal award in defamation, see *Ti Leaf Productions v Baikie* (2001) 7 NZBLC 103,464.
93. *Watkins v The Home Office* [2006] UKHL 17.
94. *Ibid* [74] (Lord Walker), 'If ... a claimant can recover general damages of over £100,000 for a single libel without proof of any monetary loss whatsoever, ancient legal history cannot be a good reason why misfeasance in public office should not develop in the same direction,' and [78] (Lord Carswell).
95. *Ibid* [9] (Lord Bingham).
96. *Ibid* [10] (Lord Bingham), [78] (Lord Carswell), where the UK Law Commission's investigation into public law and private law remedies is referred to: see <http://www.lawcom.gov.uk/remedies.htm>.
97. [2002] DCR 234, 248.
98. See above.
99. *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63; 185 ALR 1; *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 All ER 995; *Theakston v MGN Ltd* [2002] EWHC 137; [2002] EMLR 22; *A v B* [2003] QB 195.
100. *Andrews v TVNZHC Auckland*, 15 December 2006, CIV 2004-404-3536, [46]-[47].
101. J Burrows, 'The Tort of Privacy Post-*Hosking* and Post-*Andrews*', paper delivered at LexisNexis Media Law Conference, 7 March 2007, 4. The sensitive approach in *Campbell* and *Ash v McKennitt* also supports this.
102. *Andrews v TVNZHC Auckland*, 15 December 2006, CIV 2004-404-3536, [78].
103. *Ibid* [91] — [93]. These comments were obiter since the case had been decided on lack of highly offensive publication.
104. See *P v D* [2000] 2 NZLR 591.
105. *Hosking v Runtig* [2005] 1 NZLR 1, [129], [257], [259].
106. *Ibid* [130].
107. *Ibid* [132].
108. *Andrews v TVNZHC Auckland*, 15 December 2006, CIV 2004-404-3536, [81].
109. *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344, 376.
110. See U Cheer, 'Privacy and the public interest' [2005] *Privacy Law Bulletin* 145, 147.
111. *Andrews v TVNZHC Auckland*, 15 December 2006, CIV 2004-404-3536, [82]-[83].
112. *Ibid* [84].
113. *Ibid* [89]-[90]. Here, intrusiveness features in a different part of the equation, suggesting once again that the tort is about more than informational privacy.
114. *Television New Zealand v Rogers* [2007] 1 NZLR 156.

115. Ibid [86]-[89].
116. Ibid [90].
117. This appears to apply *Hosking*, where the Court stated a test for prior restraint cases — it is only to be ordered where there is compelling evidence of most highly offensive intended publicising of private information and there is little legitimate public concern in the information: *Hosking v Runtling* [2005] 1 NZLR 1, [158] (Gault P & Blanchard JJ). Tipping J stated a lesser test, requiring only severe rather than high offensiveness at [258].
118. *Andrews v TVNZHC* Auckland, 15 December 2006, CIV 2004-404-3536, [91].
119. Ibid [92].
120. Ibid [93]-[94].
121. *Schulman v Group W Productions Inc*, 955 P. 2d 469 (Cal 1998).
122. See eg, G M Harvey, 'Confidentiality: A Measured Response to the Failure of Privacy' (1992) 140 *University of Pennsylvania Law Review* 2385; R Smolla, 'Privacy and the First Amendment Right to Gather News' (1999) 67 *George Washington Law Review* 1097; D L Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort' (1983) 68 *Cornell Law Review* 291. Keith J referred to the latter in *Hosking v Runtling* [2005] 1 NZLR 1, [216].
123. See Randerson J in *Hosking v Runtling* [2003] 3 NZLR 385.
124. *Von Hannover v Germany* [2004] EMLR 21.
125. *Hosking v Runtling* [2005] NZLR 1, [132].
126. New Zealand Bill of Rights Act 1990, s 14.
127. See Rishworth et al, *The New Zealand Bill of Rights* (2003) 1; P Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 1017.
128. *A v B* [2003] QB 195, 202; *Campbell v MGN Ltd* [2003] QB 633, 658. Just what this means as yet is unclear. See G Phillipson, 'The "right" of privacy in England and Strasbourg compared' in A Kenyon & M Richardson (eds), *New Dimensions in Privacy Law* (2006) 185 cf *Murray v Express Newspapers* [2007] EWHC 1908.
129. The New Zealand Bill of Rights Act 1990, s 3.
130. See Rishworth, 'Human Rights' [2005] *New Zealand Law Review* 87.
131. Ibid and see A Geddis, 'The Horizontal Effects of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runtling* [2004] *New Zealand Law Review* 681.
132. Various approaches seem to have been accepted in the United Kingdom also — see eg: J Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' [2003] *Cambridge Law Journal* AAA; G Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the Human Rights Act' (2003) *Modern Law Review* 726; *McKennitt v Ash* [2005] EMLR 10, [49]; *Murray v Express Newspapers plc*(2) *Big Pictures (UK) Limited* [2007] EWHC 1908, [18], and see Phillipson's view of *von Hannover* in 'The "right" of privacy in England and Strasbourg compared', above n 28, 185.
133. J Norton, '*Hosking v Runtling* and the Role of Freedom of Expression' (2004) 10 *Auckland University Law Review* 245, 249.
134. See for example, a leading defamation case on the defence of qualified privilege, *Lange v Atkinson* [1997] 2 NZLR 22, 32 where Elias J supported both approaches, and *Lange v Atkinson* [1998] 3 NZLR 424, at 465-467, 474. *Lange v Atkinson* [2000] NZCA 95; [2000]

- 3 NZLR 385 added nothing to this approach but indirectly affirmed it. See also Randerson J in *Ransfield v The Radio Network* [2005] 1 NZLR 233, [69].
135. *Hosking v Runtig* [2005] 1 NZLR 1, [229].
 136. *Ibid.* Gault P and Blanchard J, also in the majority in *Hosking*, preferred to avoid the complex question of horizontality altogether, relying on international obligations to justify upholding the existence of a privacy tort: see [111] — [114]. Geddis notes that the minority in *Hosking* would have given the rights in the BORA more direct effect, treating them as presumptively disposing of the issue of whether a privacy tort should be recognised by answering in the negative: Geddis, above n 31, 704-705.
 137. Rishworth, above n 127, 104.
 138. In *Lange v Atkinson* [1997] 2 NZLR 22, Elias J quotes Lord Woolf in *Spring v Guardian Assurance plc* [1994] UKHL 7; [1995] 2 AC 296, 352, where he stated that freedom of expression 'is a consideration as least as important to the common law as it is under the international conventions by which it is also protected.' See also P Joseph, *Constitutional and Administrative Law in New Zealand*, (2nd ed, 2001) 1031-1032.
 139. See Norton, above n 133, 250-252 and Rishworth et al, above n 127, 104-105. This is so in spite of the differing constitutional arrangements in those jurisdictions.
 140. I do not use the words 'value' and 'right' in any technical sense here. I do discuss the impact of such labels, however. See 'Privacy as More Than a Tort?', below.
 141. *Television New Zealand v Rogers* [2007] 1 NZLR 156, [114].
 142. [1994] Fam 192, 202-3.
 143. *Television New Zealand v Rogers* [2007] 1 NZLR 156, [125].
 144. The other judges also took this view, though with less emphasis: see [98].
 145. *Hansen v The Queen* (2007) NZSC 7.
 146. In the context of analysing a statutory offence of disorder, it must be acknowledged.
 147. *Hansen v The Queen* (2007) NZSC 7, [272].
 148. *Hosking v Runtig* [2005] NZLR 1, [210]-[222].
 149. See for example, the difficulties which arose in the context of New Zealand's censorship regime, referred to in *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754. That series of decisions revolved around a five-step process developed by Tipping J as a Bill of Rights analysis intended to apply where legislation is being interpreted by a court: *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9. See Burrows & Cheer, above n 66, 469.
 150. See Geddis, above n 131, 702.
 151. *Hosking v Runtig* [2005] NZLR 1, [135].
 152. See at *Lange v Atkinson* [1998] 3 NZLR 424, 447; *Lange v Atkinson* [2000] NZCA 95; [2000] 3 NZLR 385.
 153. *Ibid* [258].
 154. *Ibid* [235].
 155. *Von Hannover v Germany* [2004] ECHR 294; (2005) 40 EHRR 1.
 156. *Murray*, of course, attempted to carve an exception out of *von Hannover*, and is to be appealed on that basis.
 157. *HRH The Prince of Wales v Associated Newspapers* [2006] EWCA Civ 1776; [2007] 3 WLR 222.

158. See United Nations Universal Declaration of Human Rights 1948, Preamble, 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' See also J Donnelly, *Universal Human Rights in Theory and Practice* (2nd ed, 2003) 10.
159. See W L Prosser, 'Privacy' (1960) 48 *Californian Law Review* 383, 389.
160. See Rishworth, above n 130, Norton, above n 133 and Geddis, above n 131.
161. [2007] 3 NZLR 91.
162. Under s 4(l)(a) of the Summary Offences Act 1981.
163. *Brooker v Police* [2007] 3 NZLR 91, [41].
164. *Ibid* [60].
165. *Ibid*.
166. *Ibid* [69].
167. *Ibid* [90]. Blanchard J simply did not take privacy into account at all, for reasons which are not explained.
168. [2007] 3 NZLR 91, [122],
169. *Ibid* [122]-[129].
170. *Ibid* [129].
171. *Ibid*.
172. *Ibid* [171].
173. *Ibid* [173].
174. *Ibid* [240].
175. *Ibid* [255] - [270],
176. *Ibid* [276].
177. *Ibid* [60] (BlanchardJ), [122], [129], [135] (McGrathJ), [209]-[230] (Thomas J).
178. *Ibid* [11] (EliasCJ), [231]-[233] (Thomas J).
179. *Ibid* [122]-[123], [129] (McGrathJ), [233], [255]-[273] (Thomas J).
180. *Ibid* [60] (BlanchardJ).
181. J Waldron, 'A Right-Based Critique of Constitutional Rights'(1993) *Oxford Journal of Legal Studies* 19, 29.
182. Elias CJ, though, appears to be pursuing a purist view of the rights in the Bill, untrammelled by any need to apply limitations as set out in s 5: see *R v Hansen* [2007] 3 NZLR 1, [8], [15], [18], [23].
183. See *Brooker v Police* [2007] 3 NZLR 91, [118] (McGrath J).
184. *Ibid* [237]. In a later lecture, Tipping J stated that freedom of expression did have primacy because of its status in the Bill of Rights: Tipping J, *Public Lecture to University of Canterbury*, July 2004.
185. *Hosking v Runtig* [2005] 1 NZLR 5, [266],
186. *Brooker v Police* [2007] 3 NZLR 91, [129].
187. *Ibid* [135].
188. *Ibid* [134],
189. *Ibid* [132].
190. *Ibid* [180].
191. *Ibid* [214], [228]-[229]. Section 28 provides: 'An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not

- included in this Bill of Rights or is included only in part.' Thomas J interpreted the section as confirming that the BORA is not a static document.
192. Ibid [215]-[225].
 193. Ibid [164], [230],
 194. Ibid [209]-[211]. Thomas J refers to A Butler & P Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005) [6.8.1]-[6.8.3], [6.9.10].
 195. Ibid [212], [231]-[232].
 196. *Brooker v Police* [2007] 3 NZLR91, [211].
 197. Waldron, above n 181, 26.
 198. See above.
 199. *Brooker v Police* [2007] 3 NZLR91, [232],
 200. *Hosking v Runting* [2005] NZLR 1.
 201. *Brooker v Police* [2007] 3 NZLR 91, [194],
 202. Ibid [196]-[198].
 203. Crimes Act 1961, ss216G-N.
 204. *Brooker v Police* [2007] 3 NZLR 91, [222]. See Geddis, above n 131, 702.
 205. New Zealand Bill of Rights Act 1990, s 21.
 206. *Hosking v Runting* [2005] NZLR 1, [224]. The judge also referred to arguments made by Rishworth, above n 127, 419 - 420: *ibid* [225].
 207. See T McBride, 'Recent New Zealand case law on privacy: Part I — the Privacy Act and the Bill of Rights Act' [2000] *Privacy Law & Policy Reporter* 2, referring to H Schwartz, 'The Short and Happy Life and Tragic Death of the New Zealand Bill of Rights?' [1998] *New Zealand Law Review* 259, 262. See also S Optican, 'Rolling back s 21 of the Bill of Rights' [1997] *New Zealand Law Journal* 42 and A S Butler, 'The end of precedent and principle in Bill of Rights cases? A note on R v Grayson' [1997] *New Zealand Law Review* 274.
 208. *R v Shaheed* [2002] 2 NZLR 37, [143]; *R v Williams* [2007] NZCA 52, [134].
 209. *R v Williams* [2007] NZCA 52, [113].
 210. Ibid.
 211. Ibid [114].
 212. See LC 97 Search and Surveillance Powers June 2 0 07, [2.1 - 2.18].
 213. Ibid [2.5].
 214. *TVNZ v Mafart & Prieur* [2006] 3 NZLR 534. Burrows notes that this case is evidence of a tendency for the tort to spread its influence 'like oil on the waters': see Burrows, above n 101, 8.
 215. Ibid. See also *McCully v Whangamata Marina Society Inc* [2007] 1 NZLR 185.
 216. Ibid [61]-[63]. See Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (2000) 11; W I Miller *The Anatomy of Disgust* (1998); M Nusbaum, *Hiding from Humanity: Disgust, Shame and the Law* (2004).
 217. *TVNZ v Mafart & Prieur* [2006] 3 NZLR 534, [62],
 218. Ibid [63].
 219. Ibid [67].
 220. Ibid [57]-[59].
 221. See <http://www.lawcom.govt.nz/ProjectTermsOfReference.aspx?ProjectID=129>. The first part of the study will involve a survey of trends carried out in conjunction with the

Australian Law Reform Commission. In the second part of the review, the Commission will examine whether the law relating to public registers requires systematic alteration. Stage 3 of the project will examine the adequacy of New Zealand's civil law remedies for invasions of privacy, including tortious and equitable remedies, and the adequacy of the criminal law to deal with invasions of privacy. Finally, the Commission will review the Privacy Act 1993 with a view to updating it

222. As in some of the Canadian provinces, although the Canadian Privacy Commissioner has indicated that these are not used much: J Stoddart, Privacy Commissioner of Canada, 'Developing a Canadian Approach to Privacy,' Isaac Pitblado Lecture 2004, <http://www.privcom.gc.ca/speech/2004>.
223. Funder, above n 1, 267.
224. *Rogers v Television New Zealand* [2007] NZSC 91.
225. *Ibid*, paras [6], [42] (Elias CJ), and [140] and [151] (Anderson J). The claim had been heard in a summary way and in spite of lack of evidence about such matters as how TVNZ had obtained a copy of the video.
226. See paras [63] and [99].
227. *Ibid*, paras [98] - [106].
228. *Ibid*, paras [48], [63], and [104],
229. *Ibid*, paras [103], [127].
230. *Ibid*, para [134].
231. *Ibid*, para [136].
232. http://tvnz.co.nz/view/tvone_minisite_index_skin/tvone_sunday_group.
233. Although Anderson J appears to dislike the tort, the tone of comments made by Elias CJ appear to suggest openness to discussion about possibly expanding it: see for example, paras [38] - [39].