

The Tort of Privacy

A discussion of *Mosley v News Group Newspapers Ltd* [2008]

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INTRODUCTION

On 30 March 2008, the *News of the World* in London followed its motto as the fearless advocacy of truth, and published a story headlined: "FI BOSS HAS SICK NAZI ORGY WITH 5 HOOKERS." Mr Max Mosley, the President of the FIA, sued the newspaper for breach of privacy arising from information placed on the newspaper's website, including video footage secretly obtained of the alleged orgy. He was not successful in obtaining an injunction to prevent publication,¹ but was awarded the highest damages to date for a privacy claim in Britain - £60,000.² Following his success, Mr Mosley is currently suing 17 individuals in Germany, France and Italy in defamation. He is also considering suing the *NoW* in defamation for the Nazi references in its coverage, which were found in the privacy case to be untrue, but wants to await the outcome of the European actions so that he is not seen as a 'bully'. Mr Mosley is, however, actively campaigning for a privacy law in the United Kingdom which would require pre-notification by newspapers to individuals if it is intended to publish details of their private lives.

In New Zealand the tort of privacy is in an early stage of development which is influenced by what is happening in the UK and elsewhere, and 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. The tort is being exhaustively investigated by the New Zealand Law Commission, which has just issued a significant Issues Paper on privacy generally.³

In this paper, I investigate the *Mosley* case to determine its impact on New Zealand law, if any. In particular, I examine the sort of facts which give rise to an expectation of privacy, the relevance of plaintiff culpability, the test of high offensiveness of publication, the remedies which might be sought, and the possibility that the privacy tort could metamorphosise into a general loss of dignity claim which embraces the claims we currently know as defamation and breach of privacy. First, however, it is necessary to refer briefly to the leading New Zealand case, *Hosking v Runting*.

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*.⁴ Like the English cases, *Campbell v MGN Ltd*⁵ and the more recent *Murray v Express Newspapers plc*(2) *Big Pictures (UK) Limited*,⁶ *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,⁷ 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.

As described quite cautiously by the Court of Appeal, the recognised action does not deal with unreasonable intrusion into solitude. Further, there is no simple test for what constitutes a private

¹ *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 QB (9 April 2008).

² *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 QB (24 July 2008).

³ 'Invasion of Privacy: Penalties and Remedies', Review of the Law of Privacy, Stage 3, NZLC IP 14, March 2009.

⁴ [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 CP477/86 20 Oct 1986 Jeffries J; *News Media Ownership Ltd v Tucker* 23 October 1986, CA172/86. See also Rosemary Tobin, 'Yes, Virginia, there is a Santa Claus: the tort of invasion of privacy in New Zealand' (2004) 12(2) *TLJ* 95, Katrine Evans, 'Was Privacy the Winner on the Day?' (2004) *NZLJ* 181.

⁵ [2004] 2 All ER 995.

⁶ [2007] EWHC 1908 (Ch), 7 August 2007, [2007] EMLR 583.

⁷ 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.

fact. The tort concerns itself with publicity (not facts) which is highly offensive, and that publicity must be highly offensive to the reasonable person. The harm protected against is humiliation and distress, and personal injury and economic loss are not required. Crucially, there is a public interest defence, described broadly as a legitimate public concern in the information. 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.⁸ 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. 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. Armed with these basic requirements, it is possible to examine the question of the possible impact of the *Mosley* case New Zealand.⁹

Mosley and facts giving rise to an expectation of privacy

Like the United Kingdom, we have not been able to escape the inherent difficulty of determining what is private. However, in *Mosley*, Mr Justice Eady said

...one is usually on safe ground in concluding that anyone indulging in sexual activity is entitled to a degree of privacy – especially if it is on private property and between consenting adults (paid or unpaid).¹⁰

So the sado/masochist fantasy game playing sexual activity in *Mosley* clearly gave rise to an expectation of privacy, despite attempts by counsel for the *News of the World* to argue that aspects of it were illegal, or that the activities were somehow perverted or immoral. What surprised many was the willingness of Mr Mosley to continue to speak publicly about the events, and that he has done so with some dignity. In this sense, then, *Mosley* has been a paradigm privacy case, in which the plaintiff has been able to show that a strong privacy interest was engaged at the outset.

The Court of Appeal in *Hosking* adopted the phraseology of the English cases in speaking of an expectation of privacy, and so we continue to look to cases like *Campbell* and *Mosley* for assistance, 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 and sexual relationships, financial matters,¹¹ and medical conditions.¹² For example, it has been accepted that the expectation can arise in relation to sexual photographs,¹³ and information about past treatment for psychiatric illness.¹⁴ It is very likely, then, that if *Mosley*-like facts arose in New Zealand, our courts would find an expectation of privacy clearly existed.

Where *Mosley* departs from New Zealand law is that it was the actual clandestine recording of the sexual activity on private property which gave rise to a reasonable expectation of privacy. In embracing intrusive behaviour rather than the publication of private information, the English law appears to be more expansive than ours, although I have argued that New Zealand cases like *Brown v AG*¹⁵ are intrusion cases in disguise and I believe it is only a matter of time before our tort expands in this direction.¹⁶

Mosley and the relevance of plaintiff culpability

Even after *Mosley*, some members of the British media continued to argue strongly that media have a role as moral guardians, and that the public interest is served by publication of material which exposes moral turpitude (as judged by those media). The *News of the World* itself reported on the judgment with headlines such as: '£60K What Mosley got for vile sex games with 5 hookers' and continued to insist the activities were 'brutal, repulsive and depraved'. Paul Dacre, editor of the *Daily*

⁸ See ss 14, and 5 of the New Zealand Bill of Rights Act 1990.

⁹ Although the subject of privacy has been addressed by the Supreme Court in *Rogers v Television New Zealand* [2008] 2 NZLR 277, that Court did not deal substantively with the tort, and left further argument about its form for another day.

¹⁰ See n. 1 above, [98].

¹¹ *Television New Zealand v Rogers*[2007] 1 NZLR 156, para [49].

¹² *P v D*[2000] 2 NZLR 591, para [36].

¹³ *L v G* [2002] NZAR 495.

¹⁴ *P v D*[2000] 2 NZLR 591.

¹⁵ [2006] NZAR 552 . See below for further discussion.

¹⁶ The BSA privacy principles also embrace intrusions like covert filming.

Mail, referred in a virulent speech to the Society of Editors to 'the age-old freedom [of newspapers] to expose the moral shortcomings of those in high places'.¹⁷ Others, however, such as Roy Greenslade of the *Guardian*, thought the *NoW* should have been 'caned for its scandalous errors', and noted that the paper knew well that without the Nazi allegations, there was no reason to publish the story, beyond satisfying public prurience.¹⁸

What then 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 by the New Zealand High Court in *Andrews v Television New Zealand*,¹⁹ decided prior to the *Mosley* decision, where Allen J concluded after examining overseas law²⁰ that the morality and behaviour of a plaintiff can be taken into account, with appropriate varying effects on any reasonable expectation of privacy, even to the extent of its total destruction.²¹ In my view, the question of culpability should be treated with caution and without presumption, and then only treated within the confines of the defence of public interest.

Mosley illustrates the weaknesses inherent in a punitive approach. The *News of the World* there argued that a number of crimes had been committed during Mr Mosley's S and M session, including sexual assault occasioning bodily harm, and keeping a brothel. Mr Justice Eady did not regard the latter as bearing close scrutiny and saw the former as minor offences only, if they were made out. He made it clear that

...even those who have committed serious crimes do not thereby become "outlaws" so far as their own rights, including rights of personal privacy, are concerned,²²

and used *Campbell* as an example where privacy had been upheld even though it was clear that Naomi Campbell's drug dependency would have involved the possession of prohibited drugs.²³

It is even less obvious why the moral behaviour of an individual should feature in the equation. The approach in the older UK cases such as *A v B* and *Theakston*, which attempted to evaluate sexual relationships based on an idealised notion of shared morality, is to be avoided. If we accept a zone of inherent privacy around sexual activity, for example, 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. Again, Mr Justice Eady in *Mosley* had useful comments to make:

The modern approach to personal privacy and to sexual preferences and practices is very different from that of past generations. First, there is a greater willingness, and especially in the Strasbourg jurisprudence, to accord respect to an individual's right to conduct his or her personal life without state interference or condemnation. It has now to be recognised that sexual conduct is a significant aspect of human life in respect of which people should be free to choose.²⁴

So at the very least, a remarkably cautious approach is required to development of any 'clean hands' doctrine.²⁵ 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 a particular case. To test this, we can turn to the categories of inherently private information. For instance, culpability would not

¹⁷ Dacre was also of the view that the 'arrogant and amoral' judgments of Mr Justice Eady, who he saw as single-handedly engineering a privacy law by the back door in *Mosley*, were undermining the ability of mass circulation newspapers to sell newspapers in an ever more difficult market: Address by Mr Paul Dacre to the Annual Society of Editors Conference, Bristol, 2008.

¹⁸ See http://blogs.guardian.co.uk/greenslade/2008/07/why_the_news_of_the_world_shou.ht 24 July 2008.

¹⁹ [2009] 1 NZLR 220.

²⁰ *ABC v Lenah Game Meats Pty Ltd* 185 ALR 1; *Campbell v MGN Ltd* [2004] 2 All ER 995; *Theakston v MGN Ltd* [2002] EMLR 22, *A v B* [2003] QB 195.

²¹ *Andrews v TVNZ* [2009] 1 NZLR 220, paras [46]-[47].

²² See above, n. 2, [118].

²³ *Ibid*, [119].

²⁴ *Ibid*, [125].

²⁵ Burrows, 'The Tort of Privacy Post-Hosking and Post-Andrews', Paper delivered at LexisNexis Media Law Conference, 7 March 2007, 4.

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 probably would be). Another example was raised in *Campbell*, where Lord Hoffman referred to a hypothetical case of public interest in the disclosure of the existence of a sexual relationship which had resulted in corrupt favours.²⁶

This means wrong-doing will be relevant only 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 who 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.

Justice Eady concluded in *Mosley*:

...it is not for the state or for the media to expose sexual conduct which does not involve any significant breach of the criminal law. That is so whether the motive for such intrusion is merely prurience or a moral crusade. It is not for journalists to undermine human rights, or for judges to refuse to enforce them, merely on grounds of taste or moral disapproval.²⁷

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 could validly bolster the public interest in the publication provided it is significant and relevant to that. I am pleased to see that Mr Justice Eady in the *Mosley* case has very much endorsed this sort of approach and I hope that it is adopted in New Zealand. Does this mean the end of the 'kiss and tell' story? Perhaps, but not where there is legitimate public concern in the kissing activity. I discuss the defence further below.

Publication would be highly offensive to the ordinary, reasonable person

In contrast to the United Kingdom, New Zealand privacy plaintiffs also have to show that disclosure or publication of the relevant information would have been highly offensive to a reasonable person. It was not until *Hosking* that the New Zealand courts clarified this requirement by emphasising that the concern is with publicity which is highly offensive, and not the facts themselves.²⁸ However, *Hosking* did not make clear that the test is one with both subjective and objective elements, so that the matter has to be highly offensive to the reasonable person in the shoes of the plaintiff. The Court of Appeal said in *Rogers*:

Whether disclosure would be highly offensive must be tested from the perspective of that person but subject to an objective overlay. The fragile sensibility of the claimant cannot prevail so a reasonable person test is introduced to that extent.²⁹

Undoubtedly, in some cases, the subjective/objective test is not an easy one to apply. Burrows has remarked that the test is problematic if the plaintiff is manifestly not an ordinary person.³⁰ Nonetheless, the courts have managed to apply it. In *Brown*,³¹ for example, the publication of the information in a police flyer giving the address and a photograph of a convicted paedophile was held to be highly offensive to an objective, reasonable person, standing in the shoes of the plaintiff. The judge recorded his difficulties, noting that to apply this test he had to become something between a convicted paedophile and the 'man in the street'.³²

My concern in relation to this element of the tort is that the mixed test also should not give weight to the culpability of the plaintiff. The statements of the judge in *Brown* indicate that he somehow felt it to be abhorrent to have to stand in the shoes of a convicted sex offender. This is understandable, but it should in no way, and indeed, did not in the *Brown* case, affect the outcome. I have argued above that culpability is not relevant except in a limited way in relation to the public interest defence. For

²⁶ *Campbell v MGN Ltd* [2004] 2 AC 457, [60].

²⁷ See above, n. 2, [127]. See also [128].

²⁸ *Hosking*, para [117]. *TVNZ v BA* Unreported, High Court, Wellington, CIV-2004-485-1299, 13 December 2004, appears to be wrong in this regard. See Cheer, [2005] NZLJ 222.

²⁹ Also cited by Professor J Burrows, QC, Law Commissioner, 'The Tort of Privacy Post-Hosking and Post-Andrews', an address to LexisNexis Media Law Conference, 7 March 2007, 2.(a).

³⁰ *Ibid*, 2.(b).

³¹ *Brown v AG* [2006] NZAR 552.

³² *Ibid*, paras [80]-[81].

this reason, it is clear the subjective element of the offensiveness test is absolutely essential and that all plaintiffs are entitled to have their viewpoint taken into account. Thus, even a convicted paedophile is entitled to be treated as a human being attempting to rehabilitate himself, rather than simply as a fictitious reasonable person. I believe the mixed approach expresses a view of privacy as a human right which is available to all, even those who are outcast from society, or who otherwise live lives out of the ordinary. It is important that the mixed approach is applied correctly, with equal weight given to both objective and subjective points of view.

Therefore, if *Mosley* had arisen in here, it is likely when addressing the nature of the disclosure that a New Zealand judge would have had to place her or himself in the shoes of a man with a limited public profile who had enjoyed consensual sado-masochist adulterous activities for over 45 years, who had remained married throughout that period and had chosen not to tell his wife and children about them. Additionally, the objective element to be taken account of would have been that of an ordinary, reasonable person seeing video and images of private consensual but unorthodox sexual activity published in a national newspaper and available on the internet internationally. The combination of both perspectives would, I believe, satisfy the requirements of high offensiveness of publicity which exist in New Zealand.

Defence of legitimate public concern

After some doubt about the matter,³³ *Hosking* clarified that this element is for the defendant to make out and not the plaintiff.³⁴ Gault and Blanchard JJ also noted that the defence ensures freedom of expression is taken into account³⁵ and that it means the judiciary has the pragmatic function, disliked intensely by the media, of determining what should and should not be published.³⁶ 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.³⁷ This clearly covers matters referred to in the United Kingdom breach of confidence cases such as public health, economy and safety, the detection of crime, and national security generally.³⁸ In New Zealand, the decisions of the BSA are also of assistance, although by no means definitive. 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.³⁹ Third, he noted that the legitimate public concern necessary will rise or fall depending on the level of invasion of privacy⁴⁰ and fourth, if there is intrusiveness, it should not be disproportionate to its relevance to the story.⁴¹

Mosley would have had the same result in New Zealand even though the methodology required in the UK under the Human Rights Act 1998 is based on an intense examination of the facts once a privacy interest is established, in order to weigh that interest against freedom of expression. Any intrusion is balanced against any public interest involved to determine whether it is acceptable or 'proportionate' in the circumstances. The UK approach therefore really involves one big question in which all the interests involved are tested against each other, while the New Zealand approach involves distinct steps, with public interest being the final one. If New Zealand's approach to the Bill of Rights becomes more open and consistent, and privacy becomes more established as a form of right, we could move closer to the UK approach.

On any view, it would seem difficult for the *NoW* to establish genuine public interest in Mr Mosley's activities. Since he had a very strong expectation of privacy about the S and M activities carried on in a private place, a clear and strong public interest in the disclosures had to be demonstrated. This it attempted by arguing first that Mosley had been involved in criminality, in the form of aiding or inciting assault occasioning actual bodily harm on himself because the spanking session resulted in some marking and required the application of an elastoplast to the right buttock! Secondly it was suggested that technical assaults were committed by Mosley on the consenting women, each time a

³³ See *P v D* [2000] 2 NZLR 591.

³⁴ *Hosking v Runting* [2005] 1 NZLR 1, paras [129], [257], [259].

³⁵ *Ibid*, para [130].

³⁶ *Ibid*, para [132].

³⁷ *Andrews*, n. 19 above, para [81].

³⁸ *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344 at 376.

³⁹ *Andrews v TVNZ*, above, n. 19, paras [82]-[83].

⁴⁰ *Ibid*, para [84].

⁴¹ *Ibid*, paras [89]-[90]. Here, the treatment of intrusiveness suggests that the tort is about more than informational privacy.

thwack was administered by him. These arguments were very weak and were accordingly described by Eady J as artificial, verging on desperation, and trivial. It was necessary, the judge said, to 'maintain some sense of reality'.⁴² Furthermore, a suggestion that Mosley had been 'keeping a brothel' did not even bear scrutiny and was abandoned by the end of the trial.

On much stronger ground, the newspaper argued that the sadistic sexual behaviour had a Nazi and concentration camp theme, in which the participants mocked the humiliating way the Jews were treated and parodied Holocaust horrors. The judge concluded that there *would* be public interest in such a theme because Mr Mosley was accountable to the F1A, where he had to deal with many races and religions as its President, and he had in the past spoken out about racism in the sport. However, after subjecting the facts of the S and M sessions to close scrutiny, Mr Justice Eady concluded they did not support any real Nazi theme to the activities.⁴³

The newspaper argued finally that the general depravity and adultery it exposed supported a public interest defence. Predictably this was also rejected, the judge holding that the behaviour shown and described did not fall into any of the categories of public interest previously recognised in the UK such as exposing criminal activity or public hypocrisy, nor did it meet the higher standards set by European jurisprudence, of contributing to a debate of general interest.⁴⁴

Therefore, it seems at least clear that disclosure of minor criminal activity (such as minor assault with consent, or even smoking 'a spliff')⁴⁵ or of behaviour which can only be judged in a moral sense without connection to any legitimate concern, will be difficult to justify in the public interest.

Remedies and privacy

Injunction

Mr Mosley originally sought and was refused, an injunction to restrain the newspaper from making a short extract of extended video footage of the sexual activities available on its website.⁴⁶ The footage had been published for one day on the website, but was removed voluntarily and an undertaking given that it would not reappear unless 24 hours notice was given. The application for the injunction arose when notice was given on 3 April 2008. During the short publication period, the edited footage was viewed about 1,424,959 times. It was also clear the footage had been copied to other websites worldwide.

The English approach to prior restraint in privacy cases is now governed by special provisions in the Human Rights Act 1998 which are intended to ensure protection for freedom of the press.⁴⁷ The accepted approach to these provisions requires equal balancing of privacy and freedom of expression, and a close investigation of the reasons for restraint in the light of the harms which could result.⁴⁸ On balance, although he considered that the material was intrusive and demeaning, and there was no public interest in its further publication, Mr Justice Eady concluded that granting an injunction to Mr Mosley would be a futile gesture. This was so in spite of previous dicta suggesting that images may be different from other material because they allow intimate personal detail to be revisited and focussed on, thus inviting fresh intrusion.⁴⁹ Justice Eady thought the website video had gone beyond this, because publication was so wide there was nothing the law could any longer practically protect. This suggests, of course, that getting information onto a website as soon as possible might be a good way to avoid an injunction in the United Kingdom.

As noted previously, prior restraint is available for privacy claims in New Zealand, and is the most logical remedy, since it is arguable that privacy, once gone, cannot really be restored. In spite of this, the Court of Appeal in *Hosking* took care to emphasise that the primary remedy is damages, but that injunctive relief may be appropriate also.⁵⁰ We do not have special provisions protecting freedom of the press as exist in the United Kingdom context. However, in New Zealand, with a nod to the Bill of Rights, the *Hosking* Court appeared to make the tests in defamation and privacy the same - prior

⁴² *Mosley*, n. 2 above, paras [110]-[121]

⁴³ *Ibid*, n. 2 above, paras [122]-[123]. The defendant was not helped when its main witness, Woman E, the participant it had promised to pay to secretly film Mr Mosley, was unable to give evidence in the case.

⁴⁴ *Ibid*, para [131].

⁴⁵ *Ibid*, para [111].

⁴⁶ *Mosley v News Group Newspapers* [2008] EWHC 687 QB (9 April 2008). The footage contained shots of Mr Mosley taking part in mostly bottom-spanking activities with 5 prostitutes, and of the tea break: para [4].

⁴⁷ Human Rights Act 1998, s 12.

⁴⁸ *Campbell*, see n. 5 above and *Re S (A Child)* [2005] 1 AC 593. See *Mosley*, n. 46 above, [28].

⁴⁹ *Douglas v Hello! Ltd* (No 3) [2006] QB 125, [105], referred to in *Mosley*, n. 46 above, [25].

⁵⁰ Above, n. 4, paras [149]-[150].

restraint is only to be available where there is clear and compelling evidence of most highly offensive intended publicising of private information and there is little legitimate public concern in the information.⁵¹

There has been little case law since *Hosking* to test this standard. A reported claim for an interim injunction perhaps bears out concerns in *Hosking* about the adoption of a less stringent approach to interim restraint pending determination of claims.⁵² In *Brash v John and Jane Doe*,⁵³ then Opposition Leader Don Brash successfully applied ex parte for an interim injunction restraining persons unknown from communicating the contents of emails belonging to Mr Brash which may have come into their possession. The Court did not require the applicant to proceed on notice because it accepted that would cause undue delay and prejudice. What is wrong with the Brash order was that its impact on the media and freedom of expression was not considered. Media interests had been recognised about a week earlier by Mr Justice Eady in the United Kingdom in an application to vary a 'John Doe' order he had made previously on privacy grounds.⁵⁴ That judge indicated that interested media parties should have been given notice of the application. The High Court in the *Brash* case did not consider the English decision, which is not surprising given the urgency of the hearing. However, the *Brash* decision is generally defective in any event because it contains no reference to freedom of expression issues or the Bill of Rights.⁵⁵

In contrast to this, the *Rogers* case involved an application for a permanent injunction, and the judgments in the Court of Appeal at least were certainly more protective of freedom of expression in the prior restraint context. In the Supreme Court,⁵⁶ a majority of Blanchard, Tipping and McGrath JJ allowed Television New Zealand to broadcast the videoed confession of Mr Rogers. That decision does not contain a substantive discussion of the tort of privacy. However, two judges touched on the approach to prior restraint. Tipping J endorsed the view that the position is broadly analogous to that in defamation, so that prior restraint should be difficult to obtain. However, Elias CJ, in the minority, thought the analogy with interlocutory restraint in defamation was imperfect and needed to be treated with caution. The Chief Justice was prepared to recognise a different approach based on an investigation of the circumstances of the particular case and all interests involved, both public and private (which sounds remarkably like the approach of Mr Justice Eady in *Mosley*). For Chief Justice Elias, the argument that privacy once gone is gone was a compelling reason to support restraint, in contrast to defamation, where the alternative of damages can still be effective.

As to what would have happened if *Mosley* had applied for an injunction in New Zealand, the effects of prior publication on the internet would have been taken into account, because the approach to the granting of injunctions generally is similar to that in the United Kingdom. Injunction, being an equitable remedy, is discretionary. An order does not automatically follow even if the grounds are made out using a Bill of Rights friendly approach. An order made in vain is a wasted order, and so practical effectiveness is an important consideration which may tip the balance at the end of the day.⁵⁷ Therefore, whether a judge ultimately finds an injunction against material published on the internet to be pointless will depend on how long the information has been on the internet, where it has been published and how many viewings have been made of the site.

The approach to prior restraint in the context of privacy in New Zealand remains somewhat unresolved and inconsistent. However, it would seem at least desirable for applications for prior restraint in the privacy context to be treated with caution, particularly those which are made ex parte, and with full consideration being given to potential harm to the interests involved in each case, including in every case, to freedom of expression. The media should be put on notice and heard, if at all possible.

⁵¹ Ibid, para [158], applying the test in *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129 (CA).

⁵² Ibid, para [155].

⁵³ Unreported, High Court, Wellington, CIV-2006-485-2605.

⁵⁴ See *X & Y v Persons Unknown* [2006] EWHC 2783 (QB).

⁵⁵ The private broadcaster, CanWest Mediaworks, indicated that it intended to challenge the order. However, Mr Brash asked the Court to withdraw the order as soon as it became clear that an author, Mr Nicky Hager, was intending to publish a book which contained information from emails provided by members of Mr Brash's party. Mr Brash stated that this book was a surprise to him and was not the target of the injunction: Press Release, New Zealand National Party, 6 December 2006. Mr Brash resigned as Leader of the National Party following the publication of Mr Hager's book.

⁵⁶ *Rogers v Television New Zealand* [2008] 2 NZLR 277.

⁵⁷ *Macquarie Bank Ltd v Berg* [1999] NSWSC 526 (2 June 1999).

Damages

It is in the area of damages that the *Mosley* judgment effectively broke new ground, because prior to this case, the principles for identifying and quantifying damages in privacy were not well developed.⁵⁸ 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.⁵⁹ The latter two aims correct the falsity in defamatory statements, a feature which is missing in statements which breach privacy. In privacy there can be some degree of solatium but restitutio is unavailable. The harm in privacy cases was identified in *Hosking* as humiliation and distress, and personal injury and economic loss are not required,⁶⁰ although clearly the latter, if there is evidence to support it, is recoverable. In *Mosley*, influenced by the background of European human rights law, Mr Justice Eady identified the purpose of damages in privacy claims as connected to personal dignity, autonomy and integrity.⁶¹ Damages in the United Kingdom may include distress, hurt feelings and loss of dignity, as well as vindication for infringement of a right.

In my view, invasion of privacy can have effects which are analogous to those which are compensated in the 'shun and avoid' cases in defamation.⁶² The invasion can attract a remedy in privacy because in some cases 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. Therefore, 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*, for example, 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 and in defamation in particular, consistency requires that compensatory damages for breach of privacy reflect any element of defendant behaviour which aggravated the loss to the plaintiff,⁶³ 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.⁶⁴

It must be acknowledged that this argument was in fact rejected in *Mosley*. Justice Eady expressed a strong initial view that exemplary damages are anomalous in civil law, and likened them to a quasi-criminal remedy for which he could see no pressing need.⁶⁵ He ultimately went on to exclude exemplary damages as inapplicable to privacy claims in the United Kingdom because there such claims have developed in the context of breach of confidence, a branch of equity, rather than a tort like defamation.⁶⁶ Justice Eady would not extend the remedy, of which he clearly disapproved, into an area of the law where it had never applied. Furthermore, he also thought such damages were alien to European Convention law. The judge was forced to acknowledge, however, that at least one English judge has categorised privacy as a tort,⁶⁷ and that New Zealand authority prior to the development of our tort of privacy, goes the other way.⁶⁸ I argue in this area that remedial similarities between defamation and privacy are so strong in New Zealand as to justify the availability of this remedy for both, and since privacy has developed as a tort in this jurisdiction, there are no technical reasons why this cannot occur. However, as in defamation, exemplary damages should be regarded as rare, and levels should remain modest.⁶⁹

⁵⁸ See Dr Normann Witzleb, 'Monetary remedies for breach of confidence in privacy cases' (2007) 27 LS 404, 450.

⁵⁹ Ibid, and see Burrows and Cheer, *Media Law in New Zealand*, (5th ed, 2005), 57.

⁶⁰ See n. 4 above, paras [126]-[128].

⁶¹ See n. 2 above, paras [214]-[217].

⁶² See *Youssouf v MGM* (1934) 50 TLR 580.

⁶³ 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.

⁶⁴ In *L v G* [2002] DCR 234, 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 intimate sexual photos of her. However, damages were not argued on that basis and so the award of \$2500 was compensatory only: *ibid*, 250.

⁶⁵ See n. 2 above, para [173].

⁶⁶ *Ibid*, [197].

⁶⁷ *Ibid*, [181]–[182] and [184], referring to Lord Nicholls in *Campbell v MGN* [2004] 2 AC 457.

⁶⁸ Lord Cooke in *Aquaculture Corp v New Zealand Green Mussel Co* [1990] 3 NZLR 299, 301.

⁶⁹ *Television New Zealand v Quinn* [1996] 3 NZLR 24.

Mr Mosley was awarded £60,000, and costs of £200,000. The award was described as a record but it could not be otherwise since it was the highest award reported in the UK to date.⁷⁰ Nonetheless, Mr Mosley has complained of still being £30,000 out of pocket. How are privacy damages awards to be quantified? Although Mr Justice Eady was prepared to take a limited comparative approach in *Mosley*, 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.⁷¹ Are these arguments convincing in New Zealand? In fact, it has not, as yet, been accepted that defamation awards in New Zealand are too high,⁷² with the largest jury-awarded figure to date of \$675,000 being made in 2000 to pop icon Ray Columbus,⁷³ although figures from \$100,000 to \$200,000 are more common.⁷⁴ 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*,⁷⁵ decided prior to *Hosking*, involved an award of \$2500 which appeared to reflect the lack of identification of the plaintiff, and *Brown v AG*,⁷⁶ where the award of \$25,000 against the police appeared to reflect an additional element of vilification suffered by the plaintiff. These levels are within the range of those commonly awarded for defamation. It would appear that awards up to \$30,000 would not be unreasonable in New Zealand in standard invasion cases. I suggest that *Mosley* would not be seen as a standard case, however, given the strong privacy interest, the complete lack of public interest and the fact that secret filming was involved.

It is important to maintain flexibility in approach, but courts 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.⁷⁷ 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.⁷⁸

Mosley and 'responsible journalism'.

It is intriguing to see hints in *Mosley* of a possible future form privacy might take. Justice Eady raised the possibility of having regard to the concept of 'responsible journalism' in the privacy tort and said:

There may be a case for saying, when "public interest" has to be considered in the field of privacy, that a judge should enquire whether the relevant journalist's decision prior to publication was reached as a result of carrying out enquiries and checks consistent with "responsible journalism".⁷⁹

⁷⁰ It must be said that prior to *Mosley*, levels of damages in the United Kingdom were more modest: See for example *Campbell v MGN Ltd* [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, n. 58 above, 451.

⁷¹ Witzleb, see n. 58 above, 452.

⁷² Though rather old, the leading case on this is *Television New Zealand v Quinn* [1996] 3 NZLR 24.

⁷³ *Columbus v Independent News Auckland Ltd* Unreported, High Court Auckland, CP 600/98, 7 April 2000, and see cases discussed in Burrows and Cheer, n. 59 above, 64.

⁷⁴ *Stiassny v Siemer*, a High Court decision in which the highest award of damages to date in a New Zealand defamation case was awarded by a judge, is an aberration. The award of \$825,000 was broken down into \$675,000 general damage, aggravated damages of \$150,000 and \$25,000 exemplary damages. The award was made following a calculated and protracted campaign against Mr Stiassny by Mr Siemer in which he published damaging untrue allegations over a number of years on a billboard and websites. Mr Siemer had lost the right to defend himself by refusing to comply with an injunction early in the proceedings. He was eventually committed to prison for contempt. I am unaware of a similar case in New Zealand.

⁷⁵ See n. 64 above.

⁷⁶ See n. 31 above.

⁷⁷ See Burrows and Cheer, n. 59 above, 61.

⁷⁸ In *Mosley*, Justice Eady took into account defendant behaviour up to and following the breach, plaintiff responsibility for his own actions, the levels of awards in personal injury and defamation cases, and the fact that once gone, privacy cannot be restored. The award of £60,000 was to mark the unlawful intrusion and provide solatium: see n. 2 above, paras [222]-[231].

⁷⁹ *Mosley*, n. 2 above, paras [140]-[141].

This test, borrowed from defamation law, suggests journalists could claim a public interest defence in privacy whether they get their facts right or not, so long as they can demonstrate responsible behaviour. If it is to be applied to the privacy tort, significant distinctions between defamation and privacy begin to disappear. The orthodox understanding has been that defamation provides a remedy for untrue statements while privacy provides a remedy for true intimate statements. Justice Eady's approach would take the emphasis off the truth or untruth element in each tort and puts it instead on the public interest defence based on responsible journalism. This would be unpalatable to media if applied in a rigid way. The lessons from defamation law require some understanding of the pressures faced in the modern newsroom.⁸⁰ Weight should be given to the professional judgment of the editor or journalist in the absence of evidence of any slipshod approach. Again, incorporation of a Bill of Rights friendly approach should ensure this.

In the meantime, the moving closer together of defamation and privacy appears to be ongoing in the United Kingdom, though opposed by some as doctrinally destructive. Judge Patrick Moloney QC noted the following differences and similarities in these actions recently:⁸¹

- **Meanings:** In defamation, a meaning which damages reputation is required. In privacy, it is not required, but would not prevent a claim either;
- **Publication:**
 - *Extent:* In defamation, publication must occur to at least one third party. In privacy, infringement can arise outside of publication from intrusion or acquisition or retention of private information. [In New Zealand, the privacy tort is currently limited by the requirements of wide publication and to the subject matter of informational privacy.]
 - *Prior publication:* In defamation, prior publication by others is no defence. In privacy, 'public domain' can be a defence. [In New Zealand, this is unaddressed. The English developments flow from the fact that privacy has developed under the protective rubric of breach of confidence, which is an equitable remedy where public domain is a defence.]
 - *Nature of breach:* In defamation, the type and tone of publication is generally irrelevant to liability (though it may sound in damages). In privacy, the use of static and moving images is seen as uniquely powerful, and capable of giving rise to new instances of breach even if publication has already occurred.
- **Defences:**
 - *Truth:* In defamation, truth is a complete defence. In privacy, it is not a defence, but may be relevant to the public interest defence.
 - *Public interest defence:* In defamation, it is now a defence to show words, though untrue, were the product of responsible journalism and were related to a matter of public interest. In privacy, this may also apply. [However, there has been no such suggestion in New Zealand thus far].
 - *Honest opinion:* It is a defence in defamation to show the words published were an expression of honest opinion based on true facts. This could apply by analogy to privacy, but has not occurred as yet.
 - *Malice:* In defamation, the defences of honest opinion and qualified privilege are lost if the defendant has been motivated by malice. [In New Zealand, malice is referred to as ill will or taking advantage of the opportunity to publish]. The effect of malice in privacy is undetermined as yet.
- **Remedies:**
 - *Injunction:* In defamation, a strict common law test is applied to the granting of injunctions. In privacy, the test is seen as a softer one set by the requirements of the Human Rights Act 1998. [In New Zealand, the stated approach to injunction appears to mirror the higher standard required in defamation, but practical application of the principle appears somewhat inconsistent.]
 - *Damages:* In defamation, damages are available for injury to reputation. Exemplary damages are available. In privacy, similar compensatory damages are available, but exemplary damages are not. [In New Zealand, the development of privacy as a tort

⁸⁰ See *Jameel v Wall Street Journal* [2006] UKHL 44, [2007] 1 AC 359.

⁸¹ 'Privacy: the New Libel?' *IBC Protecting the Media Conference*, London, September 2008. The New Zealand position is noted in square brackets if different.

presents no technical obstacle to exemplary damages, and the lower courts have indicated willingness to award them].

Mosley and Breach of Confidence

As noted, privacy is dealt with in the United Kingdom as a special form of breach of confidence. In New Zealand, it is a tort in its own right. The equitable doctrine of breach of confidence continues to have a separate existence in this jurisdiction and its relationship with the developing tort of privacy is unclear. *Mosley* cannot tell us much about such an overlap. However, the case could have been dealt with in terms of breach of confidence in New Zealand. Justice Eady found that the woman who had secretly filmed the events had committed an “old fashioned breach of confidence”,⁸² which means she owed a primary obligation of confidence both to Mosley himself and the other women involved.⁸³ This was so even in spite of the nature of the activities involved. The judge was not prepared to enforce the maxim that there is no confidence in iniquity, applying similar reasoning to that used to reject the argument that immoral acts should deprive the actor of a reasonable expectation of privacy.

How might this have affected the *NoW*? In *Hunt v A*⁸⁴ the New Zealand Court of Appeal reviewed the current state of the law in New Zealand as to third party recipients of apparently confidential information. The Court recognised that confusion has surrounded this area of the law but accepted that liability can follow if the third party recipient has acted unconscionably in relation to the acquisition of the information or in the way it has been employed.⁸⁵ The factors to be considered in a given case will include:

- the nature of the information;
- the state of knowledge of the acquirer of the confidential information;
- the extent of any breach;
- what kind of detriment has or might result to other parties;
- the degree of “culpability” of the third party acquirer and discloser.⁸⁶

The list is not a closed one. Unsurprisingly, the most important factor in most cases will be the state of the defendant’s knowledge. This means that if a third party has actual knowledge or acts with wilful blindness, liability may well follow. The *NoW* clearly had actual knowledge of the secret filming by Woman E since it had instigated the sting itself. It would be tainted by this knowledge and the degree of unconscionability in publishing would be close to absolute. Again, although a public interest defence exists for breach of confidence, this would likely fail on the same grounds as for privacy and because publication was so wide. An injunction or damages would follow.

Conclusion

Where to now for Mosley? I do not believe that his campaign for a law requiring notice by media to those who are the subject of intended publication is likely to succeed. Although Mosley has taken care to refer to the suggestion as a notice requirement with protection of media in the form of the public interest defence, nonetheless the proposal is seen as an exaggerated form of prior restraint. This is being argued as having serious chilling effects on media.

Nonetheless, the case has done little to enhance the media’s reputation, and privacy law will continue to coalesce and solidify, probably incorporating an element requiring media responsibility. If defamation and privacy move even closer together, what will we have then? I suggest a form of rights-based jurisprudence which is in fact a claim for loss of autonomy, dignity and integrity, based on either publication of true or untrue facts, (or intrusions such as secret filming), which may be defended on the basis of public interest. The latter will be clearly satisfied if the material contributes to an important public debate or the functioning of a democracy, and the journalism involved is responsible. The publication of untrue facts will probably attract higher damages. Whether this marriage of two dignity torts takes place in New Zealand will undoubtedly depend to some degree on what the Law Commission has to say about privacy in its ongoing investigation of this area of the law.⁸⁷

⁸² See *Mosley* n. 2 above, [108]. This would be so whether she had been paid or not.

⁸³ *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 (Ch).

⁸⁴ [2008] 1 NZLR 368.

⁸⁵ *Ibid*, at [92].

⁸⁶ *Ibid*, at [93].

⁸⁷ See n. 3 above.