Privacy in New Zealand (so far)

William Akel surveys some recent cases regarding a tort of privacy

In New Zealand, until recently, the issue of privacy had not been dealt with comprehensively in either legislation or judge made law. Legislation has been passed in the form of the *Privacy Commissioner Act* and the Privacy Information Bill is currently under review.

The New Zealand Broadcasting Standards Authority sought to establish some guidelines for television and radio, when in June of this year it recorded five relevant privacy guidelines:

1. the protection of privacy includes legal protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities;
2. protection against the public disclosure of some kinds of public facts — facts which have, in effect, become private, for example through the passage of time. The public disclosure of these facts must be highly offensive to the reasonable person;
3. protection against intentional interference (in the nature of prying) with an individual's interest in solitude or seclusion. The intrusion must be offensive to the ordinary person. Protection does not extend to being observed, followed or photographed in a public place;
4. discussing the matter in the "public interest" (defined as a legitimate concern to the public), is a defence to an individual's claim for privacy;
5. an individual who consents to the invasion of his or her privacy, cannot later succeed in a claim for breach of privacy.

In addition, the High Court has referred to a right to privacy on the special facts of a small number of cases. All have involved interim injunctions where the applicant has been required to show only that an arguable case of breach of privacy exists.

The Brain Dead case

The most recent decision is that of Mr Justice Gallen in *Bradley v Wingnut Films Limited* (unreported, Wellington High Court, CF 258/92). In this case the judge considered that although privacy did exist as a common law right in New Zealand, it was crucial that it should not impinge on the right of a free press. The case concerns the somewhat controversial New Zealand movie *Brain Dead*. Part of the film was shot at a Wellington cemetery, where the plaintiff holds a burial plot. The plot has a large marble tombstone. Part of the tombstone appeared in the movie without the plaintiff's permission. The plaintiff was shocked and upset that the tombstone was associated with the movie (the movie having been labelled a "splatter film"). He brought an injunction against the movie company to prevent the circulation of the movie. One of the plaintiff's claims was that his right to privacy had been breached.

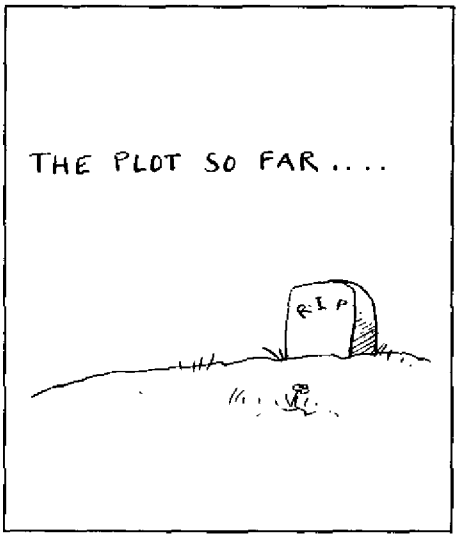
Gallen J, while holding that the common law tort of privacy existed in New Zealand, stressed that its extent should be regarded with caution. He stated:

"While the importance of the rights of the individual should not be understated, freedom of expression is also an important principle of our society."

He found that the plaintiff and his family did not have the right to privacy. He said:

"If the tombstone or burial plot had been shown as directly involved in the particular incidents which occur in the cemetery and as having a significance beyond being part of the background, there might have been more to support this argument. There is nothing in the sequence in the cemetery to suggest that there is any connection between the action filmed as taking place and the plaintiff's tombstone and grave plot."

Gallen J referred in particular to *Tucker v New Media Ownership Ltd* in his findings in favour of a right to privacy in New Zealand. Although *Tucker* went to the Court of Appeal, it is of use to look at the decision of Mr Justice Jeffries in the High Court.



Publication of criminal record

The case involved the publication of details of a potential heart transplant patient's previous criminal convictions. As part of his fundraising campaign he was interviewed on television and radio, and newspaper advertisements were published. During this campaign he was told that the weekly newspaper *Truth* had received information that he had been convicted of criminal offences. The plaintiff sought an injunction against the publisher of *Truth*, News Media Ownership Ltd and other media.

The plaintiff travelled to Australia to be assessed for a heart transplant operation. While there, one of his major sponsors, without giving reasons, withdrew its offer of funds. After this, Radio Windy, which was not a party to the injunction proceedings, broadcast details of the convictions. Soon after, the same item had been broadcast by almost the entire independent radio network in New Zealand, and a Sydney newspaper had published an article referring to the plaintiff's convictions.

The court looked at whether the tort of privacy could apply in the plaintiff's case. Jeffries J commented:

"I am aware of the development in other jurisdictions of the tort of invasion of privacy and the facts of this case seem to raise such an issue in a dramatic form. A person who lives an ordinary life has a right to be left alone and to live the private aspects of his life without being subjected to unwarranted, or undesired, publicity or public disclosure."

The court held that in its view the right to privacy may provide the plaintiff with a valid cause of action in New Zealand. It found that this seemed a natural progression of the tort of intentional infliction of emotional distress and was in accordance with the ability of the common law to provide a remedy for a wrong. Jeffries J considered that the essence of the tort of privacy was unwarranted publication of intimate details of the plaintiff's private life. These must be outside the realm of legitimate public concern, or curiosity.

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Although not referred to by Gallen J in the *Brain Dead* case, the concept of privacy was considered by Mr Justice Holland in *Morgan v Television New Zealand* (unreported Christchurch, High Court, March 1990), regarding the then ongoing Hillary Morgan international custody battle. Holland J granted an injunction restraining Television New Zealand from transmitting a programme that had been broadcast overseas about the custody dispute. The injunction was granted on the basis that according to Holland J the law of New Zealand recognised some right of privacy of an individual. The judge indicated that he could see little public interest in disclosing very private matters about the child's life. This was despite the fact of widespread publicity about the case.

However, in a subsequent hearing involving the *Hillary Morgan* case, Holland J, while satisfied that there were privacy rights vested in the child, referred to the major issues involved in such injunction cases including the liberty of the press. On this occasion no injunction was ordered. The so called right to privacy did not override freedom of expression.

What is protected?

In *Marris v TV 3 Network Ltd* (unreported, 14 October 1991) Mr Justice Neazor again considered privacy on an injunction application. Dr Marris was subject to disciplinary action by the Medical Practitioners Disciplinary Committee for failure to make a proper diagnosis of a patient's condition. That disciplinary action took place some months prior to the injunction application and information about it had been published in a provincial newspaper. TV 3 had made and proposed to screen a television programme relating to the illness in respect of which the professional disciplinary action was taken against Dr Marris. Dr Marris and his wife objected to the manner and circumstance in which he was filmed by TV 3 and in which discussions with him were recorded for use in the proposed programme. TV 3 proposed to broadcast some film of Dr Marris' private house, the reporter concerned going up to the front door of the house and Dr Marris speaking to the reporter from an upstairs window. The voice over would say that Dr Marris refused to be interviewed.

Whether or not there was an arguable issue as to tort liability arising in respect of invasion of privacy was not really an issue. Counsel for TV 3 submitted that even if the recognition of the existence of the tort was arguable, it was not seriously arguable that it would extend to the facts of that case.

Neazor J held that what was in issue in *Marris* could not be put higher than upset and anger on the part of Dr and Mrs Marris when faced with the actions of TV 3, and a degree of anger and embarrassment that the disciplinary proceedings should be publicly resurrected by TV 3 in the proposed broadcast. The court thus did not grant an interim injunction on the basis of breach of privacy.

The court noted that there are distinct problems in the issue of what is or will be protected by any tort of invasion of privacy and whether any, and if so what, resulting damage is an ingredient of the tort. For example, whether obtaining information without legitimate reason is enough, or whether publication is required as well, and what is to be regarded as "without legitimate reason".

Elements of the tort

In both *Tucker* and the *Brain Dead* cases the Court referred to *Prosser on Torts*, which refers to two distinct privacy torts:

1. cases involving public disclosure of private facts, which are highly offensive and objectionable to a reasonable person of ordinary sensibilities;
2. publicity which places the plaintiff in a false light in the public eye.

In *Brain Dead*, Gallen J accepted these American formulations as being valid in New Zealand. The court found that from these formulations three requirements must be satisfied before a tort of privacy will arise:

1. the disclosure of the private facts must be a public disclosure and not a private one;
2. the facts disclosed to the public must be private facts and not public ones;
3. the matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.

The question of privacy is yet to be addressed in detail by the Court of Appeal. Until this occurs, it is difficult to say with any certainty that the tort of privacy will be completely accepted in New Zealand law. In the *Tucker* case, the Court of Appeal stated that the concept of privacy is at least arguable. It will be interesting to see the result if a full privacy case comes before the Court of Appeal.

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ABA DEVELOPMENTS

This column is a brief review of the Australian Broadcasting Authority during its first two months of operation.

- In November 1992 the ABA conducted a series of national planning seminars for the radio industry. A similar series of seminars has been planned for the television industry in 1993.
- It is reported that the ABA has received a large number of requests for opinions regarding narrowcasting services. There has been significant debate over what constitutes a narrowcasting service, which is unlikely to be quelled until the first ABA opinions on narrowcasting are published. Mr Tim O'Keefe, a member of the ABA, has indicated that some proposed services are too wide in their appeal to currently be classified as narrowcasting services. The majority of applications received so far are for opinions on whether or not proposed tourist information services are narrowcasting services.
- The fee for an opinion on the category of service into which a proposed service falls has been set at $475. The fee for an opinion regarding control of a service is likely to be set at $2,500.
- The ABA has published a planning timetable, under which submissions on planning may be made to it by February 1993. The ABA expects to publish draft planning priorities by April 1993 and to have finalised them by mid-1993.
- On 26 November 1992 the Chairman of the ABA, Mr Brian Johns, addressed the Annual Conference of the Screen Producers' Association on local content. Mr. Johns indicated support for the concept of minimum levels of local content. However, he emphasised that it was more important to achieve improvements in quality and diversity of local content than simply increasing local content levels.