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**Balancing the right to privacy and freedom of expression: Re-evaluating
Hosking v Runting in the light of recent developments in English privacy
law**

LAWS 520: Censorship and Freedom of Expression

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Abstract: This paper examines the potential impact of recent English privacy jurisprudence on the New Zealand tort of privacy. The paper contrasts the New Zealand Court of Appeal’s aversion towards an over-expansive privacy right expressed in *Hosking v Runtig* with an increasing readiness to override freedom of expression in favour of privacy interests in the United Kingdom. Three central conflicts in the courts’ reasoning are addressed in detail, namely privacy’s relationship with public places, individuals with public profiles and mediums of publication. While developments in English privacy law highlight reasoning flaws and theoretical shortcomings in *Hosking*, the increasing influence European jurisprudence on English law may nevertheless justify some divergence in the two jurisdictions’ balancing of privacy and freedom of expression.

Balancing the right to privacy and freedom of expression: Re-evaluating *Hosking v Runtig* in the light of recent developments in English privacy law

I Introduction

In March 2004, the New Zealand Court of Appeal declined to prevent the publication of photographs of broadcaster Mike Hosking's 18 month old twins on a shopping trip with their mother. While recognising that a tort of privacy existed in New Zealand, *Hosking v Runtig* held that a successful outcome was not "reasonably open" to the plaintiffs.¹

In April 2014, the United Kingdom Queen's Bench considered whether to award compensation to musician Paul Weller for an action on behalf of his 10 month old twins and 16 year old daughter for the unauthorised publication of photographs of a family shopping trip.² Despite the close factual analogy with *Hosking*, *Weller v Associated Newspapers Ltd* stated that the photographs constituted an invasion of privacy sufficient to satisfy a misuse of private information claim; the United Kingdom equivalent of New Zealand's privacy tort.³

The contrasting outcomes of *Hosking* and *Weller* are particularly significant given that the majority in *Hosking* equated the English common law privacy approach with the New Zealand tort of privacy.⁴ This suggests that English law has diverged significantly from New Zealand's approach since *Hosking*. This paper evaluates the extent to which these developments should prompt a reconsideration of the New Zealand approach to balancing individual privacy rights with the media's freedom of expression.

This paper first outlines widely-cited theoretical justifications for the right to privacy and freedom of expression. Second, the paper summarises the legal tests for privacy in each jurisdiction. The paper then evaluates the key areas of conflict between *Hosking* and recent English jurisprudence, namely in their treatment of public places, individuals with public

¹ *Hosking v Runtig* [2004] NZCA 34, [2005] 1 NZLR 1 at [160].

² *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB).

³ *Hosking v Runtig*, above n 1, at [90].

⁴ At [90].

profiles and mediums of publication.⁵ These areas are analysed in the light of the theoretical foundations of privacy and freedom of expression, the constitutional frameworks for these rights and domestic legal precedent. Finally, the paper considers the extent to which the recent English jurisprudence should encourage New Zealand courts to depart from *Hosking*.

II Theory

In order to assess the courts' reasoning in *Hosking* and post-*Hosking* English decisions, this paper first explores the theoretical justifications for the right to privacy and freedom of expression.

A Theoretical foundations of privacy

1 What is privacy?

(a) Privacy as a subjective concept

While a universally-accepted definition is elusive,⁶ most commentators agree that privacy is a subjective concept. These theorists contend that privacy cannot be described as an objective state of social isolation, whereby others have no physical access to and possess no information about a person.⁷ Instead, given the Aristotelian truism that man is a social animal,⁸ privacy must be situated within the social context of human interaction.⁹ As most humans do not possess an absolute desire for social isolation, the extent of an individual's desire for privacy constantly fluctuates.¹⁰ Humans seek to achieve and maintain these fluctuating desires for social isolation.

⁵ Note: These categories do not provide an exhaustive analysis of differences between the cases. Additional differences include the courts' application of their obligations to protect children under the United Nations Convention on the Rights of the Child.

⁶ Melissa Waterfield "Now you see it, now you don't: the case for a tort of infringement of privacy in New Zealand" (2004) 10 CLR 182 at 185; Ministry of Justice *A Bill of Rights for New Zealand: A White Paper* 1985 at [10.144]; *Hosking v Runting*, above n 1 at [211]-[220], [270].

⁷ Law Commission *A Conceptual Approach to Privacy* (NZLC MP19, 2007) at [100]-[109].

⁸ At [75].

⁹ Charles Raab "Privacy, Democracy, Information" in B Loader (ed) *The Governance of Cyberspace* (Routledge, London, 1997) 155 at 161-165.

¹⁰ Law Commission, above n 7, at [91].

This suggests that privacy law should protect an individual's control over his or her social connectedness or isolation. Legal commentator Nicole Moreham's widely-cited definition describes privacy in these terms, namely as control over "desired inaccess" or freedom from the "unwanted access" of others to oneself or one's personal information.¹¹ Given that this thesis has been advanced by other prominent privacy commentators¹² and was preferred in the Law Commission's research paper,¹³ this paper analyses the theoretical merits of the case law using this definition.

(b) Informational privacy

This paper analyses the conflicting legal approaches to protecting informational privacy. There are two generally-accepted subsets of privacy, namely informational privacy and spatial privacy.¹⁴ Informational privacy protects one's personal or intimate information.¹⁵ As the *Hosking* tort and the United Kingdom misuse of private information action are both designed to address informational privacy, the paper is confined to this subset.¹⁶

While informational privacy might traditionally be understood as limited to intimate or embarrassing information, Moreham's definition extends the concept to innocuous information. Given that Moreham's conceptualisation of privacy is purely subjective, the enquiry focuses on an individual's desire to restrict certain information, as opposed to the objectively private nature of the information itself. Therefore, prevailing societal opinions about what constitutes personal or private information are irrelevant in determining whether a normative claim of privacy exists. As Butler and Butler note, privacy can potentially cover non-intimate and seemingly banal information such as a photograph of a person walking down a street.¹⁷

¹¹ Nicole Moreham "Privacy in Public Places" (2006) 65 CL J 606 at 617.

¹² For example: Ruth Gavison "Privacy and the Limits of the Law" (1979) 89 Yale LJ 421; James Rachels "Why privacy is important" (1975) 4(4) Phil & Publ Aff 323.

¹³ Law Commission, above n 7, at [136].

¹⁴ At [114].

¹⁵ At [112]-[114].

¹⁶ The recent High Court decision of *C v Holland* purports to cover spatial privacy in the New Zealand context. See: *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.

¹⁷ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis Butterworths, Wellington, 2006) at 348.

2 *When should legal protection be afforded to privacy?*

(a) Distinction between normative and legal right to privacy

However, given the potentially limitless scope of Moreham's definition of privacy, it is necessary to distinguish between the normative reach of privacy and its corresponding legal rights. A legal right to privacy ought to be limited in scope in order to avoid a "chilling effect" on freedom of expression.¹⁸ In most cases, privacy violations will be sanctioned through "ongoing adjustment of inter-personal relations."¹⁹ For instance, revealing another's personal information might cause a relationship to "cool in intensity, wither or cease altogether".²⁰ According to Mark Hickford, senior consultant to the Law Commission, legally sanctioning such interactions would be onerous and oppressive, and would have a detrimental impact on freedom of expression. Therefore, a legal right to privacy must be confined to a particular threshold of privacy breach.

(b) Methods of limiting the scope of a legal right to privacy

Several methods can be employed to limit the scope of a legal right to privacy. First, a legal right could be restricted through a harm requirement. As discussed above, an invasion of privacy can occur independently of harm caused to the individual. As philosopher Edward Bloustein notes, the extent of harm may be relevant in determining the legal weight attached to an invasion:²¹

Where private information is wrongfully gained and subsequently communicated, the wrong is made out independently of the communication. Communication in such a case, whether to one person or many, is not of the essence of the wrong and only goes to enhance damages.

Whereas torts such as battery and trespass are actionable *per se*, or without proof of damage, limiting a privacy tort to actions causing tangible harm may be necessary to avoid the aforementioned danger of causing a chilling effect on freedom of expression. The extent of harm required by the tort will affect the scope of privacy invasions legally actionable.

¹⁸ *Hosking v Runting*, above n 1, at [220] per Keith J.

¹⁹ Law Commission, above n 7, at [90].

²⁰ At [90].

²¹ Edward J Bloustein "Privacy as an aspect of human dignity: an answer to Dean Prosser" in Ferdinand D Schoeman (ed) *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, United Kingdom, 1984) 156 at 169-170.

For instance, a tort actionable on the basis of mere offence will have significantly wider reach than a tort requiring serious emotional distress.

Second, the normative definition of privacy can be qualified in the legal context through an objective element. Moreham argues that basing legal sanctions on a purely subjective perception of “personal information” would be “unacceptably far-reaching”, as the tort could have potentially limitless coverage.²² This subjective desire must be “disciplined” by an objective appreciation for the private nature of the information in order to avoid overly-expansive legal protection.²³ Hickford argues that such an objective limitation is achieved in New Zealand and English law by requiring applicants to establish a *reasonable* expectation of privacy.²⁴

3 *Why should privacy be protected?*

The value of privacy can be ascertained by reference to the key human values which it supports. While privacy can be characterised as a natural human desire inherently worthy of protection,²⁵ the value of privacy rests primarily in its ability “foster the conditions for a wide range of other aspects of human flourishing”.²⁶ Therefore, exploring the justifications for legal privacy protection is best achieved through reference to the values which privacy fosters.

(a) Autonomy

First, several commentators contend the privacy is essential to the realisation of human autonomy. The notion of autonomy denotes the capacity of humans to live their lives according to their own choosing,²⁷ or the ability to pursue one’s own idea of a worthwhile life.²⁸ Privacy supports autonomy by removing impediments which might constrain an individual from pursuing his or her own life choices. Given that humans are social beings, individuals often feel pressure to adjust their behaviour to conform to social groups. Therefore, affording individuals a degree of privacy protection allows them to engage in

²² Nicole Moreham, above n 11, at 617.

²³ Law Commission, above n 7, at [136].

²⁴ At [124].

²⁵ *Hosking v Runting*, above n 1, at [264] per Anderson J.

²⁶ David Feldman “Privacy-Related Rights and their Social Value” in Peter Birks (ed) *Privacy and Loyalty* (Oxford University Press, United Kingdom, 1997) 15 at 21.

²⁷ Law Commission, above n 7, at [4.1.1].

²⁸ James Griffin *On Human Rights* (Oxford University Press, Oxford, 2008) at 233.

behaviour without feeling constrained by prevailing societal attitudes, where such behaviour might otherwise provoke “unpleasant or hostile” reactions from others.²⁹

(b) Dignity

Second, privacy supports human dignity. Human dignity is based on the idea that all humans are entitled to an equal level of respect.³⁰ This entitlement rests on the innate value of a human being, whereby “each individual life is an end in itself.”³¹ Commentators contend that invasions of privacy are a threat to human dignity. Bloustein argues that privacy protects individuals from aspects of their lives life being held up to public scrutiny without their consent, regardless of whether the unauthorised publicity has detrimental impacts on the person.³² This is based on the idea that unauthorised publicity is *per se* an affront to human dignity, as every person is equally entitled to respect for his or her private life.³³ As Bloustein observes,³⁴

The wrong in the public disclosure cases is not in changing the opinions of others, but in having facts about private life made public. The damage is to an individual's self-respect in being made a public spectacle.

B Theoretical foundations of freedom of expression

In contrast to ongoing debates around a comprehensive definition of privacy, most commentators cite three primary justifications for freedom of expression. These are the argument from truth, the argument from democracy and the argument from self-fulfilment and autonomy.

²⁹ Katherine Laura Thompson “Balancing Privacy and Free Speech: A Critique of English Privacy Law under the Human Rights Act” (2 December 2013) Durham University <www.etheses.dur.ac.uk> at 6.

³⁰ Stanley I Benn “Privacy, freedom, and respect for persons” in Ferdinand D Schoeman (ed) *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, United Kingdom, 1984) 223 at 224.

³¹ Mark E Warren “Democracy and the state” in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press, Oxford, 2006) 382 at 385.

³² Edward J Bloustein, above n 21, at 168-169.

³³ At 169.

³⁴ At 170.

1 *Argument from truth*

First, freedom of expression literature submits that the right facilitates the discovery of truth. This argument was partly pioneered by John Stuart Mill. Mill argued that speech regulation defers excessive power to the government to assess the veracity of ideas.³⁵ In suppressing allegedly false speech, the government assumes authority to decide the speech's truthfulness "for all mankind".³⁶ Such a situation erroneously implies that the government's ability to judge the veracity of speech is infallible.³⁷ Instead, Mill contends that free public discussion is a better forum to assess the legitimacy of an idea. If the speech is found to be true, any contrary belief may be corrected. In addition, where the speech is established as false, a "clearer perception and livelier impression of the truth" is ascertained.³⁸

Alternatively, one widely-cited form of this argument employs the imagery of a "marketplace of ideas". This theory contends that superior ideas and opinions will outcompete their inferior counterparts where the exchange of ideas is unregulated by the state.³⁹ Therefore, the truth will "emerge victorious from the competition among ideas."⁴⁰

2 *Argument from democracy*

Second, commentators argue that freedom of expression is central to the functioning of democracy. According to philosopher Alexander Meiklejohn, western liberal democracies are founded on citizen participation in governance.⁴¹ Freedom of expression is necessary to allow citizens to effectively determine issues relevant to governance, in granting the public full access to competing ideas.⁴² Any censorship of speech relevant to political issues would undermine the population's ability to make fully-informed decisions.⁴³

³⁵ John Gray and GW Smith *JS Mill on liberty: in focus* (Routledge, London, 1991) at 37.

³⁶ At 37.

³⁷ At 37.

³⁸ At 37.

³⁹ Eric Barendt *Freedom of Speech* (2nd ed, Oxford University Press, New York, 2005) at 11.

⁴⁰ F Schauer *Free Speech: A Philosophical Enquiry* (Cambridge University Press, United Kingdom, 1982) at 16.

⁴¹ Alexander Meiklejohn *Political Freedom: the Constitutional Powers of the People* (Harper and Row, New York, 1965) at 26.

⁴² At 26-27.

⁴³ At 26-27.

While Meiklejohn's theory is confined to political expression, the constitutional democracy theory supports the protection of all forms of speech. Widely-cited freedom of expression theorist Eric Barendt argues that equality is a key democratic value which sits alongside self-governance.⁴⁴ Given the importance of equality, democratic governments must ensure equal access to political debate.⁴⁵ This suggests that democratically-elected governments should be precluded from any regulation of public discourse, given the danger of undermining equal access to public debate.⁴⁶ According to Barendt, this theory extends to protecting non-political speech, as the government should not be entrusted with determining the bounds of public discourse, as they may deliberately or inadvertently suppress legitimate public discourse.⁴⁷

3 *Argument from self-fulfilment and autonomy*

Third, freedom of expression is widely appreciated for its role in advancing individuals' self-fulfilment and autonomy. Commentators argue that imparting information to others allows the speaker or writer to develop emotionally, and is therefore central to their self-fulfilment. Self-fulfilment is either appreciated as intrinsically valuable, or for its role in creating more thoughtful individuals and a more reflective society.⁴⁸

In addition, freedom of expression can contribute to the autonomy of citizens. According to theorist Thomas Scanlon, freedom of expression enables individuals to receive competing ideas and independently assess them, instead of deferring this role to the state.⁴⁹ Scanlon argues that this is a precondition to individual autonomy, as "an autonomous person cannot accept without independent consideration the judgement of others as to what he should believe or what he should do."⁵⁰

⁴⁴ Eric Barendt, above n 39, at 19.

⁴⁵ At 19.

⁴⁶ At 20.

⁴⁷ At 20.

⁴⁸ At 13.

⁴⁹ At 13.

⁵⁰ Thomas Scanlon "A Theory of Freedom of Expression" in Ronald Dworkin (ed) *The Philosophy of Law* (Oxford University Press, United Kingdom, 1977) 163.

III Legal tests

The New Zealand and English courts have attempted to reconcile the fundamental underlying values advanced by the right to privacy and freedom of expression through the following legal frameworks.

A New Zealand tort of privacy

The majority in *Hosking* acknowledged the existence of the tort of privacy in New Zealand. The first two limbs of the *Hosking* test consider whether the plaintiff has a legal right to privacy. These elements are:⁵¹

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

Where the plaintiff satisfies these limbs, the court examines whether his or her right to privacy should be outweighed by the media's freedom of expression claims through a defence of legitimate public interest.⁵²

B United Kingdom misuse of private information action

The United Kingdom equivalent of the *Hosking* tort is a two-stage misuse of private information action. Like in *Hosking*, the court first determines whether the claimant has a reasonable expectation of privacy. However, unlike *Hosking*, the court does not then consider whether the publication is highly offensive.⁵³ Where the claimant is found to possess a reasonable expectation of privacy, the court then undertakes an "ultimate balancing test", exploring "how the balance should be struck as between the individual's right to privacy on the one hand and the publisher's right to publish on the other."⁵⁴ The ultimate balancing test can roughly be equated with the balancing exercise undertaken in *Hosking* in the context of the public interest defence.⁵⁵

⁵¹ *Hosking v Runtig*, above n 1, at [117].

⁵² At [129]-[130].

⁵³ This highly offensive limb was rejected by the House of Lords in *Campbell*. See: *Campbell v MGN Ltd* [2004] UKHL 22, [2004] AC 457 at [22].

⁵⁴ *Weller v Associated Newspapers Ltd*, above n 2, at [16]-[17].

⁵⁵ *Hosking v Runtig*, above n 1, at [129]-[130].

In executing the ultimate balancing test, the English courts consider the claimant's right to privacy as articulated in art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁵⁶ Article 8 provides that "everyone has the right to respect for his private and family life, his home and his correspondence."⁵⁷ Similarly, the content of the publisher's freedom of expression rights is ascertained from art 10 of the ECHR, which safeguards the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."⁵⁸

Excepting the highly offensive element in the *Hosking* tort, the New Zealand and English privacy tests appear analogous. However, the following sections explore the increasingly divergent approaches the courts have taken in each jurisdiction in interpreting and applying these legal tests.

IV Key divergences in the courts' reasoning

A Public places

This section explores the contrasting approaches of the New Zealand and English courts to protecting individuals' privacy in public places. While the United Kingdom is potentially open to recognising expectations of privacy in relation to innocuous public activities, this section argues that doctrinal, constitutional and cultural divergences between the jurisdictions preclude the New Zealand courts from following this approach.

1 Case analysis

While both *Hosking* and *Weller* accepted some extension of privacy protection to public places, the cases differ in defining the nature of public activities falling within the ambit of privacy protection. *Hosking* adopted a considerably narrower approach to protecting privacy in public places *vis à vis* its United Kingdom counterpart.

⁵⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (opened for signature 4 November 1990, entered into force 3 September 1953).

⁵⁷ Article 8.

⁵⁸ Article 10.

(a) *Hosking*

In *Hosking*, the Court of Appeal stated that photographs taken in public places do not generally attract a reasonable expectation of privacy. The Court unanimously held that the photographs at issue did not contain any facts worthy of privacy protection, as they did “not disclose anything more than could have been observed by any member of the public... on that particular day”.⁵⁹ In addition, the photographs did not contain any information which might endanger the children’s safety.⁶⁰

Further, the Court dismissed the appellants’ claims that permitting publication would result in a “constant” fear of similar media intrusions.⁶¹ The Court declined to consider the possibility of future intrusive publications, stating that “if there is no case for relief now, we cannot address the future.”⁶² Moreover, the Court considered that parental concerns about media intrusion were “overstated”.⁶³

Nevertheless, the Court of Appeal noted that privacy rights may arise in public places in exceptional cases. *Gault and Blanchard JJ* cited English cases recognising privacy rights in situations of public humiliation or embarrassment, such as photographs of a claimant attending a narcotics clinic or attempting suicide.⁶⁴ While the Court accepted that such cases “perhaps” qualify the general rule against privacy recognition in public places, the innocuous nature of the *Hosking*’s family shopping trip precluded it from falling under this exception.⁶⁵

In addition to failing under the first limb of the *Hosking* tort, the Court noted that photographs in public places will generally struggle to satisfy the “highly offensive” limb. The Court held that the reasonable person would not find the publication of the *Hosking* photographs sufficiently offensive, as there was no “real harm” in the photographs.⁶⁶

⁵⁹ *Hosking v Runtig*, above n 1, at [164].

⁶⁰ At [164].

⁶¹ At [161].

⁶² At [162].

⁶³ At [164].

⁶⁴ At [164].

⁶⁵ At [164].

⁶⁶ At [165].

(b) *Weller*

In contrast to *Hosking*, *Weller* accepted that a wide range of public activities can trigger a reasonable expectation of privacy. First, Dingemans J classified the *Weller*'s shopping trip as a "private family activity".⁶⁷ This approach is based on the European case of *von Hannover v Germany (No 1)*⁶⁸ and the English case of *Murray v Big Pictures (UK) Ltd.*⁶⁹

In *von Hannover (No 1)*, the European Court of Human Rights (ECtHR) held that the concept of "private life" in art 8 of the ECHR was capable of protecting innocuous public activities. According to the Court, art 8 protects the "development, without outside interference, of the personality of each individual in his relations with other human beings."⁷⁰ In order to facilitate such development, art 8 covers a "zone" of interaction with others, even where such interaction occurs in a public place.⁷¹ The Court held that this zone of interaction encompassed the claimant's "private recreation time", which extended to photographs showing the claimant undertaking innocuous public activities, such as leaving a restaurant and playing sport.⁷²

Moreover, the United Kingdom Court of Appeal in *Murray* followed *von Hannover (No 1)* in holding that routine activities carried out in public could arguably attract a reasonable expectation of privacy. The Court held that leisure activities, such as a café expedition, could be characterised as part of a person's private recreation time.⁷³ Nevertheless, the Court declined to delineate the types of activities which would constitute "recreation time", instead insisting that the enquiry is highly contextual.⁷⁴ Given that the publicity of such activities would adversely affect family recreation time in the future, the Court held that the claimant arguably had a reasonable expectation of privacy.⁷⁵ This approach signals a potential divergence from the House of Lords decision in *Campbell v MGN*, where the Court held that United Kingdom privacy law did not protect innocuous public activities, instead requiring a situation of "humiliation or severe embarrassment."⁷⁶

⁶⁷ *Weller v Associated Newspapers Ltd*, above n 2, at [159].

⁶⁸ Case C-59320/00 *Von Hannover v Germany* [2004] ECHR 294.

⁶⁹ *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, [2008] 3 WLR 1360 at [55].

⁷⁰ At [50].

⁷¹ At [50].

⁷² At [61].

⁷³ At [55].

⁷⁴ At [55].

⁷⁵ At [55].

⁷⁶ At [75]. However, the House of Lords did not dismiss the possibility for future development: see [154].

In addition to characterising the family shopping trip as “essentially private” and therefore capable of attracting privacy protection,⁷⁷ *Weller* suggested that children may have an automatic reasonable expectation of privacy in public places. The Court cited the contention in *Murray* that children arguably have a right to privacy in public places, where there is a reasonable expectation that they will not be targeted by photographers.⁷⁸ While *Dingemans J* did not make any independent assessment of this contention, the fact that the claimants were children was listed as a central factor in the Court’s finding of a reasonable expectation of privacy.⁷⁹

2 *To what extent should Weller prompt a reconsideration of the Hosking approach to public places?*

The following section first criticises the *Hosking* reluctance to recognise privacy rights in public places in the light of its reasoning and the aforementioned theoretical foundations of privacy. However, while privacy theory supports a more flexible approach to protecting privacy in public places in line with *Weller*, New Zealand courts are unlikely to follow this approach due to doctrinal, constitutional and cultural divergences.

(a) Evaluation of the *Hosking* approach

The *Hosking* unwillingness to recognise privacy in public places is based on unreliable precedent and an erroneous understanding of privacy’s theoretical underpinnings. The majority judgment, delivered by Gault and Blanchard JJ, based the tort of privacy on the avoidance of emotional harm. Unlike the United Kingdom misuse of private information action, the *Hosking* tort requires that publication be “highly offensive to the reasonable person”.⁸⁰ This additional element reflects the majority’s view that the evasion of humiliation and distress is the central rationale for privacy protection. According to the Judges, “the concern is with publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned.”⁸¹

⁷⁷ *Weller v Associated Newspapers Ltd*, above n 2, at [156].

⁷⁸ At [65].

⁷⁹ At [172].

⁸⁰ *Hosking v Runting*, above n 1, at [127].

⁸¹ At [126].

First, the limitation of the *Hosking* tort to emotional harm is founded on questionable legal precedent. Gault and Blanchard JJ cited New Zealand High Court and Court of Appeal cases involving embarrassing or intimate publications, such as revelations of serious criminal convictions and psychiatric treatment.⁸² While these cases demonstrate the need for a privacy tort, confining the tort to such cases cannot be justified solely based on their precedent, as they do not in themselves establish why the tort should be so confined.

Moreover, the Court referenced the United States privacy tort in justifying confining privacy protection to emotional harm. In the United States, publication must be “highly offensive to the reasonable person” in order to qualify for privacy protection.⁸³ In endorsing this approach, the Judges failed to acknowledge constitutional differences between the United States and New Zealand, particularly regarding the centrality of freedom of speech to the United States Constitution. Finally, the Judges cited the English Court of Appeal case of *Campbell v MGN Ltd*, which similarly contained a highly offensive limb.⁸⁴ However, this highly offensive element was overturned by the House of Lords on appeal.⁸⁵

In addition to citing unreliable legal precedent, Gault and Blanchard JJ failed to correctly identify the theoretical basis of the right to privacy. As explored in part II of this paper, privacy is primarily valued for its role in protecting human autonomy and dignity. Privacy enables individuals to live “a life of their choosing” and affords them “equal entitlement... to respect.”⁸⁶

Given privacy’s role in supporting these core human values, theorists suggest that an invasion of one’s privacy does not necessarily require tangible harm.⁸⁷ Instead, it is necessary to distinguish between the normative and legal rights to privacy.⁸⁸ Rather than forming the underlying basis of the right to privacy, harm is merely a method by which one can limit the ambit of the legal right to privacy or assess the amount of damages which should be awarded to the plaintiff.⁸⁹ In appearing to limit privacy’s value to the avoidance of harm, Gault and Blanchard JJ therefore fail to appreciate its true value.

⁸² *Tucker v News Media Ownership* [1986] 2 NZLR 716 (CA); *P v D* [2000] 2 NZLR 591 (HC).

⁸³ *Hosking v Runtig*, above n 1, at [68].

⁸⁴ *Naomi Campbell v MGN Ltd* [2002] EWCA Civ 1373, [2003] 2 WLR 80.

⁸⁵ *Campbell v MGN Ltd*, above n 53, at [22].

⁸⁶ Law Commission, above n 7, at 5.

⁸⁷ At [19] and [188]; Edward J Bloustein, above n 21, at 169-170.

⁸⁸ Law Commission, above n 7, at 10.

⁸⁹ At [19]; Edward J Bloustein, above n 21, at 169-170.

Indeed, the inclusion of a “highly offensive” element in *Hosking* has been criticised on the basis of this theoretical critique. First, the House of Lords in *Campbell* considered autonomy and dignity to be the basis for the United Kingdom tort of misuse of private information.⁹⁰ In so doing, the House of Lords in *Campbell* criticised the *Hosking* highly offensive limb, stating that offensiveness should not be relevant in deciding whether a reasonable expectation of privacy exists, as an expectation can arise independently of tangible harm.⁹¹ Instead, the extent of harm was considered relevant in determining the weight to be given to privacy *vis à vis* freedom of expression in the ultimate balancing exercise between arts 8 and 10 of the ECHR.⁹²

This critique was noted by Elias CJ in an *obiter* discussion in the Supreme Court decision in *Rogers v TVNZ*.⁹³ Moreover, Tipping J in *Hosking* rejected the majority’s formulation of the tort of privacy insofar as “highly offensive” occupies a separate limb.⁹⁴ While the highly offensive limb is a “useful reminder that relatively trivial invasions of privacy should not be actionable”, it may be “unduly restrictive” to require harm at this level for every invasion of privacy.⁹⁵

This suggests that the *Hosking* tort is overly-narrow, given its foundations on unreliable precedent and limited theoretical analysis. The highly offensive limb precludes New Zealand courts from following *Weller* in protecting a plaintiff’s right to privacy in a wide variety of public situations. This is particularly problematic given the following theoretical advantages of the *Weller* approach.

(b) Evaluation of the *Weller* approach

(i) Advantages of *Weller*

In contrast to the aforementioned theoretical issues with the *Hosking* reasoning, *Weller*’s rationale for protecting some innocuous activities in public places accords with the theoretical justifications for privacy explored in the part II of this paper. In justifying finding a reasonable expectation of privacy in *Weller*, Dingemans J primarily cited concern

⁹⁰ *Campbell v MGN Ltd*, above n 53, at [51].

⁹¹ At [22].

⁹² At [22].

⁹³ *Rogers v TVNZ* [2007] NZSC 91, (2011) NZULR 386 at [25].

⁹⁴ *Hosking v Runtig*, above n 1, at [256].

⁹⁵ At [256].

about the adverse impacts of publication on the claimant’s future activities.⁹⁶ Conversely, *Hosking* declined to consider the future impact of publication on the claimant, declaring that the effect of publication on the plaintiffs’ future activities was irrelevant in adjudicating the particular claim at issue.⁹⁷

Nevertheless, the *Weller* consideration of the adverse impact of publication on a claimants’ future recreational activities is supported by privacy theory. First, the consideration reflects the subjective nature of privacy. As explored above, Moreham defines privacy subjectively as control over “desired inaccess” or freedom from the “unwanted access” of others.⁹⁸ In *Weller, Murray and von Hannover (No 1)*, the courts were particularly concerned about future media intrusion in the light of the claimants’ public prominence. All claimants were “hounded” by the paparazzi on a daily basis.⁹⁹ As a result of this constant media attention, these figures would likely possess a greater desire for privacy. While an ordinary person would likely be unconcerned about the publication of an innocuous photo of themselves in a public place, permitting the publication of such photographs in the context of these public figures enables their continuing surveillance by media. Therefore, in evaluating the adverse impact of publication on the particular claimant, the *Weller* approach appreciates that privacy needs vary according to the subjective position of the claimant.

Second, Dingemans J’s consideration of a publication’s impact on future activities reflects the grounding of the right to privacy in autonomy. According to theorists, privacy is an essential precondition to human autonomy.¹⁰⁰ Privacy insulates individuals from the negative judgements of others, and thereby enables individuals to live in accordance with their own beliefs without concern for external behavioural norms.¹⁰¹

The *Weller* concern for the impact of publication on future activities extends privacy protection to claimants on the basis that modern media practices substantially affect their autonomy. As Thompson observes, the “infotainment” media “pursue and capture images of celebrities, regardless of their location or activities.”¹⁰² Actress Sienna Miller describes

⁹⁶ *Weller v Associated Newspapers Ltd*, above n 2, at [65].

⁹⁷ *Hosking v Runting*, above n 1, at [161].

⁹⁸ Nicole Moreham, above n 11, at 617.

⁹⁹ *Von Hannover v Germany*, above n 68, at [44]; *Weller v Associated Newspapers Ltd*, above n 2, at [161]; *Murray v Big Pictures (UK) Ltd*, above n 69, at [55].

¹⁰⁰ Katherine Laura Thompson, above n 29, at 6.

¹⁰¹ Law Commission, above n 7, at [86].

¹⁰² Katherine Laura Thompson, above n 29, at 48.

being “relentlessly pursued by about ten to fifteen men almost daily.”¹⁰³ This constant observation prevents public figures from maintaining a private “zone of interaction” in public, within which they can behave autonomously. As acknowledged in *von Hannover (No 1)*, this absence of autonomy stunts personal development.¹⁰⁴ Permitting the publication of innocuous photographs therefore has considerable impacts on individual autonomy, as it maintains the commercial incentive for the debilitating observation of public figures’ daily lives. Therefore, in assessing the impact of publicity on a claimant’s future activities, the *Weller* approach recognises the relationship between privacy and autonomy.

(ii) Justifications for diverging from the *Weller* approach

Despite the apparent theoretical advantages of the *Weller* approach to privacy in public places, New Zealand courts may decline to extend privacy protection to innocuous activities in public places in the light of the reasoning in *Weller*, and constitutional and factual divergences between New Zealand and the United Kingdom.

Weller reasoning

Arguably, *Weller* should be confined to cases involving child claimants, as it does not cite sufficient authority to justify a general extension of the misuse of private information action to everyday public activities.

First, while *Weller* cited *Murray* in justifying finding a reasonable expectation of privacy in the claimants’ case, *Murray* cannot be employed as authority for a general broadening of the misuse of private information action to innocuous public activities. *Murray* was a summary judgment, and therefore did not fully endorse the appellants’ arguments, instead accepting that they had an arguable case. Further, the Court of Appeal in *Murray* distinguished itself from *Campbell* and *von Hannover (No 1)* on the basis that *Murray* concerned a child claimant.¹⁰⁵ As a result, David Hoffman argues that *Murray* provides lower United Kingdom courts with direction regarding innocuous public activities and

¹⁰³ “Leveson Enquiry: Actress Sienna Miller gives evidence” (24 November 2011) British Broadcasting Company <www.bbc.com>.

¹⁰⁴ *Von Hannover v Germany*, above n 68, at [55].

¹⁰⁵ *Murray v Big Pictures (UK) Ltd*, above n 69, at [47].

child claimants, but has little application to non-child claimants.¹⁰⁶ This suggests that *Weller* precedent should be confined to cases involving children.

Similarly, *von Hannover (No 1)* does not provide sufficient authority to justify a general extension of the misuse of private information action to cover innocuous activities in public places. The House of Lords case of *Campbell* conflicts with *von Hannover (No 1)*, in precluding recognition of privacy in public places, except in humiliating or traumatising situations. However, the extent to which the English courts are entitled to depart from the *Campbell* approach in favour of *von Hannover (No 1)* remains unclear.

In *Weller*, Dingemans J claimed that lower courts are free to follow ECtHR jurisprudence, as domestic law in the privacy sphere is based on the ECHR.¹⁰⁷ However, the basis of United Kingdom privacy law on arts 8 and 10 of the ECHR does not automatically enable lower courts to depart from domestic precedent. Commentators argue that the English courts do not have an absolute obligation to apply ECtHR jurisprudence in the privacy sphere, but are merely required to follow the ECtHR's general principles.¹⁰⁸ According to *Alconbury*, excessive adherence to ECtHR decisions would dangerously alter the United Kingdom constitution in favour of the judiciary, given that adherence would involve drastic judicial changes usually reserved for legislative amendment.¹⁰⁹ Moreover, the ECtHR has recently emphasised the margin of appreciation afforded to states in the privacy context.¹¹⁰ Nevertheless, Hoffman argues that this debate solely applies to superior courts, as it is a "matter of clear law" that lower courts must decline to follow ECtHR decisions where they conflict with superior domestic courts' precedent.¹¹¹ This challenges *Weller's* apparent assumption that ECtHR cases can be employed to determine the content of arts 8 and 10 in the United Kingdom context. This suggests that *von Hannover (No 1)* cannot be used as authority to justify a domestic departure from *Campbell's* approach to public places.

Nevertheless, following *Murray*, the Court in *Weller* is free to diverge from the *Campbell* aversion to protecting innocuous public activities in the context of children. As Hoffman notes, *Murray* provides ample authority to steer lower courts toward protecting children in

¹⁰⁶ David Hoffman *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, United Kingdom, 2011) at 145.

¹⁰⁷ *Weller v Associated Newspapers Ltd*, above n 2, at [26].

¹⁰⁸ David Hoffman, above n 106, at 141-142.

¹⁰⁹ *Alconbury* [2001] UKHL 23, [2001] 2 All ER 929 at [76] per Hoffman LJ.

¹¹⁰ *Von Hannover v Germany*, above n 68, at [104].

¹¹¹ David Hoffman, above n 106, at 141.

these cases.¹¹² This suggests that New Zealand courts should only regard *Weller* as authority in for an extension of privacy law in cases involving child claimants.

Constitutional divergence

In addition, the New Zealand courts may decline to follow the *Weller* approach to protecting privacy in public places in the light of constitutional divergences between New Zealand and the United Kingdom.

First, New Zealand courts may refuse to follow English privacy jurisprudence in the light of the influence of EtCHR jurisprudence on United Kingdom privacy law. In *Hosking*, the Court of Appeal claimed that the English common law framework for privacy protection was essentially equivalent to the New Zealand approach.¹¹³ However, since *Hosking* was decided, United Kingdom privacy jurisprudence has significantly broadened under the influence of the ECtHR.

While the previous discussion indicates that the proper extent to which the ECtHR should influence United Kingdom jurisprudence remains contentious, it is clear that art 8 case law has triggered the post-*Hosking* expansion of English privacy law. According to *Reklos v Greece*, art 8 has broad coverage, and encompasses “the right to identity”, “the right to personal development” and “the right to protect one’s image”.¹¹⁴ In *Campbell*, the House of Lords cited this extensive scope as instrumental in the decision to broaden domestic privacy protection.¹¹⁵

Moreover, the ECtHR’s decision in *von Hannover (No 1)* has been particularly influential in the context of *Murray* and *Weller*. Prior to *von Hannover (No 1)*, United Kingdom law did not cover innocuous daily activities carried out in public.¹¹⁶ In *McKennitt v Ash*, the Court of Appeal noted that *von Hannover (No 1)* “extends the reach of article 8 beyond what had previously been understood” in recognising that such activities could attract art 8 protection.¹¹⁷ While *Murray* purported to distinguish itself from both *von Hannover (No*

¹¹² David Hoffman, above n 106, at 145.

¹¹³ *Hosking v Runtig*, above n 1, at [90].

¹¹⁴ Case C-1234/05 *Reklos and Davourlis v Greece* [2009] ECHR 200 at [39].

¹¹⁵ *Campbell v MGN Ltd*, above n 53, at [16].

¹¹⁶ At [154].

¹¹⁷ *McKennitt v Ash* [2006] EWCA Civ 1714, [2007] 3 WLR 194 at [37].

1) and *Campbell* on the basis that neither case involved children,¹¹⁸ the decision to recognise the protection of innocuous activities in the context of children is undoubtedly prompted by *von Hannover (No 1)*. Indeed, *Murray* cited *von Hannover (No 1)* in justifying its approach to privacy in public places.¹¹⁹ The considerable influence of the ECtHR on United Kingdom jurisprudence suggests that New Zealand courts should treat post-*Hosking* English privacy developments with caution.

Moreover, New Zealand courts are wary of accepting an over-expansive definition of privacy in accordance with European jurisprudence due to the constitutional weight attached to freedom of expression. Unlike the United Kingdom, New Zealand does not have a codified right to privacy. The legislature declined to codify a general right to privacy in the New Zealand Bill of Rights Act (NZBORA), noting that the boundaries were “too uncertain and contentious”.¹²⁰ Conversely, freedom of expression is recognised in NZBORA.¹²¹ As a result of this discrepancy, the Judges in *Hosking* were cautious about curtailing freedom of expression in favour of privacy considerations. The majority’s narrowly-defined tort reflects concerns that the freedom of expression must not be overridden unless the limitation is “demonstrably justified” in accordance with s 5 of the NZBORA.¹²² Further, Keith and Anderson JJ argued that a tort of privacy would be an unjustified limitation on freedom of expression, as its ill-defined boundaries will cause a “chilling effect” on freedom of expression.¹²³ Moreover, Anderson J described freedom of expression as the “first and last trench in the protection of liberty”.¹²⁴ The importance placed on freedom of expression in *Hosking* indicates that New Zealand courts would be reluctant to adopt United Kingdom privacy developments, and would view *Weller*’s protection of innocuous public activities as dangerous for freedom of expression.

Cultural divergence

Moreover, New Zealand courts may decline to follow the treatment of public activities in *Weller* as a result of differences in media and celebrity cultures between the jurisdictions. The media cultures in New Zealand and the United Kingdom give rise to different levels

¹¹⁸ *Murray v Big Pictures (UK) Ltd*, above n 69, at [47].

¹¹⁹ At [55].

¹²⁰ Ministry of Justice, above n 6, at [10.144].

¹²¹ New Zealand Bill of Rights Act 1990, s 14.

¹²² Section 5.

¹²³ *Hosking v Runting*, above n 1, at [208]-[222].

¹²⁴ At [267].

of privacy concern. In *Hosking*, the majority described the claimants' fears of "constant media intrusion" as "overstated".¹²⁵ The English Court of Appeal in *Murray* criticised this observation, instead claiming that the parents' fears for their children's autonomy were "entirely reasonable and should be protected by law."¹²⁶ However, one could argue that the Court of Appeal was correct in dismissing the Hoskings' concerns in the light of the New Zealand media environment. Paparazzi-style media tactics permeate the English media industry.¹²⁷ In contrast, the media practice of pursuing of prominent individuals is not prevalent in New Zealand, and such tactics are limited to few photographers.¹²⁸ Indeed, legal commentator Alan Ringwood argues that the need to the activities of the "papparazzi" identified in the United Kingdom Leveson enquiry does not arise in the New Zealand media context.¹²⁹

Similarly, the divergence between *Hosking* and *Weller* can be partly explained by differences between celebrity cultures in the two jurisdictions. The claimants in *Hosking* and *Weller* may be distinguished on the basis of their level of public profile. Paul Weller was described by the Dingemans J as a "well-known musician."¹³⁰ On the other hand, the Court of Appeal used quotation marks to describe Mr Hosking as a "celebrity", suggesting that the Court may have doubted his public prominence.¹³¹ Indeed, one could argue that "celebrities" in the New Zealand environment experience a lesser degree of intrusion into their personal lives than those in the United Kingdom as a result of a more restrained media culture.

In the light of New Zealand's media and celebrity culture, courts are unlikely to perceive significant threats to an individual's autonomy as a result of an incident of media attention. As the need to protect individuals from a "constant fear of media attention" is unlikely to arise to the same extent as in Europe, New Zealand courts may not perceive a need to extend the *Hosking* tort to cover everyday activities for "celebrity" claimants.

¹²⁵ *Hosking v Runting*, above n 1, at [162].

¹²⁶ *Murray v Big Pictures (UK) Ltd*, above n 69, at [50].

¹²⁷ For example: "Leveson Enquiry: Actress Sienna Miller gives evidence", above n 103.

¹²⁸ Sunday Star Times "Lorde pushes back against being papped" (11 May 2014) Stuff.co.nz <www.stuff.co.nz>.

¹²⁹ Alan Ringwood "Crucial to protect press freedom" (5 December 2012) New Zealand Herald <www.nzherald.co.nz>.

¹³⁰ *Weller v Associated Newspapers Ltd*, above n 2, at [1].

¹³¹ *Hosking v Runting*, above n 1, at [9].

(c) Conclusion: to what extent should *Weller* prompt a reconsideration of the *Hosking* approach to public places?

The *Weller* extension of privacy protection to cover some innocuous activities in public places should trigger a reconsideration of the theoretical basis of the *Hosking* tort. The *Weller* approach is theoretically sound, as it recognises the subjective nature of privacy and the relationship between privacy and autonomy. In contrast, *Hosking's* inclusion of a “highly offensive” limb in the tort of privacy appears to erroneously suggest that privacy is founded on the avoidance of emotional harm.

However, New Zealand courts may nevertheless be justified in declining to extend privacy protection to innocuous public activities. First, *Weller* only provides precedent for such an extension in the context of children. Moreover, New Zealand courts should be reluctant to follow post-*Hosking* English privacy developments as a result of the significant influence of the ECtHR, and the apparent centrality of freedom of expression to the New Zealand constitution. Finally, cultural divergences between the jurisdictions suggests that there may no genuine need to expand the *Hosking* tort along European lines given the docile nature of the New Zealand media and celebrity environment.

B Public profiles

This section explores the divergent English and New Zealand approaches to individuals with public profiles. The courts differ in determining the extent to which public prominence should reduce a person's expectations of privacy, and conversely increase the weight afforded to the media's freedom of expression. This paper contends *Hosking* places excessive emphasis on the public status of a plaintiff, a position which is not supported by legitimate freedom of expression considerations. The paper further argues that the ECtHR's approach to public figures could provide a legitimate alternative for New Zealand courts, but must be carefully demarcated to avoid a chilling effect on freedom of expression.

1 Case analysis

Hosking and the United Kingdom courts have presented contrasting views on the extent to which a claimant's public profile should impact on the strength of his or her privacy claim.

(a) *Hosking*

Hosking stated that the public profile of a plaintiff has significant implications for both the plaintiff's reasonable expectation of privacy and the media's countervailing freedom of expression claims.

(i) Reasonable expectation of privacy

The Court held that the classification of a plaintiff as a "public figure" triggers a reduced expectation of privacy. According to Gault and Blanchard JJ, the term "public figure" encompasses a wide range of individuals, who;¹³²

...engage in public activities, assume a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or submit themselves or their work for public judgment.

While *Hosking* accepted that public figures do not generally forfeit the right to privacy by virtue of their public prominence, they nevertheless have generally-reduced expectations of privacy. Gault and Blanchard JJ cited the following three factors which justify diminishing public figures' reasonable expectations of privacy.¹³³

Voluntary public figures

First, the Judges stated that voluntary public figures implicitly accept reduced privacy rights as a "necessary corollary" of their pursuit of public prominence. According to Prosser, voluntary public figures have lesser expectations of privacy as "by seeking publicity they have consented to it."¹³⁴

Prior publications

Second, *Hosking* held that public figures have reduced expectations of privacy as their private information may already be in the public domain. In the Hoskings' case, the plaintiffs had been "open and willing" to discuss Mrs Hosking's pregnancy in several

¹³² *Hosking v Runtig*, above n 1, at [121].

¹³³ At [120].

¹³⁴ At [120].

magazine articles.¹³⁵ This placing of the twin’s birth in the “spotlight” reduced the children’s expectations of privacy.¹³⁶

Public interest in publication

Third, the majority considered that public figures have diminished expectations of privacy as a result of legitimate public interest in their affairs.¹³⁷ The Court defined “public interest” widely, encompassing the public’s “natural curiosity and interest [...] in the personal lives and activities of the [public figure].”¹³⁸

Moreover, the Court asserted that legitimate public interest extends to the lives of public figures’ families.¹³⁹ This was considered a “necessary corollary” of the public figures’ reduced expectations of privacy.¹⁴⁰ In support of this contention, the Court cited the United States case of *Kapellas v Kofman*. In this case, the disclosure of a politician’s children’s criminal convictions was deemed to fall within the scope of legitimate public interest.¹⁴¹ The United States court maintained that the children’s diminished privacy was “one of the costs of the retention of a free marketplace of ideas.”¹⁴² In the light of *Kapellas*, Gault and Blanchard JJ held that there was legitimate public interest in the twins’ photographs by virtue of their relationship with their celebrity parents. This further reduced the children’s expectations of privacy.¹⁴³

(b) United Kingdom

The English courts’ approach to publically prominent claimants remains unclear. However, unlike *Hosking*, recent decisions suggest that the courts are less willing to accept that a claimant’s public profile reduces his or her privacy claims and increases the media’s freedom of expression rights.

¹³⁵ *Hosking v Runting*, above n 1, at [9].

¹³⁶ At [123].

¹³⁷ At [120].

¹³⁸ At [120], citing Randerson J’s High Court judgment.

¹³⁹ At [124].

¹⁴⁰ At [122].

¹⁴¹ At [122].

¹⁴² At [122].

¹⁴³ At [123].

(i) Reasonable expectation of privacy

Voluntary public figures

Unlike *Hosking*, the United Kingdom courts have not made a clear distinction between voluntary and involuntary public figures. In *Campbell*, the Court held that the claimant's symbiotic relationship with the media had little relevance beyond the aforementioned impact of prior publications. According to Hoffman LJ: ¹⁴⁴

A person may attract or even seek publicity about some aspects of his or her life without creating any public interest in the publication of personal information about other matters.

Moreover, while *Weller* cited *von Hannover (No 1)* in informing its approach to claimants with public profiles, Dingemans J did not consider it necessary to distinguish between the somewhat voluntary nature of musician Paul Weller's public profile and the involuntary public prominence acquired by Princess Caroline in *von Hannover (No 1)*. This suggests that the English courts do not recognise the *Hosking* distinction between voluntary and involuntary public figures.

Prior publications

In accordance with *Hosking*, *Weller* accepted that previous voluntary publications can reduce a claimant's reasonable expectation of privacy. Dingemans J cited the United Kingdom Court of Appeal case of *McKennitt v Ash*, which held that previous voluntary disclosures of personal information can diminish a person's right to privacy.¹⁴⁵ However, *McKennitt* insisted that privacy would only be reduced in relation to the specific disclosure, and did not give rise to a forfeiture of privacy claims in relation to other personal information.¹⁴⁶

In *Weller*, the Court found that previous publications about the claimants offered by the claimants' parents did not reduce the children's expectations of privacy in relation to the photographs at issue, as full images of the twins' faces had not yet been published.¹⁴⁷

¹⁴⁴ *Campbell v MGN Ltd*, above n 53, at [57].

¹⁴⁵ *Weller v Associated Newspapers Ltd*, above n 2, at [71].

¹⁴⁶ *McKennitt v Ash*, above n 117, at [55].

¹⁴⁷ *Weller v Associated Newspapers Ltd*, above n 2, at [179].

(ii) Ultimate balancing test

The extent to which a claimant's public profile boosts the media's freedom of expression claims in the context of the "ultimate balancing test" is unclear. As mentioned in part III, the second limb of the United Kingdom misuse of private information tort requires the courts to balance a claimant's art 8 privacy rights with the media's art 10 freedom of expression claims.

The conflicting approaches to this question, set out in *A v B* and *von Hannover (No 1)*, have not yet been conclusively reconciled by the United Kingdom courts. While *A v B* held that a claimant's public prominence automatically increases the weight afforded to freedom of expression, *von Hannover (No 1)* stated that an individual's public profile does not increase the significance of the media's freedom of expression claims unless the publication contributes to a "debate of general interest".

A v B

First, the United Kingdom Court of Appeal in *A v B* held that a claimant's public profile generates legitimate public interest in his or her personal life, which bolsters the media's freedom of expression claims. *A v B* defined "public figures" as "all those who play a role in public life", encompassing persons in the political, social, economic and artistic spheres.¹⁴⁸ The Court held that the media have elevated freedom of expression claims when reporting on public figures. According to the Court:¹⁴⁹

A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media.

This suggests that public interest in publication extends to private information about public figures which is of mere curiosity to the general public. This accords with the *Hosking* approach.¹⁵⁰

¹⁴⁸ *A v B* [2002] EWCA Civ 337, [2002] 3 WLR 542 at [11].

¹⁴⁹ At [11].

¹⁵⁰ This case was cited in justifying the *Hosking* approach to public figures. See: *Hosking v Runting*, above n 1, at [121].

Von Hannover (No 1)

The ECtHR in *von Hannover (No 1)* adopted a contrasting approach to *A v B*. The Court recognised a “fundamental distinction” between:¹⁵¹

Reporting facts... capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions... and reporting details of the private life of an individual who... does not exercise official functions.

As a result, the Court confined the definition of a “public figure” to individuals exercising official functions.¹⁵² Despite public curiosity about the Princess Caroline’s private life as a result of her royal status, the claimant did not exercise any official function on behalf of the state of Monaco, and therefore was not a public figure.¹⁵³

Moreover, the ECtHR held that freedom of expression will only be given weight where a publication about a public figure “contributes to a debate of general interest.”¹⁵⁴ A “debate of general interest” appears confined to political speech, and does not encompass publications created merely to satisfy “the curiosity of a particular readership”.¹⁵⁵ According to Barendt, this definition is normative, as it relates to information which the public *ought* to know, as opposed to information that the public *actually* wants to know.¹⁵⁶

Von Hannover (No 2)

However, the ECtHR’s decision in *Von Hannover (No 2)* modified the *von Hannover (No 1)* position to some extent. First, the Court doubted its distinction between private individuals and public figures in *von Hannover (No 1)*, which was based on the exercise of official functions. The Court held that the public profile of Princess Caroline meant that she could not be regarded as a private individual, regardless of the fact that she did not exercise official functions.¹⁵⁷

¹⁵¹ *Von Hannover v Germany*, above n 68, at [63].

¹⁵² At [72].

¹⁵³ At [72].

¹⁵⁴ At [76].

¹⁵⁵ At [65].

¹⁵⁶ Eric Barendt, above n 39, at 244.

¹⁵⁷ *Von Hannover v Germany*, above n 68, at [120].

Moreover, the ECtHR emphasised states' margin of appreciation in defining a "debate of general interest", suggesting that states are not obliged to limit the concept to political matters. In so doing, the Court considered that the German courts were entitled to find that a newspaper article concerning the ill-health of Monaco's Prince Rainer contributed to a debate of general interest.¹⁵⁸

McKennitt v Ash

In *McKennitt*, the Court of Appeal acknowledged that the positions in *A v B* and *von Hannover (No 1)* could not be reconciled.¹⁵⁹ However, *McKennitt* held that *A v B* was not binding authority in the context of the misuse of private information action, as the case was decided under the pre-*Campbell* breach of confidence action.¹⁶⁰ Therefore, *A v B* does not appear to preclude lower courts from applying *von Hannover (No 1)* under the misuse of private information action.¹⁶¹ Indeed, Barendt claims that the *von Hannover (No 1)* decision will prompt United Kingdom courts to depart from *A v B*.¹⁶² However, in the light of the margin of appreciation and *von Hannover (No 2)*, the extent to which *von Hannover (No 1)* will influence the United Kingdom courts' approach to publically prominent claimants is unclear.

Weller

In *Weller*, Dingemans J did not expressly address the tension between the *von Hannover* decisions and *A v B*, and thereby offered little to clarification of the United Kingdom courts' approach to public figures under the misuse of private information tort.

In undertaking the ultimate balancing exercise, Dingemans J appeared to adopt the *von Hannover (No 1)* conception of a "debate of general interest".¹⁶³ The Judge considered that the particular photographs at issue did not contribute to a debate of general interest, despite the considerable public profile of the claimants' parents.¹⁶⁴ Given that these photographs would likely have satisfied the public interest definition in *A v B*, given the public curiosity

¹⁵⁸ *Von Hannover v Germany*, above n 68, at [118].

¹⁵⁹ *McKennitt v Ash*, above n 117, at [72].

¹⁶⁰ At [64].

¹⁶¹ At [64].

¹⁶² Eric Barendt, above n 39, at 244.

¹⁶³ *Weller v Associated Newspapers Ltd*, above n 2, at [53].

¹⁶⁴ At [175].

in Paul Weller’s family life, *Weller* employed a more confined definition of “general interest” in line with the ECtHR.

However, Dingemans J’s concern for the potential consequences of prohibiting publication on the British newspaper industry suggests that the Court does not fully adopt the *von Hannover (No 1)* approach. Despite failing to contribute to a debate of general interest, the Judge stated that the Weller photographs should nevertheless be given freedom of expression weight as there is general public interest in having a “thriving and vigorous newspaper industry.”¹⁶⁵ The ability to publish matters of popular appeal was considered central to the commercial flourishing of the media. According to the Court, this commercial viability is essential to upholding the media’s role as a “public watchdog” on democracy.¹⁶⁶ However, despite acknowledging the merit in this argument, Dingemans J considered that the media’s interest did not outweigh the children’s right to privacy in the Weller’s case.¹⁶⁷

2 *To what extent should the United Kingdom and ECtHR jurisprudence prompt a reconsideration of the Hosking approach to individuals with public profiles?*

While the previous case summary highlights uncertainties in the English approach to claimants with public profiles, the narrow conception of the media’s legitimate public interest advanced in *von Hannover (No 1)* highlights shortcomings in the *Hosking* reasoning.

(a) Evaluation of the *Hosking* approach

The *Hosking* assertion that a plaintiff’s public profile significantly decreases their reasonable expectations of privacy and bolsters the media’s freedom of expression claims has some legitimacy, but is overly-broad.

(i) Reasonable expectation of privacy

Voluntary public figures

First, the Court of Appeal’s claim in *Hosking* that “voluntary” public figures have lesser expectations of privacy is supported by Moreham. Moreham argues that the involuntary

¹⁶⁵ *Weller v Associated Newspapers Ltd*, above n 2, at [76].

¹⁶⁶ At [73].

¹⁶⁷ At [183].

nature of an event should be relevant in determining whether a *reasonable* expectation of privacy exists. A claimant's expectation of privacy is more reasonable where an event has been caused by his or her voluntary actions as opposed to the situation arising involuntarily.¹⁶⁸ For instance, a person should have a greater right to privacy in relation to a public heart attack than a naked streak in public.¹⁶⁹ Applying Moreham's logic, voluntary public figures are arguably less entitled to a reasonable expectation of privacy *vis à vis* involuntary figures, as increased public scrutiny of their lives partly results from their own decision to enter the public arena. While it may be difficult to draw a definitive line between "voluntary" and "involuntary" public figures, due to differing degrees of openness and courting of the media, one can nevertheless distinguish between a royal figure such as Princess Caroline of Monaco, whose public status was conferred at birth, and the conscious decisions of Paul Weller and Mike Hosking to pursue public careers. As noted above, *Weller* failed to acknowledge this distinction.

Prior publications

Second, the *Hosking* contention that voluntary prior publications about an individual reduce his or her reasonable expectations of privacy is supported by the English courts. *Campbell* and *McKennitt* accepted that the authorised publication of personal information reduces a person's subsequent reasonable expectation of privacy in respect of that matter. This notion is consistent with the objective requirement of the privacy test in both New Zealand and the United Kingdom, namely that a claimant must have a *reasonable* expectation of privacy. Where a person has consented to putting their personal information in the public domain, it seems unreasonable to later insist upon privacy rights in relation to the disclosures. Indeed, the parties in *Campbell* agreed that it was unreasonable for the claimant to insist on privacy protection for her drug habit, given that she had previously offered information to the media on this subject.¹⁷⁰

Nevertheless, *Hosking* and *Weller* have different conceptions about the extent to which prior publications reduce an individual's reasonable expectation of privacy. In *Hosking*, the parents had agreed to several magazine articles detailing Mrs Hosking's IVF pregnancy, but refused to disclose information after the twins' birth.¹⁷¹ According to the

¹⁶⁸ Nicole Moreham "Hosking v Runtig and the protection of privacy in public places" [2006] NZLJ 265 at 267.

¹⁶⁹ At 267.

¹⁷⁰ *Campbell v MGN Ltd*, above n 53, at [58].

¹⁷¹ *Hosking v Runtig*, above n 1, at [9].

Court, “the fact that the Hoskings had placed the fact of their children’s pending birth in the public light must have objectively diminished expectations of privacy”.¹⁷²

In *Weller*, the claimants’ parents had disclosed a “considerable amount of information” relating to their children prior to the publication of the photographs at issue.¹⁷³ Paul Weller had spoken about the twins in magazine interviews, photographs of the twins taken from a distance had been posted online and the 16 year old claimant had been the subject of a *Teen Vogue* photo-shoot. In contrast to *Hosking*, *Weller* considered that these publications did not diminish the children’s expectations of privacy, as “photographs showing the faces of the children on an afternoon out with their father had not previously been published.”¹⁷⁴

Weller therefore suggests that previous publications will only be relevant insofar as the subject matter of the publication is almost identical to a previous disclosure. On the other hand, *Hosking* considers that merely placing the “fact” of the children’s birth in the spotlight is sufficient to reduce privacy entitlements.

The *Hosking* approach arguably applies an overly-broad characterisation of the previous disclosures to the detriment of the Hoskings’ privacy rights. The subject of the magazine articles in *Hosking*, namely the claimant’s IVF pregnancy, was not closely related to the events recorded in the photographs. While the magazine articles would likely have permitted the media to publish articles concerning Mrs Hosking’s future pregnancies, the articles cannot be said to have given the media *carte blanche* to publish any information about the twins. This is particularly evident given the Hoskings’ refusal to engage with the media after the twins’ birth.

Moreover, the Court of Appeal’s decision in *Hosking* to recognise diminished privacy rights as a result of the magazine articles does not accord with privacy theory. The theorists cited in part II of this paper argue that privacy protects a person’s ability to control the degree of personal information which one reveals to the public. Under the *Hosking* approach, the decision to disclose information about one subject would lead to a loss of control over personal information relating to related subjects. This suggests that the *Weller* approach is more consistent with privacy theory, as it carefully confines the impact of the disclosures in order to avoid undermining the claimants’ privacy rights.

¹⁷² *Hosking v Runtig*, above n 1, at [123].

¹⁷³ *Weller v Associated Newspapers Ltd*, above n 2, at [179].

¹⁷⁴ At [179].

(ii) “Legitimate public interest”

The *Hosking* claim that legitimate public interest extends to the public’s “natural curiosity” in public figures’ lives is not strongly supported by freedom of expression rationales outlined in part II.

Argument from truth

The argument from truth is not compelling in the context of purely personal information. As discussed in part II, the argument from truth claims that open and public discussion of ideas facilitates the discovery of the best or most useful information.

First, this argument assumes that the discovery of truth is the “highest public good”, which must necessarily take priority over competing interests.¹⁷⁵ Freedom of expression proponents argue that the discovering the truth is either intrinsically valuable, or valuable due to its facilitation of well-informed decisions leading to social progress.¹⁷⁶ Nevertheless, many legal systems opt to suppress true speech in the light of arguably more compelling social concerns.¹⁷⁷ As Barendt notes, restrictions on the publication of personal information are justified where the need to protect the right to privacy is more compelling than the need to discover of the truth. Indeed, where the societal benefit obtained from discovering the “truth” about personal information is a mere satisfaction of public curiosity, the claimant’s privacy interests will likely outweigh this benefit.

Second, Mill’s theory and the marketplace of ideas theory are not very applicable in the context of purely personal information such as the *Hosking* photographs. Mill’s argument assumes that the government will only prohibit information on the grounds that it is false, under an assumption of infallibility. However, the government may have other grounds for prohibiting speech beyond veracity concerns. In prohibiting the publication of personal information, the government accepts that the information is true, but nevertheless prohibits its publication based on concerns about the impact of publication on the individual concerned. As a result, Barendt concludes that Mill’s theory “applies most clearly to speech stating beliefs and theories about political, moral, aesthetic, and social matters”, and has little application in the context of personal information.¹⁷⁸

¹⁷⁵ Eric Barendt, above n 39, at 8.

¹⁷⁶ At 7.

¹⁷⁷ At 8.

¹⁷⁸ At 10-11.

Similarly, the marketplace of ideas theory is based on a mistrust of government regulation of the speech market. According to Barendt, a preference for marketplace regulation over government regulation is most compelling where there is legitimate suspicion of government regulation, such as in the context of political speech.¹⁷⁹ However, where speech has no political relevance, Barendt claims that a democratically-elected government should have power to regulate the marketplace, just as occurs in the economic sphere.¹⁸⁰ Indeed, the self-interested and commercially-motivated nature of the modern media suggests that such entities are primarily driven by profit, and not wholly committed to discovering the “truth”. This suggests that a democratically-elected government should play a role in regulating the speech market, given that self-regulation by the media could be self-serving.

These critiques of the argument from truth highlight errors in the *Hosking* reasoning. *Hosking* claimed that the marketplace of ideas theory supported the publication of personal information about public figures. In support of this contention, Gault and Blanchard JJ cited *Kapellas*, a case concerning the publication of a politician’s children’s criminal convictions.¹⁸¹ The Court in *Kapellas* noted that “the children’s loss of privacy is one of the costs of the retention of a free marketplace of ideas.”¹⁸² However, in using *Kapellas* as a justification for reduced expectations of privacy in the *Hosking* factual context, the Judges failed to appreciate the political context of the *Kapellas* decision.

As noted above, the argument from truth is more compelling in the context of political information for several reasons. As noted above, the quest for truth in relation to political information is more valuable to society than in the purely personal sphere. Moreover, there is considerably more justification for being suspicious about government regulation in the political context *vis à vis* information with no political implications. As the *Kapellas* information has political character, the argument from truth is more compelling in this context than in relation to the innocuous photographs at issue in *Hosking*. This suggests that *Hosking* erroneously employed *Kapellas* to justify extending legitimate public interest to cover non-political information.

¹⁷⁹ Eric Barendt, above n 39, at 12.

¹⁸⁰ At 12.

¹⁸¹ *Hosking v Runtig*, above 1, at [122].

¹⁸² At [122].

Self-fulfilment and autonomy argument

The self-fulfilment and autonomy argument is similarly unconvincing in justifying the wide definition of legitimate public interest in *Hosking*. First, the self-fulfilment argument contends that restrictions on the freedom to impart ideas limits the personal growth the speaker or writer.¹⁸³ Moreover, Scanlon's autonomy thesis asserts that government regulation infringes on individuals' autonomy, as it inhibits individuals' abilities to make decisions by independently weighing competing ideas.¹⁸⁴

These arguments are problematic in the context of personal information disclosed by the media solely to satisfy public curiosity. First, the speaker argument appears limited to human speakers, given that the process of personal growth is intrinsically human. According to Barendt, the suggestion that the media can experience personal growth is "far-fetched".¹⁸⁵

Second, neither the speaker nor the recipient theory justifies why freedom of expression is particularly conducive to self-fulfilment and autonomy *vis à vis* other rights. In accordance with the privacy theory discussion, one could argue that privacy has an equally valid claim to facilitating self-fulfilment and autonomy. Moreover, excessive regard to freedom of expression at the expense of privacy may in fact inhibit the self-fulfilment of the individuals. For instance, in *Von Hannover (No 1)*, the ECtHR found that the persistent photographing of Princess Caroline limited the development of her relationships with other individuals.¹⁸⁶

Third, purely personal information about a public figure does not facilitate the reader's autonomy, as it is unlikely relevant to an individual's life decisions. The sole purpose of imparting or receiving information about a stranger's private life is usually the satisfaction of one's curiosity. Such information does little to aid a person's life decisions or the formation of moral or political beliefs.

Nevertheless, one could contend that privacy-invading publications may contribute to the formation of moral beliefs, in addressing contemporary issues such as drug abuse and body

¹⁸³ Eric Barendt, above n 39, at 13.

¹⁸⁴ At 15.

¹⁸⁵ At 15.

¹⁸⁶ *Von Hannover v Germany*, above n 68, at [50].

image.¹⁸⁷ For instance, the case of *Campbell* concerned a celebrity seeking treatment for a drug addiction. However, Nicholls J in *Campbell* suggested that such information makes less contribution to the public domain than political speech.¹⁸⁸ Moreover, the innocuous content of the photographs at issue in *Hosking* would preclude them from falling into this contemporary issues category. Nevertheless, *A v B* contends that public figures function as role models for the public, and therefore public interest extends to trivial facts about the public figure's life on which readers may base their own behaviour.¹⁸⁹ However, the "role model" function of the *Hosking* photographs is negligible, as they do not appear to provide readers with any significant behavioural guidance given their innocuous nature.

Argument from democracy

In addition, the argument from democracy provides little justification for protecting innocuous personal information. Meiklejohn contends that freedom of expression is primarily designed to protect citizens' rights to express and receive information relevant to self-governance. As Barendt observes, this theory only applies to political speech.¹⁹⁰ This suggests that personal information will unlikely be justified in reference to Meiklejohn's theory, as such information rarely has relevance to political debate. As Fenwick and Phillipson note, this justification will only apply where one's personal information has direct bearing on a political issue, such as the publication of details of a politician's private life affecting his or her fitness for office.¹⁹¹ The theory does not defend the protection of apolitical personal information of the kind at issue in *Hosking*.

However, the constitutional democracy theory could support the definition of legitimate public interest advanced in *Hosking*. This theory asserts that the government should not be entrusted with the regulation non-political speech, as affording the government the power to define the bounds of political speech would risk the deliberate or inadvertent suppression of legitimate public discussion.

The constitutional democracy theory appears to support the media's right to publish personal information. First, concern with entrusting the government with the ability to

¹⁸⁷ Katherine Laura Thompson, above n 29, at 10.

¹⁸⁸ *Campbell v MGN Ltd*, above n 53, at [29].

¹⁸⁹ *A v B*, above n 148, at [11].

¹⁹⁰ Eric Barendt, above n 39, at 18.

¹⁹¹ H Fenwick and G Phillipson "Breach of Confidence as a Privacy Remedy in the Human Rights Act Era" (2000) 63(5) MLR 660 at 685.

determine the bounds of political expression is particularly pertinent in the media context. As the media's democratic duty involves criticising politicians,¹⁹² the government would have heightened motivations to suppress unfavourable coverage.

Moreover, where personal information is concerned, it is often difficult to draw the line between political and non-political expression. Speech which does not appear immediately political may have political consequences, such as details of a politician's extra-marital affair. Further, what constitutes a "political issue" is difficult to define. Personal stories are often used in articles relating to contemporary issues such as anorexia, obesity and drug addiction. Thompson argues that the extent to which these issues can be classified as "political" is unclear.¹⁹³ This argument would support a wide definition of "public interest", as it suggests that the government would be incapable of accurately delineating the bounds of political debate.

Nevertheless, the constitutional democracy argument can also be criticised in the context of media and personal information. Excessive deference to media self-regulation is problematic for democracy. The theory assumes that fruitful democratic debate can occur in the absence of state regulation. As a "pillar of democracy",¹⁹⁴ the media is entrusted with the role of providing forums for political debate. However, given that modern media are primarily commercial, any democracy-enhancing purpose is necessarily subsidiary to their motivations to make profit. As a result, the media will publish the information that attracts the most readers, displacing political coverage with human interest stories. Permitting the publication of such trivial information can therefore undermine the effectiveness of the media's role in facilitating democratic debate. This suggests that an excessively wide definition of 'legitimate public interest', of the kind advanced by *Hosking*, may serve to undermine democracy.

(b) Evaluation of the ECtHR and United Kingdom approach

In the light of the significant theoretical shortcomings in *Hosking's* treatment of individuals with public profiles, this section examines the merits of adopting an alternative approach in line with the ECtHR and English developments in this area.

¹⁹² *Weller v Associated Newspapers Ltd*, above n 2, at [73].

¹⁹³ Katherine Laura Thompson, above n 29, at 10.

¹⁹⁴ *Weller v Associated Newspapers Ltd*, above n 2, at [77].

(i) “Debate of general interest”

First, the ECtHR’s normative definition of a “debate of general interest”, which is partly adopted in *Weller*, is supported by House of Lords *obiter* and partly bolstered by the argument from democracy. In *von Hannover (No 1)*, the ECtHR held that a publication should only be given substantial freedom of expression weight where it contributes to a “debate of general interest.”

As Barendt notes, the Court defined this concept normatively, encompassing information which the public *ought* to know, as opposed to information which genuinely interests the public.¹⁹⁵ In so doing, the ECtHR declined to protect personal information unless it was “capable of contributing to a debate in a democratic society”.¹⁹⁶ For instance, personal information about a politician relating to the exercise of his or her functions may qualify.¹⁹⁷ This can be contrasted with *Hosking’s* interpretation of the analogous concept of “legitimate public interest”, which extends to information solely published to satisfy public curiosity. While the ECtHR has since emphasised the margin of appreciation afforded to states in applying art 8 of the ECHR,¹⁹⁸ *Weller* appears to accept that private information published to satisfy public voyeurism cannot contribute to a “debate of general interest.”¹⁹⁹

The ECtHR approach has several advantages. First, the normative definition of “general interest” is supported by *obiter* from the House of Lords case of *Jameel v Wall*. In this case, Baroness Hale asserted that there was no “real” public interest in “the most vapid tittle-tattle about the activities of footballers’ wives and girlfriends [that] interests large sections of the public”.²⁰⁰ Instead, Baroness Hale insisted that information which is in the “public interest” should not be equated with information which “interests the public”.²⁰¹

Moreover, the ECtHR’s conception of a debate of general interest accords with the argument from democracy as conceived by Meiklejohn. Meiklejohn claims that freedom of expression is not an absolute right to say anything at any time, but primarily protects competing viewpoints on issues relating to governance.²⁰² This contention supports the

¹⁹⁵ Eric Barendt, above n 39, at 244.

¹⁹⁶ *Von Hannover v Germany*, above n 68, at [63].

¹⁹⁷ At [63].

¹⁹⁸ At [104].

¹⁹⁹ *Weller v Associated Newspapers Ltd*, above n 2, at [175].

²⁰⁰ *Jameel v Wall* [2006] UKHL 44, [2007] AC 359 at [147].

²⁰¹ At [147].

²⁰² Eric Barendt, above n 39, at 18.

ECtHR’s prioritisation of political expression, namely speech “capable of contributing to debate in a democratic society”, and their aversion towards protecting non-political personal information.

Nevertheless, the ECtHR’s narrow definition of general interest can be criticised using the constitutional democracy and autonomy theories. First, the constitutional democracy theory suggests that the ECtHR’s characterisation of general interest is overly-narrow. As explored above, the constitutional democracy theory contends that parliament and the courts should not be entrusted with defining the boundaries of political debate. In the confining the general interest to a normative conception of what the public *ought* to know, the court is necessarily making judgements about the boundaries of legitimate political debate. This judgement will inevitably be subjective, causing judges to characterise the “general interest” in accordance with their own world views. As Hoffman LJ observed in *R v Central Independent Television*, “a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom.”²⁰³ Indeed, *Weller* acknowledged that restricting the editorial autonomy of the media would undermine their ability to provide an open forum for political debate.²⁰⁴

Moreover, as argued above, the difficulty of authoritatively delineating the boundaries of “political” information is particularly evident in the context of stories involving personal information. Personal information is often presented in “infotainment” stories, which primarily intend to entertain their viewers, but may nevertheless have political implications.²⁰⁵ For instance, a report on a celebrity’s body image or a politician’s eating habits may foremost aim to entertain, but may also contribute to political debate. Nevertheless, it is difficult to characterise the street scenes at issue in *Hosking* and *Weller* as contributing to any form of political debate, due to their unremarkable nature. Therefore, while the ECtHR exclusion of photographs *solely* intended to entertain is justifiable, excluding “infotainment” publications from the scope of general interest may be detrimental to democracy.

Second, the argument from autonomy supports a wider definition of general interest than the definition advanced in *von Hannover (No 1)*. As explored in part II, Scanlon’s thesis is suspicious of government censorship on the grounds that it inhibits autonomous decision-

²⁰³ *R v Central Independent Television* [1994] Fam 192 (CA) at 203-204.

²⁰⁴ *Weller v Associated Newspapers Ltd*, above n 2, at [77].

²⁰⁵ Katherine Laura Thompson, above n 29, at 10.

making, as individuals must be entitled weigh up competing ideas independently in order to be truly autonomous.

As noted above, the publication of seemingly trivial personal information may increase the audience's ability to make informed lifestyle choices, thereby supporting their autonomy under Scanlon's theory. Fenwick and Phillipson suggest that publications relating to sexuality, eating disorders and abortions may assist readers in making various lifestyle choices.²⁰⁶ However, this argument would not easily justify the publication of an innocuous street scene such as those at issue in *Hosking* and *Weller*. While one could argue that a street scene could inform viewers' fashion choices, these decisions appear considerably less significant than those listed by Fenwick and Phillipson.

Nevertheless, the Court in *A v B* and the concurring opinion in *von Hannover (No 1)* supported the contention that even trivial information is capable of contributing to an individual's autonomy. The Court in *A v B* claimed that even "trivial facts" relating to a public figure's life serve as behavioural guides for readers, given the status of public figures as societal role models.²⁰⁷ This contention was supported by the concurring opinion of Judge Barrato in *von Hannover (No 1)*. Judge Barrato insisted that the public should be allowed the judge the personal behaviour of public figures, as they are "often regarded as idols."²⁰⁸ To the extent that the photographs in *Hosking* and *Weller* can be regarded as general expressions of celebrity behaviour, this role model argument supports their publication. However, given that the children of the well-known figures could not be deemed to occupy equivalent role model status, this argument would not extend to the publication of images of public figures' children.

(ii) Public interest in a thriving newspaper industry

Finally, the argument in *Weller* that there is public interest in a thriving newspaper industry is not theoretically sound. While *Weller* accepted that innocuous photographs solely published for entertainment purposes did not contribute to a "debate of general interest", the Court asserted that the "public interest" in a flourishing newspaper industry supports the media's freedom of expression claims.

²⁰⁶ H Fenwick and G Phillipson *Media Freedom under the Human Rights Act* (Oxford University Press, United Kingdom, 2006) at 804.

²⁰⁷ *A v B*, above n 148, at [11].

²⁰⁸ *Von Hannover v Germany*, above n 68, at 29.

The Queen's Bench accepted that fewer newspapers will exist where they cannot publish purely entertaining material which interests the public. Dingemans J justified this argument in accordance with the constitutional democracy theory. According to the Court, the media must "flourish" in order to fulfil their role as a "pillar of democracy".²⁰⁹

This argument is subject to the aforementioned critique employed against the constitutional democracy theorists. The argument assumes that a "flourishing" media environment is the most effective vehicle for democratic debate, implying that excessive government regulation thwarts the media's ability to fulfil their democratic purposes. However, the mere fact that a newspaper industry is "flourishing" commercially does not imply that the press are effectively supporting democratic debate. In contrast, the Leveson Enquiry highlights that a failure to regulate the media industry may be counterproductive for democracy. In the absence of regulation, commercial media entities are incentivised to subordinate democratic public service goals in favour of commercial profit. A commercially-thriving newspaper environment will therefore be more inclined to publish entertaining content of mass appeal than stories relevant to democratic governance.

While the *Weller* approach to defining public interest would unlikely be challenged in the European courts given the ECtHR's recent affirmation of states' margins of appreciation,²¹⁰ the approach does not rest on strong theoretical foundations. On the contrary, the encouragement of a flourishing media industry may be detrimental to the press's functioning as a vehicle of democracy, thereby undermining the very rationale that *Weller* employs.

- (c) Conclusion: To what extent should the United Kingdom and ECtHR jurisprudence prompt a reconsideration of the *Hosking* approach to individuals with public profiles?

This paper has first argued that *Hosking's* extension of public interest to information satisfying the public's "natural curiosity" is overly-broad, as it has little support from the theoretical justifications for freedom of expression. In contrast, the ECtHR's normative approach to "general interest" is strongly supported by the argument from democracy. In accordance with Meiklejohn's thesis, the approach views political information as most valuable in freedom of expression terms, as it contributes to citizens' abilities to be

²⁰⁹ *Weller v Associated Newspapers Ltd*, above n 2, at [77].

²¹⁰ *Von Hannover v Germany*, above n 68, at [104].

informed self-governors. This is particularly important in the context of the media, given its role as a facilitator of democratic debate.

However, limiting “public” or “general” interest to political speech may be over-prescriptive. The constitutional democracy and marketplace of ideas theories highlight the dangers of affording excessive power to the state to determine the bounds of political speech. In the modern media context, it is difficult to draw a bold line between political and non-political content. Moreover, from a self-fulfilment and autonomy perspective, the public has an interest in receiving information beyond the political sphere, which may aid them in shaping beliefs or behaviour. This suggests that limiting “public interest” to the political sphere may be dangerous for freedom of expression. Indeed, in *von Hannover (No 2)*, the ECtHR appears to take a wider approach to the concept of public figure, suggesting that public interest is not limited to the political sphere.

Nevertheless, while the above criticisms may suggest that New Zealand courts are justified in taking a wider approach to public interest than the conception advanced in *von Hannover (No 1)*, courts should not completely disregard the normative approach to defining public interest. The innocuous photographs at issue in *Hosking* and *Weller* are not subject to the aforementioned criticisms of a narrow ECtHR approach. First, the constitutional democracy theory is not convincing in the context of the photographs. Given their innocuous nature, the photographs cannot be described as contributing to any form of political or social debate. Moreover, given the commercial nature of modern media, an absence of content regulation is counterproductive for democracy, as it detracts from the coverage of less lucrative but more democratically informative coverage. Therefore, there is little danger in the courts stifling public debate in regulating these images. Finally, the photographs can claim little support from the autonomy argument, as they are unlikely to aid the reader in making life choices or forming beliefs.

This suggests that New Zealand courts should exclude innocuous photographs merely published to satisfy public curiosity from the ambit of legitimate public interest. While there is merit in the ECtHR normative approach, courts must apply it with caution in order to avoid excessively undermining the freedom of expression.

C Medium of publication

This section examines the extent to which the medium of publication should enhance an individual's privacy claims. The paper criticises the failure to distinguish between mediums of publication in *Hosking* and argues that the ECtHR approach, which attributes special privacy weight to an image, is attractive. However, the limited framing of the *Hosking* tort appears to preclude New Zealand courts from following the European approach.

1 Case analysis

The New Zealand and English courts have diverged significantly in assessing the impact of different mediums of publication on an individual's privacy claim.

(a) Hosking

Hosking asserted that the medium of publication does not have an impact on a plaintiff's reasonable expectation of privacy. According to the Court of Appeal, an image is "not essentially different from a full written description."²¹¹ Given that the Hosking twins' names, ages and the fact that their parents were separated were already in the public domain, a photograph of the children was not considered a significant addition to this publically-available information.²¹²

(b) United Kingdom

While the United Kingdom courts have clearly accepted a distinction between written descriptions and photographs, the extent to which the medium of publication impacts on claimants' reasonable expectations of privacy and the ultimate balancing test remains unclear.

(i) Campbell

In *Campbell*, the Court held that images convey a greater quantity of information *vis à vis* non-visual representations of analogous events. This increases the claimant's expectation of privacy and the weight attached to the claimant's art 8 interests under the ultimate balancing test. While the Court could not see an intrinsic difference between photographs

²¹¹ *Hosking v Runting*, above n 1, at [86].

²¹² At [164].

and written mediums,²¹³ the majority held that an image conveys “a thousand words”.²¹⁴ As a result, publication cannot be justified solely on the basis that a written description of its content would be permissible.²¹⁵ In the context of *Campbell*, the majority considered that the inclusion of images in addition to a written article tipped the balance in favour of the claimant’s privacy protection.²¹⁶

(ii) *Reklos*

In contrast, *Weller* attached particular importance to images in the context of art 8 of the ECHR, in accordance of the ECtHR case of *Reklos*. In *Reklos*, the ECtHR defined art 8 broadly, and held that it encompassed an individual’s right to personal development.²¹⁷ A person’s image was deemed to be protected by art 8 for its role in facilitating personal development.²¹⁸ In particular, an image reveals the subject’s “unique characteristics” and enables the person to be distinguished them from his or her peers.²¹⁹ Given the importance of one’s image in the context of art 8, *Reklos* held that art 8 can be breached by the mere taking of a photograph without the subject’s consent, regardless of whether publication occurs.²²⁰

Citing *Reklos*, *Weller* held that photographs were essentially different from other mediums of publication. While the Court did not purport to endorse a right to one’s image in the same way as *Reklos*, *Dingemans J* considered that a person’s image was particularly worthy of privacy protection as it “constitutes one of the chief attributes of his or her personality.”²²¹ The Court insisted that the photographs at issue did not merely show “white babies” but conveyed the twins’ distinct personalities through their “difference in reaction and interest” during the shopping trip.²²² This was cited as a central factor supporting a reasonable expectation of privacy.²²³ Given the refusal to attach particular significance to photographs in *Campbell*, *Weller* appears to depart from the House of Lords in this context.

²¹³ *Campbell v MGN Ltd*, above n 53, at [213].

²¹⁴ At [31] and [72].

²¹⁵ At [31] and [72].

²¹⁶ At [121].

²¹⁷ *Reklos and Davourlis v Greece*, above n 114, at [39].

²¹⁸ At [40].

²¹⁹ At [40].

²²⁰ At [42].

²²¹ *Weller v Associated Newspapers Ltd*, above n 2, at [153].

²²² At [154].

²²³ At [171].

2 *To what extent should the United Kingdom jurisprudence prompt a reconsideration of the Hosking approach to mediums of publication?*

The Court of Appeal's failure to distinguish between mediums of publication in assessing the Hoskings' reasonable expectations of privacy can be criticised in the light of the aforementioned United Kingdom and ECtHR jurisprudence.

(a) Evaluation of the *Hosking* approach

Hosking's claim that a photographic depiction of an event can be equated to a written publication is clearly over-simplistic, and would be challenged by the courts in *Campbell* and *Reklos*. As *Campbell* notes, a picture is worth "a thousand words". Moreover, *Reklos* suggests that the personality manifest in a visual representation of a person makes an image particularly worthy of privacy protection. The respective merits of the *Campbell* and *Reklos* approaches are discussed in the following paragraphs.

(b) Evaluation of the United Kingdom approach

(i) *Campbell*

The *Campbell* claim that an image portrays a greater quantity of information than an equivalent written description appears self-evident, and is supported by commentators. It seems a truism that a photograph portrays more detailed information than can be achieved by a sketch or written description of the equivalent event or object. Moreover, Moreham agrees that an image conveys a more detailed and accurate depiction of a person than could be recorded through other mediums, as an image enables the viewer to observe events first-hand instead of relying on the accuracy of a narrator.²²⁴

However, the refusal in *Campbell* to recognise qualitative differences between photographic representations and other forms of publication can be challenged. Legal commentator Tatiana Synodinou contrasts the continental European states' readiness to attribute particular value to images with the English aversion to this idea.²²⁵ According to Synodinou, the English courts' limited appreciation for the value of images results from an

²²⁴ Nicole Moreham, above n 11, at 614.

²²⁵ Tatiana Synodinou "Image Right and Copyright Law in Europe: Divergences and Convergences" (23 April 2014) MDPI Open Access Publishing < <http://www.mdpi.com> > at [2.2].

erroneous doctrinal basis for the misuse of private information action.²²⁶ The misuse of private information action's genesis in common law breach of confidence has led to "piecemeal protection" for images, as the action evolved out of concerns for the confidential nature of information as opposed to the need to protect an individual's "personality" rights. Synodinou contends that this doctrinal genesis has prevented the English courts from fully appreciating the nexus between images, personality rights and art 8 of the ECHR.²²⁷

(ii) *Reklos*

The *Reklos* approach to images, partly adopted in *Weller*, is supported by continental European provisions and privacy commentators. *Reklos* asserted that images are particularly worthy of protection in the privacy context as they portray "chief attributes" of the subject's personality.²²⁸ This interpretation is accepted in several European states. For instance, art 9 of the French Civil Code attaches legal protection to one's image, accepting that a photograph is an important expression of personality.²²⁹ Similarly, privacy commentators contend that images are objectively more "private" than their written counterparts. As Andrew McLurg argues, photographs enable the viewer to observe part of the person, causing the subject to lose control of "an aspect of herself."²³⁰ Moreover, Synodinou views a person's image as constitutive of an "element of personhood".²³¹

Nevertheless, the *Reklos* approach to photographs may not be adopted by the New Zealand courts for several reasons. First, the applicability of *Reklos* to young children, as in the factual context of *Hosking* and *Weller*, can be challenged. In *Reklos*, the parents of a newborn baby objected to a photograph of their child taken without their consent. The ECtHR held that a photograph of any person is capable of art 8 protection, as it conveys essential attributes of the individual's personality.²³²

However, the extent to which a photograph of a newborn baby conveys unique personality can be questioned. As the respondents argued, a day old baby is not sufficiently developed

²²⁶ Tatiana Synodinou, above n 225, at [2.2].

²²⁷ At [2.2].

²²⁸ *Reklos and Davourlis v Greece*, above n 114, at [40].

²²⁹ Tatiana Synodinou, above n 225, at [2.1.1].

²³⁰ Andrew McClurg "Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places" (1995) 73 NCLR 989 at 1041.

²³¹ Tatiana Synodinou, above n 225, at [1].

²³² *Reklos and Davourlis v Greece*, above n 114, at [39].

for its facial expressions to convey personality, as “the psychological and emotional environment has not yet been formed.”²³³ Therefore, a newborn baby’s photograph does not express any form of personality upon which art 8 protection can be based. Similarly, one could argue that the 10 month old twins in *Weller* and the 18 month old twins in *Hosking* were not sufficiently developed for a photograph to portray their unique personality attributes. This suggests that the *Reklos* characterisation of images in the context of art 8 is problematic in the context of young children.

Second, the *Reklos* approach would be difficult to justify in the New Zealand context, given that it has not yet been embraced as English precedent. The House of Lords in *Campbell* did not characterise a photograph as intrinsically different from other mediums, but merely stated that a picture is more detailed than its written counterpart.²³⁴ In contrast, *Weller* appears to depart from *Campbell* in indicating that a photograph has particular significance in the privacy context.

This departure is unwarranted for several reasons. First, *Campbell* and *Murray* maintained that the United Kingdom courts have not yet created a right to one’s image. The mere fact of photography is insufficient to qualify for a misuse of private information action without subsequent publication.²³⁵ While Dingemans J in *Weller* did not go as far as *Reklos* in declaring the existence of image rights *per se*, attaching considerable importance to a person’s photograph in the context of art 8 greatly increases their expectations of privacy and attached to their privacy rights under the ultimate balancing test. In the absence of compelling countervailing art 10 arguments, this could have the practical implication of creating an image right. As noted in the public places discussion in part A of this section, lower English courts should not substantially depart from superior courts’ decisions in favour of ECtHR jurisprudence. This suggests that the use of the *Reklos* approach in *Weller* incorrectly departs from House of Lords precedent. In the light of this uncertainty in the United Kingdom domestic law, *Reklos* does not provide persuasive precedent for the New Zealand courts.

Third, adopting the *Reklos* approach to images under the *Hosking* tort may prove problematic. According to *Reklos*, art 8 of the ECHR has a broad meaning and is incapable of precise definition. The provision encompasses the “right to identity” and the “right to

²³³ *Reklos and Davourlis v Greece*, above n 114, at [10].

²³⁴ *Campbell v MGN Ltd*, above n 53, at [31], [72] and [156].

²³⁵ *Murray v Big Pictures Ltd*, above n 69, at [54]; *Campbell v MGN Ltd*, above n 53, at [154].

personal development.”²³⁶ This broad scope allows the English and European courts to consider the extent to which a photograph conveys one’s personality in determining whether a privacy breach has occurred. In so doing, the courts recognise the intrinsic value of one’s image, without requiring the presence of tangible harm. In contrast, as discussed in part A of this section, the *Hosking* tort is grounded in notions of “humiliation” and “embarrassment”.²³⁷ This appears to preclude considerations of the inherent value of one’s image, instead focusing on the tangible emotional harm resulting from publication. This suggests that the framing of the *Hosking* tort prevents an application of the *Reklos* description of images as “chief attributes” of the subject’s personality.

Nevertheless, it is open to New Zealand courts to appreciate *Campbell’s* quantitative distinction between images and written descriptions. Given that the *Campbell* approach relates solely to the quantity of information conveyed, as opposed to assessing the significance of that information in the context of privacy, the underlying differences in the New Zealand and United Kingdom conceptions of privacy do not preclude a New Zealand application of *Campbell*. In the light of the over-simplistic nature of the *Hosking* approach, following *Campbell* would be an advisable alternative for New Zealand courts. Nevertheless, *Reklos* highlights the limitations of the narrow framing of the *Hosking* tort. This further underscores the need for a reconsideration of the rationale for legal privacy protection in New Zealand.

(c) Conclusion: To what extent should the United Kingdom jurisprudence prompt a reconsideration of the *Hosking* approach to mediums of publication?

The United Kingdom and ECtHR approaches to mediums of publication expose central flaws in the *Hosking* assumption that photographs can be equated with written descriptions in the privacy context. However, while the *Reklos* appreciation of the intrinsic value of images is supported by commentators, this approach is unlikely to be adopted by the New Zealand courts due to the uncertainties in English domestic law and the narrow construction of the *Hosking* tort.

²³⁶ *Reklos and Davourlis v Greece*, above n 114, at [39].

²³⁷ *Hosking v Runtig*, above n 1, at [126].

V Conclusion: to what extent should recent English privacy jurisprudence trigger New Zealand courts to depart from Hosking?

The recent privacy law evolution in the English courts reveals both inadequacies in the *Hosking* reasoning and the increasing constitutional divergences between New Zealand and the United Kingdom in the field of privacy.

First, the English courts' increasing willingness to protect the privacy of individuals engaged in innocuous activities in public places highlights the overly-confined nature of the *Hosking* tort. The requirement in *Hosking* that a publication be "highly offensive" precludes an extension of the tort to cover such activities. This elucidates theoretical inadequacies in *Hosking*, where the Court appeared to view privacy as based on objective notions of harm as instead of appreciating its role in facilitating individual autonomy and dignity. While the *Weller* approach accords with Moreham's conception of privacy, the framing of the *Hosking* tort and the emphasis placed on freedom of expression in *Hosking* appear to preclude a similar extension in the New Zealand context. This suggests that the New Zealand courts should revisit the underlying rationale of privacy, and reconsider the narrow framing of the tort of privacy.

Second, the European and English courts' aversion towards readily reducing individuals' privacy expectations as a result of their public profiles should prompt a reconsideration of *Hosking*. In *Hosking*, the Court considered that "legitimate public interest" in public figures' lives extended to mere curiosity about personal and family matters, and thereby reduced their privacy rights *vis à vis* the media's freedom of expression claims. While the English approach has not been conclusively resolved, *Weller* suggested that public figures should only receive diminished privacy rights insofar as their personal information makes a contribution to public debate.

The *Hosking* extension of public interest to "tittle tattle" is not well-supported by freedom of expression theory, whereas the *Weller* approach accords more closely with these theoretical justifications. However, excessive judicial power to determine the normative content of "public interest" risks undermining the media's freedom of expression. This paper therefore submits that material of mere public interest should not be protected by the courts, but New Zealand courts should nevertheless afford substantial deference to the media in defining material in the public interest.

Third, the English and European distinctions between mediums of publication highlight the superficial nature of the *Hosking* treatment of photographs. While *Hosking* claimed that the medium of publication does not impact on a plaintiff's reasonable expectations of privacy, *Campbell* and *Reklos* suggested that images should attract higher privacy protection *vis à vis* written descriptions due to their quantitative and qualitative differences. While it remains unclear whether the English courts will treat images as "chief" manifestations of personality in accordance with the ECtHR, the *Reklos* approach will unlikely be embraced by the New Zealand courts due to the *Hosking* tort's foundation on emotional harm. This further indicates the necessity for New Zealand courts to review the theoretical foundations and formulation of the tort of privacy.

In summary, the contrasting outcomes of *Hosking* and *Weller* reflect significant post-*Hosking* divergences in privacy law between New Zealand and the United Kingdom. While these developments can be somewhat attributed to the ever-expanding conception of privacy under the ECHR, they also highlight discrepancies between the *Hosking* tort and the theoretical underpinnings of privacy and freedom of expression. In the light of the English developments, *Hosking* will likely be significantly amended in future New Zealand decisions.

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