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

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

What is protected?

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

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

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

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

Elements of the tort

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

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

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

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

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

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ABA DEVELOPMENTS

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

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