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Hoskings v Runting and Pacific Magazines NZ Ltd [2004] NZCA 101/03

(hereafter referred as Hoskings v Runting.)

Parties

Appellants	Michael Noel James Hosking Marie Angela Hosking
First Respondent	Simon Runting
Second Respondent	Pacific Magazines NZ Limited
First Intervener	Commissioner for Children
Second Intervener	Commonwealth Press Union (NZ)
Third Intervener	ACP Media Limited

Brief

Mr and Mrs Hosking, a well-known couple, had been the subject of attention by the media. In 2001, it was reported that Mrs Hosking had become pregnant and that her pregnancy involved the controversial IVF treatment. The couple was willing to disclose to the media the issues surrounding the pregnancy and did not object to various magazine articles on the subject being published. However, after the birth of the twins (Ruby and Bella) in June 2001, the Hoskings refused to allow any media attention to matters concerning the twins.

In mid-2002, the first respondent took photographs of the twins while they were in a public street with their mother without the appellants' knowledge. The appellants sought a permanent injunction preventing the respondents from taking and publishing any photographs of their children until they reach 18 years of age.

The first Intervener, acting in favour of the appellants, sought to have the court apply the United Nations Convention on the Rights of the Child (UNCROC), which 'upholds the privacy of children and protection of their identity', as a guide. The second Intervener and the third Intervener, acting in favour of the respondents, submitted that freedom of expression as a guaranteed right under s14 of the New Zealand Bill of Rights Act 1990 should be upheld and that tort of privacy did not exist in New Zealand.

The legal issue arising from the case is whether a separate tort of privacy exists in New Zealand and if it does, whether it could provide remedies to the appellants. Also, the matter raises the important issue of the competing interest between freedom of expression and the right to privacy. Other important issues regarding privacy involved include whether the photographs disclosed any private information to the public, if the publication of the photographs compromised the safety of the children, and if the content of the photographs can be interpreted as offensive to 'ordinary persons'.

In a unanimous decision, Gault P and Blanchard J, Keith J, Tipping J and Anderson J dismissed the appeal and awarded the respondents fixed costs of \$18,000.

The justices found that there is no free-standing tort of invasion of privacy in New Zealand common law. More importantly, even if such a tort existed, the freedom of expression would outweigh the right to privacy. The decision also indicated agreement that the publication of the photographs is not likely to pose any danger to the twins, nor can it be seen to cause any public offence. Furthermore, it was agreed that the photographs do not disclose 'any private information which may be useful to someone with ill-intent'.

In the joint decision, their Honours Gault P and Blanchard J also found that there is no cause for an action directed at unauthorized representation of an image, as there was no trespass or assault, and that there has been no foundation laid for a claim of negligent infliction of emotional harm to the children.

The decision also found that freedom of expression, as specified in the s14 of the New Zealand Bill of Rights Act 1990, has supremacy over the right to privacy,

which is not fully recognised in law, and that any such right does not impose limitations on the freedom of expression.

Commentary

Freedom of expression v Right to privacy

Unprecedented technological development has made this an age of information in which the ability to express opinions and to observe other people's actions has drastically increased. The interdependence between people and the media has intensified and the 'right' to information and transparency of various bureaucratic activities have been entrenched in the public mind. The question is whether the legal system should respond to this change in balance and give greater emphasis to recognising the right to privacy without undermining the fundamental importance that freedom of expression has in modern society. It is inevitable that the desire for greater transparency of information and news will encroach upon the right to privacy, so in addressing this question society must be prepared to compromise.

Given the democratic nature of common-law countries, the desire for transparency in public, corporate and political matters has led to legal systems embracing the right to free expression. This is apparent in the New Zealand Bill of Rights and, more significantly, in the United States Bill of Rights.