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Hoskings v Runting and Pacific Magazines NZ Ltd [2004] NZCA 101/03
(hereafter referred as Hoskings v Runting.)

Parties

Appellant	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 on attention by media. In 2001, it was reported that Mrs. Hosking became pregnant and that pregnancy involved the controversial IVF treatment. The couple was willing to disclose the media about the issues surrounding the pregnancy and did not object to various magazines articles being published about the issue. However after the birth of the twin (Ruby and Bella) in June 2001, the Hoskings refuse to allow any media attention and release about the twins.

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

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

The legal issue arising from the case is whether a separate tort of privacy existed in New Zealand and if it was, whether it could provide remedies to the appellants. Also it arose an important issue of the competing interest between freedom of expression and the right to privacy. Other important issue regarding privacy is

whether the photograph disclosed any private information to the public, if the publication of the photograph would increase the risk of safety of the children and if the content of the photograph can be seen as offensive to 'ordinary persons'.

In its unanimous decision – Gault P and Blanchard J, Keith J, Tipping J and Anderson J - dismissed the appeal with the respondents entitled to fixed costs of \$18,000. The decisions have similar reasoning behind it.

The justices found that there is no free-standing tort of invasion of privacy in New Zealand common law and more importantly, even if it existed, the freedom of expression would outweigh the right to privacy. The decisions also agreed that the publication of the photograph is not likely to pose danger to the twins nor can it be seen offensive to people with ordinary sensibilities. Furthermore it was agreed that the photograph does not disclose "any private information which may be useful to someone with ill-intent"

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

In the finding that freedom of expression as specified in the s14 of the New Zealand Bill of Rights Act 1990, it was stated that it has supremacy over the right to privacy, which is not fully recognised in the legal system. It also found the right to privacy does not impose limitations on the freedom of expression.

Commentary

Freedom of expression v Right to privacy

Due to the unprecedented level of technological development, the world is currently positioned in an era of information, where the ability to express one's opinion and to observe other people's actions and thoughts has drastically improved. Because of this, people's interdependence with the media have deepened and the 'right' to information and transparency of various beurocratic activities have been entrenched into people's minds. This of course led to the encroachment to the right to privacy by the freedom of expression.

The question is whether the legal system should respond to this change in balance and put greater emphasis on right to privacy without undermining the fundamental importance that freedom of expression have in the modern society. It raises a fundamental question, the extent the legal system should recognise the right to privacy. Paradoxically, the desire for the general push for greater transparency of information and news will inevitably lead to the encroachment of the right of privacy. It is a compromise the society has made and will continue to make.

With the democratic nature of the common law countries, freedom of expression and the desire for transparency in public, corporate and political world have led to the legal system embracing this right, as seen in the New Zealand Bill of Rights and more significantly in United States Bill of Rights.