**ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF PLAINTIFF.**

**IN THE HIGH COURT OF NEW ZEALAND**
**CHRISTCHURCH REGISTRY**

**CIV 2011-409-002118**
**[2012] NZHC 2155**

| | |
|---|---|
| BETWEEN | C<br>Plaintiff |
| AND | HOLLAND<br>Defendant |

Hearing: 30 April 2012

Counsel: S Rollo and D Webb for Plaintiff
G A Hair for Defendant

Judgment: 24 August 2012

---

**JUDGMENT OF WHATA J**

---

[1] C was an occupant in a house owned by her boyfriend and Mr Holland. Mr Holland surreptitiously installed a recording device in the roof cavity above the shower and toilet. He videoed C while she was showering. C discovered the videos and was deeply distressed. She has commenced an action against Mr Holland based on invasion of privacy. Mr Holland accepts that he invaded C's privacy. The critical issue I must determine is whether invasion of privacy of this type, without publicity or the prospect of publicity, is an actionable tort in New Zealand.

## Facts

[2] The facts are agreed.

1. The plaintiff is 25 years of age.

2. The defendant is 27 years of age and employed as a builder.

3. In June 2008 the defendant and the plaintiff's boyfriend, Mr Z, purchased a 5 bedroom house located at […], where they both resided.

4. For a period of some 2 years, the plaintiff would stay at the property approximately 4 nights per week before moving in with Mr Z in July 2010.

5. On a single occasion, in the period between 27 December 2010 and 9 January 2011 the defendant used a handheld digital camera and recorded 2 video clips of the plaintiff in the bathroom.

6. Each of the videos show the plaintiff both partially dressed and completely naked with clear view of her front (pubic area and breasts) and back. The first shows her undressing and tending to her bikini line, entering the shower, showering and exiting to retrieve items. The second shows her exiting the shower and dressing before she exits the bathroom.

7. The defendant took the video clips from the roof cavity above the bathroom within the ceiling area. The roof cavity is a storage area directly accessible as part of the second story of the property.

8. Video 1 runs for a time of approximately 1 minute 15 seconds, Video 2 runs for a length of 2 minutes 31 seconds.

9. The defendant downloaded the 2 video clips onto his external hard drive.

10. On Sunday 16 January 2011 the plaintiff and Mr Z were at the property with friends and wanted to watch some movies off the defendant's laptop. He gave them permission to use his laptop for the movies that he had stored on it.

11. While the plaintiff and Mr Z were searching for the movies, Mr Z located a link to one of the defendant's recently viewed files titled "[…]" being the plaintiff's nickname.

12. The following day Mr Z asked the defendant if he could use the defendant's external hard drive to search for some movies and ultimate fighting clips that he had downloaded. The defendant gave Mr Z permission to use his external hard drive for that purpose.

13. When searching the hard drive Mr Z was unable to find the link to the document file titled "[…]".

14. The defendant subsequently left the property and went to stay the night at a girlfriend's house. While the defendant was gone, Mr Z went into the defendant's room and found a further external hard drive. Upon searching this hard drive, Mr Z located the two videos of the plaintiff.

15. After taking a copy of the video clips, the plaintiff and Mr Z delivered the defendant's hard drive to the New Zealand police who thereafter retained possession of the hard drive before destroying it

at the conclusion of the ensuing criminal proceedings. The plaintiff and Mr Z retained the copy.

16. There is no evidence that the defendant published or showed the video clips to any person or entity.

17. The plaintiff did not consent to the defendant watching her in the shower or taking the video clips.

18. After the incident, the plaintiff resided at the property on an intermittent basis until 22 February 2011 and from mid March until Easter 2011.

19. The defendant was charged under Section 216H of the Crimes Act (making an intimate visual recording) and after entering a guilty plea he was convicted, ordered to pay $1,000 in emotional harm reparation and then discharged without penalty.

20. The defendant's actions were the cause of harm to the plaintiff that was more than *de minimis.* However, in the event that he is held liable, the defendant reserves his right to contend that the reparation of $1,000 is adequate compensation.

**Claim**

[3] Counsel for C, Mr Rollo, contends that Mr Holland's actions give rise to damages for breach of C's right to privacy. More specifically he submits:

(a) The Court of Appeal in *Hosking v Runting* confirmed that there is an actionable tort for invasion of privacy, subject to two fundamental requirements:[1]

i. The existence of facts in respect of which there is a reasonable expectation of privacy;

ii. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

(b) The Court did not foreclose the possibility of other actionable torts for the invasion of privacy.

(c) The principles in *Hosking* can and should be developed to apply to

[1] *Hosking v Runting* [2005] 1 NZLR 1 (CA) at 32.

the present facts, with the result that the defendant should be liable to the plaintiff for his violation of her reasonable expectation of privacy.

(d) The specific nature of the actionable tort can be drawn from the equivalent tort recognised in the United States and articulated by the *Restatement (Second) of Torts* (1977) at § 652B as follows:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

(e) The requirement for a highly offensive intrusion should be replaced with a simpler test of infringement of a reasonable expectation of privacy.

(f) There are no principled bases for objecting to this development given that it is an incremental extension of the tort identified in *Hosking* and serves a clear remedial purpose in line with the historical development of torts in the common law.

(g) This development is more broadly supported by international conventions that affirm a right to privacy, and s 21 of the New Zealand Bill of Rights Act 1990 (BORA) which affirms a right to be free from search and seizure and the strong conceptual underpinning to analogous torts (such as breach of confidence).

(h) Providing a remedy for the violation of C's privacy would also be consistent with the development of common law for wrongful injury, for example, in the context of battery.

**Defence**

[4] Mr Hair for the defendant submits:

(a) The majority judgment in *Hosking* states that an action based on the

tort of infringement of privacy rights requires publicity of private facts. There is no publicity in this case.[2] The minority judgments eschew the development of a privacy tort altogether.

(b) There is no principled basis upon which to develop an additional limb or refinement to the *Hosking* tort. *Hosking* itself was an incremental addition to longstanding principles dealing with breach of confidence where revelation of private facts is critical. The tort proposed by the plaintiff has no such ancestry and indeed is cut well adrift from it.

(c) There is no support for such a tort of simple intrusion into privacy in other common law jurisdictions, such as Australia and the United Kingdom.[3] To the extent that there is support for such a tort, it derives from genuinely foreign constitutional arrangements, for example in the United States and Canada.

(d) In the absence of a principled or other historical basis for developing a tort of intrusion into privacy *simpliciter*, no serious consideration has been given to the policy considerations arising from development of an additional privacy arm or new privacy tort. The proper and most appropriate response to such policy considerations must be with statute.

(e) This is not an administrative or criminal law case dealing with the exercise of state power where the Court's supervisory role is engaged.

(f) There is also a principled objection to developing the law by way of analogy to other torts of intentional wrongs causing injury. In all of those cases there is a direct intention to inflict harm to the body or to property. Here the harm is consequential and there was no intention

---

2 Refer also *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277 at [99] per McGrath J.

3 Referring to the decision of the House of Lords in *Wainwright v Home Office* [2004] 2 AC 406 at 419-421 discussing *Malone v Metropolitan Police Commissioner* [1979] Ch 344.

or evidence of an intention to harm C.

(g) The potential ramifications of a new privacy tort of intrusion could be significant and capture a range of conduct that might otherwise be innocuous: for example, a young man walks into a bathroom in a shared flatting arrangement and happens upon a young woman in a state of undress. Is that an intentional intrusion upon seclusion that might attract damages?

(h) The breadth of a tort of intrusion would engulf and supplant the *Hosking* tort.

(i) This Court generally does not have a role in filling gaps caused by alleged moral wrongs. Parliament is the proper place for dealing with any such emerging wrongs.

**Issues**

[5] The central issue is whether a tort of intrusion upon seclusion should form part of the law of New Zealand.

[6] I am in no doubt that:

(a) Mr Holland intruded into C's solitude and seclusion when he recorded video clips of C in the bathroom partially undressed or naked; and

(b) Mr Holland infringed a reasonable expectation of privacy when videoing C in the bathroom partially undressed or naked.

[7] I am also in no doubt that Mr Holland's conduct was highly offensive to a reasonable person.

[8] There is no existing authority in New Zealand for the proposition that an intrusion upon an individual's seclusion in breach of a reasonable expectation of privacy gives rise to an actionable tort in New Zealand.[4]

[9] Given that the intrusion based privacy claim in this case is so novel, I have found it necessary to:

(a) Describe the North American tort of intrusion upon seclusion;

(b) Identify whether, and to what extent, freedom from intrusion upon seclusion is recognised as a legal value in New Zealand law; and

(c) Review the existing law in New Zealand and in other jurisdictions to identify the principled arguments for and against the recognition of a intrusion based privacy tort.

[10] I turn now to examine each of these subjects, and then return to resolve the central issue.

**The tort of intrusion upon seclusion**

[11] Privacy law has its conceptual genesis with the seminal article on "The Right to Privacy" by Samuel Warren and Louis Brandeis.[5] This article immortalised the right "to be let alone".[6]

[12] William Prosser would, some 70 years later, describe the law of privacy in terms of four separate privacy torts (in summary):[7]

(a) Intrusion upon seclusion or solitude, or into private affairs;

---

4 Law Commission *Invasion of privacy: penalties and remedies: review of the law of privacy stage 3* (NZLC R113, 2010) at 92-3; Stephen Penk "Future Directions and Issues" in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (Brookers, Wellington, 2010) at 15.5.4.

5 Samuel Warren and Louis Brandeis "The Right to Privacy" (1890) 4 Harv L Rev 193.

6 At 195.

7 William L Prosser "Privacy" (1960) 48 Cal L Rev 383 at 389.

(b) Public disclosure of embarrassing private facts;

(c) Publicity which places the plaintiff in a false light in the public eye; and

(c) Appropriation of the plaintiff's name or likeness.

[13] These categories were adopted by the *Restatement* (*Second) of Torts* (1977) as follows:

> §652A. General Principle
>
> (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
>
> (2) The right of privacy is invaded by
>
> (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or
>
> (b) appropriation of the other's name or likeness, as stated in § 652C; or
>
> (c) unreasonable publicity given to the other's private life, as state in § 652D; or
>
> (d) publicity that unreasonably places the other in a false light before the public as stated in § 652E.

[14] §652B states:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

[15] The elements of the tort of intrusion upon seclusion have been recently described to include:[8]

1. An intentional and unauthorised intrusion;

2. That the intrusion was highly offensive to the reasonable person;

---

[8] *Jones v Tsige* [2012] ONCA 32, at [56]; William L Prosser *Handbook of the Law of Torts* (4th ed, West Publishing Co Limited, St Paul, Minnesota, 1971) at 807-9.

3. The matter intruded upon was private; and

4. The intrusion caused anguish and suffering.

[16] In determining whether there has been an act of intrusion, the focus is on the "type of interest involved and not the place where the invasion occurs."[9] There must also be an affirmative act.[10] The second offensiveness element is a question of fact according to social conventions or expectations. Various factors including the degree of intrusion, context, conduct and circumstances of the intrusion, the motive and objectives of the intruder and the expectations of those whose privacy is invaded, are all relevant to whether or not the intrusion is "highly offensive".[11]

[17] A plaintiff must establish a reasonable expectation of privacy in the matter. This has involved a two-prong test. There must be a subjective expectation of solitude or seclusion, and for this expectation to be objectively reasonable.[12] As stated in *Shulman v Group W Productions, Inc*:[13]

> The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.

[18] The approach to the fourth element is not uniform, and may be more relevant to the assessment of damages.[14]

[19] Aspects of privacy have also become regarded as subject to constitutional protection in the United States, underscoring its legal significance.[15] It has been said to be derived from natural law,[16] with solitude being the core of true privacy.[17] In a

---

9 *Evans v Detlefsen* 857 F 2d 330 (6th Cir 1988) at 338, cited in *Jones v Tsige* at [57].

10 *Kane v Quigley* 203 NE 2d 338 (Ohio 1964) at 340.

11 *Miller v National Broadcasting Co* 187 Cal App 3d 1463 (Cal Ct App 1986) at 1483, *Jones v Tsige* at [58].

12 *Jones v Tsige* at [59], *Katz v United States* 389 US 347 (1967) at 361; *Fletcher v Price Chopper Foods of Trumann, Inc* 220 F 3d 871 (8th Cir 2000) at 877: "A legitimate expectation of privacy is the touchstone of the tort of intrusion upon seclusion."

13 *Shulman v Group W Productions, Inc* 955 P 2d 469 (Cal 1998) at 490.

14 William Dalsen "Civil Remedies for Invasions of Privacy: A Perspective on Software Vendors and Intrusion upon Seclusion" (2009) Wis L Rev 1059 at 1068 and footnote 47.

15 Refer *Griswold v Connecticut* 381 US 479 (1965); *Katz v United States* at 351-355; David Feldman *Civil Liberties and Human Rights in England and Wales* (2nd ed, Oxford University Press, Oxford, 2002) at 517-519.

16 *Pavesich v New England Life Insurance Co* 50 SE 68 (Ga 1905) at 70.

17 See Michael Polelle and Bruce Ottley *Illinois Tort Law* (2nd ed) § 6.07 at 6-15, cited in James W Hilliard "A Familiar Tort that May Not Exist in Illinois: The Unreasonable Intrusion on

case involving photos of two women who were photographed together in the shower, the core value of the privacy right was articulated in this way:[18]

> Today we join the majority of jurisdictions and recognize the tort of invasion of privacy. The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close.
>
> Here Lake and Weber allege in their complaint that a photograph of their nude bodies has been publicized. One's naked body is a very private part of one's person and generally known to others only by choice. This is a type of privacy interest worthy of protection.

[20] However privacy claims that jar against freedom of expression tend to come off second best as so persuasively illustrated by Keith J's metaphor of the ridiculous mouse to explain privacy claims in the United States.[19]

**Privacy and intrusion in New Zealand**

[21] Legal concepts of privacy, intrusion and seclusion were not inherited from the common law of the United Kingdom on colonisation. Local common law dealing with those concepts is sparse and framed in terms of privacy based claims against publication. Civil statutes have been largely (though not exclusively)[20] devoted to regulating the collection and disclosure or publication of personal information, including the Privacy Act 1993 and the Broadcasting Act 1989, rather than protection from incursions into private spaces per se. While the foreign nature of these concepts should not preclude their adoption, the development of New Zealand's common law must employ locally recognisable and acceptable norms and concepts to be relevant and persuasive.

[22] But New Zealand's legal landscape is not devoid of consideration of protection of privacy from intrusion. There are clear legislative indicia that freedom

---

Another's Seclusion" (1999) 30 Loy U Chi LJ 601 at 609 and footnote 73.

18 *Lake v Wal-mart Stores, Inc* 582 NW 2d 231 (Minn 1998) at 235.

19 See [42] below and discussion by Gault P and Blanchard J in *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [69]-[73].

20 For example the right to quiet enjoyment in the Residential Tenancies Act 1986, s 38.

from unwanted or unauthorised intrusion into personal space or personal affairs is an accepted legal value.[21]

[23] The Broadcasting Standards Authority's Privacy Principles recognise claims of intrusion against an interest in solitude or seclusion where material has been publicly disclosed. In effect the Authority has adopted the intrusion principle stated in the *Restatement (Second) of Torts*, and created fairness standards relating to intrusion. Principle 3 states:

> 3. (a) It is inconsistent with an individual's privacy to allow the public disclosure of material obtained by intentionally interfering, in the nature of prying, with that individual's interest in solitude or seclusion. The intrusion must be highly offensive to an objective reasonable person. (b) In general, an individual's interest in solitude or seclusion does not prohibit recording, filming, or photographing that individual in a public place ('the public place exemption'). (c) The public place exemption does not apply when the individual whose privacy has allegedly been infringed was particularly vulnerable, and where the disclosure is highly offensive to an objective reasonable person.

[24] Principle 4 of the Information Privacy principles under the Privacy Act 1993 includes a prohibition against the collection of personal information by means that "[i]ntrude to an unreasonable extent upon the personal affairs of the individual concerned".[22] The definition of personal information is wide, being information about an identifiable person, and it is not limited to sensitive or private information.[23]

[25] In public law and criminal contexts, the concept of privacy has been dealt with extensively in the application of the New Zealand Bill of Rights Act 1990. This provides further guidance on the value attached to freedom from intrusion into privacy that might be properly employed in civil legal discourse. While the Bill of Rights Act does not incorporate a general right to privacy,[24] s 21 confers a right to be secure against unreasonable search and seizure. Judicial application of s 21 reveals

---

21 As stated by Gault P and Blanchard J in *Hosking v Runting* at [97], "It is appropriate to look at legislative provisions that have been enacted to ascertain whether there can be discerned any policy indications in respect of the protection of privacy and whether statutory protections so far enacted amount to a comprehensive treatment".

22 Privacy Act 1993, s 6.

23 Ibid, s 2; Stephen Penk "The Privacy Act 1993" in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (Brookers, Wellington, 2010) at 59.

24 *Lange v Atkinson* [2000] 3 NZLR 385 (CA) at 396.

the form, content and weight given to privacy as a legal value. The leading judgment in my view on the concept of intrusion related privacy remains *R v Williams*, in which the Court of Appeal stated:[25]

> [48] A touchstone of s 21 of the Bill of Rights is the protection of reasonable expectations of privacy (see *R v Fraser* [1997] 2 NZLR 442 (CA) at p 449). It is thus only where a person's privacy interest has been breached that his or her rights under s 21 of the Bill of Rights have been breached and a personal remedy is available. The issue therefore is in what circumstances an individual's privacy interest arises.
>
> ...
>
> [63] In our view, the approach in *Anderson* is to be preferred over that in *Savelio, Edwards* and *Belnavis*. It was, in any event, decided before *Savelio*. The Court in *Savelio* took a formal proprietary approach to the inquiry, which we consider inappropriate for the reasons outlined by La Forest J in *Belnavis*. The Bill of Rights should not become dominated by formal proprietary notions given the universal nature of the rights it protects. The Court also focused on the criminal activity being undertaken in assessing the privacy interest involved. Section 21 provides protection of the rights of the general public. Privacy interests in premises should thus be assessed objectively without any concentration on property rights, or the activities of the accused.
>
> ...
>
> [113] It is now necessary to assess the nature of the privacy interest involved. The highest expectation of privacy relates to searches of the person and particularly intimate searches, such as strip-searches (as in *Pratt*), or invasive procedures, such as DNA testing (as in *Shaheed*). In terms of searches of property, residential property will have the highest expectation of privacy attached to it (see, for example, *R v McManamy* (2002) 19 CRNZ 669 (CA)). There will be some gradation even within a residential property, however. The public areas will invoke a lesser expectation of privacy than the private areas of the house (see *Fraser* (1997) at p 453). Inaccessible areas such as drawers and cupboards (particularly ones where one would expect to find private correspondence or intimate clothing) would count as private areas. There will be less privacy expected in the garden, particularly in the front garden. The same applies to garages or outbuildings. There is also a lesser expectation of privacy in vehicles (see, for example, *Jefferies* at p 327 per Thomas J and *R v Firman* (Court of Appeal, CA 351/04 & 352/04, 16 December 2004) at para [25]), in commercial premises (see, for example, *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* [1990] 1 SCR 425 and *Hoechst Attorney-General v Commission of the European Communities* [1989] ECR 2859 at pp 17 – 18) and on farmland, apart from the areas around the farm residences (see, for example, *R v Williams* at para [83]).

---

[25] *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207.

[26] A majority of judges in *Hamed v R* also appear to endorse the proposition that a reasonable expectation of privacy is the touchstone of s 21, though with varying degrees of emphasis and effect.[26]

[27] Similarly the value of freedom from unwanted intrusion into private spheres was emphasised in *Brooker v Police*:[27]

> [123] Privacy is "an aspect of human autonomy and dignity". Although, as a police constable, the complainant is a public official, in her private life she is entitled to enjoyment of the rights of an ordinary citizen. Her privacy interest in the present appeal is her right to be free from unwanted physical intrusion into the privacy of her home.

[28] In addition, and particularly relevant to this case, Parliament has provided protection against unauthorised intrusions into intimate personal spaces in the Crimes Act 1961:

> **216H Prohibition on making intimate visual recording**
>
> Everyone is liable to imprisonment for a term not exceeding 3 years who intentionally or recklessly makes an intimate visual recording of another person.

[29] Affirmation of the privacy concept of freedom from intrusion can also be found in the recently promulgated Search and Surveillance Act 2012 as follows:

> **46 Activities for which surveillance device warrant required**
>
> (1) Except as provided in sections 47 and 48, an enforcement officer who wishes to undertake any 1 or more of the following activities must obtain a surveillance device warrant:
>
> ...
>
> (c) observation of private activity in private premises, and any recording of that observation, by means of a visual surveillance device:
>
> ...

---

[26] *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [10], [161], [264] and [285]; compare [223]. See explanation of these differing approaches to s 21 in *Lorigan v R* [2012] NZCA 264 at [17]-[22].

[27] *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91, per McGrath J.

[30] Private activity is defined as "activity that, in the circumstances, any 1 or more of the participants in it ought reasonably to expect is observed or recorded by no one except the participants".[28]

[31] Returning to the civil context, the Residential Tenancies Act 1986 affirms a right to privacy under the auspices of the quiet enjoyment entitlement in clear terms:

> **38 Quiet enjoyment**
>
> (1) The tenant shall be entitled to have quiet enjoyment of the premises without interruption by the landlord or any person claiming by, through, or under the landlord or having superior title to that of the landlord.
>
> (2) The landlord shall not cause or permit any interference with the reasonable peace, comfort, or privacy of the tenant in the use of the premises by the tenant.
>
> (3) Contravention of subsection (2) of this section in circumstances that amount to harassment of the tenant is hereby declared to be an unlawful act.
>
> (4) In this section premises includes facilities.

[32] It is therefore evident that New Zealand's legal framework has embraced freedom from unauthorised and unreasonable physical intrusion or prying into private or personal places such as the home, and freedom from unauthorised recordings of personal, particularly intimate affairs whether published or not. But it has to be said that the extent to which privacy values are vindicated still depends on the legislative framework within which the impact on those values is being assessed. Legislation affording protection of privacy values is invariably moderated by public interest considerations.[29]

---

28 Search and Surveillance Act 2012, s 3.

29 Examples are: Broadcasting Standards Authority Privacy Principle 8, issued under Broadcasting Act 1989, s 21(1)(f); Privacy Act 1993, ss 28, 43, 44, 54, 95, 98, New Zealand Bill of Rights Act 1990, s 5; Evidence Act 2006, s 30.

**Recent legal history of privacy claims**[30]

*New Zealand*

[33] Prior to *Hosking* the privacy tort of wrongful publication of private facts had a limited pedigree.[31] As I have said a tort of intrusion has none. In *Hosking*, the plaintiffs sought to prevent publication of photos taken of their children while they were on a shopping trip in one of New Zealand's busiest retail precincts. Randerson J in the High Court refused to affirm previous authorities for the following broad reasons:[32]

> [118] I have concluded that the court should not recognise such a tort for these broad reasons:
>
> (a) The deliberate approach to privacy taken by the legislature to date on privacy issues suggests that the courts should be cautious about creating new law in this field;
>
> (b) The tort contended for by the plaintiffs goes well beyond the limited form of the tort recognised in decisions of this court to date and is not supported by principle or authority;
>
> (c) Existing remedies are likely to be sufficient to meet most claims to privacy based on the public disclosure of private information and to protect children whose privacy may be infringed without such disclosure;
>
> (d) In the light of subsequent developments, it is difficult to support the privacy cases decided in New Zealand to date;
>
> (e) To the extent there may be gaps in privacy law, they should be filled by the legislature, not the courts.

---

30 Extensive legal histories about privacy claims in New Zealand are provided in *Hosking v Runting* at both the High Court ([2003] 3 NZLR 385) and Court of Appeal ([2005] 1 NZLR 1). For the United Kingdom, see the review undertaken by the House of Lords in *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406 and then in *Campbell v Mirror Group Newspapers Ltd* [2003] QB 633, [2003] 1 All ER 224 (CA). For Australia see the judgment of Callinan J in *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63, 208 CLR 199. A recent canvas was provided by the Ontario Court of Appeal in *Jones v Tsige* [2012] ONCA 32 dealing with Canadian jurisprudence. The development of privacy law across various jurisdictions is also essayed in Law Commission *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy: Stage 3* (NZLC IP14, 2009) at chapter 4.

31 *P v D* [2000] 2 NZLR 591(HC) at 599; *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 at 733; *Morgan v Television New Zealand Ltd* HC Christchurch CP67/90, 1 March 1990; *C v Wilson and Horton Ltd* HC Auckland CP765/92, 27 May 1992; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415, 423. Refer also NZLC IP14, ibid, at 2.5- 2.11.

32 *Hosking v Runting* [2003] 3 NZLR 385 (HC) at 411.

[34] Gault P and Blanchard J (separately supported by Tipping J) in the Court of Appeal however confirmed the existence of the tort in the following terms:[33]

> [117] The scope of a cause, or causes, of action protecting privacy should be left to incremental development by future Courts. The elements of the tort as it relates to publicising private information set down by Nicholson J in *P v D* provide a starting point, and are a logical development of the attributes identified in the United States jurisprudence and adverted to in judgments in the British cases. In this jurisdiction it can be said that there are two fundamental requirements for a successful claim for interference with privacy:
>
> 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.

[35] After reviewing the law in the United Kingdom, Gault P and Blanchard J preferred to articulate a distinct privacy tort rather than rely on a claim for breach of confidence observing:

> [46] The elements of the breach of confidence action are well established in New Zealand, and our Courts have adopted the formulation in *Coco v Clark* in areas such as employment, trade secrets and information about a plaintiff's private life: *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515; *X v Attorney-General* [1997] 2 NZLR 623; and *G v Attorney-General* [1994] 1 NZLR 714 at p 717. As the law currently stands, a successful action requires information that is confidential, communication of that information to another in circumstances importing an obligation of confidence and unauthorised use or disclosure. Many privacy cases simply do not fit within this analysis, yet undoubtedly justify legal remedies.

[36] Their Honours drew on the decision of the European Court of Human Rights in *Peck v United Kingdom*,[34] where the European Court observed that breach of confidence did not provide an adequate remedy for privacy based claims.[35]

[37] The boundaries of the privacy tort were broadly framed by experiences in other jurisdictions, especially those dealing with competing claims to freedom of expression.[36] First, only private facts are protected, namely those facts known to

---

33 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at 32.

34 *Peck v United Kingdom (44647/98)* (2003) 36 EHRR 41.

35 *Hosking v Runting* (CA) at [53], noting also that relevant decisions of the European Court can be important in developing New Zealand law.

36 At [117]-[132].

some people but not to the world at large.[37] Second, the right of action arises only in respect of publicity that is objectively determined, due to its extent and nature, to be offensive by causing real hurt or harm.[38] Third, a legitimate public concern in the information may provide a defence to the privacy claim. A matter of general public interest or curiosity is insufficient.[39]

[38] Their Honours did not decide whether a tortious remedy should be available in New Zealand law for unreasonable intrusion upon a person's solitude or seclusion.[40] They also expressed the view that the introduction of any high level and wide tort of invasion of privacy should be a matter for the legislature.[41]

[39] Tipping J approached the resolution of the claim on a slightly wider basis. He described privacy as "the right to have people leave you alone if you do not want some aspect of your private life to become public property." He elaborates that "[s]ome people seek the limelight; others value being able to shelter from the often intrusive and debilitating stresses of public scrutiny."[42]

[40] In separating privacy based claims from breach of confidence claims His Honour states:[43]

> Breach of confidence, being an equitable concept, is conscience-based. Invasion of privacy is a common law wrong which is founded on the harm done to the plaintiff by conduct which can reasonably be regarded as offensive to human values.

[41] The first and fundamental ingredient of the tort is said to be that a plaintiff must show a reasonable expectation of privacy in respect of information or material which the defendant has published or wishes to publish. A reasonable expectation of privacy arises when publication of private material would cause substantial offence to a reasonable person.[44] This ensured that freedom of expression was not too readily limited. Tipping J joins with Gault P and Blanchard J in saying that

---

37 At [119].
38 At [126].
39 At [134].
40 At [118].
41 At [110].
42 At [238].
43 At [246].
44 At [256].

publication of a matter of genuine public concern should be a defence to an invasion of privacy.[45]

[42] Keith and Anderson JJ in separate dissenting judgments strongly denounce the emergence of an "invasion of privacy" tort. Both emphasise the importance of freedom of expression and that an amorphous privacy exception is an unjustified limitation on that freedom. Keith J points to the array of existing protections of privacy values and the established lack of need for the proposed action, describing the North American tort as "[t]hat ridiculous mouse born of all that mountainous labour".[46]

[43] Anderson J also frames the debate in terms of the extent to which the law should give effect to privacy aspirations. He considers that elevating privacy values to a right while simultaneously reducing the s 14 right to freedom of expression to a value is erroneous. So too is treating them both as values when s 14 is something more. Like Keith J he sees no need for an extension of civil liability given that intrusion and publication are already covered by legislation.[47]

[44] *Hosking* has since been applied in *Brown v Attorney-General*[48] and *Andrews v Television New Zealand Ltd*,[49] and considered in *Rogers v Television New Zealand Ltd*.[50] These cases did not elaborate the underlying principles of the tort in depth.

*Surveillance*

[45] It has to be observed however that in the context of surveillance the common law appears to have embraced trespass as a condition precedent to unlawful surveillance. In *Lorigan v R* the Court of Appeal recently stated:[51]

> [28] The law prior to *Hamed v R* was that video surveillance by the police was not unlawful because there was no statutory or common law prohibition against it. That was the unanimous view of a full court of this Court in *R v*

---

45 At [257].
46 At [216].
47 At [264]-[268].
48 *Brown v Attorney General* [2006] DCR 630; [2006] NZAR 552.
49 *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220 (HC).
50 *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277.
51 *Lorigan v R* [2012] NZCA 264.

> *Fraser.* That view was applied by a divisional court of this Court in a later case, *R v Gardiner.* In the latter case, the Court rejected an argument that the law in New Zealand should follow the decision of the European Court of Human Rights in *Malone v United Kingdom.* It preferred the law as outlined in an earlier stage of the *Malone* litigation, *Malone v Metropolitan Police Commissioner.*
>
> [29] Applying the analysis of *Fraser* and *Gardiner* to the present case, the covert video surveillance (whether with enhanced-vision equipment or not) was lawful, because there was no statutory or common law prohibition of such activity and it would not have been unlawful for a citizen to do the same thing. The matter would, of course, have been different if the surveillance had involved any element of trespass by the police, because the trespass would have made the police actions unlawful. There was no trespass in the present case because the police had obtained the permission of the owner of the property on which the surveillance cameras were placed.

[46] And further:

> [37] As mentioned earlier, Mr Bradford strongly urged us to adopt the reasoning of Elias CJ in *Hamed v R.* He said this was necessary in order to uphold the rule of law. While he pursued this argument with passion, it is unsustainable in the face of the views of the majority in *Hamed v R.* In short, the views of Elias CJ are those of a minority. In the absence of a majority decision of the Supreme Court to overturn the decisions of this Court in *R v Fraser* and *R v Gardiner*, we proceed on the basis that the statement of the law in *R v Fraser* and *R v Gardiner* is still good law and apply it to the present case. On the facts of this case, where the surveillance involved only the filming of a public place and in a manner that did not involve any trespass by the police, we conclude that the actions of the police were lawful. That is so even if enhanced-vision equipment is used.

[47] As *Lorigan* was released after the hearing of this matter I invited submissions on its relevance to the present case. Mr Hair submitted that it affirmed that at common law there was no action for intrusion into privacy without trespass. Mr Rollo maintained that the Court was dealing only with surveillance from a public space and is not generally applicable. He also highlighted the following passage:

> [22] We agree with Lang J that no clear majority position as to what constitutes a search emerges from *Hamed v R* itself. Ms Laracy's concession means that it is not strictly necessary for us to reach a conclusion on this issue. But given the uncertainty as to the outcome of *Hamed v R*, it may assist if we express our view on the topic. We consider that the test (for assessing whether surveillance of a public place not involving any trespass by the police is a search) that has the support of a majority of the Supreme Court is that proposed by Blanchard J in *Hamed v R.* The test is whether the surveillance by the police involves state intrusion into reasonable expectations of privacy. That is similar to the test applied (in a different context admittedly) by McGrath J to determine whether police action amounted to a search in *R v Ngan.* And it is also broadly consistent with the

> test applied by the Chief Justice in *Hamed v R*, which involved assessing whether the privacy rights of those in the area under surveillance were breached. Although Blanchard J and the Chief Justice reached different results, the tests they applied were broadly the same.

[48] But the Court in that passage was dealing with the issue of whether surveillance constituted a search, not the legality of it. In addition, the focus of the Court of Appeal's inquiry when dealing with lawfulness was whether the police had similar rights and liberties of the ordinary citizen to surveil. Having found that it did, night surveillance involving only filming from a public place and in a manner that did not involve trespass by the police was deemed to be lawful, even with enhanced vision equipment.

*United Kingdom*

[49] A general tort of invasion of privacy was emphatically rejected by the House of Lords in *Wainwright v Home Office*[52] marking the high point of an unbroken line of authorities eschewing common law recognition of privacy based torts.[53] Of specific relevance to the present case is the affirmation of the reasoning in *Malone* (also cited with approval in *Lorigan*):

> [19] What the courts have so far refused to do is to formulate a general principle of "invasion of privacy" (I use the quotation marks to signify doubt about what in such a context the expression would mean) from which the conditions of liability in the particular case can be deduced. The reasons were discussed by Sir Robert Megarry V-C in *Malone v Metropolitan Police Comr* [1979] Ch 344, 372-381. I shall be sparing in citation but the whole of Sir Robert's treatment of the subject deserves careful reading. The question was whether the plaintiff had a cause of action for having his telephone tapped by the police without any trespass upon his land. This was (as the European Court of Justice subsequently held in *Malone v United Kingdom* (1984) 7 EHRR 14) an infringement by a public authority of his right to privacy under article 8 of the Convention, but because there had been no trespass, it gave rise to no identifiable cause of action in English law. Sir Robert was invited to declare that invasion of privacy, at any rate in respect of telephone conversations, was in itself a cause of action. He said, at p 372:
>
> > "I am not unduly troubled by the absence of English authority: there has to be a first time for everything, and if the principles of English law, and not least analogies from the existing rules, together with the requirements of justice and common sense, pointed firmly to such a

---

52 *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406.

53 *Malone v Metropolitan Police Commissioner* [1979] Ch 344; *Kaye v Robertson* [1991] FSR 62 (CA); *Khorasandjian v Bush* [1993] QB 727 (CA); *Earl Spencer v United Kingdom* (1998) 25 EHRR CD105 (EComHR).

> right existing, then I think the court should not be deterred from recognising the right. On the other hand, it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another."

[50] This case is significant for present purposes as it is not about wrongful publication. Mrs Wainwright and her son Alan were visiting another son, Patrick, at Armley Prison in Leeds. They were strip-searched in breach of prison rules and were humiliated and distressed. The search could not give rise to damages unless it was a tortious wrong or a breach of statutory duty.[54] Their Lordships rejected that there was a tort of invasion of privacy upon which damages could be claimed. In delivering the reasons for that view, Lord Hoffmann draws a distinction between privacy as a value underlying a rule of law (and which may point the direction in which the law should develop) and privacy as a principle of law in itself. He then implied that privacy, like freedom of speech, is incapable of sufficient definition to be applied as a specific rule in concrete cases.[55] The detailed approach needed could only be achieved by legislation rather than the broad brush of common law principle and the perceived need for a tort of invasion of privacy had been weakened with the introduction of the Human Rights Act 1998 and the partial incorporation of the European Convention on Human Rights (ECHR).[56]

[51] Lord Hoffman also dismissed a claim based on intentional infliction of emotional distress, on the basis that the existence of such a tort must be doubtful given the inherent difficulty in establishing an intention to inflict emotional distress, and that in any event no such intention was present in that case.[57]

[52] While a general tort of invasion into privacy has been dismissed outright, privacy claims based on an action in breach of confidence have become much enhanced with the impact of the ECHR on the domestic law of the United Kingdom.[58] The leading case is *Campbell v MGN Ltd*,[59] significant to the present

---

54 *Wainwright v Home Office* at [7].

55 At [31].

56 At [33]-[34].

57 At [45]-[46].

58 See Basil Markesinis et al "Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)" (2004) 52 Am J Comp L 133 at 182: "The breach of confidence remedy is mutating at an exponential rate, being used to fill gaps in

case due to its treatment of privacy values. Their Lordships applied the art 8 right to private life of the ECHR to affirm "the privacy of personal information as something worthy of protection in its own right".[60]

[53] The facts in *Campbell* are further relevant insofar as the threshold for a privacy breach. Ms Campbell sued a newspaper for publishing details of her drug addiction and treatment, and for publishing photographs taken of her in the street as she was leaving a group meeting. Lords Hope and Carswell and Baroness Hale formed the majority and resolved that the infringement of Campbell's right to privacy was not justified. Lord Hope identified the central question as being "what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity."[61] Baroness Hale referred to a "reasonable expectation of privacy"[62] and Lord Carswell opined that "[i]t is sufficiently established by the nature of the material that it was private information which attracted the duty of observing the confidence in which it was imparted to the respondents."[63] The decision is also instructive in dealing with the competing rights to private life and freedom of expression.[64] Lord Hoffmann said there is no automatic priority between them; it is a question of the extent to which it is necessary to qualify one right in order to protect the underlying value of the other.[65] Lord Carswell stated simply that any limitation on freedom of expression must be "rational, fair and not arbitrary" and "no more than is necessary".[66]

[54] In *Murray v Express Newspapers plc*[67] the Court of Appeal applied the approach taken in *Campbell* to the assessment of whether there was a breach of

---

the law that arise from the lack of a coherent privacy action."

59 *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

60 At [46] per Lord Hoffmann. He would later describe this development an adaption to the law of the breach of confidence, "mediated by analogy of the right to privacy conferred by article 8" of the ECHR in *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 at [118]. Refer also *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595; [2006] QB 125 at [53] per Lord Phillips.

61 *Campbell v MGN Ltd* at [99].

62 At [137].

63 At [166].

64 At [55] per Lord Hoffmann, [113] per Lord Hope and [138] per Baroness Hale, though she did say that "[v]ery often, it can be expected that the countervailing rights of the recipient [publisher] will prevail" at [137]. See also *In re Guardian News and Media Ltd and others* [2010] UKSC 1, [2010] 2 AC 697 at [49]-[51].

65 At [55].

66 At [167].

67 *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481.

privacy rights under art 8 of the ECHR. It is of some interest to the present case because, if I get that far, the Court elaborates on the proper threshold for intervention. The facts in *Murray* are analogous to *Hosking*, involving the publication of photographs of a child of a famous author. The judge at first instance struck out the claim, citing *Hosking* in support. The Court of Appeal disagreed. The decision was given by Sir Anthony Clarke MR and he observed that the approved test is "what a reasonable person of ordinary sensibilities would feel if he or she was placed in the same position as the claimant and faced with the same publicity."[68] At the same time the Court disapproved of the requirement from *Hosking* that the publicity be highly offensive to an objective reasonable person.

[55] Accordingly, while the Courts in the United Kingdom remain steadfast in their refusal to acknowledge a tort of intrusion into privacy, a breach of confidence tort, overlaid by the application of art 8 of the ECHR, continues to be applied to protect privacy in an expanding way without undue deference to freedom of expression.

*Australia*

[56] There is no clear authority for a general privacy tort in Australia. In *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[69] the High Court was concerned with whether observations of racing activity from an elevated platform on a neighbouring property could found a cause of action. It was alleged that the owners of the racecourse were losing patronage because of the radio broadcast from the platform. The majority resolved that there was no legal right to prevent viewing from a neighbouring property.[70]

[57] In *ABC v Lenah Game Meats Pty Ltd*[71] the High Court said that the question of a privacy tort was yet to be resolved with finality.[72] The significance of the decision lies in the reasons expressed for hesitation before adopting a privacy tort to

---

68 At [52].

69 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* [1937] HCA 45, (1937) 58 CLR 479.

70 At 507-508.

71 *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63, (2001) 208 CLR 199.

72 At [107].

resolve the dispute in that case. ABC proposed to publish a video recording of the respondent's operations. The video was obtained surreptitiously and unlawfully and given to ABC. In dealing with a privacy based claim in the application for an injunction, Gleeson CJ identified the lack of precision of the concept of privacy and tension between interests of privacy and interests of free speech as reasons for caution. He further cautioned against employing rights based language to describe privacy interests, given the influence of the constitutional framework in the United States and rights jurisprudence in the United Kingdom. He preferred instead to adopt the following dicta of Laws J in *Hellewell v Chief Constable of Derbyshire* when dealing with a photo taken of a private matter:[73]

> If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence. It is, of course, elementary that, in all such cases, a defence based on the public interest would be available.

[58] Gummow and Hayne JJ (supported by Gaudron J) express further reasons for caution. They repeat the point made in the commentary to §652A of the *Restatement* that "the Supreme Court of the United States, have spoken in very broad general terms of a somewhat undefined 'right of privacy' as a ground for various constitutional decisions involving indeterminate civil and personal rights".[74] They add that one or more of the four torts identified by Prosser would be actionable at general law in Australia under recognised causes of action. They observe that while intrusion upon seclusion comes closest to reflecting a concern for privacy "as a legal principle drawn from the fundamental value of personal autonomy,"[75] Lenah, a company, could not invoke such a fundamental value of personal autonomy. The door was nevertheless left open to a privacy based claim in this way:[76]

> For these reasons, Lenah's reliance upon an emergent tort of invasion of privacy is misplaced. Whatever development may take place in that field will

---

73 *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 at 807, cited at [34] of *ABC v Lenah.*

74 At [122].

75 At [125], using the words of Sedley LJ in *Douglas v Hello! Ltd* [2001] All ER 289 at 320.

76 At [132].

> be to the benefit of natural, not artificial, persons. It may be that development is best achieved by looking across the range of already established legal and equitable wrongs. On the other hand, in some respects these may be seen as representing species of a genus, being a principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life, in the words of the *Restatement*, "free from the prying eyes, ears and publications of others". Nothing said in these reasons should be understood as foreclosing any such debate or as indicating any particular outcome. Nor, as already has been pointed out, should the decision in *Victoria Park*.

[59] Kirby J, having found an alternative means to support an injunction was loath to declare a position on the existence of an actionable wrong of invasion of privacy, especially as *Victoria Park* had stood in its way for nearly 60 years.[77]

[60] A comprehensive treatment of the privacy claim is also provided by Callinan J. He too expressed caution about importing a privacy tort from North America given the substantial differences in political and constitutional history. It nevertheless seemed to him that the time was ripe for consideration of the tort. In this regard he said that the ability of legislators to cushion the impact of an abrupt change to the law through transitional provisions, not readily available to judges, should be taken into account.[78]

[61] Two lower court cases affirming a privacy tort[79] were not approved by the Supreme Courts of Victoria,[80] New South Wales[81] and South Australia.[82] One of them, *Grosse v Purvis* was specifically rejected by the Federal Court in *Kalaba v Commonwealth of Australia*.[83] But these later judgments, with respect, do not provide reasons for precluding the existence of a privacy tort and seem to rely on the absence of prior authority.

*Canada*

---

77 At [188].

78 At [335].

79 *Grosse v Purvis* [2003] QDC 151; *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281.

80 *Giller v Procopets* [2004] VSC 113; discussed again on appeal in *Giller v Procopets* [2008] VSCA 236 at [447]-[452].

81 *Milne v Haynes* [2005] NSWSC 1107.

82 *Moore-McQuillan v Work Cover Corporation* [2007] SASC 13.

83 *Kalaba v Commonwealth of Australia* [2004] FCA 763. Also see mention by Callinan J in *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27 at [216].

[62] Until recently there were no clear superior court authorities approving an intrusion based privacy tort in Canadian jurisprudence.[84] However *Jones v Tsige*[85] has very recently affirmed that Ontario law recognises a cause of action for an invasion of privacy. Ms Tsige used her workplace computer to access personal information of a co-worker, Ms Jones, over a period of about four years. During that time Ms Tsige was in a relationship with Ms Jones' former husband. Intrusion upon seclusion was the primary focus of the judgment, delivered by Sharpe JA. He concludes, following a comprehensive review of Canadian jurisprudence, that Ontario remained open to the possibility that a tort action exists for intrusion upon seclusion.[86] He then confirmed the existence of the right of action for the following reasons (in summary):

(a) Privacy has long been recognised as an important underlying and animating value of various traditional causes of action to protect personal and territorial privacy;[87]

(b) Charter jurisprudence recognises privacy as a fundamental value, especially informational privacy, a right that closely tracks the same interests protected by an intrusion tort;[88]

(c) Technological change has motivated greater legal protection of personal privacy and poses a novel threat to privacy interests;[89]

(d) The facts cry out for remedy and the law of Ontario "would be sadly deficient if we were required to send Jones away without a legal remedy".[90]

---

84 I exclude the province of Quebec as s 5 of its Charter of Human Rights and Freedoms guarantees the right to respect for private life. Refer *Aubry v Éditions Vice-Versa* [1998] 1 SCR 591. There were also several lower court authorities essayed in NZLC IP14, above n 30 at 4.131 and in *Jones v Tsige* below.

85 *Jones v Tsige* 2012 ONCA 32.

86 At [24].

87 At [66].

88 Ibid.

89 At [67].

90 At [69].

[63] The Court essentially adopted the elements of the action of intrusion upon seclusion from the *Restatement (Second) of Torts*, observing that a claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy, and that:[91]

> ...it is only intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.

[64] This decision has added significance to the New Zealand jurisdiction because the right to privacy is not expressly affirmed in the Canadian Charter of Rights and Freedoms, so the positive existence of such a constitutional right did not drive the conclusion. But the Charter's s 8 protection from unreasonable search and seizure has been interpreted and said to encompass a right to privacy.[92] As I will explain below, s 8 of the Charter is comparable to s 21 of the Bill of Rights Act.

**Resolution and reasons**

[65] The forgoing canvas of the authorities and the submissions of Counsel reveal a broad consensus that the concept of privacy, linked to personal autonomy, is a value worth protecting. The central dispute is how. Three key objections emerge to the transformation of privacy values, or aspects of them, into actionable rights at common law:

(a) Privacy per se is not justiciable.

(b) It is for Parliament, not the Judiciary, to resolve the weight to be accorded to privacy as a value within a complex matrix of competing values, interests and rights.

(c) A privacy tort is not necessary.

---

91 At [72].
92 At [39].

[66] For reasons which I will now explain, I do not think these objections bar the way to a tort of intrusion upon seclusion in New Zealand law.

*Worth protecting*

[67] Privacy's normative value cannot be seriously doubted, with various expressions of a right to personal autonomy affirmed in international conventions on human rights,[93] and in various domestic constitutional arrangements and human rights charters.[94] While these domestic instruments do not expressly affirm a general right to privacy, they have been interpreted as protecting rights which are central to autonomy aspects of privacy,[95] *Jones v Tsige* being the most recent example.

[68] As Lord Hoffman observed in *Campbell*:[96]

> What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity.

[69] It is trite that international conventions do not form part of domestic law until incorporated by statute. But the ratification of international conventions affirming privacy based rights raises a presumption that domestic law should be applied and if necessary developed consistently with the values of privacy and autonomy protected by those rights.[97]

[70] Legislative recognition of expectations of privacy[98] and the right to be secure from unreasonable search and seizure reinforce its worth. It is apt to recall that this right to be secure has the same conceptual genesis as the rights affirmed in *Entick v*

---

93 International Covenant on Civil and Political Rights, art 17; Universal Declaration of Human Rights, art 12; European Convention on Human Rights, art 8; American Convention on Human Rights, art 11(2).

94 Canadian Charter of Rights and Freedoms, art 8; United States Constitution, First, Third, Fourth, Fifth and Ninth Amendments; New Zealand Bill of Rights Act 1990, s 21.

95 See Feldman, above n 15 at 517-518.

96 *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 at [50].

97 *R v Rawiri* HC Auckland T014047, 3 July 2002; and in the context of an exercise of administrative/statutory discretion see *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA); *Ye v Minister of Immigration* [2009] 2 NZLR 596 (CA) at [84]-[90]; *Huang v Minister of Immigration* [2008[ NZCA 377, [2009] 2 NZLR 700 at [34] and *X (CA746/09) v R* [2010] NZCA 522 at [21].

98 Refer [23]-[31] above.

*Carrington*.[99] That linkage was aptly described by the Supreme Court in *Boyd v United States* in the following way:[100]

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense, - it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment [in *Entick v Carrington*].

*Justiciable*

[71] Baroness Hale doubted the justiciability or cognisability of privacy values in this way: "our law cannot, even if it wanted to, develop a general tort of invasion of privacy."[101] And Lord Hoffman asseverated: "That is not how the way the common law works".[102] His sentiment may have been captured some 70 years earlier by Lord Atkin:[103]

> But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy.

[72] Further:[104]

> That privacy is a large, unwieldy and elusive concept is axiomatic.

[73] And, the implications of an intrusion tort are not to be underestimated. The Law Commission identified numerous interests potentially affected by privacy law.[105]

[74] I accept therefore that a general claim to privacy may not be amenable to rules of law, or in fact be transformed into a rule of law giving rise to an actionable claim. But in New Zealand the transformation of aspects of privacy into rights and unwanted intrusion into a wrong is already well underway and in my view it is now

---

99 *Entick v Carrington* (1765) 19 St Tr 1029.
100 *Boyd v United States* 116 US 616 (1886) at 630.
101 *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 at [133].
102 *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406 at [31].
103 *Donoghue v Stevenson* [1932] AC 562 at 580.
104 Stephen Penk "Thinking About Privacy" in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (Brookers, Wellington, 2010) at 1.
105 NZLC IP14, above n 30, at chapter 12.

too late to cogently argue that judges in New Zealand are unable to adjudicate on the content and boundaries of a privacy right to be free from intrusion upon seclusion.

[75] First, as I have said, freedom from intrusion into personal affairs is a recognised value in New Zealand, underlying existing rules that regulate intrusion into personal affairs as both a civil and criminal wrong. Second, freedom from intrusion into personal affairs is amenable to familiar, justified limitations, including a defence of legitimate public concern based on freedom of expression or prosecution of criminal or other unlawful activity. Third, a tort of intrusion upon seclusion is entirely compatible with, and a logical adjunct to, the *Hosking* tort of wrongful publication of private facts. They logically attack the same underlying wrong, namely unwanted intrusion into a reasonable expectation of privacy. Fourth, freedom of speech values and the right to freedom of expression affirmed by s 14 of BORA are only infringed when publication is also contemplated, in which case the *Hosking* principles apply, and if *Hosking* should one day prove to be wrongly decided, then principles attaching to a claim based on breach of confidence could equally apply.[106] Fifth, the structure of an intrusion tort has clear similarities to traditional torts based on protection of property and the person, involving unwanted acts that cause harm or damage to a person's possessions or to the person. Sixth, a feature of the common law is its capacity to adapt to vindicate rights in light of a changing social context.[107]

---

[106] Compare Lord Hoffmann's apparent acceptance that publication of a photo taken by intrusion into a private place may be an actionable infringement of informational privacy: *Campbell v MGN Ltd* at [75].

[107] Perhaps the most notable example is the recognition of indigenous rights that had no equivalent in the common law of England. In *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 it was said that "the Court could not take cognizance of mere native rights to land", leading to the conclusion that "a phrase in a statute cannot call what is non-existent into being", at 79. But the common law adapted to recognise customary rights, given legislative recognition of them: *Nireaha Tamaki v Baker* [1901] AC 561 (PC) at 577; and see recent statement of the "modern approach" of integrating customary rights where possible in *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573, at [254].

*A matter for the common law*

[76] The second and equally formidable objection is the call for strict adherence to the constitutional (and functional) roles of Parliament and the judiciary. Gaudron J's admonition in *Lenah* is particularly salutary to all common law judges:

> "It is beyond controversy that the role of Australian courts is to do justice according to law - not to do justice according to idiosyncratic notions as to what is just in the circumstances."

[77] Three of the six primary reasons given by Randerson J in *Hosking* for refusing a tort of wrongful publication related to the respective roles of the Courts and the legislature.[108] Keith J also emphasised in the Court of Appeal that the very deliberate manner in which the legislature has provided for privacy interests precludes or should preclude judge made law on the topic. He said:[109]

> ...the resulting landscape of the law, with its varieties of planting, some of it very dense and deliberate, and its contrasting bare plains, is sharply distinct from that in *Donoghue v Stevenson* [1932] AC 562 where, for the majority and minority alike, common law authorities and principle completely occupied the field.

[78] And further:[110]

> Parliament recognises in those provisions, as in legislation for the classification of publications and broadcasting (discussed next), that specialist bodies and not the regular judiciary are to make the judgments about the release of certain sensitive information.

[79] Gault P and Blanchard J framed the issue in this way:[111]

> The Courts are at pains to ensure that any decision extending the law to address a particular case is consistent with general legal principle and with public policy and represents a step that it is appropriate for the Courts to take. In the last respect there are matters that involve significant policy issues that are considered best left for the legislature.

[80] They resolved this issue by concluding that the law of New Zealand had already developed to a position similar to that of the United Kingdom but with

---

108 See [33] above.
109 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [185].
110 At [194].
111 At [5].

different terminology. As noted, England uses the tort of disclosure of confidential information, while Gault P and Blanchard J preferred to categorise it as a privacy tort. The development of a limited privacy tort of wrongful publication was therefore seen as an incremental addition consistent with common law method.

[81] Tipping J however took a more direct route to the outcome. He said that Parliament can hardly have meant through the Privacy Act:[112]

> ...to stifle the ordinary function of the common law, which is to respond to issues presented to the Court in what is considered to be the most appropriate way and by developing or modifying the law if and to the extent necessary.

[82] And further:[113]

> If Parliament wishes a particular field to be covered entirely by an enactment, and to be otherwise a no-go area for the Courts, it would need to make the restriction clear. I am unpersuaded by the view that if Parliament has only gone so far, this is an implicit message to the Courts to stay their hands.

[83] The learned authors of the Law Commission in its review of the law of privacy also recommended that the tort of invasion of privacy should be left to the Court.[114] The reasons expressed by the Commission resonate here (in summary):[115]

(a) It has only been recently affirmed by a superior Court. A good reason is needed to strike down that decision and no such reason was provided;

(b) Privacy concerns are likely to increase with advances in technology;

(c) A tort emphasises the importance of privacy and that the law takes the matter seriously;

(d) The Courts have flexibility in dealing with individual facts and changing circumstances that a statutory regulation does not, in terms of both definition and remedy;

---

112 At [227].
113 At [228].
114 NZLC R113, above n 4, Recommendation 29 at 93.
115 Ibid at 7.6-7.13.

(e) Maintaining a tort is consistent with international trends and conventions.

[84] The Commission was more circumspect about whether a tort of intrusion into seclusion should be left to develop at common law. But the Commissioners state:[116]

> ...the danger in codifying the intrusion tort would be that this could constrain and pre-empt aspects of the common law development of the publicity tort. They are part of one package.

[85] The Commission therefore decided to leave it to the Courts to determine whether there should be a tort, and if so the ingredients of it.

[86] I have reached the view that it is functionally appropriate for the common law to establish a tort equivalent to the North American tort of intrusion upon seclusion. The reasons expressed by the Commission provide a cogent starting point. Privacy concerns are undoubtedly increasing with technological advances, including prying technology through, for example, the home computer. The affirmation of a tort is commensurate with the value already placed on privacy and in particular the protection of personal autonomy. As I have said, the similarity to the *Hosking* tort is sufficiently proximate to enable an intrusion tort to be seen as a logical extension or adjunct to it. This Court can apply, develop and modify the tort to meet the exigencies of the time, including retrenchment as the Supreme Court recently did in *Couch v Attorney-General (No 2).*[117]

[87] I cannot say however that a tort of intrusion upon seclusion (as opposed to informational privacy) is necessary to maintain consistency with international trends. Acceptance in some parts of North America is not an international trend. But New Zealand law has at least since the inception of the Bill of Rights Act placed significant value on protection from unwanted intrusion into personal space. I have mentioned the analogue to s 8 of the Canadian Charter. I am not satisfied that our constitutional arrangements are so different that Ontarians should be afforded greater

---

116 At 7.18.

117 *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149.

protection than New Zealanders from unwanted intrusions into their privacy. Furthermore it has been said by Professor Dianne Zimmerman:[118]

> [T]houghtful elaboration of privacy law involving intrusions on solitude is likely to promote greater protection of the individual's interest in being free of public scrutiny than is the vague and hard-to-apply law governing the publicity of private facts.

[88] Functionally also, the role assumed by Parliament in protecting privacy interests has focused on controlling the collection and dissemination of private information, or at the other end of the spectrum, criminal culpability and the control of state power, including most recently surveillance powers. The reticence of Parliament to wade into the realm of civil claims in the years since *Hosking* is a matter of conjecture, though the Law Commission report provides several reasons why that might be so including the potential breadth of such a statutory tort. But it is the function of the Courts to hear and determine claims by litigants seeking to vindicate alleged rights or correct alleged wrongs. As Sharpe JA said in *Tsige*, this is a case crying out for an answer, and given the value attached to privacy, providing an answer is in my view concordant with the historic function of this Court.

*Need*

[89] Existing protections from intentional intrusion into personal space and affairs are coherent but they are not comprehensive. In the absence of threatened publication, the *Hosking* privacy tort has no direct application to the present facts. Breach of confidence might provide a remedy in this case, especially on the enhanced *Campbell* version,[119] but that is far from clear. Other tortious actions presuppose interference to property or the person not present here. An action based on intentional infliction of emotional distress is unlikely to succeed, especially with its consignment to the history books by *Wainwright*.[120] There is no evidence of an intent or design to cause harm. A criminal sanction was triggered, but that relied somewhat fortuitously on the specific facts fitting the statutory criteria. Criminal

---

118 Diane L Zimmerman "Requiem for a heavyweight: a farewell to Warren and Brandeis's privacy tort" (1983) 68 Cornell L Rev 291 at 393, cited by Keith J in *Hosking v Runting* (CA) at [216].

119 See [53] above.

120 Whether that is so in New Zealand is beyond the scope of this already long judgment, but as Mr Hair submitted, it is quite difficult to say that Mr Holland intended to cause C distress – he tried to keep the whole intrusion from her.

culpability reflects society's concern about such conduct, but it is only partially concerned with vindicating C's rights and interests or remedying the harm to her.

[90] While Keith J in *Hosking* paints a compelling picture for dealing with wrongful publication via existing remedies (including breach of confidence), I do not consider that the argument has the same force here. Indeed, there is a demonstrable need for a civil remedy, with the threshold of balance of probabilities, that better accords with the significance of privacy values, the scale and offensiveness of the intrusion in this case, and the harm caused.

*Lorigan v R*[121]

[91] At first blush the reasoning of the Court of Appeal in *Lorigan v R* militates against the recognition of an actionable right at common law to be free from intrusion upon seclusion. The Court affirms the law as stated in *Malone v Metropolitan Police of Commissioner* and approved in *Wainwright*.[122] *Lorigan* is not directly binding on me given that it is dealing with the criminal context and more specifically with surveillance from a public place. Plainly however the reasoning has persuasive force. The concern is to ensure that civil and criminal law apply and develop rules of law in a consistent and coherent way.

[92] I am satisfied that freedom from intrusion upon seclusion can be articulated in such a way as to maintain coherence. Most significantly, surveillance or intrusion per se is not actionable. Rather there must be a combination of features, including a lack of authorisation, intimacy, a reasonable expectation of privacy and offensiveness. Significantly none of the cases cited by the Court of Appeal in *Lorigan* dealt with intimate spaces or activities. Those cases, and *Lorigan*, can be seen to be a logical extension of principle. There is no right to limit views from public places or from other private property.[123] Furthermore, *Lorigan* predated the Search and Surveillance Act 2012 which requires a warrant for police surveillance of private activity in private premises, save when the enforcement officer is lawfully on

---

121 *Lorigan v R* [2012] NZCA 264.
122 At [28]; and see [49] above.
123 The Australian case of *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* [1937] HCA 45, (1937) 58 CLR 479 is illustrative of this point.

those premises.[124] The exception must in my view only contemplate occupation for a lawful enforcement purpose. Therefore insofar as the recognition of an intrusional tort might affect police activity, that is consistent with the legislative position.

[93] Accordingly, a tort of intrusion upon seclusion is part of New Zealand law.

**Elements of the tort**

[94] The caution expressed through the authorities must guide the elements of the tort. I consider that the most appropriate course is to maintain as much consistency as possible with the North American tort given the guidance afforded from existing authority. I also consider that the content of the tort must be consistent with domestic privacy law and principles. On that basis, in order to establish a claim based on the tort of intrusion upon seclusion a plaintiff must show:

(a) An intentional and unauthorised intrusion;

(b) Into seclusion (namely intimate personal activity, space or affairs);

(c) Involving infringement of a reasonable expectation of privacy;

(d) That is highly offensive to a reasonable person.

[95] Intentional connotes an affirmative act, not an unwitting or simply careless intrusion. "Unauthorised" excludes consensual and/or lawfully authorised intrusions. Further, not every intrusion into a private matter is actionable. The reference to intimate personal activity acknowledges the need to establish intrusion into matters that most directly impinge on personal autonomy.[125]

[96] The last two elements replicate the *Hosking* requirements and thus remain consonant with existing privacy law in this country. The boundaries of the privacy tort articulated in *Hosking* apply where relevant. Only private matters are protected. A right of action only arises in respect of an intrusion that is objectively determined,

---

[124] Refer ss 46 and 47.
[125] Cf *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [113]-[114].

due to its extent and nature, to be offensive by causing real hurt or harm. A legitimate public concern in the information may provide a defence to the privacy claim.[126]

[97] Mr Rollo's contention that a simple reasonable expectation of privacy test should be applied has strong support in academic writing and from the developing law of privacy in the United Kingdom (under the auspices of the European Convention of Human Rights).[127] In my view however, a one step reasonable expectation of privacy test comparable to the art 8 test applied in the United Kingdom for breach of confidence is not sufficiently prescriptive. The capacity for conflict between the right to seclusion and other rights and freedoms is very significant.[128] This demands a clear boundary for judicial intervention. Furthermore, a highly offensive test will also set a workable barrier to the unduly sensitive litigant that seemed to trouble Lord Hoffmann in *Wainwright*.

**Result**

[98] An action for intrusion upon seclusion is recognised as part of the law of New Zealand. The elements of this action are specified at [94].

[99] Mr Holland intruded into C's intimate personal space and activity when he videoed her in the shower without her consent and otherwise without legislative authority. The intrusion infringed a reasonable expectation of privacy and was highly offensive to the reasonable person. He is therefore liable for that intrusion. The question of damages will now need to be considered.

[100] Costs are reserved pending the hearing on damages.

---

126 Refer [37] above.

127 N A Moreham, "Privacy in the Common Law: A Doctrinal and Theoretical Analysis" (2005) 121 LQR 628; Refer also to discussion at [53]-[54] above.

128 Consider the list of affected stakeholders identified in NZLC IP14, above n 30, at chapter 12, and the types of surveillance at 8.29-8.32.

**Suppression**

[101] There is no dispute between the parties that the details of the plaintiff should be suppressed. Little will be served by identifying the plaintiff and publication of her name may further compound the breach of her right to privacy. Accordingly, I suppress all details that might identify her and the judgment has been anonymised accordingly.

Solicitors:
Lane Neave, Christchurch, for Plaintiff
Malley & Co, Christchurch, for Defendant