

PRIVACY LAW IN NEW ZEALAND

2ND EDITION

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GENERAL EDITORS



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PREFACE

Almost six years have passed since the first edition of this book, and changes in technology with their inevitable impact on the privacy of individuals have continued apace. David Harvey's chapter on new technologies looks at the challenges these pose, while Donna-Maree Cross has rewritten the surveillance chapter to accommodate and critique the legislation enacted in the last six years that has impacted on privacy. We now have, as we predicted in the first edition of this book, an intrusion tort, and that too is discussed.

There is no doubt that the concept of privacy in New Zealand has assumed increasing importance since the late 1970s and the early 1980s. Statute law moved to protect personal privacy culminating in the enactment of the Privacy Act 1993, while the courts began expressing an interest in developing a tort of privacy, although it was not until 2005 that the Court of Appeal confirmed the existence of the tort and its elements. As we noted in the first edition the New Zealand Law Commission began an extensive privacy project in 2006. It was a major and important project. It involved a four-stage review of privacy values, changes in technology, international trends, and their implications for New Zealand civil, criminal and statute law. The project was completed in 2011 with the publication of the last report. A number of recommendations were made, with some being implemented and some still to be. These are discussed where appropriate.

Once again this book has been written for different audiences, and is a mix of theory and practical considerations. We expect that law students, and others interested in legal developments, will find the early chapters (covering the privacy concept and its status in the law; the interests with which privacy competes; the development of the tort; and the limited and piecemeal statutory protection of privacy) of relevance. At the same time we hope that the later chapters, considering the application of privacy law in various contexts, will be of use to both lawyers and other practitioners.

Stephen Penk and Rosemary Tobin

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THE COMMON LAW TORT OF INVASION OF PRIVACY IN NEW ZEALAND

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4.1 Introduction

Although the New Zealand Court of Appeal first recognised a public disclosure/private fact privacy tort in 2005, and the High Court an intrusion form of the tort in 2012, the genesis of the tort was an article written by two American authors in 1890,¹ at a time when surreptitious photography and the unauthorised use of photographs were matters of concern.² Warren and Brandeis grounded the right to privacy in the inviolate personality, and the need for individuals to have personal space that was free from the

1 S Warren and L Brandeis “The Right to Privacy” (1890) 4 Harv L Rev 193.

2 D Leebron “The Right to Privacy’s Place in the Intellectual History of Tort Law” (1991) 41 Case W Res LR 769.

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demands of the larger social order.³ Legend originally held that the article was written after unwanted publicity in the gossip columns detailing a party held by the wife of SD Warren to celebrate their daughter's wedding.⁴ It comes as no surprise that the rise of gossip such as this was attributed to the excesses of the media.⁵ Today, similar concerns are still expressed, particularly about the tabloid press, but the press in turn has become increasingly concerned about the potential erosion of freedom of expression by the invasion of privacy tort.

Despite this early recognition of the need to protect privacy interests, it was almost a hundred years before the New Zealand courts evinced an interest in protecting privacy by a new common law cause of action. This was not because privacy was not recognised as important, but rather it was due to the belief that the existing common law torts, such as intentional infliction of emotional distress, trespass to land, nuisance, defamation and the like, provided adequate protection if an individual's privacy was invaded.⁶ It was also clear that the relationship of any form of invasion of privacy tort with the older tort of defamation required proper analysis and reconciliation. Added to this was definitional concern for the ambit of the tort.⁷ Any potential recognition of a new tort protecting privacy was not helped by the categorical refusal of the English courts of the time to recognise a common law action for invasion of privacy.⁸

In the meantime a substantial body of privacy jurisprudence had emerged in the United States, and it was inevitable that New Zealand would rely heavily on these developments, particularly the work of Prosser, when it came to formulating the new tort. Prosser categorised privacy cases in the United States as falling into four classes.⁹ Of these, the public disclosure of private facts about the plaintiff has been the most influential in the New Zealand form of the tort, although the category involving the intentional intrusion into the plaintiff's seclusion or solitude, or into his or her private affairs, has also had an impact on New Zealand's privacy law, particularly in decisions of the Broadcasting Standards Authority.¹⁰

3 S Warren and L Brandeis "The Right to Privacy" (1890) 4 Harv L Rev 193 at 207.

4 Prosser himself believed that the new tort sprang from this – see W Prosser "Privacy" (1960) 48 Cal Law Rev 383; but see J H Barron "Warren and Brandeis, The Right to Privacy, 4 Harv L Rev 193 (1890): Demystifying a Landmark Citation" (1979) 13 Suffolk U L Rev 875 at 891-894.

5 S Warren and L Brandeis "The Right to Privacy" (1890) 4 Harv L Rev 193 at 196: "The press is overstepping in every direction the obvious bounds of propriety and of decency."

6 In *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 (HC), the second reported case where the Judge expressed a preference for the development of a privacy tort, six different causes of action including invasion of privacy were argued.

7 The New South Wales Law Reform Commission expressed the view that any attempt at definition was futile. See New South Wales Law Reform Commission, *Invasion of Privacy* (Consultation Paper 1, 2007) at [1.13]. See also the discussion in Law Commission *Privacy: Concepts and Issues – Review of the Law of Privacy, Stage 1* (NZLC SP 19, 2008).

8 *Kaye v Robertson* [1991] FSR 62. See also Stephen Penk's discussion in Chapter 5 (Common Law Privacy Protection in Other Jurisdictions).

9 W Prosser "Privacy" (1960) 48 Cal Law Rev 383. The two classes I will not be discussing are: publicity placing the plaintiff in a false light, and appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

10 See discussion in Chapter 9 (Media Regulation).

4.2 The evolution of a new tort

There is no doubt that the 1980s was the right time for the development of a new tort protecting personal privacy in New Zealand. Not only was it a period of political upheaval, but there was an increasing focus on human rights and human rights jurisprudence, as well as privacy concerns,¹¹ with talk of establishing a Privacy Commissioner.¹² At the same time New Zealand was moving towards a Bill of Rights which would protect the right to freedom of expression. However, although the dignity and worth of the human person is the key value underlying the rights affirmed in the New Zealand Bill of Rights Act 1990 (NZBoRA),¹³ privacy¹⁴ is not specifically mentioned,¹⁵ even though it has been recognised in a number of international instruments, such as the preamble to the Universal Declaration of Human Rights 1948.¹⁶ Freedom of expression was, however, a right confirmed in s 14 of the NZBoRA¹⁷ and has inevitably become especially important in drawing the boundary of the tort of invasion of privacy, as it presents an obvious contradiction to the developing tort. It was inevitable that of the two forms of the tort, the public disclosure/private fact form would be the first to develop.

4.2.1 The early cases

In 1986, in *Tucker v News Media Ownership Ltd*¹⁸ the opportunity to consider a privacy tort arose. Tucker was a heart transplant patient who sought funds from the public, and then discovered the possibility that details of his previous convictions would be publicised. He obtained an injunction to prevent publication that was eventually discharged. Five members of the judiciary, two in the High Court and three in the Court of Appeal, expressed interest in the development of such a tort, primarily as an extension of that of intentional infliction of emotional distress,¹⁹ although the latter rationale did not survive later decisions.

Tucker really only involved expressions of interest, although disquiet about the boundaries of any such tort was expressed, coupled with concern about its relationship

11 Tim McBride *Privacy Review: A Discussion and Resource Paper Prepared for and in Consultation with the Human Rights Commission* (Human Rights Commission, Discussion Paper, 1984).

12 See the enactment of the Privacy Commissioner Act 1991.

13 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [180] per Thomas J.

14 Privacy has, however, been seen as a rationale behind s 21 of the New Zealand Bill of Rights Act 1990 [NZBoRA], the right to be secure against unreasonable search or seizure. In *R v A* [1994] 1 NZLR 429 (CA) at 433 Richardson J stated that “[r]estraints on search and seizure reflect an amalgam of values: property, personal freedom, privacy and dignity.”

15 *A Bill of Rights for New Zealand: A White Paper* (Government Printer, Wellington, 1985) at [10.144], argued that it would be inappropriate to attempt to entrench a right that was not fully recognised and was in the course of development.

16 This refers to and acknowledges the inherent dignity of the human family, while art 12 protects from arbitrary interference with privacy. The same words are repeated in art 17 of the International Covenant on Civil and Political Rights; New Zealand’s commitment to this instrument is affirmed in the NZBoRA. See also art 8 of the European Convention on Human Rights and Stephen Penk’s discussion in Chapter 1 (Thinking About Privacy).

17 “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.” The right to freedom of expression is not, of course, absolute.

18 *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 (HC).

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with freedom of expression. These concerns were to be a feature of the cases that followed. *Tucker* was not a case where policy concerns were debated, and nor were the elements in the inchoate tort discussed at any length. It did, however, raise three issues that any new tort had to solve: the extent to which one who sought publicity had an interest in privacy;²⁰ the extent to which the court should have regard to the interests of third parties (in *Tucker*, his daughter and the public);²¹ and the extent to which public facts (in *Tucker*, previous convictions for indecency) could become private facts over time. Other cases followed,²² but it was not until *Bradley v Wingnut Films Ltd*²³ that a High Court judge accepted the submissions of counsel, and set out the elements of the tort: the disclosure of private facts must be a public disclosure, and not a private one; the facts disclosed must be private facts and not public ones; and the matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.²⁴ The case before the Court did not fall within the tort, but once again an issue was raised that would need resolution at the appropriate time in the future: to what extent was it possible to have privacy interests in public places?²⁵

References to privacy in various cases continued over the next few years,²⁶ and at the same time other developments in the law occurred that provided an impetus for the new tort. The Privacy Act 1993, and the privacy principles therein, achieved substantial publicity, and complaints to the Privacy Commissioner for breaches of these principles became common. In addition, complaints about an invasion of privacy became a standard feature of cases before the Broadcasting Standards Authority and this led to a parallel jurisprudence that informed common law developments.²⁷ In the United Kingdom, the passage of the Human Rights Act 1998 meant that privacy began to gain a foothold there, albeit under an expanded breach of confidence action.²⁸ Denial that there was no action for a breach of personal privacy in England could no longer be sustained.²⁹ However, a countervailing development also occurred, and that was a shift in the balance the law had achieved between freedom of expression and the protection of reputation –

19 The case first came before Jefferies J (*Tucker v News Media Ownership Ltd* HC Wellington CP477/86, 22 October 1986) who granted an interim injunction on the basis of the plaintiff's right to privacy. This was upheld in the Court of Appeal (*Tucker v News Media Ownership Ltd* CA CA172/86, 23 October 1986) where Cooke P, McMullin and Hillyer JJ agreed with Jefferies J. Although the injunction was discharged by McGechan J, he too expressed an interest in the development of such a tort.

20 *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 (HC) at 732 and 735.

21 *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 at 735 (HC).

22 *T v Attorney-General* (1988) 5 NZFLR 357; *Morgan v TVNZ* HC Christchurch, CP67/90, 1 March 1990; *Marris v TV3 Network Ltd* HC Wellington CP754/91, 14 October 1991; *Moko-Mead v Independent Newspapers Ltd* HC Wellington, CP813/91, 25 October 1991.

23 *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 (HC).

24 *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 (HC) at 423. In doing so he adopted the form of the tort as set out in Keeton W P and others *Prosser and Keeton on The Law of Torts* (5th ed, West Publishing Co, St Paul Minnesota, 1984) at 851.

25 *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 (HC) at 424.

26 *X v Attorney-General* [1994] NZFLR 433 (HC); *Hobson v Harding* (1995) 1 HRNZ 342 (HC); *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129 (CA).

27 See discussion in Chapter 9 (Media Regulation).

28 See discussion by Stephen Penk, Chapter 5 (Common Law Privacy Protection in Other Jurisdictions).

29 *Kaye v Robertson* [1991] FSR 62.

freedom of expression was given greater weight.³⁰ Any development of the new tort would need to take this into account.

The opportunity to do this came some fourteen years after *Tucker* when in *P v D* a High Court judge ordered that an injunction should issue, and apply until further Order of the Court, prohibiting publication that the plaintiff, referred to as a “public figure”, had been treated at a psychiatric hospital.³¹ In the course of argument the defendants referred to the guarantee of freedom of expression under s 14 of the NZBoRA, and the undesirability of imposing prior restraint on the media, together with the right of the press to make inquiry in respect of matters of interest to its readers. Counsel also attempted to argue that it was far from settled whether there was a tort of invasion of privacy in New Zealand law. The Judge concluded that there was such a tort and that it encompassed the public disclosure of private facts, but the analysis of the new tort was surprisingly superficial, and the lack of any considered reference in the judgment to the NZBoRA constitutes a serious deficiency in the decision.³² The Judge applied what he called the three Prosser factors. The information that a person had been treated in a psychiatric hospital fell into the category of a private fact, and any disclosure of this in the news media would obviously be a public disclosure. The real question was whether that disclosure would be highly offensive and objectionable to a reasonable person of ordinary sensibilities. The Judge accepted P’s stated feelings,³³ and was persuaded that a reasonable person of ordinary sensibilities would, in the circumstances, also find publication of the information that he or she had been a patient in a psychiatric hospital highly offensive and objectionable. In addition he thought that the Court should have regard to a fourth factor: the nature and extent of legitimate public interest in having the matter disclosed. It is in the Judge’s discussion of this factor that some assistance is derived about the privacy to which a public figure plaintiff may be entitled. The Judge observed that there was no basis for concern that P’s past or present mental health meant that P was unfit to carry out his or her occupation to an appropriate standard, and nor was disclosure of the information in the public interest insofar as an assessment of P’s character, credibility or competence was concerned. This meant that any legitimate public interest in having the information disclosed was minimal. Hence privacy may not attach to those aspects of a plaintiff’s life that may reflect on his or her ability to perform his or her public functions. Whether the test is objective or subjective also required careful consideration. The Judge spoke of the objective test for subject matter that is highly offensive and objectionable to a reasonable person, but he appeared to give the test a subjective element.

30 *Lange v Atkinson* [1997] 2 NZLR 22 (HC); *Lange v Atkinson* [1998] 3 NZLR 424 (CA); *Lange v Atkinson* [2000] 1 NZLR 257 (PC); *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

31 *P v D* [2000] 2 NZLR 591 (HC).

32 *P v D* [2000] 2 NZLR 591 (HC). The Judge did say that he took account of s 14, but took the analysis no further. In respect of the remedy the Judge accepted that the principle of freedom of information was an important principle, but added there would be no hardship if the order granted the defendants leave to apply for its revocation or amendment if there was a significant change of circumstances. The order issued, but the defendants must give the plaintiff seven days’ notice of any application to amend or revoke the order.

33 P had advised he or she would be “devastated” and would no longer work in his or her profession if the information was to be published.

P v D was followed two years later in the District Court when Judge Abbott awarded damages to a plaintiff who successfully argued that her privacy had been invaded.³⁴ The case is sometimes overlooked when development of the new tort is discussed, and yet in this case the Judge not only looked carefully at the interest the new tort was designed to protect, but also had some useful comments to make on the ambit of the tort itself. In particular the Judge recognised that the fourth factor from *P v D* was a defence to the tort, not an element of the cause of action itself, and similarly he noted that consent must also be a defence. In discussing this he was careful to give due weight to the importance of freedom of expression. Yet his other comments are more valuable. His conclusion that identification of the plaintiff was not necessary for the success of the action was controversial, yet his reasoning is impeccable. He noted that the interests the tort protects relate to the intrusion-free zone of personality and family, and the intrusion-free zone of self, and not to issues of perception and identification by those who see the publication.³⁵ Hence privacy is violated once the zone is breached and publication occurs. Whether there is identification, and its extent is a factor in the assessment of damages.

A combination of these last two judgments seemed to consolidate the tort, but the issue was thrown into doubt when, in 2003, in *Hosking v Runting* another High Court judge indicated that in his opinion if an individual's privacy was to be protected the better way was to follow the English approach and expand the action for breach of confidence.³⁶ The case went to the Court of Appeal.³⁷

4.3 *Hosking v Runting* – the public disclosure/private facts form of the tort

Although three members of the Court confirmed that New Zealand had a cause of action in invasion of privacy, they all agreed that the facts of this case did not fall within it. There was an opportunity for observations about some of the problems identified in the earlier cases, although these comments are, strictly speaking, obiter. The majority comprised a joint judgment delivered by Blanchard and Gault JJ, which has set the tone for subsequent decisions, while Tipping J delivered a separate judgment confirming the existence of the tort, but his formulation of it was rather more sympathetic to privacy concerns. There were, however, two strong dissenting voices, Keith and Anderson JJ, who were concerned with the impact of the tort on freedom of expression. Given that the Supreme Court has yet to definitively confirm the tort, and when it has been discussed some of the comments have been ambiguous, the voices of the minority cannot be ignored.³⁸

34 *L v G* [2002] NZAR 495 (DC).

35 *L v G* [2002] NZAR 495 (DC) at 246.

36 *Hosking v Runting* [2003] 3 NZLR 385 (HC).

37 *Hosking v Runting* [2005] 1 NZLR 1 (CA). Gault P, and Blanchard and Tipping JJ formed the majority, while Keith and Anderson JJ formed the minority.

38 See *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277 at [144] per Anderson J. Anderson J was one of the dissenting judges in *Hosking v Runting* [2005] 1 NZLR 1 (CA). Elias CJ also expressed some reservations but these were about the elements of the tort rather than the tort itself, see [23] and [25]. Her Honour's misgivings can also be seen in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [40].

4.3 HOSKING V RUNTING – THE PUBLIC DISCLOSURE/PRIVATE FACTS FORM OF THE ...

The judges all recognised the growing importance of privacy in the modern world with its increasingly intrusive technology, and the appetite of both governments and the private sector for intruding into the lives of private citizens. The concept itself is very wide, so it was important to identify the interest protected by the common law tort. Unfortunately this received almost no consideration in the joint judgment, possibly reflecting the difficulties faced by those who have attempted to define privacy. It did receive more attention from Tipping J, who, like Jefferies J in *Tucker*, identified the right to be let alone as an interest that the tort protects.³⁹ He went further and acknowledged human dignity as a rationale for protecting privacy. It was, he said, “the essence of the dignity and personal autonomy and well-being of all human beings that some aspects of their lives should be able to remain private if they so wish.”⁴⁰

The minority also acknowledged that privacy was important, but considered that the central role of the right to freedom of expression in our society as exemplified by s 14 of the NZBoRA was paramount. Keith J referred to the ambiguities and uncertainties surrounding the idea of privacy, and concluded there was no established need for the tort, as privacy was sufficiently protected by other means.⁴¹ Anderson J acknowledged the importance of privacy as a natural human desire, but considered that the tort itself had “gained impetus from semantic imprecision and questionable analysis of the relationship between rights and values.”⁴² In his opinion the residue of concepts with which the privacy cases were concerned was simply an aspect of a “value”. The cases were therefore about whether an affirmed right was to be limited by a particular manifestation of a value.⁴³ The argument gives little weight to the importance attached to privacy in various international instruments, and lacks the depth of analysis that might have been expected given the importance of the case.

The Court had been asked to follow the extended breach of confidence approach adopted by the House of Lords,⁴⁴ but the majority rejected the English approach primarily because they thought it conceptually unsound.⁴⁵ That is, if the English approach were to be adopted in New Zealand, then the requirement of a confidential relationship would need to change and this would lead to confusion in the trade secrets and employment fields. Privacy should be protected and, although there was legislation already in place that recognised the importance of protecting it, this was not comprehensive, and did not preclude the incremental development of the common law tort.

In deciding that there was a tort of invasion of privacy for the public disclosure of private facts, the joint judgment considered there were two fundamental requirements for a successful claim for interference with privacy:⁴⁶

39 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [238].

40 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [239].

41 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [185]-[287].

42 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [263].

43 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [266]. Contrast Anderson J's brief comments with the extensive analysis of Thomas J in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [211]-[266].

44 See discussion by Stephen Penk, Chapter 5 (Common Law Privacy Protection in Other Jurisdictions).

45 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [48].

46 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [117].

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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.

Tipping J agreed with the first of these, but would have slightly modified the second so that what was needed was a substantial level of offence rather than the high level stipulated by the joint judgment.

Although their Honours acknowledged the influence Prosser had on United States Privacy law, and both directly and indirectly on New Zealand law, the formulation of the requirements of the tort does not cover quite the same ground as the Prosser elements. This can probably be attributed to the fact that both Prosser and the United States Restatement of Torts (Second) (1977) refer to four different forms of the tort, and so far only two of these have been recognised in New Zealand. Our Bill of Rights is not entrenched and it was, perhaps, inevitable that when the public disclosure/private facts form of the tort was recognised here it would be wider than its parent form from the United States.

In analysing United States law, their Honours drew attention to the way freedom of expression in the First Amendment to the United States Constitution had been used to trump privacy law, and defeat a plaintiff's legitimate claim.⁴⁷ They were concerned that it would be pointless to formulate a cause of action with one hand and take it away from potential claimants with the other. Once the privacy tort had been recognised, freedom of expression had to be accommodated, but not such as to nullify the tort. The Court chose to do this, first, by utilising the defence of public interest as foreshadowed by Abbott J, and second, by confirming that the main remedy for the tort was that of damages, not an injunction. Their Honours' further observation that the cause of action would evolve through future decisions as courts assessed the nature and impact of particular circumstances has proved correct.

4.3.1 Elaboration and consolidation

Of the cases that followed, two in particular have illustrated the close relationship between the new tort and the breach of confidence action. *Rogers v Television New Zealand*,⁴⁸ an unsatisfactory decision from a procedural viewpoint, should never have been argued in invasion of privacy at all. Given the nature of the material that Mr Rogers sought to prevent being published, a videotaped reconstruction of murder made as part of a police investigation but ruled inadmissible at trial, if there was a cause of action, it was breach of confidence, and not on the part of TVNZ but of the police. *Brown v Attorney-General*⁴⁹ was a difficult case where both invasion of privacy and breach of confidence were argued. Although the Judge concentrated on invasion of privacy, given the circumstances, the better cause of action may well have been breach of confidence.

⁴⁷ See for example *Florida Star v BIF* 491 US 524 (1989) where the name of a rape victim had been mistakenly left in the police press room and subsequently published. See also E Paton-Simpson "Private Circles and Public Squares: Invasion of Privacy by the Publication of 'Private Facts'" (1998) 61 MLR 318.

⁴⁸ *Rogers v Television New Zealand Ltd* [2007] 1 NZLR 156 (CA); *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277. See particularly comments of the Chief Justice at [29]-[33].

*Andrews v Television New Zealand Ltd*⁵⁰ was appropriately an action for invasion of privacy, but although argued as the public disclosure/private fact form of the tort, it might have been better addressed as the intrusion form of the tort. The media intentionally intruded upon and broadcast the intimate conversation between husband and wife during the aftermath of a road accident. In the same way, as Thomas J recognised, the behaviour of the protestor in *Brooker v Police*⁵¹ constituted an intrusion into the privacy of the home, and would seem to fulfil the requirements of the intrusion form of the tort.

4.3.2 Existence of facts in respect of which there is a reasonable expectation of privacy

This limb of the tort is not without its difficulties. It is not clear why their Honours preferred this formulation over the simpler Prosser and Restatement form of the tort that required private facts. It seems to me that “facts in respect of which there is a reasonable expectation of privacy” has the potential to be much wider than “private facts”.⁵² Indeed, two members of a differently constituted Court of Appeal went as far as saying that while inherently private facts would ordinarily attract a reasonable expectation of privacy so would facts that did not have an inherent quality of privacy about them.⁵³ These could include not only details of home and family life and the existence and nature of family conflict,⁵⁴ but photographs and details of actions and demeanour.⁵⁵ Moreover as Tipping J recognised, it is simply not possible to disentangle the two limbs of the *Hosking* test as the second of these is implicit in the first.⁵⁶ His preference was to reverse the emphasis, and ask whether the plaintiff was able to show a reasonable expectation of privacy in respect of the information that the defendant had published, or wished to publish.⁵⁷ From whichever perspective the question is approached, and in my opinion Tipping J’s approach is the better, the surrounding circumstances will always be relevant, including the nature of the information, the circumstances in which the defendant came into possession of it, and also the manner of its proposed release. As Toogood J accepted the principal of a high profile private school could have no reasonable expectation of privacy with regard to an allegation that his past conduct was being investigated by the police.⁵⁸

49 *Brown v Attorney-General* [2006] NZAR 552 (DC). The case concerned a flyer with the name, address and photograph of a convicted paedophile, distributed by the police in a neighbourhood where there were a number of children. The police had obtained the photograph with consent, but Brown had not known the purpose for which it was taken.

50 *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220 (HC).

51 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91. See also Stephen Penk’s discussion in Chapter 15 (Future Common Law Directions and Issues).

52 John Burrows also makes this point. See J Burrows “Invasion of Privacy – Hosking and Beyond” [2006] NZ Law Review 389 at 392-394.

53 *Rogers v Television New Zealand Ltd* [2007] 1 NZLR 156 (CA) at [59] per O’Regan and Panckhurst JJ.

54 Katz J was prepared to accept for present purposes that this would be the case in *Chatwin v APN News and Media Ltd* [2014] NZHC 11 at [23].

55 Such as that in a videotape. *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277 at [102] per McGrath J.

56 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [256].

57 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [249].

58 *Clague v APN News and Media Ltd* [2012] NZHC 2898; [2013] NZAR 99 at [37].

Having formulated the requirement in this way the *Hosking* joint judgment then tended to use the term “private facts” as being synonymous with the above formulation as, having set out the two limbs of the tort, their Honours then discussed the difficulty of identifying what it is that makes a private fact.⁵⁹ The approach of looking to see if there is a private fact was subsequently criticised as unnecessarily subdividing this limb of the tort into two parts: what is a private fact, and, if there is one, whether it is of a character that gives rise to a reasonable expectation of privacy.⁶⁰ However, given the specific reference to private facts in the second limb of the tort, it was inevitable that this approach would be adopted. In respect of this the reference in the *Hosking* joint judgment to private facts being “those that may be known to some people, but not the world at large” seems too wide to invoke the tort.⁶¹ Only a certain number of people may know I like milk with my coffee, but that is hardly a private fact. It seems to me that there must be some quality about the fact or information that sets it apart as “private”, and that only a certain number of people know of it is not enough.

At what time is the reasonable expectation of privacy to be assessed? In *Tucker* the question was not addressed, but the tenor of the decision suggests that the appropriate time is the time of publication. This was the test applied in *Andrews v Television New Zealand Ltd*.⁶² The issue was brought more sharply into focus in *Rogers v Television New Zealand*⁶³ when the Chief Justice said that this was an issue that remained open, and which was important in the case before her. In *Rogers* the plaintiff sought to prevent publication of a video-taped confession to murder, later ruled inadmissible at his trial, on the basis that it had been made in such a substantial breach of his rights that any use in the trial would be unprincipled.⁶⁴ Two members of the Court of Appeal thought the proper time for assessment was the time when the tort was committed by publication.⁶⁵ The words of three Supreme Court judges, however, suggest that the time at which to judge the appropriate expectation of privacy might be the time the video was made.⁶⁶ In my opinion the Court of Appeal judges were correct. The gist of this action is publicity; more specifically, publicity given to information in respect of which there is a reasonable expectation of privacy. Hence the point at which there is publicity must be the appropriate time to assess any expectation of privacy. This does not necessarily mean that the result in any one case will be different: the circumstances surrounding the publication, including both the nature of the information and how it came into existence,

59 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [119].

60 See the discussion of the High Court in *Rogers v Television New Zealand Ltd* (2005) 22 CRNZ 668 (HC) which discussed private facts at [40]-[44] and reasonable expectation of privacy [45]-[53]. This approach was criticised by O'Regan and Panckhurst JJ in the Court of Appeal at [41].

61 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [119].

62 See Natalya King's discussion in Chapter 13 (Privacy and Reality Television: Issues for Producers and Involuntary Participants).

63 *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277 at [26].

64 *R v Rogers* [2006] 2 NZLR 156 (CA) at [73].

65 *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277 at [52]. This is consistent with the view taken in the Supreme Court of Canada in *Vickery v Nova Scotia Supreme Court (Prothonotary)* [1991] SCR 671 and the House of Lords in *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 (QB).

66 *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277 at [48] per Blanchard J, and [104]-[105] per McGrath J but see at [63] per Tipping J who thought there was no expectation of privacy whichever date was taken.

are factors that must be considered. In *Andrews*, for example, the couple had a reasonable expectation of privacy both at the time the video of the accident was made, and at the time of its publication in the later television documentary. By contrast the video-taped confession, the subject of *Rogers*, came into existence in the expectation that it would be published, and the passage of time might not be sufficient to alter that expectation.

This limb of the tort has both a subjective and an objective component. The dimension of reasonableness, a familiar concept in many fields of law, controls the subjective expectation of the individual, by introducing an objective element into the test.⁶⁷ Not only the plaintiff, but also an objective observer, would reasonably expect that a photograph of a convicted paedophile, taken ostensibly with consent for “identification purposes”, would be used only for legitimate police business, and not for neighbourhood publication in a leaflet drop.⁶⁸

(1) *Reasonable expectation of privacy in information once public*

The surrounding circumstances also explain how there can be a reasonable expectation of privacy in facts that were once public. The suggestion was first mooted in *Tucker*, following American jurisprudence,⁶⁹ that a public fact could become private over passage of time. The reverse can also be true.⁷⁰ In *Tucker* the case first came before Jefferies J as an urgent application for an interim injunction on 20 October 1986. The plaintiff had a series of convictions that began in 1977 with the last conviction being 1982.⁷¹ The Judge thought that the plaintiff had a right to privacy in the circumstances: the evidence was that publication could be lethal. Contrast this with *Brown v Attorney-General*,⁷² which throws further light on this proposition. Brown was a convicted paedophile who had been released on parole. The police were sufficiently concerned about him that they distributed a “Convicted Paedophile” leaflet in the area where he was living. It featured a photograph and description, details of his past criminal conviction and sentence, the length of time spent in prison and the street where he was living. To what extent was there a reasonable expectation of privacy in respect of conviction for a particular crime, and the sentence imposed? The Judge agreed with the earlier dicta that although these were initially public facts they would not remain so forever; passage of time and changed circumstances can change expectations. He considered that a youthful indiscretion where the offender had lived blemish free thereafter would become information in respect of which there was a reasonable expectation of privacy, subject only to the public concern defence. Here, however, there was no possibility of a reasonable expectation of privacy in respect of the conviction and sentence, where the sentence had not expired by the time the flyer was delivered, and the offender was still on parole.

67 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [250] per Tipping J who did not anticipate that this would cause the courts any more difficulty than its use in the more familiar concept of reasonable care.

68 *Brown v Attorney-General* [2006] NZAR 552 (DC).

69 See *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 (HC) where the Judge cites the leading American case as referred to in Heuston R F V and Chambers R S *Salmond and Heuston on the Law of Torts* (18th ed, Sweet and Maxwell, London, 1981).

70 This was discussed in the Court of Appeal in *Rogers v Television New Zealand Ltd* [2007] 1 NZLR 156 (CA) at [54] per O’Regan and Panckhurst JJ.

71 *Tucker v News Media Ownership Ltd* HC Wellington CP477/86, 22 October 1986 at 2.

72 *Brown v Attorney-General* [2006] NZAR 552 (DC).

Although only four years had passed since the most recent conviction in *Tucker* this does not mean that in every case a four-year-old conviction will be one in which there is a reasonable expectation of privacy. Instead all matters surrounding the conviction will be considered, and in *Tucker's* case the circumstances as provided by the medical evidence were such that publication could lead to serious injury or death. If, for example, the conviction was for a serious offence, such as one not covered by the Criminal Records (Clean Slate) Act 2004, it is unlikely that a court will find an expectation of privacy in that conviction until some considerable time has passed. For those offences covered by the legislation the seven-year time period enacted there may provide a useful guideline for determining when a reasonable expectation of privacy arises. Where the conviction is for murder it seems unlikely that there will ever be an expectation of privacy.

(2) *Privacy in public places*

To what extent can there be a reasonable expectation of privacy in a public place? In *Bradley v Wingnut Films Ltd* the photograph was of a tombstone in a public cemetery. The Court thought “there could scarcely be anything less private than a tombstone in a public cemetery.”⁷³ The same could be said of the photographs the Hoskings did not want published. These were photographs taken of Mrs Hosking and her two-year-old twin daughters as she pushed them in a stroller along a crowded street. They were shown engaging in “perfectly ordinary activities such as one would see every day in a street in a suburban shopping centre.”⁷⁴ It is difficult to see how any expectation of privacy could arise in the circumstances, and it is unsurprising that both in the High Court and the Court of Appeal the judges rejected the claim for privacy.⁷⁵

This does not mean that an attempt to publicise every photograph taken in a public street will be successful. Elias CJ in the Supreme Court has stated that in principle there is no reason why an activity carried out in a public space should not attract a reasonable expectation of privacy.⁷⁶ This would be especially so where someone undergoes a traumatic event even though the event took place in public.⁷⁷ The *Hosking* joint judgment referred to *Peck v United Kingdom* where the European Court awarded damages for the violation of the right to respect for private life in art 8 of the European Convention on Human Rights even though the video footage published of the plaintiff carrying a knife after attempting suicide was taken in a public street.⁷⁸ This was in the context of a discussion of the breach of confidence action, but nothing in the joint judgment suggests that the Court disagreed with the decision in *Peck*.⁷⁹ Similarly a reasonable expectation of

73 *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 (HC) at 416.

74 *Hosking v Runtig* [2003] 3 NZLR 385 (HC) at [136].

75 What is more surprising is that the English Court of Appeal were able to find that there could be an expectation of privacy in the very similar circumstance of *Murray v Express Newspapers Plc* [2008] EWCA Civ 446, [2009] Ch 481.

76 *Hamed v R* [2011] NZSC 101; [2012] 2 NZLR 305 at [12]. Her Honour referred to private conversations and conduct.

77 For a more detailed discussion of this see N Moreham “*Hosking v Runtig* and the protection of privacy in public places” [2006] NZLJ 265.

78 *Peck v United Kingdom* (2003) 36 EHRR 41. Still photographs taken from the footage were published in newspapers and extracts broadcast on television without his consent.

79 See also the comments of Anderson J (at [271]) who, though in dissent, drew a distinction between the circumstances of the photographs of the twins and the situation in *Peck v United Kingdom* (2003) 36 EHRR 41.

privacy can attach where photographs are taken on a public street outside a drug rehabilitation clinic.⁸⁰

Consider the circumstances of *Andrews v Television New Zealand Ltd*.⁸¹ An accident occurred on a public motorway, and the vehicle came to rest in a nearby field. Members of the public came to assist those injured. Fire fighters accompanied by a camera crew were also at the scene. The plaintiffs testified that they had no complaint about the fact that what was said could be heard by those in attendance at the accident. Here, however the camera crew filmed continuously for about an hour, and the screened footage showed communications of an intimate and personal nature. This served to distinguish the privacy expectations of these plaintiffs from those where any images portrayed were part of general news footage. In these circumstances Allan J considered that the plaintiffs were entitled to expect that their intimate conversation would not go beyond those at the scene. This result must be correct. The defendant's intention was to illustrate the varied work undertaken by fire fighters in society. Part of that work is attendance at road accidents and so it is inevitable that scenes of a road accident will be shown, and will be an essential part of any documentary. These can still be shown if those involved in making the documentary get the consent of those involved, or where that is not possible pixilate in such a way that identification is not possible.

(3) *In summary*

The Court in its joint judgment may have chosen this formulation to avoid the difficulty of defining a private fact, but if so, as subsequent cases have shown, it was not successful: the debate on private facts has continued. In relation to this, it seems to me that Tipping J's reference to "information and material" rather than "facts" better captures the subject matter of a privacy complaint. The formulation seems wider than the American tort, where private facts engaging the tort are focused on private life,⁸² and hence tend to be rather more closely linked to the qualifiers of family and private life in the international conventions.⁸³ It could extend to cover any facts about me that I do not wish to see published. Indeed, Burrows has even suggested that privacy could now mean simply non-publication.⁸⁴

Ultimately the question must be whether a reasonable person in the position of the plaintiff would have a reasonable expectation of privacy in respect of the specific information or material. This still does not deal with the issue of the defendant's intent. That is, to what extent, if any, the defendant should know that the plaintiff would have a reasonable expectation of privacy in the information, or whether the intent of the defendant goes to damages. I will discuss this further when I consider future directions of the tort.

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

81 *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220 (HC).

82 See discussion in R Post "The Social Foundations of Privacy: Community and Self in the Common Law Tort" (1989) 77 Cal L Rev 957 at 978-987.

83 The restatement in fact refers to "the private life of another".

84 J Burrows "The Tort of Privacy post-Hosking and post-Andrews", (paper delivered at LexisNexis Media Law Conference, Wellington, 7 March 2007) at 3.

4.3.3 Publicity given to those private facts that would be considered highly offensive to a reasonable person

As already observed it is the dissemination of information that the plaintiff wishes to control; this tort regulates publication and publicity. But what exactly is required for there to be the necessary publicity? In a defamation action a defamatory statement must be published, that is communicated to someone other than the plaintiff.⁸⁵ Although these two torts are closely related the use of the term “publicity” in the *Hosking* test suggests that more will be needed than publication to one or two persons, but how much more?

Most of the actions to date have been brought against the news media. Where an action is brought against the media there is no question that the requirement for publicity is met: information in respect of which there is a reasonable expectation of privacy has been widely disseminated. This will be so even where the publication does not involve the national media. In *L v G*,⁸⁶ decided before the *Hosking* test was established, the disclosure was not to the general public but to those members of the public over the age of 18 years who purchased the two issues of the magazine, but this publication was sufficient. In *Brown v Attorney-General* the leaflets were distributed across the plaintiff's community, and this met the test. It becomes more difficult if publication is to only one or two persons. It seems to me that the emphasis on publicity suggests that disclosure must be to a number of people; disclosure to one person may be insufficient.

There is support for this in the *Hosking* joint judgment where their Honours stated that the publicity, determined objectively, by reference to its extent and nature, should be highly offensive to the reasonable person. Their Honours added that “highly offensive to the reasonable person” related to the publicity, and was not part of the test for whether the information was private. By contrast, Tipping J explicitly recognised that this limb is interlinked to the first.⁸⁷ Although in general agreement with the joint judgment, he thought that the question of any offensiveness should be controlled within the need for there to be a reasonable expectation of privacy in respect of the information in question. That is, there would be a reasonable expectation of privacy if publication would cause a high degree of offence, and hence harm, to the reasonable person. This does seem to be the better argument, especially as it is the publicity, or potential publicity, that concerns the plaintiff.

(1) *Level of offensiveness*

First, the publicity generated must be offensive, and this explains why publications that, though private but not really sensitive, although this may be a matter for debate, will not give rise to legal liability. The concern of the tort is with publicity that is humiliating and distressful, and causes harm to the individual involved. While the *Hosking* joint judgment considered that what was needed was publicity that caused a high level of offence, Tipping J explained that he could envisage circumstances where that might be unduly restrictive. Instead he preferred a more flexible approach, and thought that this could be achieved if the publicity were to cause a substantial level of offence. This follows the

85 *Pullman v Hill* [1891] 1 QB 524.

86 *L v G* [2002] NZAR 495 (DC).

87 *Hosking v Runtig* [2005] 1 NZLR 1 (CA) at [256].

approach adopted by the House of Lords⁸⁸ and finds some support in academic argument.⁸⁹

Subsequent cases have required the need for a high level of offence, and in *Andrews v Television New Zealand Ltd* Allan J accepted the argument of counsel that the burden faced by the plaintiff was a high one.⁹⁰ While he accepted that there was a reasonable expectation of privacy in the exchange of communications between husband and wife at the scene of a road accident he did not find the publication offensive, as neither plaintiff were able to point to anything specific that was offensive or that was humiliating or embarrassing. The programme had treated them sympathetically, and moreover had not disclosed the drink driving in which they had been involved. It appeared that the real concern of the plaintiffs was not the intrusion on their privacy, but chagrin and annoyance because not only had they not been told they were being filmed, but in addition were given no prior information of the broadcast. As I suggested earlier this case was more properly intrusion into solitude or seclusion where publication is not the gist of the tort. Similarly in *Clague v APN News and Media Ltd* Toogood J considered that publicity given to a police investigation into a single assault some years ago would not be highly offensive to a reasonable person of ordinary sensitivities.⁹¹ It would undoubtedly be embarrassing to the plaintiff, and distressing to him and members of his family, but the disclosure could not be described as offensive or objectionable.

It has been argued that the approach of Tipping J is correct and that only a substantial level of offence should be required.⁹² This seems to me to give undue weight to privacy at the expense of freedom of expression, and while the defence of public concern partly accommodates freedom of expression I am not convinced that it is sufficient. Nicole Moreham has advanced a number of reasons why this should be so, including the dignitary interest that the tort protects, and the inconsistency with other dignitary torts. While it is certainly true that the tort protects a dignitary interest, freedom of expression is also seen as an inherent right that is rooted in human dignity and autonomy.⁹³ That being so the appropriate balance must be achieved between the two, particularly when only one of these is a right that can be found in the Bill of Rights Act. The same balancing with freedom of expression is not required with the other dignitary torts.

(2) *The objective reasonable person*

The mind that must be affected by the publicity is not that of the general reader, but of the reasonable person of ordinary sensibilities who stands in the shoes of the plaintiff. The test is whether an objective reasonable person placed in that position would consider the publicity highly offensive. The “fragile sensibility of the claimant cannot prevail.”⁹⁴ The objective reasonable person is well known to the common law, and when

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

89 N Moreham “Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort” in J Finn and S Todd (eds) *Law, Liberty, Legislation – Essays in Honour of John Burrows QC* (LexisNexis, Wellington, 2008) at 231.

90 *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220 (HC) at [49].

91 *Clague v APN News and Media Ltd* [2012] NZHC 2898; [2013] NZAR 99 at [38].

92 N Moreham “Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort” in J Finn and S Todd (eds) *Law, Liberty, Legislation – Essays in Honour of John Burrows QC* (LexisNexis, Wellington, 2008) at 244-246.

93 S J Heyman *Free Speech and Human Dignity* (Yale University Press, New Haven, 2008) at 37.

the court considers his or her position in most cases this does not cause a problem.⁹⁵ Difficulties arise when the plaintiff is not an ordinary person, as, for example, the convicted paedophile of *Brown v Attorney-General*. Spear J observed the man in the street could well consider that publication of private details, including the residence, and the identity including the photograph, of a convicted paedophile was not inherently offensive. Nonetheless he was just able to decide that an objective reasonable person standing in the shoes of the plaintiff paedophile would be highly offended by the publication. Similar problems arise where there is a confession of murder. To speak of the ordinary reasonable killer or paedophile is a contradiction in terms. Nonetheless a yardstick is needed, and in the majority of cases this particular yardstick causes no difficulty at all, and even where its application seems incongruous the cases show it can still be made to work.

4.3.4 Legitimate public concern as a defence

A matter that is of legitimate concern to the public can provide a defence to the action. The burden of proof lies on the defendant to provide evidence of the requisite public concern.⁹⁶ Although public interest has been the usual term used to describe this defence,⁹⁷ in *Hosking* the Court of Appeal chose to use the term “legitimate public concern” as better reflecting the intent of such a defence. This term was deliberately used to distinguish between matters of general interest or curiosity⁹⁸ and those matters properly within the public interest. In contrast to matters of public concern, matters of general interest would not outweigh privacy concerns. Even where the publication itself is on a matter of public concern this may not be enough to justify an invasion of privacy. In practice this may not always be easy to predict. Television is a visual medium and matters that might attract a claim for privacy often make for better television viewing. In *Andrews* while it is true that the work of the fire fighters was a matter of public concern it is less clear why the intimate conversation between the couple became caught up in the defence; the work of the fire fighters was easily portrayed without disclosing the conversation, where the audience became a voyeur. The conversation certainly did not add anything significant to the story.⁹⁹

It seems clear that the greater the invasion of privacy, the greater the degree of public interest that will be required in order to succeed in the defence. The *Hosking* joint judgment gave the example of publicity involving serious injury or death as one that would require a very considerable level of legitimate public concern to establish the defence. When the invasion of privacy is less serious, the degree of legitimate public concern needed to mount the defence will similarly abate. This suggests that the original decision in *Tucker* to grant the injunction would still be good law.

94 *Rogers v Television New Zealand Ltd* [2007] 1 NZLR 156 (CA) at [67].

95 But, see Thomas J's discussion of the incongruity of the use of the test of the reasonable sexual abuse victim *W v AG* [1999] 2 NZLR 709 (CA) at [61].

96 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [129] per Gault P and Blanchard J and at [257] per Tipping J.

97 See for example its use in the breach of confidence action and discussion in *Attorney-General for United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (CA) at 176-177.

98 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [134].

99 Similarly, as the High Court observed it was unnecessary to play the confession in *Rogers* as all the details were already in the public domain.

The public disclosure/private fact form of the tort raises a number of other concerns that will be addressed only briefly.

4.3.5 Privacy and public figures

A number of the New Zealand cases have considered the privacy rights of the public figure. *Tucker* was the first to raise the issue of whether those who go to the public might have a lesser expectation of privacy. The Judge identified Mr Tucker as a “reluctant debutante” and the matter went little further, other than the Judge’s suggestion that an involuntary public figure might have a lesser right to privacy than the man or woman in the street. As the privacy tort developed further, the right of a politician to pursue an action in defamation where the subject matter of the defamatory comment concerned his or her attributes or qualities as a politician was sharply curtailed.¹⁰⁰ Statements about personal attributes or qualities could be widely disseminated so far as these related to the ability of the politician to perform his or her public office. This development served to confirm that those who are in the public eye might have a lesser expectation of privacy than those who are not, but some careful consideration needs to be given to what is meant by “public figure”. To date this has not received sufficient attention. In *P v D* the Judge identified P as a public figure, and although he did not pursue this in any detail, he did observe that, on the material before him, there was no basis for concern that P’s past or present mental health rendered P unfit to carry out his occupation to an appropriate standard.¹⁰¹ The inference to be drawn from this is that had he been able to do so P would not have been given the injunction to prevent publication. In *Chatwin* Ms Chatwin was referred to as a “celebrity psychologist” with a lesser expectation of privacy than other people,¹⁰² but again with no elaboration.

Some assistance can be derived from *Hosking* but detailed analysis was lacking. Mr Hosking was identified as a public figure, although the case was not about him, but about the publication of photographs of his children. The joint judgment discussed whether public figures should have a lower expectation of privacy in relation to their private lives, and the extent to which their public figure status affected the privacy expectations of their families. Their Honours accepted that the right to privacy is not automatically lost simply because the plaintiff is a public figure, although his or her expectation of privacy in relation to some areas of life will be reduced as public status increases. The expectation of privacy of one who is an involuntary public figure would also be diminished but not to the same extent as those who voluntarily put themselves in the public arena. Secondly, their Honours referred to United States law that suggests that the families of public figures also have a lowered expectation of privacy because legitimate public interest in the public figure is not necessarily limited to the public figure alone. In this respect their Honours were of the opinion that New Zealand might be expected to be more sensitive to the separate interest of children of celebrities than the United States cases suggested. It was, however, a matter of human nature that public interest in public figures extended to interest in the lives of their families. A reduced expectation of at least some aspect of the private life of the family followed.

100 See *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

101 *P v D* [2000] 2 NZLR 591 (HC) at [41].

102 *Chatwin v APN News and Media Ltd* [2014] NZHC 11 at [22].

However, the private interests of the family of a celebrity are quite separate from those of the celebrity and should be treated as such. This is especially so when the celebrity has been concerned to keep his or her family out of the public arena. It is even more so when young children are involved. Their interests must be considered separately. Although the joint judgment noted that the court should not lose sight of the special position of children, and that their vulnerability must be accorded real weight, the issue was addressed only fleetingly. Tipping J, for example, refers to the privacy interests of the children but then returns to the expectations of the Hoskings in respect of their children.¹⁰³ Ultimately the majority thought that the photographs of the children that the media wished to publish were innocuous: there could be no reasonable expectation of privacy in them, and nor would publication be highly offensive to a reasonable person. If there had been evidence that publication of the photographs could put the children in danger the result would have been different.

4.3.6 Identification

This issue is not straightforward and goes to the heart of the interest the tort is designed to protect. Identification is a requirement of the tort in the American cases, but in *L v G* Judge Abbott decided differently, relying on the value that the community placed on privacy and the rights it protected.¹⁰⁴ This does not relate so much to issues of perception and identification by others, but rather to the loss of the personal shield of privacy by the individual concerned. Like other theorists he saw privacy as a value that reinforced the need for an individual to have an intrusion-free zone of personality and family, with the result that there is hurt to the victim when the zone is violated by publication whether or not the plaintiff can be identified to those who see the publication.¹⁰⁵ He held identification was not necessary to complete the tort, but that lack of identification could be reflected in damages.¹⁰⁶ Allan J in *Andrews* was rather more circumspect. In most cases he thought identification was necessary either directly or by implication, but he did leave room for a plaintiff to succeed even though he or she was not identified.

Andrews raised another issue: if identification is an element of the tort how is it to be judged? The Judge's discussion of this not only suggested that there are degrees of identification but also linked identification with the need for the publication to be offensive. If, for example, only close friends and family who already knew of the incident could identify the plaintiff there is no invasion of privacy as any publication will not be offensive. In *Andrews* this left two groups: members of the public who did not know the plaintiff, and those who knew the plaintiff but did not know of the incident. The Judge, observing Mrs Andrews in the courtroom, considered that pixilation had been sufficient to prevent identification to the former, but it was not sufficient to prevent identification to the latter group. His Honour also suggested that in respect of the former, identification to that group would be of little moment. This test, calling for the subjective assessment of the trial judge is not satisfactory.

103 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [260].

104 *L v G* [2002] NZAR 495 (DC).

105 See for example N Moreham "Privacy in the Common Law: A Doctrinal and Theoretical Analysis" (2005) 121 LQR 628.

106 *L v G* [2002] NZAR 495 (DC) at 247.

There is some force in the argument that, in weighing up the competing interests at stake, identification should be the norm. The loss of the personal shield of privacy must at times give way to other interests, such as freedom of expression. However, it seems to me that as the tort develops there is room for the exceptional case where the impact of any invasion of privacy on the plaintiff is such that identification is unnecessary. Judge Abbott discussed the example of an accident victim so badly wounded that that he or she was not identifiable from a photograph.¹⁰⁷ I suggest that not only would there be a reasonable expectation of privacy in the circumstances, but that a reasonable person standing in the shoes of the accident victim would find the publicity offensive.

4.3.7 Intention

It is not yet clear whether an element of intention is required, and if so how that might be expressed. Does, for example, the defendant need to intend the invasion of privacy, such as the taking of the photograph, or is the intention required directed to the publicity? This form of the tort has a close relationship with the tort of defamation, where an intention to defame is not necessary. As with the tort of defamation publicity is essential. Given this relationship, if intention is required the better argument would seem to be that the plaintiff must show that the defendant intends the publication.

4.3.8 Plaintiff culpability

To what extent should the blameworthiness of the plaintiff be a factor in deciding if there has been an invasion of privacy? In *Andrews* the plaintiffs were intoxicated and it would seem that this contributed to the accident that became the subject of the documentary. In *Brown* the plaintiff was a convicted paedophile out on parole, and in *Rogers* the focus of the documentary was his confession to murder, although in these two cases the more appropriate common law action might have been breach of confidence rather than privacy. There are two possibilities: either culpability is such that there is no expectation of privacy in the facts in question or that expectation is diminished, or the public interest defence can apply. I would suggest that the former is the more principled approach.¹⁰⁸ If the conduct in question is unlawful, it is hard to justify an expectation of privacy in the information or material in question.

4.4 The intrusion into seclusion form of the tort

As predicted in an earlier paper an intrusion form of the tort has now been recognised,¹⁰⁹ that complements the public disclosure/private fact form of the tort. The Law Commission had recommended that any recognition and development of a tort of intrusion into solitude or seclusion and private affairs should be left to the common law.¹¹⁰ In reviewing the common law tort of invasion of privacy the Law Commission considered that there was reason for concern in New Zealand about the growth of

107 *L v G* [2002] NZAR 495 (DC).

108 But see U Cheer "The Future of Privacy: Recent Legal Developments in New Zealand" (2007) 13 *Canta LR* 169 at 183-185.

109 S Penk and R Tobin "The New Zealand tort of invasion of privacy: Future directions" (2011) 19 *TLJ* 191.

110 Law Commission *Invasion of Privacy: Penalties and Remedies, Review of the Law of Privacy, Stage 3* (NZLC R113, 2010) at [7.17].

intrusive technology and the remedies people should have against its harmful use.¹¹¹ The facts of *C v Holland* are a graphic illustration of this.¹¹²

Ms C was an occupant of a house owned by her boyfriend and Mr Holland. Mr Holland used a hand-held digital camera and took two video clips of Ms C from the roof cavity above the bathroom within the ceiling area while she was showering. They showed Ms C both partially dressed and completely naked, tending to her bikini line, entering the shower and later dressing before leaving the bathroom. There was no evidence that the clips had been shown to anyone. However, she discovered the existence of the videos and was understandably very upset by them. The defendant was charged under s 216H of the Crimes Act 1961, and pleaded guilty. The defendant was ordered to pay \$1,000 for emotional harm and then discharged without penalty. Ms C sought damages for a breach of her right to privacy.

As there had been no publication Whata J thought it was appropriate that the common law should recognise, in addition to the *Hosking* privacy tort, an intrusion upon seclusion privacy tort equivalent to the North American tort of intrusion into seclusion. His Honour observed that privacy as a normative value could not seriously be doubted, and noted that it was a feature of the common law that it had the capacity to adapt to vindicate rights in light of a changing social context. In respect of the latter, privacy concerns were increasing with technological advances, including the home computer. Hence, the Judge considered the affirmation of the tort was commensurate with the value already placed on privacy and the protection of personal autonomy. He also thought that the intrusion tort could be seen as an extension of, or an adjunct to, the *Hosking* tort. Freedom from intrusion into personal affairs was already recognised as a value in New Zealand¹¹³ and was amenable to familiar, justified limitations, including the defence of legitimate public concern.

The Judge thought that in order to establish a claim the plaintiff must prove:¹¹⁴

- “(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.”

The elements of the tort emphasise that what is required is an intentional act; negligence will not suffice. The intrusion must be into matters that most directly infringe on personal autonomy. The last two elements reflect those of the *Hosking* tort and are consonant with existing privacy law in this country. The elements also reflect the intrusion aspect of the privacy principles developed by the Broadcasting Standards Authority.¹¹⁵

111 Law Commission *Invasion of Privacy: Penalties and Remedies, Review of the Law of Privacy, Stage 3* (NZLC R113, 2010) at ch 7.

112 *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672. See T McKenzie “The New Intrusion Tort: The News Media Exposed?” (2014) 45 VUWLR 79.

113 See for example Privacy Principle 3 of the Broadcasting Standards Authority. This principle can be found at <www.bsa.govt>.

114 *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 at [94]. The case was cited with approval in *Slater v APN New Zealand Ltd* [2014] NZHC 2157.

As noted in *Faesenkloet v Jenkin*¹¹⁶ intrusion has been the subject of careful consideration in the criminal law in the context of unreasonable search and seizure. As the Judge said the highest expectation of privacy is in relation to person, particularly strip searches. In respect of a residential property there is likely to be some gradation; public areas will have a lesser expectation of privacy than the private areas of a house. That is, there will be a lesser expectation of privacy in the gardens, the garages and on farmland.¹¹⁷ *Faesenkloet v Jenkin* involved a dispute between two neighbours over the installation of a CCTV camera on a garage adjacent to the plaintiff's property. The camera did not film the plaintiff's house but did film part of the driveway that was on public land. This meant that those who were using the driveway and the land would be filmed. The Court considered that there was no reasonable expectation of privacy in part of a driveway some distance from a house and open to the public. The Court did observe that there might have been such an expectation if the area had been secluded, but this was not the case. The Court also considered that the objective reasonable person would not see this as a highly offensive intrusion.

4.5 Remedy

There are two possible remedies for an invasion of privacy: damages and an injunction. It is the latter that is often sought, and this raises obvious concerns. Not only does it impinge on freedom of expression, but as a tort, invasion of privacy is closely related to the tort of defamation. Interim injunctive relief is very rare in defamation cases.¹¹⁸ That there shall be no prior restraint of the media can be justified where, in a defamation action, it is argued that the publication is true. In defamation if the publication is true the plaintiff has a complete defence: true information can be published to the world at large. The real conundrum for the invasion of privacy tort is that, unlike the tort of defamation, the facts in respect of which the plaintiff is concerned are true, with the result that once publication has occurred, the damage is done, privacy is invaded, and cannot be reversed. Nonetheless in *Hosking* the majority were agreed that the main remedy for an invasion of privacy should be damages, although the judges did agree that an injunction could be awarded in an exceptional case. That is, freedom of speech should prevail at the interlocutory stage.¹¹⁹ In subsequent cases plaintiffs have still sought injunctions to prevent publication, but have generally been unsuccessful. In *Chatwin v APN News and Media Ltd*¹²⁰ for example the plaintiff was in the difficult position of not being able to tell the Court what facts the news media was going to reveal about the family discord and that being so an injunction was never a possibility. The Judge observed that it was a serious matter to restrain publication of an article by the media in any circumstances, but that this was particularly so where there was little knowledge of the proposed content.¹²¹ It does, however, seem to me to be more difficult to justify refusal of an injunction in the invasion of privacy tort, at an interim stage, when content is known. If the injunction is

115 Privacy Principle 3. See also discussion in *CanWest TVWorks Ltd v XY* [2008] NZAR 1.

116 *Faesenkloet v Jenkin* [2014] NZHC 1637.

117 *Faesenkloet v Jenkin* [2014] NZHC 1637 at [26].

118 See for example *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 (CA) and more recently *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129 (CA).

119 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [256] per Tipping J.

120 *Chatwin v APN News and Media Ltd* [2014] NZHC 11.

121 *Chatwin v APN News and Media Ltd* [2014] NZHC 11 at [29].

not granted, the damage is done before a full hearing of all relevant matters.¹²² One case where an interim injunction was awarded was *Slater v APN New Zealand Ltd*¹²³ where Fogerty J awarded an injunction against a computer hacker who not only gained access to the information held on the plaintiff's computer by guessing the password but also took copies of information stored on the plaintiff's personal computer, his emails and social media accounts. There was a serious argument to be tried that the hacker had committed a tort and the common law would grant such remedies as could practicably be imposed.¹²⁴

Would the plaintiff in *P v D* still have obtained his or her injunction under the *Hosking* criteria? I suspect that the answer is "yes". The information was health information about a psychiatric disorder, which is information in respect of which most people have an expectation of privacy. It is quintessentially private information that may be known to family members but not to the public at large. It is information over which most people would wish to retain control. Publication in the news media, even that which might seek to put the plaintiff in a favourable light, is still publicity that the reasonable person in the shoes of the plaintiff would view as highly offensive and objectionable. On the facts of the case there was no public interest in the information although as a matter of curiosity the public might have been interested in reading the details. The plaintiff had testified that he or she would be "devastated" if the information became public and that he or she would no longer remain in his or her occupation if this meant that the "most private and sensitive parts of [his or her] life" would be exposed to the media.¹²⁵ It seems to me that, given the importance our community places on medical information and on employment, this is one of the exceptional cases where an injunction would still be awarded.

4.6 Privacy and defamation

Defamation protects reputation: the assessment of you made by others in your community, or the social esteem in which you are held.¹²⁶ It involves the publication of false words that cause others to think less of you. The public disclosure/private fact form of the tort of invasion of privacy, on the other hand, involves the publication of true facts that cause humiliation and distress. Both torts encroach on freedom of expression and both torts protect aspects of human dignity. Each tort is conceptually different, and yet there are cases where the two torts overlap,¹²⁷ and when that happens the plaintiff must be able to pursue both causes of action. But where an action in privacy is a means of avoiding the defences to a defamation action the courts must be astute to prevent this. *Rogers*, for example, was an attempt by the plaintiff to protect his reputation

122 This argument was applied in *A v Fairfax New Zealand Ltd* HC Wellington CIV 2011-485-569, 28 March 2011.

123 *Slater v APN New Zealand Ltd* [2014] NZHC 2157.

124 *Slater v APN New Zealand Ltd* [2014] NZHC 2157 at [4].

125 *P v D* [2000] 2 NZLR 591 (HC) at [38].

126 See L McNamara *Reputation and Defamation* (Oxford University Press, Oxford, 2008) at 21.

127 See, for example, *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB). In this case there was an invasion of Max Mosley's privacy, but in addition the paper published false allegations that he was involved in a Nazi orgy. The original successful claim was for an invasion of privacy, in England breach of confidence, but Max Mosley later advised that he intended to pursue a claim in defamation as well.

by using the new privacy tort to prevent publication of damaging material about him – namely his confession to murder and its reconstruction.¹²⁸ The New Zealand courts have been careful to ensure that the tort of negligence is not used to evade a recognised defence to another cause of action,¹²⁹ and in the same way will need to make certain that invasion of privacy is not used to circumvent what is properly a defamation action.

4.7 Conclusion

The essence of the common law is that it is able to adapt to changing political, social and moral conditions; the evolution of the privacy tort is a unique illustration of this. It began as an expression of interest, that grew over succeeding years as judges tentatively, and then more definitely explored the requirements of the tort, and the implications of recognising a new form of protected interest. Finally, some twenty years later, came confirmation that the tort existed. The next phase of the tort as the two forms of it become embedded in the common law will involve defining its boundaries and ramifications, and determining its relationship with those earlier existing causes of action with which the law is more familiar.

¹²⁸ See also McGrath J in *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277 at [103].

¹²⁹ *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 (CA); *Balfour v Attorney-General* [1991] 1 NZLR 519 (CA); *South Pacific Manufacturing Co v NZ Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA); *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* [2002] 2 NZLR 289 (CA).