

# 11

## Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort

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### Introduction

The recent emergence of a breach of privacy tort in New Zealand has rightly received a good deal of attention. Cases such as *Hosking v Runtig*<sup>1</sup> and *Rogers v Television New Zealand*<sup>2</sup> raise difficult questions about why a privacy action might be desirable, what it should seek to protect and how far protection should extend. They have also introduced into New Zealand law the subtle and often unarticulated theoretical concepts which underpin the legal privacy concept: what is privacy, why is it important, and how should it be balanced against other interests? The aim of this chapter is to examine one of those theoretical questions — why is privacy important? — and to ask how the answer to it should inform the development of the privacy tort.

The chapter is divided into two sections. The first contains a purely theoretical analysis of why privacy is important, exploring in particular the relationship between privacy and dignity. It argues that although privacy facilitates many valuable ends, its importance lies principally in the fact that it is integrally connected to a person's fundamental entitlement to respect. The second section asks how recognition of that

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<sup>1</sup> *Hosking v Runtig* [2005] 1 NZLR 1 (CA).

<sup>2</sup> *Rogers v Television New Zealand* [2008] 2 NZLR 277.

## Law, Liberty, Legislation

relationship between privacy and dignity should inform the development of the New Zealand privacy tort. It argues that once it is accepted that privacy and dignity are closely related, the desirability of the second requirement of the *Hosking* test — that there be publicity which would be highly offensive to an objective reasonable person<sup>3</sup> — becomes questionable.

The aim of the chapter is twofold. It aims, first, to show that the highly offensive publicity test should not be part of the New Zealand breach of privacy action. However, it also has the broader objective of highlighting the need to confront head-on the difficult theoretical questions which underpin the privacy action. As the discussion of the highly offensiveness test hopes to demonstrate, Courts cannot develop the privacy action coherently without first having a clear sense of what the privacy interest is and why it is important.

### Why privacy is important: the preservation of dignity

This first section will address why, as a matter of theory, privacy is important. However, before turning to that question it is important briefly to outline the definition of privacy on which the discussion will be based. For the purposes of this chapter, privacy will be defined as the state of desired “inaccess” or as freedom from unwanted access, with “access” meaning perceiving a person with one’s senses (that is, seeing, hearing, or touching him or her), obtaining physical proximity to him or her and/or obtaining information about him or her.<sup>4</sup> Thus, speaking purely theoretically, a person’s privacy will be interfered with if another obtains, looks at, listens to, touches, or finds out information about him or her against his or her wishes or enables others to do the same.<sup>5</sup> Of course, a definition based on a claimant’s subjective desires would be an

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<sup>3</sup> *Hosking v Runting* [2005] 1 NZLR 1 at para [117].

<sup>4</sup> See N Moreham, “Privacy in the Common Law” (2005) 121 LQR 628. Similar definitions are also developed by R Gavison, “Privacy and the Limits of the Law” (1979) 89 Yale LJ 421; T Gerety, “Redefining Privacy” (1977) 12 Harv CR - CL Law Rev 233; J Rachels, “Why Privacy is Important” (1975) 4 Phil & Publ Aff 323; and J Wagner De Cew, “The Scope of Privacy in Law and Ethics” (1986) 5 L & Phil 145.

<sup>5</sup> It is important to include a “desire” element as well as an “inaccessibility” element in the definition of privacy because there will be many situations where, despite being inaccessible to others, a person could not be said to be in a state of privacy. As Charles Fried says, to refer to the privacy of a lonely man on a desert island would be to “engage in irony”: see “Privacy” (1968) 77 Yale LJ 475 at 482. See also N Moreham, “Privacy in the Common Law” at 636-639; M Weinstein, “The Uses of Privacy in the Good Life”, in J Pennock and J Chapman (eds) *Privacy NOMOS* vol XIII, New York, Atherton Press, 1971, p 88; E Schils, “Privacy: Its Constitution and Vicissitudes” (1966) 31 Law & Contemp Prob 281.

## 11: Why is Privacy Important?

unacceptable basis for a *legal* right to privacy (an objective check will always be necessary) and the New Zealand Courts have not yet extended privacy protection to include the “physical” aspects of the privacy interest (interferences caused simply by sensing or getting near to the plaintiff).<sup>6</sup> However, this definition provides a useful basis for discussion of the theoretical question, Why do individuals value their privacy?

Most commentators agree that privacy is important because it promotes a number of other ends which are essential for human flourishing. For example, theorists such as Charles Fried, Stanley Benn, and James Rachels argue that privacy is necessary for the development of relationships. Friendship and intimacy would be impossible, they say, without the ability to reveal oneself more fully to some people than to others.<sup>7</sup> Wider social interactions are also seen as dependent on people’s ability to include some and exclude others from their inner circle.<sup>8</sup> Numerous commentators have also recognised that by protecting the ability to have moments “off-stage” when one can “be oneself”, privacy facilitates emotional release<sup>9</sup> and promotes liberty of thought and action.<sup>10</sup> This is in turn viewed as a vital precondition for meaningful participation in democratic society. Freedoms such as the right to vote and freedom of expression lose much of their value if people do not first have the chance to learn to think for themselves.<sup>11</sup>

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<sup>6</sup> Gault P and Blanchard J left this question open in *Hosking v Runting* [2005] 1 NZLR 1 at para [118].

<sup>7</sup> As Stanley Benn says, “We do not find it as easy to express our feelings for one another spontaneously [and] to produce the same kind of mutually sensitive and responsive relations, in full view of a nonparticipant third party”: S Benn, “Privacy, Freedom and Respect for Persons” in J Pennock and J Chapman (eds) *Privacy NOMOS* vol XIII, New York, Atherton Press, 1971, 1, p 20. See also C Fried, “Privacy” (1968) 77 Yale LJ 475; J Rachels, “Why Privacy is Important” (1975) 4 Phil & Publ Aff 323; D Feldman, “Secrecy, Dignity or Autonomy? Views of Privacy as a Civil Liberty” (1994) 47 Curr L Pr 41 at 51-53; D Laurie *Genetic Privacy: A Challenge to Medico-Legal Norms* Cambridge, Cambridge University Press, 2002, p 7; T Nagel, “Concealment and Exposure” (1998) 27 Phil & Publ Aff 3; P Freund, “Privacy: One Concept Or Many?” in J Pennock and J Chapman (eds) *Privacy NOMOS* vol XIII, New York, Atherton Press, 1971, pp 195-196; and Rachels, at 330.

<sup>8</sup> D Feldman, “Secrecy, Dignity or Autonomy?”.

<sup>9</sup> As Alan Westin says: “[t]o be always ‘on’ would destroy the human organism”: A Westin *Privacy and Freedom* Atheneum, New York, 1970, p 35.

<sup>10</sup> As Edward Bloustein says: “The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality .... Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones”: E Bloustein, “Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser” (1964) 39 NYULR 962 at 1003.

<sup>11</sup> As John Craig says: “freedom of expression would lose much of its value if ... [people] had nothing unique, creative or controversial to express”: J Craig *Privacy and Employment Law* Oregon, Hart Publishing, 1999, p 25. See also

### Law, Liberty, Legislation

Each of these reasons for protecting privacy is important and collectively they make a person's choice to seek privacy a valuable and distinctive one. Yet there is another more fundamental reason for protecting privacy which both complements and transcends them; namely that privacy is integrally bound up with the dignity of the individual. Many commentators have recognised the relationship between privacy and dignity. For example, Peter Cane identifies privacy as a "dignitary tort"<sup>12</sup> and, in his response to William Prosser's fragmentary analysis of US tort law,<sup>13</sup> Edward Bloustein argues that the coherence of privacy as a legal concept lies in the fact that all invasions of privacy are violations of human dignity. According to Bloustein, when one person interferes with the privacy of another:<sup>14</sup>

The injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered.

Similar observations can be found in the case law. For example, in *Hosking*, Tipping J held that "[i]t is the essence of the dignity and personal autonomy and wellbeing of all human beings that some aspects

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H Fenwick and G Phillipson, "Breach of Confidence as a Privacy Remedy in the Human Rights Act Era" (2000) 63 MLR 660 at 682-683; and N Moreham, "*Douglas and others v Hello! Ltd* — the Protection of Privacy in English Private Law" (2001) 64 MLR 767 at 774.

<sup>12</sup> P Cane *The Anatomy of Tort Law* Oxford, Hart Publishing, 1997, pp 71-74.

<sup>13</sup> See W Prosser, "Privacy" (1960) 48 Cal LR 383.

<sup>14</sup> E Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 NYULR 962 at 1002-1003 (see also at 1000-1007). He therefore rejects Prosser's argument that the American law of privacy is a collection of a number of different interests and actions — such as the intentional infliction of emotional distress, defamation, appropriation of name and likeness — rather than a coherent whole. Jeffrey Reiman and Stanley Benn also see the protection of dignity as the principal reason why privacy is important: see S Benn, "Privacy, Freedom and Respect for Persons" in J Pennock and J Chapman (eds) *Privacy NOMOS* vol XIII, New York, Atherton Press, 1971, 1, pp 1-13, and J Reiman, "Privacy, Intimacy and Personhood" (1977) 6 Phil & Publ Aff 26 at 39. Harry Kalven agrees that privacy is "deeply linked" to individual dignity and the needs of human existence: H Kalven Jnr, "Privacy in Tort Law — were Warren and Brandeis Wrong?" (1966) 31 Law & Contemp Prob 326. See also David Feldman who says that the preservation of dignity is one of the principal reasons for protecting privacy: D Feldman, "Secrecy, Dignity or Autonomy?" at 54-58, esp at 55; Samuel Warren and Louis Brandeis who describe the interests protected by privacy as "spiritual" and as closely connected with an individual's "inviolable personality": S Warren and L Brandeis, "The Right to Privacy" (1890) 4 Harv LR 193 at 197 and 205 respectively; and Edward Schils who says that the social space around individuals, the recollection of their past, their conversations, and their body and image, belong to individuals by virtue of their "humanity and civility": E Schils (1966) 31 Law & Contemp Prob 281 at 306.

## 11: Why is Privacy Important?

of their lives should be able to remain private if they so wish".<sup>15</sup> In *Brooker v Police*, Thomas J also said that:<sup>16</sup>

Probably [no human right] is more basic to human dignity than privacy. It is within a person's sphere of privacy that the person nurtures his or her autonomy and shapes his or her individual identity. The nexus between human dignity and privacy is particularly close.

In the English context, Lord Hoffmann has observed in *Campbell v MGN Ltd* that the modern English breach of confidence/privacy action is about "the protection of human autonomy and dignity — the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people".<sup>17</sup> Lord Nicholls agreed that "[a] proper degree of privacy is essential for the wellbeing and development of an individual".<sup>18</sup> The link between privacy and the preservation of dignity is therefore clearly recognised in the case law; indeed, it is the only reason for protecting privacy which has been expressly recognised by English and New Zealand Judges. In order fully to appreciate the importance of the privacy interest, it is therefore necessary to understand the concept of "dignity" and the way in which privacy interferences undermine it.

The starting point for any discussion of dignity must be Immanuel Kant's articulation of the right of individuals to be treated with respect. As he said in *Grounding for the Metaphysics of Morals*:<sup>19</sup>

[M]an, and in general every rational being, exists as an end in himself and not merely as a means to be arbitrarily used by this or that will. He must in all his actions, whether directed to himself or to other rational beings, always be regarded at the same time as an end .... Persons are, therefore, not merely subjective ends, whose existence as an effect of our actions has a value for us; but such beings are objective ends, ie, exist as ends in themselves.

According to Kant, the principle that one should respect the intrinsic value of all persons and seek, in so far as possible, to further their ends

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<sup>15</sup> *Hosking v Runting* [2005] 1 NZLR 1 at para [239].

<sup>16</sup> *Brooker v Police* [2007] 3 NZLR 91 at para [182]. See also para [252]. For a helpful discussion of remedies for dignitary interferences see G Hammond, "Beyond Dignity?", paper presented at the Second International Symposium on the Law of Remedies, University of Auckland and University of Windsor, 2007.

<sup>17</sup> *Campbell v MGN Ltd* [2004] 2 AC 457 at para [51]. Baroness Hale also acknowledged that privacy interferences harm both the moral and physical integrity of the claimant: at para [157]. See also Lord Mustill in *R v Broadcasting Standards Commission, ex parte BBC* [2001] QB 885 at para [48].

<sup>18</sup> *Campbell v MGN Ltd* [2004] 2 AC 457 at para [12]. See also *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) at paras [214]-[216].

<sup>19</sup> I Kant *Grounding for the Metaphysics of Morals; with On a Supposed Right to Lie Because of Philanthropic Concerns* (trans J Ellington) 3rd ed, Indianapolis, Hackett Publishing Company, 1993, p 428.

### Law, Liberty, Legislation

as well as one's own is "the supreme limiting condition of every man's freedom of action".<sup>20</sup> To use a person simply as a means to one's ends — to fulfil one's sexual desires, to make money, to provide entertainment, to titillate, or to entertain — is to fail to respect that person's inherent value as a person and is therefore unacceptable.

It is this entitlement to respect, to be treated as an "end" and not simply as a "means", that many theorists argue underpins the privacy interest. For example, Stanley Benn argues that that the "general principle of privacy" is grounded upon a more general "principle ... of respect for persons".<sup>21</sup> Considering the example of a man who records a woman's conversation without her consent, Benn observes that the intruder:<sup>22</sup>

fails to show a proper respect for persons; he is treating people as objects or specimens — like "dirt" — and not as subjects with sensibilities, ends, and aspirations of their own, morally responsible for their own decisions, and capable, as mere specimens are not, of reciprocal relations with the observer .... These resentments suggest a possible ground for a prima facie claim not to be watched, at any rate in the same manner as one watches a thing or an animal. For this is to "take liberties", to act impudently, to show less than a proper regard for human dignity.

To treat someone merely as something to be looked at, listened to, found out about, or reported on against his or her wishes is therefore to ignore his or her right to respect as a person.

There are two main ways in which privacy interferences represent a failure to show this "proper regard for human dignity". First, an intruder who looks at, listens to or finds out about another against his or her wishes is disregarding that other's choices about when and by whom he or she is accessed. For example, if a man, X, makes it clear that he does not want Y to see him as he lies in hospital recovering from a serious accident, but she insists on visiting him anyway, then Y is making it clear that she regards her choices as more important than his. If they come into conflict, Y's choices should prevail. Y wants to visit him, so she visits him; the fact that X wants to be alone does not bear on Y's decision. The same would be true, a fortiori, if Y not only obtained access to X but also allowed others to do the same by broadcasting footage of X in his hospital bed on television. In order to serve her own professional or personal ends, Y would be turning X's trauma into a public spectacle despite the fact that X does not want her to do so. To use Kant's terminology, Y is treating X as a means to her ends.

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<sup>20</sup> J Kant *Grounding for the Metaphysics of Morals* pp 430-431.

<sup>21</sup> S Benn, "Privacy, Freedom and Respect for Persons", pp 8-9. See also J Reiman, "Privacy, Intimacy and Personhood" (1977) 6 *Phil & Publ Aff* 26 at 39.

<sup>22</sup> S Benn, "Privacy, Freedom and Respect for Persons", pp 6-7.

## 11: Why is Privacy Important?

The second, and closely related, reason that privacy intrusions represent a failure to treat an individual with respect is that the intruder is disregarding the likely effect of his or her intrusion on the subject's wellbeing and peace of mind. Y does not care that her visit and the broadcast are likely to upset and unsettle X at a particularly vulnerable time, at least not enough to modify her behaviour. She wants to intrude, so she intrudes; she wants to broadcast the footage, so she broadcasts it. The upset and distress that she is likely to cause to X is not important enough to Y to affect her decision making.

To interfere with a person's privacy is therefore to show disregard for both his or her choices and his or her feelings. So, what effect does this disregard, this "impudence" or "taking of liberties" have upon the individual? The answer is that it humiliates him or her. Humiliation is closely related to dignity: to "humiliate" means to "mortify"; to "humble" or to "lower or depress the dignity or self-respect of" a person.<sup>23</sup> An intruder who communicates to the subject and the world at large that the subject's choices and feelings are not worthy of respect will invariably have this effect upon him or her. As Hyman Gross says, the individual is "humiliated" and "shamed", not because of what others learn about him or her, but because someone other than the individual is determining what will be done with what is learnt.<sup>24</sup> Breaches of privacy can therefore affect both the way that the subject is viewed by others (a person who is constantly objectified might eventually be seen as an object by others) but also, more perniciously, the way the subject sees himself or herself. A person whose choices and feelings are consistently disregarded might eventually start to question, either consciously or subconsciously, whether those choices and feelings were entitled to respect in the first place.<sup>25</sup>

The effect of breaches of privacy on the individual are therefore profound. They not only prevent him or her from obtaining the benefits of inaccessibility — the ability to relax, to develop friendships and intimate relationships, to develop his or her own ideas and thinking — but, more importantly, they communicate to the individual and to the world at large that the individual's feelings and choices are not important.

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<sup>23</sup> *Oxford English Dictionary* (Online Dictionary: [www.oed.com](http://www.oed.com), accessed 27 February 2008).

<sup>24</sup> H Gross, "Privacy and Autonomy" in J Pennock and J Chapman (eds) *Privacy NOMOS* vol XIII, New York, Atherton Press, 1971, 169, p 177.

<sup>25</sup> Jeffrey Reiman, "Privacy, Intimacy and Personhood" (1977) 6 *Phil & Publ Aff* 26 at 39 argues that privacy interferences can interfere with an individual's sense of him or herself as a "person" because in order to be a "person", an individual must recognise both his or her capacity to shape his or her destiny by choices and his or her exclusive moral right to shape that destiny. He says that in one sense privacy is the means by which an individual's ability to shape his or her destiny through choices is communicated to him or her and an interference with it can therefore undermine an individual's development of a sense of self.

## Law, Liberty, Legislation

Privacy is therefore fundamentally bound up with respect for human dignity. This is the principal reason why it should be protected.

### How should the New Zealand breach of privacy tort be formulated?

So, how should this theoretical conclusion that privacy is at heart a dignitary interest affect the development of the legal protection of privacy? It should be noted at the outset that I do not suggest that a person should have a cause of action every time his or her dignity is affronted. An individual's subjective sense of dignity is obviously too broad and subjective a basis on which to build a legal action. What is suggested, however, is that recognition of the dignitary nature of the privacy interest should inform the formulation and application of the New Zealand privacy tort. In particular, I will argue that once the relationship between privacy and dignity is recognised, the undesirability of the second limb of the *Hosking* tort — that publicity be highly offensive to an objective reasonable person — becomes apparent.

The starting point for any discussion of the formulation of the breach of privacy tort has to be Gault P and Blanchard J's judgment in the Court of Appeal decision in *Hosking v Runting*.<sup>26</sup> In that case, the plaintiffs (a television presenter and his former wife)<sup>27</sup> sought to restrain the defendants from publishing photographs of their two young children being wheeled down a busy Auckland shopping street in a pushchair. The plaintiffs claimed that the photographs breached the children's privacy and, given the celebrity of the first plaintiff, potentially jeopardised their safety. All five Judges agreed that there was no breach of privacy in the circumstances (primarily because the photographs were of an innocuous event which took place in public) but three of the five nonetheless held that there was a tort of breach of privacy in New Zealand.

In the more widely cited of the two majority judgments, Gault P and Blanchard J held that that tort has two requirements: first, the existence of facts in respect of which there is a reasonable expectation of privacy; and secondly, publicity given to those private facts that would be considered highly offensive to an objective reasonable person.<sup>28</sup> A defence of legitimate public concern was also recognised.<sup>29</sup> In the course of their judgment, Gault P and Blanchard J made it clear that the focus of the highly offensive publicity requirement was not on offensiveness in

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<sup>26</sup> *Hosking v Runting* [2005] 1 NZLR 1 (CA).

<sup>27</sup> They brought the action on behalf of their children.

<sup>28</sup> *Hosking v Runting* [2005] 1 NZLR 1 (CA) at para [117].

<sup>29</sup> *Hosking v Runting* [2005] 1 NZLR 1 (CA) at para [129].

## 11: Why is Privacy Important?

its usual sense but on the plaintiff's ability to prove that the breach of privacy caused real "harm", "distress" or "humiliation".<sup>30</sup> In their view:<sup>31</sup>

[P]ublicity, even extensive publicity, of matters which, although private, are not really sensitive should not give rise to legal liability. The concern is with publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned. The right of action, therefore, should be only in respect of publicity determined objectively, by reference to its extent and nature, to be offensive by causing real hurt or harm.

The inclusion of both a reasonable expectation of privacy requirement and a "high offensiveness" requirement is consistent with US privacy jurisprudence<sup>32</sup> and with a number of early New Zealand High Court authorities.<sup>33</sup> Both requirements have also been applied in subsequent New Zealand decisions.<sup>34</sup> However, questions are increasingly being asked about the status of the two-part test and, in particular, about the desirability of the highly offensive publicity requirement. In the recent Supreme Court decision of *Rogers v Television New Zealand* two of their Honours applied the test laid down by Gault P and Blanchard J but expressly declined to approve it,<sup>35</sup> and Elias CJ said that the Court should "reserve its position on the view ... that the tort of privacy requires not only a reasonable expectation of privacy but also that publicity would be 'highly offensive'".<sup>36</sup> Similar reservations can be gleaned from the

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<sup>30</sup> Indeed, if the Courts are not prepared to remove the highly offensive requirement from the breach of privacy tort altogether, then it should be altered to ask whether the publicity would be "very humiliating and distressing to an objective, reasonable person" rather than whether it would be highly "offensive".

<sup>31</sup> *Hosking v Runting* [2005] 1 NZLR 1 (CA) at para [126].

<sup>32</sup> See s 652 of *Restatement of the Law Second*, Torts 2d (vol 1), Minnesota, American Law Institute Publishers, 1977.

<sup>33</sup> See, for example, *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 (HC); *P v D* [2000] 2 NZLR 591 (HC).

<sup>34</sup> See, for example, *Andrews v Television New Zealand* (High Court, Auckland CIV 2004-404-3536, 15 December 2000, Allan J) at para [1]; *Television New Zealand v Rogers* [2007] 1 NZLR 156 (CA) at paras [41] and [60]-[69] per O'Regan and Panckhurst JJ; and *Brown v Attorney-General* [2006] DCR 630 at paras [54]-[82]; Spear DCJ applied the Gault P and Blanchard J approach although he acknowledged that Tipping J thought that the second element of the tort should probably be part of the reasonable expectation test: at para [56].

<sup>35</sup> *Rogers v Television New Zealand* [2008] 2 NZLR 277 (SC) at para [99] per McGrath J and para [144] per Anderson J. Blanchard and Tipping JJ approached the case by asking whether the defendants would have succeeded in an application for access to the videotape under the rules governing search of Court records in criminal cases (see paras [46] and [61] respectively) and did not discuss the *Hosking* tort expressly. However, both concluded that the plaintiff did not have reasonable expectation of privacy in respect of the confession (see paras [48] and [63] respectively).

<sup>36</sup> *Rogers v Television New Zealand* [2008] 2 NZLR 277 (SC) at para [25]. The Chief Justice noted that the desirability of including a "high offensiveness"

## Law, Liberty, Legislation

judgment of Young P in the Court of Appeal decision in *Rogers*,<sup>37</sup> and from Tipping J's statement in the second majority judgment in *Hosking* that:<sup>38</sup>

I would myself prefer that the question of offensiveness be controlled within the need for there to be a reasonable expectation of privacy. In most cases that expectation is unlikely to arise unless publication would cause a high degree of offence and thus of harm to a reasonable person. But I can envisage circumstances where it may be unduly restrictive to require offence and harm at that high level.

There therefore seems to be growing judicial support for the view that the highly offensive publicity requirement sets the barriers to recovery too high and that it should not be a part of the New Zealand privacy tort. In my view, these views are rightly held, for four reasons: first, the highly offensive publicity requirement obfuscates the dignitary nature of privacy interest and encourages the Courts to examine the wrong issues; secondly, it is inconsistent with other dignitary torts; thirdly, it is unnecessary; and fourthly, it is value-laden and unpredictable.

### ***Obfuscating the dignitary nature of the privacy interest***

The first and most important reason why inclusion of the highly offensive publicity test is undesirable is closely related to the discussion of dignity set out in the first section of this chapter. It is that by requiring the plaintiff to establish harm, the highly offensive test obscures the fact that *all* privacy interferences undermine a plaintiff's dignity. As Gault P and Blanchard J made clear in *Hosking*, the highly offensive publicity element requires the plaintiff to establish that the breach of his or her reasonable expectation of privacy caused real "harm", "distress" or "humiliation".<sup>39</sup> Yet, if all breaches of privacy humiliate the subject and cause him or her real dignitary harm (as was argued in the first section of this chapter), then it should not be necessary for a plaintiff to establish harm in every case. As Young P said in *Rogers*: "[i]n most cases it will be the defeating of a reasonable expectation of privacy which makes publication objectionable".<sup>40</sup> In

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requirement was doubted by members of the House of Lords in *Campbell v MGN Ltd*: [2004] 2 AC 457 at para [25]. Anderson J said that he "share[d] the concern expressed by the Chief Justice that the jurisprudence of [*Hosking*] should not be regarded as settled": at para [144].

<sup>37</sup> *Television New Zealand v Rogers* [2007] 1 NZLR 156 (CA) at para [122].

<sup>38</sup> *Hosking v Runting* [2005] 1 NZLR 1 (CA) at para [256]. He continued that if "offensiveness" is to be included as a requirement then a "substantial" level of offence should be required rather than a "high" level as Gault P and Blanchard J suggested.

<sup>39</sup> *Hosking v Runting* [2005] 1 NZLR 1 at paras [125]-[126].

<sup>40</sup> *Television New Zealand v Rogers* [2007] 1 NZLR 156 (CA) at para [122]. It is possible to read the highly offensive publicity test consistently with that

## 11: Why is Privacy Important?

other words, the existence of “offensiveness” and “harm” will flow automatically from a breach of a reasonable expectation of privacy.

Contrary to this reasoning, the inclusion of the highly offensive publicity test implies that only some interferences with a reasonable expectation of privacy will cause the plaintiff real humiliation, distress, or harm. In other cases, one surmises, the defendant can disregard a reasonable expectation of privacy without really humiliating or upsetting the plaintiff at all. Inclusion of the highly offensive publicity test therefore suggests that the Courts need to look for something more, for some particular feature of the publicity which makes it particularly humiliating, harmful or distressing.

The effect of this reasoning has been to take the Courts’ focus away from the dignitary interest at stake in privacy claims and on to what, it is suggested, are irrelevant considerations. In particular, Courts applying the highly offensive publicity test have focused on the tone of the publicity. Did the publicity cast the plaintiff in a positive light, the Courts have asked, or did it seek to ridicule and embarrass him or her? This focus on tone and the problems it causes are exemplified in the High Court decision of *Andrews v Television New Zealand*.<sup>41</sup> In that case, Allan J held that the plaintiffs could not recover for the broadcast of detailed footage of them being extricated from a car wreck, even though they had a reasonable expectation of privacy in respect of conversations between them at the time, because the publicity could not be regarded as highly offensive. In reaching that conclusion, his Honour stressed that the programme did not mention the fact that both plaintiffs had excess blood alcohol levels,<sup>42</sup> that it portrayed Mrs Andrews as “a caring person, very much concerned about her husband’s wellbeing” and as someone “who was coping well by making light of the situation”, and that nothing which Mrs Andrews said to her husband (she told him that she loved him and to “stay with her”) could be regarded as humiliating or

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conclusion. Courts applying the test could focus simply on the scope the publicity and hold that, as long as the information is circulated to a wide enough audience or to a small group which is particularly inappropriate, the publicity will cause the plaintiff real dignitary harm. However, this does not seem to be what Gault P and Blanchard J intended nor is it the way the action has been applied in subsequent cases.

<sup>41</sup> *Andrews v Television New Zealand* (High Court, Auckland CIV 2004-404-3536, 15 December 2006, Allan J). See also the Court of Appeal decision in *Television New Zealand v Rogers* at paras [64] and [69], in which, when concluding that the lower Court was not wrong to conclude that a reasonable person would find broadcast of an inadmissible murder confession highly offensive, O’Regan and Panckhurst JJ took account of counsel’s argument that “the television programme would inevitably be selective and graphic, and could well give rise to the endorsement of wrongful police conduct and the harassment of an innocent man”.

<sup>42</sup> They both escaped conviction for drunk driving because the police were unable to establish which of them had been driving.

### Law, Liberty, Legislation

embarrassing to either of them.<sup>43</sup> In other words, the broadcast was not highly offensive because it did not make the plaintiffs “look bad”.

This approach obscures the dignitary nature of the privacy interest. By focusing on whether particular features of the broadcast could be regarded as humiliating or embarrassing, the Judge lost sight of the fact that filming and broadcasting the conversations was in itself humiliating and distressing. By using the couple’s conversations to liven up their documentary, the broadcasters turned a private trauma into a public spectacle to be used to further their own professional and commercial ends; what was to the plaintiffs an intimate and traumatic experience, in the defendant’s hands became simply a segment in a television documentary. This was humiliating regardless of whether the tone of the documentary was positive or negative.

The Judge’s reasoning also failed to recognise that a person can be humiliated by exposure of something of which he or she has no reason to be ashamed. The affront felt by a man who is photographed comforting his dying child in hospital is unlikely to be lessened because it makes him look like a caring father. Likewise, the broadcast of CCTV footage of a woman being sexually assaulted in a car park will be humiliating and distressing even if the broadcast is a highly sympathetic one which emphasises her bravery in eventually fighting off her attacker. To suggest that publicity cannot be “highly offensive” unless it somehow denigrates or ridicules the plaintiff is to confuse “humiliation” with “reputation” and “embarrassment” and, again, to lose sight of the dignitary nature of the privacy interest. It is quite possible to interfere with a person’s dignity without making him or her “look bad”.

Too much emphasis was also given in *Andrews* to the way in which the plaintiffs expressed their objections to the defendant’s conduct. Allan J said that the determinative factor in his conclusion that the publicity was not highly offensive was the fact that “it was not the intrusion on the plaintiffs’ privacy which lay at the heart of the proceeding” but rather their “chagrin and annoyance” at not being told about the filming or the broadcast.<sup>44</sup> This, he said, was irrelevant to the plaintiffs’ privacy claim because consent is not an element of the action.<sup>45</sup> Yet if it is accepted

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<sup>43</sup> *Andrews v Television New Zealand* (High Court, Auckland CIV 2004-404-3536, 15 December 2006, Allan J) at para [68].

<sup>44</sup> *Andrews v Television New Zealand* (High Court, Auckland CIV 2004-404-3536, 15 December 2006, Allan J) at paras [69]-[70]. The plaintiffs learnt of the filming and broadcast for the first time when watching television in the company of a large group of people.

<sup>45</sup> *Andrews v Television New Zealand* (High Court, Auckland CIV 2004-404-3536, 15 December 2006, Allan J) at para [70]. He continued that because the plaintiffs themselves did not find the broadcast highly offensive, it was not open to him to conclude that a reasonable person in their position would have found it so: at para [71]. However, if the highly offensive publicity test is truly objective, then one plaintiff’s unusually thick skin in the face of a privacy intrusion should be no more relevant than another plaintiff’s particularly thin

## 11: Why is Privacy Important?

that breaches of privacy are about dignity and humiliation, then this reasoning is difficult to follow. What the plaintiffs appeared to be expressing was affront at the fact that the broadcasters had so little respect for their feelings in respect of the broadcast that they did not even bother to tell them about it. This is clearly related to the humiliation or distress that they suffered. The fact that they expressed the subtle concepts of violation and humiliation engendered by their treatment as “chagrin” or “annoyance” rather than using the language of the *Hosking* test should not have prevented them from recovering.

Both of these problems with *Andrews* — the inappropriate focus on the tone of the broadcast and on the precise way in which the plaintiffs described its impact — stem from the fact that the highly offensive publicity test suggests that the humiliation and dignitary harm inherent in all privacy interferences are not enough to satisfy the *Hosking* test. Instead, Courts are encouraged to look for some particular feature of the publicity which could be regarded as humiliating, harmful, or distressing. Once the action is examined through a dignity lens, the unattractiveness of this approach becomes apparent. If privacy is integrally related to dignity then all breaches of a reasonable expectation of privacy will be humiliating, not just those which are described in a particular way or which cast the plaintiff in a negative light. By including the highly offensive publicity requirement, the current formulation of the tort is therefore obscuring the dignitary nature of the privacy interest and encouraging the Courts to focus on inappropriate questions.

### *Consistency with other dignitary torts*

The second argument against the inclusion of the highly offensive publicity test is that by requiring plaintiffs to establish actual hurt, harm, or humiliation, Courts have taken the breach of privacy action out of step with other dignitary torts, particularly trespass to the person. Trespass to the person takes three forms: battery (the “actual infliction of unlawful force on another person”);<sup>46</sup> assault (“an act which causes another person to apprehend the infliction of immediate, unlawful, force on his person”);<sup>47</sup> and false imprisonment (“the unlawful imposition of constraint upon another’s freedom of movement from a particular place”).<sup>48</sup> Because one of the principal aims of all these torts is to vindicate the indignity inherent in unwanted touching, threatening, and

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skin. It will therefore not necessarily follow from a conclusion that the plaintiffs were not offended that a reasonable person in his or her position would also not be offended.

<sup>46</sup> *Collins v Wilcock* [1984] 1 WLR 1172 at 1177.

<sup>47</sup> *Collins v Wilcock* [1984] 1 WLR 1172 at 1177.

<sup>48</sup> *Collins v Wilcock* [1984] 1 WLR 1172 at 1177.

## Law, Liberty, Legislation

confinement,<sup>49</sup> they are actionable per se. Harm to the plaintiff is assumed.<sup>50</sup> Looked at another way, because the harm in these cases is the dignitary interference inherent in the battery, assault or false imprisonment, the plaintiff is not required to prove it.

Once it is recognised that privacy is also about the protection of dignity, then the trespass to the person cases suggest that breaches of a reasonable expectation of privacy should also be actionable per se. If, as Bloustein has argued, a person whose privacy is breached suffers a similar indignity to someone who is kissed, pushed, punched, or locked up against his or her wishes then, like those plaintiffs, he or she should be able to vindicate that dignitary interest as a matter of right.<sup>51</sup>

### *The highly offensive publicity test is unnecessary*

At this stage, potential defendants would no doubt protest that removing the highly offensive publicity requirement would make the privacy action intolerably broad and place an unacceptable fetter on expression. The law cannot create a situation, they would say, where a person can bring an action for any trivial breach of his or her privacy. This leads to the third argument against inclusion of the highly offensive publicity test, namely that it is unnecessary.

Gault P and Blanchard J included the highly offensive publicity requirement in the *Hosking* test because they were concerned about the potential scope of the privacy action:<sup>52</sup>

Although in theory a rights-based cause of action would be made out by proof of breach of the right irrespective of the seriousness of the breach ... it is quite unrealistic to contemplate legal liability for all publications of private information.

By living in societies, they said, individuals necessarily give up seclusion and expectations of complete privacy; it would be absurd, for example, to suggest that an action should lie against a person who tells a

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<sup>49</sup> See, for example, S Todd (ed) *The Law of Torts in New Zealand* 4th ed, Wellington, Brookers, 2005, para [4.4]; R Heuston and R Buckley *Salmond & Heuston on the Law of Torts* 21st ed, London, Sweet & Maxwell, 1996, p 120; J Fleming *The Law of Torts* 9th ed, Sydney, LBC Information Series, 1998, p 29; P Cane *The Anatomy of Tort Law* Oxford, Hart Publishing, 1997 p 71; E Bloustein (1964) 39 NYULR 962 at 1002.

<sup>50</sup> See *Salmond & Heuston on Torts*, p 120 and S Todd *The Law of Torts in New Zealand* para [4.4].

<sup>51</sup> See E Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 NYULR 962 at 1003. Ursula Cheer has argued that the New Zealand privacy tort should be actionable per se. See U Cheer, "The Future of Privacy: Recent Developments in New Zealand" (2007) 13 *Canta LR* 169.

<sup>52</sup> *Hosking v Runting* [2005] 1 NZLR 1 (CA) at para [125].

## 11: Why is Privacy Important?

neighbour that his or her spouse has a cold.<sup>53</sup> Thus, “publicity, even extensive publicity, of matters which although private, are not really sensitive should not give rise to legal liability”.<sup>54</sup> The requirement that the publicity be “truly humiliating and distressful or otherwise harmful to the individual concerned” was introduced to ensure that it did not.<sup>55</sup>

It is difficult not to agree that the breach of privacy tort should only protect individuals against serious, or at least non-trivial, breaches of their privacy. Any other situation would place an unacceptable fetter on media and personal freedom. However, it does not follow that the highly offensive publicity test is necessary; the *Hosking* test provides other mechanisms for excluding unmeritorious claims. In particular, the reasonable expectation of privacy requirement places a significant hurdle in the path of privacy plaintiffs. According to English and New Zealand case law, whether there is a reasonable expectation of privacy will depend on a wide range of factors including the nature of the information,<sup>56</sup> the nature of any relationship between the parties,<sup>57</sup> and the manner in which the information was obtained.<sup>58</sup> The expectation will be reduced for voluntary or involuntary public figures and their families<sup>59</sup> and will disappear altogether if the facts in question are already known to the world at large.<sup>60</sup> Plaintiffs have therefore failed to establish reasonable expectations of privacy in respect of an inadmissible video recording of a murder confession,<sup>61</sup> photographs depicting them walking down public streets with their children,<sup>62</sup> a detailed description of a visit to a brothel,<sup>63</sup> detailed footage of a rescue from a car wreck,<sup>64</sup> or a detailed “kiss and tell” article about their transient extra-marital affairs.<sup>65</sup>

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<sup>53</sup> *Hosking v Runting* [2005] 1 NZLR 1 (CA) at para [125].

<sup>54</sup> *Hosking v Runting* [2005] 1 NZLR 1 (CA) at para [126].

<sup>55</sup> *Hosking v Runting* [2005] 1 NZLR 1 (CA) at para [126].

<sup>56</sup> Information relating to health, personal relationships, or finances is more readily recognised as private: see *Hosking v Runting* [2005] 1 NZLR 1 (CA) at para [119]. See also *Campbell v MGN Ltd* [2004] 2 AC 457 at paras [93]-[95] per Lord Hope and para [145] per Baroness Hale.

<sup>57</sup> See, for example, *A v B plc* [2003] QB 195 (CA); *McKennitt v Ash* [2007] 3 WLR 194 (CA).

<sup>58</sup> The Courts are particularly wary of surreptitious photography and recording. See, for example, the judicial review decisions of *Ford v Press Complaints Commission* [2001] EWHC Admin 683; *R v Broadcasting Standards Commission, ex parte British Broadcasting Corporation* [2001] QB 885 at paras [37] and [44].

<sup>59</sup> *Hosking v Runting* [2005] 1 NZLR 1 (CA) at paras [120]-[124].

<sup>60</sup> *Hosking v Runting* [2005] 1 NZLR 1 (CA) at para [119].

<sup>61</sup> *Rogers v Television New Zealand* [2008] 2 NZLR 277 (SC).

<sup>62</sup> *Hosking v Runting* [2005] 1 NZLR 1 (CA); but compare *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446.

<sup>63</sup> *Theakston v MGN Ltd* [2002] EMLR 22 (QB).

<sup>64</sup> *Andrews v Television New Zealand* (High Court, Auckland CIV 2004-404-3536, 15 December 2006, Allan J) although they did have a reasonable expectation of privacy in respect of conversations which they had during the rescue.

<sup>65</sup> *A v B plc* [2003] QB 195 (CA).

## Law, Liberty, Legislation

Non-serious interferences, such as a disclosure that one's spouse has a cold, will therefore almost certainly fail to satisfy the reasonable expectation of privacy requirement.

Thus, it seems that the highly offensive publicity test is not necessary to keep the privacy action within bounds; even before the public concern defence is considered, the reasonable expectation of privacy test excludes non-serious claims. Indeed, English Courts are developing a carefully circumscribed law of breach of privacy without recourse to a "highly offensive" test. Instead, they rely on the reasonable expectation of privacy test and the need to balance privacy with freedom of expression and the public interest to keep the action within bounds.<sup>66</sup> By requiring highly offensive publicity as well as a reasonable expectation of privacy, New Zealand Courts have set the barriers to recovery unnecessarily high. It would be preferable to abandon the highly offensive publicity requirement and to rely instead on a clearly articulated reasonable expectation of privacy requirement and the public concern/freedom of expression defence to keep the action within bounds.<sup>67</sup>

### *Promoting certainty and predictability*

The final reason for removing the highly offensive publicity requirement is that it creates uncertainty. In contrast to the reasonable expectation of privacy test (for which rules and guidelines are beginning to emerge), the application of the highly offensive publicity test is value-laden and unpredictable. Other than the fact that that offensiveness has to be assessed from the perspective of a person "in the shoes of the plaintiff"<sup>68</sup> and the problematic suggestion that the Courts should focus on the tone of the publicity,<sup>69</sup> there are few indications in the case law as to how the requirement will be applied. Indeed, the test often seems to operate as an appeal to the Judge's instinctive feeling about the seriousness of the intrusion. For example, when explaining their conclusion that the photographs in *Hosking* were not highly offensive, Gault P and Blanchard J simply said that:<sup>70</sup>

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<sup>66</sup> Both Lord Nicholls and Baroness Hale specifically rejected inclusion of the highly offensive test in *Campbell v MGN Ltd* [2004] 2 AC 457 at paras [22] and [135] respectively.

<sup>67</sup> If this step were taken then, as in England, the nature and scope of the publicity would have to be considered at the reasonable expectation of privacy stage. For an English example of this approach in operation see *Theakston v MGN Ltd* [2002] EMLR 22 (QB).

<sup>68</sup> See *P v D* [2000] 2 NZLR 591 (HC) at para [39]; and *Rogers v Television New Zealand* [2008] 2 NZLR 277 at paras [66]-[67].

<sup>69</sup> See the discussion under the heading "Obfuscating the dignitary nature of the privacy interest" above.

<sup>70</sup> *Hosking v Runting* [2005] 1 NZLR 1 (CA) at para [165].

## 11: Why is Privacy Important?

We are not convinced a person of ordinary sensibilities would find the publication of these photographs highly offensive or objectionable even bearing in mind that young children are involved .... The real issue is whether publicising the content of the photographs (or the “fact” that is being given publicity) would be offensive to the ordinary person. We cannot see any real harm in it.

Similarly, in *P v D*, having said that Courts should not take an idealistic view about people’s attitudes to mental illness, Nicholson J simply held that:<sup>71</sup>

I accept that P has the stated feelings and consider that a reasonable person of ordinary sensibilities would in the circumstances also find publication of information that they had been a patient in a psychiatric hospital highly offensive.

This is not to criticise these particular Judges — US decisions also contain little guidance on the application of the highly offensive requirement. Indeed, it is difficult to see how a Judge could set out clear rules about what is particularly humiliating, distressing, or harmful to an objective reasonable person. As Young P and Tipping J have implied, in almost all cases a person’s response to a disclosure will in fact depend on whether and to what extent he or she had a reasonable expectation of privacy in the matter or circumstances in question. It therefore seems that certainty would be enhanced if Courts were to remove the highly offensive publicity test.

## Conclusion

Rather than require the plaintiff to show that there was publicity which is highly offensive, Courts should therefore recognise that privacy is principally a dignitary interest and that all interferences with reasonable expectations of privacy are harmful. In my view, the highly offensive publicity test should be abandoned and Courts should focus instead on articulating clearly the scope of the reasonable expectation of privacy requirement and the public concern/freedom of expression defence. All breaches of reasonable expectations of privacy which are not in the public interest should therefore be actionable (albeit that damages might be minimal). This change would improve the formulation of the breach of privacy action and, if explained clearly, go some way towards identifying the theoretical foundations on which the New Zealand breach of privacy action is based.

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<sup>71</sup> *P v D* [2000] 2 NZLR 591 (HC) at para [39].

Law, Liberty, Legislation