

# THE WRONG TORT IN THE RIGHT PLACE: AVENUES FOR THE DEVELOPMENT OF CIVIL PRIVACY PROTECTIONS IN NEW ZEALAND

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## ABSTRACT

*Privacy law has always developed in a piecemeal fashion as courts and legislators struggle with the inherently difficult concepts that it invokes. In New Zealand three causes of action exist to remedy breaches of an individual's private sphere: the tort of publication of private facts, the tort of intrusion into seclusion, and the equitable breach of confidence action. Building on first principles and drawing on experiences from the Commonwealth and the United States, this paper argues that the publication tort rests on a misconceived understanding of privacy and so risks limiting the development of civil privacy protections. It is contended that it would be more coherent for the law to focus on the intrusion tort and actions for breach of confidence to remedy actionable breaches of privacy.*

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

– Samuel Warren and Louis Brandeis (1890).<sup>1</sup>

The levels of privacy we now enjoy have probably only existed for a few generations at most. Many people in earlier generations had little physical privacy, and there was no general expectation of privacy in personal communications until relatively recently. The development of modern Western ideas of privacy is closely linked to the emergence of the concept of the self-contained individual. Boundaries

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1 S Warren and L Brandeis "The right to privacy" (1890) 4 Harvard Law Review 193 at 196.

of the public and private have also shifted over time. More kinds of information, and more physical spaces, have come to be regarded as private.

– New Zealand Law Commission (2008).<sup>2</sup>

As the world shrinks, the importance of privacy grows. Now more than ever, individuals need to be able to carve out their own private sphere in which they can develop and explore their identity without the pressure that comes from public scrutiny. The question of how the law should protect that private sphere has never been more relevant.

With statutory reform being slow and piecemeal, it has been left to the courts of New Zealand to craft mechanisms through which individuals can protect their own privacy. In *Hosking v Runting*, the Court of Appeal recognised a tort for breach of privacy via the publication of private facts.<sup>3</sup> Seven years later, the High Court in *C v Holland* applied the principles articulated in *Hosking* to grant relief under a second new cause of action: intrusion upon seclusion.<sup>4</sup> The decisions in *Hosking* and *Holland* have generally been viewed as welcome developments in the law. However, the actions which they crystallised are far from mature. The Supreme Court has yet to issue a decisive ruling on the privacy torts, and its obiter endorsement of *Hosking* in *Rogers v TVNZ* could at best be described as lukewarm.<sup>5</sup> When the Law Commission completed its recent review of privacy law, it recommended that the courts be left to continue to develop common law privacy protections.<sup>6</sup> Yet, in the same report, the Commission recommended the enactment of a Surveillance Devices Bill containing statutory civil remedies that would largely render the common law actions redundant.<sup>7</sup> So far, Parliament has declined to undertake such legislative action.

Against that backdrop of uncertainty,<sup>8</sup> this paper seeks to address the future of civil actions for breaches of privacy in New Zealand. Discussion will take place in three parts. First, the conceptual basis of privacy law will be discussed in order to provide a framework for assessing the utility of specific causes of action. Secondly, privacy actions in other jurisdictions will be canvassed and compared. Finally, the paper will examine the way in which the New Zealand courts have approached claims for breaches of privacy and suggest areas of refinement and reform.

2 Law Commission *Privacy: Concepts and Issues* (NZLC SP19, 2008) at [31].

3 *Hosking v Runting* [2005] 1 NZLR 1.

4 *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.

5 *Rogers v Television New Zealand Ltd* [2007] NZSC 91 [2008] 2 NZLR 277 at [25]-[26] per Elias CJ, at [99] per McGrath J, and at [144] per Anderson J.

6 Law Commission *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy: Stage 3* (NZLR R113, 2010), Recommendations 28 and 29.

7 Recommendation 1.

8 See Samuel Beswick “Privacy: rights, remedies, and reform” [2015] NZLJ 166.

## I. THE CONCEPTUAL BASIS OF PRIVACY LAW

It is traditional to open any discussion on privacy law with the acknowledgment that the very notion of privacy is “notoriously hard to define.”<sup>9</sup> Yet a comprehensive definition is necessary to provide coherence to the law and to allow privacy to be appropriately balanced against competing values. Such a definition can be found by resolving two common debates as to the nature of privacy. The first is over delineation: whether privacy is a unitary concept or a “bundle” of different interests, ideas and values. The second debate concerns categorisation: is privacy a “right”, a “value”, an “interest”, or something else entirely? Both discussions are related, but the first necessarily informs the second.

### A. *The Many Faces of Privacy*

The word “privacy” can be used to describe a range of different interests. Steven Penk notes at least five that are commonly the subject of legal discussion: territorial privacy; bodily privacy; informational privacy; communications privacy; and privacy of attention or associational privacy.<sup>10</sup> Dean Prosser, in his incredibly influential article of 1960, thought that he could identify four categories of privacy protections in American jurisprudence “tied together by the common name” but otherwise having “almost nothing in common”.<sup>11</sup> Whether a meaningful common ground can be found among these different aspects of privacy is of fundamental importance. If privacy is a “cluster of freestanding interests”,<sup>12</sup> as Prosser and other reductionists contend, then it should be protected by freestanding legal protections. On the other hand, if privacy is a unitary concept, then it is important that the law treats it as such.

The latter is the case: the different privacy interests are merely different manifestations of the same principle. What underpins each category of privacy is the idea of *exclusion*: that individuals have the right to isolate themselves from the public. Spatial privacy (used here as an umbrella term for bodily and territorial privacy) is about the exclusion of the public from “private spaces”. Informational privacy concerns the exclusion of the public from “private information”. Associational privacy and privacy of attention relate to the exclusion of the public from private social circles and the “private lives” of individuals. In each case, what makes something “private” is that the public has been excluded from it.

The idea of privacy as exclusion is not new. In the late 19th Century, the American jurist Thomas Cooley famously described privacy as the right

9 John Burrows “Invasion of privacy” in Stephen Todd and others (eds) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) 935 at 936.

10 Steven Penk “Thinking about privacy” in Steven Penk and Roesemary Tobin (eds) *Privacy Law in New Zealand* (Brookers, Wellington, 2010) 1 at 10.

11 WL Prosser “Privacy” (1960) 48 Cal L Rev 383 at 389.

12 An excellent summary of the debate can be found in Patrick O’Callaghan *Refining Privacy in Tort Law* (Springer, Berlin, 2014) at 847.

“to be let alone”.<sup>13</sup> His definition was cited by Warren and Brandeis in their seminal article of 1890.<sup>14</sup> However, it has undergone significant refinement over time. In 2005, Nicole Moreham argued that “privacy is best defined as the state of ‘desired inaccess’ or as ‘freedom from unwanted access’”.<sup>15</sup> Under her framework, something becomes private when a person wishes to exclude others from accessing it; the degree of privacy depends on the degree of desired exclusion. This makes sense intuitively: a person’s home is generally considered private because they wish to limit public access to it; within the home, bedrooms are generally considered to be more private than living rooms because access to them is typically more restricted. The definition is equally applicable to non-spatial privacy. The best metric on which to judge the privacy of a particular piece of information is how widely its subject wishes it to be disseminated. If someone is happy sharing a photo on social media, it is probably less private than a photo which they only show to their partner. Of course, by focusing on *desired* inaccess, Moreham’s definition is extremely subjective. Yet this is entirely appropriate. Exactly what constitutes a private matter varies among generations, cultures, and even individuals.<sup>16</sup> Any definition of the term must take that into account.

The subjectivity of privacy comes from its fundamental connection to individual autonomy. To exercise meaningful autonomy, one must conceive of oneself as a distinct individual; in German the concept is referred to as *ichbewusstsein* (self-awareness).<sup>17</sup> One cannot develop self-awareness without engaging in what JS Mill described as “experiments in living”.<sup>18</sup> This in turn requires privacy. As Edward Bloustein notes:<sup>19</sup>

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 and human dignity. 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; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.

13 TM Cooley *Torts* (2nd ed, Callaghan & Co, Chicago, 1888).

14 Warren and Brandeis, above n 1, at 205.

15 NA Moreham “Privacy in the Common Law: A Doctrinal and Theoretical Analysis” (2005) 121 LQR 628 at 636.

16 David A Anderson “The failure of American privacy law” in BS Markesinis (ed) *Protecting Privacy* (Oxford University Press, Oxford, 1999) 139 at 139.

17 O’Callaghan, above n 12, at 47.

18 John Stuart Mill *On Liberty* (eBook ed, Mobile Reference.com, 2010) at 71.

19 Edward Bloustein “Privacy as an aspect of human dignity: An answer to Dean Prosser” (1964) 39 NYU L Rev 962 at 1003.

Being an individual requires the capacity to be different, but difference is always subject to scrutiny. Such scrutiny inevitably causes pressure to conform, and thus to abandon individuality. Therefore, privacy – the ability to exclude others – is necessary to develop a firm and distinctive state of self-awareness. In turn, a self-aware individual has a fundamental right to exercise autonomy, which includes the ability to exclude others from aspects of their life which they wish to remain private. Thus, privacy is both an essential component and a necessary outcome of individual autonomy. In its 2008 report on privacy, the Law Commission recognised this by conceptualising privacy as a “subcategory of two interconnected core values”: autonomy and respect.<sup>20</sup>

Focusing on privacy as a value derived from autonomy helps resolve some difficult problems in privacy jurisprudence. One issue that scholars and courts alike struggle with is the question of whether it is possible to have privacy in a public space. However, as Patricia Abril argues, the question is only difficult because of the erroneous assumption that privacy should be thought of in physical terms.<sup>21</sup> The idea that privacy only exists in “private spaces” is one that is increasingly out-of-touch with the interconnectedness (both on and offline) of the modern world. It is also absolutist and hence often arbitrary. Fortunately, it is possible to get past this by focusing on the actions and desires of the individual involved, rather than their physical location. In *Von Hannover v Germany*, the European Court of Human Rights held that privacy can exist in public when a person retires to a “secluded place out of the public eye” with:<sup>22</sup>

... the objectively recognisable aim of being alone and where, confident of being alone, [he or she] behaves in a manner in which he or she would not behave in public.

Here, it is possible to see the usefulness of the “desired inaccess” definition. A less arbitrary legal position can be obtained by considering the autonomous actions of the individual (retiring out of the public eye) and the rationale for those actions (a desire to behave in a manner which they would not in public). Using this definition, it is possible to limit privacy along the lines of the normal limits of human autonomy, rather than to wall it off arbitrarily. These limits are threefold: consent, interference with the autonomy of others, and the rule of law. As to the first, matters are “private” to the extent that a person wishes to exclude others from them. Therefore, the more people that they consent to having access to something, the less private it is. However, the diminution of privacy is necessarily constrained by the limits of that consent – an actress might consent to appearing nude in a film, but that does not mean that she consents to anyone seeing her naked body in other settings.

20 Law Commission, above n 2, at [3.10]-[3.11].

21 Patricia Sanchez Abril “Recasting privacy torts in a spaceless world” (2007) 21 *Harvard J of L & Tech* 1.

22 *Von Hannover v Germany* [2004] ECHR 294, (2005) 40 EHRR 1 at [54].

A celebrity couple might sell their wedding photos to a magazine, but that does not mean that they consent to photographers from other publications sneaking into the wedding. As to the second restraint, a person's autonomy is necessarily limited by the effect that their actions have on others. There is no confidence in iniquity: privacy cannot be invoked to perpetuate or hide harmful conduct. Similarly, expectations of privacy must not unreasonably limit the activities of others – one cannot require the absence of bystanders on a public street. Lastly, the law may abrogate individual autonomy in order to protect society as a whole. In such cases, privacy should only be infringed upon to the extent necessary to fulfil that lawful purpose.<sup>23</sup>

This understanding of privacy informs the way in which the law should protect it. If privacy is about the autonomous act of excluding the public from certain aspects of our lives, the law should be focused on protecting this “private sphere” from illegitimate violation.<sup>24</sup> This has two consequences. First, determinations about whether something is “private” should focus on the extent to which *the person in question* desired to restrict public access to it (with the normal caveat that the law should not enforce unreasonable expectations). Secondly, the conduct that resulted in the violation of autonomy should be the basis of any right of action.

The latter point deserves some elaboration. If the law is to protect individuals' private spheres against violation, it should focus on regulating activities which *cause*, rather than *exacerbate*, such violations. The erection of a private sphere (or “private shield”)<sup>25</sup> is an autonomous action; the violation of that sphere occurs when the violator disregards that autonomy. That can happen in one of two ways. Either the violator forces their way into their victim's private sphere or, having been let in, they abuse their granted access. Forced access to private matters and abuse of access to private matters are thus the acts which the law should recognise as breaches of privacy, for it is by carrying out those acts that a person invalidates another's wish to be left alone. Any subsequent publicity given to information obtained via a breach of privacy exacerbates that breach. It will magnify the distress and harm suffered by the person whose private sphere has been breached. Yet publicity is a possible *consequence* and not the ultimate *cause* of a breach of privacy. It should be treated as such.

That conclusion cuts against the traditional publicity-centric view of privacy law. Nevertheless, it more accurately addresses the autonomy interest that underpins the desire to restrict access to oneself. Though Moreham herself does not go so far, she does provide a useful thought experiment which can be adapted to demonstrate why this is the case.<sup>26</sup> Consider the (unfortunately too common) example of a film actress who has had intimate photographs of her circulated online. If that actress has acted in nude scenes in her previous

23 *Peck v United Kingdom* (2003) 36 EHRR 186.

24 Catlin Wilson and Daniel Nilsson “Protecting our personal sphere” [2013] NZLJ 8.

25 *L v G* (2002) 6 HRNZ 489 at 501.

26 Moreham, above n 15, at 649.

films, those observing her will learn little information about her body that she has not already made public. Yet unquestionably her privacy has been breached. Why? Because of how those photos were obtained. Either someone has intruded into her privacy and taken or stolen a photo of her without her consent, or a person with whom she has shared those photos has subsequently disregarded her wishes to not make them available to anyone else. In either situation, her ability to control access to her private life – to exclude unwanted scrutiny from certain expressions of her individuality – has been taken away from her. That is what breached her privacy; the difference between one and one billion people having unauthorised access to her private self is merely the extent of the resulting harm.

### B. An Interest or a Right?

The autonomy framework also aids in resolving the second debate: whether privacy is a right or an interest. It is easy to see such a debate as semantic. However, it is important for two reasons. First, it informs whether privacy should be protected under a rights-protection framework or a loss-allocation framework. Secondly, it goes a long way to determining how a person's privacy should be balanced against competing values that *are* recognised as rights – such as the right to freedom of speech.

Legal protections typically follow either a rights-based or loss-allocation framework.<sup>27</sup> Common-law rights (such as the right to own and occupy property) are generally protected by per se actions (such as trespass). They are actionable without proof of damage. Similarly, a breach of human rights is generally remediable without proof that the breach caused any measurable harm to the person involved.<sup>28</sup> On the other hand, interference with a legal *interest* is generally only actionable where this causes significant and tangible harm. For example, the plaintiff in an action for breach of a duty of care must demonstrate that the defendant's negligence caused actual harm. The purpose of such actions is not to vindicate the plaintiff's right, but to ensure that damage is paid for by the person responsible for causing it.

Currently, tort law tends to describe privacy as a right but treat it like an interest. The reason for this is the widespread adoption of the American rule that breaches of privacy only become actionable if they are "highly offensive to the reasonable person".<sup>29</sup> In *C v Holland*, Whata J noted that this requires evidence of "real hurt or harm".<sup>30</sup> When the tort of public disclosure of private facts was articulated in *Hosking*, Gault P justified the inclusion of this

27 See Michael Tilbury "Privacy: common law or human right?" in Normann Witzleb and others (eds) *Emerging Challenges in Privacy Law: Comparative Perspectives* (Cambridge University Press, Cambridge, 2014) 157; see also Law Commission, above n 2, at [3.38].

28 See for example Human Rights Act 1993, s 92I (remedies possible for any breach of the right to be free from discrimination).

29 *Restatement (Second) of Torts (1977)* (USA), § 652B and § 652D.

30 *Holland*, above n 4, at [96].

criterion by reference to that ubiquitous excuse for judicial conservatism, the floodgates argument.<sup>31</sup>

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. However, it is quite unrealistic to contemplate legal liability for all publications of all private information. It would be absurd, for example, to consider actionable merely informing a neighbour that one's spouse has a cold. By living in communities individuals necessarily give up seclusion and expectations of complete privacy. The concern of the law, so far as we are presently concerned, is with widespread publicity of very personal and private matters.

His Honour's concern is odd given that the Court formulated a tort protecting *reasonable* expectations of privacy, not "complete" privacy. This point was made by Tipping J in his concurrence,<sup>32</sup> and a similar criticism of the Court's analysis was made by the House of Lords in *Campbell v MGN*.<sup>33</sup> Moreover, the process of litigation – with its high costs and attendant risk of further publicity – is itself a deterrent to pursuing trivial claims. If these factors are not enough to discourage a particularly tenacious plaintiff, the courts have a number of last resort powers intended to deal with vexatious litigants. Overall, there appears to be little risk of a properly formulated *per se* action opening the judicial floodgates.

Moreover, protecting privacy under a loss-allocation framework overlooks the true harm caused by its breach. When loss must be proved, plaintiffs primarily recover for humiliation and distress. These harms are hard to prove and even harder to quantify. As emotions, their appearance depends almost as much on how the plaintiff visibly reacts to the breach of privacy as on the egregiousness of the defendant's conduct. More significantly, focusing on the plaintiff's shame exaggerates the importance of the information made public by the breach of privacy. As noted above, a privacy action is not based on the fact that embarrassing information made it into the public eye, but that the plaintiff has lost the ability to control access to an aspect of their private life. Even if a breach of privacy does not humiliate someone, they still feel that loss of autonomy. With the knowledge of their vulnerability to public scrutiny, they lose confidence in their ability to behave in private "in a manner in which they would not behave in public". If the actress from the earlier example was comfortable showing her naked body in some public circumstances, its repeated exposure may not be enough to humiliate her.<sup>34</sup>

31 *Hosking*, above n 3, at [125].

32 At [256].

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

34 A similar example is used in Ursula Cheer "The Future of Privacy: Recent Legal Developments in New Zealand" (2007) 13 *Canta LR* 169 at 181182 (a naturalist whose photograph is used in pornography without their consent).



However, she is still likely to feel pressure to change her private behaviour in the face of public scrutiny. That is the real harm caused by a breach of privacy, and that is what the law should remedy.

Recognising privacy as a right is also necessary for it to be correctly balanced against other competing rights and values. In his dissent in *Hosking*, Anderson J argued that breach of privacy claims:<sup>35</sup>

... are not about competing values, but whether an affirmed right [freedom of expression] is to be limited by a particular manifestation of a value.

His Honour relied partially on the fact that the right to freedom of expression is affirmed by s 14 of the New Zealand Bill of Rights Act 1990 (NZBORA), while privacy is not mentioned in the Act at all. Section 28 does provide that other rights and freedoms are not abrogated by their omission from NZBORA, but the omission undoubtedly gives it a “different status” from the affirmed rights.<sup>36</sup> Nevertheless, it is possible to construe privacy as a right related to the s 21 prohibition on unreasonable search and seizure (similar to the Canadian position discussed below), or as a limitation on the right to freedom of speech that is demonstrably justifiable in a free and democratic society (under s 5).<sup>37</sup> Either way, privacy must be understood as a right to be adequately protected. If it is seen as a mere legal interest or value, it will always give way to more widely-recognised rights such as free speech. As will be discussed in the next section, jurisdictions which see the two rights as co-equal are better able to resolve their conflict.

### C. Summary

The right to privacy derives from the desire to free ourselves from unwanted access. By excluding others from aspects of our life, we gain the ability to develop a sense of self free from public scrutiny. The existence of private spheres is therefore a manifestation of autonomy, as well as a prerequisite for the individuality on which autonomy rests. Thus, privacy is a subcategory of the individual autonomy *Quellrecht* (“source-right”).<sup>38</sup>

The law should enforce individual privacy in the light of this status. Actions at law should focus on conduct that illegitimately disregards a person’s desire to erect their own private sphere. Conduct which breaches that sphere – whether via external intrusion or internal abuses of access – should be actionable per se in order to vindicate the plaintiff’s loss of autonomy. Subsequent publication of any information obtained via a breach of privacy should be considered an

35 *Hosking*, above n 3, at [266].

36 Law Commission, above n 2, at [29].

37 *Hosking*, above n 3, at [113] per Gault P.

38 See Paul M Schwartz and Karl-Nikolaus Peifer “Prosser’s ‘Privacy’ and the German right of personality: are four privacy torts better than one unitary concept?” (2010) 98 Cal L Rev 1925 at 1952.

exacerbation of damage, rather than an independent ground of complaint. Ultimately, the law must recognise that privacy actions do not primarily protect reputation or feelings, but the foundations of individuality itself.

## II. PRIVACY ACTIONS IN OTHER JURISDICTIONS

The difficulty in finding a coherent and comprehensive definition of privacy has contributed to the ad-hoc way in which it has been recognised by the law. The International Covenant on Civil and Political Rights (ICCPR) proclaims that: “No one shall be subjected to unlawful interference with his privacy” and that: “Everyone has the right to the protection of the law against such interference”.<sup>39</sup> Different jurisdictions have taken very different approaches to implementing these declarations. Australia’s courts have proven so reluctant to recognise an action for breach of privacy<sup>40</sup> that the Australian Law Reform Commission (ALRC) has recommended statutory intervention.<sup>41</sup> However, other common law countries have been more ready to grant individuals the ability to enforce their privacy in the courts. This section will canvass developments in the three jurisdictions that have most heavily influenced the development of our own privacy torts: England and Wales, Canada, and the United States of America.

### *A. England and Wales*

The conventional view of privacy law in England and Wales is that the common law recognises no right to privacy upon which a tortious action could be based.<sup>42</sup> Traditionally, the law has only protected *confidentiality* by punishing those who disclose information given to them in confidence.<sup>43</sup> Nevertheless, because breaches of confidence have always been dealt with under the English courts’ equitable jurisdiction, the remedy has never been confined to situations involving an explicit promise of secrecy. Indeed, the courts have long punished third parties who unconscionably revealed information which they ought to have known was confidential.<sup>44</sup> Therefore, over time, the breach of confidence action has been stretched to cover situations that would be more appropriately remedied by an action for breach of privacy.<sup>45</sup>

39 International Covenant on Civil and Political Rights 993 UNTS 3 (signed 16 December 1966, entered into force 3 January 1976) [ICCPR], art 17.

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

41 Australian Law Reform Commission *Serious Invasions of Privacy in the Digital Era* (ALRC Report 123, June 2014).

42 *Kaye v Robertson* (1991) FSR 62; *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406.

43 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

44 *Argyll (Margaret), Duchess of v Duke of Argyll* [1965] 1 All [1967] Ch 302, ER 611.

45 See *Douglas v Hello! Ltd (No 3)* [2007] UKHL 21, [2008] 1 AC 1.

The passage of the Human Rights Act 1998 (UK) precipitated a fundamental change in the nature of privacy protections in England and Wales. The Act incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) into English law.<sup>46</sup> Article 8 of the ECHR declares that: “Everyone has the right to respect for his private and family life, his home and his correspondence.” The right to privacy is qualified by the other rights specified in the ECHR – including the right to freedom of speech in art 10 – but any limitations must be proportional.<sup>47</sup> The impact of the ECHR was recognised by the House of Lords in *Campbell v MGN Ltd*.<sup>48</sup> While Their Lordships were split 3-2 on the facts of the case, they unanimously accepted that the effect of art 8 was to solidify an action for “misuse of personal information” that applies when private information is made public and a reasonable person in the position of the plaintiff would find such disclosure objectionable. Lord Nicholls of Birkenhead went so far as to refer to misuse of personal information as a separate tort,<sup>49</sup> and Lord Hoffman considered that the Human Rights Act had caused a “shift in the centre of gravity” of the breach of confidence action.<sup>50</sup> While the other Law Lords were more reserved,<sup>51</sup> the decision has been described as “*de facto* granting a privacy action under the guise of an expanded confidence law”.<sup>52</sup>

A key recent development is the decision in *Gulati v MGN Ltd (No 2)*, where the Court of Appeal confirmed that damages were available to “compensate for the loss or diminution of a right to control formerly private information” independent of any consequential loss or distress.<sup>53</sup> The trial judge in that case, Mann J, had allowed such damages on the basis that:<sup>54</sup>

The tort is not a right to be prevented from upset in a particular way. It is a right to have one’s privacy respected. Misappropriating (misusing) private information without causing “upset” is still a wrong. I fail to see why it should not, of itself, attract damages. Otherwise the right becomes empty, contrary to what the European jurisprudence requires. Upset adds another basis for damages; it does not provide the only basis.

46 European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953) [ECHR].

47 Art 8(2).

48 *Campbell*, above n 33.

49 At [13]-[15].

50 At [51].

51 See at [86] per Lord Hope of Craighead, and at [133] per Baroness Hale of Richmond.

52 Ursula Smartt *Media and Entertainment Law* (Routledge, London, 2011) at 35.

53 *Gulati v MGN Ltd (No 2)* [2015] EWCA Civ 1291, [2016] 2 WLR 1217 at [48]. Leave to appeal to the Supreme Court was denied: *Gulati v MGN Ltd* [2016] 1 WLR 2559.

54 *Gulati v MGN Ltd (No 2)* [2015] EWHC 1482, [2016] FSR 12 at [143].

Perhaps unsurprisingly, it is the author's respectful submission that this reasoning is sound.

The ECHR's recognition of privacy as a right means that it cannot automatically be trumped by the right to freedom of speech. Instead, courts must adopt a balancing approach that takes into account "the comparative importance of the specific rights being claimed" and the necessity and proportionality of restricting them in the context of each case.<sup>55</sup> The key question is whether the publication of the information at issue would contribute meaningfully to a "debate of general interest".<sup>56</sup> It must do more than merely satiate public curiosity in the private life of a celebrity.

The ECHR's rights-based framework has scope to provide powerful protection to privacy. Indeed, English courts have been criticised for being too ready to grant so-called "superinjunctions" – orders not only suppressing private information but also prohibiting publicity of the fact that a suppression order has been made.<sup>57</sup> While these are sometimes necessary to prevent a granted remedy from being ineffectual, their very nature makes it hard to gauge the extent to which such orders are used appropriately.<sup>58</sup>

Despite these considerable recent developments in the area of informational privacy, English law currently provides no direct remedy for a breach of spatial or physical privacy.<sup>59</sup> This appears anomalous: if an action for publicity of private information could evolve out of breach of confidence, surely the doctrine of trespass could also have evolved to protect physical privacy more broadly. It remains to be seen whether European jurisprudence and overseas developments will precipitate change in the future.

### B. Canada

Canadian privacy law is made up of a "patchwork of legislative and common law protections".<sup>60</sup> The Supreme Court of Canada has held that the protections against unreasonable search and seizure in the Canadian Charter of Rights and Freedoms (1982) (the Charter) are based on an independent right to privacy,<sup>61</sup> which in turn is grounded in "man's physical and moral autonomy".<sup>62</sup> However, the Charter is not directly enforceable against private parties, and the only federal legislation concerned with privacy rights is a data

55 *Re S (FC) (a child)* [2004] UKHL 47 [2005] 1 AC 593 at [17]; *Campbell*, above n 33, at [55]-[56].

56 *Von Hannover*, above n 22, at [60]; *Re Guardian New and Media Ltd* [2010] UKSC 1 [2010] 2 AC 697 at [49]-[51].

57 See *Burrows*, above n 9, at 981-982.

58 Smartt, above n 52, at 74-76.

59 *Wainwright*, above n 42.

60 Jared Mackey "Privacy and the Canadian media: developing the new tort of 'intrusion upon seclusion' with Charter values" (2012) 2 W J Legal Stud 1 at 3.

61 *Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc* [1984] 2 SCR 145 at 158-159.

62 *R v Dyment* [1988] 2 SCR 417 at 427 per La Forest J.

protection statute equivalent to New Zealand's Privacy Act 1993.<sup>63</sup> Therefore, claims for breach of privacy must rest on provincial law.

Four provincial jurisdictions have created statutory privacy torts.<sup>64</sup> The provincial torts are generally phrased broadly and are capable of protecting a wide range of privacy interests. For example, the relevant British Columbian statute provides simply that: "It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another."<sup>65</sup>

The action is intended to cover both intrusions into private spaces and the publication of private information, as is demonstrated by its stated limitations. A public interest defence exists in cases where a defendant has published private information,<sup>66</sup> but the defence explicitly does not extend to "any other act or conduct by which the matter published was obtained".<sup>67</sup> Thus while *publishing* private information may be justifiable if doing so is in the public interest, *intruding* into privacy in order to gain such information may still be actionable.

Plaintiffs in provinces without a statutory privacy tort must rely on the common law. In the landmark case of *Jones v Tsige*, the Ontario Court of Appeal recognised a tort of "intrusion upon seclusion" protecting both physical and informational privacy.<sup>68</sup> The case adopted American jurisprudence by holding that a tort is committed by an intentional and unauthorised intrusion upon a private matter that causes anguish and suffering and would be highly offensive to a reasonable person.<sup>69</sup> The tort does not require publication of any private information obtained in the course of the intrusion (as no such publication had occurred on the facts) – instead publication (or lack thereof) is relevant to the assessment of damages.<sup>70</sup>

Thus, both Canadian statute law and jurisprudence recognise actions for breach of privacy that focus on the improper gathering of private information, rather than its subsequent publication. In doing so, Canadian privacy law is able to avoid a direct conflict with freedom of speech. Where such a clash does take place, it is likely that the courts will adopt a balancing approach similar to that which the Supreme Court utilises in defamation cases.<sup>71</sup> In those cases, the Court has held that the key factor in a decision is whether the information pertains to a "matter of public interest". Such an approach

63 Personal Information Protection and Electronic Documents Act SOC 2000 (Canada).

64 Privacy Act, RSBC 1996 c 373 (British Columbia) [BCPA]; Privacy Act, RSS 1978, c P-24 (Saskatchewan); The Privacy Act, CCSM c P125 (Manitoba); Privacy Act, RSNL 1990, c P-22 (Newfoundland and Labrador).

65 BCPA, c 373, s 1.

66 At Section 2(3).

67 At Section 2(4).

68 *Jones v Tsige* [2012] ONCA 32, (2012) 108 OR (3d) 241, 346 DLR (4th) 34.

69 At [56] and [71].

70 At [81], [87] and [90].

71 *Grant v Torstar Corp* 2009 SCC 61, [2009] 3 SCR 640 at [65]; referred to in *Jones*, above n 66, at [73].

would be appropriate given the Court's recognition that privacy (like freedom of speech) is a right protected by the Charter.

### C. *United States*

The United States was one of the first jurisdictions to recognise tortious actions for breach of privacy, and as a consequence has perhaps the world's most developed jurisprudence on the subject. The relevant law is set out in s 652A of the *Restatement (Second) of Torts (1977)*:

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

The "false light" and appropriation torts have only weak conceptual links to privacy and are more relevant to defamation and intellectual property law respectively. However, the intrusion and publication actions are highly relevant to the present discussion as they formed the basis for our own privacy torts. The American actions require the relevant intrusion or publication to be "highly offensive to a reasonable person".<sup>72</sup>

The language of the *Restatement* is ambivalent towards the conceptual status of privacy. It refers to damage to a plaintiff's "interests" arising from breach of their "right to privacy". Nevertheless, in practice plaintiffs are required to prove the existence of an enforceable "privacy interest".<sup>73</sup> This indicates that the United States protects privacy under a loss-allocation rubric, which has consequences for the way in which privacy is balanced against free speech (a right explicitly protected by the First Amendment to the Constitution). Courts apply "strict scrutiny" to any action that has the potential to restrict

<sup>72</sup> Sections 652B and 652D.

<sup>73</sup> Compare *Nader v General Motors Corp* 225 NE2d 765 (privacy interest in confidential data exposed during overzealous public surveillance) and *Gill v Hearst Publishing Co* 252 P2d 441 (no privacy interest in anything exposed to public view).

free speech.<sup>74</sup> Thus, in publication actions the plaintiff must prove an absence of “legitimate public concern”.<sup>75</sup> This “newsworthiness” test has been interpreted narrowly in some cases (requiring a logical nexus between the published facts and an issue of public concern) and expansively in others (with a “leave it to the press” approach).<sup>76</sup> Overall, judicial reluctance to interfere with editorial discretion has resulted in a paradoxical situation where privacy is only protected “to the extent it is customarily respected”.<sup>77</sup> This makes “the right to privacy in the United States ... a somewhat hollow one”.<sup>78</sup>

In contrast, actions for breach of confidentiality (based on promissory estoppel or contract law) are likely to escape the ambit of the First Amendment.<sup>79</sup> In *Cohen v Cowles Media Co*, the Supreme Court held that the First Amendment does not give the press immunity from the “generally applicable” law.<sup>80</sup> Hence, a newspaper could be estopped from publishing the name of a source whom they had promised to keep anonymous. The case would seem to suggest that the right to free speech in the First Amendment is enough to outweigh a plaintiff’s general interest in privacy, but is not enough to invalidate a defendant’s express or implied promise to keep a secret.

Similarly, it is unlikely that the intrusion tort will fall afoul of the constitutional right to free speech. Though in a recent case the Supreme Court did famously disallow a claim under the intrusion tort in order to protect religious protestors demonstrating near a funeral, its ruling noted that the protestors were in a public place and did not actually intrude into the funeral itself.<sup>81</sup> The case should be regarded as exceptional, and it is likely that most intrusion cases will circumvent the First Amendment by avoiding a direct challenge to free speech.<sup>82</sup>

#### D. Analysis

Two key themes can be noted about the way in which these jurisdictions deal with privacy. The first is a difference: a lack of agreement as to what facets of privacy should be protected by the law. The second is a similarity: the clash of privacy and free speech is either avoided through a focus on the defendant’s conduct, or mediated by an evaluation of whether the “value” of the information at issue meets a “public interest” threshold. Exploring these themes sheds some light on the strengths and weaknesses of each jurisdiction’s approach.

74 Daniel J Solove and Paul M Schwartz *Privacy Fundamentals* (3rd ed, IAPP, Portsmouth, New Hampshire, 2015) at 66.

75 *The Florida Star v B/F* 491 US 524 (1989).

76 Solove and Schwartz, above n 72, at 56.

77 Anderson, above n 16, at 148.

78 *Hosking*, above n 3, at [73] per Gault P.

79 Solove and Schwartz, above n 72, at 66.

80 *Cohen v Cowles Media Co* 501 US 663 (1991).

81 *Snyder v Phelps* 562 US 443 (2011).

82 Solove and Schwartz, above n 72, at 66.

## 1. Categories of privacy

Privacy actions tend to fall into two categories. The first is concerned with access: it reacts to a person intruding into a private area. This intrusion may or may not be physical; the essence of the action that the defendant has gained unauthorised access to an aspect of the plaintiff's private life. The second category deals with the improper use of private information. These actions are less concerned with how the defendant obtained the information: so long as they did or ought to have known that it was private in nature, they have a duty to not publicise it.

The first category is very much conduct focused. First, the court examines what the plaintiff did to create seclusion. Often, this is self-evident: by having a home, a person automatically creates a space from which others are excluded. Secondly, the court looks at the conduct of the defendant: whether their entry into that space constituted an offensive disregard for the plaintiff's attempt to make it private. The plaintiff in such a case is seeking to be compensated for a derogation of their autonomy resulting from the defendant's intrusion into an area from which the plaintiff intended them to be excluded.

In contrast, the second category is less concerned with the conduct of the parties and more concerned with the substance of the information that has become public. The central question is whether the defendant knew or ought to have known that the information they disclosed was "private" or "confidential". This is a much more detached assessment. The intentions and actions of the parties are secondary to more objective considerations: *should* this kind of information be considered private? Was it actually private at the time of disclosure, or was it already widely known? If the information was and ought to have been private, a successful plaintiff is compensated from the damage to their autonomy caused by the information becoming public.

The two categories of action are thus conceptually independent. Events which trigger one may not trigger the other. The United Kingdom has rejected one of the categories, while the United States and Canada have dealt with them slightly differently. In the United States, two separate actions exist under two separate tests. In Canada, both the statutory and common law torts for breach of privacy have a more holistic focus. An "invasion" of privacy constitutes the primary tort, subsequent publication of any gathered information contributes to the damage. The United States' approach is more in line with the status quo in New Zealand. Nevertheless, as will be discussed below, this does not mean that it should continue to be followed.

## 2. Dealing with free speech

The inevitable clash between privacy and freedom of speech is mitigated differently in different situations. In some cases, it is possible to avoid the clash altogether by focusing on the culpability of the defendant's conduct. Where the clash is unavoidable, all jurisdictions engage in some kind of balancing exercise where the right to free speech is weighed against the



plaintiff's privacy. However, the weight given to privacy in such a calculus varies significantly among jurisdictions.

When physical rather than informational privacy is at issue (as in the intrusion torts), a direct conflict with free speech can usually be avoided. The freedom to spread ideas and share information does not give individuals free reign to trespass and harass others. Still, conflict cannot be avoided entirely. As Jared Mackey notes, information has to be gathered before it can be shared.<sup>83</sup> In particular, the news media will often need to pry aggressively in order to find and develop important stories. Therefore, the need to balance the two rights remains.

Similarly, actions for breach of confidence minimise, but do not fully remove, the tension between privacy and freedom of speech. Breach of confidence actions are founded on an express or implied promise to keep some information secret. Generally speaking, the obligation of confidence is voluntarily assumed, and thus the defendant has waived their right to freedom of speech in the circumstances. Nonetheless, there will always be some situations wherein the public interest demands that this waiver should be set aside – “there is no confidence in iniquity”. Ultimately, to an extent all privacy-related actions have the potential to curtail free speech.

The conflict is handled better in jurisdictions that recognise free speech and privacy as co-equal human rights. In Canada and the United Kingdom, a classic rights-balancing exercise is employed. The rationales of the right to free speech and the right to privacy are contextualised in the circumstances of each case, and then weighed against each other. If the defendant wishes to disregard the plaintiff's privacy, they must demonstrate that there is a societal value in doing so, and that the breach of the plaintiff's privacy is no larger than is necessary to obtain the public benefit. In contrast, the United States adopts a more absolutist approach. In privacy cases, any aspect of “newsworthiness” or desire to make a political statement invokes the First Amendment, making it extremely unlikely that the plaintiff's privacy will prevail. On the other hand, any contractual or estoppel-based waiver of the right to disclose information will be enforced. This dichotomy arises because freedom of speech is recognised as an explicit constitutional right, while privacy has a more ambiguous status. This creates a hierarchy between the two concepts that complicates their application in all but the most clear-cut cases. It makes it nearly impossible to justify imposing any restriction on speech in the name of privacy, and makes courts very reluctant to second-guess editorial decisions. This undermines the ability of the law to protect privacy, and has resulted in the near-impotence of the publicity tort in the United States.<sup>84</sup>

83 Mackey, above n 58, at 10.

84 Anderson, above n 75.

### 3. Lessons for New Zealand

Overseas experiences provide some guidance as to the development of the privacy torts in New Zealand. First, it is important that our courts recognise the conceptual difference between internal and external privacy. Secondly, effective privacy protections require the recognition of privacy as a human right equal in importance to freedom of speech. New Zealand law as it stands does fairly well on both counts. However, there remains room for consolidation and improvement. Discussion of this will be the focus of the remainder of this paper.

### III. ACTIONS FOR BREACH OF PRIVACY IN NEW ZEALAND

Privacy as a standalone concept is relatively new to New Zealand law. Like all jurisdictions, our law protects privacy via a patchwork of common law and statute that has evolved significantly over time. The newest additions to that patchwork are the torts of public disclosure of private information and intrusion upon seclusion. As new torts, their future is uncertain. Considerable scope for refinement still exists – as has been recognised both by the courts and the Law Commission.<sup>85</sup> This part of the paper will draw upon the discussions above and make recommendations as to how that refinement should proceed.

#### A. *The Status Quo*

Though no explicit right to privacy is affirmed in NZBORA, New Zealand law provides six direct mechanisms through which individuals can protect their private life.<sup>86</sup> Three are statutory: the Broadcasting Act 1989, Privacy Act 1993 and new Harmful Digital Communications Act 2015 provide avenues for individuals to take actions against breaches of their privacy by (respectively) broadcasters, agencies holding personal data, and individuals posting “sensitive personal facts” online.<sup>87</sup> Though all three statutes are targeted and so have a relatively narrow ambit, their existence should be borne in mind when considering the more general privacy protections provided by the common law. Those common law protections are the torts of public disclosure of private facts and intrusion into seclusion, and the equitable action for breach of confidence.

85 *Rogers*, above n 5, at [25]-[26] per Elias CJ, at [99] per McGrath J, at [144] per Anderson J; *Faesenkloet v Jenkin* [2014] NZHC 1637 at [39] per Asher J; Law Commission, above n 6, at [7.6]-[7.19].

86 These legal mechanisms are complemented by the privacy guidelines enforced by media self-regulators such as the Press Council and Online Media Standards Authority.

87 Harmful Digital Communications Act 2015, s 6, communication principle 4.

## 1. Public disclosure of private facts

The tort of public disclosure of private facts was first recognised by the Court of Appeal in *Hosking*. The judgment itself refers to the tort as “breach of privacy” or “interference with privacy”, but its true focus is demonstrated by the elements that must be proved for an action to succeed:<sup>88</sup>

- 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.

The Court noted that though there is no definitive test by which to identify private facts, they will generally be those that “may be known to some people, but not to the world at large.”<sup>89</sup> Public figures (and their families) may have a diminished reasonable expectation of privacy with regard to some parts of their lives, but this will depend on the extent to which they “willingly put themselves in the spotlight.”<sup>90</sup> As noted above, the “highly offensive to a reasonable person” test was imported from North American jurisprudence, and was intended to preclude frivolous or excessive actions.<sup>91</sup>

The Court also held that there should be a defence of “legitimate public concern” in the publicised information.<sup>92</sup> This would allow the defendant’s right to freedom of speech to be balanced against the plaintiff’s right to privacy. The level of legitimate public concern in the information would need to “outweigh” the level of harm caused by the breach of privacy for the defence to apply. For example, Gault P noted that “general interest or curiosity” would never be enough to outweigh the level of harm “presupposed” by the tort, and so could never justify the disclosure of any facts about which there was a reasonable expectation of privacy.

The tort was further developed in the case of *Andrews v TVNZ*.<sup>93</sup> In that case, Allan J noted that “because the interference complained of arises by reason of ... publicity”, the question of whether or not the plaintiff has a reasonable expectation of privacy should be assessed at the time of publication.<sup>94</sup> His Honour also reiterated that a plaintiff could have a reasonable expectation of privacy in a public space in “exceptional” cases,<sup>95</sup> but suggested that in some cases a person might lose their reasonable expectation of privacy because of their own blameworthy conduct.<sup>96</sup> As to the “highly offensive” limb of the

88 *Hosking*, above n 3, at [117].

89 At [119].

90 At [121]-[122].

91 At [125]-[127].

92 At [129]-[134].

93 *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220.

94 At [30].

95 At [31].

96 At [47].

*Hosking* test, the Court considered that “the burden faced by the plaintiff is a high one” and that the tone of the publication, as well as the extent to which the plaintiff is identifiable (to their acquaintances) is relevant.<sup>97</sup> The Court emphasised that private information being published without consent is not in itself highly offensive – the information itself must show the plaintiff in such a “bad light” that its publicity is “humiliating”.<sup>98</sup> Finally, Allan J noted that courts would “ordinarily permit a degree of journalistic latitude” in assessing the public interest defence, “so as to avoid robbing a story of its attendant detail, which adds colour and conviction”.<sup>99</sup>

The decisions in both *Andrews* and *Hosking* were heavily influenced by the United States’ public disclosure tort. As a result, the New Zealand tort closely mirrors the American: especially in terms of the “highly offensive” test and the defence of “legitimate public concern”. Indeed, a 2006 District Court case (one of the handful of cases that has directly applied the tort) noted that “New Zealand is now generally aligned to the jurisprudence of the United States of America in this area rather than that of Australia, Canada and the United Kingdom”.<sup>100</sup>

This alignment is potentially concerning, given that the Court in *Hosking* described the right to privacy in American law as “a somewhat hollow one”.<sup>101</sup>

## 2. Intrusion upon seclusion

New Zealand’s second privacy tort was first articulated by the High Court in *C v Holland*. The case itself concerned the covert filming of a woman by her partner’s flatmate. The defendant did not publish the tape; thus *Hosking* could not apply. Nevertheless, Whata J drew upon the principles of the case and the decision of the Ontario Court of Appeal in *Jones* to conclude that New Zealand law should recognise a tort of intrusion upon seclusion.<sup>102</sup> The plaintiff in such cases must prove the occurrence of:<sup>103</sup>

- 1) an intentional and unauthorised intrusion;
- 2) into seclusion (namely intimate personal activity, space or affairs);
- 3) involving infringement of a reasonable expectation of privacy; and
- 4) that is highly offensive to a reasonable person.

97 At [48]-[60].

98 At [70]-[71].

99 At [82].

100 *Brown v Attorney-General* [2006] DCR 630, [2006] NZAR 552 at [53].

101 *Hosking*, above n 3, at [73] per Gault P.

102 *Jones*, above n 66.

103 *Holland*, above n 4, at [92]-[93].

The intrusion must constitute an affirmative act, not one that is “unwitting or simply careless”.<sup>104</sup> Furthermore, “the boundaries of the privacy tort articulated in *Hosking* apply where relevant”.<sup>105</sup> Specifically, the plaintiff must demonstrate the existence of a reasonable expectation of privacy, the intrusion into that privacy must be “highly offensive to a reasonable person”, and a defence of legitimate public concern exists along the same lines as given in *Hosking*.

The similarities with the *Hosking* tort give rise to the question as to whether the two torts need be separate at all. In *Faesenkloet v Jenkin*, Asher J noted the following common elements:<sup>106</sup>

- 1) The existence of facts or circumstances in respect of which there is a reasonable expectation of privacy; and
- 2) Publicity of, or an intentional and unauthorised intrusion into, those private facts or circumstances that would be considered highly offensive to an objective reasonable person.

However, some of these similarities are uncertain. Importantly, the two torts apply the “highly offensive to a reasonable person” test quite differently. *Hosking* and *Andrews* make it clear that the test is only satisfied when *unfavourable information* is released to the public – the publicity must shame or “humiliate” the plaintiff. In contrast, *Holland* is not concerned with whether the plaintiff has been caught engaging in a shameful activity: it is the “nature and extent” of the *intrusion* that is examined. In *Holland*, the plaintiff was filmed in the shower. In *Jones*, the plaintiff’s banking information was accessed without his consent. Neither intrusion revealed anything about the plaintiff that put them in a “bad light”. Any news story publicising the information obtained by the intrusion could easily have been written in a tone that was favourable to the plaintiff. Yet in both cases the courts found the defendant’s actions to be highly offensive. This suggests that there is some inconsistency between how different tortious breaches of privacy are assessed by the courts.

### 3. Breach of confidence

The oldest private law action that can be used to protect privacy is breach of confidence. Equity will intervene to prevent the use or disclosure of information by a defendant when the following criteria are met:<sup>107</sup>

104 At [95].

105 At [96].

106 *Faesenkloet*, above n 83, at [38].

107 *Coco*, above n 43, at 4546 per Megarry J.

First, the information itself ... must “have the necessary quality of confidence about it”. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information ...

The action evolved in order to protect certain explicit relationships of confidence (for example between doctor and patient and lawyer and client), but over time has broadened to include any situation where:<sup>108</sup>

... confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.

A duty of confidence can arise even where the plaintiff does not directly disclose the information to the defendant, for example, if the defendant steals the information.<sup>109</sup> Where the defendant obtains the information via a third party, equity may still intervene if the ultimate recipient has “acted unconscionably in relation to the acquisition of the information or in the way it has been employed”.<sup>110</sup> As with the privacy torts, a public interest defence exists in relation to actions for breach of confidence. This stems from the equitable maxim that “there is no confidence in iniquity”.<sup>111</sup>

There is, of course, a difference between privacy and confidentiality. A duty of confidence arises because of a relationship of trust and confidence between two parties, whereas a duty to maintain privacy arises from the general duty to respect the autonomy of others. For this reason, a corporate entity can be owed a duty of confidentiality even if they are unlikely to ever be owed a duty of privacy,<sup>112</sup> indeed the confidence action is routinely used by corporations as a form of intellectual property protection. Nevertheless, actions for breach of confidence have always been utilised by individuals to protect their privacy. Many important early decisions involved attempts to protect the privacy of members of the British aristocracy.<sup>113</sup> This accords with the definition of privacy as a value interconnected with autonomy. If privacy is about freedom from unwanted access, an important part of protecting privacy is ensuring that people who are given access to private matters do not abuse that access. Therefore, for both pragmatic and principled reasons, the existence of the

108 *AG v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (*Spycatcher*) at 281 per Lord Goff of Chieveley.

109 *Reeves v OneWorld* [2006] 2 NZLR 184.

110 *Hunt v A* [2007] NZCA 332, [2008] 1 NZLR 368 at [92].

111 *Gartside v Outram* (1856) 26 LJ Ch 113.

112 *Lenah Game Meats*, above n 40.

113 *Prince Albert v Strange* [1849] EngR 255 (1849) 1 H & Tw 1; *Lord Ashburton v Pape* [1913] 2 Ch 469; *Argyll*, above n 44.

breach of confidence action is relevant to the future development of the New Zealand privacy torts.

*a. The Redundancy of the Hosking Tort*

The claimed role of the *Hosking* tort is to prevent the highly offensive publication of private facts. However, this role is to a large degree redundant. Exactly why this is the case can be explained by reference to an example provided by the Law Commission to explain the difference between privacy and confidentiality:<sup>114</sup>

Imagine that A knows private information about C and tells it in confidence to B, then B publishes that information. Both A and B may have breached C's privacy, but it is A whose confidence has been breached.

According to the Law Commission, A might have an action against B in breach of confidence, but C's only remedy for the publication would be to sue B under the *Hosking* tort. Yet the example is incomplete. It fails to explain *how* A "knows private information" about C. That omission mirrors the problem with actions for public disclosure of private facts. Such torts assume that that primary actionable wrong carried out by the tortfeasor is the *publication* of such information. If the information is truly private, that is highly unlikely to be true. Yet by focusing on the act of publication, courts misapply the concept of privacy, create unnecessary conflicts with freedom of speech, and undermine the coherence of the law.

In both *Hosking* and *Andrews*, the primary wrong claimed was not publicity given to private facts but an intrusion upon seclusion. Specifically, both cases concerned the taking of photographs or video without consent. In *Andrews*, Allan J noted that the true motivation behind the plaintiffs' claim was their "chagrin and annoyance at not being advised they were being filmed at close range".<sup>115</sup> Similarly, in *Hosking* one of the primary grounds of the plaintiffs' concern was "the surreptitious 'stalking' of [their] children" by a professional photographer.<sup>116</sup> In neither case did the plaintiffs contend that no information could ever be legitimately disseminated about actions which they carried out in public. Rather, their complaints were based on the contention that recordings had been made of them in a way that was unreasonably intrusive.

Though counter-intuitive, it is relatively clear that making a recording of someone's activities in a public place can constitute an intrusion upon their seclusion. The essence of seclusion is the exclusion of the public eye. While a

114 Law Commission, above n 2, at [2.57].

115 *Andrews*, above n 91, at [69].

116 *Hosking*, above n 3, at [18].

person who goes about in public is necessarily accepting *some* degree of public scrutiny, they do not give up *all* aspects of privacy. As Moreham argues:<sup>117</sup>

This is because although people cannot usually avoid being observed in public places, they can make that observation tolerable by choosing how much or how little of themselves they reveal to others when they go into public. For example, X can wear clothes to cover the intimate parts of his body, avoid discussing personal matters when others can hear him, and reserve intimate experiences such as receiving medical treatment, undressing, or viewing the bodies of deceased loved ones for situations where he cannot be observed by others.

Thus, “seclusion” is not entirely surrendered in a public space. Intrusions upon that seclusion can occur if a tortfeasor actively seeks to circumvent the plaintiff’s autonomy and strip away what privacy they have sought to preserve. This can happen when a person makes a recording of events that they are a witness to, even if being a witness to that event is not in itself deliberately intrusive. When recommending the introduction of legislation to more heavily regulate the use of surveillance devices (including videos and cameras), the Law Commission noted that the use of such devices is more intrusive than “observation using the unaided senses” because it allows more information to be captured and provides a mechanism by which that information can be permanently stored and widely disseminated.<sup>118</sup> A person going out in public consents to bystanders being able to observe their activities; they cannot be reasonably held to consent to the world at large being able to share in such observations, particularly when recordings are made surreptitiously in the hopes of catching them in a private moment. The intrusiveness of photographs taken in public places was recognised in both *Von Hannover* and *Campbell*.<sup>119</sup> It was also noted in *Andrews*. Justice Allan held that while the plaintiffs would have known that their comments could have been overheard by the emergency service crews working to aid them in the aftermath of a car crash, they had a “legitimate expectation” that their conversation “would not be heard beyond those within earshot”.<sup>120</sup> The fact that they were filmed disregarded this expectation, and gave far more people access to their private moment than they had consented to. The defendants were effectively putting the plaintiffs under a form of surveillance, and in doing so they were intruding upon their seclusion.

Once this is recognised, the redundancy of the *Hosking* tort becomes clear. If information is displayed in public in such a way that it can be collected

117 NA Moreham “Privacy in public places” [2006] NZLJ 265 at 267.

118 Law Commission, above n 6, at [3.6].

119 *Von Hannover*, above n 22; *Campbell*, above n 33.

120 *Andrews*, above n 91, at [65]-[66].



non-intrusively, it is unlikely to give rise to a reasonable expectation of privacy. If it can only be collected through an intrusion (whether surveillance in public or an invasion of a private arena such as the home or private records), publication is precluded by the ordinary principle that a person cannot profit from their own wrong.<sup>121</sup> Alternatively, the ground could easily be covered via the equitable action for breach of confidence. The intrusion could be analogised to a theft of the information which would fix the acquirer's conscience and make use of the information unconscionable.<sup>122</sup>

Of course, intrusions are not the only way to access someone's private sphere. It is possible to obtain someone's private information by close association with them. Nevertheless, the *Hosking* action is still redundant in such cases. The more appropriate remedy is breach of confidence. As noted above, the action becomes available whenever a person receives information in a context which imparts on them a duty of confidence. In such situations, equity will prevent any use of that information, which necessarily includes disclosure without consent. The remedy is easily applicable to personal relationships; for example in Australia it has been used in cases involving the publication of intimate photographs taken in the context of a sexual relationship.<sup>123</sup> Indeed, the remedy is much more appropriate than the *Hosking* tort. This is for two reasons. First, it remedies the actual wrong that has occurred – abuse of the access granted by the plaintiff to their private matters. Secondly, it forbids *any* use of the information, not merely publicity that would be highly offensive to a reasonable person. The lower threshold for legal intervention is justified because of the increased vulnerability that arises when a person divulges private information to another – they have lost control over that information and must trust the other to use it legitimately.

Breach of confidence is also applicable when the publisher is a third party recipient of information. There is clear and consistent authority that a duty of confidence can arise when a person is given information by an informant who has breached confidence or otherwise obtained it by illegitimate means.<sup>124</sup> The test is whether or not the recipient has acted “unconscionably”, taking into account the nature of the information, their state of knowledge, the extent of the wrongdoing involved in obtaining the information, and the degree of “culpability” of the recipient.<sup>125</sup> Actual knowledge or wilful blindness as to the illegitimate means of acquisition will almost certainly give rise to a duty on the part of the recipient.<sup>126</sup> There is a clear overlap here with the *Hosking* tort – if information cannot be published without being highly offensive to

121 The applicability of this principle was noted in *Hosking*, above n 3, at [269] per Anderson J (dissenting).

122 See Katrine Evans “Was Privacy the winner on the day?” [2004] NZLJ 181 at 182.

123 *Wilson v Ferguson* [2015] WASC 15; *Giller v Procopets* (2008) 24 VR 1; *Procopets v Giller* (M32/2009) [2009] HCASL 187 (leave to appeal to the HCA rejected).

124 *Wheatley v Bell* [1984] 2 NSWLR 544; *Spycatcher*, above n 106; *Hunt*, above n 108; *Lenah Game Meats*, above n 40.

125 *Hunt*, above n 108, at [93].

126 At [94].

a reasonable person due to its infringement on a reasonable expectation of privacy, then the publisher cannot disclose it in good conscience (and vice versa). Again, breach of confidence has the dual advantages of a focus on the disregard for autonomy and a low threshold for intervention. Indeed, it is puzzling why this long-established authority has not been used more assertively to preclude tabloid newspapers using “sources close to” the plaintiff in order to obtain private information. Aside from a photograph (taken in circumstances that could amount to an intrusion upon seclusion), all of the information which the House of Lords considered was published illegitimately in *Campbell* was obtained from either “a close associate of Miss Campbell or a fellow addict attending meetings of NA” – both of whom could only have disclosed that information in breach of confidence.<sup>127</sup>

The hardest scenarios in which to discount *Hosking* are those certain situations “beloved of law teachers” where private information is obtained accidentally.<sup>128</sup> Though this is rare, it is undoubtedly possible. A person might accidentally walk in on a flatmate engaged in private activities, or (as happened in *Peck v United Kingdom*)<sup>129</sup> might unwittingly record a private moment visible from a public place. Where some kind of relationship exists between the parties, a duty of confidence might flow naturally (for example flatmates naturally grant each other extended access to their private lives and so must be able to trust each other to maintain confidence). If the parties are strangers, however, a duty might seem more artificial. Nevertheless, the breach of confidence action is probably appropriate: a person should be restrained from publishing information where it would be unconscionable to do so. If the circumstances by which a person stumbles upon a strangers’ information are such that it is clear that a reasonable person could not in good conscience use or disclose that information, then a duty of confidence should arise even if the relationship between the parties is transient. There is no need, therefore, for a standalone action to provide for this narrow circumstance.

The redundancy of *Hosking* is significant because its existence distorts privacy jurisprudence. The ALRC noted in its 2014 report on privacy that maintaining overlapping causes of actions is liable to create “discordant principles” in the law.<sup>130</sup> *Hosking* creates such discordance by perpetuating the erroneous idea that privacy is based on secrecy – a notion which implies that only worthy secrets should be protected. It was this reasoning that precluded the plaintiff’s success in *Andrews*. Allan J held that the plaintiffs had a reasonable expectation of privacy as regards their “intimate” conversation taking place in a traumatic situation.<sup>131</sup> However, His Honour also found that the publication of the conversation was not highly offensive, because nothing was said that was “inherently embarrassing” or which put the two in

127 *Campbell*, above n 33, at [6].

128 *Spycatcher*, above n 106, at 281 per Lord Goff of Chieveley.

129 *Peck*, above n 23.

130 ALRC, above n 41, at [5.78]-[5.84].

131 *Andrews*, above n 91, at [65].

a bad light.<sup>132</sup> Thus, the detail of their private conversation was not a secret worth keeping. This finding was in line with the authority of *Hosking*, but was wrong nonetheless. As discussed above, the right to privacy is not a right to hide one's shame. It is a right to control (within reason) the access which others have to aspects of our life that do not directly concern them. If that right is disregarded, it is not material whether society judges that the information revealed is complementary or humiliating. When the defendant in *Holland* viewed videotapes of the plaintiff showering, that was a breach of her privacy not because she should be embarrassed about her naked body but because he viewed it despite her wish to hide it from him. Once a reasonable expectation of privacy has been established, the focus should be on whether the defendant's conduct was an illegitimate breach of that privacy, not whether the court agrees with the plaintiff's decision that matter in question was worth keeping private. Both the breach of confidence action and the intrusion tort accord with this framework by concentrating on the unconscionability or offensiveness of the defendant's actions as the key factor in liability. However, as long as *Hosking* remains the leading authority on privacy in New Zealand, there is a risk that its fixation on assessing the validity of the plaintiff's desire for secrecy will confuse the development of wider privacy jurisprudence. Given that there is no real need for a standalone tort of publication of private facts, the potential for further confusion in an already difficult area of law is enough to warrant abandoning *Hosking* altogether.

Public interest defences would also operate more coherently if *Hosking* was discarded in favour of the breach of confidence action and the intrusion tort. Because publication torts are information-centric, such defences can only be evaluated by weighing the opposing interests in the relevant information – does the plaintiff or society have greater claim on it? This essentially brings the discussion back to the question of whether the plaintiff's secret is one worth keeping. It is very hard to carry out that evaluation in a consistent manner. Both the United States and the United Kingdom constantly struggle to set a threshold for “newsworthiness” that appropriately balances privacy and freedom of speech. The most difficult part of that struggle is the courts' fear that upholding informational privacy will place too many fetters on the freedom of the press. Consequently, the right to free speech has become “fetishised” and so nearly always prevails.<sup>133</sup> In contrast, intrusion torts and the breach of confidence action clearly distinguish between the questions of whether a breach has occurred and whether it is defensible. They do this by framing the latter inquiry as whether the public interest in the plaintiff's private affairs justifies the defendant's specific conduct. Even where the defendant's only act is to publish information (as in third-party breach of confidence cases), the focus is still primarily on their conscience when doing so. The public's “right to know” factors into this assessment, but this has to

132 At [69].

133 Gavin Phillipson “Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act” (2003) 66 MLR 726 at 766.

be weighed against the defendant's knowledge about how the information came into their possession. The greater an intrusion or graver a breach of trust necessary for the information to arrive in their hands, the harder it will be for them to publish it with a clear conscience. This re-framing ensures that the defendant has the burden of justifying their actions, and avoids leaving the plaintiff with a de facto onus to disprove any legitimate public interest in their private affairs.<sup>134</sup> It also minimises the potential for a direct clash between the rights of privacy and freedom of speech.

Overall, the public disclosure tort reflects an outdated and disjointed view of privacy. It requires courts to judge what is "private" based upon reference to arbitrary (and widely varying) societal norms. In doing so, it ignores the fact that privacy is about respecting autonomy, not keeping shameful secrets. The *Holland* tort recognises this reality by protecting our private sphere from external penetration. The breach of confidence action recognises it by preventing those we let into our private sphere from abusing that access. The *Hosking* tort alone fails to recognise the essential truth about the nature of privacy. It is redundant, it confuses the law, and it ought to be discarded.

#### IV. CONCLUSION

The right to privacy is derived from the right of individuals to live autonomously. Its purpose is to allow individuals to retreat from public scrutiny, and so have the freedom to truly self-actualise. Its absence leads to conformity; its existence strengthens individuality. Privacy and autonomy are thus fundamentally linked: the exercise of each underpins the existence of the other.

Understanding privacy as a sub-right of autonomy allows the reconciliation of its various facets. Bodily privacy, informational privacy, spatial privacy, privacy of attention, and communications privacy are all founded on a desire to restrict public access to specific elements of an individual's life. Recognising the interconnectedness of these different aspects of privacy allows them to be treated more coherently.

Adopting this approach also allows for more appropriate interactions between privacy and other key rights. No person's autonomy is limitless; neither is their right to privacy. One may not use their autonomy to harm another, or to unreasonably constrain them. Similarly, society may restrict the autonomy of individuals when doing so is necessary to protect the interests of the community as a whole. Using these propositions as a starting point allows conflicts of rights to be resolved in less arbitrary ways. It becomes less important to focus on the substance of the private matter; rather courts can

<sup>134</sup> For an example of the practical effect of such a difference, compare the majority and dissenting judgments in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.

examine the methods and motivations behind the intended exclusion of the public.

Civil law privacy actions should follow this conceptual framework. Individuals should be able to seek a remedy wherever another has intentionally disregarded their private sphere. Relief should depend on the reasonableness of the plaintiff's desire to deny access to the matter in question (which should be assessed by how burdensome this is on others). However, once that is established, a remedy should be granted unless the defendant acted entirely within the bounds of the plaintiff's consent or their own lawful authority, or where the plaintiff is claiming privacy in order to obscure or perpetuate their own wrongdoing. As recognised in *Gulati*, the law should not make a successful claim contingent on the plaintiff proving that their loss of privacy exposed them to shame or ridicule. Though privacy and defamation are often spoken of in similar terms, their objects should not be conflated. Unlike the tort of defamation, actions for breach of privacy are not primarily about protecting the reputation of the plaintiff. Rather, they are about vindicating their loss of autonomy via an intrusion into their private life. Humiliation and reputational damage are *consequences* and not *causes* of this loss.

As it stands, New Zealand civil privacy law requires some refinement. The *Hosking* tort inherited the same problems that rendered "impotent" that the United States' tort of public disclosure of private facts. By choosing publication of private facts as the primary wrong, it downplays the role of autonomy and elevates reputational concerns, thus creating unnecessary conflicts with the right to freedom of speech. The common law would do well to discard this particular action. In place of *Hosking*, the tort of intrusion into seclusion and the equitable action of breach of confidence should be able to provide comprehensive and appropriate protections for privacy. Both actions are triggered by violations of autonomy, and both treat widespread publication as grounds for an increased remedy rather than as a precondition for relief. Nevertheless, there are some areas where both could be refined further. The *Holland* tort ought to abandon the requirement that an intrusion be "highly offensive" – thus making it clear that where a person's expectation of privacy is reasonable, disregarding this expectation is actionable *per se*. Moreover, courts must be ready to apply the breach of confidence action in interpersonal as well as commercial situations.

One possible mechanism for such refinement would be the enactment of a statutory privacy tort. As noted above, this has occurred in North America and has been recommended in Australia. There is potential for a statutory tort to provide some clarity to this developing area of law. In particular, it might allow for the creation of an umbrella tort of breach of privacy. A "hybrid" action has the advantage of streamlining privacy law jurisprudence – particularly in the area of defences and remedies. It is for this reason that the ALRC proposed a hybrid statutory tort for the Commonwealth.<sup>135</sup> A

135 ALRC, above n 41, at [5.87].

further advantage of a statutory action would be that it would reduce the risk that privacy claims would be undermined by the judiciary's fear of overly constraining free speech.

A statutory tort would need to improve the clarity of the law while maintaining a focus on autonomy. Ideally, the legislation would adopt the language of similar Canadian statutes while also including the specificity recommended by the ALRC. For example, the key section might provide that:

- (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
- (2) A violation of privacy is established upon proof of the following:
  - (a) that the plaintiff had a reasonable expectation of privacy relating to a specific matter, affair, activity, space, information, thing, or circumstance; and
  - (b) that the defendant disregarded that expectation by:
    - (i) gaining unauthorised access to the private matter, affair, activity, space, information, thing, or circumstance; or
    - (ii) having obtained (legitimate or illegitimate) access to the private matter, affair, activity, space, information, thing, or circumstance, misusing that access.

Specifying that the tort applies to both unauthorised access and misuse of access would ensure that it has comprehensive scope. Moreover, providing that the two limbs could apply independently (“or”) would also allow defences to apply in a more nuanced way – as in Canada.<sup>136</sup> Situations are likely to arise when a defendant breaches the plaintiff's privacy under both limbs: for example, by surreptitiously recording a private moment and then publicising it. In those cases, it may well be that the defendant was justified in making the recording but not publishing it, or vice versa. Flexibility in the legislation would allow courts to respond appropriately.

Despite the uncertainty of the law as it stands, statutory reform may not be necessary in New Zealand. The Court of Appeal and Supreme Court are yet to rule on the intrusion tort. It seems unlikely, given overseas jurisprudence, that either court would overrule *Holland*. Rather, an appellate judgment is likely to provide an opportunity to refine the tort further. A refined and confirmed *Holland* utilised alongside the well-established breach of confidence action should provide sufficient remedies for individuals wishing to enforce their

136 See Part II(B) above.

right to privacy. Statutory intervention is only likely to become necessary in two circumstances. The first would be if Parliament chose to enact legislation similar to the Surveillance Devices Act proposed by the Law Commission.<sup>137</sup> The scope of any civil remedies in such legislation would overlap with the privacy torts; thus it would be prudent for Parliament to take the opportunity to consider broader privacy law at the same time. The second scenario which would warrant legislative intervention would be if the *Hosking* tort continued to create “discordant principles” in privacy law. If the courts are unable to repair the deficiencies in the law caused by the public disclosure action, Parliament should step in.

Whether change comes from the courts or from the legislature, it is imperative that New Zealand privacy law shifts its focus from protecting emotions and reputations to upholding autonomy. Misconceptions have hindered the law’s ability to protect the private sphere of individuals for too long. Only by appreciating the fundamental nature of privacy can the law hope to protect it.

137 Law Commission, above n 6, recommendation 1.