TOWARDS A SINGULAR TORT OF PRIVACY: ARE THE JUSTIFICATIONS FOR SEPARATE PRIVACY TORTS EVAPORATING?

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The New Zealand common law has been hesitant to recognise the multifaceted nature of modern privacy invasions. In an attempt to maintain certainty and conceptual clarity, the courts have developed two privacy actions: the tort of wrongful publication of private facts, and the tort of intrusion upon seclusion. These torts protect distinct types of wrongful conduct and different privacy interests, despite sharing almost identical structural requirements. However, the categorisation of privacy actions is becoming increasingly artificial as the characteristics of the torts overlap. In practice, both informational and physical privacy interests may be relevant to a singular claim. Furthermore, in the light of recent developments to the publicity requirement, the circumstances distinguishing one tort from the other are now as little as a disclosure to a singular individual. This article argues the existence of separate torts is becoming increasingly illogical and unduly restrictive when grappling with nuanced problems posed by emerging privacy threats. If the privacy framework is to adapt to the modern world, discussions of a singular tort ought to be reignited, albeit from a different angle. By reconfiguring the descriptive and normative tools currently deployed by courts, a singular tort will enable more flexible, cohesive and workable privacy protection.

I INTRODUCTION

Discussions of a singular common law tort of privacy have been present for decades but never gained any meaningful traction in senior courts.[1] In New Zealand, the privacy framework instead

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1 See *Grosse v Purvis* [2003] QDC 151 at [144]; Chris DL Hunt and Nikta Shirazian "Canada's Statutory Privacy Torts in Commonwealth Perspective" (2016) Oxford U Comparative L Forum 3 at text after note 24; and *Australia Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199. See also *Wainwright v*

consists of two separate and overlapping torts: the tort of wrongful publication of private facts, and the tort of intrusion upon seclusion. Conceptually, these are seen as addressing distinctly different conduct and privacy interests. However, the Court of Appeal has recently noted its willingness to cover a broad spectrum of privacy invasions by confirming limited disclosures are actionable under the publicity tort.[2] This development raises the question of whether the privacy categories are being reflected by the application of the torts in practice, and if it is time to re-evaluate the plausibility of a singular tort of privacy.

Part II of this article provides an overview of the two privacy torts and discusses why courts find it desirable to keep them distinct. The article conceptualises the torts as being made up of normative and descriptive components. The normative components ask the essential question underlying both torts: whether the plaintiff was entitled to a reasonable expectation of privacy. The descriptive components work to create distinct torts, categorising the privacy interests each tort purports to address. Despite sharing key structural elements, this categorical approach is seen by commentators as necessary to contain the inherently ambiguous notion of privacy.

Part III of this article then questions whether the existence of separate privacy torts can be justified in the light of modern privacy jurisprudence. By viewing privacy interests on a spectrum, and acknowledging the overlapping privacy interests at stake, the boundaries distinguishing the torts seem increasingly artificial. It becomes unclear why academics differentiate between the torts as protecting either informational *or* physical privacy, or why descriptive terms are used to distinguish the types of conduct causing the breach of privacy. This categorisation creates a number of barriers to a plaintiff who wishes to claim under both the intrusion and publicity torts. In particular, the categorical approach prevents fluidity where it would be desirable and can unnecessarily weaken a deserving claim.

Lastly, Part IV examines how the privacy framework can develop. First, it discusses why expanding the boundaries of each tort and maintaining the categorical approach will lead to incoherent jurisprudence. Given the increasingly technological world, a flexible approach is necessary to future-proof the tort from unforeseen privacy interests that are yet to emerge. Part IV then assesses the workability of a general tort of privacy by drawing upon similarities with the existing torts. The Part points to the considerable ambiguity already present within the privacy framework and how courts have developed conceptual tools to contain the actions effectively. Lastly, Part IV seeks to encourage courts to re-evaluate the plausibility of a singular tort. By merging the two privacy actions, and reconfiguring the normative and descriptive components, the privacy framework will be more coherent and better suited for new and emerging privacy threats.

Home Office [2003] UKHL 53, [2004] 2 AC 406 at [18] per Lord Hoffmann; and *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [110].

2 *Hyndman v Walker* [2021] NZCA 25, [2021] 2 NZLR 685 at [50].

II WHY THE TORTS ARE KEPT SEPARATE

A Overview of the Privacy Framework

Protecting an individual's zone of privacy is imperative to human dignity and essential within a civilised society.[3] It allows individuals to maintain autonomy over their lives and to control which aspects they wish to keep free from the public eye. This protects citizens from the manipulation of powerful organisations and the prevailing social opinion, supporting the development of the individual self.[4] The common law torts provide a symbolic and practical pathway for those who have had their privacy infringed. In New Zealand, the common law distinguishes between the torts of wrongful publication to private facts (publicity tort) and intrusion upon seclusion (intrusion tort). This Part provides an overview of how these torts interact to provide relief for two broad categories of privacy invasion. It is important to note from the outset that they are driven by essentially the same normative structural elements. Nonetheless, descriptive requirements are seen as necessary to categorise the actions, creating clear prescriptive boundaries for when the courts will intervene.

1 Publicity tort

The publicity tort was established in New Zealand by the Court of Appeal in *Hosking v Runting*.[5] The Court recognised the need for a specific privacy tort to "protect against the publication of private information where that is harmful and is not outweighed by public interest or freedom of expression values".[6] In *Hosking*, it was held not to be an invasion of privacy where the celebrity's children were photographed and published in a magazine.[7]

The tort is generally seen as protecting informational privacy, recognising the individual's choice to control information about themselves.[8] An individual's privacy is therefore infringed to the extent that information is passed on to others against that individual's wishes.[9] In establishing the tort, Gault

3 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [123]; *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 at [86]; *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 at [50] per Lord Nicholls; *Hosking v Runting*, above n 1, at [239] per Tipping J; and *Hyndman v Walker*, above n 2, at [31].

4 *Campbell v MGN Ltd*, above n 3, at [12].

5 *Hosking v Runting*, above n 1, at [117].

6 At [7].

7 At [163].

8 NA Moreham "A Conceptual Framework for the New Zealand Tort of Intrusion" (2016) 47 VUWLR 283 at 294.

9 WA Parent "Privacy, Morality, and the Law" (1983) 12 Philosophy & Public Affairs 269 at 269.

and Blanchard JJ provided a two-limb test, coupled with a public interest defence.[10] The circumstances giving rise to an actionable invasion of privacy are:[11]

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.

This article refers to the first limb as the reasonable expectation of privacy test. It involves a normative inquiry into whether the plaintiff can reasonably expect to have their privacy protected in the circumstances.[12] This is an inherently contextual assessment based on societal norms.[13] Reference is frequently made to the England and Wales Court of Appeal decision of *Murray v Express Newspapers plc* by New Zealand courts when explaining the operation of the reasonable expectation of privacy test.[14] Sir Anthony Clarke MR explained:[15]

> As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.

This article refers to the second limb as the highly offensive test. The test was included by Gault and Blanchard JJ to ensure the tort is only concerned with "publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned".[16] Elsewhere, introduction of the test has been subject to extensive criticism, and it was expressly rejected by the House of Lords in *Campbell v MGN Ltd*.[17] Nonetheless, the highly offensive test remains part of the New Zealand privacy framework.

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10 *Hosking v Runting*, above n 1, at [117].

11 At [117].

12 NA Moreham "Unpacking the Reasonable Expectation of Privacy Test" (2018) 134 LQR 651; and *Henderson v Walker* [2019] NZHC 2184, [2021] 2 NZLR 630 at [202].

13 NA Moreham "Abandoning the 'High Offensiveness' Privacy Test" (2018) 4 CJCCL 1 at 17; and Moreham, above n 12, adopted in *Peters v Attorney-General* [2021] NZCA 355, [2021] 3 NZLR 191 at [107].

14 *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481. See *Hyndman v Walker*, above n 2, at [66]; and *Peters v Attorney-General*, above n 13, at [109].

15 *Murray v Express Newspapers plc*, above n 14, at [36].

16 *Hosking v Runting*, above n 1, at [126].

17 *Campbell v MGN Ltd*, above n 3, at [22] per Lord Nicholls. See also Moreham, above n 13.

2 *Intrusion tort*

The intrusion tort was established by Whata J in *C v Holland*.[18] The action was brought after the plaintiff discovered her boyfriend's flatmate had been recording her showering and storing the videos on a laptop. Due to the absence of any publication, the plaintiff's circumstances did not fall under the *Hosking* tort. Thus, Whata J thought it necessary to establish an action which recognises intrusions into the "victim's private space or affairs",[19] even where no disclosure has occurred.

The tort is often seen as protecting spatial or physical privacy.[20] Having a private space for retreat is central to the autonomy of individuals and protects the areas where deeply intimate aspects of oneself are otherwise vulnerable. The elements of the action are:[21]

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

In *C v Holland*, Whata J provided little guidance on how courts should apply the new framework, leaving it uncertain as to exactly how the tort will operate.[22] However, he did note that it is generally accepted that the plaintiff's reasonable expectation of privacy involves a "subjective expectation of solitude or seclusion" and that this expectation needs to be "objectively reasonable".[23] Whata J also took guidance from Canadian jurisprudence, where factors guiding the highly offensive limb include: "the degree of intrusion, the context, conduct and circumstances of the intrusion, the tortfeasor's motives and objectives and the expectations of those whose privacy is invaded".[24]

B Use of Normative and Descriptive Terms

The publicity and intrusion torts recognise privacy interests through a combination of descriptive and normative terms. Descriptive terms identify a state or condition where privacy exists and certain

18 *C v Holland*, above n 3, at [94].

19 See Stephen Todd "Tortious Intrusions upon Solitude and Seclusion: A Report from New Zealand" (2015) 27 SAcLJ 731 at 744.

20 *C v Holland*, above n 3, at [87].

21 At [94].

22 At [99].

23 At [17].

24 *Jones v Tsige* 2012 ONCA 32, (2012) 108 OR (3d) 241 at [58].

conduct or circumstances that may infringe on that state of privacy.[25] Normative terms are moral obligations and standards that ask whether the circumstances *should* give rise to privacy protection.[26] Analytically, both privacy torts are driven by the same normative assessments: whether the plaintiff was entitled to a reasonable expectation of privacy, and whether the defendant's conduct was highly offensive to the reasonable person. The descriptive terms act as a gateway to each action, creating what this article refers to as the categorical approach.

1 Descriptive terms

The elements of the publication tort are descriptive in that they address the particular mischief of disclosing private material.[27] The intrusion tort is descriptive in requiring any intrusion to be via sensory experiences.[28] These descriptive terms provide the primary difference between the torts. They enable the courts to take an approach, as put by Brennan J in *Sutherland Shire Council v Heyman*, that ensures the law develops "incrementally and by analogy with established categories".[29]

In this way, descriptive requirements establish clear categories by making each tort address "particular, defined [privacy] interests", and the wrongful conduct that intrudes upon those interests.[30] The intrusion tort deals with the conduct of intrusions into sensory experiences, and recognises physical privacy interests.[31] The publication tort deals with the conduct of disclosures of private material, and recognises informational privacy interests.[32] Consequently, this distinction also presumes a link between the wrongful conduct and particular privacy interest at stake. Penk and Tobin have noted:[33]

> Territorial, or spatial or local, privacy is conceptually different from information or data privacy. The two claims, although often related, are better addressed by separate torts …

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25 Adam Moore "Defining Privacy" (2008) 39 Journal of Social Philosophy 411 at 412–413. For discussion of descriptive frameworks of privacy, see Daniel J Solove "A Taxonomy of Privacy" (2006) 154 U Pa L Rev 477 at 484.

26 Moore, above n 25, at 413.

27 *Hosking v Runting*, above n 1, at [117].

28 *Graham v R* [2015] NZCA 568 at [26].

29 *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 (HCA) at 43.

30 Paula Giliker "A Common Law Tort of Privacy? The Challenges of Developing a Human Rights Tort" (2015) 27 SAcLJ 761 at 774.

31 *C v Holland*, above n 3, at [87]; and *Brooker v Police*, above n 3, at [124].

32 Moreham, above n 8, at 294.

33 Stephen Penk and Rosemary Tobin "The New Zealand tort of invasion of privacy: Future directions" (2011) 19 TLJ 191 at 204 (citation omitted).

Furthermore, descriptive requirements function as a *gateway*, either barring claims that fall outside the conceptual boundaries or determining which tort should deal with the complaint. For example, the descriptive requirements of the publicity tort bar all claims not dealing with disclosures. The descriptive requirements of the intrusion tort ensure that the tort only considers circumstances relating to a plaintiff's state of seclusion being intruded upon. Thus, where a plaintiff has been subject to an intrusion and publication, both torts will need to be argued if the plaintiff's full circumstances are to be considered.[34]

2 *Normative terms*

Whilst there are distinct descriptive differences, the normative terms driving the torts are essentially the same. This is reflected in the strikingly similar structural elements intended by Whata J when formulating the intrusion tort, noting it as a "logical extension or adjunct" to the publication tort formed in *Hosking*.[35] Asher J articulated the two common elements in *Faesenkloet v Jenkin*:[36]

(a) The existence of facts or circumstances in respect of which there is a reasonable expectation of privacy; and

(b) 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.

These normative elements are the primary analytical tools used by courts. Under both torts, whether a situation of privacy was infringed is ultimately dependent on the defendant justifying their conduct in the light of societal expectations and reactions to the circumstances in question.[37] Whata J even noted the torts "logically attack the same underlying wrong, namely unwanted intrusion into a reasonable expectation of privacy".[38] Consequently, the reasonable expectation of privacy tests operate in the same manner.

The operation of the highly offensive tests differs slightly. Under the publicity tort, it is the *publicity* which must be highly offensive to the reasonable person.[39] Conversely, Whata J's judgment in *C v Holland* suggests a more contextual approach is taken under the intrusion tort.[40] Therefore,

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34 Thomas Levy McKenzie "The New Intrusion Tort: The News Media Exposed?" (2014) 45 VUWLR 79 at 101.

35 *C v Holland*, above n 3, at [86].

36 *Faesenkloet v Jenkin* [2014] NZHC 1637 at [38].

37 Jonathan B Mintz "The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain" (1996) 55 Md L Rev 425 at 439.

38 *C v Holland*, above n 3, at [75].

39 *Hosking v Runting*, above n 1, at [127]. See also Robert C Post "The Social Foundations of Privacy: Community and Self in the Common Law Tort" (1989) 77 CLR 957.

40 See *C v Holland*, above n 3, at [93].

whilst almost any relevant factor will be considered in assessing offensiveness under the intrusion tort, the publicity tort will only consider the effect of the publicity. However, it is important to keep in mind that the underlying function of the highly offensive limb is harmonious across both torts. The test is used to assess the gravity of the privacy interference and block trivial claims. The lack of alignment is likely due to the inconsistent treatment of the highly offensive limb by courts. Furthermore, given the widespread criticism of it, the highly offensive test is far from solidified in New Zealand privacy law.[41]

C Justifications for the Categorical Approach

1 Definitional issues

The discussion above has illustrated how the torts are driven by essentially the same normative assessments, ie whether there is a reasonable expectation of privacy and whether the interference is highly offensive. It must then be asked, what justifications are there for the categorical approach? Why the fear of a singular tort of privacy when the only distinguishing feature is the presence or absence of publication?

One of the stronger justifications for keeping the intrusion and publicity torts separate is that a singular tort ignites definitional issues inherent to the notion of privacy.[42] In other words, the coverage of a singular tort would be uncertain because there is no universally accepted definition of privacy.[43] Thus, by addressing privacy in distinct categories, there are clear boundaries for when the courts may intervene. Whata J, when framing the intrusion tort, expressed his preference for a prescriptive approach.[44] Lisa Austin describes this as "containment anxiety", an effort to contain the tort for fear of an ambiguous and amorphous action.[45]

This definitional difficulty should not be understated. Privacy can be informational, spatial and even physical. It has also been "variously conceptualised as a right, an interest, an area of life, a psychological state and a form of control".[46] Penk and Tobin argue that, in the absence of a universally agreed definition, any attempt to consolidate the multifaceted privacy concerns in a single tort is likely

41 Moreham, above n 13, at 14.

42 See Penk and Tobin, above n 33, at 212.

43 Moore, above n 25, at 411; and Solove, above n 25, at 477.

44 *C v Holland*, above n 3, at [97].

45 Lisa M Austin "Privacy and Private Law: The Dilemma of Justification" (2010) 55 McGill LJ 165 at 165.

46 Jillian Caldwell "Protecting Privacy Post *Lenah*: Should the Courts Establish a New Tort or Develop Breach of Confidence" (2003) 26 UNSWLJ 90 at 93.

to be futile.[47] A formulation would be either lengthy and confusing, or so generalised it would be difficult to apply in practice.

This concern has been reflected by courts, such as in *Wainwright v Home Office*, when expressing distrust in any high-level principle of privacy.[48] In *Wainwright*, Lord Hoffmann drew a distinction between privacy as a principle of law in itself, and privacy as an underlying value.[49] The difficulties in defining privacy led the Court to state that privacy should not be applied as a specific rule but rather seen as an underlying principle.[50] Too general a tort could create an action for almost any undesirable conduct with privacy as an underlying interest. In *Wainwright*, this was the unnecessary and invasive, albeit rule-compliant, strip-search by prison officers. The Court was of the opinion that any gaps in the law should instead be covered by existing causes of action such as defamation, breach of confidence, trespass or battery.[51]

2 *Clear development of privacy principles*

In a more practical sense, the lack of definition could undermine one of the key functions of the common law, which is to provide a set of rules and values society ought to live by.[52] Daniel Solove sees "privacy" as a broad umbrella term.[53] Whilst it can be helpful in some cases, it can also result in the conflation of different privacy issues, distracting policy-makers and courts from addressing the particular problem before them.[54] Roderick Bagshaw questions whether the function of the common law to regulate behaviour can be achieved by a singular cause of action which simply balances competing rights.[55] Such a contextual assessment will be difficult for individuals wanting to understand in advance where the balance will be struck. For example, the threat of litigation using such an ambiguous action could be detrimental to the key role which investigative journalism plays in society.[56] The news media run a fine line between justified and actionable conduct, and the desire for certainty is understandable. By distinguishing between the torts, courts can establish clear rules

47 Penk and Tobin, above n 33, at 212.

48 *Wainwright v Home Office*, above n 1, at [35].

49 At [18].

50 At [18].

51 At [18].

52 Peter Cane *The Anatomy of Tort Law* (Hart Publishing, Oxford, 1997).

53 Solove, above n 25, at 486.

54 At 486.

55 Roderick Bagshaw "Tort Design and Human Rights Thinking" in David Hoffman (ed) *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, Cambridge, 2011) 110 at 128 as cited in Giliker, above n 30, at 783, n 126.

56 Moreham, above n 8, at 293.

and principles when individuals engage in the different types of conduct. Conversely, a singular tort would undermine the stability offered by the current legal position.[57] Penk and Tobin have noted:[58]

> … intrusions and disclosures are different concepts, and it would be confusing to press every privacy case involving intrusion into seclusion or solitude into a tort having as its foundation unwarranted exposure of information about the private lives of individuals.

In *Shulman v Group W Productions Inc*, the Supreme Court of California illustrated this desire to keep the values derived from each tort separate.[59] The defendant was a news media company which recorded the aftermath of a car accident in which the plaintiffs were involved. Subsequently, the defendant published the audio recording and video tape on television. Actions were brought under the United States intrusion and publicity torts. Interestingly, the plaintiff was successful in the former but not the latter.[60] This case serves as a good example of how courts try to keep separate the principles developed by each tort in accordance with the distinct wrongful conduct.

This line of reasoning is supported by Robert Post.[61] Post argues that each tort guides different social standards.[62] The intrusion tort focuses on spatial territories and the dyadic relationship between the plaintiff and defendant.[63] In *Shulman*, that was between the news media company and the plaintiff. The judgment acknowledged that the plaintiff's privacy was infringed when someone surreptitiously recorded the plaintiff in an intimate moment without their consent.[64] The publicity tort, on the other hand, controls the flow of information within the triadic relationship between the plaintiff, defendant and third-party recipients.[65] Thus, the triadic relationship requires an additional layer of analysis characterised as a tension between the plaintiff's right to privacy, and the defendant's freedom of expression. In *Shulman*, the third-party public's interest in the information suppressed the plaintiff's right to privacy.[66] Therefore, the categorical approach enables the different social standards to be addressed by a specific stream of jurisprudence, enhancing clarity in the law.

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57 Giliker, above n 30, at 774.

58 Penk and Tobin, above n 33, at 209.

59 *Shulman v Group W Productions Inc* 955 P 2d 469 (Cal 1998).

60 At 497.

61 Post, above n 39.

62 At 986.

63 At 986.

64 *Shulman v Group W Productions Inc*, above n 59, at 490.

65 Post, above n 39, at 986.

66 *Shulman v Group W Productions Inc*, above n 59, at 497.

III DISMANTLING THE CATEGORICAL APPROACH

In *Faesenkloet v Jenkin*, Asher J noted "it is far from clear that there needs to be different torts".[67] However, no comment was given on whether departing from the status quo was necessary. This Part attempts to do just that. Contrary to the arguments set out in the previous Part, it argues the existence of separate torts cannot be justified on the proposition that they address completely different privacy interests and substantially different conduct. Consequently, the function of descriptive requirements to categorise privacy actions is becoming increasingly artificial. First, the actions cannot be distinguished on the basis that they protect different privacy interests. There is an infinite variety of ways in which both informational and physical privacy harms may be triggered. To conceptualise the actions as protecting one or the other is to take an unnecessarily narrow view. Secondly, in the light of *Henderson v Walker*,[68] the boundaries of the distinct wrongful conduct recognised by the torts are moving closer together. Now, just a singular publication can trigger both torts. Given this, courts should instead see privacy interests on a spectrum, where fluidity between the torts is desirable.

A Overlapping Privacy Interests

This Part highlights why we should not hold fast to the categorical approach by showing how the privacy interests, which in theory are categorised, overlap in practice. The distinction between informational and physical privacy is useful but, once broken down, does not justify the separation of the torts.[69]

Professor Moreham usefully describes the torts as only "loosely" following the informational and physical privacy interest distinction.[70] The publicity tort is typically equated with protecting informational privacy because it deals with communications. However, technology has allowed for the seamless communication of sensory experiences. Disclosures of private material may take the form of a photo, video or audio recording. In these circumstances, it is too narrow to categorise the privacy interests as purely informational or non-informational. The following examples of disclosures using a photo, video and audio recording illustrate this misconception:

(1) A doctor sharing a story about a patient with a rare body deformity at a dinner party can be categorised as informational harm. However, the privacy interest would also be physical if accompanied by a photo. The photo will communicate a sensory experience of the plaintiff in a state they wished not to share with anyone except the doctor.

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67 *Faesenkloet v Jenkin*, above n 36, at [38].

68 *Henderson v Walker*, above n 12.

69 Hunt and Shirazian, above n 1, at text after note 25.

70 Moreham, above n 8, at 294.

(2) Suppose the defendant in *C v Holland* who secretly recorded the plaintiff showering also shared the videos with a friend.[71] It would be strange to say the privacy interests changed from physical to informational once the video was disclosed, or that a separate stream of jurisprudence applies. In both scenarios, the complaint is that the plaintiff was exposed in a deeply private state.

(3) An eavesdropper who writes an article detailing an argument of a celebrity couple in their home can be categorised as informational harm. However, if that argument were surreptitiously recorded, and the article were accompanied by the audio file, it would be described as a physical privacy interest. The intimate moment inside the couple's home can now be experienced and scrutinised by the public at large.

In all these circumstances, the impact of the photo or recording device introduces a key physical element to the disclosure. To categorise the privacy interests as informational would be to ignore a "major objection" of the complainant.[72] Furthermore, to deal with the issue only through the publicity tort would be artificial and based on the presumption that publication of private material causes only informational harm.

The intrusion tort is typically seen as protecting physical privacy.[73] This may take the form of a wrongdoer surreptitiously viewing someone in a clearly private state or searching through the things kept in a private space. For example, when a wrongdoer reads a person's diary, that person feels a sense of indignation regardless of the information conveyed. However, this should not discredit the role the intrusion tort has in protecting informational privacy. The things we keep in our private spaces often hold information we wish others not to come across. Examples include the information kept in our bedroom drawers, diaries or wallets.

Hunt has noted that the fluidity between physical and informational privacy in practice suggests it is not sensible to have distinct torts.[74] To categorise the harm caused by the intruder obtaining material as different to the harm caused by disclosure adds little analytical value to the question of whether the plaintiff is entitled to privacy protection. As Professor Moreham has explained, a person who surreptitiously records a video of a woman giving birth will obtain medical information and

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71 See *C v Holland*, above n 3, at [2].

72 Raymond Wacks *Personal Information: Privacy and the Law* (Oxford University Press, Oxford, 1989) at 248.

73 Moreham, above n 8, at 294.

74 Chris DL Hunt "Privacy in the Common Law: A Critical Appraisal of the Ontario Court of Appeal's Decision in *Jones v Tsige*" (2012) 37 Queen's LJ 665 at 673.

capture a very intimate sensory experience.[75] Focusing on either the information conveyed, or the physical aspect, would "only tell half the story".[76]

B Lack of Fluidity

1 The need for fluidity in the light of Henderson v Walker

The Court of Appeal has recently affirmed a significant development made in the High Court decision in *Henderson v Walker*.[77] In *Henderson*, a liquidator shared the personal documents held on a company director's laptop with the Official Assignee.[78] These included family photographs, business emails and personal emails relating to "marital breakdowns, health, weight loss, and fitness".[79] Under *Hosking*, the claim would not have been actionable, as Gault and Blanchard JJ preferred to restrict the action to widespread publicity.[80] However, *Henderson* and subsequent courts have confirmed the tort may be established by disclosure to a limited or small class of persons.[81] In *Peters v Attorney-General*, the Court of Appeal noted that limited publications can cause "very substantial" harm, and that the reasonable expectation of privacy test "does not support restriction of the tort to widespread publication".[82] The Court went on to state that a "person may have a reasonable expectation that very sensitive information will not be disclosed to anyone at all".[83]

The privacy categories made sense at the time *Hosking* and *C v Holland* were decided, and the notion of fluidity was less relevant because it was easier to distinguish conceptually between the wrongful conduct at the heart of each tort. A plaintiff could either establish an intrusion upon their seclusion or bring an action under the publicity tort if they were subject to a widespread disclosure. In the light of *Henderson*, it is questionable whether these privacy categories are being upheld. Whilst *Henderson* was by no means an indication to favour a singular tort of privacy, it showed a willingness of the courts to capture a continuum of scenarios under the privacy framework. The intrusion tort

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75 NA Moreham "Beyond Information: Physical Privacy in English Law" (2014) 73 CLJ 350 at 355.

76 At 355.

77 *Hyndman v Walker*, above n 2, at [50], affirming *Henderson v Walker*, above n 12. It was also affirmed in *Peters v Attorney-General*, above n 13.

78 *Henderson v Walker*, above n 12.

79 At [41].

80 *Hosking v Runting*, above n 1, at [125].

81 *Henderson v Walker*, above n 12, at [216]; *Hyndman v Walker*, above n 2, at [50]; and *Peters v Attorney-General*, above n 13, at [118].

82 *Peters v Attorney-General*, above n 13, at [117].

83 At [117].

applies to situations with no disclosures and the publication tort now covers situations of limited or widespread disclosures.

This article argues that, as a result of this, privacy interests should be seen on a spectrum, where the two types of privacy invasion operate fluidly. Given the overlap between physical and informational privacy interests, the spectrum of misconduct now covered, and the strikingly similar structural elements, holding fast to the categorical approach seems artificial. Instead, the plaintiff's circumstances need to be considered in an appropriate manner, without obstruction by unnecessary descriptive barriers. The following Part outlines why the current use of descriptive requirements as a gateway to the torts prevents this kind of fluidity. The descriptive requirements inappropriately break up privacy complaints despite being driven by the same normative assessments and mean the availability of a different tort can turn on as little as a disclosure to a singular individual.

2 Why the categorical approach prevents fluidity

Issues of fluidity come to light once privacy interests are seen as sitting on a spectrum. Despite sharing key structural elements, descriptive terms work to prevent an effective contextual assessment of the circumstances. This occurs because the intrusion and publication are treated separately, even if the wrongdoer had a singular objective. Thus, a plaintiff subject to both an intrusion and subsequent disclosure would have to bring forward both actions, or meet the requirements of one tort without their circumstances being considered as a whole.[84] This artificially isolates the invasion of privacy to distinct moments in time. Consequently, rather than operating as aggravating factors to strengthen a claim, the existence of separate torts creates structural barriers.

The High Court judgment of *Andrews v Television New Zealand Ltd* illustrates how the plaintiffs' action may have been weakened by the existence of separate torts.[85] Although it was a publicity action, conceptually, it could have been argued through the intrusion tort.[86] In circumstances strikingly similar to those considered in *Shulman*, the plaintiffs were filmed and recorded in the aftermath of a car accident which was then broadcast on national television.[87] In addition to the publicity, the complaints were also of the surreptitious filming, recording and photographing. The intrusion tort was not argued because *C v Holland* had yet to be heard. However, the success of the intrusion tort would be questionable even now given the existence of the subsequent publication would not be considered in establishing its elements. Thus, the tort lacks fluidity by requiring the plaintiff to show that they were entitled to a reasonable expectation of privacy, and that the infringement of that expectation was highly offensive, without relying on the existence of disclosure.

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84 McKenzie, above n 34, at 101.

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

86 Todd, above n 19, at 755.

87 *Andrews v Television New Zealand Ltd*, above n 85, at [3].

In *Andrews*, the plaintiffs would have had to show that the recording in and of itself was actionable, ignoring the fact it was broadcast on national television.

Under the publicity tort, fluidity is recognised in the assessment of the reasonable expectation of privacy limb, but not in the assessment of the highly offensive requirement. In *Andrews*, this meant the plaintiffs were not successful under the publicity tort despite findings of a reasonable expectation of privacy.[88] The reasonable expectation of privacy limb treats the test as a broad and contextual assessment. In *Murray*, one of the factors guiding the test was the "circumstances in which and the purposes for which the information came into the hands of the [defendant]".[89] This allows the effect of an intrusion to be considered in the reasonable expectation of privacy limb of the publicity tort. In *Andrews*, weight was placed on the intrusive means of filming and recording the plaintiffs in circumstances where they could reasonably have expected their privacy to be respected.[90] Thus, by considering the intrusion and publication in this limb, the plaintiffs were not limited by structural barriers.

The plaintiffs' claim failed, however, when they had to prove that the effect of the *publication* was highly offensive.[91] Some commentators have argued this illustrates a need to abandon the highly offensive test.[92] This article views the issue in terms of the fluidity of the test's requirements. Fluidity is hindered because the highly offensive test narrowly focuses on the effect of the publication, ignoring other factors that ought to be relevant. Previous cases suggest the tort does not directly consider the offensiveness of a prior intrusive act, such as the taking of a photograph.[93] Furthermore, cases have suggested the plaintiff needs to experience feelings of humiliation or shame, which is not required under the intrusion tort.[94] The plaintiffs' success under the reasonable expectation of privacy limb illustrates how fluidity could have changed the judgment. Rather than the intrusion strengthening the plaintiffs' claim, as it did under the reasonable expectation of privacy limb, the highly offensive test created an additional hurdle by narrowly focusing on the effect of the publicity. In *Andrews*, the assessment of the highly offensive test was concentrated on whether the plaintiffs were broadcast in a bad light.[95] The judgment has been criticised for ignoring factors such as the failure to obtain consent

88 At [67].

89 At [36].

90 At [65].

91 At [68].

92 See Moreham, above n 13.

93 See *Hosking v Runting*, above n 1, at [126]; and *Andrews v Television New Zealand Ltd*, above n 85, at [48].

94 Tim Bain "The Wrong Tort in the Right Place: Avenues for the Development of Civil Privacy Protections in New Zealand" (2016) 22 Canta LR 297 at 317.

95 *Andrews v Television New Zealand Ltd*, above n 85, at [67].

and notify the plaintiffs prior to the broadcast.[96] If the highly offensive test enabled a more contextual approach that captured the offensiveness of an intrusion, perhaps the deserving plaintiffs in *Andrews* would have received a favourable judgment.

Therefore, in cases where the plaintiff has been subject to an intrusion and publication, the existence of a disclosure may not assist the plaintiff under the intrusion tort. Alternatively, if the action is brought under the publicity tort, the offensiveness of the intrusion may not be considered under the highly offensive test.

C A Fluid Defence

Whilst this article is directed towards establishing liability, the notion of fluidity also extends to defences. When viewing privacy interests on a spectrum, it makes sense for the torts to have aligning defences. The publicity tort includes a defence justifying publication where "that information or material constitutes a matter of legitimate public concern justifying publication in the public interest".[97] The defence seeks to ensure the privacy tort does not "exceed such limits on the freedom of expression as is justified in a free and democratic society".[98] Prior to *Henderson*, the publicity tort's public interest defence was understandable because the action was only concerned with claims of widespread disclosure. Thus, the focus was whether the disclosed information was of *public concern* or "newsworthy".[99] However, the concept of public interest does not fit well with limited disclosures. In *Peters v Attorney-General*, the Court noted that, in the light of *Henderson*, the defence would need to be reframed to "encompass the scenario where there is a *private* disclosure of the information, and a legitimate *private* concern in relation to that information".[100]

The Court stated that such a defence could operate with analogy to that of qualified privilege in the tort of defamation.[101] A person will be justified in making disclosures where they have an "interest or duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it".[102] The occasion of privilege will not be protected where it can be established that the defendant was motivated by ill will or took improper advantage of the occasion.[103]

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96 At [69]–[70]. For criticism, see Moreham, above n 13, at 25.

97 *Hosking v Runting*, above n 1, at [259].

98 At [130].

99 Bain, above n 94, at 323.

100 *Peters v Attorney-General*, above n 13, at [119].

101 At [120].

102 At [120].

103 At [120]. See also Defamation Act 1992, s 19.

Whilst not discussed in *Peters*, this concept can apply to the spectrum of privacy interests now covered under the privacy framework. In the event of widespread publicity, notions of reciprocal duties could be extended to the public at large, such as was done in the tort of defamation in England and Wales.[104] In *Lange v Atkinson*, the New Zealand Court of Appeal similarly extended qualified privilege to widespread statements regarding the conduct of publicly elected officials.[105] However, courts may be hesitant to stretch the concept of reciprocity. Alternatively, therefore, the public interest defence could sit as an adjacent defence. This reflects the existing state of the defamation tort after *Durie v Gardiner*, where the *Lange* form of qualified privilege was "subsumed" into a new public interest defence.[106] The Court commented that extending qualified privilege to all widespread statements of public concern is a "different jurisprudential creature from the traditional form of privilege".[107] Whatever form taken, the introduction of a new defence is being discussed by senior courts.

A similar reciprocal duty-based defence can also apply to intrusions without subsequent publication. In *C v Holland*, it was suggested that the defence would ask whether the public had an interest in any information obtained.[108] However, like the publicity tort, there ought to be situations where an intrusion is justified without the matter being in the public interest. In many circumstances, what would otherwise be an intrusion upon seclusion may be justified on the basis of reciprocal duties. For example, we might say an employer is justified in searching through the drawers of an employee who is suspected of abusing their position to commit fraud. Whilst not a matter of *public* concern, there is a strong case the intrusion tort should allow such behaviour.

A singular tort, dealing with a claim without disclosure, could ask whether the defendant's infringement of privacy was justified by any "interest or duty, legal, social or moral".[109] The exception of ill will or improper advantage would be of particular relevance. Whilst applicable to situations involving only intrusions or only disclosures, the defence would not require a court to distinguish between the two. When both are triggered, the court would simply consider whether the infringement of privacy, in the light of all the circumstances, was justified by any interest or duty, legal, social or moral. Therefore, it is plausible that a singular coherent defence could operate across a spectrum of privacy claims.

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104 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL).

105 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 468.

106 *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [82] and [86].

107 At [83].

108 Moreham, above n 8, at 301.

109 *Peters v Attorney-General*, above n 13, at [120].

IV DEVELOPING A FLUID TORT

The remainder of this article will examine ways in which the privacy framework can develop. First, this article argues that expanding the boundaries of the privacy categories will lead to a further lack of cohesion in the privacy principles and will not address the issue of artificially breaking up a plaintiff's claim. The detached streams of jurisprudence have weakened the torts' ability to provide clear statements of law and adapt to changes in society. A singular tort of privacy will introduce much-needed flexibility that is necessary to comprehend the multifaceted notion of privacy.

The Part then considers what form a singular tort of privacy could take. It assesses where courts are already embracing characteristics of a singular tort within the current privacy framework, and how the key analytical tools currently used by courts are transferable to a reinvigorated singular action. Lastly, this Part shows how the role of descriptive and normative terms should be reconfigured. Descriptive terms can play an important role in setting out the boundaries of a singular tort whilst leaving the analytical work for the normative reasonable expectation of privacy assessment. By tweaking the functions of descriptive and normative tools in this way, the privacy tort can serve as a singular, flexible and improved action.

A Expanding the Existing Privacy Categories

A natural expansion of the privacy categories may allow for new kinds of claims to be captured under the privacy framework but will not address the underlying issues of the categorical approach discussed in Part III. The primary reason to maintain the categorical approach rests on the notion that distinct streams of jurisprudence are necessary to develop clear privacy principles and social guidelines.[110] This section scrutinises that proposition, arguing that categorising the privacy actions has led to silos of privacy jurisprudence developing without regard to the wider common law framework. This can create confusing statements of law and impose unnecessary barriers when grappling with the complexity of multifaceted privacy threats. Continuing to expand the boundaries of the existing privacy torts will only exacerbate the already overlapping privacy categories, and will not deal with the structural issues preventing the tort from developing effectively.

1 Discordant privacy principles

The existence of separate and overlapping torts has contributed to "discordant [privacy] principles".[111] As discussed above, they have developed differing conceptions of privacy based on the type of wrongful conduct, despite courts accepting that they address the same underlying interests. For example, Tim Bain has noted that by "choosing publication of facts as the primary wrong, [the publicity tort] downplays the role of autonomy and elevates reputational concerns".[112] It does this by

110 See Penk and Tobin, above n 33, at 212.

111 Hunt, above n 74, at 673. See also Hunt and Shirazian, above n 1, at text after note 25.

112 Bain, above n 94, at 325.

"perpetuating" the notion that privacy is grounded in the secrecy of information.[113] The intrusion tort recognises spatial privacy but separates this from subsequent uses of any information obtained. A useful quote by Tim Bain supports a singular stream of privacy jurisprudence:[114]

> 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.

Where coherent privacy principles have developed, they often apply to both torts, illustrating why clear jurisprudence is not reliant on separate torts. Whata J in *C v Holland* even noted the "boundaries of the privacy tort articulated in *Hosking* apply where relevant".[115] Such principles include those relating to the location of an intrusion, whether the individual was a public figure and what information is *newsworthy*. This reflects the notion that the torts address the same underlying wrong: whether there was an infringement of the plaintiff's reasonable expectation of privacy. The difference is merely what conduct caused the invasion.

Furthermore, distinguishing between types of conduct isolates breaches of privacy to a specific moment in time. Whilst this may support principled development within each siloed tort, it can have the opposite result when viewed as a contribution to the overall privacy framework. This is particularly relevant in situations where an intrusion is followed by disclosure. For example, as discussed, the effect of *Shulman* was that the defendant committed an actionable wrong in obtaining the information but was justified in disclosing it.[116] This provides a confusing statement of law, inconsistent with its function of guiding social norms.[117] The true mischief of the defendant was to obtain private information through intrusive means and publish it to the wider public. However, we are left unsure as to whether the defendant's behaviour was actually justified. If the actions were merged, the incidents of intrusion and disclosure would be treated together. This may result in clearer privacy principles by reflecting the wrongdoer's singular motive in the legal response.

To break up invasions and disclosures also takes the common law out of sync with other New Zealand privacy laws such as surveillance and harassment. For example, s 3 of the Harassment Act 1997 provides that harassment must be a "pattern of behaviour". Under s 3(2)(a), the conduct can be "the same type of specified act on each separate occasion, or different types of specified acts". Treating an intrusion and publication as "different types of specified acts" supports the notion that they can form part of the same wrong. Furthermore, Judge Skoien in *Grosse v Purvis* expressed his preference

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113 At 322.

114 At 324.

115 *C v Holland*, above n 3, at [96].

116 *Shulman v Group W Productions Inc*, above n 59, at 497.

117 McKenzie, above n 34, at 101.

for a tort of privacy to cover such conduct and regarded harassment as "merely an aggravated form of invasion of privacy".[118]

2 *Flexibility to deal with nuanced privacy interests*

New Zealand's privacy categories reflect two of Prosser's influential four privacy torts,[119] followed in the United States:[120]

(a) intrusion upon seclusion;
(b) appropriation of a person's name or likeness;
(c) public disclosure of private facts; and
(d) publicity placing a person in false light.

Prosser's categories have been criticised as fossilising the law and eliminating its capacity to adapt to new privacy problems.[121] Courts hold strongly to a narrow conception of what each tort addresses and the common law has consequently "struggled in recognizing more nuanced understandings of privacy in terms of levels of accessibility of information".[122] This article argues it would make little sense to simply expand the boundaries of the existing privacy torts. Doing so would cause further blurring of the privacy categories and make any distinction between the torts increasingly artificial.

Another common observation is that the privacy torts are not well-suited to deal with modern technology.[123] In Canada, Sharpe JA recognised that "Internet and digital technology have brought an enormous change in the way we communicate and in our capacity to capture, store and retrieve information" and that this needs to be weighed against the privacy risks that "cry out for a remedy".[124] In *Jones v Tsige*, that was the frequent and unconsented accessing of an individual's banking information for personal reasons.[125] Patricia Sánchez Abril argues this issue arises because the torts are grounded in conceptions of privacy in relation to physical space.[126] Where privacy is non-sensory, particularly in the online sphere, a flexible approach to privacy complaints is desirable.

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118 *Grosse v Purvis*, above n 1, at [451].

119 *Hosking v Runting*, above n 1, at [68]. See also *C v Holland*, above n 3, at [12].

120 William L Prosser "Privacy" (1960) 48 CLR 383 at 389; and American Law Institute *Restatement of Torts* (2nd ed, St Paul, Minnesota, 1977) § 652A.

121 Neil M Richards and Daniel J Solove "Prosser's Privacy Law: A Mixed Legacy" (2010) 98 CLR 1887 at 1904.

122 At 1920.

123 Danielle Keats Citron "Mainstreaming Privacy Torts" (2010) 98 CLR 1805 at 1809.

124 *Jones v Tsige*, above n 24, at [67]–[69] per Sharpe JA.

125 At [4].

126 Patricia Sánchez Abril "Recasting Privacy Torts in a Spaceless World" (2007) 21 Harv J L & Tech 1 at 12.

Professor Moreham has discussed these issues in relation to hacking.[127] Hacking "which involves the interception of a telephone or video call" or which reveals intimate images or recordings could fall into the intrusion tort.[128] However, if the hacking reveals something non-sensory in nature, such as the content of an email, the claim would fall outside its conceptual boundaries.[129] The obstacle seems to arise with the reference to "seclusion". In *Graham v R*, Fogarty J commented that "[s]eclusion as a concept … connotes an invasion of physical privacy, impinging on one's personal autonomy".[130] Thus, the Court was hesitant to interpret "seclusion" as including looking into the appellant's phone and personal data.[131]

Furthermore, the publicity tort does not capture ill-intentioned uses of material that are not disclosures. For example, the abuse of an intimately detailed data profile may not be actionable. Yet, there are persuasive grounds to allow a privacy tort to capture unauthorised uses of private information outside publication. As Daniel Solove argues, privacy "involves more than avoiding disclosure; it also involves the individual's ability to ensure that personal information is used for the purposes she desires".[132]

These issues could be dealt with to some degree by loosening the boundaries of each privacy category. For example, the concept of "seclusion" could extend to private affairs and the publicity tort could be expanded to include misuse of information.[133] Reference to "private affairs" would ensure that something non-sensory, such as an email, is covered under the intrusion tort and reference to "misuse of information" would capture scenarios where private information is exploited but not published. However, these developments do not bring about the flexibility called for in this article. There remains the issue of artificially breaking up the act of intrusion and subsequent misuse. Furthermore, this would exacerbate the already overlapping privacy categories. By allowing claims such as the hacking of an email to fall under the intrusion tort, it would increase the degree of informational harm at issue in that action. Similarly, if the publicity tort were expanded to include general misuse of private information, there would be an increase in harm caused by the fact the defendant has access to private information.

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127 Moreham, above n 8, at 299.

128 At 299.

129 At 299.

130 At 299, citing *Graham v R*, above n 28, at [26].

131 *Graham v R*, above n 28, at [26].

132 Daniel J Solove "Conceptualizing Privacy" (2002) 90 CLR 1087 at 1108.

133 For examples using the framing of "private affairs" instead of "seclusion", see Australian Law Reform Commission *Serious Invasions of Privacy in the Digital Era* (ALRC DP80, 2014) at 66; and *Jones v Tsige*, above n 24, at [70]. For an example of applying the "misuse of private information" tort to phone hacking, see *Gulati v MGN Ltd* [2015] EWCA Civ 1291, [2017] QB 149.

3 *Letting go of the categorical approach*

Fluidity is unlikely to be achieved whilst holding fast to the categorical approach. This article suggests a singular tort can reinvigorate the privacy framework, enabling a more expansive understanding of emerging privacy issues.[134] It would enable a more contextual approach to privacy without the restriction of descriptive barriers imposed by the privacy categories.

The normative tools currently driving the torts are capable of adapting to a singular action that can fluidly address both intrusions and publications. Hunt and Shirazian noted that the reasonable expectation of privacy inquiry considers privacy rights to exist on a spectrum and the strength of any claim depends conceptually on the totality of the circumstances.[135] A plaintiff subject to an intrusion and publication should have their claim treated as a singular wrong, with the disclosure working as an exacerbating factor.[136] A singular tort could ask whether, in the light of all the circumstances, the plaintiff should be entitled to have their privacy respected. Harms sourced from both intrusions and publication will contribute to the same claim. Similarly, the highly offensive requirement would take a contextual approach, looking to whether the situation as a whole was offensive to the ordinary person. Thus, the plaintiff's claim would not be weakened by separating the incidents of intrusion and publication.

B Towards a Singular Tort: Lessons from a General Tort of Privacy

1 *Current ambiguity in the torts*

A general tort would mean largely abandoning descriptive requirements and their function as a definitional anchor. Instead, the tort would be almost entirely contained and guided by the application of normative terms. The existing torts are already consistent with this since they are almost entirely driven by the normative reasonable expectation of privacy assessment.

Within the categories of privacy interests currently recognised, there already exists a significant potential for the torts to infringe on other fundamental rights. The publicity tort has the potential to unduly infringe the highly valued freedom of speech.[137] The intrusion tort, whilst thought to be "articulated in such a way as to maintain coherence",[138] poses considerable restrictions on individuals to look, listen, touch and experience the world. For example, in the United States, the structurally

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134 Citron, above n 123, at 1851.

135 Hunt and Shirazian, above n 1, at text after note 188.

136 Andrew Jay McClurg "Bringing Privacy out of the Closet: A Tort Theory of Liability for Intrusions in Public Places" (1995) 73 NC L Rev 989 at 107. See also McKenzie, above n 34, at 102.

137 *Hosking v Runting*, above n 1, at [112].

138 *C v Holland*, above n 3, at [92].

analogous tort has been used to protect against sexual harassment in the workplace.[139] This highlights how definitional uncertainty in the tort can allow for the action to creep far outside the classic privacy scenarios.

It is questionable whether descriptive terms are necessary to contain the torts and prevent infringements of these fundamental values. Presumably, if definitional uncertainty were to create chaos, it already would have done so. Courts are well-equipped to balance competing interests in the circumstances and are cautious of making developments in a factual vacuum.[140] In *Hosking*, Gault and Blanchard JJ even stated:[141]

> Just as a balance appropriate to contemporary values has been struck in the law as it relates to defamation, trade secrets, censorship and suppression powers in the criminal and family fields, so the competing interests must be accommodated in respect of personal and private information.

Rather than relying on clear definitional anchors, the torts get by using notions of reasonableness and societal standards to determine whether there has been a privacy infringement. Actions overseas show that this task can be successful in regard to a general privacy tort.[142] For example, in British Columbia, the statutory tort provides: "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".[143] The tort provides a "sweeping right of privacy and left it to the courts to define the contours of that right",[144] determined by what is "reasonable in the circumstances".[145]

A reinvigorated privacy tort should not shy away from normatively loaded assessments. Structurally, the existing privacy categories do not prevent definitional uncertainty or the possibility for fundamental rights to be infringed. Rather than relying on concrete definitional requirements, courts effectively contain the torts by applying contextual assessments to the specific facts before them.

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139 Moreham, above n 8, at 292. See for example *Phillips v Smalley Maintenance Services Inc* 435 So 2d 705 (Ala 1983) at 711.

140 *Peters v Attorney-General*, above n 13, at [115].

141 *Hosking v Runting*, above n 1, at [116]. Also note this practice is common under the New Zealand Bill of Rights Act 1990, s 5: "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

142 See comments by Thomas J in *Brooker v Police*, above n 3, at [226].

143 Privacy Act RSBC 1996 c 373, s 1(1).

144 *Jones v Tsige*, above n 24, at [54].

145 Privacy Act RSBC 1996 c 373, s 1(2).

2 *Finding certainty in normative terms*

Whilst a test grounded in reasonableness will lack an exhaustive definition of privacy, Bloustein argues this is not "an indication of a failure of thought or of an inadequate theory of liability. It is merely a reflection of the complexity and variety of the circumstances" in which privacy can be invaded.[146] As Gligorijevic points out, "definitional ambiguity is inherent in sundry torts".[147] Actions such as battery, assault and false imprisonment all have notions of reasonableness at their heart.[148] In *Brooker v Police*, Thomas J stated that arguments against a general tort of privacy which focus on the ever-developing nature of the action and its uncertain boundaries are taking a "parochial" view.[149] He then expressed:[150]

> Sight has apparently been lost of the fact that, however broad and diverse the concept of privacy and the values underlying privacy, it is the circumstances of an individual case which will serve to identify the value in issue and delimit the scope of the right in the particular circumstances. Indeed, this process occurs whenever abstract rights are applied in concrete situations.

The courts' primary focus should be to provide a workable framework to address privacy complaints. Jillian Caldwell noted that "definitional uncertainties may be largely avoided if the essential *interests* giving rise to privacy claims are identified".[151] This article argues the key privacy interests can be identified through application of the reasonable expectation of privacy test alone. Over time, a growing body of case law will enhance predictability and provide a clearer understanding of privacy: indeed, this process is already well underway.

Courts commonly take a factor-based approach to the reasonable expectation of privacy test. However, a distinction must be made between descriptive terms that serve as a concrete rule, and descriptive factors that merely indicate an invasion of privacy. The former functions as a gateway to the tort, preventing a claim where certain descriptive circumstances arise. Patricia Sánchez Abril notes that descriptive privacy principles in this form are "intellectual shortcuts" courts use as benchmarks of privacy in their analysis of concepts such as secrecy, space, subject matter and location.[152] Hunt

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146 Edward J Bloustein "Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional As Well?" (1967) 46 Tex L Rev 611 at 615.

147 Jelena Gligorijevic "A Common Law Tort of Interference with Privacy for Australia: Reaffirming *ABC v Lenah Game Meats*" (2021) 44 UNSWLJ 673 at 696.

148 At 696.

149 *Brooker v Police*, above n 3, at [226].

150 At [226].

151 Caldwell, above n 46, at 93.

152 Abril, above n 126, at 4.

describes them as "fraught and overly simplistic empirical distinctions".[153] Over time, these have had a decreasing influence because they do not account for the inherently contextual nature of a privacy invasion.

This illustrates a shift in judicial thinking. Not only are the courts confident the tort could be adequately contained by the reasonable expectation of privacy and highly offensive limbs, but privacy interests are better served without viewing descriptive factors as gateway requirements. Instead, descriptive factors should serve as "readily understandable guidance" about what is generally regarded as private.[154] From the case law, Professor Moreham identified where courts have attempted to categorise activities or information that strongly indicate an expectation of privacy such as sexual activity and the intimate details of personal relationships.[155] Other factors are less indicative, but commonly applied by courts, such as location and the way in which material is stored or communicated.[156] When accompanied by a careful explanation of their applicability to a set of circumstances, Moreham notes that the use of privacy factors can provide considerable value.[157] This approach was reflected in the United Kingdom Supreme Court judgment of *ZXC v Bloomberg LP*.[158] After confirming the reasonable expectation of privacy test is a "fact-specific enquiry",[159] the Court said:[160]

> It has already been recognised that a consideration of all the circumstances of the case, including but not limited to the so-called *Murray* factors, will, generally, in relation to certain categories of information lead to the conclusion that the claimant objectively has a reasonable expectation of privacy in information within that category.

Certainty can also be improved with more principled approaches to the reasonable expectation of privacy test that are grounded in notions of privacy signals, or control and access.[161] These provide clear conceptual rationales for the factor-based approach without dependence on descriptive terms, the nature of the privacy interest (physical or informational), or a specific type of wrongful conduct

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153 Hunt, above n 74, at 683.

154 Moreham, above n 12, at 659.

155 At 659.

156 At 665–674.

157 At 660.

158 *ZXC v Bloomberg LP* [2022] UKSC 5, [2022] AC 1158.

159 At [67].

160 At [72].

161 See Kirsty Hughes "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012) 75 MLR 806 at 812; and Moreham, above n 12. See also Jae Kim "The Case for Reform: A Right to (Access-Based) Privacy in the New Zealand Bill of Rights of Act 1990" (2019) 6 PILJNZ 137 at 149.

by the defendant (intrusion or publication).[162] For example, under a privacy signals, or "barriers", approach, an individual will experience privacy where they create or rely on social barriers that indicate they wish to be left alone.[163] Drawing upon the work of Irwin Altman, Kirsty Hughes identified three types of privacy barriers: physical, behavioural and normative.[164] Physical and behavioural barriers can be erected to signal subjective privacy, whereas normative barriers recognise social norms that indicate privacy.[165] An unreasonable disregard for these barriers will be actionable.

The inherently contextual and normatively loaded assessments discussed in this section should be central to any re-invigoration of the privacy torts. They allow a flexible assessment of privacy claims without necessarily lacking predictability or clear conceptual frameworks.

C Reconfiguring the Role of Descriptive Terms

Finally, descriptive requirements can have a role in a singular tort without functioning as a gateway to distinct privacy categories. First, as discussed in detail above, they can be used as analytical tools by indicating whether the normative elements are met. Courts will naturally categorise situations that are generally regarded as private, and, by explaining their applicability to the particular case, useful guidance will start to emerge. Secondly, they can establish the boundaries of a singular tort. The purpose of this is to allow the scope of the action to develop incrementally and ensure the tort does not upset New Zealand's unique legal landscape.

An example of this second function can be seen in the Australian Law Reform Commission's recommendation of a "hybrid" statutory action that fuses together the intrusion and publicity torts.[166] The first element uses descriptive terms to set the boundaries of the action:[167]

> (a) intrusion upon the plaintiff's seclusion or private affairs (including unlawful surveillance); or
>
> (b) misuse or disclosure of private information about the plaintiff (whether true or not).

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162 Moreham, above n 13, at 9.

163 Hughes, above n 161, at 812.

164 At 812.

165 At 813.

166 Australian Law Reform Commission, above n 133, at 66. Note the similarities to the singular tort proposed by Judge Skoien in *Grosse v Pruvis*, above n 1, at [444], where the essential requirements would be: (a) a willed act by the defendant; (b) which intrudes upon the privacy or seclusion of the plaintiff; (c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities; (d) and which causes the plaintiff detriment in the form of mental psychological or emotional harm or distress which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.

167 Australian Law Reform Commission, above n 133, at 66.

These descriptive requirements ensure the boundaries are not as broad as a general tort, but wide enough to capture threats caused by the emerging technologies at the heart of the report.[168] The reasonable expectation of privacy test is then used as the primary analytical tool for the statutory tort.[169] The court will ask whether the intrusion upon the plaintiff's seclusion or private affairs, or misuse or disclosure of private information, amounted to an interference with the plaintiff's reasonable expectation of privacy.

It is suggested that minor alterations to the descriptive and normative tools can reinvigorate the privacy action. Like the proposed Australian statutory tort, the court would first ask whether the complaint falls within the descriptive boundaries of the action. Rather than acting as a gateway to the separate torts, descriptive terms will provide an entry point to the wider singular tort. The specific formulation of the boundaries of the tort can be determined by the courts and expanded incrementally in the light of New Zealand's unique legal and social landscape. Importantly, this enables a plaintiff subject to an intrusion or publication, or both, to have their claim assessed under the same action, and treated as a singular wrong. The court would then ask whether, in the light of all the circumstances, the plaintiff should be entitled to have their privacy respected. Harms sourced from both intrusions and publications will contribute to the same claim. Similarly, the highly offensive requirement would take a contextual approach, looking to whether the situation as a whole was offensive to the ordinary person.

The tort's structure would thus reflect the fact that there is no unanimously agreed definition of privacy or the circumstances which must be present to find an actionable wrong. Rather, the action will use an all-encompassing test grounded in reasonableness, allowing for contextual nuances to be given due weight. As discussed above, the reasonable expectation of privacy assessment is more than capable of manoeuvring the wide scope of possible claims. It provides flexibility to grapple with unforeseen privacy problems and better places courts to comprehend the multifaceted and unpredictable nature of a privacy invasion.[170] Thus, reconfiguring the functions of normative and descriptive terms is a logical step towards a reinvigorated privacy framework.

V CONCLUSION

The inherently nebulous characteristics of privacy have led to courts finding certainty through descriptive terms. Consequently, a categorical approach to privacy was thought to be necessary. This article first provided a case for why the existence of distinct torts is no longer justified. Given the spectrum of claims covered under the privacy framework, and the overlapping privacy interests, the need for distinct torts is far from clear. *Henderson* also illustrated a shift in judicial treatment of

168 At 19.

169 At 87.

170 Hunt and Shirazian, above n 1, at text after note 29.

descriptive and normative requirements. By loosening the descriptive boundaries, the judgment showed the courts are more confident in letting normative assessments contain the torts. However, continuing to expand the tort boundaries will limit the privacy framework when faced with threats from emerging technologies.

This article argues a departure from the categorical approach is needed. Rather than descriptive terms acting as a gateway to distinct privacy categories, they can set the boundaries for a singular tort. Applying the reasonable expectation of privacy test within a singular tort better places courts to filter through deserving and undeserving plaintiffs and to develop the tort when needed. Thus, by reconfiguring the place of descriptive and normative terms, a singular tort of privacy can provide an important step towards a more robust privacy framework.