Tortious Intrusions upon Solitude and Seclusion

A Report from New Zealand

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Introduction

A person's interest in privacy may be said to be invaded where, without that person's consent, others see or hear or read about what he or she does or says, or what others say or do comes unwillingly to his or her attention. So understood, any right to privacy amounts to no more than the right to be left alone: yet no-one can live so as to be free from all unwanted intrusions by or contact with others. Indeed, one person's interest in solitude or seclusion has to be set against another's interest in being free to speak, to look or to act as he or she wishes. At the very least, then, laying down principles of tort liability which seek to distinguish between permissible and impermissible intrusions is not at all a straightforward exercise, and must require careful evaluation and discrimination.

The conceptual genesis of a tort protecting individual privacy is found in a seminal article in the Harvard Law Review by Samuel Warren and Louis Brandeis on "The Right to Privacy".[1] Some 70 years later William Prosser would describe the law in terms of four separate privacy torts, their common

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[1] Samuel Warren and Louis Brandeis, "The Right to Privacy" (1890) 4 Harv L Rev 193.

feature being that each represented an interference with the right of the plaintiff to be left alone.[2] The first was "intrusion upon the plaintiff's seclusion or solitude, or into his private affairs", the second was the "public disclosure of embarrassing private facts about the plaintiff", the third was "publicity which places the plaintiff in a false light in the public eye", and the fourth was "appropriation, for the defendant's advantage, of the plaintiff's name or likeness".[3] This classification was adopted by the *Restatement (Second) of Torts* (1977) in §652A.

In the United Kingdom, by contrast, the law of privacy remained largely undeveloped until the passing of the Human Rights Act 1998 (UK), giving effect in UK law to the European Convention on Human Rights and, in particular, introducing the right to privacy in art 8 of the Convention. But even thereafter the House of Lords displayed notable caution, as the decision in *Wainwright v Home Office*[4] well demonstrates. The claimants, a mother and son, were strip-searched for drugs during a prison visit in circumstances that did not comply with the Prison Rules 1964 (UK). Both claimants were humiliated and depressed and the second claimant, who was mentally impaired, developed post-traumatic stress disorder. The trial judge allowed the claims on the basis that the defendants' conduct amounted to a trespass to the person and an invasion of privacy. In the Court of Appeal it was held that requiring the claimants to remove their clothes without any bodily contact did not constitute trespass, and that apart from one instance involving a touching of the second claimant, which was conceded to be a battery, the prison officers had committed no wrongful acts. The claimants appealed to the House of Lords, arguing that there had been an actionable invasion of their privacy and that the defendants had intentionally caused harm within the meaning of the principle in *Wilkinson v Downton*.[5] For the moment we will consider only the first of these claims.[6]

Lord Hoffmann (delivering a judgment with which their Lordships all agreed) recognised that the question whether a tort protecting a right to privacy existed, or should exist, had been much debated in common law jurisdictions. English law in particular had been unwilling, perhaps unable, to formulate any high level principle which could perform a useful function in enabling one to deduce the rule to be applied in a concrete case. However, there were a number of common law and statutory remedies of which it might be said that one at least of the underlying values they protected was a right to privacy. There were also extra-legal remedies under Codes of Practice applicable to broadcasters and newspapers. But there were gaps; cases in which the courts had considered that an invasion of privacy deserved a remedy which the existing law did not offer. Sometimes the perceived gap could be filled by judicious development of an existing principle. The

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[2] William Prosser, "Privacy" (1960) 48 Cal L Rev 383

[3] The inclusion of the third and fourth of these torts under the rubric of privacy has been criticised, on the bases that the false light tort has a far closer affinity with defamation and that the appropriation tort concerns not so much a loss of a right to privacy as a loss of a right to publicity. For an analysis of the false light tort, see R Donaldson, "False Light Invasions of Privacy – Cognizability and Elements" 57 ALR (4th) 22. For a seminal article on the appropriation tort, see M Nimmer, "The Right of Publicity" (1954) 19 Law and Contemp Prob 203; and see generally J McCarthy, *The Rights of Publicity and Privacy* (Thomson Reuters, online ed, 2014).

[4] [2003] UKHL 53, [2004] 2 AC 406; A Johnston "Putting the cart before the horse: privacy and the Wainwrights" (2004) 63 CLJ 15; J Morgan "Privacy torts: out with the old, out with the new" (2004) 120 LQR 393. For earlier judicial discussion, see *Kaye v Robertson* [1991] FSR 62, where Glidewell, Bingham and Leggat LJJ all lamented the absence of a privacy tort in English law.

[5] [1897] QB 57.

[6] For the second, see 16 below and accompanying text.

law of breach of confidence had in recent years undergone such a process.[7] On the other hand an attempt to create a tort of telephone harassment by a radical change in the basis of the action for private nuisance had been held to be a step too far.[8] What the courts had refused to do was to formulate a general principle of "invasion of privacy" (the quotation marks signifying doubt about what in such a context the expression would mean) from which the conditions of liability in the particular case could be deduced. There was a critical difference between privacy as a value that underlay the existence of a rule of law, which might indicate the direction in which the law should develop, and privacy as a principle of law in itself. In the instant case, the strip searches about which the plaintiffs complained could not be actionable on the latter, essentially indeterminate, basis. Rather, a remedy, if any, had to be found in existing and accepted principles of law, guided by privacy as an important underlying value.

Of course, since *Wainwright* was decided a person's interest in protecting his or her privacy has been achieving greater recognition in many significant ways. As regards tort liability, the key development may be seen in the decisions determining the ambit of a tort of invasion of privacy by publicity given to private facts. In the United Kingdom the decisions initially were built upon the action in equity for breach of confidence, but in *Campbell v MGN Ltd*[9] the House of Lords recognised that this formulation was awkward and that the essence of the cause of action was the misuse of private information. As expressed by Lord Hoffmann, the tort focused upon the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.[10] In *Hosking v Runting*,[11] the leading decision in New Zealand, a majority of the Court of Appeal[12] reached a similar conclusion. Gault P and Blanchard J identified the two fundamental requirements for a successful claim as (i) the existence of facts in respect of which there was a reasonable expectation of privacy, and (ii) publicity given to those private facts that would be considered highly offensive to an objective reasonable person. But there was a defence enabling a publication to be justified by a legitimate public concern in the information. Tipping J put the matter slightly differently, preferring to say that the level of offensiveness of the publication was something to be taken into account when assessing whether or not there was a reasonable expectation of privacy. There are now many cases in New Zealand and in other common law jurisdictions exploring the elements to the new tort. Key issues include the nature of "private facts", whether there is a need for the separate requirement that the publicity be highly offensive, whether the plaintiff must always be identified, what mental element must be shown and the precise relationship between a tort protecting privacy and the law of defamation.[13]

Our concern now is not directly with these developments but with the question whether any liability in tort for interfering with privacy is limited to the case where a defendant wrongfully publishes private information about the plaintiff, or whether there are other interferences with privacy falling outside the ambit of the *Hosking* tort which are independently actionable. The

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[7] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457; below n 9.
[8] *Hunter v Canary Wharf Ltd* [1997] AC 655; see below n 43. This gap was filled by the Protection from Harassment Act 1997 (UK).
[9] [2004] UKHL 22, [2004] 2 AC 457
[10] Ibid, at [51]; and see *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, at [255].
[11] [2005] 1 NZLR 1.
[12] Gault P and Blanchard and Tipping JJ, Keith and Anderson JJ dissenting.
[13] See generally J Burrows and U Cheer, "Invasion of Privacy", ch 17 in S Todd (gen ed) *The Law of Torts in New Zealand*, 6th ed, 2013, especially at paras 17.4 and 17.5.

question arose in the New Zealand High Court in *C v Holland*,[14] where the court was invited to recognise a tort of invasion of privacy by intrusion into seclusion. The question is highly significant, for it takes us to the heart of notion of privacy and requires that we consider whether or in what circumstances we do in fact have a legal right to be left alone. The kinds of cases in which the question may need resolution are many and various. They include surreptitiously, or openly, photographing or videoing a person, looking through a persons' financial affairs, flying drones over another's land, installing a tracking device in someone's vehicle, intercepting another's communications, searching a person's property, in each case without publishing whatever may be heard, seen or discovered. The lawfulness of at least some of these and other intrusive activities will very likely be governed by statute. Our concern is with claims by victims for compensation and/or an injunction and the availability of an action in tort.

We will examine first, and quite briefly, the protection that may be afforded by certain existing and well-established causes of action. Of course, in a broad sense an element of intrusion may be involved in virtually any tort claim, for the allegation will be that the defendant, in one way or another, has intervened to disturb an existing state of affairs enjoyed by a plaintiff and thereby caused damage. If such intrusion causes physical injury to person or property, or economic loss, the claim is likely to be be governed by existing principles governing liability for these kinds of damage. But where the intrusion has purely sensory or emotional impact – humiliation, hurt feelings, outrage, loss of dignity – the question then arises whether existing causes of action can still give a remedy. The main possibilities seem to be a claim under the rule in *Wilkinson v Downton*, a claim for trespass to land, and a claim in nuisance. Where no such actions can lie we need to consider whether a rule protecting the victim's privacy, standing alone, can and should be formulated to fill this gap. Our inquiry will focus on the decision and reasoning in *C v Holland*, which raises the issue in particularly stark form.[15]

The rule in *Wilkinson v Downton*

In the well-known decision in *Wilkinson v Downton*,[16] Wright J laid down a form of residuary liability for intentionally inflicted harm that was not a trespass to the person.[17] In this case the defendant, as a "joke", told the plaintiff that her husband had met with a serious accident and that both his legs were broken. He intended that the plaintiff should believe what he said. The plaintiff did believe him and suffered a violent nervous shock rendering her ill. She could not sue in trespass because the damage was indirect, and at that time the courts had not permitted any recovery in negligence for nervous shock and psychiatric injury. Wright J, however, maintained that the defendant had "wilfully done an act calculated to cause physical harm to the plaintiff — that is to say, to infringe her legal

[14] [2012] NZHC 2155, [2012] 3 NZLR 672.

[15] *Wainwright* does not necessarily preclude any development of the law in this direction in the UK. In *Campbell v MGN Ltd*, at [15], Lord Nicholls recognised that an individual's privacy could be invaded in ways not involving the publication of information and that the extent to which the common law as developed in the UK protected other forms of invasion of privacy was not a matter arising in that case because the claim had been presented exclusively on the basis that there had been a wrongful publication of private information.

[16] [1897] 2 QB 57 (QB).

[17] C Witting "Tort liability for intended mental harm" (1998) 21 UNSWLJ 55; M Lunney "Practical joking and its penalty: *Wilkinson v Downton* in context" (2002) 10 Tort L Rev 168; D Réaume "The Role of Intention in the Tort in Wilkinson v Downton" in J Neyers, E Chamberlain and S Pitel (eds) *Emerging Issues in Tort Law* (Hart Publishing, Oxford, 2007) 533; P Handford "*Wilkinson v Downton*: pathways to the future" (2012) 20 Tort L Rev 145.

right to personal safety", and had in fact thereby caused physical harm to her. He thought that that proposition without more stated a good cause of action, there being no justification alleged for the act. And, applied to the facts, he was satisfied that an intention to harm ought to be imputed to the defendant and that the claim should succeed.

Further exploration of the *Wilkinson v Downton* principle in the context of claims for mental injury has been rendered largely unnecessary by developments in the law of negligence. So cases today involving actual psychiatric injury, which might at one time have been founded on *Wilkinson v Downton*, might now be treated as cases of negligence. But the question remains whether there is scope for the continued application of the principle in other circumstances, and in particular whether it might cover intrusive conduct causing mental upset falling short of psychiatric injury. This question also was considered in *Wainwright*,[18] which does not definitively reject any such development but hardly supports it.

Lord Hoffmann acknowledged that in cases of actual psychiatric injury there was no point in arguing about whether the injury was in some sense intentional if negligence would do just as well. However, the claimants submitted that damages for distress falling short of psychiatric injury could be recovered if there was an intention to cause it. His Lordship recognised that in *Hunter v Canary Wharf Ltd*[19] he himself had observed that he saw no reason why a tort of intention should be subject to the rule that excluded compensation for mere distress, inconvenience or discomfort in actions based on negligence. While he did not resile from the proposition that the policy considerations which limited the heads of recoverable damage in negligence did not apply equally to torts of intention, he thought that if such a principle was adopted it was important to be very careful about the meaning of "intend". If one was going to draw a principled distinction that justified abandoning the rule that damages for mere distress were not recoverable, imputed intention as in *Wilkinson v Downton* would not do. The defendant must have acted in a way he knew to be unjustifiable and intended to cause harm or at least acted without caring whether he caused harm or not. The facts did not support a claim on this basis. The Judge made no finding that the prison officers intended to cause distress or realised that they were acting without justification in asking the Wainwrights to strip. Rather, they had acted in good faith.

Even on the basis of a genuine intention to cause distress, Lord Hoffmann wished to reserve his opinion on whether compensation should be recoverable. He observed that in institutions and workplaces around the country people constantly did and said things with the intention of causing distress and humiliation to others. This showed lack of consideration and appalling manners, but he was not sure that the right way to deal with it was always by litigation. Furthermore, the harassment legislation[20] showed Parliament was conscious that it might not be in the public interest to allow the law to be set in motion for one boorish incident. It might be that any development in the common law should show similar caution.[21] So also Lord Scott, expressing full agreement with Lord Hoffmann, was satisfied that the infliction of humiliation and distress by conduct calculated to humiliate and cause distress was not without more, and should not be, tortious at common law.

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[18] Above n 4.
[19] [1997] AC 655 (HL) at 707; see further n 43 below and accompanying text.
[20] Protection from Harassment Act 1997 (UK).
[21] See also *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224 at [30].

The decision in *Wainwright* raises doubt about whether the rule in *Wilkinson v Downton* has a useful role to play in contributing to the coherent development of the law. But in *OPO v MLA*[22] the Court of Appeal in England discussed the elements of the tort and gave it continued life. A father proposed to publish a book describing, inter alia, his tormented childhood and, in particular, his suffering of sexual abuse, leading to episodes of mental illness and self-harm. The book was dedicated to his son, who suffered from Asperger's Syndrome and other vulnerabilities, but he, through his litigation friend, brought proceedings to prevent publication on the ground that it would cause him psychiatric injury and the risk of self-harm should he read it. The court held (i) it was not necessary that a statement be false, the tort extending to intentional acts which caused psychiatric harm, (ii) the statement should be unjustified vis à vis the particular claimant, and (iii) the defendant should intend to cause or be reckless about causing physical or psychiatric injury.[23] These conditions were seen as satisfied and an injunction accordingly was granted pending trial.[24]

It is apparent that *OPO* raised a privacy issue, but of a different nature to that which is the subject of the present discussion. The disputed information was private, but the person concerned wished for it to become public and the claim was by a third party on the basis that it had the potential to cause him harm. Even so, in light of the breadth of the decision it is possible that an argument based on the rule in *Wilkinson v Downton* could also give a remedy for deliberately intrusive conduct causing distress to the victim. But this would shift the tort quite far from its original form, involving false information causing physical or mental injury to the victim. The kind of debate that is needed today very arguably needs to focus on whether we should recognize a free-standing tort of intrusion upon seclusion and whether we can set principled limits to the ambit of any such tort.

Trespass to land

An unjustified entry by a person onto land in the possession of another is a trespass to land even if no damage is done. The defendant must be shown to have acted intentionally or negligently, but only in the sense that he or she entered the land voluntarily. So almost all trespasses are intentional. I "intend" to enter another's land if I consciously intrude upon it, even if I honestly and reasonably believe that the land is mine or that I have a lawful right to enter.[25]

On a trespass to land being established, the plaintiff is entitled to an award of nominal damages as a vindication of his or her possessory right. If the trespass has caused actual damage the plaintiff may be able to recover, inter alia, the diminished value of the land or the cost of restoration, mesne profits where the defendant has wrongfully made use of the land, and consequential losses that are not too remote. It is clear that the damages can include a sum to compensate for interference with the plaintiff's quiet enjoyment of the property and for invasion of his or her privacy. For example, an action for trespass to the airspace above land in such a way as to invade the occupier's privacy is a

[22] [2014] EWCA Civ 1277.

[23] Arden LJ considered that imputed intention would suffice notwithstanding Lord Hoffmann's words in *Wainwright*. In New Zealand the stricter view perhaps is seen in *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 (HC) (showing of the plaintiff's family burial plot as the background to a scene in a horror film could not foreseeably give rise to physical damage arising out of mental shock, nor could any damage be said to have been intentionally inflicted).

[24] On 19-20 January 2015 an appeal was heard by the UK Supreme Court and a decision is awaited.

[25] *Shattock v Devlin* [1990] 2 NZLR 88 (HC).

possibility in some circumstances.[26] Again, damages for unlawfully entering property in order to instal a microphone allowing conversations to be overheard could compensate for the affront and indignity caused by this intrusion.[27] A court also may grant an injunction to prevent publication of information, photographs or videos obtained during a trespass.[28] These principles have obvious relevance in discussing possible bases for liability for intruding upon another person's seclusion.

Whether a liability in trespass can be found to exist frequently will turn on the question whether the defendant was in fact a trespasser or whether he or she had a licence to be on the land. In two recent decisions the New Zealand Supreme Court has considered the circumstances in which such a licence may be implied and how it might be lost.

In *Tararo v R*[29] an undercover police officer went to the front door of a residential property, purchased cannabis from a person alleged to be the appellant and covertly filmed the transaction by means of a video camera concealed on his person. The question was whether the film was admissible in evidence. Counsel for the appellant argued, inter alia, that the implied licence which the officer had to go onto the premises and knock at the door did not permit him to conduct "video surveillance" while doing so and that he was therefore a trespasser.

Elias CJ was satisfied that the physical intrusion which would otherwise constitute a trespass was within the implied licence to approach the house and speak to the occupant, as was made clear by the occupant in dealing with him. In her Honour's view, it was not lost by the deception that the police officer was a customer or by his recording. Tipping J, delivering a joint judgment with Blanchard, McGrath and William Young JJ, maintained that the doctrine of implied licence was best understood as implied by law rather than as having a quasi-contractual basis. The common law modified the absoluteness of the ordinary law of trespass by permitting entry onto private premises for the purpose of reasonable enquiry. The common law recognised, however, that a landowner was entitled to deny or terminate the licence, either in advance or in the course of its being invoked. So members of the public, including police officers, could go to the door of private premises in order to make enquiry of an occupier for any reasonable purpose. In the course of doing so they might take photographs, if to do so was reasonable in order to accomplish that purpose. Police officers could avail themselves of this licence for law enforcement purposes. But they could not invoke the licence to do anything that by law required a warrant. A licence of this kind was appropriate in order to reflect the reasonable requirements of society. The rigidity of the law of trespass required modification in order to accommodate the ordinary interaction of citizens. And the taking of photographs should not be regarded as depriving the person doing so of their common law licence.

Tipping J thought that the instant circumstances showed that those at the house were running a business akin to a shop. They were implicitly inviting people to visit their premises in order to purchase the goods available. There was no advance denial of the licence and no termination during its exercise. The taking of a photographic record of the transaction was a reasonable course for the

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[26] *Bernstein v Skyviews and General Ltd* [1978] QB 479 at 488-9. The claim failed on the facts, on the basis that an aircraft taking photographs hundreds of feet above the ground was not trespassing into the plaintiff's airspace: and see further n 42 below.

[27] *Greig v Greig* [1966] VR 376 (VSC).

[28] *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 (NSWSC); *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129 (CA). Compare, however, *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* [2001] HCA 63, (2001) 208 CLR 199.

[29] [2010] NZSC 157, [2012] 1 NZLR 145.

officer to adopt in view of his law enforcement purpose in entering onto the premises. He thereby obtained a reliable record of what had occurred, and of the person with whom he had dealt. What the officer did was not such as required a warrant. Nor did he exceed the terms of the licence so as to become a trespasser. So the evidence was not improperly obtained and was admissible.

Let us now compare the decision in *Tararo* with the later decision of the Supreme Court in *Hamed v R*.[30] The police suspected that members of the Tuhoe iwi were holding quasi-military training camps on Tuhoe land and covertly installed cameras on the land to record what was happening. It was held that the surveillance was not authorised by statute and that in the circumstances no licence could be implied.

Elias CJ considered that the police had no implied licence to enter for investigative purposes. The limited licence accepted by the Court in *Tararo* (which excused from trespass someone who approached a dwelling house to speak to the occupier) had no application to the case before the court. Nor did any licence to enter arise out of the circumstance that part of the land was used by members of the public for recreational purposes. In the absence of lawful authority, the police trespass in entering the land meant that all evidence resulting from such entry was improperly obtained.

Blanchard J said that the case differed from *Tararo* because the court in the instant case was concerned with a different kind of implied licence. *Tararo* involved a licence implied by law under which it was permissible for anyone, including police officers, to enter land for the purpose of communicating with the owner or occupier. Provided that purpose genuinely existed, the motivation for the entry, for example that criminal activity was under investigation, was not relevant to the lawfulness of the entry. But in this case the police were not entering in order to communicate with any owner or occupier. Far from it: they did not wish owners or occupiers to know they were on the land. Any licence to enter therefore had to be one which had been expressly granted by an owner or occupier having power to make such a grant, or it must have been apparent from the conduct of the owner or occupier on past occasions or when the entry was made that the entry was permitted. Plainly there was no express licence and, although Tuhoe appeared to have been allowing entry by members of the public for recreational purposes, there was nothing to suggest that they had ever, or would ever, tolerate entry by police for the purpose of investigating crime. So the entries could not be justified on the basis of any implied licence.

Tipping J accepted that if the true purpose of the entry by the police officers had been purely recreational, evidence of what they happened to see when on the land would not have been improperly obtained, as they would not have been trespassers. But it would not be appropriate to imply, as a matter of law, a licence to enter for investigatory purposes. The case was different from the case of an implied licence to enter private premises in order to communicate with the occupier by knocking on the front door.[31]

The contrast between *Tararo* and *Hamed* has left the law in a state of some confusion. One source of uncertainty arises from Tipping J's support in *Tararo* for an imposed permission to enter, yet ultimately justifying the decision by pointing out that the occupants of the house were implicitly

[30] [2011] NZSC 101, [2012] 2 NZLR 305.

[31] Their Honours went to consider, inter alia, whether the evidence should be excluded pursuant to the "balancing exercise" required by s 30 of the Evidence Act 2006 (NZ), on which matter there were some differences of opinion depending on the crime charged and the nature of the disputed evidence.

inviting people to come to the door to buy drugs. Arguably, then, the occupier was accepting the risk that a purchaser might be an undercover police officer. Yet the point perhaps manifests the key imponderable arising out of the Court's determination, that one kind of implied licence depends on the occupier giving actual or implicit permission to enter, and another is imposed by the court on the basis of public interest and convenience. The drawing of this distinction has been heavily criticised.[32] Why, it is asked, should an intention to communicate with the occupier be critical for the latter but not the former? Certainly this intention may be relevant in judging whether there is actual or implicit permission to enter, but often it will not. Examples are where the entry is to avoid an obstruction, or to retrieve property, or to follow a wandering child.[33] In the case of an imposed licence it is difficult to see why an intention to communicate with the occupier is relevant at all. It may be that it would give the occupier the chance to revoke the licence, but the initial entry would still be unjustified. And the argument could not in any event apply in a case like *Tararo*, the officer having successfully deceived the occupier into thinking he was a customer.

Surprisingly, perhaps, in passing the Search and Surveillance Act 2012 (NZ) the New Zealand Parliament was apparently satisfied with the law concerning implied licences to enter land. The Act makes provision for obtaining a "surveillance device warrant"[34] if the use of such a device will involve a trespass on private property,[35] whereas no warrant is required if the officer lawfully enters the land. The Act also makes provision for "consent search rules",[36] but provides that the rules do not affect the law relating to implied licences to enter property.[37] So whether a licence can be implied is critical both in determining whether an entry without warrant is lawful and in determining whether there can be said to be consent to a search of property. The trouble is that Parliament did not address the implications of the requirement that a licence can be imposed only where the entrant's purpose is to communicate with the occupier. Nor did Parliament deal with the difficulty in reconciling *Tararo* and *Hamed* on a principled basis. The unfortunate result is that the law concerning the vital issue of police powers to enter private property remains in an unsatisfactory state.

In summary, where a claimant has a possessory right to land and can show that a trespass has in fact been committed (applying *Tararo* or *Hamed* where appropriate, at least in New Zealand), then a claim in trespass can lie. But trespass cannot provide a remedy for intrusions upon seclusion in other circumstances.

Nuisance

An invasion of privacy which amounts to an interference with the ordinary and reasonable enjoyment of property may be actionable as a private nuisance. However, in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[38] the High Court of Australia held that a racecourse owner had no cause of action against an adjoining landowner who had erected a platform on his land overlooking the racecourse and used it to broadcast reports of the racing over the radio. Latham CJ

[32] Mahoney, "Licentious confusion" [2011] NZLJ 412.
[33] *Halliday v Nevill* (1984) 155 CLR 1, at 7.
[34] Search and Surveillance Act 2012, Part 3, Subpart 1.
[35] Ibid, s 46.
[36] Ibid, Part 4, Subpart 2.
[37] Ibid, s 96(c).
[38] (1937) 58 CLR 479.

maintained that the defendant had not interfered with the races nor with the comfort or enjoyment of persons watching them. The effect of the broadcasts was simply to make the racing less profitable, as tending to prevent people from going to the races and paying for admission, and this, he thought, was not an actionable nuisance. The decision is concerned with loss of business rather than interference with privacy, but Latham CJ observed generally that any person is entitled to look over the plaintiff's fences and see what goes on in the plaintiff's land and also to describe what takes place. This opinion has been criticised as being unnecessarily categorical in asserting an unqualified right to overlook another's premises regardless of motivation or purpose,[39] and later cases point to possible examples of actionable intrusions. These include watching and besetting premises,[40] picketing a person's home,[41] and maintaining constant surveillance of a house from the air and photographing the occupier's every activity.[42]

While nuisance sometimes may have a role to play in providing a remedy for intrusive behaviour, it will always be a limited one. In *Hunter v Canary Wharf Ltd*[43] the House of Lords affirmed that, since nuisance is a tort against land and not a personal wrong, the plaintiff must have a legally protected interest in the land affected by the nuisance. So conduct directed at persons without such an interest is not actionable as a nuisance. Their Lordships accordingly overruled *Khorasandjian v Bush*,[44] where the plaintiff obtained an interlocutory injunction forbidding the defendant, a former friend, from using violence to or harassing or pestering her with telephone calls at her parents' home, on the ground that the plaintiff was a mere licensee and thus that no action for nuisance could lie. Even so, Lord Cooke was disposed to think that harassment should in any event be actionable when it occurred outside the home, and in *Khorasandjian* itself Dillon LJ specifically supported recognition of harassment as an independent tort.[45] But any developments in this direction, at least in the UK, appear to have ended with the decision of the House of Lords in *Wainwright v Home Office*.[46] Lord Hoffmann noted that protection from harassment had been put on a statutory basis,[47] and gave no support for the development by the courts of a tort of harassment or for building a remedy under the rule in *Wilkinson v Downton*.

Intrusion into seclusion or solitude

Intrusion into seclusion or solitude involves an invasion of the victim's private space or affairs. Harassing conduct is one particular form of such invasion, but many others are possible. Cases of harassment involve patterns of behaviour where the wrongdoer in one way or another forces his or her attentions on another. But suppose there is no such pattern, or the victim does not know about the wrongdoer's conduct. And suppose, for whatever reason, there can be no action for trespass or

[39] JG Fleming *The Law of Torts* Law Book Co, 9th ed, 1998, p 667 (10th ed ???)
[40] *Hubbard v Pitt* [1976] QB 142.
[41] *Thomas v National Union of Mineworkers* [1986] Ch 20 at 65.
[42] *Bernstein v Skyviews and General Ltd* [1978] QB 479 at 489.
[43] [1997] AC 655.
[44] [1993] QB 727.
[45] See also *Burris v Adazani* [1995] 1 WLR 1372 (CA).
[46] See n 20 above and accompanying text.
[47] Protection from Harassment Act 1997 (UK). Somewhat similarly, in New Zealand the Harassment Act 1997 (NZ) makes provision for an application to the District Court for a restraining order, but, unlike the UK Act, it does not give a remedy in damages.

nuisance. In *C v Holland*[48] Whata J considered for the first time in New Zealand whether an intrusion into seclusion could be accepted as a tort in its own right.

C was an occupant in a house owned by her boyfriend and H, the defendant. H surreptitiously installed a recording device in the roof cavity above the shower and toilet. He videoed C while she was showering. The videos were never published but C discovered them and was deeply upset. She brought an action against H alleging that his conduct constituted an invasion of her privacy. The question for the court was whether an invasion of privacy of this type, without publicity or the prospect of publicity, was an actionable tort in New Zealand.

Whata J was in no doubt that H intruded into C's solitude and seclusion when he recorded the video clips and that in doing this he infringed C's reasonable expectation of privacy. He also was in no doubt that H's conduct was highly offensive to a reasonable person. But whether there should be a liability in tort for an intrusion based privacy claim was a novel question. His Honour approached it by describing the North American developments, by identifying whether and to what extent freedom from intrusion was recognised as a legal value in New Zealand law, by reviewing the existing law in New Zealand and other jurisdictions and by weighing the principles and arguments for and against the recognition of intrusive conduct as a tort.

Taking the law in the US to begin with, Whata J briefly reviewed the history of the matter[49] before looking more closely at the authorities concerning the intrusion tort in the *Restatement* at §652B.[50] These showed that in determining whether there had been an act of intrusion, the focus was on the type of interest involved and not the place where the invasion occurred.[51] There should also be an affirmative act.[52] The offensiveness element was a question of fact according to social conventions or expectations. Various factors including the degree of intrusion, context, conduct and circumstances of the intrusion, the motive and objectives of the intruder and the expectations of those whose privacy was invaded were all to be taken into account.[53] The plaintiff should establish a reasonable expectation of privacy, which involved a subjective expectation of solitude or seclusion which was objectively reasonable.[54] The intrusion should involve anguish and suffering, although the approach to this element was not uniform.

Turning to intrusion in New Zealand, Whata J found a number of indicators favouring recognition of the tort in existing statutes. In particular, the Broadcasting Standards Authority had included an "intrusion into seclusion" principle in developing its privacy principles pursuant to its obligation to maintain standards consistent with "the privacy of the individual" under the Broadcasting Act 1989 (NZ); the information privacy principles in s 6 of the Privacy Act 1993 (NZ) prohibited the collection of personal information by intrusive means; the New Zealand Bill of Rights Act 1990 (NZ), while not

[48] [2012] NZHC 2155, [2012] 3 NZLR 672; N Moreham, "Beyond Information: physical privacy in English law" (2014) 73 CLJ 350.
[49] See nn 1-3 above and accompanying text.
[50] "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person".
[51] *Evans v Detlefsen* 857 F 2d 330 (6th Cir 1988) at 338.
[52] *Kane v Quigley* 203 NE 2d 338 (Ohio 1964) at 340.
[53] *Miller v National Broadcasting Co* 187 Cal App 3d 1463 (Cal Ct App 1986) at 1483.
[54] *Katz v United States* 389 US 347 (1967) at 361; *Shulman v Group W Productions Inc* 955 P 2d 469 (Cal 1998) at 490.

incorporating a general right to privacy, conferred in s 21 a right to be secure against unreasonable search and seizure, and judicial application revealed the form, content and weight given to privacy as a legal value;[55] s 38 of the Residential Tenancies Act (NZ) prohibited any interference with the tenant's peace, comfort or privacy; s 216H of the Crimes Act 1961 (NZ) prohibited the making of an intimate visual recording; and s 46(1)(c) of the Search and Surveillance Act 2012 (NZ) required a warrant before a surveillance device could be used to observe private activity on private premises. Certain court judgments also emphasised the need to protect reasonable expectations of privacy. In particular, in *Brooker v Police*,[56] McGrath J referred to the complainant's right to be free from unwanted physical intrusion into the privacy of her home.

It was therefore evident that New Zealand's legal framework had embraced freedom from unauthorised and unreasonable physical intrusion or prying into private or personal places such as the home, and freedom from unauthorised recordings of personal, particularly intimate, affairs whether published or not. But it had to be said that the extent to which privacy values were vindicated in these cases depended on the legislative framework within which the impact on those values was being assessed.

Whata J considered next the recent legal history of privacy claims in New Zealand and elsewhere. Prior to *Hosking* the tort of wrongful publication of private facts had some limited support,[57] but the decision of the Court of Appeal, drawing in particular upon developments in the UK[58] and on the jurisprudence of the European Court of Human Rights,[59] confirmed the existence of the tort.[60] Its boundaries were broadly framed by experiences in other jurisdictions, especially those dealing with competing claims to freedom of expression. First, only private facts were protected, namely those facts known to some people but not the world at large. Second, the right of action arose only in respect of publicity that was objectively determined to be offensive causing real hurt or harm. Third, a legitimate public concern in the information might provide a defence, but a matter of general public interest or curiosity was insufficient. Whata J noted, however, that *Hosking* did not decide whether a tortious remedy should be available in New Zealand law for unreasonable intrusion upon a person's solitude or seclusion, and that Gault P and Blanchard J expressed the view that any high level and wide tort of invasion of privacy should be a matter for the legislature.[61] He recognised as well that in the context of surveillance the common law in New Zealand appeared to have embraced trespass as a condition precedent to unlawful surveillance.[62]

His Honour did, however, find clear support for an intrusion based privacy tort in Canada. In *Jones v Tsige*[63] the defendant used her workplace computer to access the account of the plaintiff, a fellow employee, more than 170 times over a four year period. During this time the defendant was in a

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[55] See the leading judgment of *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207, esp at [113].
[56] [2007] NZSC 30, [2007] 3 NZLR 91, at [123].
[57] See *Tucker v News media Ownership Ltd* [1986] 2 NZLR 716; *C v Wilson and Horton Ltd* HC, Auckland, CP765/92, 27 May 1992; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415; *P v D* [2000] 2 NZLR 591
[58] *Campbell v MGN Ltd* , above n 9, was recognised as the leading case.
[59] *Peck v United Kingdom* (2003) 63 EHRR 41.
[60] Whata J recognised that there was no clear authority for a privacy tort in Australia. In *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63, (2001) 208 CLR 199 the High Court took a cautious approach and said that the question was yet to be resolved with finality.
[61] Above n 11, at [110].
[62] *Lorigan v R* [2012] NZCA 264, at [29], [37]; and see nn 29 and 30 and accompanying text.
[63] [2012] ONCA 32, (2012) 108 OR (3d) 241.

relationship with the plaintiff's former husband. The Ontario Court of Appeal held that the claim succeeded and that the plaintiff could recover damages for an intrusion upon her seclusion. Sharpe JA recognised that privacy had long been recognised as an important underlying and animating value of various traditional causes of action to protect personal and territorial privacy. In Canada, moreover, charter jurisprudence recognised privacy as a fundamental value, especially informational privacy, a right that closely tracked the same interests protected by an intrusion tort. Furthermore, technological change had motivated greater legal protection of personal privacy and posed a novel threat to privacy interests. The law in Ontario would indeed be sadly deficient if the plaintiff were sent away without a legal remedy. An actionable claim would arise for deliberate and significant invasions of personal privacy that, viewed objectively on the reasonable person standard, could be described as highly offensive.

In light of this background, Whata J was satisfied that an intrusion tort would give effect to a recognised value in protecting privacy and would be compatible with, and a logical adjunct to, the decision in *Hosking*. He rejected the argument that the matter ought to be left to Parliament, primarily for the reasons expressed by the Law Commission.[64] They were, in summary, that invasion of privacy as a tort had only recently been affirmed by a superior court, that privacy concerns were likely to increase with advances in technology, that a tort emphasised the importance of privacy and that the law took the matter seriously, that the courts had flexibility in dealing with individual facts and changing circumstances that a statutory regulation did not, and that maintaining a tort was consistent with international trends and conventions. So his Honour reached the view that it was functionally appropriate for the common law to establish the tort. He also found that there was a need for this development. Existing protections from intentional intrusion into personal space and affairs were coherent but not comprehensive. In the absence of threatened publication the *Hosking* tort had no direct application to the instant facts. Other tortious actions presupposed interference to property or the person, also not present on the facts. An action based on intentional infliction of emotional distress was unlikely to succeed,[65] especially as there was no evidence of an intent or design to cause harm. A criminal sanction was triggered[66] and criminal culpability reflected society's concern about such conduct, but it was only partially concerned with vindicating the plaintiff's rights and interests or remedying the harm to her. Accordingly, he considered that a tort of intrusion upon seclusion was part of New Zealand law.

As for the elements of the tort, his Honour stated that the plaintiff had to show (a) an intentional and unauthorised intrusion, (b) into seclusion (namely intimate personal activity, space or affairs), (c) involving infringement of a reasonable expectation of privacy, (d) that was highly offensive to a reasonable person. "Intentional" connoted an affirmative act, not an unwitting or simply careless intrusion. "Unauthorised" excluded consensual and/or lawfully authorised intrusions. Further, not every intrusion into a private matter was actionable. The reference to intimate personal activity acknowledged the need to establish intrusion into matters that most directly impinged on personal autonomy. As for the last two elements, these replicated the *Hosking* requirements and the tort thus remained consonant with existing privacy law. Only private matters were protected, and a right of

[64] Law Commission *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy Stage 3* (NZLC R113, 2010), at 7.6-7.13.
[65] Citing its consignment to the history books by *Wainwright*, above n 18 and accompanying text.
[66] Crimes Act 1961, s 216H (NZ).

action only arose in respect of an intrusion that was objectively determined, due to its extent and nature, to be offensive by causing real hurt or harm. Lastly, a legitimate public concern in the information might provide a defence to the privacy claim.

Whata J recognised that there was support in academic writing and from the developing law of privacy in the UK pursuant to art 8 of the European Convention of Human Rights for a simple reasonable expectation of privacy test. In his Honour's view, however, this one step test was insufficiently prescriptive. The capacity for conflict between the right to seclusion and other rights and freedoms was very significant and this demanded a clear boundary for judicial intervention.

A general privacy tort?

Let us consider the ambit of this new tort. Whata J balked at basing recovery simply on a reasonable expectation of privacy, but his Honour nonetheless has recognised a principle of general significance and application. It is not limited to cases involving actual physical seclusion: rather, it covers all those involving sensory intrusions upon individual autonomy and dignity. Assuming that a defendant's intrusion is intentional, this requirement is indeed the core control in determining liability.

Explaining this requires us to return to the question raised at the beginning of this essay, namely, what is privacy? A leading commentator has defined the concept of privacy as "desired 'inaccess' or as 'freedom from unwanted access'".[67] It is apparent that, at least as a general rule,[68] one must choose or wish to be left alone as well as be left alone in fact. That wish may be objectively apparent or there may be outward signs of an increased (subjective) expectation of privacy (such as signs, barricades or security).[69] However, an unwilling castaway on a desert island is not in a state of privacy, and a woman performing a striptease in a strip club does not have her privacy invaded by the audience that is watching her.[70] So on this basis a right to privacy is a right to have people leave you alone if you do not want some aspect of your life to become public property.[71]

Sometimes the focus has shifted from an individual's choice or desire to his or her loss of control over how he or she appears or is presented to others. For example, there is a loss of control where a person is made the subject of covert surveillance or where he or she unwillingly becomes involved in a traumatic situation.[72] But there are difficulties with control-based definitions.[73] One is that a loss of control may give rise to a *risk* of unwanted access, as where a computer hacker has the capacity to hack into another's private affairs, but there is an interference with privacy only where such access is in fact obtained without the victim's consent. Another is that it is often hard to see how a person can exercise control over information once it has been communicated to someone else, for in doing this it is likely that the person has at the same time relinquished control. In many cases, control can only be maintained by refraining from disclosing information to anyone, although it is also true that

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[67] N A Moreham, "Privacy in the Common Law" (2005) 121 LQR 628, at 636.
[68] Privacy also may be mandatorily imposed, for example, where a court order prohibits the publication of matters such as a person's identity, image or behaviour.
[69] *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 per William Young P and Glazebrook J at [114].
[70] N Moreham, above n 67, at 636-7.
[71] *Hosking* per Tipping J, above n 11 at [238].
[72] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 at [75], where Lord Hoffmann said that the widespread publication of a photograph of someone which revealed him to be in a situation of humiliation or severe embarrassment might be an infringement of privacy.
[73] N Moreham, above n 67, at 637-9.

using digital rights management software or Snapchat may prevent the copying or forwarding of information. In any event, possible difficulties are avoided if we see control as a means of bringing about privacy rather than privacy itself. It is the desire to be private that counts.

Next, there is the question of "access". A person seeking privacy wishes to be free from unwanted access or, to put this in a slightly different way, to be secluded from others. Of course, this immediately requires us to consider what is meant by "undesired access" or "seclusion". Whata J sought to give guidance by equating seclusion with "intimate personal activity, space or affairs", and no doubt the particular facts of the case at hand can be seen as a fairly straightforward example. But other cases are likely to raise greater difficulty.

The idea of seclusion might suggest one's interest in territorial privacy, which is partly protected by the tort of trespass to land. But many intrusive practices will not involve a trespass, as indeed in *Holland* itself. Rather, the tort can extend to other interests in privacy that may be invaded in other ways. In *Jones v Tsige*[74] Sharpe JA identified personal privacy as grounded in the right to bodily integrity and the right not to have our bodies touched or explored, territorial privacy as protecting the home or other spaces in which we have a reasonable expectation of privacy, and informational privacy as the right to determine when, how and to what extent information about us is communicated to others. Whata J's formulation in *Holland* can be seen to cover the same ground. His Honour's reference to intimate personal activity, space or affairs fairly clearly includes personal, territorial and informational privacy. While the facts of *Holland* concerned territorial privacy, it is apparent, then, that the newly recognised cause of action is not limited to physical seclusion.

Given that an intrusion into seclusion can take these different forms, we need to consider whether we can find a touchstone that will help us determine whether any particular invasion is actionable. Whata J in *Holland* said the reference to "intimate" personal activity acknowledged the need to establish intrusion into matters that most directly impinged on personal autonomy. And while his Honour was not entirely clear on the point, seemingly the need to show an intrusion that impinges on personal autonomy can and should apply equally to intrusions into the victim's space and affairs as well. So, to spell the point out in a little more detail, there is an actionable intrusion where a defendant invades the plaintiff's personal activities, personal space and personal affairs in such a way as to intrude upon his or her right to individual autonomy. Indeed, in a number of decisions the link between individual privacy and individual autonomy has been recognised and emphasised. In *Hosking*, for example, Tipping J said that "[i]t is of the essence of the dignity and personal autonomy and wellbeing of all human beings that some aspect of their lives should be able to remain private if they so wish.[75] Again, in *Brooker v Police* McGrath J maintained that "[p]rivacy is an aspect of human autonomy and dignity."[76] So we need to examine how and the extent to which intrusions into personal activities, personal space and personal affairs may have an impact upon the victim's autonomy. However, we will change Whata J's order of discussion and take personal space first of all.

Personal space

[74] [2012] ONCA 32, 108 OR (3d) 241, at [41].
[75] Above n 11, at [239].
[76] Above n 56, at [123], citing *Campbell v MGN Ltd* [2004] 2 AC 457 at [50], per Lord Hoffmann.

In *R v Broadcasting Standards Commission ex p British Broadcasting Corporation*[77] Lord Mustill thought that the privacy of a human being "denotes at the same time the 'personal space' in which the individual is free to be itself, and also the carapace, or shell, or umbrella … which protects that space from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate". Manifestly, an intrusion of this kind is very different from a complaint of a trespass to land, which focuses simply on protection of the plaintiff's proprietary interest in the land. Rather, the plaintiff loses any choice about and control over how he or she appears to others.

An intrusion into personal space may involve an inquiry with both spatial and normative elements. The spatial inquiry asks whether or the degree to which the plaintiff is physically secluded, and the normative inquiry asks what the space is used for and whether there is a reasonable expectation of privacy in that space. In *R v Williams*,[78] a criminal case, William Young P and Glazebrook J said that in terms of searches of property, residential property would have the highest expectation of privacy.[79] But there would be some gradation even within a residential property: public areas would invoke a lesser expectation than private areas, inaccessible areas such as drawers and cupboards (particularly ones where one would expect to find private correspondence or intimate clothing) would count as private areas, and there would be less privacy expected in the garden, particularly the front garden, and in garages and outbuildings. There was also a lesser expectation of privacy in vehicles,[80] in commercial premises,[81] and on farmland, apart from the area around farm residences.[82] Accordingly, applying this kind of approach, it is necessary to assess, inter alia, the physical privacy of the area where the intrusion happened, whether or how it is secured, the likely activities within it, whether visitors might be invited to use it and whether and why strangers might reasonably be expected. These various factors may all bear upon a person's reasonable expectation of being observed and, consequently, how he or she will or may behave.

What about looking through a peephole into a bathroom? In principle this might be actionable, as in *Holland*, at least in the case where the defendant created the peephole. Looking through a window is harder, but it seems possible that this could be actionable in very limited circumstances. Evidence of a course of conduct showing intentionally intrusive conduct, coupled with the plaintiff's reasonable expectation of privacy notwithstanding an open or unfrosted window, at the very least would be needed.

Personal activities

Holland contemplates that there may be an intrusion upon a person's intimate activities even where the person is not physically secluded. The idea of a right to an "inviolate personality"[83] and to be free from unwanted observation in intimate situations has a clear link with the proposition that an action for an invasion of privacy can and should protect individual autonomy and individuality. A person

[77] [2001] QB 885, at [48].
[78] [2007] NZCA 52, [2007] 3 NZLR 207, at [113].
[79] For example, *R v McManamy* (2002) 19 CRNZ 669.
[80] *R v Jefferies* [1994] 1 NZLR 290, at 327.
[81] For example, *Thomson Newspapers Ltd v Canada* [1990] 1 SCR 425
[82] For example, *R v Williams* CA 63/05, 9 Dec 2005, at [83].
[83] Samuel Warren and Louis Brandeis, above n 1, at 205

may have an interest in not being looked at, listened to or imposed upon against his or her wishes[84] in a public as well as a private place. Yet it is clear, at least as the law presently stands, that the tort does not extend to intrusions in relation to everyday activities.[85] So in what circumstances might a court be prepared to vindicate this interest in not being intruded upon in a public place?

Let us take an intrusion in an accessible or a public place where the person concerned is unaware that he or she is being watched or overheard. Covert filming or surveillance is an obvious example. It has been suggested that the very fact of clandestine recording is an intrusion,[86] but this certainly goes too far. The mere fact that a person does not know he or she is being recorded cannot be actionable in itself, for widespread recording of people in public places is a widely known occurrence, and a reasonable expectation of privacy is unlikely.[87] Covert filming of activities on private property but in an accessible area might be seen as an intrusion upon seclusion, depending on the degree of accessibility.[88] But there certainly was no suggestion in *Tararo*[89] that the videoing in that case might have been independently actionable. In *Holland* Whata J confirmed that surveillance alone was not actionable and that there must be a combination of features, including lack of authorisation, intimacy, a reasonable expectation of privacy and offensiveness.[90] Treating recording alone potentially as a tort would create serious difficulties in relation to other areas of law, notably the law of evidence, and would tend to undermine a strong public policy favouring the investigation of wrongdoing. But it is nonetheless possible to contemplate situations where an action still might lie.

One is where a person is forced into an intimate or traumatic situation. An example can be found in the facts of *Andrews v Television New Zealand Ltd*.[91] The plaintiffs, who were husband and wife, were involved in a road accident and were trapped in their car. The emergency services arrived, and the subsequent rescue operation was filmed for the purpose of a television series about the lives and daily work of fire officers. The plaintiffs spoke between themselves during their rescue in a private and intimate way, knowing that they would be overheard by those around them but unaware of being filmed. The footage later was shown on television, and it included partially obscured but close-

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[84] See N Moreham, above n 67, at 650-651.

[85] There have been developments overseas in this direction: see *Von Hannover v Germany* (2005) 40 EHRR 1 (concerning art 8 of the European Convention on Human Rights); applied in *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481; *Weller v Associated Newspapers* [2014] EWHC 1163 (QB); cp *Von Hannover v Germany (No 2)* (2012) 55 EHRR 15; *Aubry v Editions Vice Versa Inc* [1998] 1 SCR 591 (a case under Quebec's Charter of Rights and Freedoms).

[86] *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777, at [17], where Eady J considered that this would be an unacceptable infringement of the right to privacy under art 8 of the European Convention on Human Rights. But this view seemingly was influenced by the private context shown by the particular facts.

[87] But it may be different if the recording is published to others: see *Peck v United Kingdom* (2003) 36 EHRR 41.

[88] An example is *Canwest TVWorks Ltd v XY* [2008] NZAR 1 involving a privacy complaint to the NZ Broadcasting Standards Authority. The complainant, who was the editor of a men's magazine, conducted photo shoots of aspiring models in his bedroom. A female actor posing as a would-be model filmed the complainant encouraging her to adopt sexual poses with a second female actor, also posing as a model, and the footage was shown on a television programme examining apparent risks to young people wishing to work in the modelling industry. The court held that the complainant had a reasonable expectation of privacy, because the area was enclosed, confined or shut off from view except to invitees. The complainant's invitation to a third party did not extend to a hidden camera, which voided any implied licence. So there was a zone of physical and sensory privacy for the complainant and his two companions.

[89] See n 29 above.

[90] Above n 48, at [92].

[91] [2009] 1 NZLR 220.

range shots of the plaintiffs, who were identifiable to those who knew them. Allan J was satisfied that the plaintiff had a reasonable expectation of privacy in the contents of their conversation even though everything took place in public, but held that the claim should fail because what was published could not be said to be "highly offensive". The claim was made on the basis of the principles laid down in *Hosking* concerning the publication of private information, but arguably the intrusion tort could apply here. Further, for reasons to be considered below,[92] the "highly offensive" requirement arguably can be seen to be satisfied in this context.

Another possible example might be the involuntary exposure of intimate bodily parts. A court in Australia has contemplated that there would be an invasion of privacy in the case of a woman standing innocently over an air vent and someone has photographed her with her skirt blown up.[93] This also was said in the context of a privacy tort involving publication, but the intrusive nature of the conduct alone is clear. Indeed, an unauthorised strip search, as in *Wainwright*, can provide a reasonably compelling illustration.

Personal affairs

Prying into the personal affairs of another may very well give rise to a claim for a wrongful intrusion into private matters and affairs. Unauthorised accessing of the plaintiff's private bank account[94] and unauthorised telephone tapping[95] are examples. Of course, if the information gained is disclosed then the tort of wrongful disclosure of private information may be committed. Again, the *Hosking* tort would have applied on the facts of *Holland* if the recording had been published to other people. However, *Hosking* gives a remedy in respect of publicity given to private *facts*. It contemplates the wrongful disclosure of information. Yet viewers can hardly be said to be obtaining "information" by looking at a person's naked body. The gist of the complaint in such circumstances is the sensory intrusion, the assault on the plaintiff's autonomy and feelings. It has been pointed out that "information" does not adequately explain what is obtained (or lost) when one person looks at another against his or her wishes. Something more akin to "knowledge" (less tangible and more "spiritual" than "information") is obtained.[96] This is still true even in information cases. And the sensory intrusion exists whether the recording is retained or disclosed. So an approach based entirely on "information" is inadequate in accommodating this dimension to the plaintiff's complaint.

A further difference may lie in the application of the defence of legitimate public concern. The focus of a defence to the *Hosking* tort is on freedom of expression and exposing illegal or, maybe, unethical conduct. The NZ Law Commission has pointed out that the defence in the case of the intrusion tort may operate differently in two respects.[97] First, it relates to the freedom to seek information rather than to impart it. Second, there may need to be a requirement of reasonable belief of legitimate public concern rather than a purely objective test. Where the disclosure tort is concerned, the person publishing private facts can be presumed to be in possession of sufficient information to determine whether or not the publication is about a matter of public concern. In the

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[92] See *Reasonable expectation of privacy and offensiveness*, below.
[93] *Bathurst City Council v Saban* (1985) 2 NSWLR 704 at 708 per Young J.
[94] *Zimmerman v Wilson* 81 F 2d 847 (1936); *Jones v Tsige* above n 63.
[95] *Fowler v Southern Bell Telephone and Telegraph Co* 343 F 2d 150 (1965).
[96] N Moreham, above n 67, at 650.
[97] NZ Law Commission, *Invasion of Privacy: Penalties and Remedies*, Review of the Law of Privacy, Stage 3, (NZLC IP 14, 2009), at 11.46-11.48.

case of the intrusion tort, however, the defendant may, at the time the intrusion occurred, have reasonably believed that he or she was investigating a matter of public concern, but that belief may prove to have been incorrect.

Accordingly, in cases where there is both intrusion and publication, it is strongly arguable that both torts should apply, and this was the view of the Law Commission[98] and, at least arguably, of Whata J.[99] The former would allow compensation for the (perhaps continuing) impact of the sensory intrusion, and the latter for the harm caused by the publication of private information and/or for the purpose of seeking an injunction to prevent publication.

Reasonable expectation of privacy and offensiveness

Whata J required that an actionable intrusion upon seclusion should involve, further, a reasonable expectation of privacy that was highly offensive to a reasonable person. Both of these are also requirements for establishing the *Hosking* tort. Taking the first, the disclosure cases often have abbreviated "facts in respect of which there is a reasonable expectation of privacy" to "private facts", as Gault P and Blanchard J did in *Hosking* itself. But, as Gleeson CJ has said in an Australian decision, "there is no bright line which can be drawn between what is private and what is not".[100] Facts of a personal or intimate kind may be recognisably private, but what should we say about the fact that one has won Lotto; the fact that one has been suspended from one's job; the fact that one owes money; the fact that one has lost one's temper in a dispute with a neighbour; the fact that one has been interviewed by the police in connection with a driving incident? There is room for disagreement concerning all of these examples.[101] However, as regards the *Holland* tort an inquiry into whether a victim can be seen to have had a reasonable expectation of privacy is bound up with, and maybe implicit in, an inquiry into the issue of seclusion and into the question whether there has been an intrusion into individual autonomy. So it is arguable whether a reasonable expectation of privacy needs to be identified as a separate element to the tort. But it may be thought desirable specifically to draw attention to the principle, which may be helpful at least in borderline cases.

Is the requirement of high offensiveness needed as well? Whata J wished to maintain consistency with *Hosking*, yet Tipping J in that case thought that in some circumstances the requirement might be too restrictive.[102] The conversation in *Andrews* was held to fail the test, on the basis that nothing contained in it was hurtful to anyone, yet this very arguably was not the gist of the plaintiffs' complaint. Rather, it was the intimate circumstances of the conversation, and in this respect an intrusion tort can give a remedy. In the case of publication of private information, the offensiveness requirement relates to the publication. In the case of an intrusion upon seclusion, any element of offensiveness very arguably is taken into account in determining whether there has in fact been an intrusion into seclusion and autonomy. However, in the same way as with the expectation of privacy,

[98] Ibid, at 11.54.
[99] His Honour stated at [75] that freedom of expression was only infringed where publication was contemplated, "in which case the *Hosking* principles would apply", but did not say that this was to the exclusion of the *Holland* principles.
[100] *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* [2001] HCA 63, (2001) 208 CLR 199, at 226.
[101] S Todd (gen ed), *The Law of Torts in New Zealand* above n 13, at [17.4.03].
[102] Above n 11, at [256]; see also *Television New Zealand Ltd v Rogers* [2007] NZSC 91, [2008] 2 NZLR 277, at [25] per Elias CJ.

there is value in drawing specific attention to the need to show the offensive nature of the intrusion. Indeed, the requirement is more suitable for the intrusion tort than for the publication tort.

Applying C v Holland

The question of the application of an intrusion tort arose once again in New Zealand in *Faesenkloet v Jenkin*.[103] The decision and the reasoning in this case can be recognised as providing a helpful overview of the key issues in making out a cause of action. The plaintiff and the defendant were neighbours, and there was a history of incidents and disputes between the two. The immediate cause of the proceedings was the defendant installing a CCTV camera on the roof of his garage adjacent to a driveway running to plaintiff's property. Both parties had the right to make reasonable use of the driveway. The plaintiff alleged that the position and use of the camera amounted to an intentional and unauthorised intrusion upon his reasonable expectation of privacy and that its installation was highly offensive to a reasonable person.

Asher J recognised that Whata J's assessment of the elements of the tort would not preclude the invasion being in or of a public area. The recognition of a tort of invasion of privacy did not turn on the lawfulness of the initiating act of the defendant, but rather whether there had been a highly offensive intrusion into a place or situation where there was a reasonable expectation of privacy. It was the circumstances of the intrusion, and the reasonable expectation of the person intruded upon, that were the key. If the camera in *C v Holland* had been in a public shower, the intrusion would have been no less offensive. It was the unauthorised intrusion into a place where privacy was reasonably expected that was important, not whether the place was in public or private premises. So the fact that the camera surveyed only the defendant's own land and public land and did not film the plaintiff's property was not a bar. But it was relevant in assessing whether there had been an actionable invasion.

His Honour noted that on the particular facts, the driveway area filmed was open to the public and was not a place where there was a high expectation of privacy. Reasonable expectations of privacy for activities readily visible from outside the property had to be significantly less than for activities within buildings.[104] There was no evidence that the plaintiff or his invitees carried out any activities that could be regarded as intimate or private on the driveway. It was used for walking and driving to and from the plaintiff's house. Further, a driveway was not an area that was traditionally highly private, even if privately owned. Whereas it could be expected that only invitees would use, say, a back garden, a driveway would be used by persons who had not been invited, and all coming in and out could be seen. Accordingly, given the public ownership and relatively public nature of the use, his Honour concluded that there was no reasonable expectation of privacy of the driveway area.

The plaintiff submitted that the camera was installed in order to constitute a deliberate and unreasonable provocation and that it was thus particularly offensive. Asher J accepted that a deliberate intrusion was more likely to be offensive, but thought that the defendant's motive was to catch whoever was vandalising his garage, not to provoke the plaintiff. As for whether it was otherwise highly offensive, the question was linked with the consideration of the reasonable

[103] [2014] NZHC 1637. For an entertaining treatment of a somewhat similar case in Canada, see *Morland-Jones v Taerk* [2014] ONSC 3061.
[104] Citing *R v Fraser* (1997) 15 CRNZ 44 (CA), at [56].

expectation of privacy. The greater the expectation, the more likely an intrusion would be offensive. And on the facts here the camera surveyed a small area of land that was not used for any intimate purpose. His Honour was unable to see how the plaintiff could show that the intrusion on to space used by him in the driveway could be regarded by an objective reasonable person as highly offensive.

Interestingly, Asher J took the view that while there was a distinction between the concepts of the unlawful publication of private facts, as in *Hosking*, and intrusion upon seclusion, as in *Holland*, it was far from clear that there needed to be a different tort in relation to both.[105] His Honour noted that they had common elements – the need to show a reasonable expectation of privacy and an invasion of privacy that was highly offensive to a reasonable person – and that whether in a public or a private place the issue was the existence of the reasonable expectation and the nature of the intrusion. Perhaps, then, *Holland* can be seen as an incremental development of *Hosking*. However, there are the further differences noted by the New Zealand Law Commission,[106] and understanding the law in terms of two torts arguably gives recognition to the distinct focus of each. Furthermore, Asher J's view of the matter seemingly is not available in the UK, where the privacy tort is founded on the action for breach of confidence and this requires publication of confidential or private information.

Conclusion

Maybe Lord Hoffmann's fears in *Wainwright* about recognising a "high level" principle protecting privacy are not really justified. The tort recognised by Whata J in *C v Holland* provides us with helpful guidance on how such a tort can work. The focus is on the intentional and unauthorised intrusion into private, personal and intimate matters affecting autonomy and dignity. Of course, there will be uncertainty about cases on the margins, but that is no unusual consequence of the judicial development of new liabilities in tort.

Let us also foreshadow a rather different, albeit associated, development which the courts in New Zealand and elsewhere may come to consider. The question, in brief, is whether the courts should move towards protecting a person's image independently of its commercial value, if any. It arguably is harder to answer than the question in *Holland*. At all events, in the circumstances of that case, it needed neither to be raised nor resolved.

[105] Above, n 103, at [38].
[106] Above, n 97.