

PRIVACY

Privacy

Newest tort, established in *Hosking v Runting*

- Responding to growing awareness of privacy concerns, question over what shape it will take.
- How we turn our societal understanding of what privacy is and turn it into law?

5 key themes:

1. Why do the courts protect privacy?

- *See Hosking:*
 - o Technology developments mean breaches of privacy more likely
 - o Domestic legislation seeks to protect privacy
 - o International obligations also protect privacy

2. How do they protect privacy? i.e. tests for breach of privacy and how they are applied

- *Hosking majority test*

3. What effect does a person's location have on his or her privacy rights?

- i.e. whether they were in a public place or not
 - o *Campbell*

4. To what extent are a person's privacy rights affected by who they are?

- i.e. whether they are a public figure or not
 - o *Hosking v Runting*
 - o *Murray*

5. What effect does the nature of the information or of the activity the person is engaged have on his or her privacy rights?

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Hosking v Runting 2004 NZCA → **Privacy and public figure**

Photographs were taken of Mike Hosking's ex-wife and their two children in a street in Auckland for the purposes of publication in a tabloid magazine. There was no cause of action, CoA had been asked to create a new tort.

Creation of privacy tort: responds to developments of technology, changes in attitudes/practices/values in society.

- Consistent with values which underpin domestic legislation: privacy protected in domestic legislation (e.g. NZBORA)
- Consistent with international obligations: presumption that these need to be followed, e.g. *International Covenant on Civil and Political Rights*
- Consistent with developments in the UK common law

Privacy test (Gault P and Blanchard J)

1. The existence of facts in respect of which there is a reasonable expectation of privacy

- Similar to reasonableness test in negligence: what would a reasonable person expect

2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person

- 'Highly offensive' relates to the publicity and not to whether the information is private
- Will only be satisfied if the publicity is 'truly humiliating, distressful or otherwise harmful' to the individual concerned
- Unrealistic to contemplate legal liability for publication of all private information e.g. telling a neighbour that one's spouse has a cold
 - o *Strange example to give* – suggests that having a cold would satisfy the reasonable expectation of privacy test
 - o *Creates a straw man: trivial things doing through the reasonable expectation of privacy; therefore, double hurdle of highly offensive*
 - *Murray* – UK common law only has one test

HOWEVER - public interest defence: if there was legitimate public concern in information

- Not mere newsworthiness
- If information can be justified in being released, the importance of FOE etc dictates that there is a defence
- Must be a pressing need for disclosure

1. Only covers 'private' facts:

- Private facts not known to the world at large (may be known to some people)
- Not enough to establish that something is private just because it didn't happen in public
- E.g. medical information, personal relationships, finances
 - o *Differing opinions on whether these things are open e.g. pregnancy, marriage, student debt*

2. Special considerations when a person is a public figure

- Public figures have a lesser expectation of privacy in relation to private lives:
 - o By seeking publicity, they have consented to it
 - o Personalities and affairs are already public facts not private ones
 - o Legitimate public interest in the publication of details about public figures
- Public figure does not automatically lose his or her right to privacy, but his or her **reasonable expectation of privacy will be reduced as status increases**
- Involuntary public figures may also lose reasonable expectation of privacy, but not by as much as those who seek publicity
- **Privacy expectations of the children of public figures will also be reduced**
 - o Interest in private lives of public figures extends to an interest in the lives of their families
 - o *Unreasonable* – *celebrity status and behaviour of parents will determine the privacy rights to their families; condemned in Murray*
 - o *Here, because Hoskings had discussed the children's conception via IVF in public previously, they had a lower right to privacy: sets an unreasonable precedent that because the children had been commented on prior to their birth, they were then fair game for the media.*

Result

1. Reasonable expectation of privacy:

- Photos did not show anything that would not have been seen in Newmarket on that particular day
- Does not show any information about where they live, or anything else of that nature
- Existence of the twins, their ages, and their separated parents already a matter of public record
 - o i.e. **no private facts** all that had been revealed was that the twins were in Newmarket with their mother; the ordinary person would not regard this as private
 - o *But the case wasn't really about these facts – it was about the Hosking's right to choose whether photos of their children could be taken, it is about the media making an entertainment spectacle out of their lives*

2. Highly offensive:

- No real harm in these photos, doesn't pass highly offensive test

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TIPPING J FORMULATION

1. Reasonable expectation of privacy based on informational material
 - Material as opposed to majority fact based formulation; able to take more holistic approach to something rather than what is on surface (e.g. photo of the children vs. humiliation and distress over someone surreptitiously taking a photo)
 2. Substantially offensive (rather than highly offensive)
 - **Lower threshold to meet, more in line with UK Courts approach**
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David Murray v Big Pictures (UK) Limited [2007] SC → Privacy, public figure, children

Big Pictures Limited (BPL) took a photograph of JK Rowling and her family in public without consent, and they argued that this infringed on their child's (David) right to privacy under Art 8 of the European Convention on Human Rights.

Campbell v MGN Ltd

Naomi Campbell sued MGN for publishing photographs of her coming out of a Narcotics Anonymous (NA) meeting.

- Accepted that the MGN could publish the fact that Naomi had been seen outside an NA meeting, as she had lied to the public about never having taken any drugs
- However, they allowed Naomi to sue for the photos taken of her outside this meeting.
 - o The photographs included additional information about where she was getting treatment and how often.
- She argued that this infringed her rights for respect for a private life.
- Majority found in favour of Campbell **due to the sensitive nature of the material to other people**
 - o **i.e. her being in a vulnerable state**

UK equivalent – Misuse of private information action:

1. Claimant must establish there was a reasonable expectation of privacy in respect of the disclosed facts (similar to *Hosking*)

- Lord Nicholls in *Campbell* called this the 'touchstone' of the privacy action
- Objective test
- Takes into account all circumstances of the case:
 - o Attributes of the claimant (e.g. child of celebrity, celebrity, ordinary person, political figure, seeking publicity etc.)
 - o Nature of the activity in which claimant was engaged (e.g. sex in public toilet)
 - o The place it was happening (public place vs. private place)
 - o The nature and purpose of the intrusion (taken for entertainment or legitimate reasons)
 - o The absence of consent; whether it was known or could be inferred
 - o The effect on the claimant
 - o Circumstances in which/purposes for which the information came into the hands of the publisher
 - o [P 38] Whether the parents of a child courted publicity by procuring publication of photos of a child to promote their own interests

No 'highly offensive' test:

- Court of Appeal rejected for two reasons:
 - o Makes the test for a breach of privacy too strict
 - o Should be focused on balancing the claimant's rights (privacy) and the defendant's rights (freedom of expression)

European Convention on Human Rights

Courts must develop common law incorporating protections in the Human Rights Act 1998 (which incorporates the ECHR). Article 8: respect for private life vs. Article 10: freedom of expression

Once a claimant has passed the test of reasonable expectation of privacy; article 8 rights are engaged and weighed against the defendant's rights. i.e. balancing act between the two rights

Difference in application to a child than in *Hosking*

"It seems to us at least arguable that... if a child of parents who are not in the public eye could reasonably expect not to have photographs of him published in the media, so too should the child of a famous parent."

Result

The photographs were taken in public, which indicate they are not likely to be private facts (*Campbell*). However, the other factors taken into consideration were:

- David was targeted by the defendant/photographer
- The photographs were taken surreptitiously: hiding in bushes and car
 - o *Note that these factors were also present in **Hosking** but not made a big deal of*
 - o *These factors do not go to publication – **Hosking** focused in on **facts** but these are broader considerations (more the informational material from **Tipping J's formulation**)*
- Plaintiff was a child

Murray on *Hosking*

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The court in *Murray* criticised *Hosking* for not delineating between the interests of the parents and the interests of the child → this was a case about a child's privacy, not the parent's.

Andrews v Television New Zealand Ltd 2006 HC → Privacy/PUBLIC

'Bad plaintiffs make bad law'

Mr and Mrs Andrews were involved in a car accident, after driving home intoxicated from a social event. They were reasonably injured and required assistance to get out of the car. The aftermath of this crash was filmed as part of a TV show about the work of fire-fighters. The Andrews did not consent to this, and found out about it when it screened on TV. The footage includes imagery of the crash, and intimate conversations held between Mr and Mrs Andrews. Though both were intoxicated, they escaped conviction as neither 'could remember' who was driving at the time of the crash.

Test:

1. Reasonable expectation of privacy
2. Highly offensive

Allan J prefers Tipping J's formulation of 'information or material' rather than Blanchard/Gault's 'fact' → fact can cause deconstruction of the material into component parts; whereas information/material allows capturing the contents.

Exceptions to privacy in a public place

- *Campbell*: photographs were taken in a public place;
- o But the considerations concerning her visit to the NA clinic, her physical/mental condition and treatment were akin to private medical facts (i.e. fits list of private facts set out in *Hosking*)
- o Publishing these private facts would require specific justification that the newspaper could not provide
- *Peck*: man attempted to commit suicide down an alley and was caught on CCTV. The footage was then showed on TV on 'CCTV Watch' and also disseminated in newspapers.

Exceptions for people who are depicted at a vulnerable and/or traumatic time

1. Reasonable expectation of privacy:

The car accident the Andrews were involved in was a public event:

- No expectation of privacy viz a viz the fact of the accident and surrounding circumstances
- News event; therefore cannot object to it being filmed/photographed
- Cannot object to rescuers at scene overhearing anything, nor being involved

However, the intimate conversations between the husband and wife were private

- Intimate and personal nature (more personal than information in *Hosking*)
- Conversations were shown in whole on TV show
- Should have been entitled to expect that these conversations would not be published

2. Highly offensive:

Allan J seems to disagree with Tipping J → the publicity has to be highly offensive rather than the photo itself.

- Needs to be assessed from the perspective of the reasonable person in the position of the person affected by the publicity
- o But assumed to be of ordinary sensibilities – any 'fragile sensibility' on the part of the claimant will not be relevant (not applying eggshell skull rule)
- o Still takes into account vulnerabilities of a person (e.g. *Peck*, *Campbell*) as it is the reasonable person **in that position**

Here, the programme did not cast the claimants in a bad light. They could not identify anything specifically that was humiliating or embarrassing.

- *Allan J did not look at the event as a whole, and enters into awkward territory by following this 'clever lawyering':*
- o *Some situations where information should be kept private even though it casts a person in a positive light e.g. donating money to charity*
- o *What is really important here is that this was a private conversation, and it should not be up to TVNZ to decide whether the public sees it or not*

'Highly offensive requirement' now needs a person to be cast in a bad light:

- *Awkward territory: e.g. if CCTV footage is leaked of a sexual assault, is a claimant then cast in a bad light?*

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- *Being cast in a bad light also seems more similar to a defamation suit*

Public concern defence

Public interest in these types of TV shows: shows what they do, helps them to recruit, free publicity (i.e. serious underlying purpose). There is an undoubted public cost of road accidents, and the impact of these accidents on the rescue teams attracts a significant level of public concern. The details of the crash scene, including the intimate conversations between the Andrews, provide the necessary degree of verisimilitude.

Result = Though the conversations did meet the requirement for a reasonable expectation of privacy, the highly offensive test was not met. Allan J also notes that even if it did satisfy this requirement, then there would likely be a strong public concern defence.

Unfortunate precedent set in the 'highly offensive' test requirement.

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C v Holland 2006 COA, Venning J → **Intrusion into seclusion**

C was an occupant in a house owned by her boyfriend and Mr Holland. Mr Holland surreptitiously installed a recording device in the roof cavity above the shower and toilet. He videoed C while she was showering. C discovered the videos and was deeply distressed. Holland was initially charged under s 216H of the Crimes Act and ordered to pay \$1000 but his actions were more than *de minimis*, he remained unremorseful and this was a light punishment.

Can C obtain additional damages for an action based on privacy, but where Holland did not publish the footage or intend to publish the footage?

US law recognises the fundamental human importance of the right to privacy: 'the right to privacy is an integral part of our humanity', 'one's naked body is a very private part of a person's person and generally known to others only by choice'. Prosser/Restatement (US) wrote of four separate categories of privacy torts:

- **Unreasonable intrusion into the seclusion of another**
- Appropriation of name or likeness
- Giving unreasonable publicity to a person's private life (i.e. *Hosking*)
- Unreasonably casting a person in a false light (i.e. defamation)

Whata J: new tort of intrusion into seclusion consistent with existing legal principles

Value of non-consensual spatial privacy also recognised in international law, and domestic legislation:

- Broadcasting Standards Authority Privacy Principles
- Privacy Act: protects against gathering of information rather than simply publication
- S 21 of NZBORA: reasonable expectations of privacy
- Crimes Act s 216H: prohibition on intimate visual recordings
- Search and Surveillance Act
- Residential Tenancies Act
 - o Mainly cover physical incursion
 - o Privacy concerns increasing with advancements in prying technologies (e.g. drone cameras, web-cam hacking)

Tort of intrusion into seclusion test

- 1. An intentional and unauthorised intrusion**
- 2. Into seclusion (namely intimate personal activity, space or affairs)**
- 3. Involving an infringement of a reasonable expectation of privacy**
- 4. The intrusion being highly offensive to the reasonable person**

- *Does not cover where something may be unintentional, but should still be private. Might be better to have an objective standard of knowing/having ought to have known that something was private (e.g. drones).*
- *Question of authorisation*
- *Intrusion not yet defined*

Intended to cover recording a person in a state of undress, sensory intrusions (looking/listening) or incursions into space: i.e. protects against collecting personal information, search and surveillance, intimate visual recordings, entering private property

Some acts could be caught under this: i.e. investigative journalism (hidden cameras catching people admitting to wrong-doing etc.), CCTV camera designed to prevent crimes, nanny-cams.

- *Argument these could be caught under highly offensive test, but hasn't come through Courts yet so we do not know*

Defence

Defence for a legitimate public concern in the information: but should focus on the act on intrusion *not on whether any evidence is found*. i.e. justifies the intrusion.

- *Needs to be more clear as currently seems to be copied from Hosking e.g. in US, the tort has a 'news gathering' defence*

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