

PRIVACY TESTS:

I have been asked to advise the plaintiff of their chances in establishing an actionable interference with their right to privacy. To do so, we must analyse (x) situation in light of the criteria discussed in *Hosking and Andrews*. If the plaintiff's claim is made out, the publication may nevertheless be justified because it involves matters of legitimate public concern.

General notes:

- Privacy is not about protecting your reputation or making people think you are a good person; it is about having a sphere where you can protect what parts of your life are broadcasted *Andrews*

Gault P & Blanchard J *Hosking* and the development of privacy:

- Consistent with values that underpin domestic legislation
- Consistent with international treaties that NZ is party to incl. ICCPR
- Consistent with developments in other common law jurisdictions

1. The ptf. must establish that they have been identified in the publication *Andrews*

- either directly or by implication
- Does not need to be identifiable by the public at large *Andrews*
- Whether people who know the ptf. but not the private facts could identify ptf. *Andrews*
- Considerations:
 - In *Andrews* the ptf. were identifiable because of poor pixilation and the use of the first names

2. The ptf. must show the existence of facts in respect of which there is a reasonable expectation of privacy? *Hosking – Gault P & Blanchard J*

- Private fact considerations? The facts must be **private** *TVNZ Ltd v Rogers*
 - Facts known to some, but not the world at large (cannot be in the public domain – only known to a small group) *Hosking*
 - Health, personal relationships, finances *Hosking*
 - Finances - You should not expect privacy around **finances** when... 1. You have “ill-gotten gains” 2. public officials, CEOs, PM, Heads of govt. depts., school teachers etc. *Hosking*
 - Generally, no REP for accidents
- Can facts/ actions/ events occurring in public places be private? *Hosking*
 - A REP will not ordinarily arise in respect of things occurring in the public *Andrews*
 - Just because something happened out of public view does not mean it is a private fact; some facts can justify protection *Hosking*
 - The depiction of people in a vulnerable and/or traumatic time may be an exception to the public rule *Andrews, Campbell & Pecking*
 - In *Andrews* intimate conversation (even though it occurred in public setting) was more private than facts in *Hosking* – the additional publicity was unreasonable

3. Aspects that will **reduce a reasonable expectation of privacy:**

- Information gathered on a public street are generally not private *Hosking*
 - Exceptions: *Campbell & Peck*

- b. Is the person a public figure? Although they do not automatically lose their right to privacy, they will have a reduced REP *Hosking*
 - i. By seeking/ courting publicity, they have consented to it *Hosking, Murray*
 - ii. Much of their life (affairs) are already in the public domain *Hosking*
 - iii. There is a legitimate public concern in their lives *Hosking*
 - iv. As public status increases, there must be a corresponding reduction in the right to privacy *Hosking*
- c. Family of a public figure?
 - i. Should expect a reduced level of privacy, the PI in the public figure is not limited to the individual themselves *Hosking*
- d. Children?
 - i. Circumstantial *Hosking* (e.g. in *Hosking* children were already exposed to publicity, but in *Murray* the child was not)
 - ii. REP will be reduced, even though *Hosking* realises this is unfair
 - iii. But, *Murray* – children of famous parents should have the same REP as that of ordinary children with non-famous parents? Law should reflect the special rights of children that are recognised intl./ dom
 - iv. *Murray* – test for children of public figures who are not famous in their own right is whether – a newspaper would write such a story if it was about an ordinary person
- e. Ptf. culpability?
 - i. REP could be lost by reason of personal culpability for the publication – extent this may impinge of REP will vary circumstantially *Andrews*

HOWEVER...

- f. Involuntary public figures?
 - i. Even where attention is not sought, you can expect a *diminished level* of privacy simply because there is a level of curiosity around you
- g. Just because you are public in one aspect of your life, does not mean you want every aspect be public *Campbell*

4. Aspect that will enhance REP?

- a. Children may have greater REP because they are more vulnerable than adults *Murray* (court took a more child-rights focused approach)
- b. REP can occur in public places where the photo was taken surreptitiously OR
- c. Where the ptf. was targeted by the dfts/ photographer
- d. Look to if the publication has gone beyond the necessary disclosure *Andrews*
- e. Does the publication expose some vulnerability that was known to the dft? *Campbell*
- f. Public interest is more than something that is “merely interesting to the public” *Andrews*

(1) *Hosking Tipping J (minority) Level of offence/ threshold is lower for REP:*

*Ptf. must show a reasonable expectation of privacy in respect of the **information or material** that the dft. wishes to publish/ published (**rather than facts**)*

(2) *Andrews* upholds *Hosking* BUT *Allan J* prefers *Tipping*’s expression ‘info or material’ rather than ‘facts’ in respect of REP because it can encapsulate more – photos, videos etc.

(3) *Murray* (ENGLISH LAW): Misuse of Private Information Tort

Nicholls: Whether the claimant had a reasonable expectation of privacy in respect of the disclosed facts

- **The English CA did not follow *Hosking* because;**
- Objective test assessed from the perspective of the person affected by the publicity (e.g. *Murray* assessed from perspective of the child)

Considerations for REP (must take into account all the circumstances of the case):

- Attributes of the claimant
 - o Public figure?
 - o Did the claimant court publicity?
 - o Child? – law needs to reflect special rights of a child; this diffuses the public figure element, “child of ordinary parents”.
 - Public place, but photos were taken surreptitiously and were circulated on the basis that **David was a child of a celebrity** (not a simple street seen as in *Hosking*)

The judges in Hosking did not delineate sufficiently clearly between the reasonable expectations of privacy of the child(ren) and that of the parent(s) to look at the requirements through the eyes of the reasonable child

- Nature of the activity in which the claimant is engaged?
- Place in which the action occurred (Can be private in public when...)
 - Photo was taken surreptitiously
 - Ptf. was targeted by the dft/ photographer
- Nature and purpose of the intrusion
- Effect on the ptf?
- Circumstances in which it happened and the purpose for which the information came into the hands of the publisher?

European Convention on Human Rights

- *The courts have held that they must develop the CL consistently with protection in the HRA 1998 (incorporates convention) “horizontal effect”*
- *Articles 8 (right to respect for private life) and 10 (right to freedom of expression)*
- *Once the claimant shows that they have a REP then article 8 is engaged; these rights are then balanced against dfts. rights under article 10*

5. Publicity given to those facts would be considered **highly offensive** to an objective reasonable person *Hosking*

- a. If the publicity (not the information) is truly humiliating and distressful or otherwise harmful to the individual concerned (how will publication affect the ptf?) *Hosking*
- b. What would the RP of ordinary sensibilities, put in the position of the ptf, feel in regard to the publication of the private facts? *Andrews*
- c. The actions (extent and nature) is offensive because it causes real hurt or harm *Hosking*
 - i. Even positive publicity could be hurtful as it removes the right of the ptf. to stay out of the public eye
- d. *Andrews* focus on whether the publication of the private facts would be highly offensive, not the facts themselves.

- i. Otherwise, a large number of people could have private info published just because they are not humiliating/ offensive – e.g. winning the lottery, giving a donation, being raped etc. BUT the **publication** of these fact is what is offensive
- e. Extent/ tone of the publicity can make disclosure of otherwise inoffensive facts, highly offensive *Andrews*
- f. “Chagrin & annoyance” if not enough to establish ‘highly offensive’ standard *Andrews*
- g. Failure to obtain consent is not part of the tort/ establishing high offensiveness *Andrews*

NOTE...

- (1) Tipping J analysis *Hosking* (minority): **NO HIGHLY OFFENSIVE TEST – the REP must just be reasonable, the level of offensiveness/ threshold is lower**

Why?

- a. The question of offensiveness can be controlled within the need for there to be a REP – if something if private, it naturally follows that to disclose the information would be highly offensive
- b. If this limb is retained it should be ‘substantial offence’ rather than highly offensive
- c. *UK do not have this requirement*
 - a. *TVNZ Ltd v Rogers* – the Supreme Court (**Elias J**) cast some doubt/ reserves her position on the *Hosking* test, particularly the highly offensive requirement. Obiter and there have been no new real advancements made

- (2) *Allan J – Andrews Upholds Hosking.*

- a. Highly Offensive element is part of the NZ privacy test.
- b. Questions of whether Allan J went too wide on limb one and too narrow on limb two leading to difficulties in application/satisfying privacy and contorting the point of privacy.

- (3) *Murray & Campbell – Rejects Highly Offensive element for English privacy law Support stance of Tipping in Hosking*

- a. It makes the test for a breach of privacy too strict; and
- b. It brings into the question of whether something is private matters which should really be about the balancing between the claimant’s rights and the defendant’s rights

DEFENCES (legitimate public concern)

- 6. Even if a REP has been established, the dft. can raise the legitimate public concern defence where the matter being made public outweighs the claimant’s privacy interests *Hosking* (Gault P & Blanchard J) *Andrews* (obiter) + *Murray*
 - a. Burden of proof is on the dft. to show the publication is LPC *Hosking*
 - b. Proportionality
 - i. Greater the invasion of privacy → the greater the level of public concern must be to amount to a defence *Andrews*
 - ii. Lower the invasion of privacy → the degree of LPC necessary to establish a defence falls also *Andrews*
 - c. Public interest is more than something that is “merely interesting to the public” *Hosking*
 - d. Media policy arguments (general/ *Andrews*)
 - i. **Freedom of expression is impt** and should only be breached when absolutely necessary (media have greater right)

- ii. Impt. to have a functioning media, if they don't publish what we are interest in, there will be no media, which is not in the greater public interest of a free and democratic society
- iii. Media acts a check on those who are expected to uphold higher standards of behaviour
- iv. Once privacy is lost, it's lost and damages do not seem like an adequate remedy? (different to defamation where damages can fix reputation of defamed)
- e. Broadcasting footage of a person (not a public figure) who has become involuntarily involved in an event – the dft. must demonstrate a logical nexus between the role of the complainant and the matter of legitimate public concern ('substantial connection') *Andrews*
 - i. Here, even though part of the **aim** of the programme was just **entertainment**, the **public importance of road safety** and public **understanding of emergency services** would have **justified the disclosure** of the couple's conversations.

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Murray considerations (English law)

- f. LPC can be a defence because there is a need to balance freedom of expression with privacy *Murray*
 - i. Courts have held that they have to develop the common law consistently with protections in the Human Rights Act 1998 UK (which in turn incorporates the Convention)
 - ii. Those rights included the article 8 right to respect for private life and the article 10 right to freedom of expression European Convention on Human Rights
 - iii. Once a claimant shows that he or she has a reasonable expectation of privacy then article 8 is 'engaged'. Article 8 rights are then weighted against the defendant's rights under article 10.
- g. You must show that was was disclosed was more than 'merely interesting' *Murray*
- h. Proportionality test – the more serious the privacy interference, the greater the PI must be *Murray*

*Above points reinforced in *Andrews*

7. What is the threshold for injunctions?

- a. An injunction is only available where there is compelling evidence of highly offensive publicity of private info and there is no/ little public concern in the information
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INTRUSION INTO SECLUSION *Holland*

No publication. Intrusion into seclusion is wider than *Hosking* privacy tort. It is accordingly used more frequently as it covers a lot more.

"Freedom from unauthorised and unreasonable physical intrusions or prying into private or personal places such as the home, and freedom from unauthorised recordings of personal, particular intimate affairs whether published or not" *Holland*

US & Canadian Case Law

According to Prosser and *The Restatement*, there are four categories of privacy torts:

1. Unreasonable intrusion into the seclusion of another (*Holland*)
2. Appropriation of name or likeness
3. Giving unreasonable publicity to a person's private life (like in *Hosking*)
4. Unreasonably casting a person in a false light (deal with under defamation)

US LAW *Recognises the fundamental, human importance of the right to privacy*

- Idea of choice - private dimension and public dimension and you should choose when the private is to be exposed
- "The right to privacy is an integral part of our humanity..." *dignity*
- That right has been held to include the right to choose who sees one's naked body

Why the intrusion torts can and should be recognised in NZ?

- *Overall theme – protection from unwanted invasion into personal space/ private sphere (with no consent, covert and sensory aspect). Despite coherent legislation, it is not comprehensive and therefore we need this tort as well.*
- Technological advancement mean that privacy concerns are increasing
- Whata J – argues that such a tort is consistent with existing legal principle
 - o In particular, 'a tort of intrusion into seclusion is entirely compatible with, and a logical adjunct to, the *Hosking* tort of wrongful publication of private facts'
- Doesn't suggest recognition of a general tort of privacy but a specific tort of intrusion into seclusion
 - o Nervousness about how far this tort could extend?

Recognition in NZ LAW:

Whata J says the need to protect individuals against intrusion into seclusion has been consistently recognised by the legislature...

- o Broadcasting Standards Authority's Privacy Principle (regulates the media in regards to these kinds of complaints, enforces various standards including privacy principles, recognises expressly that there is a protection of intrusion, not just about publication – includes the collection of data)
- o Privacy Act (re collection of personal information)
- o NZBORA s 21 – (re search and seizure)
- o Crimes Act (re voyeurism)
- o Search and Surveillance Act
- o Residential Tenancies Act (re quiet enjoyment of property)

What does it cover? (NZ)

- Recording a person in a state of undress
- Sensory intrusions (looking or listening) or incursions into space
 - o E.g. Collecting of personal information, search and surveillance, intimate visual recordings etc.

- Freedom from unauthorised and unreasonably 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
 - o E.g. Showering, toilet, sexual activity, hacked phone calls, emails or photos, taking photos or getting into someone's space, accessing records (medical or police etc.), accessing IP (servers etc.), recording conversations.

THE TEST:

1. **An intentional and unauthorised intrusion**
 - a. Not unwitting, careless, consensual or lawfully authorised
 - b. Intentional connotes an affirmative act, not an unwitting or simply careless intrusion
 - c. Unauthorised excludes consensual/ lawfully authorised intrusions (e.g. police warrant does not count)
2. **Into seclusion**
 - a. Intimate personal activity, space or facts
 - b. Not every intrusion into a private matter is actionable
3. **Infringement of a REP**
 - a. In respect of *private matters*
4. **That is highly offensive to a reasonable person**
 - a. Must cause real harm or hurt
 - b. Due to its extent or nature
 - c. Factors relevant: degree of intrusion; context; conduct; circumstances of intrusion; motive and objectives of the intruder; expectations of those whose privacy was invaded

DEFENCES:

1. "A legitimate public concern in the information may provide a defence to the privacy claim."
 - o Whether it is in the public interest to go looking (x) in the first place
 - o If you have a good reason to think your flat mate was a terrorist → if you do/ don't find anything it may still be LPC to justify intrusion
 - o H/e if Holland had seen a disease on C, tells her and others which then saves 90% of the population, there is still not LPC defence because *there is no justification for installing the camera in the first place?*
2. Social benefit to society may justify the intrusion
3. Defence should focus on **why** you made the recording in the first place
4. What sort of legitimate activities could the intrusion tort potentially interfere with?
 - a. Nanny cams
 - b. Police investigations/investigating crime/wrongdoing
 - c. Media e.g. investigative journalism, uncovering wrongdoing - Fair Go etc.

Comparisons:

Hosking	Holland
Asks whether there is a RE that it will not be published	Asks whether there is a RE that people will not intrude around etc.
Asks about the publication of the material itself	Asks about the intrusion being HO
