

Applying and Developing the Intrusion into Seclusion Tort in New Zealand

By

William Fussey

A thesis

submitted to the Victoria University of Wellington

in fulfillment of the requirements for the degree of

Master of Laws

Victoria University of Wellington



2015

Contents:

<i>I Introduction</i>	1
<i>A Thesis Structure</i>	1
<i>II The Nature of the Intrusion Interest</i>	3
<i>A Introduction</i>	3
<i>B Why Privacy is Important</i>	3
1 <i>Is privacy the right to be let alone?</i>	3
2 <i>Privacy and its relationship with other values</i>	4
<i>C Defining the Intrusion Interest</i>	5
1 <i>Theories of Privacy</i>	6
(a) <i>Gavison, Moreham and Hunt</i>	6
(b) <i>Hughes barriers</i>	9
2 <i>Personal information</i>	10
(a) <i>How the interest in personal information is relevant to both privacy torts</i>	11
(b) <i>What constitutes personal information</i>	11
(c) <i>When should personal information be protected?</i>	12
(d) <i>Conclusion</i>	14
3 <i>Intrusion</i>	14
(a) <i>What is inherently bad about an intrusion?</i>	15
(b) <i>Access to a person</i>	16
<i>D Conclusion</i>	19
<i>III Protection of the Intrusion Interest in New Zealand Other Than the Tort of Intrusion into Seclusion</i>	20
<i>A Common Law</i>	20
1 <i>Hosking tort</i>	20
(a) <i>First element</i>	20
(b) <i>Second element and damages</i>	22
2 <i>Trespass</i>	23
<i>B Statute</i>	24
1 <i>Acts containing criminal sanctions</i>	25

(a) Crimes (Intimate Covert Filming) Amendment Act 2006	25
(b) Summary Offences Act 1981	26
(c) Harassment Act 1997.....	26
2 Regulation of state powers	28
3 Other legislative protections	28
(a) Residential Tenancies Act 1986	28
(b) Privacy Act 1993	29
C Regulatory Bodies	31
1 Broadcasting Standards Authority (BSA)	31
D Conclusion	33
<i>IV Elements of the Intrusion into Seclusion Tort in New Zealand:</i>	
<i>What They Are and What They Should Be</i>	<i>34</i>
A The Elements	34
1 An intentional and unauthorised intrusion	34
2 Into seclusion (namely intimate personal activity, space or affairs)	34
3 Involving infringement of a reasonable expectation of privacy	36
4 That is highly offensive to a reasonable person	37
B Public Interest Defence	38
C What Should the Elements of an Intrusion into Seclusion Action be?	39
<i>V Sources of Law: A Note on the Comparators</i>	<i>41</i>
A The US Version of Intrusion into Seclusion	41
B The effect of the Different Treatment of America's Privacy Torts on Intrusion into Seclusion in New Zealand	42
C Broadcasting Standards Authority (BSA)	45
D Search and Seizure Case Law in New Zealand, the USA and Canada	46
<i>VI How to Determine Reasonable Expectation of Privacy: Wilkins'</i>	
<i>Tripartite Approach.....</i>	<i>49</i>
A Place	51
1 The home	52
2 Places equivalent to the home	53
3 What role does the proprietary interest play in an assessment of place?	55
4 Relevance of place as a factor in its own right	57

5 Rented lockers and contents of bags	57
6 Curtilage and driveway	58
7 Open fields	59
8 Criticism of a sliding scale of expectation of privacy: the automobile exception	59
9 Written correspondence	62
10 Public places	62
11 Semi-public places	65
12 Digital hacking	67
<i>B Intrusiveness</i>	68
1 The degree to which the method in question is employed	69
2 Intrusiveness of the method used	71
(a) Electronic surveillance	71
(i) Whether electronic surveillance needs to be viewed or listened to, and whether it needs to capture the person	72
(ii) Electronic surveillance in public places	73
(b) Electronic recordings of conversations	75
(i) Participant recordings	76
(c) Computer Hacking	77
(d) Direct intrusions on a person's body or a person's body samples	79
(e) Intrusions on a person's abandoned property	81
(f) Harassment	83
(g) Novel intrusions on a person	84
<i>C Nature of Activity or Information</i>	84
1 Why intimate activities should be protected	86
2 Conversations	87
(a) How place and intrusiveness interact with the nature of information in conversations	87
(b) Conversations in private places	88
(c) Determining if information is personal	90
(d) Shulman	92
(e) Workplace conversations	94
3 Public places	95
(a) Stalking and nature of activity/information	96

4 Nature of information on a computer	97
5 Information and the use to which it can be put	98
D Is It a Reasonable Expectation of Privacy Assessed from the Shoes of the Plaintiff?	100
1 Mistaken belief	101
2 Genuine belief as to whether the activity or information is private	102
E Conclusion.....	102
VII Should High Offensiveness be an Element in an Intrusion into Seclusion Action	103
VIII Conclusion	107
Bibliography	110

Abstract:

As new and intrusive ways of invading a person's privacy become increasingly common, it is important that tort law has a satisfactory way of protecting a person from intrusion. The case of C v Holland in 2012 created such a protection mechanism, by importing the tort of intrusion into seclusion from the USA. Whereas the first tort of privacy introduced in New Zealand protects the publication of private facts, intrusion into seclusion prevents access to a person even if it does not result in dissemination of any personal information. This thesis explains why protecting the intrusion interest per se is important and uses Kirsty Hughes' barriers theory, which suggests that privacy should only be protected when a desire for it is communicated or normatively appropriate, to help define the intrusion interest such that it is legally useful. It analyses the elements of an intrusion into seclusion action as suggested by Whata J in C v Holland, and recommends how they could be better constituted. The crux of the thesis though focuses on when a reasonable expectation of privacy is satisfied, a question that received limited attention in C v Holland. This section suggests that determining a reasonable expectation of privacy involves a detailed analysis of three suggested factors, modified from Richard Wilkins' approach in the US search and seizure context. The thesis considers how the factors could be applied, both separately and holistically, to an intrusion into seclusion claim in New Zealand.

Word Length:

The text of this paper comprises of 49,984 words including footnotes.

Subject and Topics:

Privacy Theory
Protection of the Intrusion Interest
Intrusion into Seclusion
Reasonable Expectation of Privacy
High Offensiveness

I Introduction

The 2012 High Court case of *C v Holland*¹ introduced the privacy tort of intrusion into seclusion in New Zealand. In the case, C was filmed in the shower by a camera surreptitiously installed by Mr Holland, causing C great distress.²

The purpose of the intrusion into seclusion tort is to protect the privacy intrusion interest which prior to the introduction of this cause of action was inadequately protected in the legal framework. This thesis aims to explore what the intrusion interest is, and how the tort of intrusion into seclusion can best be applied and developed in New Zealand.

Intrusion into seclusion is likely to become increasingly relevant. Contemporary society is in the midst of an explosion of new technologies, particularly since the advent of the ubiquitous smartphone. A person's phone now has the capability to track a person using GPS,³ and to capture detailed photographs and videos of people in compromising positions without the subject even realising. Some cameras even have technology which enables photographs to be taken *through* the clothing.⁴ These examples only touch the surface of a rapidly expanding area.

Intrusion into seclusion is the second tort of privacy to become part of New Zealand's law, with the publicity of private facts tort having been affirmed by a narrow 3-2 judgment in *Hosking v Runting*⁵ in the Court of Appeal in 2004.⁶ The *Hosking* tort, which will be discussed further in the ensuing chapters, protects people's private information from being published and therefore is unable to protect C from the intrusion she suffers in *C v Holland*, as no publication is involved.

A Thesis Structure

The objective of this thesis is to evaluate the tort of intrusion into seclusion. Chapter II analyses privacy theory in general, asking what constitutes privacy and why, and in what situations it should be protected. Its purpose is to understand and define the desirable scope of the intrusion interest. In order to do so it considers how the intrusion interest fits alongside

¹ *C v Holland* [2012] 3 NZLR 672.

² At [1].

³ "Smartphones a woman's worst enemy as jealous ex-partners use GPS tracking" 29 June 2015 Television New Zealand <www.tvnz.co.nz>.

⁴ Casey Chan "Pervert Alert: This Camera Can See Through Clothes" 21 April 2011 Gizmodo <www.gizmodo.com>.

⁵ *Hosking v Runting* [2005] 1 NZLR 1 (CA).

⁶ *Hosking* concerns photographs of a celebrity couple's children in a busy Newmarket street that are taken without their knowledge, and intended to be published in a magazine – see [9]-[11]. The Court of Appeal determines, at [246], that there is a free-standing tort to protect the publicity of private facts, only that in this case the facts were not sufficient to satisfy the tort – see [260]-[261].

the protection of the dissemination of personal information, that is how they are delineated from each other and how they overlap. This in turn informs what the intrusion into seclusion tort should protect. The privacy theories considered in this chapter, particularly the Kirsty Hughes theory of privacy,⁷ will be highly relevant when it comes to the legal analysis of when a reasonable expectation of privacy is infringed.

Chapter III analyses legislation, regulatory bodies and common law other than intrusion into seclusion, which to some degree protect the intrusion interest defined in chapter II. It demonstrates that the remedies are generally inadequate, and the requirements often too difficult to satisfy. Chapter III therefore reveals the gaps in the protection of the intrusion interest that would exist without the existence of the intrusion into seclusion tort.

Chapter IV examines and explains the elements of the intrusion into seclusion action as they are described in *C v Holland*. Its purpose is to look at how the tort currently protects the intrusion interest, and it identifies the heart of the tort as the infringement of a reasonable expectation of privacy. It briefly analyses the public interest defence which, due to the word limit, is not subsequently discussed in any detail. The chapter also considers whether the elements could be constituted better, and if so, how.

Chapter V justifies the use of the sources of law most predominant in analysing a reasonable expectation of privacy in chapter VI. Chapter VI gets to the crux of the thesis, considering how to determine when a reasonable expectation of privacy is infringed. It suggests that the reasonable expectation of privacy should be evaluated using a modified version of three factors set up by Richard G Wilkins.⁸ The Wilkins factors are place, intrusiveness and object, which chapter VI modifies to place, intrusiveness, and nature of activity or information. The chapter details how each factor can be applied to the question of when there is an infringement of a reasonable expectation of privacy, including using Hughes' privacy theory discussed in chapter II to aid the analysis.

Chapter VII completes the substantive work of the thesis by considering whether a separate element of high offensiveness is needed, given the rigour with which one can determine whether there is a reasonable expectation of privacy.

⁷ Kirsty Hughes "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012) 75(5) MLR 806.

⁸ Richard G Wilkins "Defining the Reasonable Expectation of Privacy: An Emerging Tripartite Analysis" (1987) 40 Vand L Rev 1077.

II The Nature of the Intrusion Interest

A Introduction

Privacy theory informs and underpins the application of legal principles. Understanding the underlying theory strengthens the legal analysis; they are inextricably linked.

The aim of this chapter is to understand the intrusion interest and how it fits into privacy as a whole. It articulates what privacy is and, using privacy theories, demonstrates when and why it should be protected – both generally and with respect to the interests in personal information and intrusion.

The premise on which this chapter is based is that privacy theory is useful when it asks both descriptive and normative questions. It can provide an invaluable tool for determining the scope of the intrusion into seclusion action and a framework for how the courts might consider whether elements of the tort of intrusion into seclusion are satisfied.

The theoretical definition of the intrusion interest put forward in this chapter is a broad one, but it contains important limits that prevent it from being uncontrollably wide. Thus although the definition focuses on a person's subjective privacy desires, it also requires that intrusion is only invoked when privacy should be objectively respected, thereby ensuring that the intrusion interest is not construed too widely. In essence, the application of the elements of an intrusion into seclusion claim will have to reflect the true nature of the theoretical intrusion interest. The main theory that achieves this is Kirsty Hughes' barriers hypothesis,⁹ which will be discussed shortly.

B Why Privacy is Important

Before attempting to determine the best definition of the intrusion interest, it is important to consider why privacy is important as a value in its own right rather than simply as a means of achieving other social ends. In order to do so, its relationship with other values must also be understood.

1 Is privacy the right to be let alone?

Privacy is often defined in an overly broad way. One such conception of privacy is what Judge Cooley describes as the "right to be let alone",¹⁰ a description which Warren and Brandeis also use as their overarching reason as to why, for example, written "thoughts,

⁹ Hughes, above n 7.

¹⁰ Thomas M. Cooley *The Law of Torts* (2nd ed, 1888) at 29.

sentiments and emotions” should be protected.¹¹ Even Tipping J has described privacy as the right to have people leave you alone.¹²

Although this definition has some intuitive appeal, it has its limitations. These commentators not only describe a state that people may choose to be in for reasons other than privacy, they state a viewpoint that has come to be seen as “an assertion of liberty [rather than] privacy”.¹³ Indeed the conflation of privacy and liberty is a common theme; in the 1973 Supreme Court decision of *Roe v Wade* the Court considers the right of privacy as “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”.¹⁴ Such conflation gives credence to the problematic idea that privacy only exists when it is in conjunction with other interests, rather than being an interest per se. As soon as privacy is tacked on to, or seen as merely a stepping stone towards another value, it loses potency. It also strips it of much of its distinctive meaning because the definition covers things which are not generally regarded as private, such as compelling people to “pay their taxes or go into the army”.¹⁵ In cases of decisional interference such as *Roe v Wade* the primary concern is about autonomy and liberty, not privacy.

Ruth Gavison is right to say, in accordance with much of the modern privacy literature, that a reductionist view in which privacy merely derives from other values, not only diminishes privacy, but does not stand up to scrutiny.¹⁶ Judith Wagner DeCew agrees, considering it inaccurate to say that one can “explain each right in the cluster of privacy rights without ever mentioning the right to privacy”.¹⁷

2 Privacy and its relationship with other values

Although privacy should not be conflated with, or merely attached to, other values such as liberty, this is not to say that other interests are not part of what makes privacy important. Privacy does not exist in a vacuum and hence Gavison explains that the reasons people might want to protect their privacy can include the furtherance of universal concerns such as “liberty, autonomy, selfhood, and human relations”.¹⁸ Privacy in general allows the values of autonomy, dignity and personhood to flourish. The link between privacy and self-identity is made clear by Irwin Altman’s apt quote –

¹¹ Samuel D Warren and Louis D Brandeis “The Right to Privacy” (1890) 4 Harvard Law Rev 193 at 205.

¹² *Hosking*, above n 5, at [238].

¹³ Hilary Delany and Eoin Carolan *The Right to Privacy: A Doctrinal and Comparative Analysis* (Thomson Round Hall, Dublin 2008) at 8 as cited in Chris DL Hunt “Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada’s Fledgling Privacy Tort” (2012) 37 Queen’s LJ 167 at 181.

¹⁴ *Roe v Wade* 410 US 113 (1973) at 153.

¹⁵ Ruth Gavison “Privacy and the Limits of the Law” (1980) 89(3) Yale LJ 421 at 438.

¹⁶ At 424.

¹⁷ Judith Wagner DeCew “The Scope of Privacy in Law and Ethics” (1986) 5(2) Law & Phil 145 at 149.

¹⁸ Gavison, above n 15, at 422-424.

“If I can control what is me and what is not me, [then] I can define what is me and not me, and if I can observe the limits and scope of my control, then I have taken major steps toward understanding and defining what I am. Thus, privacy mechanisms serve to help define me”.¹⁹

The protection of personal information and intrusion (which will be discussed later in the chapter) are both essential for advancing these accepted values. Such protection not only guards against individual mental pain and distress, but contributes positively to society itself since “privacy harms affect the nature of society and impede individual activities that contribute to the greater social good”.²⁰

However, privacy is an interest in itself, irrespective of whether the loss of it causes a detrimental impact on another value or not. It is both an end in itself and an instrument in achieving other social ends. Essentially this means that privacy is desirable not just because it helps achieve other social objectives such as furthering liberty and autonomy, but also because there is something intrinsic about the privacy interest which makes it worth protecting. Nicole Moreham expresses this by saying that whilst the compensation for harm caused by privacy breaches is welcome, this does not mean the absence of harm supports not protecting privacy breaches.²¹ There is, she contends, something beyond emotional, physical and psychological damage to the person when a privacy breach occurs, meaning that privacy should never be automatically downgraded in the balance against freedom of expression or the public good.²² Stanley Benn suggests privacy can be seen as grounded in the principle of “respect for persons”,²³ and Edward Bloustein contends that all invasions of privacy “injur[e] ... our dignity as individuals”.²⁴ This is similar to Moreham’s point, that even when no obvious direct harm is caused, such as watching someone in secret and never being discovered, the general impertinence, insensitivity and lack of consideration are what are truly indicative of a loss of privacy.

C Defining the Intrusion Interest

The ultimate goal of this section is to define the intrusion interest in order to enable an understanding of what the intrusion into seclusion tort is designed to protect. Such a definition will be vital to the remaining chapters, as it will help elucidate both when intrusion is legally protected, and when it should be protected.

¹⁹ Irwin Altman *The Environment and Social Behaviour: Privacy, Personal Space, Territory, Crowding* (Brooks/Cole Publishing Company, Monterey, California, 1975) at 50.

²⁰ Daniel J Solove “A Taxonomy of Privacy” (2006) 154(3) U Pa L Rev 477 at 488.

²¹ Nicole Moreham “Privacy in the Common Law” (2005) 121 LQR 628 at 635.

²² At 634-636.

²³ S Benn “Privacy, Freedom and Respect for Persons” in J Pennock and J Chapman (eds) *Privacy NOMOS XIII* (Atherton Press, New York, 1971) 1 at 8.

²⁴ Edward J Bloustein “Privacy as an aspect of Human Dignity: An Answer to Dean Prosser” (1964) 39 NYU L Rev 962 at 1003.

Some commentators, such as Raymond Wacks, suggest that intrusion has no significant place in our understanding of privacy. Wacks argues that the “protection against the misuse of personal ... information”²⁵ is at the core of privacy, and contends that the “principal pursuit” of electronic surveillance “is personal information”.²⁶ The protection of personal information is undoubtedly important; a person’s ability to withhold information about him or herself, lest it be used for the opprobrium of the general populace, should be recognised. Nevertheless, privacy also includes the intrusion interest.

The intrusion interest is essentially about recognising the intrinsic value of a person’s private space; a space which is broad enough to encompass both physical and psychological attributes,²⁷ as will be discussed later in the chapter. The intrusion interest preserves the private space by protecting against both physical access and access to personal information. It does so by stopping such activities as electronic surveillance or general prying into personal items.

1 Theories of Privacy

Privacy theorists often build on the work of others in the area in order to find new and improved ways of defining privacy. This thesis follows the same approach, critiquing the theories of others and using the best ones to create the most legally useful definition. As will become apparent, previous definitions tend to suffer from being too abstract, and are therefore of limited use in the legal context. Whilst a focus on the person’s subjectivity is necessary and important, this does not easily assist legal tests which require a certain degree of realism and objectivity. Consequently, a privacy theory that is grounded in the actual experience of privacy, and which provides the best transition from theory to the legal context, is favoured.

(a) Gavison, Moreham and Hunt

The most useful abstract privacy theories all define privacy from the point of view of access. For example, Gavison’s definition describes perfect privacy as no-one having any information about X, no-one paying any attention to X, and no-one having physical access to X.²⁸ This means that any time anyone gains information about someone, pays him or her any attention, or has physical access to him or her, some privacy is lost. However, only sometimes is that loss of privacy undesirable. There is only some information that subjectively and objectively should be protected as private, just as there is only some

²⁵ Raymond Wacks *Privacy and Media Freedom* (1st ed, Oxford University Press, Oxford, 2013) at 22.

²⁶ At 190.

²⁷ David Libardoni “Prisoners of Fame: How an Expanded Use of Intrusion Upon Psychological Seclusion Can Protect the Privacy of Former Public Figures” (2013) 54(3) BC L Rev 1455 at 1464.

²⁸ Gavison, above n 15, at 428.

attention that should be prevented, and only some physical access that should be stopped. Gavison's theory provides no indication of when privacy is subjectively or objectively desired.

Moreham takes Gavison's definition a step further by proposing a theory of privacy around the idea of desired inaccess, explaining that "a person will be in a state of privacy if he or she is only seen, heard, touched or found out about if, and to the extent that, he or she wants to be seen, heard, touched or found out about".²⁹ Essentially she considers that being in a state inaccessible to others only puts a person in a state of privacy if he or she desired the inaccessibility. She uses an example of someone being stranded on a desert island as experiencing solitude, isolation and loneliness, but not necessarily experiencing privacy.³⁰ Whilst the stranded person almost inevitably wishes to be saved from his or her fate by contact with other people, Gavison would say that person was in a state tantamount to perfect privacy, only that such a state was not desirable for that person.³¹ Moreham, however, views privacy as something which cannot be undesirable. As soon as the lack of access is not desirable, the circumstances are not considered to be private.

Hunt narrows the definition even further in what he calls the "refined subjective approach".³² His criticism of Moreham is that people can experience desired inaccess which is not truly related to privacy, for example someone on public transport seeking solitude purely so as not to inflict halitosis on the other passengers.³³ Another example might be a nudist seeking solitude only because of his or her considerate nature. Hunt's criticism is similar to the criticism as to why defining privacy as the right to be let alone is a weak definition; it does not get to the essence of privacy. The difficulty though is that it is still a desire for privacy; it is just a secondary desire. In other words it is a desire based on the assumption that other people would not want to be near a nudist or someone with bad breath, and therefore in order not to be thought of badly the nudist or halitosis ridden person seeks solitude.

Hunt, in refining Moreham's definition, appears to require that the individual feel acutely sensitive about the activity or information, and considers it private for that reason.³⁴ This requirement of acute sensitivity ensures that the desire for inaccess is specifically related to a primary, direct, individualist desire for privacy. However, it could be criticised for the vagueness of the term acute sensitivity which does not impart an obvious threshold. The application of acute sensitivity applies to both personal information and physical access; one

²⁹ Moreham, above n 21, at 636.

³⁰ At 637.

³¹ Gavison, above n 15, at 428.

³² Hunt, above n 13, at 199.

³³ At 195.

³⁴ At 199.

can be acutely sensitive about being intruded upon in a particular place as much as by having private information revealed about oneself.

Hunt and Moreham's theories both posit privacy interests as unashamedly subjective, although both realise that in a legal context this must be tempered by objectivity. Hunt states that "any legal test will have to have an objective component"³⁵ and Moreham recognises that if her subjective definition "were to be transplanted, unmodified, into the legal context [it] would protect a claimant against *any* unwanted physical or informational access"³⁶ which is "intolerably broad".³⁷

The problem with their approach is that describing privacy purely from a subjective perspective is not only legally less useful, it is also not reflective of what privacy means at a societal level. In society, every person's desire for privacy must be mediated by his or her necessary interactions with others. Consequently, it is not enough to simply desire privacy. Society's approach to privacy should therefore not be encapsulated by a theory that ignores social norms, as that is reflective of an unrealistic rather than practical view of society. Hunt's theory transposed directly into society would effectively assume that an alleged perpetrator know the acute sensitivities of the person intruded upon, regardless of how unpredictable they might be. There is little difference between privacy at a legal level and at a societal level and consequently privacy theory must sit closer to the legal application than it does in Hunt and Moreham's conception. Objectivity will be forthcoming within the legal tests of the torts' elements; but there should still be a modicum of objectivity at the theoretical level.

If a person feels acutely sensitive about the privacy of something that general society would consider innocuous, then there is no social norm to protect that something unless the person has communicated this acute sensitivity. Society therefore does not protect it. If a person feels acutely sensitive about something because of religious beliefs, and it is something most people who share those religious beliefs feel acutely sensitive about, then there can surely only be a social norm involved if the intruder knows or ought to know about that person's religious convictions. If in the first example the acute sensitivity has not been communicated, or in the second example there is no indication that the person follows that religion, then to describe this as a theoretical loss of privacy would be conceptually unsound because it ignores the social context of when privacy does and does not exist. It would divorce theory from reality, suggesting that the only way to avoid causing a loss of privacy to someone would be to consider every potential trivial privacy incursion, such as an everyday social interaction, as to whether the individual in question would be acutely sensitive about it.

³⁵ At 200.

³⁶ Moreham, above n 21, at 643.

³⁷ At 644.

In essence, the best privacy theories will be tied in with normative considerations. They will demonstrate when privacy should be respected by recognising that the alleged perpetrator should have had the claimant's subjective desires communicated to him or her, or alternatively he or she ought to have known that those desires were likely because they were objectively reasonable. Privacy theory that considers when privacy should be respected or is potentially breached will include a knowledge requirement that a subjective desire for privacy was communicated or that the action may invoke privacy concerns. Such an approach to privacy theory will also be legally useful when it comes to applying the legal test of reasonable expectation of privacy which brings in the requisite objectivity.

(b) Hughes barriers

The best concept to use to create a smooth transition between privacy theory and its legal application is Kirsty Hughes' theory of physical, behavioural and normative barriers.³⁸ Hughes is attracted to theories, such as Moreham's desired inaccess theory, which are inherently subjective. She, however, "take[s] this further" by suggesting how "a desire for privacy is manifested".³⁹ This is because it is important to explore "how privacy is experienced and how privacy is achieved in a social setting".⁴⁰ Hughes' article is therefore predicated upon the social reality of what privacy is and should be, rather than abstract theory.

Hughes' analysis that privacy is concerned with the preservation of barriers,⁴¹ building on Altman's social interaction theory,⁴² suggests that when privacy is desired it should be communicated or socially understood. In other words a person whose hair is ruffled by someone else cannot claim any loss of privacy to be morally objectionable against the other person unless that person has disrespected any barriers. The three types of barriers discussed are: physical, behavioural and normative. "Physical barriers include things such as walls, doors, hedges, lockers and safes".⁴³ In the hair ruffling example this might be wearing a hat or a headscarf. Behavioural barriers are verbal or non-verbal communication that tell others they do not wish to be accessed.⁴⁴ Therefore stating "please do not touch my hair" or putting a hand up to indicate to someone to back off would be barriers to prevent hair ruffling. A normative barrier is a societal expectation that a person does not want his or her privacy invaded, based on "social practices and codified rules" that derive from "the normal rules of social interaction".⁴⁵ For example social convention suggests that a person having a shower

³⁸ Hughes, above n 7, at 809.

³⁹ At 810.

⁴⁰ At 810.

⁴¹ At 807-815.

⁴² Altman, above n 19, at 32-42.

⁴³ Hughes, above n 7, at 812.

⁴⁴ At 812.

⁴⁵ At 812.

wants privacy while he or she does so. Additionally, although the non-exposure of hair is not necessarily seen as a social rule, if it is a Muslim woman, not only is the hijab a physical barrier but it communicates the normative rule that Muslim women consider their hair as an alluring adornment which should not be kept naked before others.⁴⁶

Hughes argues convincingly that “the right to privacy should be understood as a right to respect for [physical, communication and normative] barriers”.⁴⁷ Where Hunt and Moreham’s theories could be criticised for ignoring social norms, Hughes’ barriers approach provides an excellent link between the theory of privacy and its legal application. This is because the Hughes barriers postulate when privacy should be respected, something that Moreham fails to do and which Hunt attempts unconvincingly at best. Hunt’s requirement that “the particular individual [feel] acutely sensitive about [the] activity/information”⁴⁸ suggests that a desire for privacy is not automatically protected, having instead to pass a slightly more stringent subjective test of acute sensitivity. The criticism that the alleged perpetrator may not know of a person’s acute sensitivities can be assuaged if there is a knowledge requirement: namely a physical barrier for the purposes of achieving privacy, a behavioural barrier in which the desired inaccess is communicated, or a social norm that ought to have been considered.

The Hughes barriers are legally useful because they not only provide a theory about when privacy is lost, they also provide a tool to assist the determination of the legal question as to when privacy is breached such that a claim can be made out. The Hughes barriers can provide some assistance to the question of when a reasonable expectation of privacy is infringed, and therefore shows how Hughes’ theory can easily be transposed into the legal context.

2 Personal information

Having set out the best way of approaching privacy in general, it is possible to break privacy theory down into its separate interests of personal information and intrusion. In order to define the intrusion interest, one must first consider how the interest in personal information, on a theoretical level, is conceived. Defining personal information helps explain where personal information ends and intrusion begins, and where they overlap. The purpose of this section is therefore to determine a theoretical definition of personal information that is grounded in the actual experience of privacy rather than abstract theory. It will seek to cover both what personal information is and when it should be protected.

⁴⁶ Hunt, above n 13, at 199.

⁴⁷ At 810.

⁴⁸ Hunt, above n 13, at 199.

(a) How the interest in personal information is relevant to both privacy torts

The theoretical definition of the personal information interest will be important both for protecting the dissemination of personal information in the *Hosking* tort, and access to personal information in intrusion into seclusion. In other words, protecting personal information is part of both the *Hosking* tort and intrusion into seclusion. The interest in personal information is part of the *Hosking* tort because this protects personal information from being disseminated. However, before it is disseminated the *Hosking* tort provides no protection. Up until that point it is only protected by the intrusion interest which prevents access to a person and access to his or her information. Consequently, information about a person should be considered as part of the intrusion interest *until* it is disseminated.

C v Holland demonstrates why the protection of personal information is sometimes part of the *Hosking* approach, and sometimes part of the intrusion interest. This is because secretly taking a video of someone in the shower is not just an intrusion into a person's dignity or private space; it also obtains information about a person's naked body. This personal information cannot, however, be protected by the *Hosking* tort because it requires the information to be disseminated; it can only be protected by the intrusion interest. Defining on a theoretical level what information is personal and should be protected therefore relates to both interests.

This somewhat subtle point has been overlooked by the likes of Gavison who consider "[i]nformation [k]nown [a]bout an [i]ndividual"⁴⁹ as including access to this personal information, and "[p]hysical [a]ccess to an [i]ndividual"⁵⁰ not incorporating such access.

(b) What constitutes personal information

Ascertaining what constitutes personal information requires first addressing whether a fact is private because it is objectively deemed to be so, or because of a subjective decision.

Wacks and Moreham have opposing views of what constitutes personal information, with the former considering it as objective and the latter as subjective. Wacks sees personal information as that "which it would be reasonable to expect" a person "to regard as intimate or sensitive".⁵¹ His view of personal information is that it should be defined "by reference to some objective criterion"⁵² or adjudged to belong to a "putative category".⁵³ This is because

⁴⁹ Gavison, above n 15, at 429.

⁵⁰ At 433.

⁵¹ Wacks, above n 25, at 125. He also states that "a subjective test would clearly be unacceptable".

⁵² At 125

⁵³ Raymond Wacks *Personal Information, Privacy and the Law* (Clarendon Press, Oxford, 1989) at 25.

even though a person may be willing to tell his best friend of his infidelity, and be unwilling for it to be published in a newspaper, “the information remains personal” in both situations.⁵⁴

Moreham dislikes this approach, however, because it fails to distinguish between trivial and serious matters in the same category, and rests on the “arbitrary (and often fraught) question of whether information falls into one category or another”.⁵⁵ It also fails to recognise that “what is private to one person is not necessarily private to another”.⁵⁶ Moreham therefore sees it as necessary to adopt a “broad, subjective approach” in which “unwanted access to *any* information about a person” constitutes personal information.⁵⁷ Although Moreham makes the same mistake as Gavison in including *access* to personal information within the informational privacy interest rather than intrusion, the important point is that in her view what is a private fact is purely subjective. Westin agrees, stating that: “privacy is the claim of [individuals] to determine for themselves when, how and to what extent information about them is communicated to others”.⁵⁸ Hunt provides an equally subjective approach, but limits it to personal information that a person feels acutely sensitive about.⁵⁹

Wacks’ approach should not be favoured because it is almost exclusively objective and therefore fails to appreciate the subjective nature of privacy. It too quickly eliminates various potentially private facts, which although no social norm or objective measure would initially consider personal, can take on the characteristics of private facts in certain situations. It can also render something private that a person does not desire to be so, simply because it fits into one of his categories. For example Wacks might consider the fact that a campaigner for gay rights is openly homosexual as a private fact because it fits into the “sexuality” category, without consideration of the context. Moreham on the other hand would see that this person’s sexuality does not fit the privacy interest of personal information because such information is widely available, and because the homosexual gay rights campaigner does not desire for it to be kept private.⁶⁰

(c) When should personal information be protected?

It is not enough to simply define what constitutes personal information, as it is only some personal information that will be protected by law. This section determines a theoretical concept of when personal information should be protected, based on how privacy is actually experienced.

⁵⁴ At 23.

⁵⁵ Moreham, above n 21, at 642.

⁵⁶ At 641.

⁵⁷ At 641.

⁵⁸ Alan F Westin *Privacy and Freedom* (Atheneum, New York, 1967) at 7.

⁵⁹ As discussed above in II C 1 (a) at 7.

⁶⁰ Moreham, above n 21, at 645.

Gavison considers that all personal information is part of the theoretical concept of privacy.⁶¹ However, she contends that some scholars have rejected this, providing the example of Tom Gerety who believes that personal information should only be protected where it relates to intimacy, identity and autonomy.⁶² Gavison, however, fails to fully appreciate that Gerety is searching for a normative definition as to when, legally, personal information should be protected, rather than a philosophical one. Gerety is eager to move from a conception of privacy as a “metaphysical entity” to an “ethical and legal boundary that we prescribe for others and ourselves”.⁶³ His focus is on what the law should protect in terms of privacy, rather than what privacy is on a descriptive level. Gavison uses her definition of what privacy is as a “methodological starting point”⁶⁴ for her more specific view as to which aspects of personal information are desirable for protection, whilst Gerety jumps straight to this normative question. Therefore both scholars want to see personal information protected by law, but neither wants to protect all information about a person.

Where Gerety’s “ethical and legal boundary” should be drawn is the essence of this section. Moreham postulates that translating her theoretical definition into the legal context requires tempering each person’s subjective view with an objective check.⁶⁵ This objective check comes in the form of the first element of the *Hosking* tort which requires “the existence of facts in respect of which there is a reasonable expectation of privacy”.⁶⁶ In this scenario any fact which is private, based on the theoretical definition of personal information as subjective, is assessed through an objective lens of reasonableness.

In the same way that Hunt’s general theory of privacy (desired inaccess for the reason of acute sensitivity)⁶⁷ is considered too abstractly subjective to create a smooth transition from theory to legal, a theoretical definition of the personal information interest should also not simply be subjective, as “in the legal context, this simply includes too much”.⁶⁸ A purely subjective definition would not be founded upon how privacy is actually experienced. As noted above, the power of the Hughes barriers is that they can improve Hunt and Moreham’s theoretical definition to create a mixed subjective/objective approach that is based on the actual privacy experience,⁶⁹ and will also ultimately prove relevant to the reasonable expectation of privacy test mentioned in the previous paragraph.

⁶¹ At 429.

⁶² Tom Gerety “Redefining Privacy” (1977) 12(2) Harv CR-CL L Rev 233 at 281-295.

⁶³ At 245.

⁶⁴ Gavison, above n 15, at 428.

⁶⁵ At 643.

⁶⁶ *Hosking*, above n 5, at [117].

⁶⁷ Discussed above in II C 1 (a) at 7.

⁶⁸ Gerety, above n 62, at 262.

⁶⁹ Hughes, above n 7, at 807-815.

The Hughes barriers recognise the social reality that when a person has information that he or she considers private and therefore does not want to be disseminated, it is not enough to simply have this thought. The fact that it is considered personal must be communicated to others, or otherwise must be normatively recognised as personal. The communication aspect ensures the enquiry retains a subjective focus, underlining people's autonomy and liberty to decide what about themselves should be public or private, but still allowing societal norms to prevent what constitutes personal information from being intolerably broad. They also enable the important question of what the alleged perpetrator knows or ought to know about whether the information is personal. In this way the Hughes barriers help provide a more relevant theoretical definition of personal information, which is consequently more legally useful.

(d) Conclusion

Consistent with Hughes' approach, the personal information interest can be defined as information which a person desires to be kept private, and is communicated to be so by a physical barrier (such as locking the information in a safe), by actual verbal or non-verbal communication (such as stating that certain information is private, or by whispering to prevent anyone in earshot from hearing), or which even if it has not been communicated can be understood as private by virtue of social norms.

This philosophical understanding can then help inform the application of a legal test (such as reasonable expectation of privacy) which could limit this further to determine normatively and holistically whether the information is sufficiently private, and whether the person's acute sensitivity towards the information objectively breaches a particular threshold of non-triviality.⁷⁰

3 Intrusion

Access to a person as represented by an intrusion has only emerged as worthy of specific legal protection very recently in the Anglo-Commonwealth.⁷¹ In contrast, preventing the dissemination of personal information has historically been considered as fundamental to privacy and it has therefore undergone extensive analysis. In spite of this, it is essential that the conception of privacy cover both the dissemination of personal information and the intrusion interest. The intrusion interest protects universal values like autonomy and self-identity, and promotes dignity, consideration and respect. It is imperative to have a suitable theoretical definition of the intrusion interest. Again it should be grounded in the actual experience of privacy rather than abstract theory.

⁷⁰ The reasonable expectation of privacy test is discussed in detail in Chapter VI.

⁷¹ Although *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406 demonstrates that it is not a legal principle in its own right in the United Kingdom, in the USA such protection has been common for over fifty years.

(a) What is inherently bad about an intrusion?

Definitions of intrusion that focus almost exclusively on the information interest, and consider access to a person only in terms of what communicable information is obtained, really undervalue and “[fail to] appreciate the gravity of the privacy violation itself”.⁷² If one considers the situation in *C v Holland*, setting up a video recorder to film a flatmate in the shower is clearly something that should be protected for reasons beyond obtaining information about the flatmate’s naked form. Such an intrusion is a privacy breach that intrinsically attacks the dignity of the person regardless of the limited amount of information that is revealed. Hence although access to information is protected by the intrusion interest before it is disseminated, the focus is not just on whether the information is personal but also the circumstances surrounding the intrusion.

Hunt and Moreham both describe how someone spying on an ex-lover getting undressed would communicate a negligible amount of new information, and therefore if privacy were considered as simply the protection of information, there would be no privacy violation.⁷³ However, it seems intuitively obvious that watching someone getting undressed without consent, particularly perhaps by a scorned ex-lover, would be a serious violation of a person’s privacy. A person’s naked body is not for anyone to look at, even if that person has seen it many times before, unless the person has given permission to be watched. People walk around wearing clothes in public life and only tend to get undressed in inherently private places in front of lovers, family or friends. As soon as someone trains a telescope on the bedroom window or installs a video camera, the privacy breach must surely be a significant one. It is a clear breach of Hughes’ physical and normative barriers.

Another situation for which it is more important to protect the intrusion interest generally than it is to protect access to information is the solitude and secrecy sought by an intimate interaction between two people. Intimacy is an actual experience of privacy that advances social interactions because it is a private state in which conversations are more frank and more illuminating of the inner self than any interaction between others not so intimately acquainted.⁷⁴ When people are intimate with others, they tend to reveal more of themselves than in any other state “though the expression is inevitably limited and incomplete”.⁷⁵ Two people in a state of intimacy do not want their intimate interaction to be broken by anyone intruding regardless of whether such an intrusion obtains information. Additionally, if they do suffer the unfortunate event of someone intruding and obtaining personal information, they will not want such details to be distributed to a wider audience. Information is not revealed to

⁷² Moreham, above n 21, at 650-651.

⁷³ Moreham, above n 21, at 650; Hunt, above n 13, at 184.

⁷⁴ Westin, above n 58, at 31.

⁷⁵ Janna Malamud Smith *Private Matters: In Defense of the Personal Life* (Addison Wesley, Reading, Massachusetts, 1997) at 49.

outsiders as long as no-one is interrupting or paying attention to the interaction, therefore protecting the intrusion interest can be one effective means of also protecting the informational interest.

However, one must avoid focussing on the intrusion interest as simply a means of protecting the control and dissemination of information. The intrusion interest is important even if it results in no information being put at risk of exposure. For example a man who is both blind and deaf wandering unannounced into a woman's house where she is having an intimate conversation with her father, is still committing a potential intrusion regardless of the fact that there may be no information he can see or hear. The heightened awareness of the possibility of intrusion, or the intrusion itself, will potentially prevent the participants being quite so frank in their conversation compared with the situation in which they have no concern over potential privacy loss. This is one reason why a conversation between friends at a restaurant can sometimes be protected from intrusion, because in a public place people "still need space from others in order to converse freely".⁷⁶ The friends are deprived of "engag[ing] in a particular type of privacy experience, namely intimacy".⁷⁷

Essentially, not only does access to a person attack his or her dignity, it can inhibit the future behaviour of a person who may worry that every move or comment could be under surveillance, causing self-censorship. The same is even true of a threat or known risk of access. Access to a person also, in a negative way, enhances "the power of social norms, which work more effectively when people are being observed by others in the community".⁷⁸ Social norms tend to control a person's behaviour rather than provide the opportunity to act in an autonomous way. As Solove points out, the possibility of surveillance is one of the most damaging forms of observation. If a person is aware that at any time he or she is under surveillance then he or she will likely abide by societal conventions at all times, to avoid the possibility of criticism.⁷⁹

(b) Access to a person

Given its centrality to the intrusion inquiry, it is necessary, in this final section, to consider in more depth what is meant by "access to a person". Access to a person can be quite obvious in some circumstances, for example breaching the physical barrier of a locked door, but this will not always be the case. Essentially access to a person involves an invasion of someone's person (or things closely associated with the person) by means of the senses, technological

⁷⁶ Solove, above n 20, at 553.

⁷⁷ Hughes, above n 7, at 817.

⁷⁸ Solove, above n 20, at 493.

⁷⁹ At 494-495.

devices that enable the use of the senses, or physical proximity.⁸⁰ This includes access to a person's information.

Considering the advantage of having a theoretical definition that translates smoothly into the legal context, the intrusion interest should also be defined with both subjective and objective components. It is therefore not enough for people to desire that they not be accessed, they also objectively should not be intruded upon. The Hughes barriers are, once again, an excellent way of achieving this normativity. If the desire to be free from intrusion has been indicated by a physical barrier such as erecting a fence, a behavioural barrier of verbal or non-verbal communication, or a normative barrier of societal expectation that an intrusion should not occur, then the desirable scope of the intrusion action will be satisfied. As was pointed out in more detail in the personal information section above, the communication aspect of the physical and behavioural barriers takes a subjective desire and makes it objectively worthy of respect.

It should also be remembered that although breaches of a physical barrier will generally invoke the intrusion interest, not all intrusions or access to a person will breach a physical barrier. As the above definition notes, it can simply involve the senses or a technological device to aid the senses. For example, a photograph of someone in a public place who is unable to impose a physical barrier can still invoke the intrusion interest, as can someone interrupting a conversation at a restaurant in the example detailed above. Scenarios like these should be considered based on “the role that privacy plays in social interaction”, “the impact [it has] on individuals experiencing the various states of privacy” and “the impact [the] technology has upon an individual's opportunity to employ physical or behavioural barriers”.⁸¹

One example of an individual experiencing a state of privacy, which rarely imposes a physical barrier, is Westin's idea of the state of reserve which helps elucidate what is appropriate in social interactions. The concept of reserve is such that it recognises perfect privacy does not exist and is predicated upon “the willing discretion of [others]”.⁸² It is a concept that is clear about the fact that people live in society and that this means they are required to come into contact with other people in their daily life. Reserve in the intrusion context minimises how unavoidable contact with others affects individuals' privacy. Reserve “is the creation of a psychological barrier against unwanted intrusion”⁸³ such as by using headphones to block out other passengers on public transport. This is an example of obtaining an essence of solitude in a busy place. This example also provides some sort of explanation as to why, normatively, intrusions into public places are much harder to protect. In a public

⁸⁰ Moreham, above n 21, at 639-641.

⁸¹ Hughes, above n 7, at [814].

⁸² Westin, above n 58 at 32.

⁸³ At 32.

place like a bus there can be no complete physical seclusion, physical access is almost inevitable. As much as a person may avoid contact by wearing headphones, he or she should not be perturbed by an unavoidable intrusion such as being pushed past by people attempting to get to their seat, or being tapped on the shoulder to receive important information. These intrusions are expected and an inescapable part of the state of reserve.

A non-verbal behavioural barrier against unwanted intrusion, such as wearing headphones, cannot create pure privacy; it is simply a barrier to enable maximum privacy in a situation where it is impossible to have full privacy. Headphones can offer “a basic form of emotional safety”.⁸⁴ However, some access goes beyond what is expected and desirable in a state of reserve, and therefore every action should be assessed on its merits. For example, it is obviously not expected or desirable for a voyeur to take an unwanted photograph up a person’s skirt. Such an action not only violates the state of reserve, but human dignity also – the skirt provides a physical and normative barrier that should be respected. Reserve demonstrates that privacy can depend upon the extent to which different social interactions are expected by society, expectations which can be influenced by what Hughes barriers, if any, are in place.

A definition of access to a person should not include the control of such access. As Moreham states: “people can lose control over access to themselves even though no access to them is actually gained” and hence “control-based definitions ... fail to distinguish between those situations where there is a *risk* of unwanted access and those where unwanted access has in fact been obtained”.⁸⁵ In other words where there is only a *risk* of unwanted access, no barrier has been breached.

For the purposes of clarity, intrusion should cover the hacking of a person’s computer or email account regardless of whether this will allow information to be accessed, as people’s files are closely associated with them and the hacker can physically see the material. Even though one could say there is no physical barrier being breached by sitting at one’s computer screen, a physical barrier has to be construed more broadly than that. A person’s files on their computer can be conceived as having the computer as the barrier and even though it cannot even be seen by the hacker the computer’s barrier is still being breached when material on it is accessed. Regardless of whether there is a physical barrier, there is certainly a normative barrier against intruding into personal files on a computer.

The intrusion interest should also be sufficiently flexible to include some behaviour that exists outside the strict definition. The most important aspect in considering if an action can be conceived of as an intrusion is whether it demonstrates an intuitive lack of respect,

⁸⁴ Smith, above n 75, at 46.

⁸⁵ Moreham, above n 21, at 638.

disregarding a person's dignity. In other words, anything that intrudes into a person's private sphere where he or she "should be free from the incursions of others"⁸⁶ is a potential intrusion. Such flexibility will allow for any technological developments to be able to come under the ambit of intrusion where appropriate, and may have the side effect of broadening what constitutes a physical barrier.

A legal test such as reasonable expectation of privacy can satisfy a similar role as has been indicated for personal information: it could normatively and holistically determine whether the intrusion interest has been sufficiently breached, and whether the person's acute sensitivity towards the breach of the intrusion interest objectively satisfies a particular threshold of non-triviality.⁸⁷

D Conclusion

The definition of the intrusion interest is that there must be access to someone's person (or things closely associated with the person) by means of the senses, technological devices that enable the use of the senses, or physical proximity. The intrusion interest includes access to information and has the possibility of being extended to include any incursion into the private physical and psychological space of another person. An intrusion must not just be subjectively unwanted as per Moreham's theory of desired inaccess, it must also be something that the person is acutely sensitive about as per Hunt.

There should also be the requisite objectivity in the form of a knowledge requirement represented by the Hughes barriers. The desire not to be intruded upon needs to have been demonstrated either by the imposition of a physical barrier such as a locked cupboard, or a behavioural barrier that communicates the desire by words or actions. If it has not, then there should be a normative barrier in which intrusions are objectively unwanted due to social norms. An intrusion is therefore not precluded from occurring in a public place; it is very much context dependent based largely on what privacy barriers are in place and on the dignitary interest as a whole.

⁸⁶ Solove, above n 20, at 555.

⁸⁷ Again, the reasonable expectation of privacy test is discussed in detail in chapter VI.

III Protection of the Intrusion Interest in New Zealand Other Than the Tort of Intrusion into Seclusion

In order to identify the gaps in intrusion protection, and hence the role the intrusion into seclusion tort needs to play, this chapter will look at a range of legal measures that in limited ways protect the intrusion interest defined in chapter II. Analysis of these protections will show that the intrusion interest is generally protected haphazardly and ineffectively. Any measures that appear to have any degree of effectiveness are rare and highly circumscribed.

This chapter will analyse the protection of intrusion in the common law, in legislation and by regulatory bodies. Some legal actions only protect indirectly against intrusion, some have weak or difficult to satisfy remedies, and others have requirements that undermine their attempted protection of intrusion. The following analysis demonstrates a great need for the intrusion into seclusion action to be a comprehensive regime, available to fill in the many and varied gaps of intrusion protection.

A Common Law

1 Hosking tort

Prior to the introduction of the tort of intrusion into seclusion in New Zealand the *Hosking* tort provided limited indirect protection of the intrusion interest. Although intrusion is not a focus of the *Hosking* tort, it is unavoidably an aspect that comes into consideration, albeit implicitly rather than explicitly. The concurring judgment of Gault P and Blanchard J elucidate the elements as they are still expressed today.⁸⁸

- 1) the existence of facts in respect of which there is a reasonable expectation of privacy; and
- 2) publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

(a) First element

It is mainly within the first element that intrusion comes to be considered. A reasonable expectation of privacy is a requirement that the published information be information for which a person could reasonably expect his or her privacy to be respected. This requires a somewhat objective assessment as to whether each set of facts in question is private or not. One factor within this objective assessment is how the information was obtained. For

⁸⁸ At [117].

example *Hosking v Runting* is about whether photographs of the appellant's 18-month-old twins on a busy Auckland street could be prevented from publication.⁸⁹ The fact that the photograph was taken on a public street, where thousands of people could have seen the children that day, helps the judges decide there was no reasonable expectation of privacy in the pictures: they "do not disclose anything more than could have been observed by any member of the public in Newmarket on that particular day".⁹⁰ However, had the photos been taken through the appellant's front window for example, the intrusive nature of such a photograph would likely have informed a decision that there may have been private facts involved. In such a situation, information regarding what the twins looked like, what they were doing, or how they were interacting with their parents, could only have been obtained through intrusive means and hence could suggest that such facts were private.

Another example might be that political paraphernalia promoting one party stuck to a person's fence could suggest political allegiance was not a private fact, but a private notepad found in the dustbin of that person's property could make his or her political opinions private. Protecting the dissemination of information found in a person's dustbin also indirectly protects the intrusion into the dustbin itself. Here the intrusion is only being protected because it reveals the private facts of a person's political allegiances, not because the intrusion itself is against a person's dignitary interest. Often what is a private fact to one person is not to another and it is factors such as intrusiveness that can objectively indicate those subjective expectations. The more intrusiveness required to obtain information can suggest the degree to which something is private. For example, the most highly secretive information is likely to require the most covert operation, potentially involving highly invasive electronic surveillance.

Tipping even contends in *Hosking* that a reasonable expectation of privacy can arise purely from "the circumstances in which the defendant came into possession of [private facts]",⁹¹ comments that are similar to those of Lord Hoffman in the UK case of *Campbell* who suggests that a picture taken in a private place "may in itself" be an infringement, "even if there is nothing embarrassing about the picture itself".⁹² Those arguments seem to go beyond what the *Hosking* tort is aiming to protect; they are about protecting a person's dignity regardless of what information is obtained.

The essence of the *Hosking* tort is protecting people's personal information that they would find objectionable for others to know about. This allows people to protect themselves from the judgement of those possessing a different sense of morality, prevent themselves from being embarrassed, or generally avoid interference from others. However, at the time the

⁸⁹ At [1].

⁹⁰ At [164].

⁹¹ At [249].

⁹² *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457 at [75].

Hosking and *Campbell* judgments were made, neither the New Zealand nor UK jurisdiction had a tort of intrusion into seclusion. Therefore it was always going to be likely that the more pro privacy judges would push the boundaries of the *Hosking* tort in such a way.

Nevertheless, clear demarcation between the means of gathering information and the information and publication of the information itself, best protects the separate privacy interests involved. The means of gathering information can help decide whether the facts are private; however, they should never be considered private purely on the basis that they were obtained from an intrusion.

(b) Second element and damages

Intrusion can influence the second element of high offensiveness. The more intrusiveness required to obtain information the more secretive the information is likely to be, and therefore the more offensive it would be to publish such information. Consequently, the degree of intrusiveness could be one indicator of the level of offence which publication would cause to an objectively reasonable person. However, the extent of intrusiveness is likely to be insignificant in comparison to factors that focus more squarely on what is being revealed, to what audience, and through what medium.

The District Court case of *L v G*⁹³ indicates that intrusion could be relevant to the *Hosking* tort when it comes to a damages assessment. The case involved Mr G consensually taking photographs of Ms L's genitals as part of their prostitute client relationship, and publishing these photographs in an adult entertainment magazine without her consent.⁹⁴ The Judge appears to consider it pertinent that "Mr G's conduct was itself contemptuous of Ms L and her rights" and that he was "prepared to exploit Ms L for his own prurient or salacious ends".⁹⁵ Whilst such behaviour is not a reflection of intrusion into seclusion given Ms L's consent to the photographs in a private context, it indicates that it is not just the invasion of privacy or the offensiveness of the facts which are significant, but the behaviour involved, such as the wanton disregard for a person's feelings. Clearly Judge Abbott would consider granting higher damages where deplorable behaviour (intrusions) such as wiretapping is involved.

L v G also finds liability for the publicity of private facts with the aid of the language of intrusion. Despite the fact the person whose genitals were exposed to the world through the magazine could not be identified, the publicity of private facts tort was still made out. The reason given for doing so was the consideration of privacy as serving a "psychological need

⁹³ *L v G* [2002] DCR 234.

⁹⁴ At 236.

⁹⁵ At 250.

to preserve an intrusion-free zone of personality and family”.⁹⁶ The anguish and stress of a person is seen as important rather than whether he or she is identified. This kind of language is more akin to protecting what intrusion protects. In other words, having one’s genitals displayed to the world but without people knowing whose genitals they are, is an affront to a person’s dignity and it is this unwarranted invasiveness which intrusion protects. However, it does not go to the core of a person’s reputation or individual autonomy, more connected with the informational interest, because he or she is not associated with the exposed genitalia.

The very limited protection of intrusion by the *Hosking* tort demonstrates the need for a separate tort of intrusion. In the *Hosking* tort, intrusion is protected only insofar as it helps create a reasonable expectation of privacy in disseminated facts, influences high offensiveness, or relates to the decision or damages assessment. Intrusiveness is relevant to helping the *Hosking* tort be made out but it does not receive any protection for its own sake. A person against whom a plethora of intrusive acts are committed, but which result in the publication of facts that are already widely known, facts that are not highly offensive or no facts at all, would not have any recourse to this cause of action. This is where intrusion into seclusion comes in.

2 Trespass

Trespass to land prevents the “unjustified direct interference with land in the possession of another” and “is actionable per se without proof of actual damage”.⁹⁷ Trespass is traditionally about protecting the proprietary rights in land but in contemporary times it is “primarily intended to protect possessory rights”.⁹⁸ Possession requires an intent to possess and the exercise of control to the exclusion of others.⁹⁹ It can never encompass “a mere right to use land”.¹⁰⁰ Trespass can therefore coincide with intrusion into seclusion only when possessory interests are at stake.¹⁰¹

Trespass extends to both the air above and the ground below the land, yet “the rights of an owner...above his land [only extend so far] as is necessary for the ordinary use and enjoyment of his land”.¹⁰² This means that “observation [or photographs] from a reasonable

⁹⁶ Geoffrey Robertson *The Justice Game*, (Vintage Book/Random House, London, 1999) at 351 as cited in *L v G*, above n 93, at 246.

⁹⁷ Stephen Todd and others *The Law of Torts in New Zealand* (6th ed, Brookers Ltd, Wellington, 2005) at 468.

⁹⁸ At 473.

⁹⁹ At 473.

¹⁰⁰ At 469.

¹⁰¹ Although it is pointed out in Bill Atkin and Geoff McLay *Torts in New Zealand: Cases and Materials* (5th ed, Oxford University Press, Melbourne, 2012) at 113 that trespass developments “arguably focus more on protecting a person’s ability to be left alone in a zone which can be called his or her own”, possessory rights remain its focus.

¹⁰² *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] 1 QB 479 at 488.

height above a property is not actionable in trespass”.¹⁰³ Neither is “observation from a neighbouring property or public place”.¹⁰⁴ These examples combined with the strict possessory requirements of the law demonstrate that trespass is tightly circumscribed to specific situations and therefore intrusion into seclusion is needed because of its much broader reach.

Trespass to goods is a “[direct] interference ... with the plaintiff’s possession of goods”.¹⁰⁵ However, “whether [mere contact] with goods constitute trespass if no damage ensues is doubtful”.¹⁰⁶ Again, the trespass involved here is tightly circumscribed. A person who peers inside someone’s bag and reads a document has committed an act against the intrusion interest, but intrusion into seclusion not trespass will be best placed to provide a satisfactory remedy.

Trespass to the person also forms part of the trespass action. This will often be a battery which “is the act of intentionally applying force to the body of another person without ... consent or other lawful justification”.¹⁰⁷ The force does not need to be “hostile” but should be “generally [un]acceptable in the ordinary conduct of daily life”.¹⁰⁸ This cause of action most obviously coincides with intrusion into seclusion in the very limited circumstance of direct physical contact with a person, but it seems unlikely to cover such actions as taking a person’s hair or body fluids he or she has left unattended, as this involves no application or threat of force. As discussed below,¹⁰⁹ intrusion into seclusion might therefore be of relevance in such circumstances.

B Statute

The Law Commission noted in relation to the protection of private facts that: “[t]here is no reason why the development of a judge-made tort and the creation of statutory protections by the legislature [cannot] develop side-by-side”.¹¹⁰

This section will explore the statutory protections of intrusion to determine the extent to which each protects the intrusion interest. This helps to define the role of the tort, i.e. the gaps it is filling compared with how the intrusion interest is already covered by statute.

¹⁰³ Mark Warby QC, Nicole Moreham and Iain Christie (eds) *Tugendhat and Christie’s The Law of Privacy and the Media* (2nd ed, Oxford University Press, Oxford, 2011) at 6.

¹⁰⁴ At 6.

¹⁰⁵ Todd and others, above n 97, at 601.

¹⁰⁶ At 602.

¹⁰⁷ At 107.

¹⁰⁸ At 108-109.

¹⁰⁹ See VI B 2 (d) at 80.

¹¹⁰ Law Commission *Protecting Personal Information From Disclosure* (NZLC PP49, 2002) at [78].

1 Acts containing criminal sanctions

(a) Crimes (Intimate Covert Filming) Amendment Act 2006

This Act covers only a very limited range of intrusions such as the kind that occurred in *C v Holland*, and in practice it often provides insufficient remedy. Section 4 of the Crimes (Intimate Covert Filming) Amendment Act added ss 216G and 216H to the Crimes Act 1961 in order to protect against the intrusion of intimate covert filming. Section 216H makes everyone “liable to imprisonment for a term not exceeding three years who intentionally or recklessly makes an intimate visual recording of another person”. Intimate visual recording is defined in s 216G. This covers such recordings as a photograph, videotape or digital image of nudity or partial nudity, sexual activity, showering or any bodily activity that requires dressing or undressing; although only if the person is in a place that would reasonably be expected to provide privacy. These all clearly come under the category of intrusion.

Section 216G(b) makes it clear that the peeping tom recordings beneath or under clothing are always an intimate visual recording. It also prohibits recordings through a person's clothing but only when it is unreasonable to do so. It is unclear when such a recording might be reasonable, and the author cannot conceive of such a situation. The section also notes that intimate visual recordings do not have to be stored; they can be made and transmitted in real time in physical or electronic form. The Law Commission has also recommended that “it should be an offence to deliberately observe without consent, whether with or without a device, for purposes of sexual gratification, conduct of the kind defined in the Crimes Act 1961, section 216G(1)(a)”¹¹¹ – i.e. nudity or partial nudity, sexual activity, showering or any bodily activity that requires dressing or undressing. The rationale for this is that any kind of voyeurism is considered an extreme invasion which is truly deplorable and intrusive. The fact that this is not currently an offence highlights the limitations of this Act in protecting the intrusion interest.

Although the maximum penalty is three years jail, it is instructive that the intimate visual recordings made in *C v Holland* only resulted in a \$1,000 fine under that offence.¹¹² Had the remedy in that situation been stronger, it is less likely that Ms Holland would have taken the civil claim against C which resulted in the intrusion into seclusion tort. *C v Holland* also demonstrates intrusion into seclusion working alongside statute to provide two remedies where the criminal one was considered to be insufficient. This highlights that even where criminal offences cover the behaviour in question, the civil remedy of damages through the intrusion into seclusion tort can also operate.

¹¹¹ Law Commission *Invasion of Privacy: Penalties and Remedies* (NZLC R113, 2010) at R23.

¹¹² *C v Holland*, above n 1, at [2].

(b) Summary Offences Act 1981

The Summary Offences Act can protect against intrusive behaviour in very limited ways. Section 30 provides that every person who peers into a dwellinghouse or loiters on land in which a dwellinghouse is situated, at night and without reasonable excuse, is liable to a fine not exceeding \$500. Although this recognises the sanctity of the family home, protection is limited to night-time (defined as starting one hour after sunset and ending one hour before sunrise) and to dwellinghouses. Section 29 also provides liability against those found on premises without reasonable excuse, carrying a maximum penalty of 3 months jail or a \$2,000 fine. The limited nature of these legislative measures inadequately protects the intrusion interest, and highlights the need for a wide ranging tort.

(c) Harassment Act 1997

The Harassment Act, whilst initially implemented “in response to concerns about the activities of gangs and...stalking”,¹¹³ was described in *Hosking v Runting* as recognising “the privacy value and entitlement to protection”.¹¹⁴ However, its usefulness as a tool to protect against intrusion is limited. Section 3 of the Act explains that harassment occurs when a person engages in a “pattern of behaviour that includes doing any specified act to the other person on at least two separate occasions” within a 12 month period. The nature of some of the specified acts would be considered intrusion. The specified acts are in s 4 ss 1 (a) – (f).

Section 4(1)(a) describes “watching, loitering near, or preventing or hindering access to or from, that person’s place of residence, business, employment, or any other place that the person frequents for any purpose” as a specified act. Within that, watching can be an unauthorised and intentional intrusion into another person’s seclusion in which he or she has a reasonable expectation of privacy. Whilst a person can lawfully walk on the street and look at another person’s residence or place of employment, to do so continually and consistently with the purpose of gathering information about the likes of a person’s movements or interactions is intruding on an individual’s personal space in a way that affronts dignity and emotional well-being. A person aware of being watched is hindered making decisions, knowing that there is a possibility that any of his or her actions are being observed by an unauthorised third party. It is not clear whether setting up a video camera to constantly keep track of someone constitutes “watching” but there is certainly a tenable argument that it does.

Loitering near and preventing or hindering access to or from a place could also be considered an intrusion. The knowledge of a loiterer and the difficulties inherent in entering or leaving a

¹¹³ Law Commission, above n 111, at [5.6].

¹¹⁴ *Hosking*, above n 5 at [108].

property would be an incursion of a person's private space that attacks a person's dignity or quiet enjoyment of privacy. It can be viewed as an unwarranted accessing of a person.

It is not only "watching" that presents the possibility of surveillance activities coming under the Harassment Act. Section 4(1)(b) includes "following" a person and s 4(1)(c) refers to "entering" or "interfering with" property in a person's possession. Logically, bugging a person's room (in which consent was given to enter the premises), or having cameras installed on the periphery of a person's property, should constitute entering or interfering with property, or following a person. Nevertheless, the author is unaware of any cases which test this. The dignity afforded a person to live his or her life without being followed is the same whether or not the following is of a physical or an electronic nature. However, until it is tested, due to the Government refusing as yet to accept the Law Commission's recommendations to include another specified act of "keeping that person under surveillance",¹¹⁵ it is unclear where the courts would stand.

Intrusion could be protected in the generic space of s 4(1)(f). Section 4(1)(f) covers any conduct that causes a person to fear for his or her safety and for which it is objectively reasonable that he or she does so. There is the temptation for certain allegedly intrusive acts to attempt to be brought within s 4(1)(f) because they may not fit within the other more particular specified acts. The problem with this is of course that many intrusive acts do not cause fear for safety *per se*, even though they do cause emotional distress.

There is still a need for the tort because the Harassment Act has overly onerous requirements, inadequate remedies and gaps in protection for the intrusion interest. Section 3 requires that there are *two* specified acts. Therefore one act of intrusion cannot be punished, there has to be two. This means that a camera set up for a protracted period, say twenty four hours a day for several weeks, would not be enough to be within the ambit of the legislation as it would appear to be only one specified act. This is why the Law Commission also recommended that "as well as repeated conduct, a single protracted instance should be enough to constitute harassment".¹¹⁶

Harassment Act remedies are also problematic. Section 8 provides what can constitute criminal harassment, which would result in a jail sentence of up to two years. This requires the person to know that his or her behaviour would cause another person in the same particular set of circumstances to reasonably fear for his or her or another person's safety or intends to cause that fear. Causing fear is not connected to the heart of the intrusion interest and would seem to be a stricter criterion than the high offensiveness requirement of intrusion into seclusion.

¹¹⁵ Law Commission, above n 111, at 5.7 and R21.

¹¹⁶ At [5.9].

The only civil remedy available for the Harassment Act is to obtain a restraining order.¹¹⁷ Beyond proving two specified acts in a 12 month period that constitute a pattern of behaviour amounting to harassment, the complainant must also prove that the behaviour caused, or threatened to cause, him or her distress; that it would cause, or threaten to cause, distress to a reasonable person; and that the degree of distress caused or threatened justifies the making of an order.¹¹⁸ The last part appears to bring in a proportionality element to the behaviour. The requirements are quite onerous and a successful result is only that a restraining order is made. Whilst this will bring comfort to a complainant, it very much focuses on safety rather than any punitive measure or financial compensation. Such an inadequate remedy again highlights the need for an intrusion into seclusion tort.

2 Regulation of state powers

A combination of the Search and Surveillance Act 2012 and s 21 of the Bill of Rights Act 1990 (BORA) protect against intrusion in a state-individual context.¹¹⁹ Whilst this will provide protection against intrusion in some circumstances, such as police trespassing on a property to search for illegal drugs, the obvious limitation is that these statutes only govern state activities and therefore leave the behaviour of individuals untouched. Given that intrusion into seclusion is a civil tort which largely governs intrusions by private citizens on other private citizens, these pieces of legislation are protecting intrusions in a narrower context to the one in which intrusion into seclusion operates.

As shall be seen,¹²⁰ however, the search and seizure cases spawned by s 21 of BORA are highly relevant to an assessment of when there is a reasonable expectation of privacy.

3 Other legislative protections

(a) Residential Tenancies Act 1986

Section 38 of the Residential Tenancies Act provides limited protection of the intrusion interest. It requires that “the landlord shall not cause or permit any interference with the reasonable peace, comfort, or privacy of the tenant in the use of the premises by the tenant”. Effectively this prevents a landlord from intruding into the tenant’s seclusion, or allowing others to. A landlord intruding on a tenant is a highly restricted situation. Additionally, by

¹¹⁷ Section 9.

¹¹⁸ Section 16.

¹¹⁹ Section 21 of BORA states that “everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise”. This is the basis for the Search and Surveillance Act requiring warrants by police officers in many situations, such as the requirement in s 46(1)(c) that an enforcement officer must obtain a surveillance device warrant to observe and record “private activity in private premises”.

¹²⁰ Particularly in chapters V and VI.

making a landlord liable for another person's intrusion, it is unable to make the actual intruder liable.

The Residential Tenancies Act also provides that a tenant must not cause or permit interference with the privacy of any of the landlord's other tenants or anyone living in the neighbourhood.¹²¹ Again, this protects the intrusion interest in a highly restricted situation, and again it can potentially make a person liable for another person's intrusion.

Intrusion into seclusion will allow the people who actually intrude to be taken to court, not just landlords and tenants.

(b) Privacy Act 1993

The Privacy Act protects the intrusion interest by regulating the collection and dissemination of personal information by agencies, whether in the public or private sector. However, the privacy commissioner notes, essentially summarising s 56, that an agency does not include "individuals who collect or hold personal information for their own personal ... affairs".¹²² This severely limits the potential for the Privacy Act to cover intrusion into seclusion situations, as these often involve the collection of information on the basis of personal affairs. The Privacy Act is instead focused on organisations such as government departments, schools and clubs.¹²³ Agencies, however, also do not include the news media collecting information for their news stories,¹²⁴ which are instead subject to the BSA and Press Council.

The Privacy Act contains 12 privacy principles but only principle 4 deals exclusively with the way the information is collected, i.e. protecting intrusion. Not only is personal information not supposed to be collected by unlawful means, it also shall not be collected by an agency "by means that, in the circumstances of the case are unfair or intrude to an unreasonable extent upon the personal affairs of the individual concerned".¹²⁵ This protects the intrusion interest to some extent, although not any intrusion per se, only intrusion that is unreasonable. The privacy commissioner website explains what reasonable means. It states that it depends on the circumstances and that relevant factors include:¹²⁶

¹²¹ Section 40(2)(c).

¹²² "A Guide to the Privacy Act 1993" (4 June 2009) Office of the Privacy Commissioner <www.privacy.org.nz>.

¹²³ "A Guide to the Privacy Act 1993", above n 115.

¹²⁴ Section 2(b)(xiii).

¹²⁵ Privacy Act 1993 Information Privacy Principle 4.

¹²⁶ "Manner of collection of personal information (principle 4)" Office of the Privacy Commissioner <www.privacy.org.nz>.

- (1) “the purpose” of collecting the information;
- (2) “the degree to which the collection intrudes on privacy” such as the information being highly sensitive; and
- (3) “the circumstances”, such as whether “the place” has a “stronger or weaker expectation of privacy”.

The purpose is analogous to the public interest defence used in the torts and BSA context, which will briefly be explained in chapter IV. The other points relate more directly to the intrusion interest. The second point demonstrates that the more private the information is, the more an intrusion is unacceptable.¹²⁷ The third point is a key one with respect to protecting an interest against intrusion because it explicitly mentions the degree of reasonable expectation of privacy, specifically alluding to the locational inquiry of place. However, it fails to elaborate regarding what factors will determine whether something has a strong or weak expectation of privacy.

Principle 4 does not, on strict reading, include failed attempts to collect information, even though those failed attempts might be equally as intrusive as successful ones. The Tribunal in *Stevenson v Hasting District Council* commented, however, that an approach covering how an agency “shall not set about collecting personal information” would be an approach that arguably “reflects the legislative intention”.¹²⁸ Although it would therefore be logical to prevent intrusive failed attempts, it seems unlikely that they can be explicitly prevented.

Although principle 4 can protect the intrusion interest in some situations it is limited to the collection of information, appears to be particularly focused on the intrusions of organisations rather than individuals, explicitly does not incorporate individuals who collect information for their own affairs, does not encompass the news media, and seems unlikely to protect failed intrusions. In addition, an interference with privacy is only found if the action has caused some form of harm, although this can include “significant loss of dignity”.¹²⁹ Damages can only be awarded by the Human Rights Review Tribunal; therefore a complaint often needs to go through a number of stages before such a remedy is provided.¹³⁰

¹²⁷ This is discussed in depth in VI C at 84-100.

¹²⁸ *Stevenson v Hastings District Council* HRRT Decision 7/06, 4 March 2006.

¹²⁹ Section 66(1)(b).

¹³⁰ Section 88.

C Regulatory Bodies

1 Broadcasting Standards Authority (BSA)

Intrusion is also protected by the BSA, but again only in a very specific context. The BSA was set up by s 20 of the Broadcasting Act 1989 and is only applicable to determine complaints about television or radio broadcasts.¹³¹ Privacy principle 3 states:¹³²

1. (a) It is inconsistent with an individual's privacy to allow the public disclosure of material obtained by intentionally interfering, in the nature of prying, with that individual's interest in solitude or seclusion. The intrusion must be highly offensive to an objective reasonable person. (b) In general, an individual's interest in solitude or seclusion does not prohibit recording, filming, or photographing that individual in a public place ("the public place exemption"). (c) The public place exemption does not apply when the individual whose privacy has allegedly been infringed was particularly vulnerable, and where the disclosure is highly offensive to an objective reasonable person.

Principle 3 protects against intrusion in limited circumstances and in potentially inconsistent ways. The above wording demonstrates that it protects against intrusion but only when there is subsequent publication in the form of a television or radio broadcast. If material is obtained by intentionally interfering with someone's seclusion, such as by prying, and the material is kept but never published, the BSA has no grounds on which to impose sanctions. At the same time, there is a remedy for the publication of innocuous facts in which there could be no expectation of privacy but which were obtained by snooping. This is due to 3(a) which prevents the disclosure of *any* material acquired by prying. It also states the intrusion rather than the disclosure must be highly offensive. Therefore despite the fact publication is required, the interest protected is not in the publication of private facts, but explicitly in the intrusion itself.

The public place exemption in 3(b) demonstrates that the BSA generally does not consider intrusions to occur in public places. Intrusions are therefore potentially more narrowly protected by the BSA than in intrusion into seclusion in which no such public place exemption formally exists. 3(c) states that the public place exemption does not apply when the person whose privacy has allegedly been infringed is particularly vulnerable, and the disclosure is highly offensive to a reasonable person. The requirement of high offensiveness to be in the disclosure rather than in the intrusion shifts the interest protected to the publication itself. The requirement of vulnerability creates a two tier approach in which

¹³¹ Section 21(1); section 2(1).

¹³² Broadcasting Standards Authority Privacy Principle 3.

principle 3 is applied differently to two different categories of people as it suggests that notions of reasonableness can be diminished in importance for those who are emotionally fragile. It is also unclear as to whether the broadcaster has a knowledge requirement of people's vulnerability. 3(c) goes beyond considering a person's unique circumstances in deciding whether his or her privacy is infringed and does not translate well to a general application of intrusion principles.

Section 13(1)(d) of The Broadcasting Act allows damages to be awarded for a decision on a complaint that finds "the broadcaster has failed to maintain, in relation to any individual, standards that are consistent with the privacy of that individual", but only up to \$5,000. BSA decisions can be appealed to the High Court.¹³³

The fact that the BSA is a separate regime for broadcasters, which only protects intrusions when they are subsequently published in a television or radio broadcast, means that principle 3 of the BSA provides only a very limited protection of intrusion in New Zealand law. In addition, although 3(b) and (c) may be appropriate in a BSA context¹³⁴ they highlight the stand-alone nature of the BSA as they are quite different to what one might expect in an intrusion into seclusion analysis. This suggests the need for a comprehensive tort of intrusion into seclusion which may consider BSA decisions as persuasive in some circumstances.

D Conclusion

Prior to the tort of intrusion into seclusion, intrusion was only protected in piecemeal ways. For instance, it was indirectly protected by the *Hosking* tort, but only when intrusive means were used to obtain the disseminated information. Even then, intrusion was not considered as a privacy breach in its own right. It simply helped point to whether certain facts were private and generally assisted in deciding whether there was liability for a private facts claim, such as the extent of intrusion indicating the degree of offensiveness in publishing facts, and the magnitude to which harm caused to the complainant should be compensated.

Many statutory protections for intrusion are clearly targeted at particular behaviour in particular contexts and do not provide comprehensive protection against intrusion. For example, whilst the Harassment Act protects against a number of behaviours considered intrusive, such as watching, loitering near and preventing access to a person's place of work, it is only some arguably intrusive acts that are considered. Some intrusive acts are unclear as to whether they are covered and there is the difficulty that there needs to be two intrusive acts

¹³³ "High Court Appeals of BSA Decisions" Broadcasting Standards Authority <www.bsa.govt.nz>.

¹³⁴ It is beyond the scope of this thesis to discuss whether principle 3 is appropriately constructed or should be modified.

to qualify. Additionally the only civil remedy is a restraining order, and the criminal remedy is much more difficult to satisfy.

In addition, the Privacy Act does not cover individuals who intrude for their own personal affairs, the BSA can only be invoked if there is subsequent publication, and the covert filming section of the Crimes Act only covers one type of intrusion and often provides inadequate remedies.

On the rare occasion when a cause of action effectively protects an aspect of intrusion it is only in very circumscribed situations, such as trespass to the person in the form of a battery, a trespass into a person's possessory interest in land, or peering into a dwellinghouse during the prescribed time. Consequently, intrusion into seclusion is the only comprehensive remedy for intrusions in general.

IV Elements of the Intrusion into Seclusion Tort in New Zealand: What They Are and What They Should Be

C v Holland introduced the intrusion into seclusion tort in New Zealand because of the gaps in the protection of the intrusion interest identified in chapter III. It is important to set out and explain the elements Whata J identified in order to understand how the intrusion interest is currently protected by this tort.

The High Court established the four elements it considers as appropriate for determining an intrusion into seclusion.¹³⁵ The case explains these elements by reference to other jurisdictions and contexts; consequently the following explanations of the elements adopt a similar mode of analysis.

There is nothing preventing an appellate court in the future from modifying the elements. Recommended modifications are the focus of the latter part of this chapter.

A The Elements

1 An intentional and unauthorised intrusion

As Sharpe J A points out in the Canadian case of *Jones v Tsige*, the focus of the first element of intrusion into seclusion is on the type of interest involved.¹³⁶ In other words, that it involves an act of intrusion rather than publication of information. This is just as appropriate to the New Zealand tort. Whata J in *C v Holland* explains that “intentional” precludes a “careless intrusion”,¹³⁷ for example accidentally encountering a flatmate in the bathroom. It has to have what criminal law would consider a mens rea element – that is the person needs to have intended to do the intrusive act. However, this element does not require the intruder to know that his or her intrusion was a probable breach of privacy. The word “unauthorised” is included in order to prevent the tort covering consensual intrusions.

2 Into seclusion (namely intimate personal activity, space or affairs).

The influential American treatise “Restatement of the Law”¹³⁸ explains the requirements of the US intrusion tort in § 652B. It explains that the intrusion must be “upon the solitude or seclusion of another or his private affairs or concerns”. The word “seclusion” is not dealt with in much detail in *C v Holland* because a shower is clearly a place of seclusion. It is, however,

¹³⁵ At [94].

¹³⁶ *Jones v Tsige* 2012 ONCA 32 at [57].

¹³⁷ At [95].

¹³⁸ American Law Institute *Restatement of the Law, Second, Torts* (St Paul, Minnesota, 1977).

described further by the phrase in parentheses: “namely intimate personal activity, space or affairs”. Whata J states that “the reference to intimate personal activity acknowledges the need to establish intrusion into matters that most directly impinge on personal autonomy”.¹³⁹ The Restatement also points out that there is only liability when someone “has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs”.¹⁴⁰ All of these explanations indicate that seclusion is not purely locational, but extends to something much broader. The indication is that the most personal places or interactions are the places or interactions in which intrusion into seclusion would be most easily established.

Shulman, a leading US case in which the treatment and rescue of car accident victims was recorded and broadcast on TV, essentially describes seclusion as the penetration of “some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff”.¹⁴¹ This explanation, by including any action that obtains information about another person, also conceives of seclusion as covering a broader area than physical or sensory privacy.

In the BSA context the High Court case of *CanWest TVWorks Ltd v XY* describes seclusion as “a state of screening or shutting off from outside access or public view”.¹⁴² The case notes that this “creates the zone of physical or sensory privacy referred to in *Shulman*”.¹⁴³ Although this is a less broad definition of the essence of the seclusion interest, even physical privacy does not just mean privacy in a particular place. Moreham defines interfering with physical privacy as “watching, listening to or otherwise sensing [someone] against [his or her] wishes”.¹⁴⁴ This means that a breach of physical privacy can occur in any location where a person desires not to be intruded upon. *CanWest* also usefully points out that the definition of seclusion “is of a wider reach than solitude in that it allows or extends to a situation where the complainant is accompanied”.¹⁴⁵ Solitude, in which a person is completely alone, is a subset of seclusion.

“Seclusion” has never been simply a locational approach. There is ample evidence from a variety of legal sources that seclusion denotes private matters, regardless of the physical place in which they occur. If a person is physically secluded it will likely be easier to ascertain that this element has been satisfied; however, a legal definition that encompasses any private activity, space or affairs recognises that intrusions into these areas are the most devastating.

¹³⁹ At [95].

¹⁴⁰ At § 652B comment c.

¹⁴¹ *Shulman v Group W Productions Inc* 955 P 2d 469 (Cal 1998) at 490.

¹⁴² *CanWest TVWorks Ltd v XY* [2008] NZAR 1 (HC) at [42].

¹⁴³ At [42].

¹⁴⁴ Nicole Moreham “Beyond Information: Physical Privacy in English Law” (2014) 73 Cambridge L J 350 at 354.

¹⁴⁵ At [42].

As stated in *Evans v Detlefsen*: what is most important is “the type of interest involved and not the place where the invasion occurs”.¹⁴⁶

3 Involving infringement of a reasonable expectation of privacy

The reasonable expectation of privacy in the intrusion into seclusion tort has a wider focus than the reasonable expectation of privacy in the *Hosking* tort. In the latter the facts themselves are analysed as to whether the plaintiff has a reasonable expectation of privacy such that they should not be published to the world at large. In the former the focus is on whether there is a reasonable expectation of privacy in the intimate personal activity, space or affairs identified in the second element.

Reasonable expectation of privacy is treated superficially in *C v Holland* as a person having a shower is always going to enjoy a reasonable expectation of privacy with respect to uninvited outsiders. However, Whata J describes how the US tort has used a two-prong test,¹⁴⁷ adopted from the search and seizure applications of the Fourth Amendment of the United States constitution.¹⁴⁸ In Canada, *Jones v Tsige* also affirms that “[t]he courts have adopted the two-prong test”.¹⁴⁹ The test is “a subjective expectation of solitude or seclusion, and for this expectation to be objectively reasonable”.¹⁵⁰ The first prong would therefore see courts test whether claimants truly believed they had an expectation of seclusion. The second would be an objective assessment by the courts as to whether such a situation is in fact one that has a reasonable expectation of privacy. Similarly, *Shulman* states that there is a requirement to show a “reasonable expectation of seclusion or solitude in the place, conversation or data source”.¹⁵¹

In the recent New Zealand case of *Faesenkloet v Jenkin*, Asher J states that “[i]t is the unauthorised intrusion into a place where privacy is reasonably expected that is important, not whether the place was in public or private premises”.¹⁵² Although he suggests that place is relevant to the reasonable expectation of privacy test, he notes that it is the “nature of the intrusion” generally which is determinative.¹⁵³ *Hamed v R*, which held that s 21 of BORA “guarantees reasonable expectations of privacy from State intrusion” in a New Zealand search and seizure context,¹⁵⁴ considers that there can be a reasonable expectation of privacy in “private conversations and conduct” in public spaces.¹⁵⁵ This can be infringed when people

¹⁴⁶ *Evans v Detlefsen* 857 F 2d 330 (6th Cir 1988) at 338.

¹⁴⁷ At [17].

¹⁴⁸ *Katz v United States* 389 US 347 (1967) at 361.

¹⁴⁹ *Jones v Tsige*, above n 136, at [59].

¹⁵⁰ *C v Holland*, above n 1 at [17].

¹⁵¹ At 490.

¹⁵² *Faesenkloet v Jenkin* [2014] NZHC 1637 at [37].

¹⁵³ At [39].

¹⁵⁴ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [10].

¹⁵⁵ At [12].

secretly observe or listen to them.¹⁵⁶ The English Court of Appeal suggests in the private facts context that reasonable expectation of privacy can be assessed based on factors such as “the nature of the activity in which the claimant was engaged, the place at which it was happening, [and] the nature and purpose of the intrusion”.¹⁵⁷ Reasonable expectation of privacy will be discussed in detail in chapter VI.

4 That is highly offensive to a reasonable person

The current tort in the USA, New Zealand and Canada, requires that high offensiveness be met before a breach is made out.¹⁵⁸ This means that it is possible for there to be an intentional and unauthorised intrusion into seclusion involving infringement of a reasonable expectation of privacy which fails in establishing a breach because it is not highly offensive. Whilst in the private facts context Tipping J in *Hosking* reasons that a reasonable expectation of privacy is “unlikely to arise” unless there is “a high degree of offence”,¹⁵⁹ and similarly Young P in *TVNZ v Rogers* states that “[i]n most cases it will be the defeating of a reasonable expectation of privacy which makes publication objectionable”,¹⁶⁰ the very fact they use the phrases “unlikely to arise” and “in most cases” suggests that occasions when everything but high offensiveness are met are rare but do occur. High offensiveness in intrusion is likely to follow a similar line of thinking and is clearly supposed to be a step beyond breaching a reasonable expectation of privacy. Such a breach could indeed, for example, be classified as substantially offensive and thus fail to satisfy the criteria.

The US case of *Miller v National Broadcasting Co*¹⁶¹ sets out a list of factors to consider when evaluating what meets the highly offensive standard. These are cited affirmatively by Whata J in *C v Holland*, and adopted by the Ontarian Court of Appeal in *Jones v Tsige*.¹⁶² These are: (1) “the degree of intrusion”, (2) “the context, conduct and circumstances of the intrusion”, (3) “the motives and objectives of the intruder” and (4) “the expectations of those whose privacy is invaded”.¹⁶³ Whilst these factors are similar to those that could be employed in the second prong of the reasonable expectation of privacy test, they impart a different threshold. The test of a reasonable expectation of privacy asks whether the person could have reasonably expected to have been afforded seclusion in that context, and the offensiveness question asks whether, given that a reasonable expectation of privacy has been breached, that breach is a highly offensive one. It is essentially an extra step that increases the difficulty of satisfying an intrusion into seclusion claim.

¹⁵⁶ At [12].

¹⁵⁷ *Murray v Big Pictures Ltd* [2008] EWCA Civ 446, [2009] Ch 481 at [36].

¹⁵⁸ *Shulman*, above n 141; *C v Holland*, above n 1 at [94]; *Jones v Tsige*, above n 136, at [70].

¹⁵⁹ *Hosking*, above n 5, at [256].

¹⁶⁰ *Television New Zealand v Rogers* [2007] 1 NZLR 156 (CA) at [122].

¹⁶¹ *Miller v National Broadcasting Co* 187 Cal App 3d 1463 (Cal 1987) at 1483.

¹⁶² *Jones v Tsige*, above n 136, at [58].

¹⁶³ *Miller*, above n 161, at 679.

Principle 3 of the BSA also contains the exact limitation of the intrusion into seclusion tort that the intrusion must be highly offensive.¹⁶⁴

B Public Interest Defence

The defence of public interest is not a focus of this thesis, but for completeness it must be noted that any intrusion into seclusion claim can be defeated by such a defence in New Zealand. As Whata J states: “freedom from intrusion into personal affairs is amenable to...a defence of legitimate public concern based on freedom of expression or prosecution of criminal or other unlawful activity”.¹⁶⁵ This foreshadows the possibility that a justified belief in the existence of facts in which there is a significant public interest is a legitimate defence for using intrusive means to gather information. To say that intrusive means is never acceptable would encroach too much on freedom of expression because it would mean that even if bugged telephone calls resulted in a discovery that the Government of the day was systematically murdering citizens who opposed their policies, the bugged telephone calls themselves would still provide the Government with a remedy.

The BSA and the *Hosking* tort also have a public interest defence.¹⁶⁶ Given the public interest defence does not yet appear to have been used in an intrusion into seclusion case in New Zealand, it would be instructive to note how it has been treated in a BSA context. Privacy principle 8 explains that if the matter disclosed is in the public interest then legitimate concern to the public is a defence. This defence is consistent with the public interest defence in both privacy torts. In *CP v TVWorks Ltd* it is noted that “the more serious the breach of privacy, the greater the degree of legitimate public interest necessary to justify the breach”.¹⁶⁷ This imputes a balancing exercise between the severity of the intrusion and the extent of the public interest. In that decision electricians from three different electricity companies were surreptitiously filmed installing a heated towel rail and changing a light fitting in order to rate their performance. The decision pointed out that there was some public interest in the footage in terms of encouraging proper training and workplace safety, but that did not outweigh the privacy of an ordinary citizen going about his work. This is contrasted to the decision of *de Hart*¹⁶⁸ in which secret footage was seen to be in the public interest because it was of a well-known identity who had received serious allegations of sexual impropriety. In that situation, the public interest in the situation meant that there was no liability despite an infringement of a reasonable expectation of privacy. The word limit precludes any further analysis as to when a public interest defence should be satisfied.

¹⁶⁴ Broadcasting Standards Authority Privacy Principle 3(a).

¹⁶⁵ *C v Holland*, above n 1, at [75].

¹⁶⁶ Broadcasting Standards Authority Privacy Principle 8; *Hosking*, above n 5, at [129].

¹⁶⁷ *CP v TVWorks Ltd* BSA Decision 2012-069, 19 December 2012 at [42].

¹⁶⁸ *de Hart, Cameron and Cotter v TV3 Network Services Ltd* BSA decision 108-113, 10 August 2000.

C What Should the Elements of an Intrusion into Seclusion Action be?

Ultimately, the most important element of an intrusion into seclusion action appears to be the third element: infringement of a reasonable expectation of privacy. This element goes to the crux of the tort. This is because remedies for intrusion into seclusion do not occur as a result of every intrusion into the privacy interest; unauthorised, non-consensual intrusions happen all the time but most are not considered sufficient to create liability. There is only sufficient interest in determining liability when an intrusion infringes a reasonable expectation of privacy. Consequently it would seem appropriate to combine Whata J's first three elements.

The first element requiring an intentional and unauthorised intrusion is easily satisfied as it essentially only requires that the intrusion interest is engaged by an intrusive act that is deliberate and non-consensual.

The second element of "seclusion" requires that the intrusion was into personal activity, space or affairs. The third element requires that this intrusion into personal activity, space or affairs infringes a reasonable expectation of privacy. The second element is therefore almost redundant. If the intrusion is not into personal activity, space or affairs then there can be no breach of a reasonable expectation of privacy. If it is, then the personal activity, space or affairs is assessed as to whether it is sufficient to breach a reasonable expectation of privacy. Therefore essentially both elements analyse whether the intrusion is into matters that are intrinsically private, it is just that reasonable expectation of privacy requires a higher threshold to satisfy. It therefore makes sense to analyse it only once, but to do it rigorously.

Additionally, the requirement that the intrusion be into "seclusion" can be a dangerous one if it is misinterpreted to mean that only intrusions into private places can be actionable, or even if it carries a subconscious connotation that renders the place an intrusion occurs in as elevated in importance at the expense of other considerations. The word seclusion can imply that there can only be liability if a person is in actual seclusion, that is, in some sort of isolation. If it is misinterpreted to mean that the intrusion must occur in a particular type of location, and such a misinterpretation would be easy to make despite the fact the word is legally defined in brackets to mean personal activity, space or affairs, then it will change the essence of the tort in unfortunate ways. Thomas Levy McKenzie for example analysed the whole "into seclusion" element as if this imbued the tort with a "strict locational requirement".¹⁶⁹

It would be much simpler, cleaner and effective to remove the word seclusion from the lexicon of the elements as occurs in the way the elements of the tort in America are

¹⁶⁹ Thomas Levy McKenzie "The New Intrusion Tort: The News Media Exposed" (2014) 45 VUWLR 79 at 89.

constructed.¹⁷⁰ Whilst Whata J states that this element “acknowledges the need to establish intrusion into matters that most directly impinge on personal autonomy”,¹⁷¹ this need can be fulfilled completely by a proper assessment of reasonable expectation of privacy. Additionally, as Mckenzie points out, “[t]he “seclusion” element of Whata J’s test is similar to the term “private facts” from the first limb of the Hosking tort”.¹⁷² However, the *Hosking* tort states the first element as “the existence of facts in respect of which there is a reasonable expectation of privacy”¹⁷³ without separating this into determining first whether the facts are private, and second, “whether there is a reasonable expectation of privacy in those facts”.¹⁷⁴

Essentially, the first three elements can be combined into one element in such a way that it achieves everything it needs to. This element could be simply expressed as: “an intrusion into intimate personal activity, space or affairs that infringes a reasonable expectation of privacy”. This would largely retain Whata J’s wording of the elements. Such wording ensures that the largely overlapping second and third elements become one, thereby allowing an analysis that does not cover the same or similar ground twice. Some cases in the USA, notably *Shulman*, summarise New Zealand’s first three elements as one. In that case it is worded as “intrusion into a private place, conversation or matter”,¹⁷⁵ with the explanation being that this covers penetration of a zone of physical, sensory or informational privacy in which the plaintiff had an objective reasonable expectation of privacy. Whilst Whata J considers this a two-prong test of subjective and objective expectations, the analysis in *Shulman* merges the so-called two prongs, with the focus being on whether there was a reasonable expectation of privacy, with the subjective aspect predominantly assumed.

Not only are the first two elements easily satisfied, the extent of each of them are highly relevant in determining whether reasonable expectation of privacy is also satisfied. That is, the extent of an intrusion, and the degree to which the intrusion goes into private matters, helps establish whether there is a reasonable expectation of privacy. It therefore makes sense to combine the first three elements together, consequently allowing the heart of the tort to be thoroughly evaluated to determine potential liability.

The question as to whether high offensiveness should remain as an element is considered in chapter VII, once it is understood from chapter VI how reasonable expectation of privacy is to be applied. As will become clearer, high offensiveness is largely dependent upon the application of reasonable expectations of privacy.

¹⁷⁰ William L Prosser *Handbook of the Law of Torts* (4th ed, West Publishing Co Ltd, St Paul, Minnesota, 1971) at 807-809 provides the elements of the tort in the USA. The US tort is discussed in more detail in the next chapter.

¹⁷¹ *C v Holland*, above n 1, at [95].

¹⁷² At 90.

¹⁷³ *Hosking*, above n 5, at [117].

¹⁷⁴ Mckenzie, above n 169, at 91.

¹⁷⁵ *Shulman*, above n 141, at 490.

V Sources of Law: A Note on the Comparators

Before embarking on the application of the reasonable expectation of privacy test which is the subject of chapter VI and the crux of this thesis, it is important to justify the main sources of law that will be used in this analysis. This chapter explains why particular sources of law are especially relevant to intrusion into seclusion in New Zealand, and the reasonable expectation of privacy test specifically. It also considers how different causes of action in different jurisdictions can have an indirect effect on the application of intrusion into seclusion in New Zealand.

A The US Version of Intrusion into Seclusion

The intrusion tort has been active in the USA for over fifty years,¹⁷⁶ thereby providing a wealth of cases to analyse and potentially apply to intrusion into seclusion in New Zealand. It is obvious why it is advantageous to make use of an influential jurisdiction's case law for the same tort, especially when it has been a feature of their law for markedly longer. The American tort is particularly significant in New Zealand because it is used to justify the creation of the tort in *C v Holland*. Whata J stated that since "the intrusion based privacy claim is so novel, I have found it necessary to ... describe the North American tort of intrusion upon seclusion".¹⁷⁷

Whata J provides a detailed discussion of the American tort as a background for its application in New Zealand, giving a clear indication of the value of the US case law. He explains how "intrusion upon seclusion or solitude, or into private affairs" is one of the four privacy torts summarised by Prosser,¹⁷⁸ and that it is subsequently adopted by the *Restatement (Second) of Torts* (1977).¹⁷⁹ He also notes the four elements of the tort, identically described by Prosser in 1971 and the Ontarian case of *Jones v Tsigie* only a few months previously in 2012.¹⁸⁰

These elements are also very useful when bearing in mind some of the differences between America and New Zealand in the application of the tort.

¹⁷⁶ As pointed out in footnote 71.

¹⁷⁷ At [9].

¹⁷⁸ William L Prosser "Privacy" (1960) 48 Cal L Rev 383 at 389 as cited in *C v Holland*, above n 1, at [12].

¹⁷⁹ The Restatements of the Law are a set of expositions of the law that describe the general principles of common law. They are codifications of case law which demonstrate the consensus of what the law is but are not binding authority. They are extremely persuasive secondary authority as they are published by the American Law Institute with William Prosser as one of its reporters and formulated with considerable input from the legal profession.

¹⁸⁰ Prosser, above n 170, at 807-809; *Jones v Tsigie*, above n 136, at [56] as cited in *C v Holland*, above n 1, at [15].

Prosser described the four elements of intrusion into seclusion as:¹⁸¹

1. An intentional and unauthorised intrusion;
2. That the intrusion was highly offensive to the reasonable person;
3. The matter intruded upon was private; and
4. The intrusion caused anguish and suffering.

The first element is identical to that used in New Zealand. The element of high offensiveness is used in both jurisdictions, although the way the words are put together indicate that in the USA it is the intrusion that must be highly offensive, whilst in New Zealand it is the infringement of a reasonable expectation of privacy that must be highly offensive. In practice there is little difference. The US element that “the matter intruded upon was private” seems to be equivalent to the amalgam of “seclusion (namely intimate personal activity, space or affairs)” and “infringement of a reasonable expectation of privacy” in New Zealand.

The main difference is that America includes an element that requires the intrusion to cause anguish and suffering. This element is, however, only required by some states;¹⁸² others such as California make no such requirement.¹⁸³ In New Zealand there is no requirement that an intrusion cause mental suffering, a position supported by Bloustein who points out that if mental tranquillity is part of the social value of privacy, then privacy lacks independence as a value.¹⁸⁴ Bloustein views mental suffering like Warren and Brandeis, as a “mere element of damages”.¹⁸⁵ Whata J’s comment that anguish and suffering “may be more relevant to the assessment of damages”¹⁸⁶ appears to accord with such thinking.

B The effect of the Different Treatment of America’s Privacy Torts on Intrusion into Seclusion in New Zealand

This thesis has already covered the difference conceptually between the *Hosking* tort and the intrusion into seclusion tort. The publicity of private facts and intrusion interests are protected similarly by their respective equivalent US tort. There are, however, inherent difficulties in satisfying a private facts claim in the USA compared to New Zealand, due to the constitutional differences in the treatment of freedom of speech. The same is not true, however, for an intrusion into seclusion claim. This section will explain how this has the

¹⁸¹ Prosser, above n 170, at 807–809.

¹⁸² *Narducci v Village of Bellwood* 444 F Supp 2d 924 938 (ND Ill 2006) as cited in William Dalsen “Civil Remedies for Invasions of Privacy: A Perspective on Software Vendors and Intrusion upon Seclusion” (2009) Wis L Rev 1059 at 1069.

¹⁸³ See *Shulman*, above n 141.

¹⁸⁴ Edward J Bloustein, above n 24, at 966.

¹⁸⁵ At 967.

¹⁸⁶ *C v Holland*, above n 1, at [18].

potential to unjustifiably broaden the scope of intrusion into seclusion in both the USA and New Zealand.

In the USA, freedom of expression is upheld by the First Amendment, which must not be contravened by any court decision.¹⁸⁷ It is this sanctity of free speech which gives the news media a “right to investigate and relate facts about the events and individuals of our time”.¹⁸⁸ In New Zealand, freedom of expression is a right in s 14 of BORA. However, s 5 states that “the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. New Zealand law can therefore allow torts to be developed which balance freedom of expression with other values, compared with the American system in which freedom of expression is of elevated importance.

The tort of publicity of private facts in the USA requires the plaintiff to prove as one of its elements that the private facts are “not of legitimate public concern”.¹⁸⁹ In New Zealand public interest (concern) is a defence to the *Hosking* tort which the defendant must raise and prove.¹⁹⁰ This demonstrates the extra protection of freedom of expression in America: their default position is that publications of private facts are assumed to be in the public interest unless proven otherwise, whereas in New Zealand liability is found for the publication of private facts unless they are *proven* to be in the public interest.

Legitimate public concern is considered broadly in the USA.¹⁹¹ Consequently it is only the exceptional case which establishes a private facts claim,¹⁹² as the vast majority of private facts published within arguably newsworthy stories are deemed acceptable. In New Zealand, however, “the greater the invasion of privacy, the greater must be the level of public concern to amount to a defence”.¹⁹³ This means it will usually require a greater public interest to remove or counter any liability that has already been established.

In *Shulman*, no liability was found for *broadcasting* the rescue of accident victims due to the public interest in “highlight[ing] some of the challenges facing emergency workers dealing

¹⁸⁷ The first ten Amendments of the Constitution together constitute the Bill of Rights and the Supreme Court has held in *Near v Minnesota* 283 US 697 (1931) that the Bill of Rights is a requirement of State law.

¹⁸⁸ *Shulman*, above n 141, at 470.

¹⁸⁹ *Diaz v Oakland Tribune Inc* 139 3d 118 (Cal App 1983) at 126.

¹⁹⁰ *Hosking v Runtig*, above n 5, at [129].

¹⁹¹ *Shulman*, above n 141 at 478 states: “where the facts disclosed about a private person involuntarily caught up in events of public interest bear a logical relationship to the newsworthy subject of the broadcast and are not intrusive in great disproportion to their relevance” the publication satisfies the test of public concern.

¹⁹² Two such exceptional cases are *Melvin v Reid* 297 P 91 (Cal App 1931) and *Briscoes v Readers Digest Association Inc* 483 P 2d 34 (Cal 1971) in which the plaintiffs in both were identified as having committed crimes in the distant past. However, even though crime and rehabilitation is a newsworthy topic, the identification of the plaintiffs was deemed to have “minimal social value” (*Briscoes* at 541) and “would tend to interfere with the [S]tate’s interest in rehabilitating criminals” (*Shulman*, above n 141, at 483).

¹⁹³ *Andrews v Television New Zealand* [2009] 1 NZLR 220 (HC) at [84].

with serious accidents”.¹⁹⁴ It was therefore left to the intrusion tort to offer some protection for the intrusive behaviour of the broadcasters. Even though the broadcast showed one of the victims stating that she “just want[s] to die”,¹⁹⁵ the court held that personal conversations depicting “disorientation and despair”¹⁹⁶ are substantially relevant to the matter of public interest. It is considered inappropriate for the Court to act as editors of the news media.¹⁹⁷ There is a strong argument, however, that one could edit out the private facts to produce a broadcast which serves the public interest just as effectively, whilst still providing sufficient context for the story.

In a similar kind of case in *Andrews* in New Zealand it was considered that the personal words expressed by the injured parties also form part of the public interest due to the contention that “the Court will ordinarily permit a degree of journalistic latitude”¹⁹⁸. The Court’s comments in regard to public interest are based largely on its interpretation of *Shulman*, that “the degree of detail shown was not only relevant, but essential to the narrative”.¹⁹⁹ At the time there was no intrusion tort for *Andrews* to fall back on. However, this suggests that were a similar case to happen today it would be the tort of intrusion into seclusion that would provide the best opportunity for finding liability.

Andrews shows no appreciation of the differing constitutional context of freedom of expression in New Zealand compared with America. In other words, in New Zealand an argument that colour is gratuitously unnecessary is compelling due to the freedom of expression right being subject to the aforementioned reasonable limits in s 5 of BORA.

In the USA, when a publicity of private facts claim and an intrusion are brought together “the private facts claim frequently fails on First Amendment principles, and the intrusion question more often may be left to the jury”.²⁰⁰ Consequently some judges, who want to find the defendant liable for breaching the tort of publicity of private facts but feel constrained from doing so because of the First Amendment, may unreasonably extend the tort of intrusion into seclusion in order to find liability.

Another reason for this is the lack of a specific newsgathering defence for intrusion into seclusion in the USA, as *Shulman* demonstrates. Whilst the actual broadcast of newsworthy items prevent liability in a publicity of private facts context, any intrusive means of obtaining that information is not similarly protected from liability. *Shulman* notes that the “high degree of deference to editorial judgment” for publication of private facts is not extended to

¹⁹⁴ At 488.

¹⁹⁵ At 476.

¹⁹⁶ At 488.

¹⁹⁷ At 488.

¹⁹⁸ *Andrews*, above n 193, at [82].

¹⁹⁹ At [89].

²⁰⁰ Warby, Moreham and Christie, above n 103, at 75.

intrusions “into secluded areas or conversations in pursuit of publishable material”.²⁰¹ Newsworthiness in the USA can only stop an intruder being liable by preventing the intrusion from satisfying the high offensiveness element.²⁰² Intrusion into seclusion in New Zealand is amenable to a public interest defence however.²⁰³

The differing constitutional context of freedom of expression between New Zealand and America, and the contrasting treatment of the public interest or newsworthiness in intrusion into seclusion, indicates that the courts need to be circumspect in following America’s torts too closely. If New Zealand blindly follows America then it too could face the danger of widening the ambit of intrusion into seclusion beyond its logical limits. Or alternatively, in situations like *Shulman* or *Andrews* where both torts could clearly apply, the focus will be on intrusion into seclusion to find liability and the *Hosking* tort will be too easily dismissed.

Whenever any work or analysis is done on either of the two torts in New Zealand, or privacy torts as a whole, one must always bear in mind the legal framework of both torts and ensure that there is little danger of their application becoming somewhat lopsided as arguably occurs in America. This thesis ensures that it does not widen the intrusion tort in response to any interpretation of the *Hosking* tort, and is careful not to simultaneously reduce the scope of the *Hosking* tort in order to broaden the horizon of the other. It never chooses to prefer intrusion over private facts simply because of the difficulties imposed on private facts in a different jurisdiction.

Despite the above analysis, the treatment of intrusion into seclusion by the various jurisdictions in America has immense persuasive power.

C Broadcasting Standards Authority (BSA)

BSA decisions in relation to the intrusion interest can inform the development of ideas such as reasonable expectation of privacy. This is because despite being applicable only when information is published through a broadcast medium, and despite being subject to the flaws exposed in chapter III, the legal precepts in principle 3 of the BSA are similar to those in an intrusion into seclusion claim. They deal with similar intrusions into privacy as might be apparent in an actual intrusion into seclusion claim. BSA decisions can therefore be used to defend, add value to and potentially modify a legal or theoretical proposition. Relevant decisions will therefore be discussed in the analysis of reasonable expectation of privacy in the following chapter.

²⁰¹ At 416.

²⁰² This is indicated in *Sanders v American Broadcasting Companies* 978 P 2d 67 (Cal 1999) at 69.

²⁰³ As discussed above in IV B at 38.

D Search and Seizure Case Law in New Zealand, the USA and Canada

Search and seizure case law is also a useful source of principles and guidance for the development of intrusion into seclusion.

In the USA, search and seizure is protected by the Fourth Amendment to the Constitution which states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”. Wilkins notes that “[i]n *Katz* the court adopted a flexible “reasonable expectation of privacy” analysis for resolving search and seizure issues”.²⁰⁴ Wilkins uses three factors as the base for exploring how to apply reasonable expectation of privacy in a search and seizure context in the USA, namely place, intrusiveness, and object.²⁰⁵ It is a modified version of these three factors which this thesis recommends in determining a reasonable expectation of privacy for an intrusion into seclusion in New Zealand. This will be developed in chapter VI.

Search and seizure case law in New Zealand derives from s 21 of BORA which states that “everyone has the right to be secure against unreasonable search or seizure, whether of the persons, property or correspondence or otherwise”. Reasonable expectations of privacy in a search and seizure context in New Zealand are used by Whata J in *C v Holland* as part of his reasoning for why there should be a tort of intrusion into seclusion in this country. He pointed to s 21 in BORA as protecting a similar type of privacy as would be upheld by his introducing the new tort of intrusion into seclusion.²⁰⁶ Importantly, Whata J emphasised that leading cases such as *R v Williams*²⁰⁷ and *Hamed v R*²⁰⁸ defend “the proposition that a reasonable expectation of privacy is the touchstone of s 21”²⁰⁹. The purpose of this was to demonstrate “that New Zealand’s legal framework has embraced freedom from unauthorised and unreasonable physical intrusion or prying into private or personal places”.²¹⁰ Canada’s search and seizure case law is based on s 8 of the Canadian Charter of Rights and Freedoms, which is very similar to s 21 of BORA, and embraces the reasonable expectation of privacy as the barometer for liability.²¹¹

A search and seizure claim is quite different compared to one for intrusion into seclusion; the former relates to actions of the State against the individual and the latter more usually relates to actions between individuals. There will inevitably be some differences between what is unreasonable search and seizure by a public official or body and what is unacceptable

²⁰⁴ Wilkins, above n 8, at 1079.

²⁰⁵ At 1100-1127.

²⁰⁶ At [25]-[27].

²⁰⁷ *R v Williams* [2007] NZCA 52.

²⁰⁸ *Hamed v R*, above n 154.

²⁰⁹ *C v Holland*, above n 1, at [26].

²¹⁰ At [32].

²¹¹ Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at 2.36.

between private citizens. A policeman fulfilling his duty to investigate crime and protect the public from antisocial behaviour potentially has good reason to undergo search and seizure that in a private context would be unacceptable. Essentially, there will always be an arguable case for a search and seizure by the State to be reasonable given the public interest. There is therefore a danger of the courts “marginalis[ing] privacy interests” by “manipulat[ing] reasonable expectations of privacy” to prioritise “investigating serious criminality”, or to give leeway to actions that have brought about the discovery of some illicit contraband or exposed some criminal behaviour.²¹² An intrusion into seclusion may also infrequently be justified on public interest grounds, such as perhaps media investigating high profile figures engaging in activities of dubious morality. However, this is likely to happen far less often than in a policing context as many intrusions into seclusion will have no arguable public interest defence.

Despite the difference it is judicious to suggest that some aspects of the reasonable expectation of privacy analysis can be transposed between the two, given how they both protect the intrusion interest. Even though the courts have tended to downgrade BORA concerns for the sake of the public good, one can still analyse the Courts’ decisions and judgments as a pointer to where different situations might fit on a sliding scale of expectations of privacy. Additionally, the reasonable expectation of privacy in s 21 cases is often discussed separately and irrespective of the public interest, such as by arguing that there may be a reasonable expectation of privacy before assessing that the public interest in the officer’s behaviour supersedes it. This is closer to New Zealand’s intrusion into seclusion approach in which a public interest defence is only raised after an infringement of a reasonable expectation of privacy has been made out.

The recent decision of *Faesenkloet v Jenkin* indicates the strength of transferability of reasonable expectation of privacy from one cause of action to the other.²¹³ In this case, New Zealand search and seizure case law is used to determine whether there is infringement of reasonable expectation of privacy in the intrusion into seclusion context. The issue in the case revolved around whether a video camera situated on top of a garage recording a shared driveway on council land constituted intrusion into seclusion. Asher J noted that *C v Holland* “did not have to consider an intrusion into an activity, space or affairs that occurred in a public place”.²¹⁴ However, he considered that Whata J’s “assessment of the elements of the tort would not preclude the invasion being in or of a public area”.²¹⁵

²¹² Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) at 460-461.

²¹³ *Faesenkloet*, above n 152.

²¹⁴ At [37].

²¹⁵ At [37].

Asher J analysed the position in relation to s 21 reasonable expectations of privacy and applied this to intrusion. He considered it highly relevant for example that *R v Fraser* holds that “[r]easonable expectations of privacy for activities readily visible from outside the property must be significantly less than, for instance, for activities within buildings”.²¹⁶ In other words, Asher J’s decision was intrinsically linked to what happens in a search and seizure context given the greater depth of case law in that area and the transferability of reasonable expectations of privacy between the two.

Reasonable expectations of privacy in search and seizure are therefore an excellent analytical tool in assisting a reasonable expectation of privacy in an intrusion into seclusion, providing they are used with caution. Both causes of action look to protect the intrusion interest by requiring a reasonable expectation of privacy to be infringed as one of the steps in determining liability.

²¹⁶ *R v Fraser* (1997) 15 CRNZ 44 (CA) at 56 as cited in *Faesenkloet*, above n 152, at [43].

VI How to Determine Reasonable Expectation of Privacy: Wilkins' Tripartite Approach

As previous chapters have discussed,²¹⁷ the reasonable expectation of privacy test is the crux of the tort of intrusion into seclusion. One of the aims of this thesis is to provide guidance as to when a reasonable expectation of privacy is infringed. This will be fundamental to assisting judges charged with ascertaining liability for intrusion into seclusion in the future. The dearth of cases on this tort in New Zealand, due to its very recent introduction into the legal landscape, means that providing a roadmap or a set of flexible rules to navigate when an expectation of privacy exists is crucial. By bringing together reasonable expectations of privacy in a variety of contexts, such as those discussed in chapter V, it is hoped that this thesis will create a useful resource for qualitatively calculating when a reasonable expectation of privacy is likely to exist.

Interpreting the reasonable expectation of privacy is problematic. Whilst the concept of reasonableness is used in many aspects of law, it is never straightforward to actually determine whether reasonableness is satisfied. This is because ascertaining what the reasonable person would think requires considering contemporary societal viewpoints, and establishing normatively what society's positions are at any one time is always going to be a somewhat subjective exercise.

This thesis contends that the best guidance for working out when a reasonable expectation of privacy exists comes from a modified version of Richard Wilkins' tripartite approach as put forward in his 1987 journal article "Defining the Reasonable Expectation of Privacy: An Emerging Tripartite Analysis".²¹⁸ This article was written following what Wilkins saw as an inconsistent approach by the US judiciary to the Supreme Court decision in *Katz*²¹⁹ which, as pointed out in the previous chapter, "adopted a flexible 'reasonable expectation of privacy' analysis for resolving search and seizure issues" in response to "the rapid development of electronic and other technologically-enhanced means of surveillance"²²⁰ that "required no physical penetration".²²¹ Wilkins believed that the "potentially limitless range of factors relevant to" determining a reasonable expectation of privacy could be reduced to "a workable set of criteria ... discernible in the stated rationales of Supreme Court decisions".²²² This was seen as necessary to prevent the "divergent and conflicting analytical resolutions" which had become predominant in search and seizure case law.²²³

²¹⁷ Particularly in IV C at 39.

²¹⁸ Wilkins, above n 8.

²¹⁹ *Katz*, above n 148.

²²⁰ Wilkins, above n 8, at 1079.

²²¹ At 1086.

²²² At 1080.

²²³ 1080.

Wilkins presents three factors: “(1) the place of location where the surveillance occurs; (2) the nature and degree of intrusiveness of the surveillance itself; and (3) the object or goal of the surveillance”.²²⁴ He justifies this on the basis that although “the Court has not adopted explicitly this trio of factors as a formal legal test”, “cases before and after *Katz* imply this approach”.²²⁵ This thesis employs a modified version of the Wilkins factors. It retains their essence but renames the “object” factor as “nature of activity or information” in order to reflect more accurately what the factor represents.²²⁶ Once the three factors have been analysed there should then be a holistic assessment as to reasonable expectation of privacy in which the factors are balanced and combined.

Although Wilkins synthesised these factors almost thirty years ago regarding the reasonable expectations of privacy of surveillance in search and seizure cases, they are still highly relevant to reasonable expectations of privacy in an intrusion into seclusion claim today. For example, many considerations of reasonable expectation of privacy in contemporary New Zealand search and seizure case law actually consider, to some degree, the same three factors as Wilkins. However, this happens somewhat accidentally, rather than in a clear and methodical way. The aim here is to combine all ideas of a reasonable expectation of privacy into the invaluable Wilkins approach. In addition, Wilkins’ three factors are similar to the four factors Moreham suggests being used in place of a purely locational approach to the BSA: nature of the location, the nature of the activity, indications that filming was not welcome, and the way the recording was obtained.²²⁷ Moreham also suggests in her “Privacy in Public Places” article that location, nature of the activity, and the way in which the image is obtained are crucial, dedicating sections to each of these.²²⁸

In each of the three Wilkins factors there is a hierarchy of highest reasonable expectation of privacy to lowest reasonable expectation of privacy. Analysis centres round what kind of places, activity and information have the highest expectations of privacy, and what kind of behaviour is the most intrusive. Ultimately it is vital to consider what combinations of the three factors will equate to a breach satisfying the infringement of an overall reasonable expectation of privacy. Much of this analysis benefits greatly from an assessment of the Hughes barriers in the context of the Wilkins factors.

The Hughes barriers²²⁹ is a theory about how privacy is actually experienced. In the same way that Wilkins attempts to find out when an expectation of privacy is reasonable in a legal context, Hughes creates a theory which describes when a subjective desire for privacy should

²²⁴ At 1080.

²²⁵ At 1080.

²²⁶ This will be explained in VI C at 85.

²²⁷ Nicole Moreham "Private Matters: A Review of the Broadcasting Standards Authority" (New Zealand Broadcasting Standards Authority, 2009) at 12-13.

²²⁸ NA Moreham "Privacy in Public Places" [2006] 65(3) CLJ 606 at 621-631.

²²⁹ As discussed in chapter II C 1 (b) at 9-10.

be respected. Whilst Hughes' theory is broader, it can help inform the Wilkins factors as to when a desire for privacy has been communicated, or has a tenable basis for being reasonable. The Hughes barriers are physical (placing a tangible object in between the intruder and the subject matter), behaviour (verbal or non-verbal communication that privacy is desired), and normative (a societal expectation against intrusion based on social norms). Physical, behavioural and normative barriers can increase the reasonable expectation of privacy in a place, make an intrusion more intrusive, and/or make the nature of the information or activity more intimate.

Although (like the Hughes barriers) all three Wilkins factors are interlinked, it is useful to consider them separately. Sometimes it is only by considering each situation in terms of all three factors that one can make a useful assessment as to the overall reasonable expectation of privacy. However, when a reasonable expectation of privacy in one or two of the factors is very high there will often be an overall reasonable expectation of privacy, even if the other factor(s) have a low expectation of privacy. One factor can even be completely absent and there be an infringement of a reasonable expectation of privacy. These ideas will be demonstrated at various points throughout the chapter.

A Place

Wilkins includes "place" as one of his three factors because even though it is sometimes not determinative of a reasonable expectation of privacy, such as in the cases *California v Ciraolo*²³⁰ and *Dow Chemical Co v United States*²³¹, it is still considered in detail.²³² Wilkins considers that this is indicative of the fact that a reasonable expectation of privacy analysis will always require consideration of place.²³³ Secondly, although the *Katz* reasonable expectation of privacy test is designed to protect "people, not places",²³⁴ Wilkins views place as relevant because of the "types of human conduct likely to occur in particular locales".²³⁵ The locational inquiry is therefore not so much whether the place is constitutionally protected, "but rather whether it is conceptually linked with intimacy and personal privacy".²³⁶

The factor of place essentially refers to the location of the alleged intrusion and whether that is traditionally associated with privacy rights. It requires detailed consideration of the location of the alleged intrusion in order to ascertain the extent to which there may be a

²³⁰ *California v Ciraolo* 476 US 207 (Cal 1986).

²³¹ *Dow Chemical Company v United States* 476 US 227 (Cal 1986).

²³² Wilkins, above n 8, at 1102.

²³³ At 1103.

²³⁴ *Katz*, above n 148, at 351.

²³⁵ At 1103.

²³⁶ Wilkins, above n 8, at 1112.

reasonable expectation of privacy in the place itself. The purpose of this section is to determine which places are most associated with privacy rights.

1 The home

Residential property has the highest expectation of privacy attached to it.²³⁷ *R v Thomas* makes plain that privacy embraces the sanctity of the private home²³⁸ and the US Fourth Amendment explicitly mentions protecting houses.²³⁹ The home is protected because it is the place where the most intimate activities occur and in which no-one expects to be observed. The somewhat trite maxim that “a man’s home is his castle” implies that people can do as they please in the privacy of their own home, which would be gratuitously undermined by any unwarranted intrusion into the property. This is focused on the building in which a person resides rather than the backyard or driveway which will be assessed separately.

New Zealand search and seizure case law draws fine distinctions between different parts of the residential home such that although the home itself is at the forefront of the sliding scale of expectations of privacy, there are gradations within it.²⁴⁰ The purpose behind assessing these distinctions, and why one part has a higher reasonable expectation of privacy than another, is because it provides a framework, or a set of ideas, for the analysis of any place that is not so obviously private. When a place has a borderline reasonable expectation of privacy it is these kinds of concepts and ways of thinking that will allow a relevant assessment to be made.

The fine distinctions between different parts of the home require determining which parts are intuitively more private than others. *Williams* points out for example that “the public areas will invoke a lesser expectation of privacy than the private areas of the house”.²⁴¹ Whilst *Fraser* indicates that a public area is one which is “readily visible from outside the property”,²⁴² essentially a backyard or a driveway, *Williams* gives an example of “inaccessible areas such as drawers and cupboards” counting as private areas,²⁴³ suggesting that one could also make a distinction between public and private areas inside a home. By pointing out that drawers and cupboards are especially private where they are likely to contain intimate correspondence or clothing,²⁴⁴ *Williams* demonstrates that even within buildings there can be a sliding scale of reasonable expectation of privacy.

²³⁷ *R v McManamy* (2002) 19 CRNZ 669 (CA).

²³⁸ *R v Thomas* (1991) 286 APR 341 (NLCA).

²³⁹ As quoted in V D at 46.

²⁴⁰ *R v Williams*, above n 207, at [113].

²⁴¹ At [113].

²⁴² *R v Fraser*, above n 216, at 56.

²⁴³ At [113].

²⁴⁴ At [113].

It would seem reasonable to suggest that anywhere in the home with a locked door has a higher reasonable expectation of privacy, as this creates a physical barrier that makes the room inaccessible. In addition, regardless of whether a bathroom and bedroom have a locked door, they should have a greater normative barrier than a living room. As *Young v Superior Court of Tulare County* states: a bathroom or bedroom “is entitled to an expectation of privacy far greater than [exists] in the common areas of a house, such as the living room and kitchen”.²⁴⁵ In a bathroom intimate activities like showering and undressing occur; bedrooms are a space to retreat and carry out intimate or secret activities such as sexual relations, secretly reading a copy of *Mein Kampf* or watching obscene YouTube clips.

Whilst an intrusion into a living room or dining area will invariably infringe a reasonable expectation of privacy, they have a lower normative barrier than a bathroom or bedroom as they are more public. These are places for example where guests are often entertained. When people enter a house it is common for them to be invited into the living room and anyone in there is likely to be operating under the assumption that visitors will enter from time to time. Consequently people are less likely to be doing something in a living area that they do not want others to see. In a dining area, although personal conversations should not be intruded upon without consent, the nature of observing someone have a conversation at a dinner table does not offend privacy so much as observing someone in a bathroom or bedroom. This is perhaps because most people have eaten meals in the presence of others, including strangers and vague acquaintances, whereas a person’s bedroom or bathroom are inherently private locations for undertaking inherently private activities. Such a normative barrier is highlighted by the fact that housemates or family members tend to knock on a bedroom or bathroom door before entering. However, a living room can increase its reasonable expectation of privacy further by imposing the Hughes barriers to communicate a greater desire for privacy. For example by installing a lock on the door or asking guests not to enter the living room.

Plaintiffs in an intrusion into seclusion claim should have little difficulty establishing their expectation of privacy when an individual has intruded upon their home, regardless of which part of the home has been breached.²⁴⁶

2 Places equivalent to the home

There is also a high expectation of privacy in a private hotel room which is considered analogous to a home. The Restatement sees “the defendant forc[ing] his way into the plaintiff’s [hotel room]” in the same way as “insist[ing] over the plaintiff’s objection in entering his home”.²⁴⁷ The Supreme Court of Canada describes a hotel room as a “home

²⁴⁵ *Young v. Superior Court of Tulare County* 57 Cal App 3d 883 (Cal 1976) at 887.

²⁴⁶ See for example *Miller v Brooks* 472 SE 2d 350 (NC App 1996); *Dietemann v Time Inc* 449 F 2d 245 (9th Cir 1971).

²⁴⁷ Restatement, above n 138, at § 652B comment b.

away from home” and states that a hotel room is a “private enclave where we may conduct our activities free of uninvited scrutiny”.²⁴⁸ This of course is the same as a private home. However, where a person has indiscriminately invited people to a hotel room, such as by passing out notices in restaurants and bars, “[i]t is impossible to conclude that a reasonable person, in the position of the appellant, would expect privacy in these circumstances”.²⁴⁹

A hospital is viewed similarly to a private home or hotel room. Receiving hospital treatment is always going to be considered private because of the personal information it can impart, and because treatment is generally intimate and sensitive and can include dealing with parts of the human body not usually accessible to the public. This shows a clear link between place and nature of activity or information. The place an intrusion occurs will always suggest the nature of the activity that might be observed or the nature of information that might be obtained. This link and its implications will be expanded upon in the analysis of the third factor.

The reasonable expectation of privacy in a hospital was breached in *Barber v Time* when a woman sick in hospital with a rare disease refused to see a reporter, but the reporter entered the hospital and took a photograph of her anyway.²⁵⁰ In *Shulman* a rescue helicopter was seen in the same light as a hospital: “a jury could reasonably regard entering and riding in an ambulance - whether on the ground or in the air - with two seriously injured patients to be an egregious intrusion on a place of expected seclusion”.²⁵¹ The Court of Appeal had rightly surmised that there is no societal permissibility for “media representatives [to] hitch a ride in an ambulance and ogle as paramedics care for an injured stranger”.²⁵²

Had the presence of someone outside the patients or those associated with the medical fraternity been consented to, there would be no reasonable expectation of privacy in a hospital or rescue helicopter with respect to that person; just as accepting a person’s entry into one’s house or hotel room reduces the reasonable expectation of privacy in the place. In *De May v Roberts* some people were present at a birth with permission, but one person was not.²⁵³ The unwelcome viewer was committing an intrusion into seclusion. Solove points out that a person “can want to keep things private from some people but not others”.²⁵⁴ Similarly, *Huskey v National Broadcasting* points out that “[the plaintiffs] visibility to some people does not strip him of the right to remain secluded from others. Persons are exposed to family members and invited

²⁴⁸ *R v Wong* (1990) 3 SCR 36 at [21].

²⁴⁹ At [50].

²⁵⁰ *Barber v Time Inc* 348 Mo 1199 (Mo 1942).

²⁵¹ *Shulman* above n 141, at 494.

²⁵² *Shulman v Group W Productions Inc* 59 Cal Rptr 2d 434 (Cal 1996) at 453 as cited in *Shulman*, above n 141, at 491.

²⁵³ *De May v Roberts* 46 Mich 160 (Mich 1881).

²⁵⁴ Daniel J Solove “Conceptualising Privacy” (2002) 90 Cal L Rev 1087 at 1108.

guests in their own homes, but that does not mean they have opened the door to television cameras”.²⁵⁵

In places such as the home, the hotel or the hospital, proactive consent is needed for the presence of those who are not free to come and go as they please. This means that where patients, due to their condition, are not “in a position to keep careful watch on who [is] riding with them, or to inquire as to everyone’s business and consent or object to their presence” there is no passive acceptance of everyone who is there.²⁵⁶ Instead a behavioural barrier seems to be assumed.²⁵⁷ In general, in places of the highest reasonable expectation of privacy, such as a family home, a private hotel room or a hospital, there is a normative expectation that people will only enter if they have requested to do so, and their request has been accepted.

It is suggested that, as with the home, the tort of intrusion into seclusion will generally be made out if there is an intrusion into a person’s hotel or hospital room.

3 What role does the proprietary interest play in an assessment of place?

The fact that there is a high reasonable expectation of privacy in a private hotel room and in a hospital suggests that the notion of proprietary interest is irrelevant to an assessment of the reasonable expectation of privacy in a place. A reasonable expectation of privacy “should not become dominated by formal proprietary notions given the universal nature of the rights it protects”.²⁵⁸ Privacy interests are to be “assessed objectively without any concentration on property rights”.²⁵⁹

Section 21 of BORA is worded to include the phrase “whether of the person, property, correspondence or otherwise”, in order to ensure the privacy interest protected by an unreasonable search and seizure measure is broader than a simple property interest.²⁶⁰ For example, an unreasonable search and seizure on a child in the family home can still create liability, despite the child having no proprietary interest.²⁶¹

R v Jefferies for example focused on the importance of s 21 for defending “those values or interests which make up the concept of privacy”.²⁶² This means that a person can have a

²⁵⁵ *Huskey v National Broadcasting Co Inc* 632 F Supp 1282 (ND Ill 1986) at 1288.

²⁵⁶ *Shulman*, above n 141, at 494.

²⁵⁷ This point will be returned to in the subsequent discussion of *Shulman* in C 2 (d) at 92-94.

²⁵⁸ *R v Williams*, above n 207, at [63].

²⁵⁹ At [63].

²⁶⁰ Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984–1985] I AJHR A6 at 105-106.

²⁶¹ The problem with proprietary interests is recognised in the separate context of correspondence. Although questions like “who owns an email?” or “at what point does a person have a property interest in a letter he or she receives?” are legitimate, these questions are not a helpful way of stating the real, much broader, issue of the extent to which there is a reasonable expectation of privacy in such mail.

²⁶² *R v Jefferies* [1994] 1 NZLR 290 (CA) at 319.

reasonable expectation of privacy in something he or she has no proprietary interest in. This is no different from the intrusion into seclusion tort.

The American search and seizure case law follows a similar path. Although the Fourth Amendment specifically states that people have the right to be “secure in their persons, houses, papers and effects”, the house comes, not just to be protected for the proprietary interest, but because of the privacy interest as well – that is, “the human activities innately associated” with it.²⁶³ *Katz*, well-known for adopting a flexible reasonable expectation of privacy analysis for resolving search and seizure issues, dismissed proprietary requirements of search and seizure in the USA, the Court stating, as mentioned above, that it protects “people, not places”.²⁶⁴ That of course does not mean that places are irrelevant, only that one of the purposes of including the location in a reasonable expectation analysis is in it being “an analytical tool to determine what conduct and activities people reasonably could assume would remain private”.²⁶⁵

Recent Supreme Court case law suggests a departure from this approach. *United States v Jones*,²⁶⁶ “which held that attaching a GPS device to a suspect’s car...constitutes a physical intrusion upon the car”,²⁶⁷ potentially shifts the paradigm back from reasonable expectations of privacy to common law trespass. Five judges decided the case based on trespass and four reached the same decision via reasonable expectation of privacy.

Erica Goldberg agrees with the decision, contending that “reliance on the value-laden notion of reasonable expectation of privacy” erodes Fourth Amendment rights.²⁶⁸ Whilst Harlan J, who established the reasonable expectation of privacy test in *Katz*, states that judges should not merely “recite the expectations and risks without examining the desirability of saddling them upon society”,²⁶⁹ Goldberg criticises this reasonable expectation of privacy approach for giving judges “the power to dictate to society when society’s assumptions about privacy [are] acceptable”.²⁷⁰

If the proprietary approach of *United States v Jones* continues to be adopted, common law trespass will mean that any trespass regardless of whether there are strong Hughes’ barriers or no barriers at all, will be treated the same. It will mean that any situation in which there is no trespass will not be a breach of privacy. If this continues to be adopted, there will be little use

²⁶³ Wilkins, above n 8, at 1111.

²⁶⁴ *Katz*, above n 148, at 351.

²⁶⁵ Wilkins, above n 8, at 1103.

²⁶⁶ *United States v Jones* 132 S Ct 945 (2012).

²⁶⁷ Erica Goldberg “How *United States v Jones* Can Restore Our Faith in the Fourth Amendment” (2014) 110 Mich L Rev First Impressions 62 at 62.

²⁶⁸ Goldberg, above n 267, at 64.

²⁶⁹ *United States v White* 401 US 745 (1971) at 786.

²⁷⁰ At 65.

in New Zealand looking to contemporary US search and seizure case law to assist in determining when there is a reasonable expectation of privacy.

4 Relevance of place as a factor in its own right

Clearly the nature of the place can indicate the nature of the activities that take place there and the kind of information sought by an intrusion. One could suggest that this does not just demonstrate one way location and nature of activity/information can be closely related, but that location as a factor in its own right is superfluous because it is merely a tool to determine the more important question of the activity taking place. Such a suggestion seems flawed though as this could lead to intrusions on innocuous domestic activity in some parts of the home being considered acceptable.

The nature of a place like a private residence should mean that any activity taking place there, even those that seem innocuous such as reading a book or sweeping the floor, has a reasonable expectation of privacy simply because of the location in which it occurs. That is, activities have differing reasonable expectations of privacy depending on where they take place. For example, a person reading a book at home has a much higher reasonable expectation of privacy than a person reading a book in a park, because the person reading a book in a park has knowingly and willingly exposed him or herself to the public gaze. The main reason for this is that the home is viewed as the quintessential private space for which intrusions infringe upon reasonable expectations of privacy per se. Any intrusion in the home weakens its psychological primacy as a place where people can be themselves, free from the burden of carefully constructing their desired public persona. The inviolability of the home²⁷¹ would be lost regardless of the actions that occurred to upset the sanctity of the space.

Of course the home is not completely impenetrable. Whilst the highest reasonable expectations of privacy will exist in a home, these can be superseded by the public interest in ascertaining whether a person is breaking the law or harming others.²⁷²

5 Rented lockers and contents of bags

Places other than the home, hotels and hospitals to have been considered by Canadian search and seizure cases to have a reasonable expectation of privacy, although not as high, are a rented locker²⁷³ and the contents of a bag.²⁷⁴ A rented locker is a place rented to someone to

²⁷¹ The inviolability of the home is a principle that has existed for centuries that is still relevant today. It was prescient in *Boyd v United States* 116 US 616 (1886), and very recently Justice Scalia noted that “when it comes to the Fourth Amendment, the home is first among equals”, *Florida v Jardines* 133 S Ct 1409 (2013) at 1414.

²⁷² Detailed discussion of the public interest defence is beyond the scope of this thesis.

²⁷³ *R v Buhay* (2003) 1 SCR 631.

²⁷⁴ *R v Truong* 2002 BCCA 315.

store belongings. It presumably requires a key to get into, contains contents that the person who has rented the locker has hidden from public view, and is a space to which only he or she should normatively have access. A bag also has a physical barrier when it is shut, with the difficulty level required to access it suggesting how strong the physical barrier is and therefore the level at which it has a reasonable expectation of privacy. Even if a zip is accidentally left open, there is a normative barrier that a person's bag, like a locker, may contain highly intimate or secret effects. The reasonable expectation of privacy in a bag may also fluctuate slightly on the basis of the place the bag is located.

6 Curtilage and driveway

The curtilage is the land immediately surrounding a house or dwelling excluding any open fields beyond.²⁷⁵ It is not always clear where a curtilage starts and ends but *United States v Dunn* considered four factors: (1) the area's proximity to the home, (2) "whether the area is included within an enclosure surrounding the home", (3) how the area is used, and (4) the extent the area is protected from observation.²⁷⁶ The driveway is often considered as "included within the curtilage".²⁷⁷ However, some courts see it as a separate entity, "analog[ising] a private driveway to an open field"²⁷⁸ or stating that it is "not enclosed in a manner that shield[s] it from [outside] view".²⁷⁹

The curtilage has a high reasonable expectation of privacy because people use it to engage in "intimate activity associated with the sanctity of [the] home and the privacies of life".²⁸⁰ The driveway also has a high reasonable expectation of privacy, although it is often lower than the curtilage because of the implied licence to walk through and knock on the door.²⁸¹ Additionally, the driveway can usually be seen by anyone passing by. Therefore the privacy of the driveway can differ depending on any physical barrier such as a high fence preventing access and obscuring the view, or a behavioural barrier such as any communication asking the general public for privacy. If the driveway is completely hidden from view and there are signs stating "no entry", then the reasonable expectation of privacy will be particularly high.

In the recent New Zealand intrusion case *Faesenkloet v Jenkin* the part of the driveway that was filmed "was a distance away from the *Faesenkloet* home" and was not used exclusively

²⁷⁵ *Oliver v United States* 466 US 170 (1984) at 180.

²⁷⁶ *United States v. Dunn* 480 US 294 (1987) at 301.

²⁷⁷ Vanessa Rownaghi "Driving Into Unreasonableness: The Driveway, the Curtilage and Reasonable Expectations of Privacy" (2003) 11(3) *Am U J Gender Soc Pol'y & L* 1165 at 1166. This article explains why in the author's view a driveway should be afforded the same constitutional protection as a curtilage, and how courts have applied the unfair and "arbitrary" (at 1177) *Dunn* criteria to prevent the driveway being considered part of the curtilage.

²⁷⁸ *United States v Brady* 734 F Supp 923 (ED Wash 1990) at 928.

²⁷⁹ *State v Mitchem* 2366 (Ohio App 1 Dist 2014) at [16].

²⁸⁰ *Boyd*, above n 271, as cited in *Oliver*, above n 275, at 180.

²⁸¹ See *Robson v Hallett* [1967] 2 QB 939 (CA).

by Mr Faesenkloet, instead being “open to the public”.²⁸² Asher J held there to be no reasonable expectation of privacy, stating that “the road end of a driveway that is not in the immediate vicinity of the house, is not an area that is traditionally highly private, even if it is privately owned”.²⁸³ Asher J however, paid scant attention to what arguably gives a driveway a reasonable expectation of privacy: the possibility that it can provide information regarding every time a person enters or leaves the Faesenkloet premises. In other words, the driveway itself could facilitate an unacceptable information gathering exercise on Mr Faesenkloet’s daily interactions. This could have the effect of altering the visitation habits to the property or at least make Mr Faesenkloet uncomfortable that a metaphorical “big brother” is watching. Although information gathering on visitors was arguably not the purpose of Mr Jenkin’s camera, the factor of place considers the likelihood of intruding upon private activity and information. The case is therefore a useful example of the importance of deconstructing the reasonable expectation of privacy test in the manner advocated in this thesis.

7 Open fields

Land that is attached to residential use has a higher expectation of privacy because it is “associated with [the intimacies] of domestic life”.²⁸⁴ It should therefore be more readily protected by the intrusion tort than open fields. Open fields “do not provide the setting for those intimate activities...intended to [be] shelter[ed] from...interference”.²⁸⁵ However, just as distinctions can be made between different parts of the home,²⁸⁶ open fields in a New Zealand context should also be distinguished from each other in terms of differing expectations of privacy. An open field should have a higher reasonable expectation of privacy in circumstances where a desire for privacy has been communicated, for example by a physical barrier such as an unmovable, high, strong fence. Such a physical barrier might also create a normative barrier that society would want to protect the privacy of someone who has gone to those lengths to try and avoid being disturbed. This indicates that when a subjective desire for privacy is communicated strongly, such as by the Hughes barriers, a place that ostensibly lacks a reasonable expectation of privacy can develop one.

8 Criticism of a sliding scale of expectation of privacy: the automobile exception

The question could be asked as to why there should be a sliding scale of reasonable expectation of privacy in different parts of the home or between open fields in different contexts, given that it makes it difficult for a potential intruder to work out whether a

²⁸² *Faesenkloet*, above n 152, at [42].

²⁸³ At [44].

²⁸⁴ Thomas E Curran III “The Curtilage of *Oliver v United States* and *United States v Dunn*: How Far Is Too Far?” (1988) 18 *Golden Gate U L Rev* 397 at 410.

²⁸⁵ *Oliver*, above n 275, at 178.

²⁸⁶ As discussed in VI A 1 at 52-53.

reasonable expectation of privacy is likely to be infringed. American search and seizure case law has indicated distaste for such distinctions and prefers to provide clarity that open fields will always have a much lower expectation of privacy than the home, rather than forcing intruders to second-guess at which point an open field develops an expectation of privacy.²⁸⁷

One of the reasons that a desire for a more blanket than nuanced approach arose was due to the automobile exception for search and seizures in the USA. A motor vehicle was noted in *United States v Chadwick* as having a lower expectation of privacy as “its function is transportation and it seldom serves as one’s residence or the repository of personal effects”.²⁸⁸ It was this sentiment that originally created the automobile exception which essentially meant that a warrantless search of a motor vehicle with “probable cause” to believe it contained contraband was reasonable.²⁸⁹ In New Zealand, cars have also been considered to have lesser reasonable expectations of privacy, with *Jefferies* reasoning this to be so because cars travel on public roads²⁹⁰ and are subject to extensive government regulation.²⁹¹ At the same time, a car with a current warrant and registration which is being driven in a legitimate manner provides no reason to be intruded upon. These considerations should, however, be part of a public interest analysis that occurs after evaluating a reasonable expectation of privacy.²⁹² *Jefferies* is correct that there is a lesser reasonable expectation of privacy in a car compared to the home; nevertheless it still has a high reasonable expectation of privacy. A car has physical barriers of locked doors and closed windows which prevent people entering without permission, and is often perceived as a private space in which personal items are often carried or temporarily stored.

It is this kind of reasoning that enabled *Chadwick* to find that despite there being no reasonable expectation of privacy in a car per se, luggage “is intended as a repository of personal effects” and therefore some containers inside a vehicle may be protected by reasonable expectations of privacy if they are intended to carry personal items.²⁹³ This meant that each container in a car was assessed on whether it was intended as a repository of personal effects, culminating in the decision of *United States v Ross* in which there were two containers: a zipped leather pouch and an unsealed brown paper sack, one containing drugs and the other proceeds from drugs.²⁹⁴ Were one to follow the line of cases on containers, the likely conclusion would be that a zipped leather pouch has a reasonable expectation of privacy because these are typically used for carrying personal items, and because the physical

²⁸⁷ As demonstrated in *Oliver*, above n 275, at 171.

²⁸⁸ *United States v Chadwick* 433 US 1 (1977) at 12.

²⁸⁹ *Carroll v United States* 267 US 132 (1925) at 149. (This concept is also cited affirmatively by *United States v Ross* 456 US 798 (1982) at 799.)

²⁹⁰ *R v Jefferies*, above n 262, at 327.

²⁹¹ At 297.

²⁹² Such a discussion would be beyond the scope of this thesis.

²⁹³ *Chadwick*, above n 288, at 13.

²⁹⁴ *United States v Ross*, above n 289, at 801.

barrier of the closed zip communicates a desire for its contents to remain private. However, sacks do not typically carry personal belongings, particularly when they are unsealed. The fact that the decision could come down to the finest of distinctions, such as whether the sack was sealed or not, was seen as exacting too great a price in having to determine reasonable expectations of privacy through an “unmanageable vortex of factual complexity”.²⁹⁵

Consequently, *US v Ross* broadened the scope of the automobile exception saying that: “if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search”.²⁹⁶ This of course meant that any luggage inside a vehicle did not have a reasonable expectation of privacy that could prevent the searching of said luggage. The broad brush approach to cars, extended to include containers inside cars, has been applied to other situations of reasonable expectation of privacy, such as the previously mentioned open fields in *Oliver*.

Whilst the *Ross* approach might have been necessary due to the policy considerations underpinning the particular context of police searches of cars, it does not translate well into the civil context, and therefore should not be applied more broadly. Were such an approach to be applied to intrusion into seclusion it would certainly provide clear guidelines for reasonable expectation of privacy; but it would be a crude approach at the expense of nuance. It would in effect make the other factors of the tripartite approach, namely intrusiveness and nature of activity/information, almost redundant. It is only by assessing the unique circumstances of each place in regards to the Hughes barriers, and looking at the extent of the intrusion and the activities taking place there, that a sensible assessment can be made.

This thesis rejects the one size fits all approach and favours flexibility in assessing reasonable expectations of privacy when applying intrusion into seclusion, because it makes sense to approach each case on its very specific merits and because it accords with the New Zealand case law on search and seizure that Whata J pointed to in *C v Holland*.²⁹⁷ That means using all three Wilkins factors to assess each example within a category such as open fields, and thereby determine each example’s own unique level of reasonable expectation of privacy. It is not enough to reject a nuanced approach by bringing up an example of a case where flexibility in assessing reasonable expectations of privacy is problematic, such as that described in *United States v Ross*, and use it to justify an overly simplistic approach to a concept of detailed complexity. It is not too much for private citizens to consider open fields or luggage with greater barriers in place, or which are more likely to contain large amounts of personal information, as potentially deserving a reasonable expectation of privacy.

²⁹⁵ Wilkins, above n 8, at 1094-1095.

²⁹⁶ *United States v Ross*, above n 289, at 825.

²⁹⁷ At [25]-[27].

9 Written correspondence

One place in which there should be a high reasonable expectation of privacy is in “personal papers, such as diaries, personal correspondence and other documents revealing the personal lifestyle of that person”.²⁹⁸ This is because there is an assumption that personal papers are very likely to reveal personal information about an individual. For example in *Birnbaum v USA* it was held to be an intrusion into seclusion that the Central Intelligence Agency covertly opened and reproduced “first class mail which American citizens sent to, or received from, the Soviet Union” for twenty years.²⁹⁹

In the modern age this would almost certainly extend to text messages, emails or Facebook private messages, as for similar reasons to personal papers there should be a high reasonable expectation of privacy in the likes of a mobile phone or email inbox. These places will invariably reveal a large amount of personal information. Even if a person asked a friend to hold onto a non-password protected phone for a few minutes while he or she went to the bathroom, that would still not amount to acceptance that the contents of said phone could be perused with abandon. This would be a bit like an invited guest in a person’s house looking through the cupboards while the host was out of the room.

The New Zealand tort should recognise however, that there can be some fluctuation in the reasonable expectation of privacy depending on the place where a mobile phone or personal letter is found and scrutinised. Intruding upon a phone in a person’s house might have a higher reasonable expectation of privacy, for instance, than intruding on a phone discovered on a park bench.

10 Public places

The lowest reasonable expectation of privacy occurs in a public place, as previously suggested in the BSA context.³⁰⁰ In most cases a public place does not have a reasonable expectation of privacy. Intuitively this is because when people are in public they know that everything they do can be seen by others. However, a public place should not preclude there being a reasonable expectation of privacy.³⁰¹ As Elias CJ argued, “if those observed or overheard reasonably consider themselves out of sight or earshot, secret observation of them or secret listening to their conversations may well intrude upon personal freedom”.³⁰²

²⁹⁸ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 918.

²⁹⁹ *Birnbaum v United States* 588 F 2d 319 (2d Cir 1978) at 321.

³⁰⁰ See above in III C 1 at 31.

³⁰¹ See above in V D at 47.

³⁰² *Hamed v R*, above n 154, at 320 per Elias CJ dissenting.

Hosking in the context of publicity of private facts noted that “in exceptional cases a person might be entitled to restrain additional publicity being given to the fact that they were present on the street in particular circumstances”.³⁰³ There are exceptional cases which demonstrate this. For example *Daily Times Democrat v Graham* found liability for a photograph taken of a woman whose dress was accidentally blown up.³⁰⁴ *Andrews*, in a private facts context, held that there was a reasonable expectation of privacy in the conversation despite the incident occurring in public.³⁰⁵ Intrusions in public places can therefore give rise to liability in extreme situations; “a purely mechanical application of legal principles should not be permitted to create an illogical conclusion”.³⁰⁶ Hence it should not be automatically assumed that there can be no liability in such a location. Instead, a public place should provide a starting point that there is a much lower reasonable expectation of privacy, therefore requiring that the actions be particularly intrusive and infringing on obviously sensitive activity or information, in order to find liability.

Whilst the level of intrusiveness and the nature of the activity or information will often be determinative as to whether there is a reasonable expectation of privacy in a public place, there must also be analysis of the public place itself. Not every public place has the same reasonable expectation of privacy and must be assessed on its merits by such factors as physical and normative barriers. Consequently, a person behind a bush has a higher expectation of privacy than a person standing in the middle of an open field both because a bush creates a physical barrier, and because normatively a person who is hidden from view should have a higher societal expectation not to be intruded upon. Additionally, a person on a little used side street has a higher expectation of privacy than a person in a busy shopping mall, and in *Shulman* the fact that the wreckage of the accident was located off the highway created a higher reasonable expectation of privacy than if the cars had been in the middle of the road.³⁰⁷

An assessment of a public place should examine both empirical and normative considerations. Empirical considerations are the actual probability that “there will be a privacy incursion in this situation”.³⁰⁸ A smaller number of people will see a person behind a bush than will see that person in the middle of an open field, and far fewer people will view a person in a quiet side street than on a busy main road. As previously indicated, normative considerations are those that indicate, based on social norms, when society objectively believes privacy should be respected. Empirical considerations intertwine with normative

³⁰³ *Hosking*, above n 5, at [164].

³⁰⁴ *Daily Times Democrat v Graham* 276 Ala 380 (1964). This is discussed further in VI B 2 (a) (ii) at 74.

³⁰⁵ *Andrews*, above n 193, at [67].

³⁰⁶ *Daily Times Democrat*, above n 304, at 383.

³⁰⁷ This is also discussed in VI C 2 (d) at 93.

³⁰⁸ Joshua Dressler *Understanding Criminal Procedure* (3rd ed, LexisNexis, New York, 2002) at 101 as cited in Daniel P O’Gorman “Looking out for Your Employees: Employers’ Surreptitious Physical Surveillance of Employees and the Tort of Invasion of Privacy” (2006) 85 Neb L Rev 212 at 245.

considerations in regard to reasonable expectations of privacy. When the prima facie normative considerations suggest that there may be no reasonable expectation of privacy, because for example the intrusion has occurred in a public place, this can potentially change based on empirical considerations. If the place is such that despite it being nominally public it is unlikely that anyone would hear the conversation, then there is more likely to be a reasonable expectation of privacy in the location. For example, the actual amount of people in a place can change the extent to which it has a reasonable expectation of privacy. A normally busy shop in which people can usually overhear parts of other people's conversations may have a different reasonable expectation of privacy on a day when very few customers visit the shop. Normatively, society might expect that if no-one is around, a reasonable expectation of privacy may be created more easily.³⁰⁹

All this means that public and private should exist on a spectrum rather than be classified as binary notions. Despite the fact that both are nominally public, there is a huge distinction between being filmed in a very public protest on parliament's steps, and sitting on the roadside of a severely underpopulated rural area. There are also situations that are far more complex to place on the privacy spectrum, which sit in between these two more obvious examples. For example, people with no banners sitting in the back row of a sport's match that is attended by 100,000 people might expect to be anonymous, and therefore assume that the camera is not pointing at them, but the fact that the game is so well attended and is being simultaneously broadcast to millions, indicates that they should know the risk.

The limits of the view that public and private are binary are exemplified in the BSA decision of *Davies v TVNZ*. In this decision the complainant was unsuccessful because even though he was collecting shellfish in Whangaroa Harbour where a limited number of people could view him, he was considered to be in a public place.³¹⁰ This decision neglected to consider that public place is on a sliding scale. A person can still suffer an actionable intrusion if a small subset of the public is able to see what is occurring. Additionally, even in some very busy places there are conversations in which it would be improbable for the participants to be overheard. Therefore the BSA decision of *CanWest TVWorks Ltd v XY*³¹¹ may also have been a poor one. Although the filmed conversation was deemed to occur in a public place due to it occurring at a busy airport check-in counter, it was "unlikely that more than a handful of people would have been able to observe [or hear] the exchange".³¹²

³⁰⁹ However, if a person is alone in order to behave in a particularly socially deviant manner, the reasonable expectation of privacy may be overridden by the public interest defence, further discussion of which is beyond the scope of this thesis.

³¹⁰ *Television New Zealand Ltd v Davies* BSA Decision 2005-017, 3 June 2005.

³¹¹ *CanWest TV Works Ltd v XY*, above n 142.

³¹² Moreham, above n 227, at 11.

In the very recent decision of *PG v Television New Zealand Ltd* the BSA upheld an intrusion that occurred in a public place.³¹³ The complainant was filmed in his boat in the Marlborough Sounds, “not wearing any pants”, and with a towel wrapped around his waist instead.³¹⁴ The BSA noted affirmatively³¹⁵ Moreham’s assertion that “potential exposure to passers-by at the time that the events occurred is not enough to make them public for all purposes”.³¹⁶ The BSA held that “no other boats were visible in proximity to him”³¹⁷ and was influenced by the fact “PG stated he objected to the filming”³¹⁸ which constituted a behavioural barrier.

The idea of reserve helps afford a reasonable expectation of privacy even when in public. Altman describes personal space as “an “invisible” boundary or separation between the self and others”³¹⁹ and Solove describes “privacy” as including civility and respect of not interfering in personal space.³²⁰ He elaborates that seclusion is relative and just because some people can see and hear them does not mean the whole world should be able to.³²¹ When the zone of personal space is broken, there is potential liability, depending on how and the extent to which it is broken.³²²

11 Semi-public places

Courts applying the *Holland* tort will also have to decide what to do with places which can be classified as semi-public, such as some places of work. Whilst a hospital can be clearly demarcated between a public waiting area and a private treatment area, some places of employment can easily be viewed as either semi-public or partially private. There is a low reasonable expectation of privacy in places such as retail stores in which anyone can browse (subject to the aforementioned considerations like how busy it is), but there would be a higher reasonable expectation of privacy in the staff quarters to which the general public is not admitted. Sometimes, however, a staff area is not exclusively for staff, creating blurred lines.

In *PETA v Bobby Berosini* a dancer secretly filmed Berosini “grabbing, slapping, punching and shaking” his orang-utans before going on stage to perform with them.³²³ “The area in question was demarcated by curtains which kept backstage personnel from entering the staging area where Berosini made last-minute preparations”.³²⁴ Even though the curtains

³¹³ *PG v Television New Zealand Ltd* BSA Decision 2014-090, 16 June 2015.

³¹⁴ At [1].

³¹⁵ At [16].

³¹⁶ Moreham, above n 227, at 7.

³¹⁷ At [17].

³¹⁸ At [19].

³¹⁹ Altman, above n 19, at 52-53.

³²⁰ Solove, above n 20, at 552.

³²¹ At 552.

³²² This discussion on reserve is complementary to the earlier discussion in II C 3 (a) at 16-17.

³²³ *PETA v Bobby Berosini Ltd* 111 Nev 615 (1995) at 620.

³²⁴ At 620.

created a physical barrier, and Berosini reportedly created a behavioural barrier by demanding that he be left alone with his animals before going on stage, he was not considered to have a reasonable expectation of privacy. Part of the reason is that the video camera was only doing what other backstage personnel were also permissibly doing. That is, they were able to catch glimpses of what Berosini was doing with his animals as he was going on stage. On the other hand, backstage personnel are a subset of the public; his actions were not viewable to the community at large.³²⁵

Likewise in *Bogie v Rosenberg* it was not an infringement of a reasonable expectation of privacy to film a person who had gone backstage to obtain an autograph, as the backstage area was crowded, and the “conversation took place immediately after the comedian exited the stage in the plain view and company of four other individuals”.³²⁶ In both cases the Court held that busy backstage areas are semi-private areas that do not have a reasonable expectation of privacy for the performer or the autograph hunter.

A semi-public area in which a large number of co-workers can see or hear what is going on can still create a reasonable expectation of privacy. In *Sanders*³²⁷ “the plaintiff could have a reasonable expectation of privacy against a television reporter’s covert videotaping”³²⁸ of a personal conversation between co-workers, “to which the general public did not have unfettered access”,³²⁹ despite “the plaintiff lack[ing] a reasonable expectation of complete privacy because he was visible and audible to other co-workers”.³³⁰ The court may also have been influenced by the reporter masquerading as a bona fide co-worker.³³¹

These cases demonstrate that the assessment of a reasonable expectation of privacy in semi-public places is not only interested in how many people can actually hear or see any particular situation, but what section(s) of the public have access to what is occurring and the general likelihood of people using that access. In other words a semi-public place that is only visible or audible to a small subsection of the population has a higher reasonable expectation of privacy than a place that is accessible to a large subsection of the population as the more people who have the potential to witness the events, the more public is the place. In *Sanders* it is the normative consideration of the lack of unfettered public access and the access to only co-workers that is determinative. Having said that, the empirical consideration of the actual

³²⁵ The case also does not take into account how intrusive it is to record something with a video camera, which is discussed below in B 2 (a) at 71-72.

³²⁶ *Bogie v Rosenberg* 705 F 3d 603 (7th Cir 2013) at 610.

³²⁷ *Sanders*, above n 202.

³²⁸ *Medical Laboratory Management Consultants v American Broadcasting Companies Inc* 306 F 3d 806 (9th Cir 2002) at 817 summarising *Sanders*.

³²⁹ *Medical Laboratory*, above n 328, at 815 summarising *Sanders*.

³³⁰ At 817.

³³¹ *Sanders*, above n 202, at 69-70.

amount of people who can see or hear an interaction should always be an important part of an overall determination.

It is suggested, then, that when considering semi-public places in the intrusion context, every area that is not obviously completely public or private must be assessed according to its merits, such as by asking who is permitted to be in the area and how many people are in the vicinity at the time of the intrusion.

12 Digital hacking

The usefulness of the notion of place is not limited to physical locations. Actions like digital hacking or gathering information from the internet can also be analysed in terms of place. The way that place can be conceived in such a situation is as a virtual place. The internet is usually a public virtual place, although sometimes it can be seen as semi-public or even private. Personal files on a person's computer are stored in a private virtual place. In other words, the straightforward intercepting of "information voluntarily transmitted by consumers via the Internet" that is unencrypted and therefore willingly exposed to the public will always have a lower reasonable expectation of privacy than the hacking of a seemingly secure private computer server.³³² "The bulk of the information stored on personal computers ... is not normally made available to the public and therefore should be considered private".³³³

When one considers information voluntarily transmitted by consumers over the internet, this is problematic as it is difficult to categorise what exactly is meant by this phrase. The best way of considering it can be proposed as follows. Any social media post or comment on a message-board, or information written down on a website will have a limited expectation of privacy that is dependent upon how accessible it is to the person who obtains it. If for example a person makes a public Facebook post, this can be viewed by anyone – regardless of whether or not he or she is friends with that person, or even if he or she does not have a personal Facebook profile. This is essentially a virtual public place as people from the public can view it if they wish. As with public places in the physical world, even though this is a virtual public place there will always be the consideration of how many people will view or are likely to view the post. A person with only twenty Facebook friends whose public post is not "liked" (liking provides exposure) or seen anywhere else on the internet is similar to an uninhabited side street. Both are ostensibly in public, but neither have many people there. Alternatively a person who makes a public post which receives 1,000 "likes" from his/her 2,000 Facebook friends, 5,000 "likes" from members of the public, is "shared" by 100 people to his or her own Facebook friends, and is quoted in two news articles, has made a post in a very public way. This is akin to walking down the main street of a city in a very noticeable

³³² Dalsen, above n 182, at 1079.

³³³ At 1080.

way. In the latter scenario it becomes almost impossible to have a reasonable expectation of privacy. However, in the former scenario, there may be an action deemed intrusive enough to infringe a reasonable expectation of privacy. This is harder to ascertain than in the quiet public place in the physical world as will become clear in the second factor of intrusiveness.

A Facebook post with the audience set to “friends” is a semi-private virtual place. If it is read by a Facebook friend it is like having a conversation with a co-worker that no-one outside of the work place has access to. Therefore a Facebook post with the audience set to ‘friends’ that is read by a Facebook friend can have little expectation of privacy with respect to that Facebook friend. The person has voluntarily exposed information to a set number of people who have access to it, with only those people reading it. If, however, someone outside that person’s Facebook friends accesses it, there is more likely to be an infringement of a reasonable expectation of privacy as objectively the person should not have been able to access it. This would be similar to a member of the public hearing a conversation between two co-workers in a workplace that excludes members of the public. It is a semi-private place because only a subset of the public has access to it, and once someone outside that subset reads it, it invokes concerns about a possible infringement of a reasonable expectation of privacy.

Data on the internet that can be considered as existing in a similarly private virtual place as personal files on a person’s computer; is that which no-one, or a very limited number of trusted people, has access to. Such data is that which is encrypted on the internet in order that only the person who encrypted it, and perhaps a small number of trusted associates, is able to view it.³³⁴ The original data which cannot be seen because it has been encrypted can be regarded as existing in a private virtual place.

Ultimately it seems logical to analyse digital hacking in terms of place, in the above way.

B Intrusiveness

Wilkins’ second factor in determining a reasonable expectation of privacy is that of intrusiveness. This is the only one of the factors that focuses on the actions of the intruder rather than what is actually intruded upon, and is therefore couched in the language of infringing a reasonable expectation of privacy rather than having a reasonable expectation of privacy. Although it does not lend itself to easy definition, it has been recognised by judges and academics alike.

³³⁴ Encryption is “the method of turning plaintext information into unintelligible format ...using different algorithms. This way, even if unauthorised parties manage to access the encrypted data, all they find is nothing but streams of unintelligent, alphanumeric characters”: “What does “encryption” mean?” East-Tec – Privacy Protection and File & Disk Encryption <www.east-tec.com>.

Wilkins points out that by considering whether surveillance of the curtilage for marijuana plants was done in a physically intrusive or non-intrusive manner, the Supreme Court in *Ciraolo* emphasised “the degree of intrusiveness [as] a central factor” in a reasonable expectation of privacy analysis.³³⁵ Daniel Pesciotta also notes that “[t]he [Supreme] Court has considered the degree of intrusiveness” as a factor in several Fourth Amendment cases.³³⁶

Whereas the Court in *Ciraolo* emphasised the presence or absence of a physical intrusion, in *Katz* the intrusiveness factor was considered to include anything that “unreasonably intrudes upon the person”.³³⁷ The *Katz* conception of intrusiveness appears to be implicitly favoured in Wilkins’ analysis,³³⁸ and it is explicitly favoured in this thesis. As Powell J (dissenting in *Ciraolo*) persuasively points out, an emphasis on physical intrusion “provides no real protection against surveillance techniques made possible through technology”.³³⁹ *Katz* provides clear flexibility for the intrusiveness enquiry to evolve providing that the focus is on the extent that the perpetrator’s behaviour intrudes upon the victim. This could be through electronic devices, something more overtly physically intrusive, or any method that unacceptably impinges on another person’s dignity and autonomy. As it was expressed in the search and seizure context, “it is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offen[c]e; but it is the invasion of his indefeasible right of personal security, personal liberty and private property”.³⁴⁰

The key points the New Zealand intrusion into seclusion tort should consider in this factor are both the intrusiveness of the method used, and the degree to which the method in question is employed. Intrusiveness can essentially be assessed by considering how demeaning the actions are, and the severity to which they attack a person’s dignity.

1 The degree to which the method in question is employed

The following sections will analyse different methods of intrusion and the extent to which they are intrusive. However, prior to that it is useful to consider the other prong of intrusiveness: the degree to which the method in question is employed. In essence, this considers that intrusions using the same method can still differ in their intrusiveness, depending on such factors as how long they are employed for, how many photographs are taken, or the strength of the zoom lens used.

³³⁵ At 1104.

³³⁶ Daniel Pesciotta “I’m not Dead Yet: Katz, Jones and the Fourth Amendment in the 21st Century” (2012) 63(1) Case W Res L Rev 187 at 238.

³³⁷ Wilkins, above n 8, at 1116-1117.

³³⁸ He points out at 1114 that *Katz* “put[s] to rest a rigid calculus hopelessly inept in the face of advancing technology”.

³³⁹ *Ciraolo*, above n 230, at 218.

³⁴⁰ *Boyd*, above n 271, at 630.

The following comparison of two cases illustrates this. In *Maryland v Macon* there was no reasonable expectation of privacy in the goods in a retail shop such that would prevent two officers from making a brief stop for some purchases to investigate their legality.³⁴¹ However, in *Lo-Ji v New York* officers spending hours in a store conducting wholesale searches meant that reasonable expectation of privacy was infringed.³⁴² Normatively, there is a reasonable expectation that a person's business not be subjected to the intrusiveness of such a comprehensive investigation of its contents. It impedes the owner's ability in his or her private space to conduct business.³⁴³

Another example sees Justice Alito stating that "short-term monitoring of a person's movements on public streets accords with expectations of privacy" but "the use of longer term GPS monitoring in investigations of most offences impinges on expectations of privacy".³⁴⁴ Long-term surveillance is demanding and costly, therefore society would expect empirically, that it is unlikely to be carried out. Normatively it should also be considered as unacceptable because it involves extensive and potentially humiliating incursions into people's lives, impeding their autonomy and damaging their dignity. Whether or not short-term monitoring does accord with expectations of privacy, it certainly has a lower expectation of privacy because it is less intrusive than long-term monitoring. Similarly, the longer video surveillance lasts, the more intrusive it is.

In *Boring v Google Inc*, a vehicle entering an ungated driveway and taking a photograph of the view was not considered intrusive enough to infringe a reasonable expectation of privacy.³⁴⁵ Any person could enter the driveway and see "the external view of the Borings' house, garage, and pool", and the photograph is no more than could be seen on the internet.³⁴⁶ However, if the vehicle had stayed down the driveway for a much longer time despite attempts to get it to leave, and numerous less generic photographs been taken, then the actions would have been more intrusive and potentially infringed a reasonable expectation of privacy.

The degree to which the method in question is employed is also determinative in a number of employee monitoring cases in the USA.³⁴⁷ As discussed in "place"; personal correspondence, such as an email or a text message, generally has a high reasonable expectation of privacy because of the likelihood that it will reveal personal information. When personal

³⁴¹ *Maryland v Macon* 472 US 463 (1985).

³⁴² *Lo-Ji v New York* 442 US 347 (1979).

³⁴³ Both cases are also discussed in Wilkins, above n 8, at 1117-1119.

³⁴⁴ *Jones v United States* 362 US 257 (1960).

³⁴⁵ *Boring v Google Inc* 362 Fed Appx 273 (3rd Cir 2010).

³⁴⁶ At 279.

³⁴⁷ Although these may be covered by the Privacy Act in New Zealand (see above in III B 3 (b) at 30-31) they help elucidate the concept of the degree to which a particular method is employed.

correspondence is sent to a person's place of work, the determining factor will often be the extent to which the employer intrudes upon that correspondence.

In *Roth v Farner-Bocken* it was a potential intrusion into seclusion for an employer to read a letter written to an ex-employee, even though the employer did not expect it to be addressed to the employee personally.³⁴⁸ The reason for this decision is that the employer did not just read enough to ascertain that it was a private letter, but becoming aware that the nature of the information in the letter is private he read all the contents regardless.³⁴⁹ Reading the letter was not intrusive until the employer read enough to ascertain that the letter was a private one. Consequently, the longer that the employer read beyond this point, the more intrusive his or her actions were.³⁵⁰

In summary then, the greater the degree to which the method in question is used, the more cumulatively demeaning and disrespectful it is, and therefore the more intrusive.

2 Intrusiveness of the method used

This section will consider a variety of different methods and how intrusive they are. It will consider for example why electronic surveillance is more intrusive than just watching someone, and whether the likes of harassment, and interference with abandoned property, are intrusive.

(a) Electronic surveillance

Contrary to the indication in *Ciraolo*, some non-physical intrusions are highly intrusive and will easily infringe a reasonable expectation of privacy. For example, technology in contemporary society renders electronic surveillance as one of the most intrusive actions a person can do.³⁵¹ This is highlighted by *C v Holland* in which the video footage of a flatmate in the shower was considered to be so obviously an infringement of a reasonable expectation of privacy that analysis was not required.³⁵²

Video surveillance is likely to have a high reasonable expectation of privacy because it is highly intrusive on a personal level. It is an affront to a people's dignity because it intrudes

³⁴⁸ *Roth v Farner-Bocken* 667 N W 2d 651 (SD 2003).

³⁴⁹ At 661.

³⁵⁰ Similarly, in *Watkins v L M Berry & Co* 704 F 2d 577 (11th Cir 1983) the company informed its employees that their calls were to be routinely listened to, but only long enough to determine if they are of a personal nature. Potential liability was found when the employer continued to listen to a call after becoming aware that it was personal.

³⁵¹ Goldberg, above n 243, at 68 actually considers "an electronic connection to an individual's property ... [as] a physical intrusion, albeit on a microscopic level".

³⁵² At [6] and [99].

upon their ability to keep information private, and to converse intimately with whomever they like.

For example, filming people spending time in their property, by setting up a video camera, is much more intrusive than the naked eye looking through a crack in the fence. This is because recording something with a video is more intrusive than seeing it with the naked eye. “Television surveillance is exceedingly intrusive”, “inherently indiscriminate” and “could be grossly abused”.³⁵³ A video can be watched numerous times allowing the footage to leave a much more indelible impression in the mind than seeing something once in real life. It can also provide extra details, either from a video’s capability to enhance the images or by pausing on a one second moment in real life, for a much longer period of time. It also has the potential to be shared. Therefore if for instance a couple are surreptitiously viewed having sexual intercourse, this will be less humiliating and demeaning for them than if it was captured on video and watched repeatedly.

Video surveillance in comparison with viewing by the naked eye can also relate to the degree to which the method in question is employed. This is because video surveillance has the potential to be carried out for hours or days depending on such factors as battery life and tape space, but a human being undertaking surveillance with the naked eye will normally do so for a shorter period of time because he or she can easily become tired or hungry.

(i) Whether electronic surveillance needs to be viewed or listened to, and whether it needs to capture the person

Intrusive technological methods do not necessarily require that the fruits of such methods be proven to have been viewed or listened to by the intruder. For example in *Harkey v Abate* “see-through panels in the ceiling of the women’s restroom, allowing surreptitious observation of the restroom’s interior”³⁵⁴ were seen as an intrusion into seclusion even though it could not be proven that Abate had viewed the plaintiff or her daughter.³⁵⁵ The case held that “the installation of the hidden viewing devices alone constitutes” infringement of a reasonable expectation of privacy.³⁵⁶ This decision was based on *Hamberger v Eastman* in which installing an eavesdropping device in the plaintiffs’ bedroom was an intrusion into seclusion even though it could not be proved the defendant “overheard any sounds or voices originating from the plaintiffs’ bedroom”.³⁵⁷

³⁵³ *United States v Torres* 751 F 2d 875 (7th Cir 1984) at 882.

³⁵⁴ Gorman, above n 308, at 230.

³⁵⁵ *Harkey v Abate* 346 NW 2d 74 (Mich App 1983).

³⁵⁶ At 76.

³⁵⁷ *Hamberger v Eastman* 106 NH 107 (1964) at 112.

Hernandez v Hillsides suggests that where it can be proven that the perpetrator did not use the equipment to directly record the plaintiff, there will be no actionable intrusion into seclusion.³⁵⁸ This is likely to be because this will show that there was no intentional and unauthorised intrusion on that person. However, care must be taken to prove that no private matters of the plaintiff were recorded, as a person can clearly suffer from an intrusion into seclusion when something associated with that person is intruded upon. For example, perpetual video surveillance of a person's property that never captures the person is still an intrusion which is likely to infringe a reasonable expectation of privacy. Therefore it is only in some circumstances that the absence of the plaintiff from recordings should absolve a potential intrusion into seclusion.

In a situation where it is unable to be proven either way whether the plaintiff has been viewed or heard by the electronic surveillance, or whether the electronic surveillance itself has been viewed or heard, there seems to be an assumption in favour of the plaintiff. It has been briefly suggested that *res ipsa loquitur* be a possibility when it comes to attempted surveillance.³⁵⁹ This would essentially operate such that where surveillance equipment is demonstrated to have been installed, the burden of proof moves to the defendant to prove on the balance of probabilities that he or she did not operate the device when the plaintiff (or anything associated with the plaintiff) was present, or that if the device was operated that he or she did not see or hear anything of or related to the plaintiff on it.

(ii) Electronic surveillance in public places

There is likely to be no infringement of a reasonable expectation of privacy for “[m]ere observation by the naked eye” in a public place.³⁶⁰ This indicates that in order for intrusions in public places to be actionable, the intrusiveness of electronic equipment is generally required. Despite Prosser's contention that it is not an invasion of privacy to follow a person or take his or her photograph in a public place,³⁶¹ every potential intrusion in a public place must be assessed on its merits as to its intrusiveness.

For example an inadvertently embarrassing gust of wind revealing a woman's undergarments was sufficiently intrusive to create a reasonable expectation of privacy in the USA in *Daily Times Democrat v Graham* only because the moment was captured on camera.³⁶² Although it has been argued that taking a photograph “is not significantly different from maintaining the mental impression of the scene”,³⁶³ the earlier discussion demonstrates that there is a

³⁵⁸ *Hernandez v Hillsides* 47 Cal 4th 272 (2009).

³⁵⁹ Gorman, above n 308, at 232.

³⁶⁰ Butler and Butler, above n 298, at 948.

³⁶¹ Prosser, above n 178, at 391-392.

³⁶² *Daily Times Democrat*, above n 304.

³⁶³ Gorman, above n 308, at 251.

compelling difference. People who saw the woman's underwear with the naked eye were not sufficiently intruding as it was something they could not help but see. All they will have is an abiding memory of the incident. However, people taking photographs indicate "that they wish to disseminate footage of the incident or to re-visit it for their own gratification", making the "indignity even worse".³⁶⁴

The level of intrusiveness should also depend upon the extent to which the electronic equipment breaches the Hughes barriers, as intrusiveness can often be measured by objectively determining the subjective expectations of the people intruded upon. Breaching a physical, behavioural or normative privacy barrier can, depending upon the circumstances, be sufficiently demeaning. In the *Daily Times Democrat* example, the dress operates as a physical and normative barrier, even after the dress is blown up. One could compare a dress hiding a person's underwear with a fence around a house indicating a boundary. If the fence had just blown over, the fact that a physical barrier had been erected in the first place would still indicate a desire for privacy.

Electronic surveillance from a public place is generally less intrusive. For example, in *Aisenson v American Broadcasting Company* any footage of the appellant in his driveway was held to be an extremely de minimis invasion of privacy because he was in full public view.³⁶⁵ However, in some contexts electronic surveillance from a public place can be highly intrusive. For instance, drone cameras operating from the public airspace will often film people inside their homes. Although these are usually recorded from a lawful vantage point, such actions are intrusive and deeply humiliating. In addition, there are many things that can be seen from a public place that should never be intruded upon. For example non-consensually watching a couple in bed together is highly intrusive as there is a strong normative barrier in such a situation.

In *Deteresa v American Broadcasting Companies* Deteresa was videotaped in public view speaking to a reporter at her door. The appellant claimed that she could only be seen because of the use of an enhanced lens but no liability was found. Employer employee cases in the USA have been divided on this issue. *Jones* found that the use of enhancing equipment to see things invisible to the naked eye is not sufficiently intrusive to create liability;³⁶⁶ however, *DiGirolamo* held the opposite to be true.³⁶⁷

³⁶⁴ Moreham, above n 228, at 634.

³⁶⁵ *Aisenson v American Broadcasting Company* 220 Cal App 3d 146 (1990).

³⁶⁶ *ICU Investigations Inc v Jones* 780 So 2d 685 (Ala 2000).

³⁶⁷ *Digirolamo v Anderson & Associates Inc* 10 Mass L Rptr 137 (Mass Super 1999). This case quotes search and seizure case *United States v Taborda* 635 F 2d 131 (2d Cir 1980) at 139 affirmatively, that "enhanced viewing of the interior of a home [impairs] a legitimate expectation of privacy" whereas unenhanced viewing does not. Although finding the unenhanced viewing of a home's interior not to be intrusive is problematic, the case aptly portrays enhanced viewing as worse.

This thesis contends that electronic surveillance from public places of anything associated with a person, and which can only be seen with the aid of technology, is intrusive because the person does not expect to be observed and it can cause his or her dignity to suffer. Digitally enhancing a person's actions, appearance, or belongings should have an arguable reasonable expectation of privacy as subjectively and normatively those aspects surrounding a person should not be intruded upon by electronic surveillance. If electronic surveillance does occur, it will naturally be more intrusive if the equipment is used to record the moment in its entirety than if it is used purely to enable everything to be adequately viewed and heard.

(b) Electronic recordings of conversations

Electronic enhancement and recordings of conversations should be considered sufficiently intrusive to infringe a reasonable expectation of privacy in intrusion into seclusion in New Zealand. As *Katz* states, "interception of conversations that are reasonably intended to be private" could constitute a reasonable expectation of privacy.³⁶⁸ *Shulman*, in which a microphone was attached to the rescue nurse in order to capture and record her entire conversation with the accident victim, provides such an example.³⁶⁹

Sanders and *Shulman* both point out that "[w]hile one who imparts private information risks the betrayal of his confidence by the other party, [there is] a substantial distinction ... between the second[-]hand repetition of the contents of a conversation" and recording it for future use".³⁷⁰ Notably, *Sanders* also states that, "a person may reasonably expect privacy against the electronic recording of a communication, even though he or she ha[s] no reasonable expectation as to confidentiality of the communication's contents".³⁷¹ Regardless of the place the conversation occurs, and the nature of the information contained within that conversation, recording a conversation can be so intrusive in itself that it infringes a reasonable expectation of privacy.

In summary, hearing snippets of other people's conversations is an unavoidable concomitant of being part of society, which even when summarised to another person is not intrusive. However, as soon as it is recorded, or made more audible by the use of electronic equipment, there is often sufficient intrusiveness to invoke a potential reasonable expectation of privacy.

³⁶⁸ *Katz*, above n 148, at 362.

³⁶⁹ The reasonable expectation of privacy in the conversations in *Katz* and *Shulman* will be discussed further in VI C 2 (b) at 89 and (d) at 93-94 respectively.

³⁷⁰ *Ribas v Clark* 38 Cal 3d 355 (Cal 1985) at 360: quoted by *Sanders*, above n 202, at 72 and *Shulman*, above n 141, at 492. The sentiment and part of the quotation is also used by *Medical Lab*, above n 328, at 815.

³⁷¹ *Sanders*, above n 202, at 72 drawing on *Shulman*.

(i) Participant recordings

Alpha Therapeutic Corporation v Nippon Hoso Kyokai, in which a person answered the door and was asked questions by a reporter who was secretly recording the conversation,³⁷² raises an interesting question. Is it intrusive for a person to surreptitiously record a conversation in which he or she is a participant? This section considers whether unauthorised participant recordings should be an intrusion into seclusion in New Zealand.

In *Alpha Therapeutic* there was no agreement for an interview beforehand and no subsequent consent to being recorded. Although McAuley did not know that he was being recorded, he knew he was being interviewed by a reporter and therefore that his words might be reported. The case considered the above quote from *Sanders*, that “a person may reasonably expect privacy against the electronic recording of a communication, even though he or she had no reasonable expectation as to confidentiality of the communication’s contents”,³⁷³ as determinative. Consequently, the recording of McAuley’s specific comments was considered sufficiently intrusive to infringe a reasonable expectation of privacy.

In comparison, in *Deteresa v American Broadcasting Companies* a reporter speaking to Deteresa at her door, and making an audiotape of this conversation,³⁷⁴ was held not to be an intrusion because “Deteresa spoke voluntarily and freely with an individual whom she knew was a reporter. He did not enter her home, let alone did he enter by deception or trespass”.³⁷⁵ It was not considered sufficiently offensive, or as it should more aptly have been expressed, was not enough to infringe a reasonable expectation of privacy.

In addition, *Holman v Central Arkansas Broadcasting Co*, in which a TV reporter recorded Holman loudly complaining while he was in custody for drunk driving,³⁷⁶ claimed that “use of a device to record [speech] cannot create a claim for invasion of privacy when one would not otherwise exist”.³⁷⁷ Whilst unauthorised participant recordings such as those in *Deteresa* and *Holman* do not seem as intrusive as those involving entering somewhere by deception, they should still potentially be intrusive enough to infringe a reasonable expectation of privacy.

In *Medical Laboratory Management Consultants v American Broadcasting Companies (Medical Lab)* there was no liability for an unauthorised participant recording which occurred as a result of entry by deception by a reporter masquerading as a business person.³⁷⁸

³⁷² *Alpha Therapeutic Corporation v Nippon Hoso Kyokai* 199 F 3d 1078 (9th Cir 1999) at 1083.

³⁷³ *Sanders*, above n 202, at 72.

³⁷⁴ *Deteresa v American Broadcasting Companies Inc* 121 F 3d 460 (9th Cir 1997) at 462-463.

³⁷⁵ At 466.

³⁷⁶ *Holman v Central Arkansas Broadcasting Co Inc* 610 F 2d 542 (8th Cir 1979) at 543.

³⁷⁷ At 544.

³⁷⁸ *Medical Lab*, above n 328, at 819. The facts of this case will be looked at more closely in VI C 2 (e) at 94-95.

However, this is because Arizona law does not have the same breadth of protection against electronic communications as California. Legislation in Arizona allows “any person present at a conversation [to] record [conversations] without obtaining the consent of the other parties to the conversation”.³⁷⁹ The legislation “reflects a policy decision by the State that the secret recording of a private conversation by a party to that conversation does not violate another party’s right to privacy”.³⁸⁰

In Canada search and seizure case law the Supreme Court held in both *R v Duarte*³⁸¹ and *R v Wiggins*,³⁸² that “an undercover police officer could not legally record a conversation in which he was a participant, without either the consent of all parties or a court order”.³⁸³ Jonathan Colombo claims that many courts in the US make a “distinction ... between third party interception of a conversation and unauthorised participant recording of a conversation”, and that *Duarte* and *Wiggins* “render [that distinction] inapplicable”.³⁸⁴

This thesis contends that unauthorised participant recordings will, in the vast majority of circumstances, be sufficiently intrusive to infringe a reasonable expectation of privacy.³⁸⁵ In general, to suddenly learn that one’s throwaway statements have been recorded by the other party in a conversation is an unreasonable indignity to suffer. As well as being degrading, the unconsented recordings of conversations would, from a wider perspective, lead to a person undertaking greater self-censorship and having less autonomy. In other words, if surreptitiously recording a conversation is not considered intrusive then people will worry about what they say due to the fear of it being recorded in perpetuity.

(c) Computer Hacking

Coalition for an Airline Passengers' Bill of Rights v Delta Air Lines Inc. had no difficulty in finding that hacking a person’s private computer and stealing personal correspondence is an intrusion into seclusion.³⁸⁶ This is essentially because computer hacking can be considered a similar form of electronic surveillance as taking a video of people inside their home. It is the use of electronic equipment to obtain personal information or see something intimate about a person, which he or she does not consent to be seen or known. It is therefore equally as intrusive as traditional methods such as video surveillance. Although users may empirically

³⁷⁹ *Medical Lab*, above n 328, at 816 interpreting statute Ariz Rev Stat § 13-3005.

³⁸⁰ At 816.

³⁸¹ *R v Duarte* 1990 1 SCR 30.

³⁸² *R v Wiggins* 1990 1 SCR 62.

³⁸³ Jonathan G Colombo “The Right to Privacy in Verbal Communication: The Legality of Unauthorised Participant Recording” (1990) 35 McGill L J 921 at 937.

³⁸⁴ At 937.

³⁸⁵ A participant video recording has also created liability. In *Lewis v Legrow* 670 NW 2d 675 (Mich App 2003). a person having consensual sexual intercourse secretly and non-consensually records the intimate act and an intrusion into seclusion is found.

³⁸⁶ *Coalition for an Airline Passengers' Bill of Rights v Delta Air Lines Inc* 693 F Supp 2d 667 (SD Tex 2010).

be quite likely to suffer a form of cyber-attack at some point in their digital lives, there is absolutely a normative and subjective expectation that such behaviour will not be carried out. It is arguably no less intrusive than the act of rummaging through a person's drawers containing private correspondence.

In the same way that video surveillance can occur to a greater or lesser extent, computer hacking comes in many forms and in many degrees. In general, the higher percentage of a person's files intruded upon, the more intrusive it is. At the highest end of the intrusiveness scale would be hacking into every single one of a person's computer files and taking copies. If those files were looked at but copies were not made this would also be highly intrusive, but less so. This is because copying a file, like recording a conversation or video, enables it to be viewed again at any time. A person will be unable to remember every detail of a file he or she views, but taking a copy of it ensures that the details will be available to the intruder, or any person the intruder wishes to show it to, at any time he or she likes. At the lowest end would likely be such actions as simply disrupting the computer's operation without viewing a person's files. There are a variety of methods of computer hacking and all of them are susceptible to either particularly prolonged and intrusive use, or merely providing an annoyance.

It is very unlikely that intrusiveness will occur in a virtual public place. When something is posted in public and receives wide exposure one cannot intrude upon it. The post is there to be seen and has been viewed by many people; therefore even taking a copy of that post is not intrusive as this is like taking a photograph of someone walking down a busy main street without incident. Additionally, when people hoping for wide exposure only receive a few views for their public internet posts, the desire for exposure will prevent it from being intrusive for others to access it. This is akin to it not being intrusive for someone to film a widely publicised public lecture in which only six people are in attendance.

As pointed out in the discussion of place, the comparison of the rarely viewed public internet post with the uninhabited side street, whilst being useful as a conceptual tool, has its limitations. The reason it is harder to ascertain sufficient intrusiveness in a rarely viewed public internet post than in a person's actions in an uninhabited side street, is because in order to do so, the internet post must be posted with the expectation that although it is accessible to anyone, only a small subset of people will read it (such as a post on a rarely visited public forum). There must also be an expectation that the author of the post or host of the site will remove the post within a short period of time of its posting, similar to the expectation one usually has in an uninhabited side street that the person will only be there for the time it takes to complete what he or she is doing, and that once the person leaves it is physically impossible for him or her to be intruded upon any longer. Such an expectation or reality will rarely exist as unlike physically secluded public areas, people tend to have the reasonable

expectation that things will be posted indefinitely on the internet, whether or not they are. Viewing the post can never be intrusive because that is akin to someone seeing the person in the uninhabited side street with the naked eye; it is only if a copy is made that intrusiveness will be invoked, just as the uninhabited side street requires photographs to be taken before sufficient intrusiveness can occur.

Intrusiveness may occur in a semi-private virtual place. In the earlier example of the Facebook post shared to Facebook friends viewed by a non-Facebook friend, this may or may not have resulted from intrusiveness that infringes a reasonable expectation of privacy. If the Facebook friend showed it to a non-Facebook friend there would be no reasonable expectation as this is similar to someone passing on second-hand information. However, if it was obtained by hacking into the person's Facebook profile, or another person's Facebook profile who is Facebook friends with the person who wrote the post, then the intrusive electronic method of hacking has been introduced. In the latter example of hacking into the profile of a Facebook friend of the person, this has similarities with a person pretending to be a workmate (*Sanders*)³⁸⁷ or a business person (*Medical Lab*)³⁸⁸ in order to hear conversations that were not meant for his or her ears.

The degree to which intrusiveness occurs should be based around a vast range of factors such as the extent to which a person intrudes, whether the material intruded upon is likely to be personal or not based on its location and the type of file it is, and whether the hacking completely disables a computer's operation or if it can continue to be used. The intrusiveness of every situation should be closely assessed by considering how demeaning the intrusion is, and the extent to which it undermines a person's dignity.

(d) Direct intrusions on a person's body or a person's body samples

Search and seizure case law has often found a high reasonable expectation of privacy for direct intrusions made on a person. At the most serious end of the spectrum is touching the individual without consent, for example a search to "find [and remove] hidden items in, on or about [the] person".³⁸⁹ Within that category, one might postulate that the worst direct intrusions on people will involve stripping them naked and searching their body cavities. This is demeaning, highly invasive, attacks a person's dignity and both reveals and interferes with the naked body that a person tends to keep hidden from the outside world. A frisk, which involves no stripping or inspection of body cavities, is still highly intrusive, although the indignity suffered is less.

³⁸⁷ As discussed in VI A11 at 66.

³⁸⁸ As discussed in VI B 2 (b) (i) at 76-77.

³⁸⁹ Butler and Butler, above n 298, at 943.

The non-consensual taking of samples such as “blood, sweat, urine, breath, hair, sputum [and] buccal swabs”³⁹⁰ directly from an individual, such as “the insertion of a needle to draw ... blood”,³⁹¹ is also considered to be particularly intrusive in New Zealand and US search and seizure. It provides a good example because of the importance of bodily integrity, the potential for personal information concerning a person’s health to be obtained through bodily products (such as by DNA testing), and because the process of directly collecting a sample from a person’s body can be degrading.

An intrusion on a person’s seclusion, unlike a battery, does not necessarily require the touching of a person or his or her body samples. In a search and seizure context in *State v Hardy*, an officer’s request for Hardy to open his mouth so that his mouth could be observed in relation to possession of drugs was seen as a sufficient intrusion upon privacy interests.³⁹² In part this was based on the Californian Supreme Court in *Schmerber v California* stating that individuals have a legitimate privacy interest protecting “searches involving intrusions beyond the body’s surface”.³⁹³

It can also be intrusive, but less so than the direct taking of bodily samples, to take people’s discarded body samples. In *Froelich v Adair*, which introduced intrusion into seclusion as a cause of action in Kansas, a hospital orderly “obtained combings from Froelich’s hairbrush and a discarded adhesive bandage to which Froelich’s hair was attached”.³⁹⁴ The hair was passed on to Mrs Adair who had it analysed as part of her investigations as to whether her husband was having a homosexual affair. Although the case granted a “new trial on the failure of the trial court to make findings of fact”,³⁹⁵ and therefore did not adequately address whether the taking of hair samples is an intrusion into seclusion, there is a good argument to say that it is. People’s hair is something inherent to them such that hairs should only be removed from a person’s comb or discarded sticking plaster if it is consented to in a specific context, such as cleaning purposes. Tying in with the factor of place, taking a hair sample is particularly intrusive when the used hairbrush or sticking plaster is taken from an intrinsically private space such as a person’s home, hotel room or hospital bed, rather than from the abandoned roadside.

Taking a person’s body sample from another person who legitimately has that sample has also been held to be intrusive. In one of the leading Canadian search and seizure cases, *R v Dymont*, it was held that taking possession of a person’s blood sample from his doctor

³⁹⁰ Butler and Butler, above n 298, at 943.

³⁹¹ Wilkins, above n 8, at 1117.

³⁹² *State v Hardy* 577 NW 2d 212 (Minn 1998).

³⁹³ *Schmerber v California* 384 US 757 (1966) at 769.

³⁹⁴ *Froelich v Adair* 213 Kan 357 (1973) at 358.

³⁹⁵ At 361.

without the patient's permission, and using it for non-medical purposes, was sufficiently intrusive to infringe a reasonable expectation of privacy.³⁹⁶

Although direct intrusions by one citizen on another will often fall within the tort of trespass to the person,³⁹⁷ not all instances of physical intrusion will fall neatly within that action. The last three examples in this section would arguably be located most appropriately in an intrusion into seclusion claim. Courts might therefore be persuaded to incorporate some types of physical intrusions within the scope of the intrusion into seclusion action.

(e) Intrusions on a person's abandoned property

This section considers whether an intrusion into seclusion claim in New Zealand can be successful based on the intrusiveness of interfering with abandoned property. In the search and seizure case of *California v Greenwood*, it was held that rubbish left just outside the curtilage of a house does not generally have a reasonable expectation of privacy.³⁹⁸ Whilst part of the reason for this is that the rubbish is not afforded the high reasonable expectation of privacy that it would be if it were stored in the enclosed backyard of a family home, it raises questions as to whether inspecting rubbish outside the curtilage can ever be intrusive enough to infringe a reasonable expectation of privacy.

In the case, rubbish collectors handed Greenwood's rubbish over to police who found evidence of drugs. In court it was argued that there was a reasonable expectation of privacy in the rubbish bags because they were opaque not transparent, the rubbish collectors were the only people expected to pick them up, and the garbage was to be mingled with the refuse of others and discharged at the dump. In other words there was an expectation that no-one would be aware of the contents of the rubbish and therefore that it would be intrusive, regardless of what was contained within the rubbish, for the contents to be investigated.

Whilst the arguments may have subjectively created a reasonable expectation of privacy it was concluded that objectively, garbage bags left on the side of the street are "readily accessible to animals, children, scavengers, snoops and other members of the public".³⁹⁹ The Court therefore assumedly believed that if so many others could access the rubbish that it would not be intrusive for anyone to do so. This fails to appreciate that a person who puts out the rubbish does so on the basis that only the rubbish collector will access it, and only in a way that his or her job requires. It also neglects to consider that although the rubbish bags could be accessible to the likes of scavengers, this does not mean that a scavenger's actions are not intrusive themselves. Certainly if a scavenger took a person's full rubbish bag home

³⁹⁶ *R v Dymont* 1988 2 SCR 417.

³⁹⁷ Trespass to the person is discussed in III A 2 at 24.

³⁹⁸ *California v Greenwood* 486 US 35 (1988).

³⁹⁹ At 40.

and systematically searched through it in great detail, the extent of the method in question would surely be significantly intrusive. The contents of a person's rubbish may reveal personal information, or details on how a person lives his or her life. Whether or not such information is revealed, a thorough investigation of the contents of rubbish will leave a person feeling violated and lacking in dignity and autonomy.

The essence of intrusiveness in this situation does not lie in an assessment of the location of the rubbish bags. Whilst keeping the rubbish bags just inside the curtilage of a person's property would render it in a private place, animals could still spill the contents onto the street outside of the curtilage, and snoops could potentially lean over into the curtilage and rummage through the contents. It therefore makes little difference to reasonable expectation of privacy that Greenwood's rubbish bags were kept in the public place of just outside the curtilage. There is little normative difference in interfering with rubbish that is inside or just outside the curtilage; it will be equally degrading in both scenarios.

The question of intruding on discarded rubbish has also been analysed in the intrusion into seclusion case of *Danai v Canal Square Associates*.⁴⁰⁰ In this case rubbish was taken from Danai's office "and placed with trash from other offices in a locked community trash room under the control of [Canal's] property managers for disposal of off-site".⁴⁰¹ Canal's property managers went through Danai's rubbish in the trash room, taking a torn letter which they used during a trial "to impeach Ms Danai's testimony as to her understanding of the renewal provision in her lease agreement".⁴⁰² The issue in the case was therefore whether the taking of the discarded torn letter from the trash room was sufficiently intrusive to infringe a reasonable expectation of privacy.

It was concluded by the court that whilst Danai obviously had a subjective expectation of privacy in her discarded rubbish that this was not reasonable. The trash room was not considered a place of seclusion for Danai or her trash as it was under the control of property managers, and she did not even have a key to the room. The problem with this thinking, as alluded to earlier in this section, is that just as in *California v Greenwood* it should be considered equally intrusive for rubbish to be searched inside or outside the curtilage, it should also be equally intrusive for Danai's rubbish to be searched in her office or in the trash room. Therefore the Court's argument that the trash room was "not akin to "the curtilage" of Ms Danai's office space"⁴⁰³ is largely irrelevant.

The Court also argues that "as in *Greenwood*, the property managers and the trash collector could have been expected to sort through Ms Danai's trash and permit others to do the

⁴⁰⁰ *Danai v Canal Square* 862 A 2d 395 (DC Cir 2004).

⁴⁰¹ At 400.

⁴⁰² At 397.

⁴⁰³ At 403.

same”.⁴⁰⁴ However, there is clearly a difference between sorting through rubbish which involves cursory inspection of its contents and reading through discarded pieces of paper for evidence. Abandonment and relinquishment of control should not remove all privacy from refuse, as surely the general expectation is that those who are permitted to remove it should not be entitled to disrespect people’s dignity by trawling through their waste in painstaking detail.

This seems even clearer than in *Greenwood* where the accessibility of the bags to scavengers caused the Court to hold that there was no reasonable expectation of privacy in the rubbish bags. Here the trash room was locked to prevent access to scavengers; therefore there is arguably a stronger reasonable expectation of privacy in the rubbish. Even though property managers have keys to the locked trash room, and therefore easy access to the rubbish, it is only for the legitimate purpose of disposing of it. Nevertheless, cases in the USA would tend to disagree that it is intrusive to interfere with a person’s rubbish that has been “knowingly and voluntarily ... placed in [the] trash”.⁴⁰⁵

Although it is intuitively less intrusive to interfere with abandoned property than it is to, say, use electronic surveillance, this thesis contends that in some situations it can be intrusive enough to infringe a reasonable expectation of privacy.

(f) Harassment

Harassment such as by hounding to pay a debt has often been considered sufficiently intrusive to be considered an intrusion into seclusion in the USA. According to the Restatement “there is no liability for knocking at the plaintiff’s door, or calling him to the telephone on one occasion or even two or three, to demand payment of a debt”.⁴⁰⁶ However, when they “are repeated with such persistence and frequency as to amount to a course of hounding the Plaintiffs” this is a breach of a reasonable expectation of privacy.⁴⁰⁷ In *Housh v Peth* the actions were seen as a “campaign to harass and torment the debtor” by ringing six or eight times every day both at home and at work, calling the debtor’s superiors to inform them of the debt, and making calls as late as 11.45pm.⁴⁰⁸ Cases in which vast numbers of phone calls are made or in which a wide variety of means of communication are employed have in some circumstances been sufficiently intrusive to constitute an intrusion into seclusion.⁴⁰⁹ For example *Dunlap v McCarty* described *Collection Consultants Inc. v. Bemel* as being “a classic case of invasion of privacy. In ten months the plaintiff received about fifty collection

⁴⁰⁴ At 403.

⁴⁰⁵ At 402.

⁴⁰⁶ Restatement, above n 138, at § 652B comment d.

⁴⁰⁷ At comment d.

⁴⁰⁸ *Housh v Peth* 165 Ohio St 35 (1956) at 35.

⁴⁰⁹ Jeffrey F Ghent “Unsolicited mailing, distribution, house call, or telephone call as invasion of privacy” (1974) 56 ALR.3d 457 at § 14[b].

letters and seventy phone calls from the defendant, some to the plaintiff's place of employment and many made at irregular hours".⁴¹⁰

Whilst harassment would arguably fit under the Harassment Act in New Zealand, this thesis covered in chapter III why the Harassment Act offers insufficient protection against all such behaviour. It may be that harassment situations which are inadequately protected by the situation could fit under an intrusion into seclusion analysis instead.

(g) Novel intrusions on a person

An intrusion does not necessarily have to fit into a neat category to be intrusive. Interestingly, *Melvin v Burling* considered it an intrusion to order items under another person's name leading to that person receiving demands for payment.⁴¹¹ Whilst this seems to be a relatively novel scenario for an intrusion into seclusion claim, it can be used to defend the point made in chapter II that any intrusion into a realm "that people should be free from the incursions of others" can be held liable.⁴¹² Ordering items under another person's name was seen as demeaning under those circumstances, although it is the consequence of the subsequent demands that would be seen as the more traditional intrusion into seclusion.

Perhaps then, the receiving of spam emails a person has asked not to receive or has opted out from, can be conceived as an intrusion into the private space of the email inbox, a realm in which people should be free from the intrusion of others. This, however, would seem unlikely to ever be so demeaning as to be sufficiently intrusive to infringe a reasonable expectation of privacy.

C Nature of Activity or Information

Wilkins identifies the third factor as "the object or goal of the surveillance".⁴¹³ In analysing this factor Wilkins essentially contends that the more private the information gathered by the search and seizure, the higher the reasonable expectation of privacy. Intruding upon personal information undermines people's ability to decide for themselves the extent to which their personal information is communicated to others, and violates the core of a person's privacy.

⁴¹⁰ *Collection Consultants Inc v Bemel* 274 Ark 223 (1981) as cited in *Dunlop v McCarty* 678 SW 2d 361 (1984) at 364.

⁴¹¹ *Melvin v Burling* 141 Ill App 3d 786 (Ill 1986).

⁴¹² Solove, above n 20, at 555.

⁴¹³ At 1080. This would seem to imply that it concerns the ultimate purpose of an intrusion. However, when Wilkins discusses *Dow* as "emphasis[ing] the significance of the object of surveillance" (at 1105), his rationale is based on the nature of information obtained. That is, the photographs in *Dow* "concerned simple physical details regarding the layout of the manufacturing facility" (Wilkins at 1105) rather than "confidential discussion[s]", "identifiable human faces", or "secret documents" (*Dow* at 239). Therefore, the non-intimate nature of the information is determinative in finding that a reasonable expectation of privacy is not infringed. Object is not therefore employed in this context as a synonym for purpose.

As *Katz* states, “what a person knowingly exposes to the public”⁴¹⁴ will generally not create liability.⁴¹⁵ Wilkins therefore analyses the “object of the surveillance” as being about the extent to which the information obtained is personal.

Whilst Wilkins’ conception of “object” largely ignores the nature of the activity that is being intruded upon, it is cursorily mentioned once in his analysis. He states that “the very nature of the object, undertaking or activity sought to be shielded from official scrutiny plays an important part” in reasonable expectations of privacy.⁴¹⁶ Wilkins is therefore aware that the type of activity intruded upon is important, although he refers to it more in his analysis of “place” than he does in his analysis of “object”. He points out for example, that a person’s home and curtilage should be protected because they are associated with intimate activities.⁴¹⁷

It is suggested that Wilkins’ analysis is clearly more useful if this third factor is re-labelled as being about the nature of activity or information, as this better encapsulates the third factor. The best way of understanding the “nature of activity or information” factor is to provide examples in which the place and intrusiveness are the same but the nature of activity or information is different, thereby creating different reasonable expectations of privacy. In example 1, person A and person B are standing in an open field having a five minute conversation about the weather and the latest English Premier League football results. Person C makes a secret video recording of their conversation from a video camera hidden in a tree. In example 2 person A and person B are in the same part of the open field for five minutes, having sexual intercourse. Person C makes a secret video recording of the activity from a video camera hidden in a tree. If A or B makes an intrusion claim in both scenarios, he or she will have the same reasonable expectation of privacy in the place (a point in the open field) and in the intrusiveness (a five minute secret video recording), but a lower expectation of privacy in a conversation in which no personal details are discussed compared with that engendered by a highly intimate act.⁴¹⁸

As mentioned earlier in this chapter, liability can sometimes be found when one of the three Wilkins factors is absent or has a very low reasonable expectation of privacy. For example,

⁴¹⁴ *Katz*, above n 148 at 351.

⁴¹⁵ The privacy interest of the nature of activity or information therefore has similarities to the privacy interest of the *Hosking* tort, discussed in chapters II and III, as both protect private facts. The reasonable expectation of privacy in the nature of information in an intrusion into seclusion context protects the gathering of information whether or not it is subsequently disseminated. This essentially strengthens the protection of personal information in the New Zealand tort framework.

⁴¹⁶ At 1106.

⁴¹⁷ At 1099 and 1103.

⁴¹⁸ Whilst this leads to the scenario whereby person A and person B doing what appear to be equally culpable things receive different decisions based on the vagaries of what actually transpired; this can happen in many areas of the law. For instance, if A shoots and injures X, then A will be treated more leniently by the criminal law than B who shoots Y in exactly the same circumstances but ends up killing him.

Phillips v Smalley Maintenance Services Inc made clear that “acquisition of information from a plaintiff is not a requisite element” in an intrusion into seclusion action.⁴¹⁹ The case pointed out that for instance, illustration 5 in the Restatement finds liability where a photographer repeatedly telephones a person’s home at various inconvenient times, insisting she allow him to photograph her, and ignores her entreaties for him to stop.⁴²⁰ Such an intrusion into seclusion acquires no more than nominal information from a plaintiff, yet the place and level of intrusiveness is sufficient to breach a reasonable expectation of privacy. Similarly in the *Tigges* case, the Supreme Court of Iowa held that there was an intrusion into seclusion when a husband installed a number of cameras in his wife’s bedroom even though the wife believed that no demeaning material was uncovered, only the “comings and goings” from her bedroom.⁴²¹ Whilst it should have been held that there is a reasonable expectation of privacy in the nature of the information in these “unremarkable activities”,⁴²² the point is that it does not matter what information is found or what activity is intruded upon – the place and the intrusiveness can have a very high reasonable expectation of privacy that makes the nature of activity or information redundant.

This illustrates that it is a combination of the reasonable expectation of privacy in all three factors that achieves an overall determination. Although the focus of this section is on when there will be a reasonable expectation of privacy in the nature of activity or information, given that it is the third and final factor it will also emphasise, where appropriate, how all three Wilkins factors work together.

1 Why intimate activities should be protected

The Alabama Supreme Court in *Phillips* declared that a person’s “emotional sanctum” or psychological seclusion “is certainly due the same expectations of privacy as one’s physical environment”.⁴²³ Whilst each of the factors of place, intrusiveness, and nature of activity or information is related to the effect on a person’s psychological seclusion, it is perhaps the nature of activity or information which goes most to the heart of that query. It may always be demeaning to be intruded upon in certain situations but what will usually clinch the extent to which people feel debased is considering precisely what has been seen or found out about them.

In an intrusion context it is particularly appropriate to focus on the nature of the activity as there are often situations in which minimal information is provided by an intrusion, but in which intimate activities are observed. Protecting these intimate activities means allowing

⁴¹⁹ *Phillips v Smalley Maintenance Services Inc* 711 F 2d 1524 (11th Cir 1983) at 1534.

⁴²⁰ At 1534.

⁴²¹ *Re Marriage of Tigges* 758 NW 2d 824 (Iowa 2008) at 826.

⁴²² At 826.

⁴²³ *Phillips*, above n 419, at 1537.

people greater dignity and respect for their private actions. The more intimate the activity is, the higher the reasonable expectation of privacy. For example, watching two friends play a board game has a lower expectation of privacy than observing someone use the bathroom. This is because people's bodily functions are more intimate than how they play a board game. Actions like those in *C v Holland* that are voyeuristic easily infringe a reasonable expectation of privacy. They will have a negative effect on a person's emotional sanctum, and the more intimate activity or information that is seen, the worse it will be. In situations when it is borderline whether a reasonable expectation of privacy is infringed, the question of the extent to which intruding upon intimate activity or private information degrades the person, will always carry significant weight.

2 Conversations

As indicated earlier,⁴²⁴ a private conversation has a very strong expectation of privacy.⁴²⁵ Indeed Wilkins considers "the highly personal content of a private, interpersonal conversation" as having the highest reasonable expectation of privacy in the nature of the information.⁴²⁶ As Wilkins says, "protecting the privacy of conversations" is more important "than maintaining the secrecy of physical objects located in suburban backyards".⁴²⁷ That is, a person will consider the location of physical objects as far less private than what he or she says in conversation with friends and family. Personal conversations strike to the heart of reasonable expectations of privacy because they promote and preserve the state of intimacy, and the ability to keep conversations secret from others.

Wilkins does not go on to compare and contrast different conversations as to the extent to which they are personal or impersonal. Nor does he consider when it is relevant to analyse the content of the conversations as to the degree to which they should enjoy privacy, compared with when a conversation might be considered personal regardless of what information is revealed. Wilkins is useful for explaining why conversations will generally have a high reasonable expectation of privacy, but it is useful to go further and deal with many of the nuances inherent in the nature of activity and information.

(a) How place and intrusiveness interact with the nature of information in conversations

Any private conversation has a high reasonable expectation of privacy because any private conversation is, in and of itself, a highly intimate activity that contains a significant amount of personal information. That is, there is a high reasonable expectation of privacy in the

⁴²⁴ In VI B 2 (b) at 75.

⁴²⁵ *Katz*, above n 148.

⁴²⁶ At 1121.

⁴²⁷ Wilkins, above n 8, at 1105

nature of the activity of a private conversation per se. Therefore, the fact that a conversation is private, regardless of the contents of the conversation, will be enough to infringe an overall reasonable expectation of privacy when the reasonable expectation of privacy in place and intrusiveness are high. In fact, as will shortly be demonstrated, a conversation occurring in a private place can in itself make a conversation private.

However, when the reasonable expectation of privacy in place and intrusiveness is borderline or low, for example if it occurs in a public place and no recording is made, an assessment of the actual content of a conversation as to how private or intimate the details are can be vital to determining an overall reasonable expectation of privacy. This is because even in a public place with a low level of intrusiveness, the reasonable expectation of privacy can arguably be sufficiently high if the conversation's contents are of a particularly personal nature. How private or intimate the details are that are intruded upon will have a direct correlation with the emotional sanctum of the victim, as the more private the details are the more demeaning it is to have them encroached on.

(b) Conversations in private places

When considering a conversation, it is essential to decide whether it is a private one that is intended for others not to be privy to, or if the participants in the conversation are having an everyday communication in which they are relaxed about whether they can be overheard.

In order to determine whether a conversation will be private, regardless of the content, will require analysing Wilkins' first two factors: place and intrusiveness. This will consider, for example, the location of the conversation and the likelihood both that other people will hear the conversation, and that something private or intimate will be revealed. That is, a conversation that occurs in a private place such as the home will always be private. Similarly, an empirical evaluation that very few people are in the vicinity of the conversation can also render it private. There will be an evaluation of the extent to which a person attempts to preserve the privacy of the conversation, such as the employment of the Hughes physical or behavioural barriers. A physical or behavioural barrier can indicate that this is a location or situation in which personal conversations or intimate activities are taking place. In terms of intrusiveness, a person using technology to enable communications to be heard does not just increase the intrusiveness of the behaviour, but indicates that the participants do not intend to be listened to by others, thereby making the argument that the conversation is a private one more robust.

The fact that the home is an intrinsically private place in which any conversation is a private one is demonstrated somewhat by the Canadian case of *R v Sandhu*,⁴²⁸ which found a

⁴²⁸ *R v Sandhu* 1993 BCCA 1429.

reasonable expectation of privacy in a conversation inside a house, even though it was only being listened to by police officers with ears to the door and no electronic surveillance. *Sandhu* held that any conversation in the home carried on in an ordinary tone of voice has a reasonable expectation of privacy.⁴²⁹ Therefore even the most anodyne of conversations in the home is protected. This is partly because any conversation in the most private of places will invariably reveal something sufficiently private or intimate as to have a reasonable expectation of privacy. However, it is also because people need a space in which they can drop the mask and say anything they like. The sanctity of that free space is not greatly lessened if the weather is being discussed.

Katz also substantiates the point that any conversation in a private place should be deemed to be private. In *Katz*, the FBI put microphones on top of phone booths frequented by the appellant, and recordings were made of the appellant's end of various conversations.⁴³⁰ The appellant closing the door of the phone booth transformed it from a public place to a "temporarily private" one by virtue of enclosing himself inside it in order to use it.⁴³¹ By shutting the door the appellant indicated by the simultaneous use of a physical and behavioural barrier that he was excluding others from hearing his calls, even though he could be observed through the glass. Harlan J states that the critical fact is that a person who occupies a telephone booth "shuts the door and ... [is] entitled to assume that his [or her] conversation is not being intercepted".⁴³² If one is in any doubt as to whether a phone booth is sufficiently private to make any telephone conversation inside it a private one, the fact that the conversation can only be heard with the use of microphones is indicative of a private conversation taking place. The combination of there being a private conversation, and the highly intrusive behaviour of it being enhanced and recorded via the use of microphones, creates an infringement of a reasonable expectation of privacy. As the reasonable expectation of privacy in the place of the phone booth is lower than in a private home, had the actions been less intrusive, the actual content of the conversation may have become relevant.

Cases like *Sandhu* and *Katz* highlight that one of the purposes of the assessment of place is to protect the likely nature of the activity or information that will be revealed, regardless of the nature of activity or information that is actually revealed. Consequently, any conversation in a private place will likely be protected because it is very likely to reveal personal information. The "intrusion interest" focuses on the indignity of the situation, and the long-term effects on intimacy, autonomy and self-censorship. Thus, protecting intrusions on conversations in places where there is a high reasonable expectation of privacy, regardless of whether any private information is revealed, can improve intimacy, autonomy and self-censorship in the long-term.

⁴²⁹ At [47].

⁴³⁰ *Katz*, above n 148, at 348.

⁴³¹ At 361.

⁴³² At 361.

When the combined reasonable expectation of privacy in the place and intrusiveness is low or borderline, a conversation can be considered private by virtue of its highly intimate contents. For example, sometimes a conversation does not appear to be private or seems unlikely to reveal something private or intimate, because say, it is carried out in the earshot of others; but if it contains clearly confidential or personal content it can still be deemed a private conversation. In essence, the nature of the information that is revealed can sometimes determine whether or not it is a private conversation per se. The lower the reasonable expectation of privacy in the place and intrusiveness, the higher the reasonable expectation of privacy in the nature of information must be, in order for an overall infringement of a reasonable expectation of privacy to be found. Sometimes the conversation can be a clearly public one, intended to be heard by a large number of people, and subjected to no intrusive behaviour, in which case the nature of the activity is no longer personal and intimate. This highlights that the Wilkins factors require an ad hoc balancing approach in order to make an overall determination of reasonable expectation of privacy.

(c) Determining if information is personal

As stated in the previous section, when the likely nature of the activity or information is not enough to render the reasonable expectation of privacy in the place as sufficiently high, and the behaviour is not sufficiently intrusive, the actual nature of the activity or information becomes crucial. Indeed, two conversations recorded in exactly the same situation can have materially different overall levels of expectation of privacy depending entirely on the contents of the actual conversation. However, it is not always easy to determine whether a conversation's details are private or not. It is not merely a normative enquiry, but also considers the extent to which the participants of the conversation consider its contents private or otherwise.

Whilst empirical considerations such as the number of people in the vicinity who can hear a particular conversation are more relevant to public place, they can also influence the extent to which information is considered personal. This is because it is a person's attitude towards being heard that indicates subjective expectations of privacy, which can have an effect on the objective determination. Different people consider different pieces of information to have different levels of privacy. The reason for this is that some people feel demeaned by others seeing them do a particular activity while others do not; some people want to boast about personal details while others consider them intensely private. Therefore a person's subjective view on the nature of his or her information can only become objective if it is communicated.

For example, if a person stands on a public rooftop and boasts loudly within earshot of anyone passing by about how big his or her salary is, not only is this a place lacking in reasonable expectation of privacy and is not intrusive because passers-by could not help but

hear it, the nature of the information is not private either. The reason for this is that the subjective expectations of individuals regarding what they wish others to know about their life, can translate to objective expectations if those subjective expectations are communicated. That is, by literally shouting it from the rooftops, the person's information becomes not just subjectively lacking in privacy, but objectively too. This is because he or she has imparted to the outside world that the nature of the communicated information is not considered to be private.

There is a higher reasonable expectation of privacy in the nature of the information, compared with the person shouting from the rooftops, when two people are having a conversation in which they are careless about being overheard. A person who is careless about being overheard can create an objective inference that he or she does not consider the nature of the information in the subject matter to be intensely private, especially in comparison to the person whose conversation is at the level of a whisper. However, this conversation can still indicate some desire for privacy.

A person's subjective expectations of privacy in the nature of the information is not just communicated by a person telling his or her information to everyone, or being careless about who can hear it, it can be communicated by a person's previous actions or attitudes towards the information. This can be explained easily in the non-conversational context of an exhibitionist. People who regularly strip naked in front of strangers will not consider the nature of information in their naked form as private, whereas the default position regarding general people on the street is that their naked form is private by its very nature. Another example would be that if a person writes a blog detailing all of his or her sexual exploits, this is an objective demonstration that the person subjectively does not consider the nature of this information to be private. Consequently, if he or she is overheard discussing this information with another person there will be a much lower reasonable expectation of privacy in it than there would be for the generic reasonable person.

The above examples focus on people's information that might normally be considered private having a lower reasonable expectation of privacy because they have communicated that they are quite happy for other people to know this information. It can also happen that something which is not ordinarily private can have a high reasonable expectation of privacy in the nature of the information, if a subjective expectation for it to be so has been communicated. As pointed out in chapter II, if a person feels acutely sensitive about the privacy of something that general society would consider innocuous, then this will only be protected if it is communicated, such as by one of the Hughes barriers.

In some situations the normative societal view can be so strong that it overrides the objective determination of a person's subjective expectation. In other words, a person communicating a

subjective expectation of privacy is not always enough to create a reasonable expectation of privacy in the nature of the information. This is because what a person communicates about his or her subjective expectation does not automatically translate into a reasonable expectation of privacy; rather it is a factor that is taken into account. In the above example of people being careless about who hear their conversations, and who know that being overheard is likely, the contents of the conversation must be more personal to create a reasonable expectation of privacy. For example, if a high probability of being overheard exists, and the participants appear comfortable being overheard, an obvious societal expectation of confidentiality in the particular conversation can still make the nature of the information private. Additionally, sometimes a person can communicate that he or she considers certain facts to be private and therefore not to be intruded upon, but be effectively overruled by normative considerations. It would be objectively nonsensical for example to enforce a person carrying a sign saying “please do not walk within 10 metres of me” on a busy street.

One case that demonstrates this is *Roberts v Houston Independent School Dist*, in which a teacher was filmed taking a class as part of her teacher assessment and despite her objections.⁴³³ This was held not to violate a reasonable expectation of privacy as she “was videotaped in a public classroom” and “at no point, did the school district attempt to record [her] private affairs”.⁴³⁴ Despite the teacher communicating by her objection to the filming that she considered herself to have a reasonable expectation of privacy, the nature of the activity of teaching was not enough to create one, nor was the nature of the information that came out of her mouth.⁴³⁵

When a person does not communicate subjective expectations in any way, an assessment of the reasonable expectation of privacy in the nature of activity or information will be based on a purely normative societal standard relying on an objective determination of the views of the reasonable person.

(d) Shulman

In *Shulman* a mother and her son were injured in a serious car accident on a California highway. The “car went off the highway, overturning and trapping them inside”⁴³⁶ and Ruth Shulman was “left ... a paraplegic”.⁴³⁷ The lack of people in the public area who could possibly hear the conversation between the nurse and the patient (Ruth Shulman) is largely an

⁴³³ *Roberts v Houston Independent School Dist* 788 SW 2d 107 (Tex App 1990).

⁴³⁴ At 111.

⁴³⁵ In New Zealand this would likely have been dealt with by employment law based on the terms of her teaching contract. However, the case is still instructive as to the type of situation in which communicated subjective expectations do not create a reasonable expectation of privacy.

⁴³⁶ *Shulman*, above n 141 at 474.

⁴³⁷ At 476.

indication of the extent to which the place is public, rather than an indication of the nature of the information that could be obtained from the conversation. In terms of nature of information, what is crucial is that the conversation takes place between a medical professional and a patient as a person's health and injuries are clearly personal. It is also a situation that is generally imbued with an expectation of confidentiality.

The nature of some of the phrases expressed is also relevant. When Shulman stated: "I just want to die. I don't want to go through this" she was expressing a very personal sentiment of worry about her circumstances, which is demeaning to have heard.⁴³⁸ When she revealed that she was 47 and considered herself old,⁴³⁹ there is potentially a reasonable expectation of privacy in this as age can be highly personal. In addition her repetitive comments about the well-being of the rest of her family and questions about whether she was dreaming,⁴⁴⁰ which reveal the disoriented and distressed state she was in, arguably created a high reasonable expectation of privacy in the nature of the information. Intruding on these comments would clearly be disrespectful and lack dignity.

The conversation between Shulman and her nurse was a private one. Although it could be argued that Shulman appeared relaxed about who could overhear her public conversation with the nurse, as she did not communicate her subjective expectations of privacy through a behavioural barrier or any other means, this would be flawed for a number of reasons. One is that a microphone was required in order to hear the entire conversation, which suggests that Shulman was talking so quietly her intention was only for the nurse to hear what she was saying. Another reason is that,⁴⁴¹ Shulman was in no state to be assessing her environment and engaging in such self-censorship. The conversation was imperative in order to increase the chances of Shulman's recovery. A person cannot be expected to self-censor him or herself because of the possibility of there being others in the area when the content that would be self-censored is the very content that must be spoken about in order to save that person's life. Such an expectation would be preposterous.

Such an argument also misses the point that it does not matter whether other people were present at the accident scene, whether Shulman was aware of them, and if so what her attitude might have been towards their listening to her conversation. This is because the reasonable expectation of privacy in the nature of information itself, including the nature of the confidentiality between a nurse and her patient, indicate that this was a private conversation per se.

⁴³⁸ At 476.

⁴³⁹ At 476.

⁴⁴⁰ At 476.

⁴⁴¹ As alluded to in VI A 2 at 54.

(e) Workplace conversations

As suggested in the intrusiveness factor,⁴⁴² in some situations the reasonable expectation of privacy in the place and in the intrusiveness can be so high as to make analysis of the contents of the conversation unnecessary. *Sanders* and *Medical Lab* are two cases in which similar situations are treated differently. In *Sanders* there was no analysis of the contents of the conversation other than commenting, almost as an aside, that “*Sanders* discussed his personal aspirations and beliefs and gave Lescht a psychic reading”.⁴⁴³ This is presumably because such an analysis was unnecessary given that the conversation occurred in a workplace to which the public lacked access,⁴⁴⁴ and given that it was videotaped by a representative of the mass media disguised as an employee of the company. In other words, regardless of what was said between the two workers, the reasonable expectation of privacy in the place was sufficiently high, and the actions suitably intrusive, that the conversation was deemed to be private irrespective of the nature of the information in its contents.

Medical Lab revolved around a workplace conversation in which the content of the conversation was deemed to be determinative. Despite the similarities with *Sanders*, the place and level of intrusiveness was not considered sufficient to infer a reasonable expectation of privacy in the conversation. In this case, ABC producers masquerading as business persons were invited into “a conference room in *Medical Lab*’s administrative offices”.⁴⁴⁵ It was a room that *Devaraj*, the founder and owner of *Medical Lab*, testified was generally only used for “private conversations and meetings of a confidential nature”.⁴⁴⁶ The conversation in the conference room was recorded, but no personal information was revealed, nor did *Devaraj* state that any of the conversation was confidential.⁴⁴⁷ Consequently, there was considered not to be a reasonable expectation of privacy in the conversation.⁴⁴⁸

In the author’s view there should have been a reasonable expectation of privacy regardless of whether there was anything private in terms of the nature of activity or information. *Medical Lab* is a workplace in which nobody had access to the conference room unless they had been invited. Although it was thought significant that *Devaraj* had denied the ABC producers access to his own office but invited the strangers into the administrative offices and on a tour of the premises, thereby waiving any reasonable expectation of privacy, this logic fails to stand up to scrutiny. The conference room was a semi-private place (unlike the adjoining laboratory which is open to the public) to which no-one else beyond prospective customers

⁴⁴² VI B 2 (b) at 75.

⁴⁴³ *Sanders*, above n 202, at 70.

⁴⁴⁴ As mentioned in A 11 at 66.

⁴⁴⁵ *Medical Lab*, above n 328, at 810.

⁴⁴⁶ At 810.

⁴⁴⁷ At 811.

⁴⁴⁸ At 819.

and other authorised persons were ever permitted access, and the ABC producers were only admitted on false pretences because of who they aberrantly represented themselves to be.⁴⁴⁹

The nature of information in the conversation did not imbue it with a reasonable expectation of privacy because it was a “business conversation amongst strangers in business offices”.⁴⁵⁰ That is, “the topics of conversation were restricted to discussions of the industry as a whole and to the general practices at Medical Lab”.⁴⁵¹ Essentially, ABC obtained information about Medical Lab’s business operations which the court considered to lack privacy because “privacy is personal to individuals and does not encompass any corporate interest”. This is predicated upon § 652I of the Restatement which states that “[a] corporation, partnership or unincorporated association has no personal right of privacy”.

Although as William Dalsen points out, describing *Medical Lab* as involving a business conversation is “pure fiction because it was an obvious pretext to enter the lab”,⁴⁵² it is indeed true that the nature of information that Medical Lab imparted in the conversation had no intrinsic private value and therefore a low reasonable expectation of privacy.⁴⁵³ The case nevertheless raises an important question about the dividing line between business and personal information, which can arguably intersect, at least at the margins. For example, were one to pierce the corporate veil and therefore treat the company’s affairs as an individual’s affairs, one could consider the practices of a company to reflect such things as the ethical compass of the owner, his or her financial and business circumstances and capabilities, and his or her general approach to life. These may still register low on the reasonable expectation of privacy in the nature of information factor but they are at least likely to exist on the scale.

3 Public places

A reasonable expectation of privacy in a public place will usually only be able to be found if there is an intrusion upon highly intimate activity or personal information (in conjunction with a high level of intrusiveness). However, the higher the reasonable expectation of privacy in the public place, such as a situation in which very few people are present, the lower the reasonable expectation of privacy that is required in the nature of the activity or information (or the less intrusive an intrusion needs to be).

⁴⁴⁹ As mentioned in the intrusiveness factor, the fact that it was recorded would likely be sufficient to find a reasonable expectation of privacy in New Zealand, particularly as the blatant deception involved to obtain such a conversation is deeply intrusive. However, this was prevented by the narrowness of Arizona’s law.

⁴⁵⁰ *Medical Lab*, above n 328, at 819.

⁴⁵¹ *Medical Laboratory Management Consultants v American Broadcasting Companies Inc* 30 F Supp 2d 1182 (D Ariz 1998) at 1189.

⁴⁵² Dalsen, above n 182, at 1082.

⁴⁵³ Discussing the company’s affairs lends itself instead to the argument that there is a breach of confidence. See chapter 5 in John Burrows and Ursula Cheer (eds) *Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015).

Returning to the example of *Daily Times Democrat*, the reasonable expectation of privacy in the nature of activity/information was high because the photograph that was taken was one of the woman's underwear revealed in a gust of wind. A person's undergarments and general private area is particularly intimate. Knowing that others have seen this when it is supposed to be hidden is likely to have a deleterious effect on a person's emotional sanctum. The exposed area is something that only very specific people have access to view, such as a lover or a doctor, and to have a stranger take a photograph of that is not just upsetting from an intrusiveness perspective but also in the nature of the information that was caught on camera.

Liability was able to be found in the case because the nature of the information had a high reasonable expectation of privacy and taking a photograph in the circumstances was highly intrusive. If a photograph was taken of a person walking without incident in public it is unlikely there would be a reasonable expectation of privacy. Even though taking a photograph can have a high reasonable expectation of privacy in terms of the intrusiveness factor, there is no private information to be gleaned or intimate activity to be seen. Similarly, a person who only sees the woman's underwear with the naked eye would not infringe a reasonable expectation of privacy.⁴⁵⁴

In public places, it is ultimately the combination of the intimate information of what is seen and the fact that it is captured on camera that can enable an intrusion into seclusion to succeed. As Moreham convincingly argues, "taking a ... photograph in a public place should be legally actionable if the person photographed is involuntarily having an intimate or traumatic experience".⁴⁵⁵

(a) Stalking and nature of activity/information

In extreme situations information gathered in public places can be an invasion of privacy, particularly where stalking is involved. For example, in *Kramer v Downey* when a married man ended his extra-marital affair his lover was so enraged that she followed him to and from work, to school events he was at with his children, and to restaurants.⁴⁵⁶ There was a high expectation of privacy in the nature of the information because the accumulation of all the information that could be acquired from following the man was beyond what a reasonable person would expect someone to acquire from his or her public exploits. Essentially it is reasonable that a person not be followed so much in public that a general profile of that person be able to be put together. It is a combination of the nature of the accumulated information and the effect of the intrusiveness of the stalking/harassment on a person's emotional sanctum which creates liability for intrusion into seclusion in this instance.

⁴⁵⁴ This was also discussed in VI 2 (a) (ii) at 73-74.

⁴⁵⁵ Moreham, above n 228, at 634.

⁴⁵⁶ *Kramer v Downey* 680 SW 2d 524 (Tex App 1984) at 525.

Although the precise situation in *Kramer* might be covered by the New Zealand Harassment Act, as previously discussed the remedies may be insufficient. In any event, this example is a useful way of conceptualising the idea that the more extensive the information obtained, the more likely there is to be an infringement of a reasonable expectation of privacy.

4 Nature of information on a computer

This thesis has earlier discussed that there is a high reasonable expectation of privacy in the place of a person's private files on a personal computer or when a person's information is stored in a virtual private place. It has also canvassed how digital hacking can be highly intrusive. However, what also needs to be considered is the nature of information found on a person's computer files or his or her internet communications. Naturally, this is particularly important in a borderline situation when an assessment of place and intrusiveness does not create an obvious breach of a reasonable expectation of privacy.

Determining the reasonable expectation of privacy in the nature of information means assessing the extent to which the information obtained from digital hacking is private or not. This means analysing the information with respect to what it reveals about a person's intimate and personal details, and how demeaned and humiliated a person would feel were others to become aware of this information. For example, if a person only obtains information about the person which is already public, there is perhaps going to be a lower expectation of privacy in that information compared with a person's internet banking records. Some information is more difficult to determine a reasonable expectation of privacy for however. For example, the reasonable expectation of privacy in the nature of information in a person's private music taste might seem on first inspection to be low; however, music taste can disclose a lot about a person's personality. Determining a reasonable expectation of privacy in such an example should therefore rely on an assessment of the specific facts.

One also has to consider the amount of information acquired. For example, Google logs all of a person's searches.⁴⁵⁷ If a person puts together all of a person's searches, a number of intimate things about a person can be discovered, such as sexual orientation, health concerns, or if he or she suffers from depression. Therefore whilst having data that a person regularly logs on to Leeds United's official website is unlikely to have a reasonable expectation of privacy because the football team a person supports is generally expressed very publically, the knowledge that a person regularly seeks out guidance from mental health websites is very intimate and would cause a large amount of distress to a person if he or she knew this had been exposed. Similarly the knowledge that a person once googled "how do I know if I have

⁴⁵⁷ Caitlin Dewey "How to see everything you've googled" (22 April 2015) New Zealand Herald <www.nzherald.co.nz>.

depression?” has a lower reasonable expectation of privacy compared with the knowledge that a person spends half an hour a day on a depression message board.

As has been indicated previously, if one intrusion into seclusion claim is more intrusive than another by virtue of the degree to which the method in question is employed, it will also tend to have a higher reasonable expectation of privacy in the information. This is because the greater extent that a method is employed, the greater the amount of information that will usually be acquired. That is, constant video surveillance of a driveway for a month will be both more intrusive than a half an hour video and far more easily infringe a reasonable expectation of privacy in the nature of the information. The greater extent of the intrusion allows information to be obtained for about one month of comings and goings in a driveway compared with an isolated half an hour, revealing far more private information.

In relation to GPS monitoring,⁴⁵⁸ Alito J pointed out that “prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than any individual trip viewed in isolation”.⁴⁵⁹ Short-term surveillance might obtain information about what a person is doing on that day, but long-term surveillance can determine information which has a higher reasonable expectation of privacy, such as how regularly a person visits a particular person, goes to a particular shop, or drinks at a particular bar.

However, the extent of intrusiveness does not always translate to obtaining a greater amount of personal information. Whilst intrusiveness might ask what percentage of a person’s documents or photos were obtained, a nature of activity or information enquiry asks what knowledge was acquired. It could be, for example, that one file out of the 250 files on the computer is infinitely more personal than the other 249, and so whether that one particular file is intruded into can have a large bearing on the nature of information, but little effect on intrusiveness.

5 Information and the use to which it can be put

The lowest reasonable expectation of privacy in the nature of information is where the data obtained “contain[s] little information that is truly “private”.⁴⁶⁰ There is little personal information for example in noting down the registration number of a passing car. Car registration plates are visible to the public and provide generic information. As stated in *State of Rhode Island v Bjerke*, “there can be no expectation of privacy in one’s licen[c]e plate

⁴⁵⁸ Discussed in chapter V B 1 at 70 but relevant to all intrusions in which one method is used extensively.

⁴⁵⁹ *United States v Maynard* 615 F 3d 544 (DC Cir 2010) at 562.

⁴⁶⁰ Wilkins, above n 8, at 1122.

when it hangs from the front and the rear of one's vehicle for all the world to see".⁴⁶¹ *Olabisiomotosho v. City of Houston* compared the licence plate number with the area outside the curtilage of a house: both are "constantly open to the plain view of passers[-]by".⁴⁶² Therefore the information contained in a licence plate is constantly exposed to the public and thus is not private. This is similar to the low expectations of privacy in elements such as height, weight, appearance, and physical aspects of voice and handwriting that are fairly obvious from generic daily life.⁴⁶³

Although a car number plate is not necessarily private information, if it is used to follow someone's everyday movements then this would naturally invoke privacy concerns. This merely addresses the difference between to what extent information about a person such as a number plate is expected knowledge in society, and to what extent using that information creates knowledge that infringes a reasonable expectation of privacy. Thus, in essence, knowing a person's registration number is completely different to using it to track his or her daily movements.

The obvious point to make from this distinction is that seeing what a person's number plate is as he or she drives past is a very different situation to using that number plate to acquire more detailed information. It is not comparing two similarly intrusive situations that impart two different sets of information; it is comparing two situations that not only garner different information but in which one involves far more intrusive actions than the other. In the first situation, obtaining people's number plates from seeing them drive by involves a non-intrusive naked eye observation in a public place. The reasonable expectation of privacy is low in all three factors. In the second situation, whatever method is used to map every car ride that a person takes, it involves something very intrusive: whether it's constantly following the car or using technology such as Automatic Licence Plate Recognition Systems (ALPRs) the actions amount to systematic surveillance that is highly intrusive. In the second situation it is no longer a consideration of the nature of information in a licence plate, rather it is the nature of information obtained in constantly following a car or using ALPRs.

The car licence plate example illustrates a relevant point. Any publically available information such as a person's address on the electoral roll may not have a reasonable expectation of privacy; yet that information can be used to intrude upon a person, in the case of the examples just given, at home. Again, as soon as the intrusion occurs on a person's home the question is no longer about the reasonable expectation of privacy in terms of the nature of information in a person's address, but an analysis of the intrusion into seclusion in terms of intruding upon a person's home.

⁴⁶¹ *State of Rhode Island v Bjerke* 697 A 2d 1069 (RI 1997) at 1073.

⁴⁶² *Olabisiomotosho v City of Houston* 185 F 3d 521 (Tex 1999) at 529.

⁴⁶³ Wilkins, above n 8, at 1122.

However, the reasonable expectation of privacy in the nature of someone's personal information might also take into account the potential this information provides to intrude on a person. Since the number plate or address is specific to the individual it has the potential to reveal other important information about him or her. Additionally, the way information is used after an intrusion, if it is not an intrusion in itself, will often be indicative only of the intruder's original motive, which is separate from a reasonable expectation of privacy analysis.

What this analysis shows, then, is that care must be made to separate information that does or does not have an expectation of privacy, and breaches of privacy that use that information. The latter does not make the former have privacy protection per se.

D Is It a Reasonable Expectation of Privacy Assessed from the Shoes of the Plaintiff?

One important question to clarify is whether a reasonable expectation of privacy should be one assessed in the shoes of the plaintiff, based on the plaintiff's subjective desires, personal characteristics and circumstances; or is purely objective.

This thesis contends that the general perspective considered is closest to that of a reasonable person in the shoes of the plaintiff. However, because people can often have a different subjective expectation of privacy compared to the views of the reasonable person, the reasonable person will usually only be able to take on these views if they have been communicated, such as by a Hughes barrier. It would be inappropriate to stymie an intruder based on subjective views that he or she cannot expect to be aware of. Even where they have been communicated and seem reasonable for that person to have, a reasonable expectation of privacy must also consider whether it is normatively appropriate to impose liability.

A reasonable expectation of privacy approach aimed at the reasonable person in the shoes of the plaintiff is also consistent with the approach taken to the *Hosking* tort, although that is sometimes centred on the question of high offensiveness. For example, the Court of Appeal in *TVNZ v Rogers* stated that the highly offensive test "must be tested from the perspective of that person but subject to an objective overlay", ensuring that "the fragile sensibility of the claimant cannot prevail".⁴⁶⁴ *Brown v Attorney-General* also noted that the test is "of a reasonable person in the shoes of the person that the publication is about".⁴⁶⁵

A reasonable expectation of privacy cannot solely be based on what society considers is or is not a reasonable expectation of privacy. This would be inconsistent with the approach developed throughout the thesis of an intrusion interest grounded in the actual experience of privacy, in which privacy is protected based on a combination of a person's subjective

⁴⁶⁴ *Television New Zealand v Rogers*, above n 160 at [67].

⁴⁶⁵ *Brown v Attorney-General* DC Wellington, CIV-2003-08-236, 20 March 2006 at [81].

desires, the extent to which they are communicated, and whether they are objectively reasonable.

Two scenarios will be considered in regards to the best approach for reasonable expectation of privacy to take.

1 Mistaken belief

The first scenario is when a person subjectively believes he or she has a reasonable expectation of privacy due to an erroneous belief as to the actual situation.

In *White v White* the husband wrongly believed that his emails were password protected and that his wife therefore intruded upon his seclusion by reading emails between him and his girlfriend.⁴⁶⁶ The computer was located in the sun room where the husband slept; however, everyone had access to both the sun room and the computer.⁴⁶⁷ This was determinative in the holding that there was no reasonable expectation of privacy. However, if his emails had been password protected, the outcome may have been different. If the situation had been assessed as to whether there was a reasonable expectation of privacy in the shoes of the plaintiff an intrusion into seclusion would potentially have been found, as a person in his shoes would reasonably consider an intrusion into his password protected emails as infringing a reasonable expectation of privacy.

Similarly in the “late-night romp” in Christchurch, which involved two employees in an office being watched through the window having sexual intercourse by the people in the pub across the road, it is “understood that the pair thought the tinted windows in the office would stop anyone from looking in”.⁴⁶⁸ However, they were easily viewable from the pub across the road. If *White v White* was applied to the situation it would seem that there could be no reasonable expectation of privacy. However, if the objective person was in the shoes of the couple, he or she would surely consider there was a reasonable expectation of privacy due to the mistaken belief that they could not be seen.

The problem with saying that in the case of a mistaken belief as to the reality of the situation there must be an assessment of reasonable expectation of privacy in the shoes of the plaintiff is that it makes an intruder, who did not know the person laboured under a mistaken belief, liable. This seems unnecessarily harsh on an intruder who has a correct belief based on the reality of the situation, that his or her actions were not unacceptable. In situations of mistaken belief there should be an objective determination of the facts of any given situation. The

⁴⁶⁶ *White v White* 344 NJ Super 211 (2001).

⁴⁶⁷ At 215.

⁴⁶⁸ “Bar patrons snap employees having late-night romp in Christchurch office” (2 Feb 2015) Television New Zealand <www.tvnz.co.nz>.

reasonable expectation of privacy could then include an assessment of what the claimant's attitude towards those facts would be were he or she to know said facts.

2 Genuine belief as to whether the activity or information is private

As indicated at various points in the body of the thesis, when a person considers what society might deem a normally private fact or activity not to be private, or vice versa, the reasonable expectation of privacy will take into account what the person genuinely thinks rather than what a purely objective analysis would create, providing the subjective belief has been communicated. A subjective belief can be communicated in a number of ways, such as the imposition of a physical or behavioural barrier; or an indication from a person's blog or general attitude. The reasonable expectation of privacy will tend to be assessed predominantly from the plaintiff's perspective. This will enable factors like the person's religion or occupation to be taken into account when considering what the reasonable person would think in any given situation. In this way, Moreham's "out" gay rights campaigner in chapter II does not have a reasonable expectation of privacy in his or her sexuality.

E Conclusion

In conclusion, a reasonable expectation of privacy analysis should be undertaken based on a combination of the objective facts of a situation and what the victim has indicated his or her subjective attitude to those facts is or is likely to be. A reasonable expectation of privacy analysis should analyse each of the Wilkins factors separately, assessing to what degree each one indicates a reasonable expectation of privacy. By combining these analyses together a final evaluation can be made as to whether the intruder has infringed a reasonable expectation of privacy or not.

VII Should High Offensiveness be an Element in an Intrusion into Seclusion Action

In the explanation of how the elements of intrusion into seclusion work in New Zealand, this thesis has detailed how high offensiveness works as an extra threshold to satisfy before liability is enforced. High offensiveness is a requirement in intrusion into seclusion torts in New Zealand, the USA and Ontario (Canada) and is also consistent with the *Hosking* tort and its US equivalent. The BSA privacy principles covering private facts and intrusion also include a highly offensive prerequisite for liability. The point is that high offensiveness is a common requirement in privacy torts and principles, and emerges from a perspective that views privacy as important but only when breaches are extreme.

The Courts are arguably influenced by a historical wariness about privacy impinging on other more established rights such as freedom of expression, which includes “the freedom to seek, receive, and impart information and opinions of any kind in any form”.⁴⁶⁹ They may also be influenced by the relative newness of both torts in the Anglo-Commonwealth, and cognisant of the controversy of their existence. Additionally, although intrusion into seclusion has been around for about half a century in the USA it has not evolved to a point in which high offensiveness is not required. Hence New Zealand and Canadian courts are reluctant to create the tort without the insurance of this extra threshold, assumedly reasoning that if a jurisdiction that has recognised the privacy value in tort law for so long is not seeking to remove a barrier of high offensiveness, then it must be included for a reason.

The important question to be asked is whether a threshold of high offensiveness is really necessary. Whata J acknowledges that some academic writers would like to have no highly offensive test, thereby causing any established breach of reasonable expectation of privacy to be held liable (providing the first two elements are also met and the public interest defence is not applicable); but he still chooses to include the element.⁴⁷⁰ One reason for this is that he considers the reasonable expectation of privacy test as “not sufficiently prescriptive”.⁴⁷¹ However, by suggesting a strong framework for the test, and explaining in detail how this can be applied, this thesis can go some way to assuaging that fear.

Tipping J, however, in the context of the *Hosking* tort, commented that he would “prefer that the question of offensiveness be controlled within the need for there to be a reasonable expectation of privacy”.⁴⁷² In *Rogers*, Elias CJ indicated some dissatisfaction “that the tort of privacy requires not only a reasonable expectation of privacy, but also that publicity would be

⁴⁶⁹ Bill of Rights Act 1990, s 14.

⁴⁷⁰ *C v Holland*, above n 1, at [97].

⁴⁷¹ At [97]. Whata J is also worried about the “unduly sensitive litigant” and the very significant “capacity for conflict between the right to seclusion and other rights and freedoms”.

⁴⁷² *Hosking*, above n 5, at [256].

highly offensive”.⁴⁷³ Moreham has argued that the high offensiveness stage should be removed because “it obfuscates the dignitary nature of [the] privacy interest”, “is inconsistent with other dignitary torts”, “is unnecessary”, and “is value-laden and unpredictable”.⁴⁷⁴

It may be that as breaches of privacy become more pernicious, and privacy’s value as a right or important concern becomes more entrenched, that stringent requirements like “highly offensive” are relaxed. This thesis argues that the requirement of an infringement of a reasonable expectation of privacy substantially covers the factors deemed to apply to high offensiveness, and that if their application to reasonable expectation of privacy via the Wilkins factors is sufficiently rigorous, it will render the requirement of high offensiveness unnecessary. The only high offensiveness factor that may not quite fit with reasonable expectation of privacy is motive. As discussed below, this is best dealt with in damages or defences.

The “highly offensive” factors, other than “the intruder’s motives and objectives”, covered by a reasonable expectation of privacy are, according to *Miller*: “the degree of intrusion”; “the context, conduct and circumstances surrounding the intrusion”; “the setting [in which the intrusion occurs]”; and “the expectations of those whose privacy is invaded”.⁴⁷⁵ In terms of the Wilkins factors the degree of intrusion comes under intrusiveness; the context, conduct and circumstances of the intrusion comes under both the nature of activity and intrusiveness; the setting comes under place; and the expectation of those whose privacy is invaded comes under all three via analysis by the Hughes physical and behavioural barriers. There is little point analysing this list of ideas twice, once in a reasonable expectation of privacy context and secondly in a high offensiveness context, when it can simply be analysed in one rigorous step. Reasonable expectation of privacy should not be a straightforward element to satisfy such that preventing liability for insignificant intrusions can only be achieved through a highly offensive standard.

There are numerous examples from the US in which reasonable expectation of privacy (often expressed as private matters) is either not adequately addressed or is considered met far too easily, resulting in an evaluation of high offensiveness that would be more appropriate to a reasonable expectation of privacy context. For example the Restatement states that high offensiveness will be found for payment demands only if they are “repeated with such persistence and frequency as to amount to a course of hounding the plaintiff”.⁴⁷⁶ However,

⁴⁷³ *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277 at [25].

⁴⁷⁴ N A Moreham “Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort” in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation* (LexisNexis, Wellington 2008) 231 at 240.

⁴⁷⁵ *Miller v National Broadcasting Company*, above n 161, at 1483-1484.

⁴⁷⁶ At § 652B comment d.

reasonable expectation of privacy if applied properly should only be found if demands are insistent and often, such that they besiege a complainant.

In *Harkey v Abate*, considering whether see through panels of a restroom infringe a reasonable expectation of privacy, the Court only offered the truism that a person has a right to privacy in a restroom before stating that “the installation of the hidden viewing devices alone” is highly offensive.⁴⁷⁷ Instead the installation of the hidden devices should be considered with respect to reasonable expectation of privacy by assessing the Wilkins factors and making a holistic determination. In another example, commentator Libardoni noted that determining high offensiveness requires considering “the type of seclusion that plaintiffs have established” and “if the invasion occur[s] in view of the public”.⁴⁷⁸ These considerations, along with those already mentioned, should be evaluated at the reasonable expectation of privacy stage.

Additionally, the high offensiveness element can be used to create perverse outcomes. In *Plaxico v Michael* the defendant took partially naked photos of his ex-wife’s new female lover through their bedroom window in a quest to obtain a more favourable child custody ruling.⁴⁷⁹ Although the Court stated that “Plaxico was in a state of solitude or seclusion in the privacy of her bedroom where she had an expectation of privacy”, it also stated that “a reasonable person would not feel Michael’s interference with Plaxico’s seclusion was a substantial one that would rise to the level of gross offensiveness”.⁴⁸⁰ “In fact, most reasonable people would feel Michael’s actions were justified in order to protect the welfare of his minor child”.⁴⁸¹ High offensiveness should not protect clear breaches of the tort on spurious grounds of reasonability.

As suggested, the most appropriate *Miller* factor for a question of high offensiveness is that of motive. Reasonable expectation of privacy is very much centred on the expectations of the person who has been intruded upon and the objective expectations of a reasonable person who is in his or her approximate shoes. It has sparing interest for the motives of the intruder unless it helps better elucidate one of the Wilkins factors, or somehow alters the expectations of privacy of the person intruded upon.

More appropriately, high offensiveness could use motive as a means of better reflecting the culpability of the person who did the intruding. In other words, after determining that the person is subjectively and objectively intruded upon, it could then say that a person should only be liable if the motive was sufficiently bad. However, this is not the criminal law in

⁴⁷⁷ *Harkey v Abate*, above n 355, at 182.

⁴⁷⁸ Libardoni, above n 27, at 1463.

⁴⁷⁹ *Plaxico v Michael* 735 So 2d 1036 (Miss 1999).

⁴⁸⁰ At 1039.

⁴⁸¹ At 1040.

which culpability would have the stigma of a conviction, it is tort law which is designed to compensate the victim.

The motive of the intruder should instead apply in two ways. The first is as a public interest defence if information is being sought for a sufficiently good reason. Such a motive will satisfy the public interest defence and prevent liability. The second is when it comes to an assessment of damages, as it would for instance, be unfair to force the intruder to pay excessively for an intentional act with no malice behind it.

The idea that high offensiveness is a largely redundant element is backed up by the following quote in *Faesenkloet*: “to an extent the consideration of the reasonable expectation of privacy links with whether the intrusion was highly offensive. The greater the expectation, the more likely an intrusion will be offensive”.⁴⁸² In other words, where the overall reasonable expectation of privacy is high, its infringement should easily create liability, but where it is low, infringement is unlikely to make the intruder liable. This thesis also takes such an approach, and thereby renders the “highly offensive” element unnecessary.

⁴⁸² *Faesenkloet*, above n 152, at [50].

VIII Conclusion

Intrusion into seclusion, introduced in New Zealand in 2012, is an important tort that is significant in New Zealand's legal landscape because of the potential effect it could have in responding to the proliferation of new technologies that constantly allow easier access to people's highly sensitive information. The likes of instant photography and videos are commonplace techniques that enable the capture of anything that a person happens to be doing at any given time. People are also continually finding new ways to digitally hack into extremely intimate files on personal computers, phones or other digital devices.

The tort of intrusion into seclusion protects the "intrusion interest". This thesis argues that the Hughes barriers theory is an excellent analytical tool for determining when the intrusion interest is invoked.⁴⁸³ The theory is a concept grounded in the actual experience of privacy which provides a clear and realistic link between the theory of privacy and the legal requirements of an intrusion into seclusion action. It essentially reduces the scope of privacy from anything a person desires to protect, to one that is communicated or demonstrated by a physical, behavioural or normative barrier. A physical barrier is a tangible object that is placed in between the intruder and the subject matter, such as a fence or chest of drawers. A behavioural barrier is verbal or non-verbal communication that indicates a desire for privacy, such as whispering rather than speaking in a normal tone of voice. A normative barrier is a societal expectation that the subject of the intrusion should not be intruded upon, such as something pertaining to family, personal finances, or sexuality.

The Hughes barriers improve access-based definitions of the intrusion interest. Under these access-based theories the intrusion is defined as the unwanted physical access of someone's person (or things closely associated with the person) by means of the senses, technological devices that enable the use of the senses, or physical proximity. More generally it can include any incursion into the private realm of another person. The intrusion must be undesirable because it impinges on something that the person is acutely sensitive about. The Hughes barriers add an essential extra dimension by providing that such a desire for privacy should be communicated or plausible by virtue of a physical, behavioural or normative barrier.

This thesis subsequently argues that the elements of an intrusion into seclusion action should be refined so that it principally focuses on when there is an infringement of a reasonable expectation of privacy.⁴⁸⁴ Consistent with the approach of many US states, the first three elements could be integrated into a single inquiry as to whether there is "an intrusion into intimate private activity, space or affairs that infringes a reasonable expectation of privacy". Providing that reasonable expectation of privacy is rigorously analysed, the highly offensive

⁴⁸³ See above in II C 1 (b) at 9-10.

⁴⁸⁴ See above in IV C at 39-40.

element should be eliminated. This is because the highly offensive factors suggested by *Miller* – the degree of intrusion, the circumstances surrounding the intrusion, the setting, and the expectations of those whose privacy is invaded – are already covered by the reasonable expectation of privacy analysis. The other factor *Miller* suggests regarding the motives of the intruder should be dealt with as part of the public interest defence or damages.

This thesis contends that reasonable expectation of privacy, considered the crux of the tort, should be analysed in terms of the Wilkins framework.⁴⁸⁵ Wilkins, in the US search and seizure context, postulates that there are three factors to take into account when assessing a reasonable expectation of privacy: place, intrusiveness and object. This thesis argues that a modified version of the three factors is highly useful and applicable to intrusion into seclusion in New Zealand. The modification made is to relabel the third factor as “nature of information or activity” which both better encapsulates Wilkin’s argument, and tailors the approach more specifically to intrusion into seclusion.

It is argued, firstly, that “place” requires evaluating the extent to which the location of the intrusion is public or private, such as a home being a more quintessentially private place than a car, or an uninhabited side street having a higher expectation of privacy than a busy main road. “Intrusiveness” considers how intrusive the circumstances are in terms of the method used by the intruder and the degree to which the method in question is employed, for example electronic surveillance being more intrusive than watching someone with the naked eye, and using it 24 hours a day for a week being more intrusive than making a one hour recording. Finally, the “nature of the activity or information” considers the degree to which activities and information are personal or intimate, for instance a person having a shower is undertaking a more intimate activity than if he or she is playing a board game, and a conversation is more private if it is discussing a person’s love life rather than the football results.

Assessing each factor in the Wilkins framework is aided by the invaluable Hughes barriers which help to navigate the conceptual thinking behind the factors. This thesis has therefore analysed each factor from first principles and, using the reasonable expectations of privacy in various contexts such as both intrusion into seclusion and search and seizure case law in New Zealand, the USA and Canada, and in some appropriate BSA decisions, considered how they should be applied in future intrusion into seclusion decisions in New Zealand.

Once all three factors have been analysed a holistic determination should be made as to whether or not a reasonable expectation of privacy has been infringed. Sometimes all that is needed is one or two of the three factors to be sufficiently high to satisfy the element. Often, however, situations are more borderline as to whether there is an infringement of a reasonable

⁴⁸⁵ This is the focus of chapter VI.

expectation of privacy. It is only by bringing the three factors together and making comparisons with previous decisions that a reasonable judgement can be made. A reasonable expectation of privacy should never be satisfied too easily, and it should take proper account of contemporary social mores such that future applications of previous decisions are suitably flexible.

Given the newness of the tort of intrusion into seclusion in New Zealand, and the fact it has never been considered at the Court of Appeal level, it is likely that this cause of action will grow and develop. It is hoped that such ideas as the Hughes barriers and the Wilkins factors will enable such growth to occur.

Bibliography

A Cases and Decisions

1 New Zealand

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

Brown v Attorney-General DC Wellington, CIV-2003-08-236, 20 March 2006.

C v Holland [2012] 3 NZLR 672.

CanWest TVWorks Ltd v XY [2008] NZAR 1 (HC).

CP v TVWorks Ltd BSA Decision 2012-069, 19 Dec 2012.

de Hart, Cameron and Cotter v TV3 Network Services Ltd BSA Decision 108-113, 10 Aug 2000.

Faesenkloet v Jenkin [2014] NZHC 1637.

Hamed v R [2011] NZSC 101, [2012] 2 NZLR 305.

Hosking v Runting [2005] 1 NZLR 1 (CA).

L v G [2002] DCR 234.

PG v Television New Zealand Ltd BSA Decision 2014-090, 16 June 2015.

R v Fraser (1997) 15 CRNZ 44 (CA).

R v Jefferies [1994] 1 NZLR 290 (CA).

R v McManamy (2002) 19 CRNZ 669 (CA).

R v Williams [2007] NZCA 52.

Rogers v Television New Zealand Ltd [2007] NZSC 91, [2008] 2 NZLR 277.

Stevenson v Hastings District Council HRRT Decision 7/06, 4 March 2006. *Television New Zealand Ltd v Davies* BSA Decision 2005-017, 3 June 2005.

Television New Zealand v Rogers [2007] 1 NZLR 156 (CA).

2 United Kingdom

Bernstein of Leigh (Baron) v Skyviews & General Ltd [1978] 1 QB 479.

Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22, [2004] 2 AC 457.

Murray v Big Pictures Ltd [2008] EWCA Civ 446, [2009] Ch 481.

Robson v Hallett [1967] 2 QB 939 (CA).

Wainwright v Home Office [2003] UKHL 53, [2004] 2 AC 406.

3 *United States*

Aisenson v American Broadcasting Company 220 Cal App 3d 146 (Cal 1990).
Alpha Therapeutic Corporation v Nippon Hosyo Kyokai 199 F 3d 1078 (9th Cir 1999).
Barber v Time Inc 348 Mo 1199 (Mo 1942).
Birnbaum v United States 588 F 2d 319 (2d Cir 1978).
Bogie v Rosenberg 705 F 3d 603 (7th Cir 2013).
Boring v Google Inc 362 Fed Appx 273 (3rd Cir 2010).
Boyd v United States 116 US 616 (1886).
Briscoes v Readers Digest Association Inc 483 P 2d 34 (Cal 1971).
California v Ciraolo 476 US 207 (Cal 1986).
California v Greenwood 486 US 35 (1988).
Carroll v United States 267 US 132 (1925).
Coalition for an Airline Passengers' Bill of Rights v. Delta Air Lines Inc 693 F SUPP 2d 667 (SD Tex 2010).
Collection Consultants Inc v Bemel 274 Ark 223 (1981).
Daily Times Democrat v Graham 276 Ala 380 (1964).
Danai v Canal Square 862 A 2d 395 (DC Cir 2004).
De May v Roberts 46 Mich 160 (Mich 1881).
Deteresa v American Broadcasting Companies Inc 121 F 3d 460 (9th Cir 1997).
Diaz v Oakland Tribune Inc 139 3d 118 (Cal App 1983).
Dietemann v Time Inc 449 F 2d 245 (9th Cir 1971).
Digirolamo v Anderson & Associates Inc 10 Mass L Rptr 137 (Mass Super 1999).
Dow Chemical Company v United States 476 US 227 (Cal 1986).
Dunlop v McCarty 678 SW 2d 361 (1984).
Evans v Detlefsen 857 F 2d 330 (6th Cir 1988).
Florida v Jardines 133 S Ct 1409 (2013).
Froelich v Adair 213 Kan 357 (1973).
Hamberger v Eastman 106 NH 107 (1964) at 112.
Harkey v Abate 346 NW 2d 74 (Mich App 1983).
Hernandez v Hillsides 47 Cal 4th 272.
Holman v Central Arkansas Broadcasting Co Inc 610 F 2d 542 (8th Cir 1979).
Housh v Peth 165 Ohio St 35 (1956).
Huskey v National Broadcasting Co Inc 632 F Supp 1282 (ND Ill 1986).
ICU Investigations Inc v Jones 780 So 2d 685 (Ala 2000).

Jones v United States 362 US 257 (1960).
Katz v United States 389 US 347 (1967).
Kramer v Downey 680 SW 2d 524 (Tex App 1984)
Lewis v LeGrow 670 NW 2d 675 (Mich App 2003).
Lo-Ji v New York 442 US 347 (1979).
Maryland v Macon 472 US 463 (1985).
Medical Laboratory Management Consultants v American Broadcasting Companies Inc 306 F 3d 806 (9th Cir 2002).
Medical Laboratory Management Consultants v American Broadcasting Companies Inc 30 F Supp 2d 1182 (D Ariz 1998).
Melvin v Burling 141 Ill App 3d 786 (Ill 1986).
Melvin v Reid 297 P 91 (Cal App 1931).
Miller v Brooks 472 SE 2d 350 (NC App 1996).
Miller v National Broadcasting Company 187 Cal App 3d 1463 (Cal 1987).
Narducci v Village of Bellwood 444 F Supp 2d 924 938 (ND Ill 2006).
Near v Minnesota 283 US 697 (1931).
Olabisiotosho v City of Houston 185 F 3d 521 (Tex 1999).
Oliver v United States 466 US 170 (1984).
PETA v Bobby Berosini Ltd 111 Nev 615 (1995).
Phillips v Smalley Maintenance Services Inc 711 F 2d 1524 (11th Cir 1983).
Plaxico v Michael 735 So 2d 1036 (Miss 1999).
Re Marriage of Tigges 758 NW 2d 824 (Iowa 2008).
Ribas v Clark 38 Cal 3d 355 (Cal 1985).
Roe v Wade 410 US 113 (1973).
Roth v Farner-Bocken 667 N W 2d 651 (SD 2003).
Sanders v American Broadcasting Companies 978 P 2d 67 (Cal 1999).
Schmerber v California 384 US 757 (1966) at 769.
Shulman v Group W Productions Inc 59 Cal Rptr 2d 434 (Cal 1996).
Shulman v Group W Productions Inc 955 P 2d 469 (Cal 1998).
State v Hardy 577 NW 2d 212 (Minn 1998).
State v Mitchem 2366 (Ohio App 1 Dist 2014).
State of Rhode Island v Bjerke 697 A 2d 1069 (RI 1997).
United States v Brady 734 F Supp 923 (ED Wash 1990).
United States v Chadwick 433 US 1 (1977).

United States v. Dunn 480 US 294 (1987) .
United States v Jones 132 S Ct 945 (2012).
United States v Maynard 615 F 3d 544 (DC Cir 2010).
United States v Ross 456 US 798 (1982).
United States v Taborda 635 F 2d 131 (2d Cir 1980).
United States v Torres 751 F 2d 875 (7th Cir 1984).
United States v White 401 US 745 (1971).
Watkins v L M Berry & Co 704 F 2d 577 (11th Cir 1983).
White v White 344 NJ Super 211 (2001).
Young v. Superior Court of Tulare County 57 Cal App 3d 883 (Cal 1976).

5 Canada

Jones v Tsige 2012 ONCA 32.
R v Buhay (2003) 1 SCR 631.
R v Duarte 1990 1 SCR 30.
R v Dymment 1988 2 SCR 417.
R v Sandhu 1993 BCCA 1429.
R v Thomas (1991) 286 APR 341 (NLCA).
R v Truong 2002 BCCA 315.
R v Wiggins 1990 1 SCR 62.
R v Wong (1990) 3 SCR 36.

B Legislation and Regulations

I New Zealand

Bill of Rights Act 1990.
Broadcasting Act 1989.
Broadcasting Standards Authority Privacy Principles.
Crimes Act 1961.
Crimes (Intimate Covert Filming) Amendment Act 2006.
Harassment Act 1997.
Privacy Act 1993.
Residential Tenancies Act 1986.
Search and Surveillance Act 2012.

Summary Offences Act 1981.

2 United States

American Law Institute *Restatement of the Law, Second, Torts* (St Paul, Minnesota, 1977).

Ariz Rev Stat.

C Books and Chapters in Books

1 New Zealand

Bill Atkin and Geoff McLay *Torts in New Zealand: Cases and Materials* (5th ed, Oxford University Press, Melbourne, 2012).

John Burrows and Ursula Cheer (eds) *Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015).

Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015).

Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003).

Stephen Todd and others *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013).

2 United Kingdom

Hilary Delany and Eoin Carolan *The Right to Privacy: A Doctrinal and Comparative Analysis* (Thomson Round Hall, Dublin 2008).

Geoffrey Robertson *The Justice Game* (Vintage Book/Random House, London, 1999).

Raymond Wacks *Personal Information, Privacy and the Law* (Clarendon Press, Oxford, 1989).

Raymond Wacks *Privacy and Media Freedom* (1st ed, Oxford University Press, Oxford, 2013).

Mark Warby QC, Nicole Moreham and Iain Christie (eds) *Tugendhat and Christie's The Law of Privacy and the Media* (2nd ed, Oxford University Press, Oxford, 2011).

3 United States

Irwin Altman *The Environment and Social Behaviour: Privacy, Personal Space, Territory, Crowding* (Brooks/Cole Publishing Company, Monterey, California, 1975).

S Benn "Privacy, Freedom and Respect for Persons" in J Pennock and J Chapman (eds) *Privacy NOMOS XIII* (Atherton Press, New York, 1971) 1.

Thomas M. Cooley *The Law of Torts* (2nd ed, 1888).

Joshua Dressler *Understanding Criminal Procedure* (3rd ed, Lexis Nexis, New York, 2002).

Janna Malamud Smith *Private Matters: In Defense of the Personal Life* (Addison Wesley, Reading, Massachusetts, 1997).

Alan F Westin *Privacy and Freedom* (Atheneum, New York, 1967).

William L Prosser *Handbook of the Law of Torts* (4th ed, West Publishing Co Ltd, St Paul, Minnesota, 1971).

D Journal Articles

1 New Zealand

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

Nicole Moreham "Private Matters: A Review of the Broadcasting Standards Authority" (New Zealand Broadcasting Standards Authority, 2009).

2 United Kingdom

Kirsty Hughes "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012) 75(5) MLR 806.

Nicole Moreham "Beyond Information: Physical Privacy in English Law" (2014) 73 Cambridge L J 350.

NA Moreham "Privacy in Public Places" (2006) 65(3) CLJ 606.

Nicole Moreham "Privacy in the Common Law" (2005) 121 LQR 628.

Judith Wagner DeCew "The Scope of Privacy in Law and Ethics" (1986) 5(2) Law & Phil 145.

3 United States

Edward J Bloustein "Privacy as an aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 NYU L Rev 962.

Thomas E Curran III "The Curtilage of *Oliver v United States* and *United States v Dunn*: How Far Is Too Far?" (1988) 18 Golden Gate U L Rev 397.

William Dalsen “Civil Remedies for Invasions of Privacy: A Perspective on Software Vendors and Intrusion upon Seclusion” (2009) *Wis L Rev* 1059.

Ruth Gavison “Privacy and the Limits of the Law” (1980) 89(3) *Yale LJ* 421.

Tom Gerety “Redefining Privacy” (1977) 12(2) *Harv CR-CL L Rev* 233.

Jeffrey F Ghent “Unsolicited mailing, distribution, house call, or telephone call as invasion of privacy” (1974) 56 *ALR.3d* 457.

Erica Goldberg “How United States v Jones Can Restore Our Faith in the Fourth Amendment” (2014) 110 *Mich L Rev First Impressions* 62.

Daniel P O’Gorman “Looking out for Your Employees: Employers’ Surreptitious Physical Surveillance of Employees and the Tort of Invasion of Privacy” (2006) 85 *Neb L Rev* 212.

David Libardoni “Prisoners of Fame: How an Expanded Use of Intrusion Upon Psychological Seclusion Can Protect the Privacy of Former Public Figures” (2013) 54(3) *BC L Rev* 1455.

Daniel Pesciotta “I’m not Dead Yet: Katz, Jones and the Fourth Amendment in the 21st Century” (2012) 63(1) *Case W Res L Rev* 187.

William L Prosser “Privacy” (1960) 48 *Cal L Rev* 383.

Vanessa Rownghi “Driving Into Unreasonableness: The Driveway, the Curtilage and Reasonable Expectations of Privacy” (2003) 11(3) *Am U J Gender Soc Pol’y & L* 1165.

Daniel J Solove “A Taxonomy of Privacy” (2006) 154(3) *U Pa L Rev* 477.

Daniel J Solove “Conceptualising Privacy” (2002) 90 *Cal L Rev* 1087.

Samuel D Warren and Louis D Brandeis “The Right to Privacy” (1890) 4 *Harvard Law Rev* 193.

Richard G. Wilkins “Defining the Reasonable Expectation of Privacy: An *Emerging Tripartite* Analysis” (1987) 40 *Vand L Rev* 1077.

4 Canada

Chris DL Hunt “Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada’s Fledgling Privacy Tort” (2012) 37 *Queen’s LJ* 167 at 181.

Jonathan G Colombo “The Right to Privacy in Verbal Communication: The Legality of Unauthorised Participant Recording” (1990) 35 *McGill L J* 921 at 937.

E Internet Articles

“A Guide to the Privacy Act 1993” (4 June 2009) Office of the Privacy Commissioner <www.privacy.org.nz>.

“Bar patrons snap employees having late-night romp in Christchurch office” (2 Feb 2015) Television New Zealand <www.tvnz.co.nz>.

Casey Chan “Pervert Alert: This Camera Can See Through Clothes” 21 April 2011 Gizmodo <www.gizmodo.com>.

Caitlin Dewey “How to see everything you’ve googled” (22 April 2015) New Zealand Herald <www.nzherald.co.nz>.

“Manner of collection of personal information (principle 4)” Office of the Privacy Commissioner <www.privacy.org.nz>.

“Smartphones a woman's worst enemy as jealous ex-partners use GPS tracking” 29 June 2015 Television New Zealand <www.tvnz.co.nz>.

“What does “encryption” mean?” East-Tec – Privacy Protection and File & Disk Encryption <www.east-tec.com>.

F Parliamentary Materials

Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984–1985] I AJHR A6.

G Government Publications

Law Commission *Invasion of Privacy: Penalties and Remedies* (NZLC R113, 2010)

Law Commission *Protecting Personal Information From Disclosure* (NZLC PP49, 2002)

Law Commission *Search and Surveillance Powers* (NZLC R97, 2007)