

## Privacy

The issue is whether ... will be successful in a privacy action if...

In order to establish the tort of privacy, per the majority (Gault and Blanchard JJ) in Hosking v Runtig, it first must be established that there is the existence of facts in which there is a reasonable expectation of privacy, or per the minority (Tipping J), that there is a reasonable expectation of privacy in respect of the information or material which the defendant has published or wishes to publish. Although in the minority, this conception was favoured in Andrews v TVNZ, and is more in line with UK law, and better reflects the purpose of the tort as although a publication may not necessarily contain facts, it may take a private moment and make it a public spectacle.

Following the majority in Hosking, it also must be established that publicity of those facts would be considered highly offensive to the objective reasonable person.

However, this requirement may not need to be established should the Court choose to follow Tipping J's conception which does not include this as a requirement. The requirement was rejected outright and criticized in the English case Murray, so this Court may agree with the overseas precedent.

Even if the tort of privacy has been established, the public concern defence is available to the defendant per Hosking.

In order to establish the tort of intrusion into seclusion, the following elements set out by Whata J in C v Holland must be satisfied:

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

### Majority in Hosking (Gault and Blanchard JJ):

Test:

Existence of facts in which there is a reasonable expectation of privacy	<u>Hosking v Runtig</u> <ul style="list-style-type: none"><li>- No simple test</li><li>- Facts which may be known to some but not the world at large</li><li>- Not enough to establish that something happened out of the view of the public</li><li>- Certain kinds of facts may be easy to identify as private e.g health, personal relationships, finances</li></ul>
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- Public figures do not automatically lose right to privacy, but reasonable expectation will be reduced
- Same as if you are an involuntary public figure, although to a lesser extent
- Children of public figures will also have their reasonable expectation of privacy reduced as it is “human nature that public interest extends”, although there is still a need to protect children

Held:

- Not persuaded that the photos would cause harm
- Did not show anything which would not already be seen in Newmarket that day
- Photographed on a public street
- Other information like names are public known in public records
  - Nicole questions whether this is relevant - photo in time doesn't necessarily reveal info but a moment in time that you don't want to be a spectacle? (not relevant on busy street)

Andrews v TVNZ

- A car accident is a public event with no reasonable expectation of privacy
- Intimate and personal conversations between the plaintiffs have a reasonable expectation of privacy

Henderson v Walker

- The test must involve a normative element
- It has to focus on what privacy a person should be entitled to respect in the situation in question not what privacy he or she would usually in fact be accorded.

Quince

- There is scope within that for recognising the different experiences that we all bring to bear in deciding what we regard as private.
- If it is (or should be) clear to the defendant that the person would regard the matter as private (for cultural, religious or other reasons) then should that have a bearing on whether the plaintiff has a reasonable expectation of privacy in respect of it?

Concept of Tapu:

- Gives us appropriate language to show philosophical/spiritual/intangible element of privacy

	<ul style="list-style-type: none"> <li>- Temporary and intrinsic tapu</li> <li>- E.g body, pregnancy, birthing, bereavement</li> </ul>
<p>Publicity of those facts would be considered highly offensive to the objective reasonable person</p>	<p><u>Hosking v Runtig</u></p> <ul style="list-style-type: none"> <li>- Does not apply too broadly</li> <li>- How do we work out if it is highly offensive? <ul style="list-style-type: none"> <li>- Relates to publicity and not whether the info is private</li> <li>- It will only be satisfied if the publicity is “truly humiliating and distressful or otherwise harmful to the individual concerned”.</li> </ul> </li> </ul> <p>Held: cannot see any real harm in this case.</p> <p><u>Andrews v TVNZ</u></p> <ul style="list-style-type: none"> <li>- High threshold</li> <li>- Assessed from the perspective of the objective reasonable person in their shoes</li> <li>- Extent or tone of the publication can make the publicity highly offensive</li> </ul> <p>Held that:</p> <ul style="list-style-type: none"> <li>- The tone of the publication painted them in a positive light</li> <li>- Chagrin and annoyance is not enough to establish that the publication is highly offensive (NICOLE DOUBTED)</li> <li>- Failure to get consent, or even inform the subjects, is not enough to establish offensiveness</li> </ul> <p><u>Henderson v Walker</u></p> <ul style="list-style-type: none"> <li>- Publicity not the information which has to be offensive</li> <li>- When determining whether publicity given to information is highly offensive relevant factors include: <ul style="list-style-type: none"> <li>- The nature of the information</li> <li>- The “circumstances and extent of the publication” (is it being done to harass, contributing to a debate, breach of trust, how widely was it published...)</li> <li>- And the nature of the relationship between the parties</li> <li>- Publicity might be offensive even though it is not widespread - but more difficult to establish.</li> </ul> </li> </ul> <p><u>TVNZ v Rogers</u></p> <p>Opinion on Hosking - need to be cautious</p>

	Reserves her position on highly offensive element e.g because of commentary in other jurisdictions. Anderson J agrees.
Public concern defence	<ul style="list-style-type: none"> <li>- Not enough to show that the disclosure is 'merely interesting'</li> <li>- Proportionality - the more serious the privacy interference, the greater must be the public interest</li> <li>- Closely related to freedom of expression - must balance w privacy</li> </ul> <p><u>Andrews v TVNZ</u></p> <ul style="list-style-type: none"> <li>- The test requires that there is a substantial connection between the material disclosed and the legitimate public concern.</li> <li>- Intimate conversations in the context of a car crash bring the public concern of road safety and emergency service providers to life and would satisfy the public interest test. (NICOLE DOUBTED)</li> </ul>

**Minority in Hosking (Tipping J):**

A reasonable expectation of privacy in respect of the information or material which the defendant has published or wishes to publish	- (slightly wider approach than the other judges - not reducing down to the facts in the photograph but the photograph itself?)
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**English test:**

Whether the claimant had a reasonable expectation of privacy in respect of the disclosed facts (Campbell v MGN Ltd.)	<p><u>Murray v Big Pictures Ltd.</u></p> <p>An objective test - "would the ordinary reasonable person in their shoes regard this as private?"</p> <p>List of factors:</p> <ul style="list-style-type: none"> <li>- Attributes of the claimant</li> <li>- Nature of the activity</li> <li>- Place</li> <li>- Nature and purpose of intrusion</li> <li>- Absence of consent and whether it was known or could be inferred</li> <li>- Effect on claimant</li> <li>- Circumstances and purposes for which the information came into the hands of the publisher</li> </ul> <p>Whether the claimant courted publicity will be relevant in the case of a child</p> <ul style="list-style-type: none"> <li>- Attempts not to publicise will be taken into account</li> </ul>
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	<p>Held it was private as:</p> <ul style="list-style-type: none"> <li>- Photograph was taken surreptitiously</li> <li>- Plaintiff was targeted by the defendants</li> <li>- The plaintiff is a child and deserves a wider right to privacy - also the same as an ordinary child</li> </ul>
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### **Tort of Intrusion into Seclusion - C v Holland**

Four requirements:

- a) An intentional and unauthorised intrusion;
- b) Into seclusion (namely intimate personal activity, space or affairs);
- c) Involving an infringement of a reasonable expectation of privacy; and
- d) That is highly offensive to a reasonable person

Perhaps slight difference to Hosking as no sharing of info

First element is broadly worded e.g could include looking into medical records - it is worded broadly that it could encompass publication as well/ Need to be careful so as to not subsume hosking tort

What was it intended to cover?

- Recording a person in a state of undress
- Legislation also indicates sensory intrusions e.g looking or listening or incursions into space, e.g collecting personal info, search and surveillance, intimate visual recordings and entering private property

Nicole says we should be narrow in interpretation so as to not subsume Hosking

Defences should focus on when it is reasonable to do the looking. "A legitimate public concern in the information may provide a defence to a privacy claim.

Damages:

#### Gulati (Eng)

Compensation for a dignitary breach

The damages awarded were for the distress that the plaintiffs could justifiably have felt because of their private information being exploited, and for the loss of privacy itself (loss or diminution of right to control private information)

Compensating that your choice has been violated