

Abandoning The “High Offensiveness” Privacy Test

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This article argues that the New Zealand torts of giving publicity to private information and intruding upon solitude and seclusion would better reflect the true nature of the privacy interest if the requirement that any alleged privacy interference be “highly offensive to an objective reasonable person” were abandoned. Courts should, instead, determine what is prima facie private by reference to the plaintiff’s “reasonable expectation of privacy” in respect of the information or activity in question. There are three main reasons for this: first, the high offensiveness test operates in a manner which is both uncertain and unpredictable; second, New Zealand courts applying the high offensiveness test have taken too narrow a view of the nature of privacy harms; and third, the test is unnecessary.

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I. Introduction

The common law protection of privacy in the Anglo-Commonwealth has blossomed in the last fifteen years. New Zealand and Ontario have recognised torts both of giving publicity to private facts and of intrusion into solitude and seclusion and in England and Wales, the tort of misuse of private information has emerged from within the breach of confidence. Two main approaches to ascertaining what is private have emerged from these developments. On the one hand, courts applying the English misuse of private information tort focus on the plaintiff’s reasonable expectations of privacy (which in turn determine whether the plaintiff’s right to respect for private life under Article 8 of the *European Convention on Human Rights*¹ is “engaged”) and on any competing public interest in the material. On the other hand, there is the more complex Ontarian and New Zealand approach of asking not just whether the information or activity is private — which is usually determined by reference to reasonable expectations of privacy — but also whether the intrusion or publicity in question would be highly offensive to an objective reasonable person.

This article will argue that the first of these approaches — determining what is private by reference to reasonable expectations of privacy — is better. It does so by highlighting the many shortcomings of the operation

1. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 art 8 (entered into force 3 September 1953).

of the high offensiveness requirement in New Zealand law and by contrasting it with the simpler English approach. The article begins by explaining both the rationales for and doubts about the New Zealand high offensive test. Three reasons for abandoning the requirement are then given. First, the relative lack of principle governing the application of the high offensiveness test makes it uncertain and unpredictable. Second, where principles have been developed, courts have taken too narrow a view of the nature of privacy harms (which in turn obfuscates the dignity and autonomy interests at heart of the privacy action). Third, the article shows that the high offensiveness test is unnecessary.

II. The High Offensiveness Test in New Zealand Law

The New Zealand privacy torts have at their heart ideas of retreat and inaccessibility. They protect people's ability to remove themselves from the world and to keep certain information to themselves; in other words, to carve out a realm in which they can choose, on their own terms, the extent to which they are accessed by others. As Justice McGrath said (citing this author) in the Supreme Court case of *Brooker v Police*,² privacy is therefore an aspect of human autonomy and dignity which protects against unwanted access to one's physical self and private information.³ Justice Tipping agrees. In the leading New Zealand Court of Appeal decision, *Hosking v Runting*,⁴ he says:

Privacy is potentially a very wide concept; but, for present purposes, it can be described as the right to have people leave you alone if you do not want some aspect of your private life to become public property. Some people seek the limelight; others value being able to shelter from the often intrusive and debilitating stresses of public scrutiny. ... It is of the essence of the dignity

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2. [2007] NZSC 30.
 3. *Ibid* at para 123, citing Lord Hoffmann in *Campbell v MGN Ltd*, [2004] UKHL 22 at para 50 [*Campbell HL*] and citing N A Moreham at para 253 in "Privacy in the Common Law: A Doctrinal and Theoretical Analysis" (2005) 121:4 Law Quarterly Review 628 at 640–41. See also *ibid* (Thomas J's description of the home as a "sanctuary", a place "to retreat or repair to" at para 257).
 4. [2004] NZCA 34 [*Hosking*].

and personal autonomy and well-being of all human beings that some aspects of their lives should be able to remain private if they so wish. Even people whose work, or the public nature of whose activities make them a form of public property, must be able to protect some aspects of their lives from public scrutiny.⁵

New Zealand appellate courts first recognised tortious protection of these privacy interests in 2004 in the *Hosking* case just mentioned.⁶ In that case, a television presenter and his former wife (acting on behalf of their 18 month old children) sought to prevent a women’s magazine from publishing photographs of the children being wheeled down a busy Auckland shopping street in a push chair by their mother. The plaintiffs claimed that the photographs breached the children’s privacy and, given the celebrity of the first plaintiff, potentially jeopardised their safety. All five judges agreed that there was no breach of privacy in the circumstances (primarily because the photographs were of an innocuous event which took place in public), but three of the five nonetheless held that there was a tort of giving publicity to private facts in New Zealand.

In the more widely cited of the two majority judgments, Justices Gault and Blanchard held that the publicity tort has two main requirements. The plaintiff, first, has to establish the existence of facts in respect of which

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5. *Ibid* at paras 238–39. These views are echoed elsewhere in the common law world. For example, in an oft-cited passage from the leading English privacy tort case of *Campbell HL*, *supra* note 3 Lord Hoffmann said that “the protection of human autonomy and dignity — the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people” at para 51. Blatz CJ similarly says in the Supreme Court of Minnesota in *Lake v Wal-mart Stores Inc* (1998), 582 NW (2d) 231 (Minn Sup Ct (US)) that: “The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close” at 235.
 6. *Hosking*, *supra* note 4. The tort had previously been recognised in a handful of first instance decisions including *Tucker v News Media Ownership Ltd*, [1986] 2 NZLR 716 (HC) [*Tucker*]; *Bradley v Wingnut Films Ltd*, [1993] 1 NZLR 415 (HC) [*Bradley*]; *P v D*, [2000] 2 NZLR 591 (HC) [*P v D*].

there is a reasonable expectation of privacy and second, that publicity was given to those private facts that would be considered highly offensive to an objective reasonable person.⁷ Gault and Blanchard JJ made it clear that the first requirement — that the plaintiff had a reasonable expectation of privacy — is designed to determine whether the information in question was private. Under the heading “Private Facts”, they explained (citing Chief Justice Gleeson in the Australian High Court case of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*)⁸ that there is no bright line between what is public and private but that:

Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved.⁹

The third member of the majority, Tipping J, agreed that whether there is a reasonable expectation of privacy depends on social mores, stating that the word “reasonableness” plainly imports into the privacy tort an enquiry into “contemporary societal values” in respect of the matter at hand.¹⁰ Gault and Blanchard JJ took account of a range of factors in deciding that the children had no reasonable expectation of privacy in that case including the plaintiffs’ location, the nature of the activity depicted, public accessibility of the “facts” which the photograph conveyed (which they said, were the existence of the twins, their age, and the fact that the parents were separated), and the plaintiffs’ particular attributes including the fact that they were children and that they had a celebrity parent.¹¹

Importantly for the purposes of this article, according to Gault and Blanchard JJ, but not Tipping J, a plaintiff seeking to establish an actionable breach of privacy also has to satisfy a second test. He or she

7. *Hosking*, *supra* note 4 at para 117.

8. [2001] HCA 63 [*Lenah*].

9. *Hosking*, *supra* note 4 at para 119 citing *ibid* at para 42.

10. *Hosking*, *supra* note 4 at para 250.

11. *Ibid* at paras 120–24, per Gault and Blanchard JJ and at para 260, Tipping J also took account of the plaintiffs’ location and his assessment of likely societal attitudes to the image.

has to show that publicity was given to the facts in question which would be highly offensive to an objective reasonable person.¹² The inspiration for this came particularly from three sources:¹³ the United States tort of giving publicity to private life (as articulated in the *Restatement of the Law of Torts (Second)*);¹⁴ Gleeson CJ’s statement in *Lenah* that “[t]he requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private”;¹⁵ and the English Court of Appeal’s application of the high offensiveness test in *Campbell v MGN Ltd*¹⁶ (which, as discussed below, was subsequently overruled by the House of Lords).

Gault and Blanchard JJ make it clear that the point of the high offensiveness test is to ensure that trivial claims are excluded from the reach of the publicity tort. They said that although a rights-based action like breach of privacy would usually be actionable irrespective of “the seriousness of the breach”, “it is quite unrealistic to contemplate legal liability for all publications of private information”.¹⁷ It would be “absurd” they said “to consider actionable merely informing a neighbour that one’s spouse has a cold”:¹⁸ rather “[b]y living in communities individuals necessarily give up seclusion and expectations of complete privacy”.¹⁹ They go on to explain that the action should only be concerned with

12. *Ibid* at para 117.

13. *Ibid* at para 126.

14. William L Prosser, John W Wade & Frank J Trelease, *Restatement (Second) of Torts* (Philadelphia: The American Law Institute, 1977) (which says that the publicity tort requires a plaintiff to show that “the matter publicised is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public” at § 652D) [*Restatement of Torts*]. Early High Court decisions recognising the right to privacy in New Zealand were also heavily influenced by US law; see *e.g. P v D*, *supra* note 6 at paras 33–34 and *Bradley*, *supra* note 6 at 423 *et seq.*

15. *Lenah*, *supra* note 8 at para 42.

16. [2002] EWCA Civ 1373 [*Campbell CA*].

17. *Hosking*, *supra* note 4 at para 125.

18. *Ibid.*

19. *Ibid.*

“*widespread* publicity of very personal and private matters”²⁰ and that:

publicity, even extensive publicity, of matters which although private, are not really sensitive should not give rise to legal liability. The concern is with publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned. The right of action, therefore, should be only in respect of publicity determined objectively, by reference to its extent and nature, to be offensive by causing real hurt or harm.²¹

Finally, they stressed that the high offensiveness test relates to “the publicity” and is not part of the test of whether the information is private.²²

Although there has always been doubt about the desirability of this separate highly offensive publicity requirement, Gault and Blanchard JJ’s approach has been consistently applied in subsequent first instance decisions.²³ Importantly, this includes the 2012 case of *C v Holland*²⁴ in which New Zealand’s second privacy tort — the tort of intrusion into seclusion — was first recognised.²⁵ In that case, a woman successfully sued her flatmate for damages after he videoed her through a hole in the ceiling while she was having a shower. Proceedings were brought to establish the preliminary issue of “whether invasion of privacy of this type, without publicity or the prospect of publicity, is an actionable tort in New Zealand”.²⁶ Justice Whata held that it was, regarding the tort of intrusion into seclusion as “entirely compatible with, and a logical adjunct to, the *Hosking* tort of wrongful publication of private facts”.²⁷ Whata J

20. *Ibid* [emphasis added].

21. *Ibid* at para 126.

22. *Ibid* at para 127.

23. See e.g. *Andrews v Television New Zealand Ltd*, [2009] 1 NZLR 220 (HC) [*Andrews*]; *Faesenkloet v Jenkin*, [2014] NZHC 1637 [*Faesenkloet*]; *Brown v Attorney-General (Invasion of Privacy)*, [2006] NZAR 552 (DC) [*Brown*].

24. [2012] NZHC 2155 [*Holland*].

25. *Ibid*. The existence of the seclusion tort in New Zealand has been implicitly accepted in a handful of cases since, including in the Court of Appeal in *Graham v R*, [2015] NZCA 568 at para 22 *et seq*.

26. *Holland*, *supra* note 24 at para 1. (The case settled before the substantive hearing took place.)

27. *Ibid* at para 75.

held that the New Zealand intrusion tort has four key requirements:

- (a) An intentional and unauthorised intrusion;
- (b) Into seclusion (namely intimate personal activity, space or affairs);
- (c) Involving infringement of a reasonable expectation of privacy; and
- (d) That is highly offensive to a reasonable person.²⁸

A legitimate public concern in the “information” may provide a defence.²⁹

Whata J’s formulation of the intrusion into seclusion tort was once again heavily influenced by North American jurisprudence, this time by both the US and new Ontarian intrusion torts.³⁰ In Whata J’s view, it was important to develop the requirements of the action consistently with those actions so that the New Zealand torts could benefit from the guidance which North American authority provides. He also stressed the need to ensure that the “content” of the intrusion tort is consistent with domestic privacy law and principles.³¹ Whata J therefore preferred his four-part approach to the one-step English reasonable expectation of privacy test, holding that the English approach “is not sufficiently prescriptive”³² and that the conflict between the right to seclusion and other rights and freedoms is “very significant” and demands “a clear

28. *Ibid* at para 94.

29. *Ibid* at para 96.

30. *Ibid* at paras 11–17, 94. According to *Restatement of Torts*, *supra* note 14, “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person” at § 652B. The question of whether there is an intrusion upon seclusion is determined by reference to the plaintiff’s reasonable expectation privacy in respect of the place or matters intruded upon (see *Shulman v Group W Productions, Inc*, 18 Cal (4th) 200 (Cal Sup Ct (US) 1998)) [*Shulman*]. According to *Jones v Tsige*, 2012 ONCA 32 [*Jones*], a plaintiff seeking to establish the Ontarian tort of seclusion must show “(1) an 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” at para 56.

31. *Holland*, *supra* note 24 at para 94.

32. *Ibid* at para 97.

boundary for judicial intervention”.³³ In his view, the high offensiveness test sets a “workable barrier to the unduly sensitive litigant”.³⁴

III. Doubts About The High Offensiveness Test

In spite of its consistent application in first instance decisions, the desirability of a separate high offensiveness test in New Zealand law has always been a matter of contention. Significantly, Tipping J did not see any need for it in *Hosking*. Although he agreed with Gault and Blanchard JJ that “relatively trivial invasions of privacy should not be actionable”³⁵ and that “it will always be necessary for the degree of offence and harm to be substantial”,³⁶ in his view the separate high offensiveness requirement set the bar for recovery too high and was unnecessary. This was because the reasonable expectation of privacy test could be relied on to exclude unmeritorious claims:

I would myself prefer that the question of offensiveness be controlled within the need for there to be a reasonable expectation of privacy. In most cases that expectation is unlikely to arise unless publication would cause a high degree of offence and thus of harm to a reasonable person. But I can envisage circumstances where it may be unduly restrictive to require offence and harm at that high level ...³⁷

He continued that regardless of whether it forms part of the reasonable expectation of privacy test or operates as a separate test, any “qualifier” used to determine whether something is private should be a “substantial level of offence” rather than a high level of offence. The former, he said, was “more flexible, while at the same time capturing the essence of the matter”.³⁸

Other judges — including members of the New Zealand Supreme Court — have also questioned the status of Gault and Blanchard JJ’s test, particularly the desirability of the highly offensive publicity requirement.

33. *Ibid.*

34. *Ibid.*

35. *Hosking*, *supra* note 4 at para 255.

36. *Ibid* at para 256.

37. *Ibid.*

38. *Ibid.*

In the Supreme Court decision of *Rogers v Television New Zealand*,³⁹ two of their Honours applied Gault and Blanchard JJ’s test but expressly declined to approve it.⁴⁰ Chief Justice Elias, with whom Justice Anderson concurred, also said that the Court should “reserve its position on the view ... that the tort of privacy requires not only a reasonable expectation of privacy but also that publicity would be ‘highly offensive’”, noting that the test had been “doubted” by members of the House of Lords in the leading English decision of *Campbell*.⁴¹ Similar reservations can be gleaned from the judgment of President Young in the Court of Appeal decision in *Rogers*. Echoing Tipping J in *Hosking*, he said:

These two elements are interconnected. In most cases it will be the defeating of a reasonable expectation of privacy which makes publication objectionable, and likewise if publicity could fairly be seen as objectionable that might well suggest that there was a reasonable expectation of privacy in relation to the information in question. For present purposes, however, I propose to focus on the first of these two requirements.⁴²

These observations also reflect concerns raised by numerous commentators about the impact of the high offensiveness test on the New Zealand privacy

39. [2007] NZSC 91.

40. *Ibid* at para 99, per McGrath J at para 144, per Anderson J at para 46, per Blanchard J at para 61, and per Tipping J (who decided the case on a different basis altogether).

41. *Ibid* at para 25. (Anderson J said that he “share[d] the concern expressed by the Chief Justice that the jurisprudence of [*Hosking*] should not be regarded as settled” at para 144.)

42. *Television New Zealand Ltd (TVNZ) v Rogers*, [2007] 1 NZLR 156 (CA) at para 122 [*Rogers CA*].

torts.⁴³ Tom McKenzie, for example, argues that “the offensiveness test does little analytical work and fails to protect the plaintiff’s dignity and should, therefore, be abandoned”.⁴⁴

Finally, it should be observed that English courts’ support for the high offensiveness test was perhaps not as strong as Gault and Blanchard JJ suggested in *Hosking*. In their discussion of English developments, Gault and Blanchard JJ said that in contrast to breach of confidence (which they said focused on confidential information and did not require a disclosure to be offensive), the emerging English privacy action gave a right of action for the publication of personal information absent an obligation of confidence “but only where that publication is or is likely to be highly offensive to a reasonable person”.⁴⁵ They continued that in developing this high offensiveness requirement, English courts had drawn upon the US publicity tort. This was because the English Court of Appeal in *Campbell* had referred with approval to Gleeson CJ’s dicta in *Lenah* which in turn “comes directly from the American privacy

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43. See e.g. Lisa Tat, “Plaintiff Culpability and the New Zealand Tort of Invasion of Privacy” (2008) 39:2 Victoria University of Wellington Law Review 365 at 379–80; Chris Hunt, “Breach of Privacy as a Tort” (2014) 1:1 New Zealand Law Journal 286; Chris Hunt, “New Zealand’s New Privacy Tort in Comparative Perspective” (2013) 13:1 Oxford University Commonwealth Law Journal 157 at 163–65 [Hunt, “New Privacy Tort”]; Jennifer Moore, “Traumatised Bodies: Towards Corporeality in New Zealand’s Privacy Tort Law Involving Accident Survivors” (2011) 24:3 New Zealand Universities Law Review 387 at 402–05; Tim Bain, “The Wrong Tort in the Right Place: Avenues for the Development of Civil Privacy Protections in New Zealand” (2016) 27:2 New Zealand Universities Law Review 295 at 304–05; N A Moreham, “Why is Privacy Important? Privacy, Dignity and the Development of the New Zealand Breach of Privacy Tort” in Jeremy Finn & Stephen Todd, eds, *Lau, Liberty and Legislation* (Wellington, NZ: LexisNexis, 2008) 231 at 239 *et seq*; N A Moreham, “Recognising privacy in England and New Zealand” (2004) 63:3 Cambridge Law Journal 527 at 555–58.
44. Thomas Levy McKenzie, “The New Intrusion Tort: The News Media Exposed?” (2014) 45:1 Victoria University of Wellington Law Review 79 at 95.
45. *Hosking*, *supra* note 4 at para 42.

jurisprudence”.⁴⁶ This conclusion influenced Gault and Blanchard JJ’s adoption of the high offensiveness test. Just before setting out their own version of the two-part privacy test, they said that its requirements were “a logical development of the attributes identified in the United States jurisprudence and adverted to in judgments in the British cases”.⁴⁷

All of these conclusions seem to have been based on the fact that the high offensiveness test had been applied by the English Court of Appeal in *Campbell* in 2002. But the Court’s approach in that case was inconsistent with another leading English Court of Appeal decision, *A v B Plc*,⁴⁸ in which Lord Woolf CJ identified the plaintiff’s reasonable expectation of privacy as the gravamen of liability and did not adopt a highly offensive requirement at all.⁴⁹ Further, in one of the pre-*Hosking* iterations of *Douglas v Hello! Ltd* litigation,⁵⁰ Justice Lindsay had declined to rely on the high offensiveness test developed in *Campbell CA*⁵¹ to determine whether surreptitiously taken photographs of the plaintiffs’ wedding reception should be regarded as confidential. He noted in doing so that Gleeson CJ’s dictum “does not even purport to be an exclusive definition of what is private”.⁵²

It is unsurprising, then, that just two months after the *Hosking* case

46. *Ibid* at para 43.

47. *Ibid* at para 117.

48. [2002] EWCA Civ 337.

49. *Ibid* at para 11ix-x. (Although the Court in *A v B Plc* cited the passage in which Gleeson CJ expresses support for the high offensiveness test in *Lenah*, *supra* note 8, this was simply to show “the difficulty of distinguishing between public and private information” and not to endorse the high offensive test as a means of determining what is private at para 11vii.)

50. [2003] EWHC 786 (Ch) [*Douglas*]. (This litigation concerned the publication of unauthorised photographs of the wedding of celebrity actors, Michael Douglas and Catherine Zeta-Jones.)

51. *Campbell CA*, *supra*, note 16.

52. *Douglas*, *supra* note 50 at paras 188–92. (He continues that the fact that “matters the disclosure of which would be highly offensive to a reasonable person of ordinary sensibilities may, on that account, be regarded as private does not, of itself, suggest that no other matters can be so regarded” at para 191.)

was decided, the high offensiveness requirement was rejected by the House of Lords in *Campbell* in favour of the reasonable expectation of privacy test. The majority also overturned the Court of Appeal's decision that the plaintiff was not entitled to damages for publication of the details of her drug addiction treatment and photographs of her leaving a Narcotics Anonymous meeting. In what has emerged as the leading judgment in that decision, Lord Nicholls said that "the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy" and that the high offensiveness test had no place in it.⁵³ Baroness Hale agreed. Lord Carswell concurred with the judgments of both Baroness Hale and Lord Hope (who was in favour of relying on a "substantial" offensiveness test in cases where whether the information is public or private is not "obvious")⁵⁴ but decided the case on the basis of the intimate nature of the information, making it "not necessary" to consider the high offensiveness part of the test.⁵⁵ This led the English Court of Appeal to say in *Associated Newspapers Ltd v HRH Prince of Wales*⁵⁶ that Gault and Blanchard JJ's claim in *Hosking* that a plaintiff could only recover under the English privacy tort if publication is or was likely to be highly offensive to a reasonable person did not reflect the law as it stood in 2006.⁵⁷ It is perhaps also questionable whether it was a sufficiently fulsome articulation of the law as it stood in 2004.

The failure to recognise the alternative test in *A v B Plc* (and the subsequent adoption of that test by the House of Lords in *Campbell*) reduces the weight that should be given to Gault and Blanchard JJ's decision to include it in the New Zealand privacy tort. It not only means that an important alternative approach (*i.e.* one based principally on reasonable expectations of privacy) was not considered in *Hosking* but that consistency with English law — which Gault and Blanchard JJ themselves regarded as desirable — was not achieved. In those circumstances, it is regrettable that greater consideration was not given

53. *Campbell HL*, *supra* note 3 at para 21.

54. *Ibid* at para 92.

55. *Ibid* at para 166.

56. [2006] EWCA Civ 1776.

57. *Ibid* at para 65.

to the significant constitutional and cultural differences between New Zealand and the United States, particularly in respect of the protection of freedom of expression.

IV. Why The High Offensiveness Test Should Be Abandoned

All these reservations about the high offensiveness test are, it is suggested, rightly held. Indeed, this section will set out three main reasons why New Zealand courts should abandon it. First, the absence of clear principle about the operation of the high offensiveness test makes it unacceptably unpredictable. Second, when courts have set out principles to guide the application of the test, they have taken too narrow a view of the harm caused by privacy breaches. This in turn obfuscates the dignity and autonomy interests at the heart of the privacy action. Third, all of the tools needed to exclude unmeritorious claims are already available under the reasonable expectation of privacy test. The high offensiveness test is therefore unnecessary.

A. Lack of Principle in the Application of the High Offensiveness Test

The first problem with the New Zealand high offensiveness test is the lack of clear principle in the jurisprudence about how it should be applied. In fact, in some cases, the question of whether the intrusion or publicity is highly offensive is disposed of with no reasoning at all. For example, in the strike-out decision in *Henderson v Slevin*,⁵⁸ Associate Justice Osborne gave no reasons for his conclusion that a reasonable person would not think it highly offensive for a liquidator to pass on the plaintiff's computer records to an enforcement unit nor to examine them himself.⁵⁹ He just said that the requirement was not satisfied. Similarly, in declining an application for an interim injunction in *Clague v APN News and Media Ltd*,⁶⁰ Justice Toogood gave no reasons for his conclusion that,

58. [2015] NZHC 366.

59. *Ibid* at paras 48, 71.

60. [2012] NZHC 2898.

although it would be embarrassing to the plaintiff and distressing to the plaintiff and his family, he was not persuaded that publicity around a police investigation into allegations of domestic assault would be highly offensive or objectionable to a reasonable person.⁶¹

In other cases, courts have set out potentially useful principles for the application of the high offensiveness test but then failed clearly to apply them to the facts, instead treating the matter as a question of judicial instinct. For example, when determining whether the high offensiveness test was met on the facts in *Hosking*, Gault and Blanchard JJ simply said that:

We are not convinced a person of ordinary sensibilities would find the publication of these photographs highly offensive or objectionable even bearing in mind that young children are involved. ... The real issue is whether publicising the content of the photographs (or the ‘fact’ that is being given publicity) would be offensive to the ordinary person. We cannot see any real harm in it.⁶²

There is nothing in their discussion to explain why the proposed publication was insufficiently harmful — was it, for example, because the children were unaware of it, because they were too young to suffer distress, or because the information in the photograph had already been held not to be private? The leading intrusion case, *Holland*, is similar. Whata J begins the judgment by usefully saying that the offensiveness element is “a question of fact according to social conventions or expectations”⁶³ and by citing a passage identifying “various factors” which will bear on whether an intrusion is “highly offensive” including “the degree of intrusion, context, conduct and circumstances of the intrusion, the motive and objectives of the intruder and the expectations of those whose privacy is invaded”.⁶⁴ But when it comes to applying the high offensiveness test, he does not apply those factors systematically to the facts. Rather, he simply says that the defendant’s act of filming the plaintiff in the shower was

61. *Ibid* at para 38.

62. *Hosking*, *supra* note 4 at para 165.

63. *Holland*, *supra* note 24 at para 16.

64. *Ibid* citing *Miller v National Broadcasting Co*, 187 Cal App (3d) 1463 (Cal Ct App (US) 1986) at 1483 [*Miller*] and citing *Jones*, *supra* note 30 at para 58.

offensive without saying why.⁶⁵

Faesenkloet v Jenkin is an exception to this trend. In that case, the plaintiff sought an injunction to prevent his neighbour, with whom he was already engaged in an acrimonious dispute, from filming people using the plaintiff's driveway. Justice Asher expressly identifies and applies the principle that a deliberate intrusion which was designed to offend the plaintiff “might be more offensive than one which is obviously accidental and incidental to another purpose”,⁶⁶ concluding that the camera in that case was not installed with the purpose of offending the plaintiff.⁶⁷ He also said that the greater the expectation of privacy interfered with by the intrusion, “the more likely an intrusion will be offensive”,⁶⁸ concluding that the surveillance was not offensive because the area surveyed was not large nor used for any intimate purpose, the camera did not film the plaintiff's home or garden, and because cars and pedestrians could still use the driveway without being caught by the camera.⁶⁹ Although this more detailed reasoning is welcome, the broad principles applied in this case still provide only limited guidance for future cases (especially since Asher J had already decided that the plaintiff had no reasonable expectation of privacy in respect of the filming (in part because the plaintiff was in fact

65. *Holland, ibid* at para 99. (In a similar vein, in the pre-*Hosking* case of *P v D, supra* note 6, Nicholson J said that offensiveness has to be assessed from the perspective of a person of ordinary sensibilities “in the same position” as the plaintiff at para 39 and that courts should not take an idealistic view about societal attitudes to mental illness at para 37, but when it came to applying the law to the facts, he simply held that he accepted that the plaintiff had the “stated feelings” and that “a reasonable person of ordinary sensibilities would in the circumstances also find publication of information that they had been a patient in a psychiatric hospital highly offensive” at para 39.)

66. *Faesenkloet, supra* note 23 at para 47.

67. *Ibid* at paras 47–49.

68. *Ibid* at para 50.

69. *Ibid.* (Asher J concluded that the plaintiff did not have a reasonable expectation of privacy in respect of the filming for similar reasons at paras 44–45.)

able to evade the camera's gaze altogether)).⁷⁰

The general paucity of reasoning about the application of the high offensiveness test makes its operation unpredictable. Although a test appealing to a judge's instincts might be useful for disposing of unmeritorious cases once they come to court, it does not delineate the boundaries of the privacy torts clearly. This in turn makes it difficult for people — including those seeking to publish information, investigate wrongdoing or advise clients wanting to do these things — to know exactly what the law does and does not proscribe. This level of uncertainty is undesirable. Although privacy actions need to retain a degree of flexibility to reflect legitimate differences in the degree of inaccessibility that each individual seeks, they do not need to be imprecise or unpredictable. Indeed, given that the action has the potential to stymie freedom of expression and prevent legitimate investigation of wrongdoing, it is important that they are not. The application of the high offensiveness test requires more, then, than a general conclusion at the end of the judgment about whether or not the judge in a particular instance thought that the behaviour was offensive.

It is important to note at this point that this lack of clear reasoning in the New Zealand privacy case law is a particular feature of the application of the high offensiveness part of the privacy tests. The principles governing the application of the reasonable expectation of privacy test are, in contrast, much better articulated.⁷¹ As outlined above, when it comes to applying the reasonable expectation of privacy test in *Hosking, Gault and Blanchard JJ* explain that information about health, personal relationships, and finances “may be easy to identify as private” and that reasonable expectations of privacy depend on what people applying “contemporary standards of morals and behaviour, would understand to

70. *Ibid* at para 50.

71. It should be noted that there is also still uncertainty about the scope of the requirement in *Holland* that the plaintiff establish an “intentional and unauthorised intrusion” into “seclusion (namely intimate personal activity, space or affairs)” in the intrusion tort. See further N A Moreham, “A Conceptual Framework for the New Zealand Tort of Intrusion” (2016) 47:2 Victoria University of Wellington Law Review 283.

be meant to be unobserved”.⁷² They also discussed in some detail the impact that a plaintiff’s location and public profile — including that of involuntary public figures, like the children at issue in that case — would have on his or her reasonable expectations of privacy.⁷³

The factors which bear on the application of the reasonable expectation of privacy test are even better articulated in England and Wales. In the influential judgment of the Court of Appeal in *Murray v Express Newspapers Plc*,⁷⁴ Sir Anthony Clarke MR said (in the course of holding that the young son of well-known author J K Rowling could restrain the defendants from publishing photographs taken of him on the public street during a family trip to a café):

As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the plaintiff was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.⁷⁵

These factors were systematically applied in *Murray* itself and have been adopted in numerous first instance and appellate judgments since.⁷⁶ This has in turn led to the emergence of identifiable principles governing the application of the reasonable expectation of privacy test. Indeed, this author has argued elsewhere that it is now possible to identify from within English law both high-level principles governing the application of the reasonable expectation of privacy test and specific categories of

72. *Hosking*, *supra* note 4 at para 119 citing *Lenah*, *supra* note 8 at para 42.

73. *Ibid* at paras 120–24.

74. [2008] EWCA Civ 446 [*Murray*].

75. *Ibid* at para 36. (The Court also expressly rejected the *Hosking* court’s approach to the children of public figures on the basis that it put too little weight on the children’s separate privacy interests at para 51.)

76. See *e.g.* *Weller v Associated Press Ltd*, [2015] EWCA Civ 1176 at para 16; *Re JR38*, [2015] UKSC 42 at para 98.

information that are likely to satisfy it.⁷⁷ The reasonable expectation of privacy test is therefore applied in a much more principled way than the high offensiveness test.

B. Taking Too Narrow a View of Privacy Harms

One notable exception to the lack of principle in the application of the high offensiveness test in New Zealand is the approach taken in *Andrews v Television New Zealand*.⁷⁸ Regrettably, however, that case is problematic for other reasons.

Andrews concerned a reality television programme which showed in considerable detail the two plaintiffs being extricated from a car wreck on the side of the road late one night. The footage included intimate conversations between the couple including exchanges in which Mrs Andrews told her injured husband that she loved him and asked him to “stay with her”. The couple were not informed of the filming; instead, they first learnt of it some months later when the programme appeared on television during a party at a neighbour’s house.

In his decision rejecting the couple’s claim for damages, Justice Allan accepted that the couple had a reasonable expectation of privacy in respect of the broadcast of intimate conversations between them but said

77. See further N A Moreham, “Unpacking The Reasonable Expectation Of Privacy Test” 134 *Law Quarterly Review* [forthcoming in 2018] [Moreham, “Unpacking”]. (This article argues that under the first of the two high-level principles, courts consider whether recognition of a reasonable expectation of privacy is consistent with societal attitudes to the information or activity and under the second, they ask whether the plaintiff relied on socially-recognised signals to show that he or she regarded the information or activity as private. Categories of information or activity which society will usually regard as private include matters relating to the appearance or workings of the physical body, to sexual encounters or activity, to the intimate details of one’s personal relationships, and the intimacies of one’s family and/or domestic life.)

78. *Andrews*, *supra* note 23.

that the broadcast was not highly offensive.⁷⁹ In reaching that conclusion, he focused on the tone of the publicity. He held that:

There may be instances where the disclosure of otherwise relatively inoffensive facts may become offensive by reason of the extent and tone of a publication. So the manner of disclosure is a relevant consideration.⁸⁰

Later in the judgment, Allan J said that there was nothing in the programme which showed the couple in “a bad light”.⁸¹ He said that neither plaintiff was able to point to anything about the programme which they regarded as humiliating, embarrassing, or offensive and noted that it had not made mention of the fact that both plaintiffs had excess blood alcohol levels at the time of the accident.⁸² Mrs Andrews had accepted, he said, that she was portrayed as “a caring person, very much concerned about her husband’s wellbeing” and “coping well by making light of the situation” and that nothing which she had said to her husband could be regarded as humiliating or embarrassing to either of them.⁸³ Although Allan J said that the absence of inherently embarrassing material “does not lead inexorably to the conclusion that the disclosure was not humiliating and distressful”,⁸⁴ it therefore clearly had a significant bearing on his disposal of the case.

This approach, with respect, misses the point. The publicity tort is not about protection from reputational harm or embarrassment but the preservation of choice about when the private aspects of one’s life will be accessible to others. This, as widely recognised by commentators and

79. *Ibid* at para 100. (Allan J also held that had the plaintiffs established that the footage had breached their privacy, it would have been outweighed by a legitimate public concern in the activities of emergency services at para 91.)

80. *Ibid* at para 51.

81. *Ibid* at para 67.

82. *Ibid* at para 67. (They had both escaped conviction for drunk driving because the police were unable to establish which of them had been driving.)

83. *Ibid* at para 68.

84. *Ibid* at para 69.

judges, is a fundamental aspect of individual dignity and autonomy.⁸⁵ The complaint in *Andrews* is therefore not that the footage made the couple look bad but that someone else decided that the world should see and hear them during that traumatic rescue. This is humiliating and distressful in itself regardless of the tone of the documentary.⁸⁶ Other examples drive home that point. Is it really alright, for example, to broadcast surreptitiously obtained footage of a father comforting his dying child in hospital because it makes him look like a caring person? And what say there is widespread agreement that the plaintiff looks great in naked photographs that her ex-boyfriend put up on the internet? Clearly that does not mean that they are no longer humiliating. The objection in these situations is that it should be the subjects themselves — not the defendants — determining whether these intimate matters are shown. By suggesting that the unwanted broadcast of detailed footage of the event has to be in some way negative or embarrassing, *Andrews* therefore obfuscates what the privacy action is really about.

It should also be noted that Allan J’s conclusion runs contrary to an increasing body of evidence showing the harm caused by unwanted exposure at intimate or traumatic times, even if the coverage is positive. For example, friends and family members of the men who died in the Pike River mine disaster in 2011 have said that intense media intrusion

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85. See *e.g.* Edward J Bloustein, “Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser” (1964) 39:6 *New York University Law Review* 962; Stanley Benn, “Privacy, Freedom and Respect for Persons” in James Roland Pennock & John W Chapman, eds, *Privacy, NOMOS XIII* (New York: Atherton Press, 1971) 1; David Feldman, “Secrecy, Dignity or Autonomy? Views of Privacy as a Civil Liberty” (1994) 47:2 *Current Legal Problems* 41; Ruth Gavison, “Privacy and the Limits of the Law” (1980) 89:3 *Yale Law Journal* 421; Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1967); *Pavesich v New England Life Insurance Co*, 50 SE 68 at 70 (Sup Ct Ga (US) 1905); *Hosking, supra* note 4 at para 239, per Tipping J; *Campbell HL, supra* note 3 at para 50, per Lord Hoffman.
86. See generally Catlin Wilson & Daniel Nilsson, “Protecting Our Personal Sphere” (2013) 1:1 *New Zealand Law Journal* 8 at 9–10; Tat, *supra* note 43 at 379; Moreham, “Why is Privacy”, *supra* note 43 at 240–43.

in the days following the explosion left them feeling “violated”, physically unsafe, and commodified.⁸⁷ The fact that the coverage was sympathetic did not alter the strength of any of these reactions.

In *Andrews*, Allan J was of the view that Gault and Blanchard JJ’s decision in *Hosking* required him to take this narrow, tone-focused approach to the highly offensive requirement. He said, when dismissing Tipping J’s view in *Hosking* that the reasonable expectation and high offensiveness requirements would “be likely to coalesce”,⁸⁸ that it was important to bear in mind “as a matter of analysis at a practical level that the ‘highly offensive’ test relates to publicity” and is therefore not part of the test of whether information is private.⁸⁹ The court “does not reach the stage of considering the highly offensive test unless and until it has concluded that what has been disclosed was private information”.⁹⁰ In his view, then, the focus on the nature of the publicity flowed from Gault and Blanchard JJ’s formulation of the privacy test.

The highly offensive publicity test does certainly point away from the conclusion — which the English Court of Appeal recently reached in *Gulati v MGN Ltd*⁹¹ — that breach of privacy without more can cause compensable harm. Rather, its inclusion implies that even if the breach of privacy is sufficiently serious to be regarded as socially unacceptable (as the reasonable expectation of privacy test requires) it still might not cause real humiliation, distress, or other harm to the plaintiff. Something more, it says, is needed. The test therefore obscures the fact that all privacy interferences “humiliate” their subjects — and undermine their dignity and autonomy — by shifting control over something personal to

87. N A Moreham & Yvette Tinsley, “Media Intrusion into Grief: Lessons from the Pike River Mining Disaster” in Andrew T Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016) 115 at 127 [Moreham & Tinsley, “Media Intrusion into Grief”].

88. *Andrews*, *supra* note 23 at para 25 (citing *Hosking*, *supra* note 4 at para 256).

89. *Ibid.*

90. *Ibid.*

91. [2015] EWCA Civ 1291. (Substantial damages were awarded in that case for the loss of privacy itself even in the absence of distress or other harm.)

the subject to someone other than the subject.⁹²

This obfuscation is exacerbated by the fact that the high offensiveness element of Gault and Blanchard JJ’s test requires the plaintiff to show that the publicity would cause a reasonable person “offence”. The word “offensive” is usually used to refer to something which is insulting or denigrating in some way — an opinion which is racist or sexist, for example. This is not the language of privacy. In privacy situations, people use the language of dignity and autonomy: “violation”, lack of respect, commodification.⁹³ The word “offensiveness” therefore distracts from the interests at the core of the privacy right.

All this makes it less surprising that the judge in *Andrews* focused on the lack of denigration or criticism in the broadcast of the couple rather than the humiliation inherent in it. It also suggests that at the very least the high offensiveness test should be reformulated to reflect Gault and Blanchard JJ’s actual concern in *Hosking*, namely that the publicity be “truly humiliating and distressful”⁹⁴ to an objective, reasonable person.⁹⁵

92. Hyman Gross, “Privacy and Autonomy” in James Roland Pennock & John W Chapman, eds, *NOMOS XIII* (New York: Atherton Press, 1971) 169 at 169, 177. (He continues that public disclosures of private facts always result in the individual being shamed, not because of what others learn about him or her, but because someone other than the victim is determining what will be done with what is learnt at 177.) In *Hosking*, *supra* note 4 at para 125 Gault and Blanchard JJ also implicitly acknowledge this by saying that “[i]n theory a rights-based cause of action would be made out by proof of breach of the right irrespective of the seriousness breach” (but they go on to say that such an approach is unrealistic and that the high offensiveness test is therefore needed at para 127).

93. Moreham & Tinsley, “Media Intrusion into Grief”, *supra* note 87; UK, The Leveson Inquiry, *An Inquiry into the Culture, Practices and Ethics of the Press: Report*, by The Right Honourable Lord Justice Leveson, vol 2 (London: The Stationery Office, 2012) at 504 para 3.2, 540 paras 1.7, 1.10, 548 para 3.4, 553 para 3.27, 602 para 2.44 (where Sir Brian Leveson spoke of individual lives being treated like “commodities” by the media).

94. *Hosking*, *supra* note 4 at para 126.

95. *Ibid* at para 117.

But even given its current formulation, Allan J’s application of the high offensiveness test in *Andrews* is too narrow. Although Gault and Blanchard JJ argued in *Hosking* that the high offensiveness test was necessary to exclude non-serious claims from the reach of the action, neither suggested that the “tone” of the publicity would determine whether it was satisfied. Rather, they focused on whether the publicity was widespread and would cause a reasonable plaintiff distress. And, contrary to Allan J’s suggestion, Tipping J’s point in *Hosking* (echoed by Young P in *Rogers CA*)⁹⁶ about the reasonable expectation of privacy and high offensiveness tests usually coalescing can be reconciled with the view that it is the publicity which has to be offensive. What Tipping J and Young P said in those cases is that offensiveness — whether it is of the publicity or anything else — should inevitably follow interference with a reasonable expectation of privacy.

The second reason why Allan J concluded that the high offensiveness test was not satisfied in *Andrews* was that that the couple did not get upset about the right thing in the right way. Allan J said that, as the evidence unfolded, it emerged that “it was not the intrusion on the plaintiffs’ privacy which lay at the heart of the proceeding” but rather their “chagrin and annoyance” at not being told about the filming or the broadcast.⁹⁷ “Even more” important was the fact that the plaintiffs were given no prior notice of the date of the broadcast and as a result found themselves watching the broadcast for the first time in the company of strangers.⁹⁸ But all this, says Allan J, is immaterial because “a failure to obtain consent prior to publication is not an ingredient of the tort of breach of privacy”.⁹⁹ Further, consent is not normally sought by broadcasters if the filming takes place in public view.¹⁰⁰ It followed, he said, that given that neither plaintiff found the broadcast of conversations at the accident scene as highly offensive, it was impossible to conclude that a reasonable person

96. *Rogers CA*, *supra* note 42.

97. *Andrews*, *supra* note 23 at para 69.

98. *Ibid.*

99. *Ibid* at para 70.

100. *Ibid.*

in the shoes of the plaintiffs would do so.¹⁰¹

This reasoning is, with respect, difficult to follow. First, considering whether broadcasters normally seek consent before broadcasting footage of something which was in public view begs the very question the proceedings were designed to answer. The whole point of this case is to determine whether broadcasters *should* be entitled to publish footage of this nature without informing or asking its subjects.¹⁰² What the media usually do should not be determinative of this matter. Further, contrary to Allan J's contention, questions of choice and consent are central to the right to privacy including in the tort of giving publicity to private facts. As Tipping J said in *Hosking*, privacy is all about "the right to have people leave you alone if you do not want some aspect of your private life to become public property ... that some aspects of people's lives should be able to remain private if they so wish".¹⁰³ Consent — or lack thereof — plainly lies at the heart of these ideas of "wanting", "wishing", and "choosing". The fact that the plaintiffs were upset that their consent was not sought is therefore entirely relevant to their claim.

Third, it is difficult to see why the plaintiffs' "chagrin and annoyance" were not enough to satisfy the requirement that the privacy interference causes real humiliation, distress, or other harm. It is clear from Allan J's own findings of fact that the plaintiffs were deeply affected by the defendant's conduct. He held that:

The plaintiffs were greatly distressed by the screening of the programme. They had no warning of it. The accident had given rise to tensions within the family, particularly in the relationship between the plaintiffs themselves and in respect of the emotional health of one of their children. They were forced to re-live the trauma of the accident, as they saw the scene from an entirely different viewpoint. Moreover, all of this occurred while in the company of a number of other people, not all of whom were known to them.¹⁰⁴

101. *Ibid* at para 71. (Even on its face, this statement is questionable. If the highly offensive publicity test is truly objective, then a plaintiff's unusually thick skin about a privacy intrusion should be no more relevant than another plaintiff's thin one.)

102. *Ibid* at para 70.

103. *Hosking*, *supra* note 4 at paras 238–39.

104. *Andrews*, *supra* note 23 at para 15.

This is exactly the kind of distress and consequential harm that was described by Gault and Blanchard JJ in *Hosking*.¹⁰⁵ People experience a range of emotions at having their privacy interfered with including “chagrin and annoyance”. It is not at all clear why only certain of these negative emotions should satisfy the high offensiveness test.

It is unsurprising in light of all this that *Andrews* has been the subject of much academic criticism.¹⁰⁶ Not only did it deny a remedy to the meritorious (albeit perhaps unsympathetic) plaintiffs in that case, it misinterpreted the nature of privacy harms and provided a carte blanche for voyeurs and media companies to broadcast footage of victims at will. The decision in *Andrews* sets the bar for recovery both too high and in the wrong place. By doing so, it fortifies arguments for abandoning the high offensiveness test itself.

C. The High Offensiveness Test is Unnecessary

This leads to the final reason for abandoning the high offensiveness test — it is unnecessary. It will be recalled that in *Hosking*, Gault and Blanchard JJ said that they included the high offensiveness requirement because they believed that it is necessary to keep the action within bounds. It is “quite unrealistic”, they said, to contemplate legal liability for all publications of private information: it would be “absurd”, for example, “to consider actionable merely informing a neighbour that one’s spouse has a cold”.¹⁰⁷ This is not doubted. Privacy torts have the potential both to silence legitimate speech and to deter the desirable investigation of wrongdoing. They therefore need to be kept within clearly defined parameters. Courts do not, however, need to rely on the high offensiveness test to do this.

105. *Hosking*, *supra* note 4 at para 126. (Indeed, since, as discussed above, “offence” imports an idea of denigration or insult, “chagrin and annoyance” seem to fit particularly comfortably within the concept.)

106. See Moore, *supra* note 43 at 402–05; McKenzie, *supra* note 44 at 95–97; Ursula Cheer, “The Future of Privacy: Recent Legal Developments New Zealand” (2007) 13:2 Canterbury Law Review 169 at 183–85; Bain, *supra* note 43 at 319–22; Tat, *supra* note 43 at 379–80; Moreham, “Why is Privacy”, *supra* note 43 at 240–43.

107. *Hosking*, *supra* note 4 at para 125.

This is because unmeritorious claims are already excluded from the privacy tort through the proper operation of the reasonable expectation of privacy test.

All three of the majority judges in *Hosking* made it clear that the reasonable expectation of privacy test will not be satisfied unless the plaintiff's privacy expectations accord with general societal standards. As Tipping J says, the word “reasonableness” plainly imports into the privacy tort an enquiry into “contemporary societal values” in respect of the matter at hand.¹⁰⁸ Gault and Blanchard JJ also approved of Gleeson CJ's observation in *Lenah* that “contemporary standards of morals and behaviour” determine what is and is not private¹⁰⁹ and in *Holland*, Whata J stressed (citing the Californian Supreme Court case of *Shulman v Group W Productions*) that in order to establish a reasonable expectation of privacy, the plaintiff must show both that he or she had a subjective expectation of solitude or seclusion and that that expectation was “objectively reasonable”.¹¹⁰ All this means that whether a plaintiff has a reasonable expectation of privacy is a *normative* enquiry into what privacy protection a plaintiff can expect the law to provide.¹¹¹ Once this is recognised, it becomes plain that it will not be satisfied unless the interference in question is a serious one. The plaintiff has to show that normal everyday people would share their view that the information or activity is private and should be legally protected. This will not be the case if your spouse tells your neighbour — or anyone else for that matter — that you have a cold.

The superfluousness of the high offensiveness test is reinforced when one considers the factors which Whata J identified in *Holland* as relevant to the application of the high offensiveness test. It will be recalled that in *Holland*, Whata J (drawing on *Jones v Tsige* and *Miller v National Broadcasting Co*) said that “various factors” will bear on whether an intrusion is “highly offensive” including “the degree of intrusion,

108. *Ibid* at para 250.

109. *Ibid* at para 119 citing *Lenah*, *supra* note 8 at para 42.

110. *Holland*, *supra* note 24 at para 17 citing, *inter alia*, *Shulman*, *supra* note 30 at para 490.

111. See further, Moreham, “Unpacking”, *supra* note 77.

context, conduct and circumstances of the intrusion, the motive and objectives of the intruder and the expectations of those whose privacy is invaded”.¹¹² But these factors have all also been identified by the English Court of Appeal in *Murray* as relevant to the application of the reasonable expectation of privacy test (noting that English and New Zealand law are very similar in this regard).¹¹³ In fact, there is complete overlap between the two tests. To take the elements one-by-one, the *Holland* enquiries into the “degree”, “conduct”, and “circumstances”¹¹⁴ of the intrusion align with the *Murray* enquiry into “the nature and purpose of the intrusion”,¹¹⁵ the *Holland* enquiry into “context”¹¹⁶ aligns with the *Murray* court’s consideration of the attributes of the plaintiffs, the nature of the activity which they were engaged, the place at which the relevant activity was happening, the absence of consent and the circumstances in which the information came into the publisher,¹¹⁷ *Holland*’s concern with “the motives and objectives of the intruder”¹¹⁸ is covered by the *Murray* enquiry into “the purposes for which the information came into the hands of the publisher”,¹¹⁹ and finally, the concern in *Holland* with the “expectations of those whose privacy is invaded”¹²⁰ plainly overlaps with the reasonable expectation of privacy test itself. It is difficult to see, then, what tools the high offensiveness test is providing that are not already part of the reasonable expectation of privacy test.

It should be recalled at this point that English courts determine privacy claims simply by applying a reasonable expectation of privacy test and a public interest defence. The high offensiveness test was expressly rejected by the House of Lords in *Campbell*. In that case, Baroness Hale

112. *Holland*, *supra* note 24 at para 16 citing *Miller*, *supra* note 64 at 1483 and *Jones*, *supra* note 30 at para 58.

113. For discussion of the factors which the *Hosking* majority regarded as relevant to the reasonable expectation of privacy test see Part II.

114. *Holland*, *supra* note 24 at para 16.

115. *Murray*, *supra* note 74 at para 36.

116. *Holland*, *supra* note 24 at para 16.

117. *Murray*, *supra* note 74 at para 36.

118. *Holland*, *supra* note 24 at para 16.

119. *Murray*, *supra* note 74 at para 36.

120. *Holland*, *supra* note 24 at para 16.

held that “an objective reasonable expectation test is much simpler and clearer” than one which asks whether “disclosure or observation would be highly offensive to a reasonable person of ordinary sensibilities”.¹²¹ Lord Nicholls agreed saying that the “highly offensive” phrase was “suggestive of a stricter test of private information than a reasonable expectation of privacy” and second, that it can:

all too easily bring into account, when deciding whether the disclosed information was private, considerations which go more properly to issues of proportionality; for instance, the degree of intrusion into private life, and the extent to which the publication was a matter of proper public concern.¹²²

Reinforcing all this, the English Court of Appeal recently held that the first instance judge in a judicial review decision was wrong to apply Lord Hope’s high offensiveness test to determine whether information about the plaintiffs’ indebtedness to the National Health Service was private and confidential at common law. Lord Neuberger MR said, speaking for the Court in *W, X, Y and Z v Secretary of State for Health*,¹²³ that “in so far as the judge regarded ‘highly offensive’ formulation as material to whether the information was private and confidential, he was wrong to do so”.¹²⁴

V. Conclusion

If English courts can rely solely on the reasonable expectation of privacy test and legitimate public concern defence to dispose of the dozens of privacy cases which come before them each year, the New Zealand courts can too. Such an approach would move New Zealand courts away from reliance on the imprecise and often value-laden high offensiveness requirement and onto an element which is increasingly the subject of detailed and principled reasoning both in New Zealand and abroad. Unmeritorious claims can easily be dealt with on a reasonable expectations-based approach — non-serious cases will not satisfy the reasonableness test. Indeed, the need to deal with unmeritorious claims

121. *Campbell HL*, *supra* note 3 at para 135 citing *Lenah*, *supra* note 8.

122. *Campbell HL*, *ibid* at para 22.

123. [2015] EWCA Civ 1034.

124. *Ibid* at para 34. (The appeal was ultimately dismissed on other grounds.)

under the reasonable expectation of privacy test would encourage the more nuanced development of that requirement in New Zealand law.

Whilst it is difficult to see what value the high offensiveness test adds to the New Zealand privacy torts, it is not difficult to see what it might be taking away. As discussed, lack of clarity about what is and is not offensive undermines the predictability of the New Zealand privacy actions as a whole. And the narrow types of harm which some courts (most notably the High Court in *Andrews*) say will cause “offence” obfuscates the interests in dignity and autonomy at the heart of the privacy action. The high bar set by the high offensiveness requirement also seems to have arrested the general development of the torts. In the 14 years since *Hosking* was decided, only four successful privacy claims have been brought in New Zealand.¹²⁵ In contrast, courts in England and Wales have considered many dozens of cases and awarded relief to a wide range of plaintiffs. Some of these differences can be put down to the different context in which the torts are operating (including the larger number of celebrities living in the United Kingdom and the media’s strong appetite for stories about them) but there is every reason to think that the higher bar for recovery under the New Zealand torts (particularly under the high offensiveness test) is a factor.

125. See respectively, *Holland*, *supra* note 24; *A v Fairfax New Zealand Ltd*, [2011] NZHC 71 (in which it was held that the fact that the plaintiff had made a sex offence complaint was private); *JJC v Fairfax New Zealand Ltd*, HC Auckland CIV-2001-404-5605 (where the fact that the plaintiff was a child whose mother was allegedly murdered by his father was private); *Brown*, *supra* note 23 (police breached privacy by distributing a flier identifying the plaintiff (by full name and photograph) as a convicted paedophile living in the area). There were also three successful claims which predated *Hosking*: *P v D*, *supra* note 6 (in which a public figure obtained an injunction restraining publication of an article about his or her mental health); *L v G*, [2002] NZAR 495 (DC) (regarding non-consensual publication of an unidentifiable woman’s genitalia in an adult lifestyles magazine); *Tucker*, *supra* note 6 (regarding the proposed disclosure of the fact that a man seeking to raise funds for heart surgery was a convicted paedophile).

Many New Zealand judges have indicated a willingness to reconsider the formulation of the requirements of the privacy torts in an appropriate case. It is hoped that when the opportunity presents itself, the high offensiveness test will be abandoned.