DETERMINING REASONABLE EXPECTATION OF PRIVACY IN THE INTRUSION INTO SECLUSION TORT

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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 article focuses on how to determine when a reasonable expectation of privacy is satisfied, suggesting it involves a detailed analysis of three suggested factors, modified from Richard Wilkins' approach in the US search and seizure context. The article considers how the factors could be applied to an intrusion into seclusion claim in New Zealand.

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 article aims to explore what the intrusion interest is, and when and why it should be respected. It addresses 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

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1 *C v Holland* [2012] 3 NZLR 672.

2 At [1].

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 protects people's private information from being published and therefore was unable to protect C from the intrusion she suffered in *C v* Holland, as no publication was involved.

This article will first examine what the intrusion interest is, then it will summarise what the elements of an intrusion into seclusion action are and should be, and, finally, it will analyse the crux of the tort: when a reasonable expectation of privacy exists.

II. The Intrusion Interest

Before we start the analysis of the details of the New Zealand intrusion into seclusion tort, it is important to consider how the intrusion interest is conceived in theoretical accounts of privacy, why it is important and when it is invoked.

A. How the intrusion interest is conceived

The intrusion interest encapsulates a person's interest in not being accessed. Intrusion and access to a person are essentially an interchangeable way of saying the same thing. This concept is about recognising the intrinsic value of people's private spaces which they recognise as psychologically theirs, and protecting against its unwanted intrusion. Access to a person or intrusion is engaged on a theoretical level whenever a person sees, hears, touches or obtains information about another person. Essentially, it involves an invasion 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.[7] This includes access to a person's information.

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].

7 Nicole Moreham "Privacy in the Common Law" (2005) 121 LQR 628 at 639-641.

Nevertheless, the intrusion interest should not be confused with the information interest. Judges applying the intrusion tort should never consider access to a person only in terms of what communicable information is obtained, as this "[fails to] appreciate the gravity of the privacy violation itself".[8] For example, Nicole Moreham describes how someone spying on an ex-lover getting undressed would communicate a negligible amount of new information and that, if privacy were considered as simply the protection of information, there would be no privacy violation.[9]

However, it seems intuitively obvious that watching someone getting undressed without consent would be a serious violation of a person's intrusion interest. It is a truly deplorable access to a person. A person's naked body is not for anyone to look at, even by someone who 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.

B. Why the intrusion interest should be protected

It is important to preserve the intrusion interest because it protects universal values like autonomy and self-identity, and promotes dignity, consideration and respect. However, even without these, it is intrinsically worth protecting.

Moreham expresses this by saying that, whilst the compensation for harm caused by privacy breaches is welcome, this does not mean that harm is required for a privacy breach to occur.[10] There is, she contends, something beyond emotional, physical and psychological damage to the person when a privacy breach such as intrusion occurs.[11] 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. Edward Bloustein agrees, contending that all invasions of privacy "injur[e] … our dignity as individuals".[12]

C. When is the intrusion interest invoked?

Determining whether the intrusion interest is invoked should largely focus on a person's subjective privacy desires. Moreham explains that:[13]

> … 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

8 At 650–651.
9 At 650.
10 At 635.
11 At 634–636.
12 Edward J Bloustein "Privacy as an aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 NYU L Rev 962 at 1003.
13 Moreham, above n 7, at 636.

> that, he or she wants to be seen, heard, touched or found out about.

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. However, the law cannot protect people based purely on the foibles of their own desires. There must also be a reason that a person's privacy should objectively be respected.

Kirsty Hughes' theory of physical, behavioural and normative barriers provides such objectivity.[14] This theory helps to navigate when a subjective desire for privacy should normatively be respected. 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".[15] This is because it is important to explore "how privacy is experienced and how privacy is achieved in a social setting".[16] Hughes' theory 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 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".[17] 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.[18] Therefore stating "please do not touch my hair" or putting a hand up to indicate a desire not to be touched 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".[19] For example, social convention suggests that a person having a shower wants privacy. 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.[20]

14 Kirsty Hughes "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012) 75(5) MLR 806 at 807–815.
15 At 810.
16 At 810.
17 At 812.
18 At 812.
19 At 812.
20 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 199.

Although breaching a physical barrier appears to be the most intuitive type of intrusion, for example, breaching the physical barrier of a locked door is an obvious unwanted attempt to access a person, not all intrusions or access to a person will breach a physical barrier. 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 these situations, a behavioural or normative barrier might be involved. An assessment should consider "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".[21]

Hughes argues convincingly that "the right to privacy should be understood as a right to respect for [physical, communication and normative] barriers".[22] It adds a knowledge requirement, in the form of a barrier, that ensures the person accused of breaching privacy knew or ought to have known that the person did not want to be intruded upon. Hughes' barriers approach provides an excellent link between the theory of privacy and its legal application as these social norms also form a vital part of the legal interest. This will be documented below.

III. The Elements (and defence) of an intrusion into seclusion claim

Moving now from the theory of what the concept of intrusion encapsulates, to how it is reflected in the tort of intrusion into seclusion; it is important to discuss what the elements of the tort as laid down by Whata J in *C v Holland* are, how he envisaged them to be applied, and whether they could better capture the essence of intrusion.

A. The Elements

1. An intentional and unauthorised intrusion

Whata J, in *C v Holland*, explains that "[i]ntentional connotes an affirmative act, not an unwitting or simply careless intrusion"[23] such as accidentally encountering a flatmate in the bathroom. Whata J notes further that "unauthorised" excludes consensual and/or lawfully authorised intrusions.

21 Hughes, above n 14, at 814.
22 At 810.
23 At [95].

2. Into seclusion (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".[24] At no point does he suggest that the word seclusion imbues the tort with a strict locational requirement, in fact he cites overseas case law affirmatively that what is most important is "the type of interest involved and not the place where the invasion occurs".[25]

3. Involving infringement of a reasonable expectation of privacy

This element focuses on whether there is a reasonable expectation of privacy in the intimate personal activity, space or affairs identified in the second element. Whata J does not really explain how a reasonable expectation of privacy is to be determined, perhaps because on the facts of *C v Holland* it is clearly intuitive that a person having a shower is always going to enjoy a reasonable expectation of privacy with respect to uninvited outsiders. He mentions superficially how a reasonable expectation of privacy is treated in overseas jurisdictions, for example, that in Canada the courts have adopted a two-prong test: "a subjective expectation of solitude or seclusion, and for this expectation to be objectively reasonable".[26]

Reasonable expectation of privacy appears to be the most important element of an intrusion into seclusion action as it goes right 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 into personal matters happen regularly, 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.

The second element sets the parameters of the reasonable expectation test. 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, both the second and third 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 essentially makes sense to combine the first three elements and analyse everything only once, but rigorously.

Such an 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. However, the conclusions of this article are not contingent on such a change in the expression of the law.

24 At [95].
25 *Evans v Detlefsen* 857 F 2d 330 (6th Cir 1988) at 338.
26 *C v Holland*, above n 1, at [17].

4. That is highly offensive to a reasonable person

C v Holland requires that high offensiveness be met before a breach is made out.[27] 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. Such a breach could indeed, for example, be classified as substantially offensive and thus fail to satisfy the criteria.

One reason Whata J keeps this element is that he considers the reasonable expectation of privacy test as "not sufficiently prescriptive".[28] In other words, he worries that a claim will be too easily satisfied. However, by having a strong framework for the test and ensuring the analysis of it is sufficiently rigorous, the highly offensive test could be removed. Moreham has argued that the highly offensive 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".[29]

Although the arguments in this article do not stand and fall on the issues, my view is that the highly offensive test is unnecessary.

B. Public interest defence

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".[30] This is an important aspect of the tort but is outside the scope of this article.

IV. How to Determine Reasonable Expectation of Privacy

As explained in the previous section, the crux of the New Zealand tort of intrusion into seclusion is reasonable expectation of privacy. In what kind of situations will and should New Zealand judges consider that intrusion has sufficiently impinged on a person that a remedy is necessary? Is there some kind of formula that can give guidance in novel situations? This section will argue that an appropriate framework, partly derived from Richard Wilkins' 1987 journal article "Defining the Reasonable Expectation of Privacy: An Emerging Tripartite Analysis",[31] will consider the location and means of the intrusion as well as the information it obtains. It will also provide guidance

27 At [94].

28 At [97].

29 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.

30 At [75].

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

as to how this framework to assess reasonable expectation of privacy would apply in a variety of hypothetical situations.

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".[32]

Wilkins presents three factors as relevant to the reasonable expectation of privacy enquiry: "(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".[33] Although Wilkins synthesised these factors almost 30 years ago regarding the reasonable expectations of privacy of surveillance in search and seizure cases, prior to many of the technological advances that concern us in contemporary New Zealand, they are still highly relevant to reasonable expectations of privacy in an intrusion into seclusion claim today. This is because search and seizure case law also encapsulates the intrusion interest and the mode of analysis is applicable to any intrusion situation, including those using technology not even imagined at the time.

It is suggested that these three factors provide an appropriate framework for understanding and developing the New Zealand intrusion tort. As will become clear, they each reflect an intrinsic part of what it means for an intrusion into seclusion to occur. This article retains their essence but better reflects the nature of the tort by modifying the "object" factor as "nature of activity or information". 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.

Some of this analysis benefits greatly from an assessment of the Hughes barriers in the context of the Wilkins factors. Whilst Hughes' theory is broader, it can help inform the Wilkins factors as to when a desire for privacy has a tenable basis for being reasonable. 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.

Under what circumstances will a New Zealand plaintiff justifiably claim that there was a breach satisfying the infringement of a reasonable expectation of privacy? This can only be decided by separately considering the reasonable expectation of privacy in each factor before holistically balancing and combining them. 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 or are absent.

32 At 1080.
33 At 1080.

A. Place

The first factor that Wilkins considers is the place at which the intrusion occurs.[34] So what is the relevance of place to the reasonable expectation of privacy enquiry? Although any reasonable expectation of privacy test should protect "people, not places",[35] Wilkins views place as relevant because of the "types of human conduct likely to occur in particular locales".[36] The locational inquiry for reasonable expectation of privacy in New Zealand can therefore be not so much whether the place is constitutionally protected, "but rather whether it is conceptually linked with intimacy and personal privacy".[37]

This article will examine a variety of different spaces, drawing particularly on US and New Zealand case law, to provide guidance on a general hierarchy of those places with the highest reasonable expectations of privacy to those with the lowest.

1. Homes, Hotels and Hospitals

Residential property has the highest expectation of privacy attached to it.[38] *R v Thomas* makes plain that privacy embraces the sanctity of the private home[39] and the US Fourth Amendment explicitly mentions protecting houses. The home is protected because it is the place where the most intimate activities occur and in which no-one expects to be observed.

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.[40] 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 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. For example, *Williams* gives an example of "inaccessible areas such as drawers and cupboards" being particularly private.[41] A living or dining room, however, might be seen as less private as these are places where guests are often entertained or people are invited into when they visit. Consequently, people are less likely to be doing something in a living area that they do not want others to see.

34 At 1103.
35 *Katz v United States* 389 US 347 (1967) at 351.
36 At 1103.
37 Wilkins, above n 31, at 1112.
38 *R v McManamy* (2002) 19 CRNZ 669 (CA).
39 *R v Thomas* (1991) 286 APR 341 (NLCA).
40 *R v Williams* [2007] NZCA 52 at [113].
41 At [113].

It would seem reasonable to suggest that a New Zealand plaintiff would consider anywhere in the home with a locked door as having 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. They are "entitled to an expectation of privacy far greater than [exists] in the common areas of a house, such as the living room and kitchen".[42] 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.

There is also a high expectation of privacy in a private hotel room which is considered analogous to a home. A "defendant forc[ing] his way into the plaintiff's [hotel room]" is seen in the same way as "insist[ing] over the plaintiff's objection in entering his home".[43] The Supreme Court of Canada describes a hotel room as a "home away from home" and states that a hotel room is a "private enclave where we may conduct our activities free of uninvited scrutiny".[44] 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 … would expect privacy in these circumstances".[45]

A hospital is viewed similarly to a private home or hotel room. For example, 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.[46] 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.

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. 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, however it is also important as a factor in its own right.

The sanctity of a place like a private residence or a hospital 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 in New Zealand simply because of the location in which it occurs. That is,

42 *Young v. Superior Court of Tulare County* 57 Cal App 3d 883 (Cal 1976) at 887.
43 American Law Institute *Restatement of the Law, Second, Torts* (St Paul, Minnesota, 1977) at § 652B b.
44 *R v Wong* (1990) 3 SCR 36 at [21].
45 At [50].
46 *Barber v Time Inc* 348 Mo 1199 (Mo 1942).

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.

2. Rented lockers and contents of bags

Places other than the home, hotels and hospitals to have been considered to have a reasonable expectation of privacy, although not as high, are a rented locker[47] and the contents of a bag.[48] A rented locker 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.

3. Curtilage and driveway

The curtilage is the land immediately surrounding a house or dwelling excluding any open fields beyond.[49] The driveway is often considered as "included within the curtilage".[50] However, some courts see it as a separate entity, "analog[ising] a private driveway to an open field"[51] or stating that it is "not enclosed in a manner that shield[s] it from [outside] view".[52]

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".[53] 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.[54] 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.

47 *R v Buhay* (2003) 1 SCR 631.
48 *R v Truong* 2002 BCCA 315.
49 *Oliver v United States* 466 US 170 (1984) at 180.
50 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.
51 *United States v Brady* 734 F Supp 923 (ED Wash 1990) at 928.
52 *State v Mitchem* 2366 (Ohio App 1 Dist 2014) at [16].
53 *Boyd v United States* 116 US 616 (1886), as cited in *Oliver v United* States, above n 49, at 180.
54 See *Robson v Hallett* [1967] 2 QB 939 (CA).

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 by Mr Faesenkloet, instead being "open to the public".[55] Asher J held there to be no reasonable expectation of privacy, stating that:[56]

> … 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.

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. 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 article.

4. Open fields

Land that is attached to residential use has a higher expectation of privacy in terms of place because it is "associated with [the intimacies] of domestic life".[57] 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".[58] However, just as distinctions can be made between different parts of the home, 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.

55 *Faesenkloet v Jenkin* [2014] NZHC 1637 at [42].
56 At [44].
57 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.
58 *Oliver*, above n 49, at 178.

5. Public places

The lowest reasonable expectation of privacy occurs in a public place. 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. 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".[59]

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".[60] 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.[61] 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".[62]

In addition, 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*,[63] 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.

In general, the extent of a normative barrier in a public place will largely depend on the empirical consideration of the actual probability of a privacy infringement in the circumstances. For example, 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. 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. In essence, 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.

59 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at 320 per Elias CJ dissenting.
60 *Hosking*, above n 5, at [164].
61 *Daily Times Democrat v Graham* 276 Ala 380 (1964).
62 At 383.
63 *Shulman v Group W Productions Inc* 955 P 2d 469 (Cal 1998).

In the recent decision of *PG v Television New Zealand Ltd*, the BSA upheld an intrusion that occurred in a public place.[64] The complainant was filmed in his boat in the Marlborough Sounds, "not wearing any pants", and with a towel wrapped around his waist instead.[65] The BSA noted affirmatively[66] 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".[67] A person can still suffer an actionable intrusion if a small subset of the public is able to see what is occurring. The BSA held that "no other boats were visible in proximity to him"[68] and was influenced by the fact "PG stated he objected to the filming"[69] which constituted a behavioural barrier.

6. 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. 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.

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.[70] "The area in question was demarcated by curtains which kept backstage personnel from entering the staging area".[71] Even though the curtains 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.[72]

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*,[73] "the plaintiff could have a reasonable expectation of privacy

64 *PG v Television New Zealand Ltd* BSA Decision 2014-090, 16 June 2015.
65 At [1].
66 At [16].
67 Nicole Moreham "Private Matters: A Review of the Broadcasting Standards Authority" (New Zealand Broadcasting Standards Authority, 2009) at 7.
68 At [17].
69 At [19].
70 *PETA v Bobby Berosini Ltd* 111 Nev 615 (1995) at 620.
71 At 620.
72 The case also does not take into account how intrusive it is to record something with a video camera, which is discussed below.
73 *Sanders v American Broadcasting Companies* 978 P 2d 67 (Cal 1999).

against a television reporter's covert videotaping"[74] of a personal conversation between co-workers, "to which the general public did not have unfettered access",[75] despite "the plaintiff lack[ing] a reasonable expectation of complete privacy because he was visible and audible to other co-workers".[76]

Cases such as these demonstrate that the reasonable expectation of privacy analysis is nuanced and multi-dimensional. Each semi-public place 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.

7. Written Correspondence and Digital Hacking

Written correspondence, digital hacking and internet usage can also be analysed in terms of place. That is, the real-world concepts of public and private space can be used to unpack the complexities of those that are more nebulous, such as written documents and the world of cyberspace. The New Zealand tort should recognise a high reasonable expectation of privacy in "personal papers, such as diaries, personal correspondence and other documents revealing the personal lifestyle of that person".[77] This is because there is an assumption that personal papers are very likely to reveal personal information about an individual and consequently exist within the spectrum of a private place. 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 20 years.[78]

In the modern age, this would almost certainly extend to text messages, emails, Facebook private messages or personal files on a computer, which can all be conceptualised as existing in a private place due to their ability to reveal large amounts of personal information and because they are "not normally made available to the public".[79] However, unencrypted and publicly accessible "information voluntarily transmitted by consumers via the Internet" exists in a public place and therefore has a low reasonable expectation of privacy.[80] Information transmitted by Internet users should not however be given blanket treatment and should instead be assessed subject to such factors as the likely audience.

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

75 At 815 summarising *Sanders*.

76 At 817.

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

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

79 William Dalsen "Civil Remedies for Invasions of Privacy: A Perspective on Software Vendors and Intrusion upon Seclusion" (2009) Wis L Rev 1059 at 1079.

80 At 1080.

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 with internet access. This is essentially a public place as people from the public can view it if they wish. As with public places in the physical world, there will always be the consideration of how many people will view or are likely to view the post. A person with only 20 Facebook friends whose public post is not "liked" (liking provides exposure) or seen anywhere else on the internet, and is removed a couple of hours after it is posted, 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 or 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 busy main street of a city wearing an outrageous costume. In the latter scenario, it becomes almost impossible to have a reasonable expectation of privacy.

A Facebook post with the audience set to "friends" is a semi-private 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 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. The original data which cannot be seen because it has been encrypted can be regarded as existing in a private place and therefore has a high reasonable expectation of privacy.

B. Intrusiveness

So far the discussion has focused on where the intrusion takes place. Wilkins' second factor in determining a reasonable expectation of privacy is that of intrusiveness. This involves answering the question: to what extent does a particular method and the degree to which it has been used unreasonably intrude on a person? Intrusiveness is the only factor 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.

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*[81] emphasised "the degree of intrusiveness [as] a central factor" in a reasonable expectation of privacy analysis.[82]

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 central question in this analysis of intrusiveness is how intrusive different methods of intrusion are and the extent to which they are intrusive. Before getting to that question, however, 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 such as how long they are employed for, how many photographs are taken, or the strength of the zoom lens used.

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.[83] However, in *Lo-Ji v New York*, officers spending hours in a store conducting wholesale searches meant that reasonable expectation of privacy was infringed.[84] 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.[85]

81 *California v Ciraolo* 476 US 207 (Cal 1986).
82 At 1104.
83 *Maryland v Macon* 472 US 463 (1985).
84 *Lo-Ji v New York* 442 US 347 (1979).
85 Both cases are also discussed in Wilkins, above n 31, at 1117–1119.

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".[86] 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 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

Leaving aside questions of degree, it is necessary to analyse how intrusive the methods electronic surveillance and digital hacking are. This will demonstrate the kinds of thinking that show how the level of intrusiveness is assessed.

(a) Electronic surveillance

Contrary to the indication in *Ciraolo*, electronic surveillance is highly intrusive and will easily infringe a reasonable expectation of privacy. Regardless of whether it is considered to be included within a definition of a physical intrusion, it is clearly something that unreasonably intrudes upon the person. 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.[87]

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 people's dignity because it allows the intruder to see them whenever they like and it intrudes 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 far more intrusive than the naked eye looking through a crack in the fence. "Television surveillance is exceedingly intrusive", "inherently indiscriminate" and "could be grossly abused".[88] 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

86 *United States v Jones* 132 S Ct 945 (2012).
87 At [6] and [99].
88 *United States v Torres* 751 F 2d 875 (7th Cir 1984) at 882.

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 of natural limits to his or her endurance.

(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"[89] were seen as an intrusion into seclusion even though it could not be proven that Abate had viewed the plaintiff or her daughter.[90] The case held that "the installation of the hidden viewing devices alone constitutes" infringement of a reasonable expectation of privacy.[91] 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 proven that the defendant "overheard any sounds or voices originating from the plaintiffs' bedroom".[92]

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.[93] 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.[94] This indicates

89 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 230.

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

91 At 76.

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

93 Gorman, above n 89, at 232.

94 Butler and Butler, above n 77, at 948.

that, in order for intrusions in public places to be actionable, the intrusiveness of electronic equipment is generally required.

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.[95] Although it has been argued that taking a photograph "is not significantly different from maintaining the mental impression of the scene",[96] the earlier discussion demonstrates that there is a 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".[97]

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. 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.[98] 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.

(b) Electronic recordings of conversations

Electronic enhancement and recordings of conversations should, in many circumstances, 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

95 *Daily Times Democrat*, above n 61.
96 Gorman, above n 89, at 251.
97 Moreham, above n 7, at 634.
98 *Aisenson v American Broadcasting Company* 220 Cal App 3d 146 (1990).

private" could constitute infringement of a reasonable expectation of privacy.[99] *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.[100]

Sanders and *Shulman* both point out that:[101]

> … [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.

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".[102] 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.

This can be the case even in the less intrusive situation where a conversation is recorded by one of the participants. 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 could, from a wider perspective, lead to a person undertaking greater self-censorship and having less autonomy.

(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.[103] 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 and, in many cases, can be viewed repeatedly.

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

99 *Katz*, above n 35, at 362.

100 *Shulman*, above n 63.

101 *Ribas v Clark* 38 Cal 3d 355 (Cal 1985) at 360: quoted by *Sanders*, above n 73, at 72 and *Shulman*, above n 63, at 492. The sentiment and part of the quotation is also used by *Medical Lab*, above n 74, at 815.

102 *Sanders*, above n 73, at 72 drawing on *Shulman*.

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

files were looked at but copies were not made this would also be highly intrusive, but less so. 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.

It is very unlikely that intrusiveness will occur in a public place in the digital context. When something is posted in public and receives or seeks 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.

Although the earlier comparison of the rarely viewed public internet post with the uninhabited side street is useful as a conceptual tool, it has its limitations. 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. This 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 post will be removed 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.

Intrusiveness may occur in a semi-private 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.

C. Nature of Activity or Information

Wilkins identifies the third factor in determining a reasonable expectation of privacy as "the object or goal of the surveillance".[104] Object is, however, not employed in this context as a synonym for purpose. In analysing this factor,

104 At 1080.

Wilkins essentially contends that the more private the information gathered, 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. As *Katz* states, "what a person knowingly exposes to the public"[105] will generally not create liability.

Wilkins also recognises 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.[106] Wilkins is therefore aware that the type of activity intruded upon is important.

It is suggested that re-labelling object as being about the nature of activity or information better encapsulates the third factor. The best way of understanding the third 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.

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

It is perhaps the nature of activity or information, rather than place or intrusiveness, which most of all affects a person's psychological seclusion. 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.

105 *Katz*, above n 35 at 351.
106 At 1106.

Protecting these intimate activities means allowing people greater dignity and respect for their private actions.

2. Conversations

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.[107] As Wilkins says, "protecting the privacy of conversations" is more important "than maintaining the secrecy of physical objects located in suburban backyards".[108] 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, but it is useful to go further and deal with such nuances inherent in the nature of activity and information.

3. How place and intrusiveness interact with the nature of information in conversations

The fact that a conversation is intruded upon, 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 sufficiently high.

For example, 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.[109] 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.[110] 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. The reasonable expectation of privacy in the place was therefore reasonably high and the use of microphones to enhance and record conversations was particularly intrusive. This meant that what was said in the telephone conversation was immaterial as to whether a reasonable expectation of privacy was breached.

However, when the reasonable expectation of privacy in place and intrusiveness is borderline or low, 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. For example, had the actions in *Katz* been less intrusive, such as listening to the phone call by putting an ear on the door, the actual content of what was said may have become relevant. In general, the lower the reasonable expectation of privacy in

107 At 1121.
108 At 1105.
109 *Katz*, above n 35, at 348.
110 At 361.

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.

4. Determining if information is personal

In situations where the place and intrusiveness indicate that breach of a reasonable expectation of privacy is borderline, New Zealand courts will need to determine, as objectively as possible, the extent to which information or activity is personal. Personal information will typically be information about such things as a person's intimate family life, sexual partners, finances or health. However, any consideration of the extent to which something is personal must also, where possible, take account of what the person's individual views are as to what is or is not personal, providing that this subjective viewpoint has been communicated in some way. This is because each individual has a different subjective expectation as to the privacy of the information they impart, however this 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. By literally shouting it from the rooftops, the person has indicated that he or she does not consider the nature of the communicated information to be private. A person talking to a friend who is careless about being heard has a lower reasonable expectation of privacy in the conversation because it creates an objective inference that he or she does not consider the nature of the information in the subject matter to be intensely private. However, this conversation can still indicate some desire for privacy.

A person's subjective expectations of privacy in the nature of the information can also be communicated by a person's previous actions or attitudes towards the information. For example, people who regularly strip naked in front of strangers may not consider the nature of information in their naked form as private, whereas the generic reasonable person would say it 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 does not consider the nature of this information to be private. Consequently, if he or she is overheard discussing this information there will be a much lower reasonable expectation of privacy in it than for the standard person. Another possible scenario is that something which is not ordinarily private can have a high reasonable expectation of privacy in the nature of the information, if a person's acute sensitivity about it has been 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 can communicate that he or she considers certain facts or activities 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 regardless of her objections.[111] 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 contained in her class presentation.[112]

Another case in which the normative societal view overrides any objective determination of a person's subjective expectation, but with the opposite result, is *Shulman.* In this case 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"[113] and Shulman was "left … a paraplegic".[114] Whilst one could argue whether Shulman's conversation with the nurse was one she was relaxed about others overhearing her or not, this would miss the point. 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 conversation between a medical professional and a patient is clearly personal and generally imbued with an expectation of confidentiality. This was therefore a private conversation per se.

5. Nature of information on a computer

Determining the reasonable expectation of privacy in the nature of information on a computer 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, this will have a lower expectation of privacy than a person's private 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

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

112 In New Zealand this would likely have been dealt with by employment law based on the terms of her employment agreement. 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.

113 *Shulman,* above n 63 at 474.

114 At 476.

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, if a person puts together all of a person's Google 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 publicly, 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 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.

In many situations, the more intrusive an action is, the greater the amount of personal information that is acquired. For example, a five-hour video recording of someone is likely to obtain more personal information about them than a five minute one. However, this is not always the case.

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.

6. Information with a low reasonable expectation of privacy

The lowest reasonable expectation of privacy in the nature of information is where the data obtained "contain[s] little information that is truly 'private'".[115] 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 unless they are linked to a particular driver at which point they can become very illuminating. This is similar to the low expectations of privacy in elements such as height, weight, appearance, and physical aspects of voice and handwriting that can be fairly obvious from daily life.[116]

115 Wilkins, above n 31, at 1122.
116 At 1122.

V. 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 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. The 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".

Whether a reasonable expectation of privacy has been infringed should be analysed in terms of three factors which get to the crux of what it means to suffer from an intrusion: place, intrusiveness and nature of information or activity. A person can suffer from intrusions and a loss of dignity in a wide range of locations, from a variety of technological and non-technological means, and from having a broad spectrum of personal information or activity accessed. It is vital that a comprehensive and holistic assessment of these factors is made in every situation that engages the tort, in order that lines can be drawn about the extent to which the law respects privacy between individuals.

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 ideas such as the Hughes barriers and the Wilkins factors will enable such growth to occur.