THE REASONABLE EXPECTATION OF PRIVACY IN NEW ZEALAND LAW

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ABSTRACT

It is increasingly recognised that privacy is an inherent human value, interest and a right that is worthy of legal protection. Privacy is no longer simply about being let alone 'in one's home', rather the concept of privacy has evolved in a broader sense and is recongised to be an entitlement of an individual even in public spaces.

With increased surveillance by both state and non-state actors, privacy is more important than ever before. Various countries across the globe have declared privacy as a constitutional right that must be protected, and in countries where a constitutional right does not exist, the judiciary has stepped in to declare privacy as a right. Unfortunately, in New Zealand there is no general right to privacy. Rather, there are specific legal protections that safeguard certain aspects of an individual's privacy. For example, certain offences created in the Crimes Act 1961 protects bodily privacy and informational privacy is protected under the Privacy Act 1993.

The New Zealand judiciary has also taken firm stances by creating two privacy torts, namely, tort of publication of private facts and intrusion into seclusion. However, the question remains whether there is a general right to privacy in New Zealand outside of these privacy protections. This is precisely what this thesis seeks to answer by looking closer at the concept of reasonable expectation of privacy. The judiciary has repeatedly used this concept when addressing privacy breaches. The continued use of this concept is important. But why?

Rather than just a mere test, the reasonable expectation of privacy has been attributed by the courts as an 'entitlement' of the individual. The courts have interpreted and applied the reasonable expectation of privacy in a range of case law such as privacy trots, search and surveillance, and other areas of the law including broadcasting matters. The courts have found that an individual's reasonable expectation of privacy can be breached, and subsequent remedies are available. This thesis argues that the frequent and sustained use of reasonable expectation of privacy as an entitlement that deserves protection by the common law, is without a doubt sufficient to be an expression or an embodiment of a general right to privacy in New Zealand.

Acknowledgements

Ehara taku toa i te toa
Takitahi engari he toa takimano

My strength is not that of an individual but that of the collective

As I look back on the past year, the above whakatauki captures the aphorism that comes to my mind. Without the support and strength of some very special people, this journey would not have been possible.

First and foremost, I would like to express my most sincere gratitude to my supervisor Dr Michael Dizon. Thank you for your guidance, support and enthusiasm throughout this journey. You challenged me to extend my thinking well beyond the outer layer and critically explore legal ideas and arguments. I appreciate the endless hours you put into providing me with valuable feedback on my many drafts. Most importantly, thank you for your unwavering encouragement and positivity.

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TABLE OF CONTENTS

THE CONCEPT OF REASONABLE EXPECTATION OF PRIVACY IN NEW ZEALAND

INTRODUCTORY CHAPTER

"The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat for the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury" [1]- Tim Bain

1. Background

Let me introduce a normal working day for Alexia. Alexia like many others is an ordinary citizen. Aged 33, she holds a full time job as a nurse. She wakes up every morning and reads several websites on her phone before heading out to work. Unknown to her, these websites are tracking her every move on the internet through cookies and web bugs. They gather a plethora of information about her and her internet habits. Her information is subsequently solicited by websites and shared with third party websites for marketing, advertisements, statistical research and consumer profiling.[2] *Her e-mail address is also used by these websites without her permission for promotion deals and there is a risk that her other personal information such as credit card details could be stolen.*[3] *Next, she heads out to her car parked on the road, and in the process is secretly captured by her neighbour's surveillance cameras. Footage from the cameras are passed onto the police by her neighbour as they suspect a break-in. As she drives to the hospital, CCTV surveillance on public roads record her car's every move. These are watched by law enforcement officials through "closed circuit television" as they search for suspects related to a murder case.*[4] *As Alexia drives, her car's GPS system records every*

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1 Tim Bain "The Wrong Tort in the Right Place" (2016) 22 Canterbury Law Review 297 at 297.

2 John Mills *Privacy: The lost right* (Oxford Press, New York, 2008) at 30.

3 Cookies collect personal information about a user's online presence. While they are not generally harmful like viruses, they are used heavily by websites for advertising and marketing. See generally Sowmyan Jegatheesan "Cookies-Invading Our Privacy for Marketing, Advertising and Security Issues" (2013) 4 International Journal of Scientific & Engineering Research 926.

4 Daniel Solove *Nothing to Hide: The False Tradeoff between Privacy and Security* (Yale University Press, United States, 2013) at 21.

route she takes and the data is subsequently stored in the "event data recorders" box.[5] *This is akin to the 'black box' in aircrafts and will practically store the data perpetually. Alexia arrives at work and parks her car. She is captured on the video surveillance cameras. While at work, she swipes her ID card to enter wards, the staff room and medication cupboards. This records her every movement and attendance at work. She uses her employee details to log onto her work computer. Software installed in the computers track every click she makes, websites she visits, any searches she does, or any emails she sends.*[6] *At lunch, Alexia sends several text messages to her friends and makes a phone call from her personal cell phone. Unknown to her satellite communications interception stations can target, collect and share the content of her phone call with law enforcement officers, and intelligence services.* [7] *These mediums can also locate Alexia's precise location through cell phone tapping and triangulation.*[8] *After work, she goes to the mall for coffee with a friend. As the two catch up they are unwittingly being observed by officials undertaking mass public surveillance due to a potential terrorism threat.* [9]

For many citizens, this is the unfortunate reality as they live in contemporary society. They are constantly subject to various forms of surveillance including government surveillance, and commercial surveillance whether this be when they are at work, shopping or simply catching up with a friend. Such surveillance is carried out by a range of parties including "the government, the press, private corporations and private individuals".[10] With advancements in technology the situation has intensified and the importance of privacy grows more than ever before for individuals.[11] A plausible defence by the state might be that such surveillance is required for national security, the prevention of crimes, or to hold individuals accountable. Or

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5 See generally Aleecia McDonald and Lorrine Cranor "Technology Drives Vehicular Privacy" (2006) 2 I/S A Journal of Law and Policy 981.

6 Rebecca Britton "An employer's right to pry: a study of workplace privacy in New Zealand" (2006) 12 Canterbury Law Review 65.

7 Privacy International *The Right to Privacy in New Zealand* (Privacy International, Stakeholder Report Universal Periodic 32nd Session period, July 2018) at 7.

8 Carissa Tener "Hold the Phone: PA High Court Says No Reasonable Expectation of Privacy during Phone Call" (2003) 64 University of Pittsburgh Law Review 855.

9 See generally Nick Taylor "State Surveillance and the Right to Privacy" Surveillance and Society (2002) 1(1) 66.

10 John Mills *Privacy: The lost right* (Oxford Press, New York, 2008).

11 John Mills *Privacy: The lost right* (Oxford Press, New York, 2008); See generally David Robinson and Julia Wykoft "NSA Metadata Collection & Storage: An Internment Camp for Citizens" (2015) 40 Southern Illinois University Law Journal 29; Zhendon Ma and Others, 'Towards a Multidisciplinary Framework to Include Privacy in the Design of Video Surveillance Systems' in *Privacy Technologies and Policy*, Springer 2014, 103; Stephen graham "Towards the fifth Utility? on the Extension and Normalisation of Public ccTv" in c Norris, J Moran and g Armstrong (eds) *Surveillance, Closed Circuit Television and Social Control* (Ashgate Publishing company, Aldershot, 1999) 89.

alternatively many people espouse the argument that "I've got nothing to hide, only if you're doing something wrong should you worry and then you don't deserve to keep it private".[12] However, do these arguments pave the way for the erosion of an individual's privacy and should it be accepted that living with such scrutiny and surveillance is the norm in modern society? Or can citizens expect a certain degree of privacy in public? If so, how can the degree of privacy a person can expect be determined? These are just some of the questions currently at the forefront of an ever-evolving concept of privacy in New Zealand and across the globe in general.

1.1. Central Research Question and Sub-questions

The central research question of this thesis asks what is the concept of reasonable expectation of privacy in New Zealand? In order to find answers, this paper will use the following sub research questions:

(i) What is the concept of privacy;

(ii) How has reasonable expectation of privacy been interpreted, applied and developed in New Zealand; and

(iii) Can the concept of reasonable expectation of privacy be a basis for a general right to privacy in New Zealand?

1.2. Significance

It is well established by now that privacy is an important and integral right to the human being.[13] Yet the definition/concept of privacy is still hazy and in desperate need of clarification in New Zealand. It has sparked many conversations, debates, and has been the subject of much academic writing.[14] As the Law Commission states the development of privacy is patchy and

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12 Daniel Solove *Nothing to Hide: The False Tradeoff between Privacy and Security* (Yale University Press, United States, 2013) at 21.

13 See generally Human Rights Act 1998 (UK), s 1(1), Schedule 1; John Burrows "Invasion of Privacy" in Stephen Todd (ed) *The Law of Torts in New Zealand* (4 ed, Brookers, Wellington, 2005) 745; *R v Jefferies* [1994] 1 NZLR 290 (CA); *R v Wharewaka* (2005) 21 cRNZ 1008 (HC) at [26]. In this case Justice Baragwanath said "general appreciation that the dignity of the individual is a core value, indeed the fundamental value, of a civilised society"; John Burrows "Invasion of Privacy" in Stephen Todd (ed) *The Law of Torts in New Zealand* (4 ed, Brookers, Wellington, 2005) 745.

14 See generally Thomas Levy Mckenzie "The New Intrusion Tort: The News Media Exposed?" (2014) 45 VUWLR 79; Petra Butler "The Case for a Right to Privacy in the New Zealand Bill of Rights Act" (2013) 11 NZJPIL 213; Sam McMullan "Third Party Consent Searches Following the Search and Surveillance Act" (2012) 43 VUWLR 447.

erratic.[15] The elastic nature of privacy in New Zealand has led to a lack of clarity on what privacy actually means and how citizens privacy is protected at law, if at all.

The lack of a general right to privacy in New Zealand forms the premise to the proposed research and the aim of this research is to add to the existing work on privacy in New Zealand by taking a closer look at the concept of reasonable expectation of privacy. More specifically, this thesis will look at how the courts have used the reasonable expectation of privacy and how it has been interpreted, developed and applied in case law. The reasonable expectation of privacy has been used in a vast range of areas within the law, such as torts, fisheries, broadcasting and search and surveillance.[16] Analysing these cases will assist to formulate an understanding on whether the reasonable expectation of privacy can form a general right to privacy in New Zealand. It is endeavored that by taking a closer look at this concept, it would add some clarity to the elusive notion of privacy in New Zealand.

In particular, by addressing the absence of a general right to privacy, it is hoped that it will have a positive impact on New Zealand society as a whole. This is because privacy has been recognised globally as being paramount to the individual and their dignity.[17] Other countries have taken steps to safeguard their citizens privacy protections by declaring privacy as a constitutional right, yet New Zealand still has not. If a general right to privacy can be devised from the reasonable expectation of privacy concept, it will have a positive impact on New Zealand society by safeguarding the privacy protections of citizens. This will limit the way in which individuals are scrutinised or are subject to surveillance by both state and non-state actors. The overall aim of this research will be to contribute to the legal understanding of the concept 'reasonable expectation of privacy' and whether this could provide clarity on what privacy means in New Zealand.[18]

1.3. Methodology

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15 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008).

16 *Hosking v Runting* [2005] 1 NZLR 1 (CA); *C v Holland* [2012] NZHC 2155 (HC); *R v Alsford* [2017] NZSC 42; *R v Fraser* [1997] 2 NZLR 442 (CA) at 449; See also Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008).

17 See generally Daniel Solove *Understanding Privacy* (Harvard University Press, United States, 2008); Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553.

18 Stephen Penk "Thinking About Privacy" in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (Thomson Reuters, Wellington, 2010) 1.

This research paper will use doctrinal legal research, referring to various cases and scholarly articles by international and New Zealand academics. Reference to statutes will take a purposive approach[19] (i.e. in accordance with the objectives of the Act). Significant pieces of legislation referred to in this paper include the Privacy Act 1993 and the New Zealand Bill of Rights Act 1990 (NZBORA). For example, in criminal law there are certain offences related to "particular actions or behaviours that impact on individual privacy"[20] such as battery and assault. Similarly, informational privacy is protected through the Privacy Act 1993, which is one of the earliest forms of statutes in the field of privacy. The Privacy Act restricts the disclosure of an individual's personal information and provides "privacy principles".[21] A breach of privacy principles, or "of a code of practice, constitutes an interference with the privacy of an individual".[22] If an individual is subject to a breach of their informational privacy, then pursuant to s 66 of the Privacy Act, they are to make a complain to the Commissioner, who then has the power to conduct an investigation. However, there is no civil liability for a breach of informational privacy. Another piece of legislation affording privacy protections is the Broadcasting Act 1989.[23] This Act is like the Privacy Act, in the sense "that it does not create any civil liability in the event that a broadcaster fails to comply with the provisions of s 4".[24] A relatively recently enacted statute is the Harmful Digital Communications Act 2015. This Act holds individuals liable for the misuse of electronic communications.[25] While New Zealand has such legislation in force, for the most part of it, it is our judiciary that has come to the forefront of shaping privacy rights in New Zealand. This has largely been through the development of the common law torts and determining privacy breaches involving both state and non-state actors.[26]

This thesis will largely focus on case law as this is where the concept of reasonable expectation of privacy has been interpreted and applied. While the development of privacy can be traced back historically in case law, it is the seminal case of *Hosking v Runting*,[27] that is paramount as

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19 Interpretation Act 1999, s 5.
20 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 71.
21 Privacy Act 1993.
22 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [98].
23 Broadcasting Act 1989.
24 Broadcasting Act 1989.
25 Harmful Digital Communications Act 2015, s 3.
26 There are three to date; and they include a breach of confidence, publication of private facts and intrusion into seclusion.
27 *Hosking v Runting* [2005] 1 NZLR 1 (CA).

it confirmed the "common law tort for the publication of private facts".[28] In that decision, the Court of Appeal provided a two-staged test for "a successful claim for interference with privacy".[29] This test requires the fulfilment of two limbs - namely "the existence of facts in respect of which there is a reasonable expectation of privacy" [30] and secondly that expectation must be one that society is prepared to recognise. Tipping J, in the Court of Appeal's judgment stated that "the concept of a reasonable expectation of privacy is amorphous and ill-defined".[31] However, his honour did not consider that further clarification on this was necessary as it is an evolving tort. The test developed in this case has been discussed in many subsequent decisions.[32] For example in *TVNZ v Rogers*, the Court of Appeal attempted to provide meaning to the first limb of this test as "[i]s it a fact in respect of which there is a reasonable expectation of privacy? If so, it is a private fact". [33]

The 'reasonable expectation of privacy' was once again utilised by the High Court in *C v Holland*. In that landmark case, Whata J recognised a second privacy tort – the tort of intrusion into seclusion. Interestingly, the elements to satisfy this tort were stated as: [34]

i) An intentional and unauthorised intrusion
ii) Into seclusion;
iii) Involving infringement of a **reasonable expectation of privacy**; and
iv) That is highly offensive to a reasonable person.

Regarding the third element to be satisfied his honour noted that it is a replica of the *Hosking* test and thus remained "constant with the existing privacy law in this country".[35] Besides this, no further clarification was provided in this regard.

Meanwhile, the concept 'reasonable expectation of privacy' has also shed light in other contexts. Section 21 of the NZBORA is a piece of legislation that protects citizens against unreasonable searches and seizures by state officials. Privacy has often been conflated with

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28 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at para 4.73.
29 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [32].
30 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [32]
31 At [249].
32 *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220 (HC); See also *Brown v Attorney-General (Invasion of Privacy)* [2006] NZAR 522 (DC).
33 *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220 at [27].
34 *C v Holland* [2012] NZHC 2155 (HC) at [94].
35 *C v Holland* [2012] NZHC 2155 (HC) at [96].

this section and the concept of reasonable expectation of privacy has been determined as the underlying determinant for potential breaches of surveillance and searches by law enforcement officials. The Court of Appeal has "referred to the touchstone of s 21 as being the reasonable expectations of privacy".[36] For example in *R v Alsford*,[37] a case considering whether a search carried out by the police was lawful, the Supreme Court enunciated that the protection of a reasonable expectation of privacy was:[38]

> …directed at protecting "a biographical core of personal information which individuals in a free and democratic society would with to maintain and control from dissemination by the state" and includes information which tends to reveal intimate details of the lifestyle and personal choices of the individual…

In the context of employment, the Court has also considered the concept of a reasonable expectation of privacy, more specifically the circumstances in which an employee may be entitled to have a reasonable expectation of privacy. For example, in *Naiker v Porirua Supermarket (1997) Ltd*,[39] the Court considered whether the applicant had a reasonable expectation of privacy in the staff tea room while having a conversation with a colleague. The Court held that despite the respondent company describing the tea room as a public place as it was sometimes used by non-employees, the Court failed to see how this precluded the employees from having a reasonable expectation of privacy in the tea room.[40]

The repeated use of this concept by the judiciary raises some thought-provoking questions such as 'what does the concept of reasonable expectation of privacy' really entail? How has the judiciary interpreted this? Are there commonalities between the varying contexts in which this concept has been used? And importantly, can this concept be used to justify a general right to privacy? These questions are at the heart of this thesis as it aims to provide clarity on privacy by taking a closer look at the commonly used concept of 'reasonable expectation of privacy'.

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36 *R v Fraser* [1997] 2 NZLR 442 (CA) at 449; See also Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 94.
37 *R v Alsford* [2017] NZSC 42.
38 *R v Alsford* [2017] NZSC 42 at [63].
39 *Naiker v Porirua Supermarket (1997) Ltd* [2017] NZERA Wellington 96.
40 *Naiker v Porirua Supermarket (1997) Ltd* [2017] NZERA Wellington 96 [36].

1.4. Overview

Chapter II of this paper will explore the conceptualisation of privacy. In other words, this chapter will look closely at how the definition of privacy has evolved through the decades to conclude that while there is no one definition of privacy, it is still recognised as a value or an interest worthy of legal protection. Following from this, Chapter III will analyse various case law and statutes that have used, interpreted and applied the concept 'reasonable expectation of privacy', in what circumstances it has been used and whether specific privacy invasions could be justified using this. Case law will include searches and surveillance and privacy torts. Chapter IV will endeavour to thread together commonalities in the case law and statutes referred to in Chapter III to ultimately determine whether the concept of 'reasonable expectation of privacy' could be the basis of a general right to privacy. Lastly, a conclusion will be presented in Chapter V of the thesis.

CONCEPTUALISING PRIVACY

CHAPTER TWO

"*A conception of privacy is different from the usage of the word "privacy". The usage of the word "privacy" constitutes the ways in which we employ the word in everyday life and the things we are referring to when we speak of "privacy". A conception of privacy is an abstract mental picture of what privacy is and what makes it unique and distinct"*[41]– Daniel Solove

2. Conceptualising Privacy

Many theorists over time have delved into endless attempts to define privacy or at the very least formulate some possible hypotheses. Despite the various efforts, privacy is still elusive. This can be seen in Arthur Miller's statement that "privacy is difficult to define because it is exasperatingly vague and evanescent".[42] In addition Robert Post, a legal theorist says "privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all".[43] Moreover, Professor Richard Poser fittingly stated "privacy is elusive and ill defined. Much ink has been spilled in trying to clarify its meaning".[44] In short, as Judith Jarvis states "perhaps the most striking thing about the right to privacy, is that nobody seems to have any clear idea what it is".[45]

The situation is no different in New Zealand. Petra Butler has outlined the current patchy state of privacy in New Zealand in her well-known article "*The case for a right to privacy in the New Zealand Bill of Rights Act"*.[46] Other New Zealand legal academics, government departments, the legislature and the judiciary have further contributed extensive efforts to take

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41 Daniel Solove *Understanding Privacy* (Harvard University Press, United States, 2008) at 13.

42 Daniel Solove *Understanding Privacy* (Harvard University Press, United States, 2008) at 1; See also Arthur Miller *The Assault on Privacy* (University of Michigan Press, United States, 1970) at 25.

43 Daniel Solove *Understanding Privacy* (Harvard University Press, United States, 2008) at 2; See also Robert Post "Three Concepts of Privacy" (2001) 89 Georgetown Law Journal 2087 at 2987.

44 Richard Posner "The Right to Privacy" (1978) 12 Georgia Law Review 393 at 393.

45 Chris Berg *The Classical Liberal Case For Privacy In A World Of Surveillance And Technological Change* (Palgrave Macmillan, Switzerland, 2018) at 35.

46 Petra Butler "The Case for a Right to Privacy in the New Zealand Bill of Rights Act" (2013) 11 NZJPIL 213; See also Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008).

apart this notoriously difficult concept of privacy with the aim of providing clarity in a somewhat multifaceted and evolving paradigm.[47]

While at first glimpse the overwhelming activism in the development of privacy portrays the idea that it is settled or in the process of being settled, as Professor Daniel Solove puts it "beyond this outer layer of consensus [there] lurks an underworld of confusion".[48] With advancements in technology and an ever increasing abundance of material, questions on privacy are confusing and difficult to answer. The importance of conceptualising privacy is clear, as it is "conception that informs what matters are protected and the nature and scope of the particular protections".[49] As Professor Daniel Solove puts it "what exactly is privacy? why is it worth protecting and how valuable is it?".[50] Therefore, the purpose of this chapter is to show that while there is no single or universal definition of privacy, there is common agreement that it is an important value, right or interest that is subject to legal protection.

2.1. Some of the earlier thinkers

The modern recognition of privacy can be traced back historically, where some of the early thinkers and writers distinguished between 'personal' and 'public' spheres. While this recognition may be eschewed as an accurate reflection on how privacy is interpreted in modern society, this separation is nevertheless pivotal to demonstrate the evolution of privacy. One of the earliest philosophers that spoke about this spatial separation was Aristotle.[51] Aristotle distinguished between the "public sphere of politics and political activity, *the polis*, and the private or domestic sphere of the family, *the oikos*". [52] John Stuart Mill, about 2000 years later, similarly spoke of a space in which the "liberty of the citizen"[53] would be preserved from the state. He said that it is only the conduct of an individual where he is open to society that should concern other individuals. What he decides to do that concerns himself is "individual

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47 See generally Gefforey Palmer "Privacy and the Law" (1975) NZLJ 747; Petra Butler "The Case for a Right to Privacy in the New Zealand Bill of Rights Act" (2013) 11 NZJPIL 213; Nicole Moreham "Privacy in the Common law: A Doctrinal and Theoretical Analysis" (2005) 121 LQR 628.

48 Daniel Solove *Understanding Privacy* (Harvard University Press, United States, 2008) at 4.

49 Daniel Solove *Understanding Privacy* (Harvard University Press, United States, 2008) at 4.

50 Daniel Solove *Understanding Privacy* (Harvard University Press, United States, 2008) at 4.

51 Aristotle lived in about 300 BC.

52 Judith DeCew "Stanford Encyclopedia of philosophy" (Research paper, Stanford Center for the Study for Language and Information, 2018) at 2.

53 Referred to in *Justice K.S Puttaswamy (Retd) and Anr. v Union of India And Ors Writ Petition* (Civil) No 494 of 2012 at para [31].

sovereign".[54] Mill went on to say that in terms of the battle between 'dignity and authority', "the tyranny of the majority could be reined by the recognition of civil rights such as the individual right to privacy, free speech, assembly and expression". [55]

However, in the Supreme Court of India it was pointed out that the distinctions espoused by Aristotle and Mill were not without limitations.[56] They specify that if dignity of an individual paves the way to protecting their privacy, then if an individual interacts in the public sphere, would this mean dignity is eroded? While the "the extent to which an individual expects privacy in a public street may be different from what she expects in the sanctity of the home…if dignity is the underlying feature, the basis of recognising the right to privacy is not denuded in public spaces".[57] This itself illustrates that there were noticeable difficulties with some of these early philosophers' theories of privacy. As a result, it is important to consider some other theories of privacy that govern the contemporary stage.

2.2. Theories of privacy that govern modern day

There are many theories of privacy that has been traversed by modern legal thinkers, but some have gathered more importance than others. This thesis will focus on six of these theories which will be presented alongside their critiques. These theories are: the right to be let alone, the limited access to the self, secrecy; control over personal information; personhood and intimacy.[58]

2.2.1. The right to be let alone

One of the most popular theories of privacy was put forward by Samuel D Warren and Louis D Brandies, in their article published in 1890. They opined that people have a "distinct right

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54 *Justice K.S Puttaswamy (Retd) and Anr. v Union of India And Ors Writ Petition* (Civil) No 494 of 2012 at para [31].

55 *Justice K.S Puttaswamy (Retd) and Anr. v Union of India And Ors Writ Petition* (Civil) No 494 of 2012 at para [31].

56 *Justice K.S Puttaswamy (Retd) and Anr. v Union of India And Ors Writ Petition* (Civil) No 494 of 2012 at para [31]-[35].

57 *Justice K.S Puttaswamy (Retd) and Anr. v Union of India And Ors Writ Petition* (Civil) No 494 of 2012 at para [31].

58 Most of these theories are obtained from Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087; Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553; Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008).

to liberty – the right to be let alone".[59] Moreover, this right is to be inviolable and injuries to privacy did far greater harm than those to the person or property but were not afforded legal protection.[60] Warren and Brandies use the examples of a private letter and a catalogue of a private collection of gems to illustrate their ideas about privacy. They suggest that the right to privacy should be considered independently of any other property right. The key requirement of respecting privacy is that "in every case the individual is entitled to decide that which is shall be given to the public".[61] The legal thinkers say that, essentially, it should not be the content or the intent of the content that should be protected or recognised, under for example copy right law or laws surrounding publication of manuscripts, "but if privacy is once recognized as a right entitled to legal protection, the interposition of the courts cannot depend on the particular nature of the injuries resulting".[62] The following is relevant in this regard:[63]

> These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the moral general right of the individual to be let alone. It is like the right not be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognized by the law, there inhere the quality of being owned or possessed … there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term.

Courts in Untied States have adopted the theory enunciated by Warren and Brandeis. In *Katz v United States*, Justice Douglas defined privacy as "the right to be let alone. That right includes the privilege of an individual to plan his own affairs, for outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he please, go where he pleases".[64] This notion of the right to be let alone has been discussed in numerous court decisions.[65]

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59 Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 559.
60 Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 559.
61 Samuel D Warren and Louis D Brandeis "The Right to Privacy" (1890) 4 Har L Rev 193 at 200.
62 Samuel D Warren and Louis D Brandeis "The Right to Privacy" (1890) 4 Har L Rev 193 at 200.
63 Samuel D Warren and Louis D Brandeis "The Right to Privacy" (1890) 4 Har L Rev 193 at 205.
64 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1101.
65 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 33; See also *Olmstead v United States* (1928) 22 US 478; *Griswold v Connecticut* (1965) 381 US 479; *Roe v Wade* (1973) 410 S 113.

Critics of Warren and Brandeis state that their theory lacks detail and is too vague. Anita Allen says if privacy was "being let alone" then "any form of harmful conduct directed toward another person could be characterized as a violation of personal privacy. A punch in the nose would be a privacy invasion as much a as a peep in the bedroom".[66] Not only would harmful behaviour, but any behaviour could essentially fall within the ambit of "being let alone".[67] According to Allen, the only way to accurately reflect "being let alone" is living in "complete isolation from society".[68] Daniele Solove further critiques this theory as one that does not provide enough guidance. In other words, "being let alone does not inform us about the matters in which [one] should be let alone".[69] According to Solove, this inherently boils down to a failure of Warren and Brandeis to precisely define privacy. This is in line with the thoughts articulated by Ferdinand Schoeman. [70]

2.2.2. Limited access to the self

Another theory of privacy is "limited access to the self". The early thinker behind this conceptualisation is E.L. Godkin. Godkin states that "privacy constituted the right to decide how much knowledge of [a person's] personal thought and feeling…private doings and affairs…the public at large shall have".[71] Modern theorists have gone on to further develop 'limited access' theories. For example, Sissela Bok states "privacy is the condition of being protected from unwanted access by others…"[72], and Hyman Gross, defines privacy "as the condition of human life which are personal to him is limited".[73] Notably, Ruth Gavison says "our interest in privacy…is related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the

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66 Annita L Allen "Uneasy Access: Privacy for Women in a Free Society (Rowman & Littlefield, Totowa, NJ, 1988) at 7; See also Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 33.

67 Annita L Allen "Uneasy Access: Privacy for Women in a Free Society (Rowman & Littlefield, Totowa, NJ, 1988) at 7; See also Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 33.

68 Annita L Allen "Uneasy Access: Privacy for Women in a Free Society (Rowman & Littlefield, Totowa, NJ, 1988) at 7; See also Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 33.

69 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1101.

70 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1102; See also Ferdinand Schoeman *Privacy: Philosophical Dimensions of Privacy* (Cambridge University Press, United Kingdom, 1984) at 1-14.

71 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1103; See also Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 34.

72 Sisssela Bok *Secrets: On the Ethics of Concealment and Revelation* (1st ed, Pantheon Books, New York, 1983) at 10-11.

73 Hyman Gross "The Concept of Privacy" (1967) 42 N.Y.U L Rev 31 at 35-36; Referred to in Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1103; See also Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 34.

extent to which we are the subject of others attention".[74] Gavison does not restrict privacy to a particular area, state or situation. Moreover, Gavison "attempts to provide a neutral definition of privacy"[75], and does not define what aspects of an individual's privacy should be protected. To illustrate the three elements of privacy discussed by Gavison, the Law Commission uses an example of X. Broadly speaking, if X had a "state of privacy, then no one will have any information about X (secrecy), pay any attention to X (anonymity), or have physical access to X (solitude)".[76] While this is not an "all or nothing concept",[77] Gavison says privacy can be lost "as others gain information about, pay attention to, or gain physical access to a person".[78]

Critics of the 'limited access' theory state it is too vague or broad. These theorists have been criticised for not addressing the personal autonomy individuals have in the information they choose to share with others and the type of "access that implicate privacy".[79] As the Law Commission states "Gavison's definition of privacy is too board…[in that it treats] privacy [as] physical access to a person, or attention paid to a person, or information gained about a person…".[80] Therefore, "her attempt to define access entails winds up being too narrow".[81]

2.2.3. Concealment or control of personal information

This theory has largely been used with two dominant descriptions – "privacy as concealment or [privacy as] withholding of information about the self and privacy as control of such information".[82] Posner holds the view that an individual's right to conceal material facts was a form of "self- interested economic behaviour"[83], meaning privacy is largely 'discreditable information' such as those that are embarrassing or harmful facts about a person that they wish

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74 Ruth Gavison "Privacy and the Limits of the Law" (1980) 89 Yale LJ 421.

75 Ruth Gavison "Privacy and the Limits of the Law" (1980) 89 Yale LJ 421.

76 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 34; See generally Raymond Wacks *Personal Information: Privacy and the Law* (Oxford University Press, Oxford, 1993) at 16; N Moreham "Privacy in the common law: A doctrinal and theoretical analysis" (2005) 121 LQR 628.

77 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 34; See generally Raymond Wacks *Personal Information: Privacy and the Law* (Oxford University Press, Oxford, 1993) at 16; N Moreham "Privacy in the common law: A doctrinal and theoretical analysis" (2005) 121 LQR 628.

78 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 34.

79 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 34.

80 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 34.

81 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1104.

82 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 35; See generally Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087.

83 Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 562; See also Richard Posner "The Right to Privacy" (1978) 12 Ga L Rev 393; Richard Posner *Overcoming Law* (Harvard University Press, Cambridge, 1955) 539; Richard Posner *Economic Analysis of Law* (6th ed, Apsen Publishers, New York, 2003) 40.

to conceal. According to Posner's analogy, concealment of such facts is akin to sellers who wish to conceal defects in their products, which buyers or acquaintances may find beneficial in knowing to form an accurate perspective about their purchase. It is essentially the manipulation of one's society by "selective disclosure of facts about themselves".[84] In this regard, Posner notes the following: [85]

> An analogy to the world of commerce may help explain why people should not – on economic grounds, in any event – have a right to conceal material facts about themselves. We think it wrong (and inefficient that the law should permit a seller in hawking his wares to make false or incomplete representations as to their quality. But people "sell" themselves as well as their goods. They profess high standards of behavior in order to induce others to engage in social or business dealings with them from which they derive an advantage but at the same time they conceal some of the facts that these acquaintances would find useful in forming an accurate picture of their character.

This is essentially viewed as "privacy-as-secrecy"[86] as it limits privacy to "one aspect of access to the self-the concealment of personal facts".[87] The Supreme Court looked at this hypotheses in *Griswold v Connecticut*, stating that the 'zone of privacy' included the ability of the individual to avoid disclosing facts that were of personal to them.[88] This theory if utilised to its extremes would mean that privacy ceases to exist for the better of society or in other words for "societal efficiency".[89]

There have been many critiques of this theory, largely centering around the fact that is too restrictive as it only focuses on discreditable facts. As Bruyer points out individuals choose to disclose some material facts expecting to retain a certain amount of control over the facts.[90] For example, disclosure when dealing with a fiduciary falls within the ambit of this. Individuals still expect that the fiduciary would not disclose their personal information.

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84 Daniel Solove "Conceptualizing Privacy" (2002) 90 Cal L Rev 1087 at 1106.

85 Richard Posner "John A Sibley Lecture: The Right to Privacy" (1978) 12 Ga. L. Rev. 393 at 399; See also Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 562.

86 Richard Posner "John A Sibley Lecture: The Right to Privacy" (1978) 12 Ga. L. Rev. 393 at 399; See also Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 562.

87 Richard Posner "John A Sibley Lecture: The Right to Privacy" (1978) 12 Ga. L. Rev. 393 at 399; See also Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 562.

88 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1106; See also *Griswold v Connecticut* 381 U.S (1965); *Roe v Wade* 429 U.S 589 (1977).

89 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1106; See also *Griswold v Connecticut* 381 U.S (1965); *Roe v Wade* 429 U.S 589 (1977).

90 Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 565-566.

Similarly, Solove opposes this theory on the basis that privacy "involves more than avoiding disclosure; it also involves the individual's ability to ensure that personal information is used for the purposes she desires".[91] As the Law Commission puts it, privacy is not merely a simple case of concealing information rather there is an added element of being able to retain control over that information in terms of further dispersal.[92]

The second conception of privacy as control over personal information has also attained a great degree of attention. For adherents of this theory, privacy is essentially "the claim of individuals, groups, or institutions to determine for themselves when, how and what extent information about this communicated to others".[93] Fried states that privacy should not simply be limited to 'secrecy' or the concealment of information from others but rather "it is the control over knowledge about oneself".[94] At the crux of this theory is "privilege".[95] In this regard Fried notes: [96]

> An excellent, very different sort of example of a contingent, symbolic recognition of an area of privacy as an expression of respect for personal integrity is the privilege against self-incrimination and the associated doctrines denying officials the power to compel other kinds of information without some explicit warrant. By according the privilege as fully as it does, our society affirms the extreme value of the individual's control over information about himself. To be sure, prying into a man's personal affairs by asking questions of others or by observing him is not prevented by the privilege. Rather it is the point of the privilege that a man cannot be forced to make public information about himself. Thereby his sense of control over what others know of him is significantly enhanced, even if other sources of the same information exist. Without his conception, the other sources are necessarily incomplete, since he himself is the only ineluctable witness to his own present lift, public or private, internal or manifest. And information about himself which others have to give out is one sense information over which he has already relinquished control.

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91 Daniel Solove "Conceptualizing Privacy" (2002) 90 Cal L Rev 1087 at 1106.

92 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 35.

93 Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 564; See also Tom Grety "Redefining privacy" (1977) 12 Harv C.R. C.L.L. L. Rev 233 at 234.

94 Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 564; See also Tom Grety "Redefining privacy" (1977) 12 Harv C.R. C.L.L. L. Rev 233 at 234; Ferdinand Schoeman *Privacy: Philosophical Dimensions of Privacy* (Cambridge University Press, United Kingdom, 1984).

95 Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 564; See also Tom Grety "Redefining privacy" (1977) 12 Harv C.R. C.L.L. L. Rev 233 at 234; Ferdinand Schoeman *Privacy: Philosophical Dimensions of Privacy* (Cambridge University Press, United Kingdom, 1984).

96 Referred to in Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 564.

By defining privacy as control, emphasis is placed on the individual's ability to disclose information about themselves as they please. Moreover, once facts are disclosed, there is a privacy expectation that information will only be used for the purpose in which it was disclosed. Another term for this is "selective disclosure".[97] While this seems to provide a great deal of autonomy for the individual and avoids the problems encountered by other theories, there are still a variant number of critiques.

One of the main grounds on which this theory is criticised is the fact that "control" of information implies that the information is the property of the person disclosing it. Solove argues that this commodifies personal information. However, personal information "is often based in relationships with others, with all parties to that relationship having some claim to that information".[98] Solove draws attention to intellectual property law to illustrate this further. He says, information, unlike commodities, can be present in the minds of many individuals. That is why there are laws governing intellectual property to protect "particular tangible expressions of ideas".[99]

Moreham further identifies limitations with the conception of control. She says "it is possible for people to lose control over access to information about themselves without any such access actually being gained".[100] To illustrate this Moreham gives an example of an internet hacker, Y. If Y can access personal information of X, then X does not have control over his personal information. Under the "control definition" Y has lost his privacy, even though X has not obtained that information. In short, defining privacy as control, fails to take into account when there "is a unwanted risk and those [situations] where unwanted access has in fact been obtained".[101] The second limitation identified by Moreham is that it is challenging for an individual to control information. In other words, disclosing personal information is "both an exercise and relinquishment of control at the same time"[102] because by A disclosing

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97 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 36.

98 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1113.

99 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 37; See also Paul Roth "What is personal infromaton" (2002) 20 NZULR 40.

100 N Moreham "Privacy in the common law: A doctrinal and theoretical analysis" (2005) 121 LQR 628 at 636.- 638; Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 36; See also N Moreham "Privacy in the common law: A doctrinal and theoretical analysis" (2005) 121 LQR 628 at 636.

101 N Moreham "Privacy in the common law: A doctrinal and theoretical analysis" (2005) 121 LQR 628 at 636.

102 N Moreham "Privacy in the common law: A doctrinal and theoretical analysis" (2005) 121 LQR 628 at 636-638; See also Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 37.

information to X, A loses all control over the information as X can now do what he or she wishes with that information. Therefore in order to really maintain any meaningful control over information, it should not be disclosed to anyone.

2.2.4. Personhood

Unlike the theories discussed above, privacy as 'personhood' differs in the sense that focus is given to dignity and the individuality of a person. Jeffery Remiman says "the right to privacy...protects the individual's interest in becoming, being and remaining a person".[103] Focus is given to the individual to have autonomous power over how he or she chooses to live their lives, make choices in order to "define himself".[104] Another proponent for this theory is Edward Bloustien, who says the following:[105]

> The man who is compelled to live every minute of his among others and whose every need thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality, and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones: his feeling, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual."

Essentially, proponents of this argument would say that privacy allows one to fully develop as an individual free from intrusion. It is the backdrop in which individuals can experiment to create their own identity. If individuals are not given this opportunity, then they become somewhat "less noble, less interesting"[106] and different from who they are today. [107] It places a high degree of importance on "autonomy" and this is viewed as being "essential to the functioning of democratic societies".[108]

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103 Jeffrey Reiman "Privacy, Intimacy and Personhood" (1976) 6 Philosophy & Public Affairs 26; See also Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1116.

104 Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 566.

105 Edward Bloustein "Privacy as an aspect of human dignity: an answer to Dean Prosser" (1964) 39 N.Y.U.L 962 at 1003; Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 566.

106 Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 566 at 567; American courts have used the personhood theories in cases such as *Griswold v Connecticut* 281 U.S 479 (1965); *Roe v Wade* 410 U.S. 113 (1972).

107 Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 566 at 567; American courts have used the personhood theories in cases such as *Griswold v Connecticut* 281 U.S 479 (1965); *Roe v Wade* 410 U.S. 113 (1972).

108 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 38.

Many critics argue this conception is like the 'right to be let alone', meaning it suffers from somewhat similar criticisms. One main criticism is the fact that it fails to address an individual's right to "define himself and society's right to define itself".[109] In other words, how should this disparity be addressed. To illustrate this, take the example of homosexuality. According to Shepherd, in line with the personhood conception, homosexuality would be supported as it tends towards supporting the development of an individual's identity. On the other hand, if this theory is applied to those that are intolerant to homosexuality, then "the value-neutrality of the personhood theory, which is its core – that individuals have a right to define themselves, even against the norms of society – is lost when it prevents the existence of communities [that are] intolerant of some identities".[110] Essentially, there is a difficulty reconciling the right of individuals to define themselves with the right of other individuals to hold certain identities to be invalid or not to be tolerated. Another obvious criticism is the fact that personhood is too broad and fails to explain how "personhood is to be protected".[111] Solove argues that while personhood theories are useful to explain the values privacy protects, it fails to give any further definition on what privacy is.[112]

2.2.5. Intimacy

Lastly, intimacy as a conception has its roots embedded in privacy as "creating the conditions for the development of intimate human relationships".[113] It is often viewed as an extension to the personhood conception as stated above. According to Solove, intimacy is a recognition that privacy is important not only to develop one's self-identity but also one's relationships with other human beings.[114] Fried, an advocate of the 'privacy as information control' model states: [115]

> [i]ntimacy is the sharing of information about one's actions, beliefs, or emotions which one does not share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital which we spend in friendship and love…

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109 Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 566 at 657.

110 Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 567.

111 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1118.

112 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1118.

113 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 38.

114 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1121.

115 Charles Fried "Privacy" (1968) 77 Yale LJ 475 at 484-485; See also Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 38.

This definition has attracted criticism on the basis that it is too broad and fails to discuss what exactly in the relationship amounts to intimacy.[116] Innes, another proponent of this theory, provides a more sculptured definition as she addresses what decisions regarding intimate matters are private. She says these are "[t]he state of the agent having control over decisions concerning matters that draw their meaning and value from the agent's love, caring and liking".[117] These decisions enable an individual to choose what information he or she wishes to disseminate. Importantly, as the Law Commission states Innes' definition focuses on "motives, not behaviours"[118] as it is not the "particular behaviour"[119] that amounts to intimacy.[120]

This model is not without criticism. The main point of criticism is that not all relationships that demand a degree of privacy fall within the realm of "intimacy". Take for example financial information of an individual or the client/lawyer relationship. Both of these scenarios rely on the notion that the shared information is private, however there is no question of relational intimacy. These are commonly not understood to be intimate, yet they are still considered "private". These types of circumstances form obvious disparities with the conception of intimacy. [121]

2.2.6. Pragmatism – Solove's theory

Almost two decades ago, Solove reviewed the existing conceptions on privacy. As a consequence Solove has put forward his own theory – "the pragmatic approach".[122] The pragmatic approach, according to Solove is a collection of "a few recurring ideas of pragmatism".[123] It has essentially formed its basis on Ludwig Wittgenstien's view of "family resemblances".[124] According to Wittgenstien, there may not be a common denominator to

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116 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 38; See generally Stanley Benn "Privacy, Freedom and Respect for persons" (1971) 13 Nomos 1.

117 Julie Inness *Privacy, Intimacy and Isolation* (Oxford University Press, New York, 1992) 78 at 91; See also Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 38.

118 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 38-39.

119 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 38-39.

120 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 38-39.

121 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 38-39.

122 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087; See also Daniel Solove "A Taxonomy of Privacy" (2006) 154 U Pa L Rev 477.

123 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1127.

124 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 40; See also Ludwig Wittgenstien *Philosphical Investigations* (trans Gem Ancombe, 1958), referred to in Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087.at 1097.

certain concepts, rather "a complicated network of similarities overlapping and criss-crossing".[125] He uses the example of various sports such as "board games, card-games, Olympic games and so on".[126] He says there is no one common factor in all the sports, yet there are similarities.

Solove advocates for the fact that privacy must be examined in contextual situations, in other words be "context-specific".[127] This has been termed as a "bottom-up rather than a top-down approach".[128] He says that privacy should be viewed in terms of "disruptions of particular practices".[129] In other words, when the term privacy is used, Solove states this in in relation to a disruption that is caused. For example, disruptions to one's "peace of mind and tranquility, invasion of solitude, breach of confidentiality, [and] loss of control over facts about oneself…".[130] It is noted that in adopting such an approach there is bound to be similarities but also differences. Therefore, Solove says it is pivotal that individuals look to the "specific practices disrupted rather than a common denominator that links all of them".[131] Moreover, the pragmatic approach recognises that with the development of technology, privacy evolves. Therefore, it may lead to misrepresented conclusions or difficulties if one tries to fit these evolving situations "into old conceptions". [132]

It is suggested that the following questions should be used when individuals try to understand the circumstances of the situation, and the practices that are being disrupted. How does this disruption differ or resemble others and how would this affect society at large? This approach has been used by Solove to develop "a taxonomy"[133], also known as a "system of classification of privacy, focusing on particular harms or problems".[134] Solove provides four groups of

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125 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 40; See also Ludwig Wittgenstien *Philosphical Investigations* (trans Gem Ancombe, 1958), referred to in Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1097.

126 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1097.

127 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1097.

128 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 40.

129 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1097; See also Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 40.

130 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1097; See also Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 40.

131 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1130; See also Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 40.

132 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 1156; Referred to in Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 40; See also Daniel Solove "A Taxonomy of Privacy" (2006) 154 U Pa L Rev 477 at 562.

133 Daniel Solove "A Taxonomy of Privacy" (2006) 154 U Pa L Rev 477.

134 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 40.

harmful activities as: "information collection, information processing, information dissemination and invasion".[135] Under each of these groups there are further groups of activities that infringe on an individual's privacy. For example, "surveillance" is listed under information collection.[136] While this thesis does not dive into an in depth analysis of this taxonomy, it must be noted that this taxonomy does not address the question of "what is [it] that make these problems of privacy rather than something else".[137] Solove does defend this argument by posing the question "why not refer to the particular harms themselves and jettison the term privacy altogether".[138] But fails provide any further comments in this regard.

2.3. What does all this mean?

The concepts of privacy discussed above illustrate the various ways in which privacy has been construed. The criticisms show that there is no one definition as to what privacy is. In other words, "no one theory on its own has yet captured all the complexities of privacy".[139] Yet, all these theories show that privacy is something that is worthy of legal protection. Some recognise privacy as "freedom, democracy, individual well-being",[140] central to the living of humankind. Others say it is key to the development of one's identity. Despite the variations, there is one key theme emerging from all these conceptions, and that is 'privacy' deserves greater recognition and protection by law. Furthermore, privacy has evolved from its early predecessors in a broader sense. Some of the early conceptulisations of privacy revolved around privacy simply at one's home. However, this notion is evolving and now includes much more than one's home. For example, s 21 of the NZBORA provides protection from unreasonable searches of "the person, property, correspondence or otherwise".[141] This notion is further evident in case law in New Zealand, which will be discussed in the next chapter. Essentially, the conceptualisation of privacy is expansive and expanding.

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135 Daniel Solove *Understanding Privacy* (Harvard University Press, United States, 2008) at 1; See also Arthur Miller *The Assault on Privacy* (University of Michigan Press, United States, 1970) at 103.

136 Daniel Solove *Understanding Privacy* (Harvard University Press, United States, 2008) at 1; See also Arthur Miller *The Assault on Privacy* (University of Michigan Press, United States, 1970) at 104.

137 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 40.

138 Daniel Solove "Conceptualising Privacy" (2002) 90 Cal L Rev 1087 at 562; See also Daniel Solove "A Taxonomy of Privacy" (2006) 154 U Pa L Rev 477 at 562; Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 40.

139 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 52.

140 Daniel Solove *Understanding Privacy* (Harvard University Press, United States, 2008) at 13.

141 New Zealand Bill of Rights Act 1990, s 21.

It is well-established that privacy is something that is meaningful and worthy of protection at law. It has been recognised as a human right, in particular through Art 12 of the Universal Declaration of Human Rights 1948 and Art 17(1) of the International Covenant on Civil and Political Rights 1966 .[142] The European Convention of Human Rights 1959 also provides everyone with "the right to respect for his privacy and family life, his home and his correspondence".[143] Taken together these international instruments recognise privacy as a right deserving protection and be safeguarded against arbitrary interferences.

In many countries, the notion of privacy is "enshrined as a fundamental right",[144] though the word "privacy" itself may not be used. For example, the U.S Constitution affords everyone with "sanctity of the home and confidentiality of communications from government intrusions".[145] In other nations developments have occurred that protect privacy rights of their citizens by explicitly declaring it as a constitutional right. In South Africa, s 14 of the Constitution provides "everyone has the right to privacy" [146] in their home, property, possessions and communications. Similar constitutional rights exist in Sweden. Their Instrument of Government provides that "everyone shall likewise be protected against body searches, house searches and other invasions of privacy".[147] In Finland "everyone's private life, honour and the sanctity of the home is guaranteed".[148] These are just a few examples of nations that have entrenched privacy as a constitutional right.

In countries where no constitutional right exists, or privacy is not explicitly stated as a right protected under domestic law, the courts have stepped in and declared the importance of

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142 International Covenant on Civil and Political Rights vol 999 (signed on 16 December 1966, entered into force on 23 March 1976), art 17. Art 17 provides No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

143 European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (signed on 4 November 1950, entered into force on 3 September 1953), art 8. Art 8 provides 1. life, his home and his correspondence. Everyone has the right to respect for his private and family There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

144 Daniel Solove *Understanding Privacy* (Harvard University Press, United States, 2008) at 1; See also Arthur Miller *The Assault on Privacy* (University of Michigan Press, United States, 1970) at 2.

145 Daniel Solove *Understanding Privacy* (Harvard University Press, United States, 2008) at 1; See also Arthur Miller *The Assault on Privacy* (University of Michigan Press, United States, 1970) at 3.

146 Constitution of the Republic of South Africa, 1996, Chapter 2, art 14.

147 The Instrument of Government 1972, Chapter 1 art 2, Part 2 art 6, 20.

148 Constitution of Finland 1999, Chapter 2 s 10.

recognising privacy. The Supreme Court of India has recently declared privacy as a constitutional right in the case of *Justice K.S Puttasaym v Union of India.* The Supreme Court held "the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution".[149] "The right to privacy is a fundamental right. It is a right which protects the inner sphere of the individual from interference from both State, and non-state actors and allows the individuals to make autonomous life choices".[150] Other judiciaries around the globe have taken similar stances, such as the Supreme Court in Canada stating "the protection of privacy is a fundamental value in modern democratic states".[151]

In New Zealand, the judiciary has recognised a growing importance of privacy. This has been evident through case law and the development of privacy torts. In the seminal case of *Hosking v Runting*, the Court of Appeal stated "it is the essence of dignity and personal autonomy and wellbeing of all human beings that some aspects of their lives should be able to remain private if they so wish".[152] There has been significant emphasis placed on privacy, not simply as a value but importantly "one that society should protect".[153] Privacy considerations have also been considered in light of s 21 of the NZBORA. As stated above, the Court of Appeal has stated that "the protection of reasonable expectations of privacy"[154] is at the heart of s 21 of the NZBORA. This 'reasonable expectation of privacy' concept has been alluded to and utilised by the judiciary frequently. As the Law Commission says, "this is not a unique concept to New Zealand"[155] and has been used favourably in other jurisdictions such as the United States and Canada.

Despite this recognition, New Zealand does not yet have a general right to privacy. This absence of a general right to privacy provokes questions about how the courts have drawn conclusions in privacy cases. Could a closer look at the notion of a "reasonable expectation of

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149 *Justice K.S Puttaswamy (Retd) and Anr. v Union of India And Ors Writ Petition* (Civil) No 494 of 2012 at [77].

150 *Justice K.S Puttaswamy (Retd) and Anr. v Union of India And Ors Writ Petition* (Civil) No 494 of 2012 at para [77].

151 Richard Bruyer "Privacy: A review and critique of the literature" (2006) 43 Alta L Rev 553 at 554; See also *Dagg v Canada (Minister of Finance)* [1997] 2 S.C.R 403 at para [65].

152 *Hosking v Runting & Others* [2004] NZCA 34; [2003] 3 NZLR 385 at [239] per Tipping J.

153 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 75.

154 *R v Fraser* [1997] 2 NZLR 442 (CA) at 449; See also Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 94.

155 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 94.

privacy" serve any purpose in the attempt to understand the current state of privacy law in New Zealand? More importantly could it provide insight into whether a general statutory right to privacy might be possible (or even desirable)? These questions pave the way to the next chapter, which will take a closer look at how the courts in New Zealand have interpreted, applied and determined the concept of reasonable expectation of privacy.

THE CONCEPT OF REASONABLE EXPECTATION OF PRIVACY IN NEW ZEALAND

CHAPTER THREE

"So what is privacy? In my view, privacy is best defined as the state of desired 'in access' or as "freedom form unwanted access"[156] – N Moreham

3. The concept of reasonable expectation of privacy in New Zealand

The seminal case of *Katz v United States* in 1967 provides the origins to the 'reasonable expectation of privacy'.[157] While *Katz v United States* was a case concerning when "a governmental intrusion constitutes as search"[158], the concept of reasonable expectation of privacy has in many ways moved beyond this to other "common law [cases] and statutes, and even the laws of other countries".[159]

Katz arose out of technological advancements such as the development of telephones, microphones and subsequent surveillance including "wiretapping".[160] Before providing a brief historical context of *Katz*, it is necessary to comment on its predecessor *Olmstead v United States*.[161] *Olmstead* (a case decided in 1928) was the first case that addressed wiretapping. In that case, the Court ruled that wiretapping by state officials did not amount to a violation of the Fourth Amendment as "there was no entry of the houses or offices of the defendants".[162] The Fourth Amendment provides the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".[163]

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156 Nicole Moreham "Privacy in the Common law: A Doctrinal and Theoretical Analysis" (2005) 121 LQR 628 at 636.

157 Peter Winn "Katz and the Origins of the Reasonable Expectation of Privacy Test" (2008) 40 McGeorge Law Review 1 at 1.

158 Peter Winn "Katz and the Origins of the Reasonable Expectation of Privacy Test" (2008) 40 McGeorge Law Review 1 at 1.

159 Peter Winn "Katz and the Origins of the Reasonable Expectation of Privacy Test" (2008) 40 McGeorge Law Review 1 at 1.

160 Haley Plourde-Cole "Back to Katz: Reasonable Expectation of Privacy in the Facebook Age" (2010) 38 Urb. L.J 571 at 579.

161 *Olmstead v United States* (1928) 277 U.S. 438.

162 Haley Plourde-Cole "Back to Katz: Reasonable Expectation of Privacy in the Facebook Age" (2010) 38 Urb. L.J 571 at 579.

163 Charles McLean "Katz on a Hot Tin Roof: The Reasonable Expectation of Privacy Doctrine is Rudderless in the Digital Age, Unless Congress Continually Resets the Privacy Bar" (2014) 24 Alb. L.J. Sci & Tech 47 at 53.

Following this case, the Court did eventually "move away from delineating Fourth Amendment violations by trespass standards".[164] For example in *United States v Silverman*[165] (decided in 1961) a case where state officials attached a microphone in an apartment to listen in on an conversation, the Court found that this was a breach of the Fourth Amendment noting that "technical trespass was not necessary; rather, it suffices if there is actual intrusion into a constitutionally protected area".[166]

As Plourde-Cole says, in the modern day and age, the Fourth Amendment mandates the concept of "reasonable expectation of privacy" derived from *Katz.* The facts of *Katz* are simple. State officials recorded the defendant's phone conversation in an enclosed telephone booth using wiretapping.[167] The main issue was "whether the Fourth Amendment covered government initiated electronic surveillance".[168] Importantly, the Court held that the Fourth Amendment "protects people, not places, therefore what an individual seeks to preserve as private, may be constitutionally protected".[169] This broadens the predecessor's findings and held that physical trespass is not a requirement with developments in technology. Their honours noted that earlier decisions which required physical intrusions were akin to "in the present day, bad physics as well as bad law for reasonable expectations of privacy may be defeated by electronic as well as physical invasion".[170] Justice Harlan in concurrence, was of the opinion that like a home, an enclosed telephone booth "constitutionally protected reasonable expectations of privacy"[171] and this was something that a citizen was entitled to. In order to determine the reasonable expectations of privacy, Justice Harlan went on to espouse: [172]

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164 Haley Plourde-Cole "Back to Katz: Reasonable Expectation of Privacy in the Facebook Age" (2010) 38 Urb. L.J 571 at 579.

165 *United States v Silverman* (1961) 365 U.S. 505 cited in Haley Plourde-Cole "Back to Katz: Reasonable Expectation of Privacy in the Facebook Age" (2010) 38 Urb. L.J 571 at 579.

166 Haley Plourde-Cole "Back to Katz: Reasonable Expectation of Privacy in the Facebook Age" (2010) 38 Urb. L.J 571 at 579.

167 *Katz v United States* (1967) 389 U.S. 347, 367.

168 Peter Winn "Katz and the Origins of the Reasonable Expectation of Privacy Test" (2008) 40 McGeorge Law Review 1 at 1.

169 Haley Plourde-Cole "Back to Katz: Reasonable Expectation of Privacy in the Facebook Age" (2010) 38 Urb. L.J 571 at 580; Charles McLean "Katz on a Hot Tin Roof: The Reasonable Expectation of Privacy Doctrine is Rudderless in the Digital Age, Unless Congress Continually Resets the Privacy Bar" (2014) 24 Alb. L.J. Sci & Tech 4; Richard Wilkins "Defining the Reasonable Expectation of Privacy: An Emerging Tripartite Analysis" (1987) 40 Vand. L. Rev 1077.

170 Charles McLean "Katz on a Hot Tin Roof: The Reasonable Expectation of Privacy Doctrine is Rudderless in the Digital Age, Unless Congress Continually Resets the Privacy Bar" (2014) 24 Alb. L.J. Sci & Tech 47 at 55.

171 *Katz v United States* (1967) 389 U.S. 347, 367 at 361.

172 *Katz v United States* (1967) 389 U.S. 347, 367 at 361 Harlan J concurring.

> …(1) whether the individual exhibited an actual (subjective) expectation of privacy"; and
> (2) whether that expectation is one that society is prepared to recognize as reasonable.

Using this test Justice Harlan goes onto note that in this case, the defendant shuts the door, pays the required toll which enables the defendant to make the call. His honour deliberated that despite the telephone booth being "accessible to the public at other times… it is a temporarily private place whose momentary occupants expectations of freedom from intrusion are recognized as reasonable".[173] Since the development of the reasonable expectation of privacy concept, it has been interpreted and applied using a two-staged test in a range of circumstances by the U.S Supreme Court and lower courts. [174] But this test has not evolved without criticism. This thesis will not dive into an examination of these criticisms as the scope of the thesis is on ascertaining whether the concept of reasonable expectation of privacy can form a general right to privacy in New Zealand. However, it is important to note that an array of work done on this test exists.

3.1. Reasonable expectation of privacy in privacy related statutes and case law in New Zealand

As chapter two has demonstrated there is no one way to conceptualise privacy. Some commentators argue it is a value, or an interest, while others conceptualise privacy as being pivotal to human dignity and self-realisation. Either way, there is no uniform manner as to how it has been addressed. In New Zealand, the judiciary has approached privacy case law by using the "reasonable expectation of privacy". This concept has been interpreted and applied into various cases in a range of contexts such as search and surveillance and privacy torts. The aim of this part of the chapter is to look deeper into how the judiciary has done this by categorising the cases into various areas of the law. Due to the constraints of time and scope, this thesis focuses on privacy torts and search and surveillance cases. Other areas will only be touched on lightly.

3.1.1. Human rights and criminal law

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173 *Katz v United States* (1967) 389 U.S. 347, 367 at 364.

174 Charles McLean "Katz on a Hot Tin Roof: The Reasonable Expectation of Privacy Doctrine is Rudderless in the Digital Age, Unless Congress Continually Resets the Privacy Bar" (2014) 24 Alb. L.J. Sci & Tech 47 at 56; See also David Sullivan "A bright line in the Sky? Toward a New Fourth Amendment Search Standard for Advancing Surveillance Technology (2002) 44 Ariz L. Rev 967.

Searches, seizures and surveillance is an area of the law that "privacy consideration arise in".[175] While it is the Search and Surveillance Act 2011 that largely governs state officials conduct, s 21 of the NZBORA is also triggered as it buffers citizens "to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise".[176] If a search is found to be unreasonable, s 30 of the Evidence Act 2006 may be initiated which nullifies evidence that is "improperly obtained"[177] and the Court will duly need to make an assessment on whether excluding the evidence would be a "proportionate response to the impropriety".[178] Importantly, s 21 adopts the reasonable expectation of privacy as being "the touchstone"[179] that must be satisfied. In order to decipher whether a search has occurred, the Courts have repeatedly held, the claimant must satisfy that they had a reasonable expectation of privacy in the thing being searched and if so, whether it was reasonable.

One of the leading cases related to search and surveillance is *Hamed v R*.[180] The basic facts are as follows. Certain military exercises were conducted in the Urewera Ranges, owned by various trusts that have affiliations with Tuhoe, between 2006 and 2007. These alleged military exercises involved "firearms, live ammunition, and Molotov cocktails".[181] Police installed hidden cameras on three locations where they expected these exercises to be taking place, over a series of months. They also undertook a series of searches. The police stated they had search warrants for the physical searches and interception of text messages between those accused. Those accused with carrying out the military exercises had connections with the Tuhoe and were charged under the Fire Arms Act 1983 for the possession and use of firearms. Some of the accused were also charged with s 98A of the Crimes Act, "participation in an organised criminal group".[182] Due to the manner in which the police obtained the evidence, pre-trail concerns arose as to the admissibility of the evidence, including the legitimacy of the warrants and the evidence obtained from hidden surveillance, and whether the search was unreasonable pursuant to s 21 of the NZBORA.

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175 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 94.
176 New Zealand Bill of Rights Act 1990, s 21.
177 Evidence Act 2006, s 30.
178 Sam McMullan "Third Party Consent Searches Following the Search and Surveillance Act" (2012) 43 VUWLR 447 at 448.
179 *Hamed v R* [2011] NZSC 101; See also Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008).
180 *Hamed v R* [2011] NZSC 101; *R v Williams* [2007] NZCA 52 at [113] - The position in surveillance was fully reviewed by the SC in *Hamed.*
181 *Hamed v R* [2011] NZSC 101 [2].
182 *Hamed v R* [2011] NZSC 101at [2].

The matter was first heard in the High Court, and two judgments were given. In the latter judgment, Winkelmann J, opined that although the evidence including video footage was improperly obtained it was admissible under s 30 of the Evidence Act.[183] The 19 individuals that were accused, appealed the decision.[184] The Court of Appeal affirmed the High Court's findings. The defendants appealed to the Supreme Court. The Supreme Court found "that the use of the police's trespassory surveillance amounted to a search under s 21 of NZBORA. As it was not authorised by any positive authority it was unlawful".[185] The Supreme Court noted that "the Court must engage in a two-step process"[186] to determine s 21. This is i) whether there was a search or a seizure? And ii) if so was it unreasonable?[187]

Of relevance to this thesis is the Supreme Court's findings in relation to s 21 of the NZBORA and 'reasonable expectation of privacy'. Importantly, Blanchard J adopted the Canadian Supreme Court's decision in *R v Wise* [1992] 1 SCR 527 as to what constitutes as a search. In that case, a search was described as being "a police activity that invades a reasonable expectation of privacy".[188] His honour, provided a two staged test to determine whether there had been a search, as "firstly the complainant must have a subjective expectation in the place or thing being searched, or time of the police activity. Second, that expectation must be one that society is prepared to recognise as reasonable".[189] If both these limbs are met, then the conduct of the police will be a search for the purpose of s 21.

As to the reasonable expectation of privacy, the Court held that the police surveillance was on private land, and it was not "visible from any public land".[190] In this regard "the appellants had a reasonable expectation of privacy, though one of limited extent in some cases, and such an expectation in relation to private land would have been recognised by society".[191] While the owners may have permitted public access to some sections of the land, "they still had a reasonable expectation of privacy from police investigation on their land".[192] The Supreme Court held that "as with the equivalent provisions in the United States and Canada, the

183 *R v Bailey* HC Auckland CRI-2007-085-7843, 7 October 2009.
184 *Hunt v R* [2010] NZCA 528, [2011] 2 NZLR 499.
185 Harriet Bush "The Video Camera Surveillance (Temporary Measures) Act 2011: An Unprecedented Licence to Search?" (2013) 44 VUWLR 221 at 224.
186 *Hamed v R* [2011] NZSC 101at [162].
187 *Hamed v R* [2011] NZSC 101at [162].
188 *Hamed v R* [2011] NZSC 101at [163].
189 *Hamed v R* [2011] NZSC 101at [163]-[164].
190 *Hamed v R* [2011] NZSC 101at [171].
191 *Hamed v R* [2011] NZSC 101at [171].
192 *Hamed v R* [2011] NZSC 101at [171].

touchstone of the section is the protection of reasonable expectations of privacy".[193] In particular, the Court noted: [194]

> [168] It should make no difference to whether a surveillance is a search or seizure that the filming of the public place was done from private land or that filming of any kind is done covertly. The important matter is whether the subject of the surveillance was a place within public view. That would include areas of land, such as the front garden of a house, which are open to viewing from the street or another public place; that is, where the privacy of the occupiers is not protected by, say, a surveillance of such a private space, it were necessary to climb up on a fence or place a camera up a power pole, for example, that action is likely to constitute a search. Even more so would the action of filming by a camera taken on to the property and used to record things unable to be filmed from a public area unless there was an express or implicit invitation to enter and do so, or a right of entry as in

Elias CJ stated the following:[195]

> [11] Whether surveillance amounts to a State intrusion upon reasonable expectations of privacy depends on wider context than property ownership. The values protected by s 21 are not simply property-based, as were the common law protections which preceded it. Rather, they provide security against unreasonable intrusion by State agencies into the personal space within which freedom to be private is recognised as an aspect of human dignity…

It is elucidated that as the defendants were on private land, away from the public, they would have had a reasonable expectation of privacy that was reasonable. However, Elias CJ does point out that even in public individuals can expect to have a reasonable expectation of privacy. Once it is found there is a search, the Courts will turn to examine whether it was unreasonable. The Supreme Court noted that at this stage "it is necessary to look at the nature of the place or object which was being searched, the degree of intrusiveness into the privacy of the person or persons affected and the reason why the search was occurring".[196]

There are many other cases that concern s 21 and privacy. However, to meet the purposes of this thesis, the most recent and relevant cases have been chosen.

193 *Hamed v R* [2011] NZSC 101at [161].
194 *Hamed v R* [2011] NZSC 101at [168].
195 *Hamed v R* [2011] NZSC 101at [11].
196 *Hamed v R* [2011] NZSC 101at [172].

A more recent decision is *R v Alsford.*[197] In that decision the defendant was charged with cannabis related offences after the police received a 'tip'. The Police undertook investigations including searches of the defendant's property, and information on his electricity usage from the power supplier. At the District Court, Judge Neave determined that the evidence obtained by the police was inadmissible. The Court of Appeal affirmed this. The matter came before the Supreme Court. One of the main issues the Supreme Court had to consider was whether the electricity information obtained about the defendant was one he had an expectation of privacy in.

The Supreme Court adopted Blanchard J's approach in *Hamed*, which was that "there would be a search where the information-gather activity "invades a reasonable expectation of privacy"".[198] Blanchard J had identified two aspects to this which was: [199]

1. **Whether the individual had an reasonable expectation of privacy in fact; and**
2. **Whether the expectation was one that society is prepared to regard as reasonable.**

In undertaking this determination, Arnold J used the following principles developed in the Canadian Courts: [200]

> [63] To summarise, the question whether there is a reasonable expectation of privacy in personal information has both subjective and objective elements. The objective component asks whether the subjective expectation of privacy held by the person involved is an expectation that society is prepared to recognise as reasonable. The Court's approach to the determination of that question is a contextual one, requiring a consideration of the particular circumstances of the case. On the Canadian authorities, these circumstances could include:
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> (a) The nature of the information at issue;
>
> (b) The nature of the relationship between the party releasing the information and the party claiming confidentiality in the information;
>
> (c)The place where the information was obtained; and
>
> (d) The manner in which the information was obtained.
>
> The reasonable expectation of privacy is directed at protecting "a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from

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197 *R v Alsford* [2017] NZSC 42; See also *New Zealand Police v Cotton* [2017] NZDC 1913 – a case with similar circumstances, affirmed *R v Alsford*; *The Queen v Gul* [2017] NZCA 317, adopted *R v Alsford*.

198 *R v Alsford* [2017] NZSC 42 [48].

199 *R v Alsford* [2017] NZSC 42 [48]. Four cases from Canadian jurisprudence were discussed at 303.

200 *R v Alsford* [2017] NZSC 42 at [63]-[64].

> dissemination by the state" and includes information "which tends to reveal intimate details of the lifestyle and personal choices of the individual.
>
> [64] We consider that this approach provides an appropriate framework for analysis in the New Zealand context in a case such as the present. It follows that we do not agree with the approach taken in *R v R* that if information is obtained consistently with the privacy principles, in particular Principles 2(2)(d) and 11(e), there will no search. ..
>
> Whether a police request for information amounts to a "search" will depend on whether it relates to personal information in respect of which there is a reasonable expectation of privacy, which depends on a consideration of factors such as those identified at [63] above. If there is a reasonable expectation of privacy in the information, there will be a search and the question will become whether the search is unreasonable.

Assuming Mr Alsford had satisfied the first limb, Arnold J went on to consider whether he met the objective element. On this point, it was held that Mr Alsford did not in fact have a reasonable expectation of privacy as the information provided was simply an "aggregate figure"[201] of the power usage instead of a month by month detail, the data belonged to the power companies that collected information for "commercial reasons"[202], "contractual terms of supply"[203] existed between Mr Alsford and the power companies, and these may have "provisions relevant to the supply of customer information to third parties",[204] and the possibility of disclosure was stated in the contracts, albeit the arguments against and for this. The Court also noted that "the special protection recognised in respect of a person's home is not engaged directly".[205]

Another recent decision involving privacy consideration under s 21 of the NZBORA was *Aranguiz v New Zealand Police*.[206] The appellant in this case, Mr Aranguiz was found guilty of "intentionally making an intimate visual recording of another person, and a charge of intentional damage".[207] The appellant says the police obtained the evidence in breach of s 21 of the NZBORA. The facts of the case are as follows. A toilet cubicle in the Riccarton Westfield had small holes which allowed a person to "view a person using the urinal"[208], if they were sitting down. These were repaired on multiple occasions by Westfield, yet they kept reappearing. The management had reason to suspect Mr Aranguiz as being the person making these holes. One day, a retail manager noticed the holes had been made again and found that

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201 *R v Alsford* [2017] NZSC 42 at [66].
202 *R v Alsford* [2017] NZSC 42 at [67].
203 *R v Alsford* [2017] NZSC 42 at [68].
204 *R v Alsford* [2017] NZSC 42 at [68].
205 *R v Alsford* [2017] NZSC 42 at [7].
206 *Aranguiz v New Zealand Police* [2019] NZHC 1765.
207 *Aranguiz v New Zealand Police* [2019] NZHC 1765 at [1].
208 *Aranguiz v New Zealand Police* [2019] NZHC 1765 at [2].

the cubicle was occupied. Police were called to the scene, and a police officer used the cubicle next to the one occupied, levered up to see over the cubicle and found Mr Aranguiz sitting and "holding his mobile phone".[209] The police officer unlocked the door and arrested Mr Aranguiz. He also touched Mr Aranguiz pockets and found a screwdriver.

On appeal to the High Court, Mander J had to determine whether the search was unlawful. The Judge noted that there has been no other cases in New Zealand that have discussed privacy related to a toilet cubicle located in public settings and drew up on jurisprudence from Canada in this regard. Nevertheless, in coming to a decision, it was acknowledged by Mander J that a person has an expectation of privacy in a toilet, however, the "question arises as to the reasonable limits of that, particularly when regard is had to the purpose for which the facility is provided by the mall proprietors, namely for the convenience of customers frequenting the mall".[210] As Mr Aranguiz was in the toilet cubicle for 50 minutes or so, this was considered by the lower court Judge "to have eclipsed the occupant's expectation of privacy".[211] Mander J agreed that it was a pertinent fact, however it was "secondary to the necessary preliminary step of making inquiries of the occupant before infringing the person's privacy by making a visual observation"[212] inside the cubicle. Therefore, Mander J concluded that a better approach would have been for the police officer to make some form of verbal contact or a 'knock' on the cubicle door before leveraging himself up. If the officer did not receive any response, then "arguably against the background of the length of the person's occupation of the cubicle, any reasonable expectation of privacy would likely have been extinguished".[213] On this basis, Mander J held that the defendant had a reasonable expectation of privacy. However, in terms of the balancing exercise with s 30 of the Evidence Act, the Judge found that excluding the evidence would be disproportionate to the impropriety in this case. [214]

Hoete v R was a Court of Appeal decision involving a search and seizure.[215] The appellants in this cased were "charged with manufacturing methamphetamine and various possession charges".[216] The police conducted a warrantless search of the appellants in his parked vehicle

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209 *Aranguiz v New Zealand Police* [2019] NZHC 1765 at [2].
210 *Aranguiz v New Zealand Police* [2019] NZHC 1765 at [23].
211 *Aranguiz v New Zealand Police* [2019] NZHC 1765 at [23].
212 *Aranguiz v New Zealand Police* [2019] NZHC 1765 at [23].
213 *Aranguiz v New Zealand Police* [2019] NZHC 1765 at [24]-[25].
214 *Aranguiz v New Zealand Police* [2019] NZHC 1765 at [33].
215 *Hoete v R* [2013] NZCA 432.
216 *Hoete v R* [2013] NZCA 432 at 429.

outside a petrol station. As a result of the search, the police found drugs and a memory card of a camera. The memory card revealed photos of drugs being manufactured. One of the issues before the Court of Appeal was the admissibility of the evidence obtained by the police from the memory card. In this regard, White J noted that "the degree of intrusion into privacy, together with nature of the place or object searched and the reasons why the search took place, inform the assessment of reasonableness".[217] The Court accepted that the appellant had an expectation of privacy to his memory card and that it would be one "society was prepared to recognise as reasonable", [218] following the argument given in *R v Caron* where it was held that memory cards held information of a biographical nature and attracted an expectation of privacy. The Court rejected the Crown's claim, that a memory card should be considered as akin to notebooks or cellphones that are typically used in illicit enterprise and thus admissible, noting in particular that "a camera memory card…would not normally be similarly regarded or be expected to contain similar incriminating evidence".[219]

Tye v The Queen concerned a case where the defendant had been charged with a series of crimes related to drugs.[220] Some of the evidence obtained by the police was through video surveillance. The video surveillance was captured by placing cameras on the defendant's property. While the police had a search warrant they did not have authority to "covertly record any activity there".[221] On appeal to the Court of Appeal regarding admissibility of that evidence, the Court of Appeal relying on *Hamed*, acknowledged that as the proprietor of the subject land, the defendant would no doubt have an expectation of privacy. However, the surveillance was in relation to a shed, located away from the main dwelling on the land. A number of factors resulted in the Court's findings that the privacy in respect of the shed was less than that of the dwelling. These factors were namely, the "remote location of the shed on a relatively large rural property"[222], its use (i.e. the shed was used as storage), the defendant had in contemplation that "others may well visit the shed or be in the vicinity and observe it".[223] As a result, and after carrying out a balancing exercise, the Court upheld the lower Court's

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217 *Hoete v R* [2013] NZCA 432 at [19].
218 *Hoete v R* [2013] NZCA 432 at [20].
219 *Hoete v R* [2013] NZCA 432 at [20]-[1].
220 *Tye v The Queen* [2012] NZCA 382.
221 *Tye v The Queen* [2012] NZCA 382 at [1].
222 *Tye v The Queen* [2012] NZCA 382 at [24]; See also *Hodgkinson v R* [201] NZCA 457 – the Court of Appeal held that a property in a remote location "did not have a privacy right of the highest order" at [52].
223 *Tye v The Queen* [2012] NZCA 382 at [25].

decision, that excluding the evidence would be a disproportionate response under s 30 of the Evidence Act.

Lorigan v R also involves video surveillance and drug related offences.[224] Police officers installed cameras on a neighbouring property with the consent of that owner. These cameras captured vehicles that passed the street, but vehicles also "entering and exiting"[225] the accused's driveway. After looking at other public place cases, the Court of Appeal upheld the High Court's findings, that the search was not unreasonable. It was conducted lawfully, it was in relation to "public places, being a road and a foot path [the driveway was also a public place]…people travelling along public streets and in public places…are aware of the possibility of being subject to surveillance by state or local authorities; people on the suburban street..did not have a reasonable expectation of privacy as to their movement and knew they were in public view, when they were on the driveway".[226]

In *Fanesenkloet v Jenkin*,[227] the plaintiff had installed a surveillance camera on the roof of his garage, that was "adjacent to a driveway running to Mr Fanesenkloet's property".[228] Mr Fanesenkloet sought interim order to have this camera removed and one of the grounds he relied on was a breach of privacy. The Judge was of the view that the driveway being videoed "was a distance away from the home, and which was open to the public is not a place where there is a high expectation of privacy".[229] Essentially, a driveway is not generally an area where intimate activities occur, rather is merely used as an entry point by visitors or those who wish to enter the house, even though it may be privately owned. Given the "relatively public nature of the use"[230], the Judge determined that there was no reasonable expectation of privacy in the area of the driveway that was captured by the surveillance camera.

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224 *Lorigan v R [*2012[NZCA 264.
225 *Lorigan v R [*2012[NZCA 264 at [9].
226 *Lorigan v R [*2012[NZCA 264 at [40].
227 *Fanesenkloet v Jenkin* [2014] NZHC 1637.
228 *Fanesenkloet v Jenkin* [2014] NZHC 1637 at [1]; See also *R v Gardiner* (1997) CRNZ 131 (CA) a case concerning a camera placed at the back of the house and recorded the back area of the neighbouring property. It was held that the camera was lawfully in place.
229 *Fanesenkloet v Jenkin* [2014] NZHC 1637 at [42].
230 *Fanesenkloet v Jenkin* [2014] NZHC 1637 at [45].

In *Warren v Attorney-General*,[231] Mr Warren while on bail was subject to 75 checks by the police, mostly occurring at night or early hours of the morning. It was argued that the checks amounted to searches and were a breach of privacy. The Judge noted that the onus was on Mr Warren under s 12 of the Bail Act to "satisfy a Judge on the balance of probabilities that, if granted bail, he would not commit any burglary or other serious property offence".[232] Further, he had signed a bail notice which outlines potential visits by the police. This, however, did not mean that privacy considerations were removed. Rather, it is "fair to say that a person on EM bail…must have a reduced expectation of privacy". [233] On this basis, the Judge was not satisfied the checks by the police amounted to searches.

In *Ngan v R*, the police found and opened "a zipped pouch" located in a car that was involved in an accident.[234] Inside this pouch was methamphetamine and the defendant was subsequently charged with drug related offences. One of the issues this decision addressed was whether the search conducted by the police was unreasonable pursuant to s 21 of the NZBORA. The Court found that the search was lawful as Mr Ngan's "reasonable expectation of privacy was at a low level"[235] in relation to the zipped pouch found in the car. The degree of privacy in cars is lower than in a dwelling and the purpose of the search was "reasonably necessary and incidental to both the safekeeping and the restoration purposes…[of what the police found]".[236]

3.1.2. Torts

Many argue that the seminal case of *C v Holland* has changed the landscape of privacy torts in New Zealand by affirming the existence of a new tort – intrusion into seclusion.[237] Before diving into the examining the facts of *C v Holland*, it is necessary to briefly touch on what this new tort actually protects. William Fussey has written an extensive article on this where he

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231 *Warren v Attorney-General* [2019] NZHC 1690; See generally *New Zealand Police v Skyes* [2018] NZDC 7463 at [23] - The expectation of privacy is lower "in a motor vehicle than a home"; *Milligan v New Zealand police* [2017] NZHC 836 - A defendant has the highest reasonable expectation of privacy in their home; *Cameron v New Zealand Police* [2015] NZHC 2957 - However, there may be lesser degree of privacy in the garden or front garden, garages and outer buildings; See also *Wright v Boshale* [2016] NZCA 493 At [49].

232 *Warren v Attorney-General* [2019] NZHC 1690 at [98]; See also G v The Queen [2016] NZCA 390; *R(CA201/2015) v The Queen* [2015] NZCA 165.

233 *Warren v Attorney-General* [2019] NZHC 1690 at [100].

234 *Ngan v R* [2007] NZSC 105.

235 *Ngan v R* (2007) 23 CRNZ 754 at 754; See also Gill v Attorney-General [2010] NZCA 468.

236 *Ngan v R* (2007) 23 CRNZ 754 at 773.

237 *C v Holland* [2012] NZHC 2155; See also William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury L Rev 269; See also *Graham v The Queen* [2015] NZCA 568.

states, "intrusion interests encapsulates a person's interest in not being accessed".[238] It can be described as an invasion of person's space, which they recognise "psychologically [as] theirs"[239] by the use "of the senses, technological devices that enable the use of the senses, or physical proximity".[240] Commonly, in such circumstances and the ever developing technological mediums, intrusions such as watching a person having a shower or "getting undressed without consent"[241] can be done secretly and this is a "serious violation of a person's intrusion interest".[242] But why protect such interests? Fussey succinctly answers this by expressing that protection of intrusions is essential to the "universal values"[243] including identify, respect, consideration and autonomy.[244] So what happened in *C v Holland*?

The facts in *C v Holland* are straightforward. C lived in a property owned by the defendant and her boyfriend. The defendant installed recording cameras "in the roof cavity above the shower and toilet and videoed C while she was showering".[245] When C unearthed these recordings, she was extremely upset. The defendant accepted that "he invaded C's privacy"[246] and the issue before Whata J in the High Court was "whether invasion of privacy of this type, without publicity or the prospect of publicity is an actionable tort in New Zealand".[247] In coming to a decision, Whata J embarked on an hefty task of canvassing privacy laws in other jurisdictions before analysing why New Zealand should develop a tort that recognises intrusions into an individuals' personal space. His honour's reasoning was coalesced at paragraph [75] as:[248]

> [75] First, as I have said, freedom from **intrusion into personal affairs is a recognised value in New Zealand,** underlying existing rules that regulate intrusion into personal affairs as both a civil and criminal wrong. Second, freedom from intrusion into personal affairs is

238 William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury L Rev 269 at 270.
239 William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury L Rev 269 at 270.
240 William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury L Rev 269 at 270.
241 William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury L Rev 269 at 271.
242 William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury L Rev 269 at 271.
243 William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury L Rev 269 at 271.
244 William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury L Rev 269 at 271.
245 *C v Holland* [2012] NZHC 2155 at [1].
246 *C v Holland* [2012] NZHC 2155 at [1].
247 *C v Holland* [2012] NZHC 2155 at [1].
248 *C v Holland* [2012] NZHC 2155 at [75].

> amenable to familiar, justified limitations, including a defence of legitimate public concern based on freedom of expression or prosecution of criminal or other unlawful activity. Third, a tort of intrusion upon seclusion is entirely compatible with, and a logical adjunct to, the Hosking tort of wrongful publication of private facts. **They logically attack the same underlying wrong, namely unwanted intrusion into a reasonable expectation of privacy**. Fourth, freedom of speech values and the right to freedom of expression affirmed by s 14 of BORA are only infringed when publication is also contemplated, in which case the Hosking principles apply, and if Hosking should one day prove to be wrongly decided, then principles attaching to a claim based on breach of confidence could changing social context. Fifth, the structure of an intrusion tort has clear similarities to traditional torts based on protection of property and the person, involving unwanted acts that cause harm or damage to a person's possessions or to the person. Sixth, a feature of the common law is its capacity to adapt to vindicate rights in light of a changing social context.

Whata J reached the view that a tort of intrusion was necessary with developments in technology, and the development of the tort would "commensurate with the value already placed on privacy".[249] His honour reiterated that the tort was "sufficiently proximate"[250] to the *Hosking* tort (which will be discussed below). After arriving at this conclusion, Whata J set out the elements of the tort. These are: [251]

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

In regards to 'an intentional and unauthorised' intrusion, Whata J explained that "intentional connotes an affirmative act, not an unwitting or simply careless intrusions".[252] And "unauthorised" was referred to as those that "excludes consensual and/or lawfully authorised intrusions".[253] Interestingly, his honour further iterated that not every intrusion could be actional rather there is a need that the intimate activity "most directly impinge personal autonomy".[254] As for the third element "infringement of a reasonable expectation of privacy"[255], there is little to no explanation provided as to what constitutes a reasonable expectation of privacy. According to Fussey, this was probably due to the unique set of facts

249 *C v Holland* [2012] NZHC 2155 at [86].
250 *C v Holland* [2012] NZHC 2155 at [86].
251 *C v Holland* [2012] NZHC 2155 at [94].
252 *C v Holland* [2012] NZHC 2155 at [95].
253 *C v Holland* [2012] NZHC 2155 at [95].
254 *C v Holland* [2012] NZHC 2155 at [95].
255 *C v Holland* [2012] NZHC 2155 at [95].

in the case, whereby an individual having a shower is no doubt expecting to have a reasonable expectation of privacy.[256] Despite not providing a determinative observation on the reasonable expectation of privacy concept, as Fussey correctly notes, Whata J does refer to how other jurisdictions, including Canada have determined the concept. In particular, the Canadian jurisprudence revealed a two-staged test with a subjective limb – "a subjective expectation of solitude or seclusion"[257] and second an objective limb –"for this expectation to be objectively reasonable".[258] Essentially, the reasonable expectation of privacy goes to determining whether the particular activity was one where "the intrusion is into matters that are intrinsically private".[259] The last element, "highly offensive to a reasonable person"[260] is largely incorporated into the test as Whata J considered that a "one step reasonable expectation of privacy test…is not sufficiently prescriptive".[261] Thereby, including this added element "will also set a workable barrier to the unduly sensitive litigant"[262], or in other words, as Fussey states it "he worries that a claim will be too easily satisfied".[263] However, there has been many arguments advocated for the removal of this element by legal scholars, although, there has been no change made to date.[264]

Prior to the development of the tort of intrusion into seclusion, another tort had taken to the spotlight. 2004 was a decisive year for the law of privacy in New Zealand. It was in this year, that the Court of Appeal confirmed the existence of a privacy tort known as the 'publication of private facts' in the influential case *Hosking v Runting*.[265] Mr and Mrs Hosking were known as "a celebrity couple when Mr Hosking's broadcasting career put him into the public limelight".[266] He was subsequently the subject of many articles including those "touching on a range of personal matters".[267] Both Mr and Mrs Hosking did not prevent the publication of

256 William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury L Rev 269 at 274.
257 *C v Holland* [2012] NZHC 2155 at [17].
258 *C v Holland* [2012] NZHC 2155 at [17].
259 William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury L Rev 269 at 274
260 *C v Holland* [2012] NZHC 2155 at [95].
261 *C v Holland* [2012] NZHC 2155 at [97].
262 *C v Holland* [2012] NZHC 2155 at [97].
263 William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury L Rev 269 at 275.
264 William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury L Rev 269 at 275.
265 *Hosking v Runting* [2005] 1 NZLR 1 (CA). In *Murray v Express Newspapers Plc* [2007] EWHC 1908, a similar situation arose in the UK concerning the publication of photos taken in public of JK Rowling's child.
266 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [9].
267 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [9].

these articles. However, in 2002, Mr Runting, a photographer, was hired by a magazine to take photos of Mr and Mrs Hosking's then 18 month old twins. Mr Runting successfully did this in the streets of New Market, Auckland. Mr and Mrs Hosking sought to have publication of these photographs prevented and also sought "a remedy".[268] The matter went onto be heard at the High Court, where the Judge held that a privacy tort could not be "recognised" and any developments in the law of privacy was best dealt by the legislature. In particular, the Judge referred to the elements given by Nicholson J in the *P v D*,[269] in that the Hosking's case did not squarely fall within those elements given "for the tort of privacy".[270] For the sake of context, those elements were:[271]

1. That the disclosure of the private fats must be a public disclosure and not a private one.
2. Fact disclosed to the public must be private facts and not public ones.
3. The matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.
4. The nature and extent of legitimate public interest in having the information disclosed must be weighed.

It was the Judge's conclusion the facts could not be classified as 'highly offensive' nor did he consider that there would be any 'public disclosure of private facts'. The matter was appealed. The Court of Appeal, in coming to decision noted that "there is no guaranteed right of privacy in the New Zealand Bill of Rights Act".[272] But, there has been several cases which have discussed the possible "emergence of a common law tort of breach of privacy".[273] The Court of Appeal went on to note these cases and also consider the existing legislation in place that protect the privacy of the individual, such as the Privacy Act and the Broadcasting Act, finding that the "legislative protection [that] has been provided has been of specific focus and limited".[274] The quorum unanimously underscored the vital nature of privacy in modern society, especially with advancements in technology and the ability of state and non-state actors to intrude into individual lives. While this was not closely elaborated by Gault P and Blanchard J, Tipping J stated "the right to be let alone as an interest that the tort protects [the tort of

268 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [1]-[2].
269 *P v D* [2000] 2 NZLR 59.
270 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [15].
271 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [15].
272 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [77].
273 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [77].
274 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [118].

publication of private facts]"[275] and that "the essence of the dignity 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".[276]

Along with this and further deliberation on whether the development of a privacy tort would encroach on other fundamental values such as 'freedom of expression', their honours found that recognising a tort of privacy would not limit other values, rather a careful balancing exercise is needed.[277] The Judges used the elements identified in *P v D* as a starting to point, to state that for a successful claim relating to publication of private facts the following two staged test must be satisfied: [278]

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

Their honours also noted that a defence of "public concern" was available justifying the need for publication for private facts. In terms of the reasonable expectation of privacy element, interestingly through their discussion, their honours appears to use the phrase 'private facts' instead. In other words, the two terms are conflated.

Gault P and Blanchard J then proceed to consider public figures in the spotlight, noting that being in the spotlight did not necessarily amount to a loss of their reasonable expectation of privacy. However, they opined that there is a "reduced"[279] reasonable expectation of privacy as "public status increase" [280] as "it is a matter of human nature that interest in the lives of public figures also extends to interest in the lives of their families".[281] In this regard, their honors referred particularly to United States jurisprudence. As to the second limb – 'the highly offensive to the reasonable person'- their hours concluded that this right of action ought to only

275 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [238]-[230].
276 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [239].
277 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [117].
278 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [117].
279 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [121].
280 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [121].
281 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [124].

be used "in respect of publicity determined objectively, by reference to its extent and nature, to be offensive by causing real hurt or harm".[282] It was noted in particular:[283]

> [128] We do not see personal injury or economic loss as necessary elements of the action. The harm to be protected against is in the nature of humiliation and distress. These are concepts now familiar in the law having recognition in statutes such as the Employment Relations Act and the Privacy Act. We are not concerned with issues of whether there need be recognised psychiatric harm.

Applying the established elements to Mr and Mrs Hosking's circumstances, the Court agreed with the lower Court's conclusion that "there is nothing in the evidence to suggest there is a serious risk to the children if publication occurs as intended."[284] The photos did not "disclose anything more than could have been observed by any member of the public"[285] nor do they provide information on where they live, or other information that could be used for "ill intent".[286] On this basis, their honours dismissed the appeal.

There have been several post-*Hosking* cases that must be touched upon to ascertain the development of this tort and importantly the concept of reasonable expectation of privacy. The tort was further put under the spotlight in *Rogers v TVNZ Ltd*.[287] The facts of *Rogers v TVNZ Ltd* were somewhat curtailed. In 2004 Mr Rogers had a police interview, where he admitted his responsibility for the death of "Kathy Sheffield in 1994".[288] In 2005, Mr Rogers was found not guilty for the victim's death despite the jury having evidence by witnesses and an admission from Mr Rogers himself where "in 2001…he described cutting Ms Sheffield's throat "like a sheep"". [289] However, the police interview in 2004 was not available to the jury on the basis of inadmissibility, as it had involved significant breaches of the NZBORA. Nevertheless, once the video was made, TVNZ had been provided a copy by the police. TVNZ intended to use the video in a documentary relating to Mr Roger's acquittal and whether the video, if played to the jury would have altered the outcome of Mr Roger's case. Mr Rogers sought to restrain this on the grounds that it "would injure his privacy and dignity and would impede his efforts to rebuild his life".[290] In the High Court, Mr Rogers was successful in obtaining an injunction

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282 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [126].
283 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [128].
284 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [159].
285 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [164].
286 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [164].
287 *Rogers v TVNZ Ltd* [2007] NZSC 91 [29]-[33].
288 *Rogers v TVNZ Ltd* [2007] NZSC 91 at [1].
289 *Rogers v TVNZ Ltd* [2007] NZSC 91 at [1].
290 *Rogers v TVNZ Ltd* [2007] NZSC 91 at [3].

against TVNZ and the High Court notably concluded that such use of the video would amount to an interference of privacy, in line with the tort established in *Hosking*. TVNZ appealed to the Court of Appeal and their honours annulled the earlier made orders by the High Court. The Court of Appeal did not "differ from the view reached in the High Court"[291], that is "the circumstances [that] afford a basis for the reasonable expectation finding".[292] However, public interest outweighed any of his privacy concerns.[293] The Supreme Court allowed leave to appeal and ultimately concluded that the matter be remitted to the High Court, while ordering an interlocutory injunction.

In relation to the concept of reasonable expectation of privacy, the High Court in its analysis divided this limb into two stages: "whether there are private facts, and if so, whether they are of a character to give rise to a reasonable expectation of privacy":[294]

> [48] The videotape was recorded as part of an evidential process. As such, it would have been Mr Rogers' reasonable expectation that the videotape was recorded for use in the trial process and further, that the access of the media to that material would be regulated through the Court, and that any reporting of context would have been a part of the reporting of trial. It would not be within the contemplation of any reasonable New Zealander that Police would shortly after obtaining an evidential videotape and before trial, release that tape to the media. As we discuss below, there is good reason why the Police are not permitted to, and do not usually behave in such a manner.

However, the Court of Appeal rejected this test as being unnecessarily dividing the test given in *Hosking* and reverted back to the original two staged test. As the starting point, the Court of Appeal reminded themselves, that there is not clear test in this regard, drawing upon the comments of *Australian Broadcasting Commission*. The Court of Appeal went on to state "whether facts exist in respect of which there is a reasonable expectation of privacy, must be judged at the time the tort it is committed by the publishing of those facts".[295] However, this alone will not be sole basis on which this limb is judged, rather: [296]

> [54] But, it does not follow that whether facts give rise to a reasonable expectation of privacy is to be judged solely at the date of actual, or intended, publication. The circumstances which prevailed when such facts first came into existence, will of course

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291 *Television New Zealand Limited v Rogers* CA CA12/06, 7 August 2006 at [58].
292 *Television New Zealand Limited v Rogers* CA CA12/06, 7 August 2006 at [58].
293 *Rogers v TVNZ Ltd* [2007] NZSC 91 at [5].
294 *Rogers v Television New Zealand Ltd* (2005) 22 CRNZ 668 (HC) at [48].
295 *Television New Zealand Limited v Rogers* CA CA12/06, 7 August 2006 at [52]-[53].
296 *Television New Zealand Limited v Rogers* CA CA12/06, 7 August 2006 at [54].

> remain relevant. But equally, the passage of time and changed circumstances, may influence the reasonable expectations held in relation to facts. And, the transition may be from public to private, or vice versa. Similarly, facts that are "public" for one purpose (in this case, Court proceedings) are not "public" for all purposes. Although information has been made known to others, a degree of privacy may remain: T*V3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720 at 731.

The Court of Appeal provided the following reasons for Rogers' expectation of privacy:

1. Firstly, a videotape of a confession, or evidence is generally kept in "safekeeping of the police until tendered to the Court"[297], which is then "the control of the property"[298]. While TVNZ where provided a copy, this does not alter the reasonable expectation of privacy Mr Rogers may have held about the videotape;
2. Secondly, the fact the tape was deemed inadmissible and played in Court meant that "there was no need, nor opportunity, for Mr Rogers to meet the contents of the tape"[299]; and
3. Lastly, the outcome of the trail, that is Mr Rogers being acquitted.

Nevertheless, the Court of Appeal opined that "[his] privacy was held to be minimal compared with that arising from inherently private facts".[300] These three considerations paved the way for the Court of Appeal to reach the same conclusion as the High Court that there was a reasonable expectation of privacy in regards to the videotapes. It must be noted that at paragraph [59], the Court of Appeal specifically commented that a reasonable expectation of privacy does not merely rise in those activities that are inherently private but can also be attributed in facts that "do not have an inherent quality of privacy".[301] With regards to the second limb- highly offensive, the Court of Appeal affirmed the lower Court's finding that it would be highly offensive to the reasonable person. However, on other grounds, were of the view that the High Court's orders be annulled.

In the Supreme Court, the comments of McGrath J are noteworthy. It was opined by his honour that the facts of Mr Rogers' case did not establish it was "private" in nature. In particular, the

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297 *Television New Zealand Limited v Rogers* CA CA12/06, 7 August 2006 at [56].
298 *Television New Zealand Limited v Rogers* CA CA12/06, 7 August 2006 at [56].
299 *Television New Zealand Limited v Rogers* CA CA12/06, 7 August 2006 at [57].
300 Ursula Cheer "The future of privacy. Recent legal developments in New Zealand" (2007) 13 Canterbury Law Review 169 at footnote 29.
301 *Television New Zealand Limited v Rogers* CA CA12/06, 7 August 2006 at [58].

videotape taking place as part of a police investigation, that it could potentially be shown to the Court at a public trial "strongly indicate[d] that Mr Rogers had no reasonable expectation of privacy in relation to the recorded events at the time they took place".[302] His honour stated "the relative weight to be given to privacy interests must always depend on all the circumstances, even where they involve a vulnerable acquitted defendant".[303] The majority of Justices held that Mr Rogers did not have a reasonable expectation of privacy, but McGrath J's reasoning was the most detailed in this regard, as referred to above.

Brown v Attorney General is another case that was brought under the spotlight by the *Hosking* tort.[304] Mr Brown was convicted of sexual offences relating to a five year old and was sentenced to five years in prison. After serving three and half years of his sentence, Mr Brown was released on parole. Mr Brown lived in the suburbs of Wellington known as Starthmore Avenue. The police took a photograph of Mr Brown to which he agreed. Mr Brown stated that the police told him the photo will only be used for police identification processes. However, the police went onto use the photo of Mr Brown to distribute a flyer around the community labelled "Convicted Pedophile Living in Your Area".[305] The flyer cautioned the neighbours to be aware of Mr Brown and his activity in the area. Mr Brown argued that as a result of the flyer, he had suffered "physical, psychological and emotional harm".[306] Mr Brown relied on several causes of action, including invasion of privacy and breach of confidence. In coming to a decision the Court found that Mr Brown had a reasonable expectation of privacy in the photograph taken by the police. The photograph was taken under the impression that it would be used solely for police business, rather than to be disseminated in a flyer notifying neighhbours to be aware of Mr Brown. This satisfied the first limb of the test – the reasonable expectation of privacy.

As to the second limb of the test, the Judge had difficulty in applying this because:[307]

> [81] The test of course is not for the objective reasonable paedophile but of a reasonable person in the shoes of the person that the publication is about — see *P v D* [2000] 2 NZLR 591 at 601, per Nicholson J. I am just able to find that an objective reasonable person,

302 *Rogers v TVNZ Ltd* [2007] NZSC 91 at [104].
303 *Rogers v TVNZ Ltd* [2007] NZSC 91 at [230] per McGrath J.
304 *Brown v attorney general* [2006] NZAR 552.
305 *Brown v attorney general* [2006] NZAR 552 at [33].
306 *Brown v attorney general* [2006] NZAR 552 at [1].
307 *Brown v attorney general* [2006] NZAR 552 at [81].

> standing in the shoes of the Plaintiff, should be highly offended by the publication of that information about the Plaintiff. That person should also find the resultant vilification to be highly alarming and offensive.

By "just" the Judge found that the defendant satisfied the second limb too and that any defence of public concern did not outweigh Mr Brown's invasion of privacy. On this basis Mr Brown was awarded the sum of $25,000 plus interest in damages.

Another case which has attracted academic discussion in relation to the publication of private facts is *Andrews v TVNZ*.[308] In *Andrews*, TVNZ filmed a roadside accident, involving the Fire department removing two injured people from the crashed car. The husband was in a critical condition and the video showed the "distressed conversation in which the wife was talking to her husband".[309] Mr and Mrs Andrews thought that their identities were not appropriately hidden. TVNZ intended to air the video as part of a documentary with the purpose of portraying the daily lives of fire fighters.[310] One of the main issues the Court had to decide was whether Mr and Mrs Andrews "established an actionable interference with their right to privacy in the light of the criteria discussed in *Hosking*".[311] The High Court affirmed the approach taken in *Television New Zealand v Rogers* at [41], namely, the test for the first limb of the two staged test should not be divided into two stages, i.e. "whether there are private facts, and if so, whether they are of such a character as to give rise to a reasonable expectation of privacy".[312]

In turning to the facts of the case, it was noted that road accident victims are generally "subject of treatment, attention and advice from a range of people"[313] and there is no right to privacy in terms of the accident and the surrounding matters to the accident. However, Mr and Mrs Andrews were filmed for a period of approximately one hour. Despite them being aware their conversations could potentially be overheard by the public, they would have "had a legitimate expectation that there would no additional publicity, [and] neither was aware they were being filmed throughout from close range".[314] The length of the video along with the "intimate

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308 *Andrews v TVNZ* [2009] 1 NZLR 220 (HC).
309 John Burrows "Invasion of Privacy – Hosking and Beyond" (2006) 3 NZLR 389 at 404.
310 *Andrews v TVNZ* [2009] 1NZLR 220 at [10].
311 *Andrews v TVNZ* [2009] 1NZLR 220 at [22].
312 *Andrews v TVNZ* [2009] 1NZLR 220 at [27].
313 *Andrews v TVNZ* [2009] 1NZLR 220 at [62].
314 *Andrews v TVNZ* [2009] 1NZLR 220 at [65].

communications"[315] differentiated this from other publication of "general news footage".[316] While Allan J found the plaintiffs had a reasonable expectation of privacy, his honour held they did not satisfy the second limb of the test. This was primarily on the basis that it is was "not possible to conclude that a reasonable person in the shoes of the plaintiffs would consider the publication of the conversations at the accident scene to be highly offensive, given that neither plaintiff did so"[317] and dismissed the proceedings on this basis.

Since the array of cases discussed above, there have been no other significant cases that have come to light specifically addressing the *Hosking* tort. Nevertheless, the three cases that follow, while do not at large discuss the privacy tort, it gleans over the reasonable expectation of privacy concept.

Recently, in *Driver v Radio New Zealand Limited*,[318] the High Court considered the tort amongst other causes of action such as defamation. The applicant, a New Zealander who was in India, was charged for her engagement in a "illegal money circulation scheme"[319] in 2014. The Indian Police issued media statements in relation to events leading to her charge and media companies, the defendants, in New Zealand published articles and video footages relating to her arrest and subsequent charges. Ms Driver was acquitted in 2017, however, she sought proceedings against the media companies in New Zealand for defamation and invasion of her privacy. Of relevance is the ground, invasion of privacy. Ms Driver claimed that she had a reasonable expectation of privacy in relation to "the facts of her arrest, allegations…, passport details, residential address…[and] the reactions of her family members to the news she had been arrested".[320]

Before coming to a decision, Clark J traversed the comments as stipulated by the Australian High Court in *Australian Broadcasting Corp v Lenanh Game Meats Pty Ltd*, namely as to what constitutes as private facts: [321]

315 *Andrews v TVNZ* [2009] 1NZLR 220 at [65.
316 *Andrews v TVNZ* [2009] 1NZLR 220 at [65].
317 *Andrews v TVNZ* [2009] 1NZLR 220 at [71].
318 *Driver v Radio New Zealand limited* [2019] NZHC 3275.
319 *Driver v Radio New Zealand limited* [2019] NZHC 3275 at [4].
320 *Driver v Radio New Zealand limited* [2019] NZHC 3275 at [88].
321 *Driver v Radio New Zealand limited* [2019] NZHC 3275 at [93].

> 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 behaviours, would understand to be meant to be unobserved.

In terms of 'contemporary standards of morals and behaviours, Clark J alludes to the fact these should be taken in accordance with a "a normative element to the reasonable expectations test".[322] To put simply, "it is not just to how society usually treats privacy interests in a particular situation but how those privacy interests ought to be treated".[323] His honour noted that a reasonable expectation of privacy required "a contextual exercise requiring consideration of the particular circumstances of the parties, the nature of the information and circumstances of the alleged invasion of privacy".[324] Essentially, those factors should be "considered in light of contemporary standards of behavior but cross-checked against a minimum standard of privacy".[325] His honour did not provide any further guidance as to what constituted a 'minimum standard of privacy'.

His honour first considered the facts of arrest and allegations relating to Ms Driver and whether she had a reasonable expectation of privacy in relation to these. The Court accepted that some individuals may expect their arrest to remain private, however, the seriousness of the allegation, the requirement for "legitimate operational concerns" [326] by the police, are factors that go into deciding this. Clark J also highlighted that "freedom of expression" is another relevant criterion because the public have an interest in being informed about "serious criminal activity, even at the stage of an arrest or investigation".[327] However, the facts of Ms Driver's case were unique in the sense that she was arrested in India without any evidence and subsequent investigations took place only two weeks later. If she was in New Zealand it would be unlikely that Ms Driver would have been arrested at the same stage she was arrested in India. Furthermore, in New Zealand it was unlikely for the media to publish her name while the police investigated allegations. On this basis, it was possible for Ms Driver to have a reasonable

322 *Driver v Radio New Zealand limited* [2019] NZHC 3275 at [94].
323 *Driver v Radio New Zealand limited* [2019] NZHC 3275 at [94].
324 *Driver v Radio New Zealand limited* [2019] NZHC 3275 at [96].
325 *Driver v Radio New Zealand limited* [2019] NZHC 3275 at [96].
326 *Driver v Radio New Zealand limited* [2019] NZHC 3275 at [103.] For example, if the police needed to locate the suspect
327 *Driver v Radio New Zealand limited* [2019] NZHC 3275 at [104].

expectation of privacy in relation her arrest, along with the fact she was not a person of high 'public interest'.

Secondly, in terms of video footage of Ms Driver's arrest by the Indian Police, which was subsequently broadcasted in New Zealand, the Court held that Ms Driver had a reasonable expectation of privacy as this displayed "her reaction to those allegations in real time".[328] However, Ms Driver's cause of action failed on the publication of her passport details, address and reaction of her family members to her arrest. Clark J noted that reactions of her family was not something that Ms Driver could have a reasonable expectation of privacy in as "any privacy they had in their reactions was not hers to protect".[329] In terms of her passport details and address, the Court held while these may attract a reasonable expectation of privacy it would not be highly offensive to the reasonable person as these details were while personal would not cause 'distress' and further the details were not in the article itself but rather contained in a separate hyperlink. On this basis, the claim for invasion of privacy was struck out.[330]

3.1.3. Data protection

The Privacy Act protects informational privacy. As the Law Commission states this Act "was passed to promote and protect individual privacy".[331] Essentially it protects informational privacy by established 'privacy principles' which limits the "use and disclosure of [an] individual's personal information".[332] Generally, privacy breaches under the Privacy Act are heard by the Human Rights Review Tribunal.[333] These will not be discussed here as the scope of this thesis focuses on the general courts and the Broadcasting Authority. So how does reasonable expectation of privacy tie into data protection?

In regards to data protection, it has often been considered amongst the inadmissibility of evidence cases. Take for example, the aforementioned case *R v Alsford*. In this case, one of the issues the Supreme Court considered was whether there was compliance in accordance with the Privacy Act. Their honours proceeded on the basis that "power consumption" constituted

328 *Driver v Radio New Zealand limited* [2019] NZHC 3275 at [91].
329 *Driver v Radio New Zealand limited* [2019] NZHC 3275 at [146].
330 *Driver v Radio New Zealand limited* [2019] NZHC 3275 at [145].
331 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 80.
332 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 80.
333 See for example *Marshall v IDEA Services Ltd* [2019] NZHRTT 52; *Armfield v Naughton* [2014] NZHRRT 48.

to "personal information in the sense it indicates the power consumption at a place owned and occupied by identifiable individuals".[334] In particular, s 6 of the Privacy Act outlines privacy principles for agencies holding personal information including how to deal with that information. Their honours concluded that there had been a breach of the Privacy Act and went to examine what impact such a breach would have bearing in mind that breaches of Privacy Act are not enforceable legal rights in courts. However, this does not mean that the evidence obtained was in breach of s 30 of the Evidence Act.[335] The central question then turned to "whether the data was obtained as a result of an unreasonable search and seizure in terms of s 21 of NZBORA".[336] The Court went onto (as cited above) to consider the reasonable expectation of privacy under s 21. Importantly, the Court fittingly stated:[337]

> …It follows that we do not agree with the approach taken in *R v R* that if information is obtained consistently with the privacy principles, in particular principles 2(2)(d) and 11(e), here will be no "search". This suggest that these privacy principles effectively confer on the police a power to obtain information. However, the principles do not create any such power – in combination, they allow the police to seek personal information other than directly from the person involved and allow (but do not compel) an agency to release information to police provided the statutory pre-conditions are met. **Whether a police request for information amounts to a "search" will depend on whether it relates to personal information in respect of which there is a reasonable expectation of privacy, which depends on a consideration of factors such as those identified at [63] above. If there is a reasonable expectation of privacy in the information, there will be a search and the question will become whether the search is unreasonable.** In circumstances of exigency such as applied in *R v R*, the search (the voluntary provision of information) may not be unreasonable. But where there is time to obtain a production order or search warrant, the search may well be unreasonable. **If there is no reasonable expectation of privacy in the information, there will be no search for the purpose of s 21 and the issue will simply be whether the requirements of the exception in principles 2(2)(d) and 11(e) are met. If they are, that will be the end of the matter. If they are not, then the question will be whether there is any issue of unfairness under s 30; if there is, a proportionality analysis will be required.**

334 *R v Alsford* [2017] NZSC 42 at [30].
335 *R v Alsford* [2017] NZSC 42 at [47]-[48].
336 *R v Alsford* [2017] NZSC 42 at [47].
337 *R v Alsford* [2017] NZSC 42 at 65]-[66] ; See also *New Zealand Police v Cotton* [2017] NZDC 19132.

Essentially, breaches of the Privacy Act do not provide claimants with enforceable rights in courts, however, it may be "relevant to the assessment of whether the evidence was unfairly obtained in terms of s 30 of the Evidence Act".[338]

3.1.4. Other laws

3.1.4.1. Bankruptcy and Insolvency case law

The reasonable expectation of privacy has also been considered in bankruptcy and insolvency cases. A few of the most recent cases are summarised below.

Henderson v Attorney-General is a decision concerning the "powers of the Official Assignee and the right to privacy, and where twain shall meet".[339] In this case, the Mr Henderson was declared bankrupt and the Official Assignee sought to acquire material from Mr Henderson, including a "clone of the [his] Laptop pursuant to s 171 of the Insolvency Act 2006".[340] A clone was not possible, therefore "flash drives containing emails and voice recordings"[341] were instead obtained as constituting everything in the hard drive of the computer. Mr Henderson argued the lawfulness of the search. The Court in coming to a decision, noted that s 171 does give the Official Assignee power to request all necessary documents related to the bankruptcy. In such circumstances "there would be little or no expectation of privacy by the bankrupt individual against such intrusion, nor would society consider any such expectation to be reasonable in light of the extensive rights of the Official Assignee under the Act".[342] However, in this case, the request by the Official Assignee for a clone of the laptop, with the scope of the data unknown, amounted to being unlawful because Mr Henderson would have had a reasonable expectation of privacy "in some of the stored data"[343] and the Judge did not "accept that Mr Henderson lost any reasonable expectation of privacy when he made the decision to store his private information on the Laptop".[344] Therefore, it was held that the search was unreasonable under s 21 of the NZBORA.

338 *R v Carey* [2017] NZDC 24821 at [27].
339 *Henderson v Attorney-General* [2017] NZHC 606 at [1].
340 *Henderson v Attorney-General* [2017] NZHC 606 at [60].
341 *Henderson v Attorney-General* [2017] NZHC 606 at [104].
342 *Henderson v Attorney-General* [2017] NZHC 606 at [43].
343 *Henderson v Attorney-General* [2017] NZHC 606 at [224].
344 *Henderson v Attorney-General* [2017] NZHC 606 at [22].

In *Hydman v Walker*, the Court held private communications between close friends, that included very personal information was something an individual could have a reasonable expectation of privacy in".[345]

3.1.4.2. Coroners Act

Gravatt v The Coroner's Court is a case concerning an individual who died as a result of meningococcal disease. The Coroner recommended that "the identities of the health professional responsible"[346] for the deceased's care and treatment be withheld from publication. However, this decision was challenged by the deceased's father. In the High Court, Whata J addressed several grounds and of relevance is the claim relating to privacy. Under s 71 of the Coroners Act 2006, Whata J concluded that "personal privacy" while not defined in the Coroners Act, it is akin to a context which "refers to personal facts in respect of which there is a reasonable expectation of privacy".[347] In essence, his honour opined "the more intimate the facts, the more compelling the case will be for limits to be placed on freedom of speech and open justice principles"[348] and this must be weighed against "genuine public interest or concerns in those facts [that they] may outweigh even a strong privacy interest".[349] In applying these principles, his honour stated while hospitals are public in nature, the medial treatments that patients receive "is a deeply personal matter…attracting a high expectation of privacy. There is also a reasonable expectation that employers will keep private information about the performance of health professionals".[350] However, the facts of this case were unique, in the sense that the cause of the death was for the failure to recognise and obtain proper treatment for the disease in a timely manner. "This suggests that any ongoing public interest should relate to the [health system] not the individuals, and the apparent utility in naming the individual health professionals is small".[351] In his analysis of the privacy considerations, Whata J noted that medical professionals under disciplinary hearings should expect to be named. He did suggest there was room for name suppression but only if unrelated matters disclosed to the Coroner would cause undue harm. Fear of embarrassment is insufficient.[352]

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345 *Hyndman v Walker* [2019] NZHC 2188 at [94]. See also *Henderson v Walker* [2019] NZHC 2184 - private emails sent to third parties be afforded a reasonable expectation of privacy.
346 *Gravatt v The Coroner's Court at Auckland* [2013] NZHC 390 at [1].
347 *Gravatt v The Coroner's Court at Auckland* [2013] NZHC 390 at [72].
348 x *Gravatt v The Coroner's Court at Auckland* [2013] NZHC 390 at [72].
349 *Gravatt v The Coroner's Court at Auckland* [2013] NZHC 390 at [72]
350 *Gravatt v The Coroner's Court at Auckland* [2013] NZHC 390 at [75].
351 *Gravatt v The Coroner's Court at Auckland* [2013] NZHC 390 at [77].
352 *Gravatt v The Coroner's Court at Auckland* [2013] NZHC 390 at [78]-[81].

On this basis Whata J held that held that the Corner had erred in his decision and annulled the previous orders.

Another case relating to the Coroner's Court is *Stuff Limited v The Coroner's Court*.[353] This was a case involving an individual, Mr Hanzlik who passed away after setting himself "alight outside the Parliament".[354] Media publications showed Mr Hanzlik protesting outside the Parliament before his death and as part of their investigation, the Coroner made interim orders prohibiting the publication of Mr Hanzlik's family details. Stuff Ltd sought a review on those orders. One of the grounds relied on by Stuff was whether the Judge correctly applied the test under s 74 of the Coroners Act 2006 to prohibit publication. Stuff argued that the Coroner erred by "accepting a general claim to privacy was sufficient to establish the ground of personal privacy under s 74 of the Coroners Act 2006"[355], which allows a Coroner to prohibit the publication of any evidence, names or particulars that is subject to the investigation, if it thinks will be needed in the interests of justice, decency, public order or personal privacy. In considering this section, the Judge noted that "the more intimate the facts, the more compelling the case will be for limits to be placed on freedom of speech and open justice principles".[356] The deceased's family background involved concerns over "domestic violence, protection orders and Family Court proceedings".[357] These are information that would be "highly personal sensitive information, which a family can reasonably expect will remain private and have a reasonable expectation of privacy over them".[358] The Court agreed with the Coroner who referred to how "V and the children have reasonable expectation of privacy in respect of their personal and domestic affairs".[359]

3.1.4.3. Broadcasting Law

Jng Management v Radio New Zealand Ltd was a case that went before the Broadcasting Authority.[360] Radio New Zealand Ltd broadcasted the applicant's home, and office in an attempt to obtain a response from the applicant in relation to an allegation that his business

353 *Stuff Limited v The Coroner's Court* [2018] NZHC 2556.
354 *Stuff Limited v The Coroner's Court* [2018] NZHC 2556 at [1].
355 *Stuff Limited v The Coroner's Court* [2018] NZHC 2556 at [3]-[4].
356 *Stuff Limited v The Coroner's Court* [2018] NZHC 2556 at [39].
357 *Stuff Limited v The Coroner's Court* [2018] NZHC 2556 at [41].
358 *Stuff Limited v The Coroner's Court* [2018] NZHC 2556 at [41]-[42].
359 *Stuff Limited v The Coroner's Court* [2018] NZHC 2556 at [41].
360 *Jng and Radio New Zealand Ltd* (2017) BSA 095 per Members: Radich, Kupenga, Rose and Palmer.

premises "had not been issued with a warrant of fitness in 435 days"[361], yet continued to operate. Privacy Standard 10 requires that the "broadcaster should maintain standards consistent with the privacy of the individual".[362] The applicant claimed the footage breached his privacy and that of his employees. The Authority considered whether the information was one that "there was a reasonable expectation of privacy"[363] in. Relevant considerations included, whether the material was in the "public domain, whether it is intimate or sensitive in nature; and whether the individual or individuals could reasonably expect it would not be disclosed".[364] The Authority also noted that an individual will not have a reasonable expectation of privacy related to matters that are in the public record or public place. "A public place is defined as being generally accessible to, and/or in view of, the public".[365] In applying these considerations to the facts of this case, the Authority was of the opinion that the applicant's address was public knowledge already, and the footage of knocking on the applicant's door could be construed as a "implied license available to members of the public on lawful business, including media to approach the front door of a house and seek entry".[366] In relation to the footage that showed the faces of the applicant's employees at the front door of the premises, the Authority regarded that this is dependent on the "circumstances of their employment and accessibility of the workplace".[367] The circumstances of this case was that the office address was "publicly accessible information"[368] and the premises "was not shut off from public access".[369] It was also common from employees to come to the front door to answer queries. Therefore, they only had a limited "expectation of privacy" and the footage captured was in fact not that of private in nature.

Another case that examined privacy standards was *Parlane v Radio New Zealand Ltd*.[370] This case related to a child who had returned after she had gone "missing off the coast of New Zealand with her father".[371] The aired item related to the child's return and her mother expressing her fears for the child's safety. There was a custody proceeding in process at the

361 *Jng and Radio New Zealand Ltd* (2017) BSA 095 at [1].
362 *Jng and Radio New Zealand Ltd* (2017) BSA 095 at [11].
363 *Jng and Radio New Zealand Ltd* (2017) BSA 095 at [19].
364 *Jng and Radio New Zealand Ltd* (2017) BSA 095 at [19].
365 *Jng and Radio New Zealand Ltd* (2017) BSA 095 at [20].
366 *Jng and Radio New Zealand Ltd* (2017) BSA 095 at [21]; See also *Robson v Hallett* [1967] 2 QB 939; [1967] 2 ALL ER 407.
367 *Jng and Radio New Zealand Ltd* (2017) BSA 095 at [26].
368 *Jng and Radio New Zealand Ltd* (2017) BSA 095 at [26]-[27].
369 *Jng and Radio New Zealand Ltd* (2017) BSA 095 at [26]-[27].
370 *Parlane v Radio New Zealand Ltd* (2017) BSA 023.
371 *Parlane v Radio New Zealand Ltd* (2017) BSA 023 at [1].

time the child went missing. The father argued that the broadcast (interview with the mother) breached the child's privacy, especially as it disclosed the child's name. However, the Authority held that the child's name was already in the public domain at the time of broadcast that was complained off. This was also largely due to officials seeking the assistance of the public to locate the missing child at the time. Further, more information relating to the child and the custody disputes had been published previously in other broadcasting mediums. Therefore, what was disclosed did not amount to a reasonable expectation of privacy.

In another more recent case, the Authority dealt with a phone call that was aired by a radio channel in relation to a fundraiser, without the person on the phone knowing that it was in part being recorded and aired. While there were many issue before the Authority, of relevance was their ruling that the disclosure of name of the complainant, and their involvement in the fundraiser was not "private information, over which he could have a reasonable expectation of privacy".[372]

3.1.4.4 Employment Law

In the Employment Relations Authority, the concept of reasonable expectation has also been considered. For example, recently in *Naiker v Porirura Supermarket Limited*, an employee was dismissed for "serious misconduct relating to her behaviour in relation to a conversation she had with another employee in the company's staff tearoom".[373] Of relevance, was the Authority's findings on whether an employee can have a reasonable expectation of privacy in the tea room when having a discussion with a colleague. In this regard, the Authority found that the conversation was "private". And while the business argued that the tea room was a 'public place', the Authority found that the "the occasional use of the tea room by non-employees"[374] did not justify the understating that an employee cannot have a private conversation there. Held, unjustified dismissal and compensation was provided.

3.1.4.5 Fisheries Law

Fisheries is an area that is highly regulated by law and the two cases that follow challenge the use of surveillance by state officials pursuant to the Fisheries Act 1996. Often, an argument

372 *Sing v Access Community Radio Inc* (2019) BSA 045 at [45].

373 *Naiker v Porirura Supermarket Limtied* 2017] NZERA Wellington 96 at [2]; See also *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd* (2004) 7 HRNZ 539, (2004) 7 NZELC 97,367, [2004] 1 ERNZ 614, (2004) 2 NZELR 157; See also *XUG v DJV* [2019] ERA 124.

374 *Naiker v Porirura Supermarket Limited* 2017] NZERA Wellington 96 at [36].

espoused by claimants is that video surveillance is inadmissible and breaches their reasonable expectation of privacy under s 21 of the NZBORA. This is premise on which the cases that follow will be examined. While neither case gives an in-depth analysis on the reasonable expectation of privacy, the use of surveillance renders them worth mentioning.

*Commercial Fisheries Whanau Inc v Attorney-Genera*l examined whether the video monitoring of the applicant's fisheries operation pursuant to s 227A of the Fisheries Act 1996 allows the installation and maintenance of equipment to "observe fishing and transportation"[375] on vessels. One of the arguments the applicant relied on was that there was a breach of s 21 of the NZBORA and relied on *Hamed v R*. In essence, he argued that a video camera "attached to private property at the State's insistence would constitute a search for the purposes of s 21".[376] However, the Judge held that the legislation was clear, and any recording obtained as required under legislation did not amount to a breach of s 21 of the NZBORA and was not contrary to the intention of the parliament. "[T]he fishers know that compliance with this regulatory requirement is, in effect, a condition precedent to their continuing to fish lawfully".[377] Importantly, the learned Judge cited approvingly a Canadian Supreme Court case where it was held that "there can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities, which, though lawful, are subject to state regulation as a matter of course".[378]

R v Tobin concerned a similar circumstance whereby the respondents, who were awaiting trial, claimed that surveillance by state officials amounted to a breach of their privacy.[379] The Judge looked to the purpose of the legislation and what is required for state officials to carry out their duties. In this regard, it was noted that: [380]

> [if]…in maintaining that Fisheries officers had no power to do anything unless expressly authorized by statue, the results would be absurd. **So far as I can see, there is no specific power in the legislation to enable Fisheries officers to use their eyes, their ears, to write down what it is they are observing or indeed to do anything at all. Where powers are legislated for in the Act appears to be where they involve an expectation of privacy and**

375 *Commercial Fisheries whanau Inc v Attorney-Genera*l [2019] NZHC 1204 at [75].
376 *Commercial Fisheries whanau Inc v Attorney-Genera*l [2019] NZHC 1204 at [86].
377 *Commercial Fisheries whanau Inc v Attorney-Genera*l [2019] NZHC 1204 At [91]
378 *Commercial Fisheries whanau Inc v Attorney-Genera*l [2019] NZHC 1204 at [95].
379 *R v Tobin* DC Auckland CRI 2007-004-026594, 1 December 2010; See also *Gill v Attorney General* [2010] NZCA 468, [2011] 1 NZLR 433.
380 *R v Tobin* DC Auckland CRI 2007-004-026594, 1 December 2010 at [22].

an absences of unreasonable search and seizure. To put in a nutshell, without covert activities, the detection and enforcement of the fisheries legislation would be impossible.

3.2. Brief observations

The cases and statutes above all have referred to the concept of 'reasonable expectation of privacy' in somewhat unique circumstances in different contexts. They have all used reasonable expectation of privacy in arriving at a conclusion regarding the presence or non-existence of privacy protections. If this is the situation, then the next part of the thesis will draw on the case law and statutes summarised above, to examine what exactly the reasonable expectation of privacy means in New Zealand and what role it plays in privacy and privacy protections.

REASONABLE EXPECTATION OF PRIVACY AND THE RIGHT TO PRIVACY IN NEW ZEALAND

CHAPTER FOUR

"The future of individuality and personal autonomy is a cause in need of a constituency. We need to evaluate why we tolerate intrusions on our individual privacy by the government, bloggers, the press, and our fellow citizens. The responsibility is ours. In the immortal words of the cartoon character Pogo, "we have met the enemy…and he is us.""[381] *– Jon L Mills*

The previous chapter canvassed a range of case law in New Zealand that have used the concept of reasonable expectation of privacy. Importantly, this concept was considered in a range of areas including privacy torts, search and surveillance, broadcasting, fisheries and even coroner inquiry cases. This chapter focuses on analysing the case law discussed in chapter three and how reasonable expectation of privacy has been used under New Zealand law.

4. Reasonable expectation of privacy and the right to privacy in New Zealand

As chapter two has demonstrated there is no clear-cut way to conceptualise privacy. Some commentators argue it is a value, or an interest, while others conceptualise privacy as being pivotal to human dignity and self-realisation. Either way, there is no uniform manner as to how it has been addressed. In New Zealand, the judiciary has tried to explain the concept of privacy and the existence of specific privacy protections in relation to the concept of reasonable expectation of privacy. The next part of the paper will argue that reasonable expectation of privacy is in fact an important element of a test but moreover it is an entitlement of the individual.

4.1. Reasonable expectation as an entitlement not a test

4.1.1. Reasonable expectation as an element

Many commentators and the courts have constantly referred to the reasonable expectation of privacy as being a legal test when dealing with privacy.[382] It has obtained the title of the

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381 Cited in Daniel Solove *Understanding Privacy* (Harvard University Press, United States, 2008) at 306.

382 See generally *Hosking v Runting* [2005] 1 NZLR 1 (CA); N Moreham "Unpacking the reasonable expectation of privacy test" (2018) 134 Law Quarterly Review 651; Peter Winn "Katz and the Origins of the "Reasonable Expectation of Privacy" Test" (2009) 40 McGeorge Law Review 1.

'reasonable expectation of privacy test' in overseas jurisdiction and in a local context. For example, in *C v Holland*, Whata J stated that the reasonable expectation of privacy should not be a simple test but one that is two-staged. In academia, for example, Moreham, in her article 'Unpacking the reasonable expectation of privacy test', states that "the reasonable expectation of privacy test is essentially a good one"[383] because there is both a subjective an objective limb to it. Moreham draws attention to the factors the courts have alluded to in determining reasonable expectations to privacy as:[384]

> 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 claimant 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..

But is it really a test or is the reasonable expectation of privacy something more?

As foreshadowed from the previous chapter, reasonable expectation of privacy has been consistently used in a range of areas. In some areas the reasonable expectation of privacy has been formulated to determine whether there had been a search for the purposes of s 21 of NZBORA or tort breaches. However, this thesis argues that despite reasonable expectation of privacy being called as a 'test', it is actually an element– that is fundamentally important and goes to the crux of the relevant privacy protection. Moreover, it is an entitlement that deserves legal protection in New Zealand.

Firstly, for the tort of intrusion into seclusion, Whata J in *C v Holland* outlined four limbs that needed to be satisfied for a successful claim. These elements were an intentional and unauthorised intrusion, into seclusion, involving infringement of a reasonable expectation of privacy, that his highly offensive to a reasonable person. While the reasonable expectation of privacy is an element of the overall four staged test , it is argued that this element goes to the

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383 N Moreham "Unpacking the reasonable expectation of privacy test" (2018) 134 Law Quarterly Review 651 at 653.

384 N Moreham "Unpacking the reasonable expectation of privacy test" (2018) 134 Law Quarterly Review 651 at 652; See also *Murray v Express Newspaper Plc* [2009] Ch 481 cited in N Moreham "Unpacking the reasonable expectation of privacy test" (2018) 134 Law Quarterly Review 651 at footnote 12.

crux of the tort".[385] But how? Firstly, intrusions into seclusions "do not occur as a result of every intrusion into a privacy interest"[386] as unauthorised intrusions happen frequently in every-day life. For example, a peek into a room does not always constitute as being an unauthorised intrusion or a glance through someone's window is not always an intrusion. These are intrusions that happen on a daily basis. However, to distinguish such intrusions from an 'intrusion into seclusion' tort, element three- that is the reasonable expectation of privacy is paramount. That is, the intrusion must be one that "infringes a reasonable expectation of privacy".[387] As Fussey points out the "second element", 'in to seclusion", almost "sets the parameters of the reasonable expectation test"[388] by marking those activities that are a personal space where the individual has a reasonable expectation of privacy. In other words, 'seclusion' can be thought of as a premise to the third element being the reasonable expectation of privacy. While it is referred to as a 'reasonable expectation of privacy test' taken cumulatively with the other elements in the tort, it is the core element of the test. Thus, both the second and third elements, as Fussey opines goes to "analysing matters that are intrinsically private".[389] Justice Whata in his judgment does not provide any further insight into the reasonable expectation of privacy element, although he does discuss the two-staged test adopted in Canadian jurisprudence as being the subjective limb – "a subjective expectation of solitude or seclusion"[390] and second an objective limb –"for this expectation to be objectively reasonable".[391] This test alone does not decide whether there has been a breach of the tort intrusion into seclusion, rather, there are four elements that needed to be satisfied in order for a successful claim under the tort with the most determining element being the reasonable expectation of privacy. On this basis, it is argued that the reasonable expectation of privacy, though commonly referred to as a test, is in fact an element. By element, this thesis means "one of several parts".[392] Once again, the importance of this element can be seen from the comment made by Justice Whata in that an intrusion into seclusion tort is compatible with the

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385 *C v Holland* [2012] NZHC 2155; See also William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury L Rev 269 at 274-275.

386 William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury L Rev 269 at 274.

387 William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury L Rev 269 at 274.

388 William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury L Rev 269 at 274.

389 William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury L Rev 269 at 274.

390 *C v Holland* [2012] NZHC 2155 at [17].

391 *C v Holland* [2012] NZHC 2155 at [17].

392 Oxford University Press "element" Oxford Learner's Dictionaries <(https://www.oxfordlearnersdictionaries.com/definition/english/element?q=element>

current law in New Zealand. It is "a logical adjunct to, the *Hosking* tort wrongful publication of private facts. They logically attack the same underlying wrong, namely unwanted intrusion into a reasonable expectation of privacy".[393] The intrusion must be one to which there is a reasonable expectation of privacy.

A similar position is elucidated in the tort of publication of private facts. In *Hosking v Runting*, the Court developed a two staged test for a successful claim in the tort of publication of private facts. The test is i) the existence of facts in respect of which there is a **reasonable expectation of privacy**; and ii) publicity given to those private facts that would be considered highly offensive to an objective reasonable person. The important point to note is that the first limb, the existence of facts in which there is a reasonable expectation of privacy. This has been notably stated as the "fundamental ingredient of the tort that a plaintiff must show a reasonable expectation of privacy in respect of information or material which the defendant has published or wishes to publish".[394] It is argued that once again the reasonable expectation of privacy, goes to the crux of the tort, as it must be satisfied. Not all facts an individual holds will be construed as 'private' but rather it must be facts that individuals have a reasonable expectation of privacy in relation to. Furthermore, private facts cannot be simply those that occur on private property such as a person's home or in their car, but those that after consideration of the time, locality and surroundings and "applying contemporary standards of morals and behaviour"[395] would be understood to be "unobserved".[396] In this regard, Gault P and Blanchard J states that "private facts are those that may be known to some people, but not known to the world at large. There is no simple test for what constitutes a private facts"[397], however their honours refers to the decision of Gleeson CJ given in *ABC V Lenah Game Meats*, as being "helpful".[398] In that decision, Gleeson CJ states the commonly cited phrase:

> "there is no bright line which can be drawn between what is private and what is not. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality and the disposition of the property owner combine to afford…as may certain kinds of

393 *C v Holland* [2012] NZHC 2155 (HC) at [75].
394 *C v Holland* [2012] NZHC 2155 (HC) at [41].
395 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [119].
396 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [119].
397 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [119].
398 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [119].

> activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved".[399]

These two seminal cases show that in the context of privacy torts, reasonable expectation of privacy is an important element that goes to deciding whether a claimant will be successful or not under the tort of intrusion into seclusion or publication of private facts. However, can reasonable expectation of privacy be more than a 'element'. This thesis argues that the reasonable expectation of privacy is much more than an element, it is an entitlement of the individual. But how?

4.1.2. Reasonable expectation as an entitlement

Drawing on *Hosking* again, the Court of Appeal in that case applied the two-staged test for a tort the publication of private facts and found that the "inclusion of the photographs of [the Hosking children] would not publicise any fact in respect of which there could be a reasonable expectation of privacy". [400] These photographs did not disclose "anything more than could have been observed by any member of the public in Newmarket on that particular day".[401] Importantly, in coming to this decision the Court of Appeal alluded to the comments of Randerson J in the High Court about reasonable expectations of privacy as: [402]

> **It is also relevant to consider what reasonable expectations of privacy the plaintiffs' family are entitled to.** In an ideal world, most of us would prefer to have the right to choose where and when photographs or other personal material about ourselves is published to the world at large. But it is an uncomfortable fact that those in public life, including the plaintiff Mr Hosking, necessarily sacrifice to a greater or lesser degree, the privacy ordinarily enjoyed by those who are not household names or identities in the community. Viewed objectively, as it must be, **the reasonable expectations of privacy of such persons will necessarily be lower** since it is inevitable the media will subject celebrity figures such as Mr Hosking to closer scrutiny and because the public has a natural curiosity and interest not only in the personal lives and activities of the celebrity but also in their families.

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399 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [119]; See also *Australian Broadcasting Corporation v Lenah Games Meats* (2001) 208 CLR 199 – cited at para [43] in *Hosking*.
400 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [164].
401 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [164].
402 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [120].

This comment captures the argument of this thesis accurately. That is, the reasonable expectation of privacy is an 'entitlement' for the individual. By 'entitlement' this thesis means "the official right to have".[403] The Court in this case considered whether the plaintiff had a reasonable expectation of privacy in the facts. As foreshadowed this is the fundamental element of the tort. Importantly, by considering whether the plaintiff 'had a reasonable expectation of privacy', the courts are treating the reasonable expectation of privacy as something an individual is entitled to or is entitled to carry with them. Therefore, in order for a breach of the tort to occur, there must have been a breach of facts in which a claimant had a reasonable expectation of privacy in.

In *Brown v AG* a similar approach was taken, whereby the Courts ruled that the photograph of Mr Brown taken by the police was one in which he had a reasonable expectation of privacy.[404] Judge Spear in coming to a decision noted that to determine whether Mr Brown had a reasonable expectation of privacy, the facts in the flyer needs to be examined. The test according Judge Spear was "simply, whether at the time that the privacy is alleged to have been invaded, there is a reasonable expectation that the relevant information should be considered private".[405] At the time the flyer was disseminated, Mr Brown was still serving his sentence. So, to expect the information in the flyer as 'private' was doubtful as it would have been in the public arena. However, his honour proceeded to note that "the flyer goes further than simply mentioning that information, which…was clearly and quite legitimately in the public domain and remained such at the time".[406] But, the photograph was a fact or information in which Mr Brown may well had a reasonable expectation of privacy. The police had taken the photo while visiting Mr Brown on apparent police work. They did not inform Mr Brown that the photo may very well be used in the flyer. On this note Judge Spear found "the photograph was taken in circumstances that would give a reasonable expectation to the Plaintiff and to an objective observer, that the photograph would be used only for legitimate Police business". [407] Essentially, it shows that the Mr Brown had a reasonable expectation of privacy and it was breached by the police. Once again, the learned Judge applied the reasonable expectation of privacy element, as something that an individual 'had' or in other words was an entitlement, to

403 Oxford University Press "entitlement" Oxford Learner's Dictionaries <https://www.oxfordlearnersdictionaries.com/definition/english/entitlement?q=entitlement>
404 *Brown v Attorney General* [2006] NZAR 552.
405 *Brown v Attorney General* [2006] NZAR 552 at [64].
406 *Brown v Attorney General* [2006] NZAR 552 at [68].
407 *Brown v Attorney General* [2006] NZAR 552 at [74]

ultimately determine whether there had been a breach of his or her reasonable expectation of privacy.

The situation was once again exemplified in *Driver v New Zealand,* where the Court held that Ms Driver did have a reasonable expectation of privacy in relation to video footage of her arrest. While her claim ultimately failed on other grounds, Mander J's ruling in this regard affirmed that reasonable expectation of privacy is an entitlement of the individual. His honour held: [408]

> [91] Given my conclusion in relation to the claim based on the publicity given to the allegations against Ms Driver, I am satisfied it is reasonably arguable **she had a** reasonable expectation of privacy in relation to this video footage…it not only involved the allegation against Ms Driver but displayed her reaction to those allegations in real time. In *Television New Zealand Ltd v Rogers,* McGrath J said:
>
> > [101] It is well recognised that, in general, photographic images may contain significantly more information than textual description. This is especially so with sequential images on a videotape which will often portray graphically intimate and personal details of someone's personality and demeanor…

Essentially, Justice Clark relied heavily on Ms Drivers reaction to her arrest, noting that it "may have been one of the most significant, or at least consequential, moments of Ms Driver's life".[409] The Judge carried onto state that her reaction would have been "intensely personal"[410] to conclude that she held a reasonable expectation of privacy in relation to the video footage.

In contrast, *Rogers* was a case where the Supreme Court held that Mr Rogers did not have a reasonable expectation of privacy in relation to his videotaped confession, overturning the lower court's finding. McGrath J held that the facts of the case "strongly indicate[d] that Mr Rogers had no reasonable expectation of privacy in relation to the recorded events at the time they took place".[411] Blanchard J noted "anyone who agrees to be interviewed for the purposes of a criminal investigation, and in that connection elects to make a statement to the police, cannot persuasively claim to have held a reasonable expectation of privacy concerning that

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408 *Driver v Radio New Zealand limited* [2019] NZHC 3275 at [91].
409 *Driver v Radio New Zealand limited* [2019] NZHC 3275 at [142].
410 *Driver v Radio New Zealand limited* [2019] NZHC 3275 at [142].
411 *Rogers v TVNZ Ltd* [2007] NZSC 91 at [104].

occasion".[412] Tipping J went onto note that "the absence of any reasonable expectation of privacy suggest that any residual case in favour of Mr Roger's privacy interests must be slight".[413] On the other hand McGrath J and Anderson J did not outright deny that Mr Rogers had no reasonable expectation of privacy, noting the following: [414]

> [145] I would not go as far as Blanchard J appears to in excluding the possibility of a reasonable expectation of privacy on an occasion when a person agrees to be interviewed by and makes a statement to the police for the purposes of a criminal investigation. A good deal of police interviews must occur in circumstances which are to some extent confidential. It may be intended or supposed that what is said will not become evidence before a court, or if it is to become evidence that it will have confidential features which a court may see fit to protect. It is true that in this particular case, Mr Rogers had been charged with murder and he made his statement in circumstances where it was obviously intended that his statement was going to be put in evidence at his trial. **But that does not mean that he can have no expectation of privacy in relation to a different use in other circumstances.** Unfortunately, the way in which this litigation has developed means that this important issue, also, was not adequately explored.

Regardless of the differing views on whether Mr Rogers had a reasonable expectation of privacy in relation to his confession, the important point to note for the purposes of this thesis, is the consistent conversation of the judiciary as to the extent of Mr Rogers' reasonable expectation of privacy. This in itself is illustrative that the judiciary has considered reasonable expectation of privacy as something that an individual has naturally and the degree of that entitlement is assessed on the facts of each case.

Andrews v TVNZ is another case whereby the Court found the plaintiffs did not have a reasonable expectation of privacy in relation to the footage of their car accident. While this case was a matter of contentious litigation, one of the issues the Court had to decide on was whether they had "established an actional interference with their right to privacy".[415] Justice Allan was quick to note that there is no easy answer to the first limb (i.e. whether the Andrews had a reasonable expectation of privacy) although drawing on Gault P and Blanchard J's

412 *Rogers v TVNZ Ltd* [2007] NZSC 91 at [48] per Blanchard J.
413 *Rogers v TVNZ Ltd* [2007] NZSC 91 at [68] per Tipping J.
414 *Rogers v TVNZ Ltd* [2007] NZSC 91 at 145 per Anderson J.
415 *Andrews v TVNZ* [2009] 1NZLR 220 (HC) at [22].

comments held that, it is "possible to draw an analogy with the test employed in breach of confidence cases" [416] and private facts "are those not known to the world at large, but they may be known to some people, or even particular class".[417] Importantly, it is the time of publication of the private facts that is relevant to assessing whether the applicant had a reasonable expectation of privacy.

Justice Allan held it may also be appropriate to draw on "culpability or blameworthiness of the plaintiff"[418] in assessing the reasonable expectation of privacy, although this is essentially case dependent. Justice Allan drew attention to several English cases in relation to this, such as *Campbell*, where Lord Nicholls in agreement with Ms Campbell's counsel noted that a reasonable expectation of privacy could not be found in circumstances where she had told the public she was drug-free but continued to take drugs. Justice Allan's comment is of relevance:[419]

> [47] I accept however, that an expectation of privacy, otherwise reasonable, may in certain circumstances be lost by reason of culpability on the part of the plaintiff. It is to be observed that the same consideration might well arise in a given case in the course of an assessment of whether publication of private facts is highly offensive, and further, in relation to the assessment of a defence of legitimate public concern.

However, his honour did offer caution as "the tort is in its early stages of development".[420] In determining whether the Andrews had a reasonable expectation of privacy the Court, as foreshadowed in chapter three, found that they did due to the lengthy duration of the footage and their lack of awareness that they were being filmed. However, the Andrews' claim failed on the second ground, that is highly offensive. While they were unsuccessful, the statement by the Court in relation to reasonable expectation of privacy is important as it shows that the reasonable expectation of was once again considered as an 'entitlement of the individual'. It was something the Andrews 'had' and it was subsequently breached by the filming of the aftermath of their accident.

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416 *Andrews v TVNZ* [2009] 1NZLR 220 (HC) at [28].
417 *Andrews v TVNZ* [2009] 1NZLR 220 (HC) at [28].
418 *Andrews v TVNZ* [2009] 1NZLR 220 (HC) at [42].
419 *Andrews v TVNZ* [2009] 1NZLR 220 (HC) at [47].
420 *Andrews v TVNZ* [2009] 1NZLR 220 (HC) at [46].

The courts have taken a similar stance in considering reasonable expectation of privacy as an entitlement in the tort of intrusion into seclusion. As aforementioned, in *C v Holland* the Court held the claimant had suffered a breach of the tort of intrusion into seclusion when the claimant was filmed while showering. As argued above, at the heart of this tort is the element – the reasonable expectation of privacy. Not every intrusion will be construed as being an intrusion but rather it is an intrusion into an activity in which the claimant has a reasonable expectation of privacy in. While Whata J did not offer an elaborate discussion on the reasonable expectation of privacy, as pointed out earlier, this may be due to the distinctive facts of the case – that is a person having a shower will no doubt have the highest reasonable expectation of privacy. Nevertheless, the question really is whether the plaintiff had a reasonable expectation of privacy in the 'activity'. 'Had' implies it is an entitlement or a reasonable expectation of privacy is something an individual is entitled to carry with them and can expect to be protected at law.

While the courts have not imprimatur stated that the reasonable expectation of privacy is an entitlement of an individual, their formulated discussions and subsequent rulings tells otherwise. Moreham argues that the reasonable expectation of privacy test should be read as "whether the claimant had a reasonable expectation of privacy protection".[421] Using the English case *Schulman* as an example, she says that English courts and their interpretation of the reasonable expectation of privacy being viewed by whether "the claimant had an objectively reasonable expectation of privacy depended not on whether the defendant's conduct was acceptable but on whether the media usually respected an individual's privacy in the situations in question".[422] While the scope of this thesis does not cover English law, the comments made by Moreham are still vital. She proposes that the reasonable expectation of privacy should be focused on "what a person should be entitled to expect in the circumstances in question".[423] Drawing on this analogy, this thesis argues that the New Zealand courts have done just that. They have attributed reasonable expectation of privacy as an entitlement of the individual by determining on the circumstances whether the claimant 'had' a reasonable expectation of privacy. All the cases discussed above have been approached this way, apart

421 N Moreham "Unpacking the reasonable expectation of privacy test" (2018) 134 Law Quarterly Review 651 at 652-653.

422 N Moreham "Unpacking the reasonable expectation of privacy test" (2018) 134 Law Quarterly Review 651 at 652-653.

423 N Moreham "Unpacking the reasonable expectation of privacy test" (2018) 134 Law Quarterly Review 651 at 652-653.

from *Holland*, which probably due to the sensitivity of the facts of the case did not consider an analysis on whether the claimant having a shower had a reasonable expectation of privacy.

Another area of the law in which the reasonable expectation of privacy has been considered is in the context of search and surveillance. As the Law Commission stated "[t]he Court of Appeal has referred to the touchstone of section 21 being the reasonable expectation of privacy".[424] What exactly does the 'touchstone' mean? And is the reasonable expectation of privacy a test or an element or also an entitlement?

In the context of search surveillance cases under s 21 of the NZBORA, the courts have established that to determine whether there had been a search that was unreasonable would be by applying the two staged test - whether the claimant had an expectation of privacy in the thing or place being searched and whether that expectation was that society is prepared to regard reasonable.[425] If both these limbs are met, then the conduct of the police will be a search for the purposes of s 21. The courts have defined reasonable expectation as "a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination by the state"[426] and includes information "which tends to reveal intimate details of the lifestyle and personal choices of the individual".[427] There have been numerous cases that have applied this under s 21 of the NZBORA. Therefore, it is commonly referred to as the 'reasonable expectation of privacy test'. However, this thesis argues that this is not the case. The reasonable expectation of privacy is a fundamental element in determining whether there has been a breach of s 21 of the NZBORA.

In this regard, the decision of the Supreme Court in *Hamed v R* is pivotal. In that case, Blanchard J affirmed the decision in *R v Wise* [1992] 1 SCR 527 as to what constitutes a search. It describes a search being "a police activity that invades a reasonable expectation of privacy".[428] Similarly, Elias CJ, as she was then, held that "whether surveillance amounts to a State intrusion upon reasonable expectations of privacy depends on wider context than property ownership".[429] Private individuals are entitled to "reasonable expectations that they will be let

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424 Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008) at 94.

425 *Hamed v R [*2011] NZSC at [163]-[164] at [163], the Supreme Court affirmed *R v Wise* [1992] 1 SCR 527 as to a search being one that intrudes a reasonable expectation of privacy.

426 *R v Alsford* [2017] NZSC 42 at [63].

427 *R v Alsford* [2017] NZSC 42 at [63].

428 *Hamed v R [*2011] NZSC at [163]-[164].

429 *Hamed v R [*2011] NZSC at [11].

alone by State agencies even in public spaces".[430] What is fundamentally important in this regard, is the reasonable expectation of privacy in the first limb – or as the Court referred to the 'subjective limb'. The element that needs to be satisfied in the first limb once again goes to the crux of the privacy protection offered by s 21 of NZBORA. The activity must be in which the individual ***had*** a reasonable expectation of privacy in. Although, it may be argued that this is of course a straightforward element to be satisfied as in almost all cases it will be given that or argued by a plaintiff that they had a reasonable expectation of privacy, for the purposes of this paper it is an element rather than the test, because it is forms part of the 'two-staged' test established by the courts.

More importantly, the element is an entitlement of the individual. But how? In almost all cases traversed in chapter three under s 21, the reasonable expectation of privacy was considered or questioned on the premise that it was something the individual had. The comments of Elias CJ are helpful as a starting point: [431]

> [12] In principle, there is no reason why activity in public spaces should, by virtue of that circumstance alone, be outside the protection of s 21**. It is consistent with values in the New Zealand Bill of Rights Act that people may have reasonable expectations that they will be let alone by State agencies even in public spaces in their private conversations and conduct. a human right space for privacy in such settings.** And in an age when technology makes surveillance impossible to resist, anywhere, the human right described in s 21 would be substantially obliterated if its scope is limited to what cannot be seen or heard by State agencies from public space. It follows that I am also unable to agree with the suggestion made by Blanchard J at [167] that police surveillance in a public place which is not technologically enhanced does not generally amount to a search. 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.

This quotes neatly sums up the Court's view in terms of reasonable expectation of privacy. In *Hamed v R,* the Supreme Court referred to the reasonable expectation of privacy to find that the police had breached s 21 by installing surveillance cameras on private property. The Supreme Court found that the defendants had a reasonable expectation of privacy they would be free from intrusions by the police (both subjectively and objectively).

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430 *Hamed v R [*2011] NZSC at [12].
431 *Hamed v R [*2011] NZSC at [12].

In *R v Alsford,* the Court held that:[432]

> Whether a police request for information amounts to a "search" **will depend on whether it relates to personal information in respect of which there is a reasonable expectation of privacy**, which depends on a consideration of factors such as those identified at [63] above. If there is a reasonable expectation of privacy in the information, there will be a search and the question will become whether the search is unreasonable.

Once again, the Court has considered the reasonable expectation of privacy as an entitlement of the individual. This has been exemplified in subsequent cases, for example cases like *Lorgian*[433] and *Fanesenkloet v Jenkin*[434] have held that driveways in view from the public roads are areas that a defendant did not have a reasonable expectation of privacy, due to the public nature of the surroundings. Similarly in *Tye v The Queen,* the Court held that the defendant did not have a reasonable expectation of privacy in relation to a remote shed located on his property.[435] On the other hand in *Henderson v Attorney-General,* it was held that Mr Henderson had a reasonable expectation of privacy in relation to some of the data contained in his laptop. Therefore, for the Official Assignee to request to a copy of the entire laptop was unreasonable in terms of s 21 of the NZBORA.[436] In *Ngan v R*, the Court determined that Mr Ngan had reasonable expectation of privacy in a car that was being searched, however, it was "at a low level"[437] . Similarly, in *Hoete v R*, the Court of Appeal held that the appellant had an expectation of privacy to his memory card,[438] following the argument given in *R v Caron* where it was held that memory cards held information of a biographical nature and attracted an expectation of privacy.

A unique situation arose recently in *Aranguiz v New Zealand Police*, whereby the High Court considered the degree of reasonable expectation of privacy a claimant had in a toilet cubicle located in a public mall. The High Court applied the two-staged test affirmed in *Hamed*, as to what constitutes a search. The facts of this case are well explained in chapter three. Citing Blanchard J, Mander J noted "an expectation of privacy will not be reasonable unless the

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432 *R v Alsford* [2017] NZSC 42 at [64].
433 *Lorgian v R* [2012] NZCA 264.
434 *Fanesenkloet v Jenkin* [2014] NZHC 1637.
435 *Tye v The Queen* [2012] NZCA 382.
436 *Henderson v Attorney-General* [2017] NZHC 606.
437 *Ngan v R [*2007] NZSC 105 at [61].
438 *Hoete v R* [2013] NZCA 432 at [19]-[20].

person subjectively held such expectation at the time and that the person's expectation is one that society would be prepared to expect is reasonable in the circumstances".[439]

> [20] There does not appear to have been any previous New Zealand cases dealing with expectations of privacy in relation to the occupation of a toilet cubicle in a public bathroom. The issue has been the subject of consideration in Canada. In R v Wegner, Duncan J of the Ontario Court of Justice observed that Canadian case law "almost uniformly recongised the existence of [a reasonable expectation of privacy] with respect to stalls or cubicles within a public washroom"…
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> [21] In the present case the issues distil to whether Mr Aranguiz subjectively had an expectation of privacy and whether such an expectation should on the circumstances be considered reasonable. Care is required that an ex post facto analysis is not applied in determining whether there was a reasonable expectation of privacy. The fact that Mr Aranguiz was found to be engaged in criminal activity, or that the prior suspicions of him were confirmed, cannot validate or render the search reasonable. The Court's focus is on the justification for the search in the first place and its prior authorisation, rather than its subsequent validation.

Mander J, citing approvingly Canadian jurisprudence held that "the reasonable expectation of privacy deriving from a person's occupation of a toilet cubicle is obvious".[440] "As Duncan J commented in *Wenger*, "[t]here can be few places where, at least subjectively, an expectation of privacy is higher- and intrusion by the state more offensive- than in a toilet cubicle".[441] It is important to note that in this case, again, the courts have attributed that the reasonable expectation of privacy as akin to something a claimant is entitled to. In this case, Mr Aranguiz had a reasonable expectation of privacy when he was using the cubicle that he would be free from intrusion. [442]

This thesis argues that reasonable expectation of privacy is at the heart of s 21 of the NZBORA. The courts have affirmed this by declaring reasonable expectation of privacy as being the "touchstone" of s 21 or in other words it is an expectation that claimants are entitled to hold.

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439 *Aranguiz v New Zealand Police* [2019] NZHC 1765 at [20]-[21] per Mander J.
440 *Aranguiz v New Zealand Police* [2019] NZHC at [22] per Mander J.
441 *Aranguiz v New Zealand Police* [2019] NZHC at [22] per Mander J.
442 *Aranguiz v New Zealand Police* [2019] NZHC at [22]-[23] per Mander J.

When states actors interfere, a s 21 determination will fall on whether that expectation was breached by the state actors.

In other areas, such as broadcasting, the courts have once again considered the reasonable expectation of privacy as an entitlement. Take the case of *Jng Management v Radio New Zealand Ltd.* In this case the Broadcasting Authority considered whether the applicant had a reasonable expectation of privacy in relation to the publication of particulars regarding his business. [443] In this regard, the Authority stated:

> [19] The next question is whether any private information was disclosed about A, X or Y, over which they had a reasonable expectation of privacy. Factors the Authority will consider include, but are not limited to: whether the information or material is the public domain; whether it is intimate or sensitive in nature; and whether the individual or individuals could reasonably expect it would not be disclosed.
>
> [20] A person will usually not have a reasonable expectation of privacy in relation to matters of public record, and, in general, a person will not have a reasonable expectation of privacy in a public place. A public place is defined as being generally accessible to, and/or in view of, the public.

In the application of the facts, as stated in chapter there, the Authority found that there was no reasonable expectation of privacy for A when he was leaving their offices, as this was a public place and was "in the view of many members of the public, including the reporter. No private information or material was therefore disclosed".[444] The Authority also found that footage of the front door and entrance to the office, was not one in which there was a reasonable expectation of privacy, as the "JNJ management address for service is publicly available information"[445] and footage of A's house (namely, the front door) only disclosed what was visible to any member of the public as they came up to the front door.[446] Once again, the reasonable expectation of privacy was seen by the Authority as an entitlement the individual could have and the subsequent analysis depended on whether the broadcast had breached this entitlement of the individual.

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443 *Jng and Radio New Zealand Ltd* (2017) BSA 095 per Members: Radich, Kupenga, Rose and Palmer.
444 *Jng and Radio New Zealand Ltd* (2017) BSA 095 at [24].
445 *Jng and Radio New Zealand Ltd* (2017) BSA 095 at [24]-[28].
446 *Jng and Radio New Zealand Ltd* (2017) BSA 095 at [31].

The case law canvassed in chapter three considers the reasonable expectation of privacy as an entitlement of the individual. I.e. whether X had a reasonable expectation of privacy when XYZ took place. The focus has been on what, if any reasonable expectation of privacy the claimant 'had'. The fact that it has been treated as entitlement leads on to the next argument – which is whether the reasonable expectation of privacy embodies a general right to privacy in New Zealand?

4.2. Reasonable expectation of privacy as a general right to privacy in New Zealand

Drawing on the case law cited in the previous chapter, it is obvious that certain types of privacy are protected at common law, and that the reasonable expectation of privacy has been important in this regard. This is the premise on which this thesis argues that the reasonable expectation of privacy can be a basis or an embodiment of an expression of a general right to privacy in New Zealand.

The legal maxim or principle – "for every violation of a right, there must be remedy"[447] is relevant in the present context. As Jefferies states, remedies are an effective redress for violations of one's rights. In relation to privacy protections in New Zealand, the case law surveyed above shows that the courts have repeatedly treated reasonable expectation of privacy as an entitlement of the individual in a range of different areas of the law – such as privacy torts, search and surveillance. Importantly, the case law shows that these areas of the law, such as torts, are in itself an avenue that citizens can take for wrongful breaches of their privacy. In other words, they are remedies for breaches of certain privacy protections. New Zealand has long held the view that there is no general right to privacy rather there are specific statutory rights that protect certain aspects of privacy. As Richardson J stated in *R v Jefferies* "…neither the Bill of Rights nor the International Covenant gives a general guarantee of privacy. And New Zealand does not have a general right to privacy".[448] Despite the judiciary's reluctance to firmly declare that a general right to privacy is present in New Zealand, the development of legal protections by other methods such as torts, breach of confidence, search and surveillance, illustrates that in New Zealand there are remedies available for breaches of privacy. For

447 John Jefferies "The Right-Remedy Gap in Constitutional Law" (1999) The Yale Law Journal 87 at 87.
448 *R v Jefferies* [1994] 1 NZLR (CA) at 290-302.

example, in *R v Williams*, William Young P outlined the parameters in relation to s 21 of the NZBORA and reasonable expectation of privacy. He opined that personal searches or medical/invasive undertakings afforded the highest expectations of privacy. In addition, residential property and private areas of the home afford a greater degree of privacy than the outdoors or public spaces: [449]

> The highest expectation of privacy relates to searches of the person and particularly intimate searches, such as strip searches (as in Pratt) or invasive procedures, such as DNA testing (as in Shaheed). in terms of searches of property, residential property will have the highest expectation of privacy attached to it...There will be some gradation even within a residential property however. The public areas will invoke a lesser expectation of privacy than the private areas of the house... inaccessible areas such as drawers and cupboards (particularly ones where one would expect to find private correspondence or intimate clothing) would count as private areas. There will be less privacy expected in the garden, particularly in the front garden. The same applies to garages or outbuildings. There is also a lesser expectation of privacy in vehicles..., in commercial premises...., and on farmland, apart from the areas around the farm residences...

In each and every case discussed, the reasonable expectation of privacy was viewed by the courts as something an individual had with them, whether this be when they are at home, or in one's car or in public. Subsequent discussions and analysis by the courts depended on whether that expectation was reasonable. For the purposes of this thesis it is relevant that the courts viewed the reasonable expectation of privacy as an entitlement. Therefore, in applying the aforementioned legal maxim- if there is a right, there is a remedy, the reverse of the maxim, if there is a remedy, there must be a right is applicable and demonstrates that a reasonable expectation of privacy right must exist.

Furthermore, the word, entitlement has been defined by the Black Laws Dictionary as a "reference to a precedence or established procedure defends a right or claim".[450] Often the courts have said a person had a reasonable expectation of privacy or a low level of reasonable expectation of privacy. Attributing reasonable expectation of privacy to a claimant, implies it is something that they are entitled to have, akin to a right. For example, take 'freedom of expression'. This is a right protected under s 14 of the NZBORA and is often viewed as "the

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449 *R v Williams* [2007] NZCA 52, 23 CRNZ 1 (CA) at [113] per William Young P.

450 Black's Law Dictionary "entitlement" The Law Dictionary <https://thelawdictionary.org/entitlement/>

most pertinent right seen as justifiably limiting the right to privacy in certain situations".[451] If it is a right, then it is an entitlement of the individual. The average citizen is entitled to have their opinions, and freedom of speech protected as they desire. When this entitlement is breached then he or she will have a grounds for a claim for a breach of his or her 'freedom of expression'. This is demonstrated by the ample case law relating to freedom of expression. In any case, this is the premise on which it is proposed that the reasonable expectation of privacy is akin to an entitlement and therefore can be a basis for a general right to privacy or at the very least an expression or an embodiment of a general right to privacy.

This thesis argues that the frequent and sustained use of reasonable expectation of privacy as an entitlement that deserves protection by the common law and the attribution of this to a claimant to determine whether or not they had a 'reasonable expectation of privacy' means it is subject to legal protection. As illustrated above, it is without a doubt that the reasonable expectation of privacy is construed as an entitlement. If it is an entitlement that can be breached and there are remedies available for such breaches, then most certainly this ought to be to be an expression or an embodiment of a general right to privacy.

451 Petra Butler "The Case for a Right to Privacy in the New Zealand Bill of Rights Act" (2013) 11 NZJPIL 213 at 216.

CONCLUSION

CHAPTER FIVE

"There is a great need to understand privacy in a clear and comprehensive manner"[452]- Daniel Solove

And there is an even greater need to create legal protections for citizens right to privacy.

5. Conclusion

Privacy is recongised as a fundamental value, interest or a right worthy of protection. Many countries across the globe have entrenched a general right to privacy as a constitutional right. In instances where the Parliament has not, the judiciary has stepped in and declared privacy as a constitutional right, as illustrated by the Supreme Court of India recently.[453] Despite other countries recognising a general right to privacy, New Zealand does not explicitly have 'a general right to privacy'. Rather the privacy protections present in New Zealand are specific and considered patchy.[454] For example, there are certain Acts that protect various aspects of an individual's privacy, such as trespass and nuisance protecting bodily privacy, s 21 of the NZBORA that protects unreasonable searches and surveillance, and informational privacy protected through the Privacy Act 1993. While this may seem like privacy is recongised in New Zealand, there still lacks a general statutory right to privacy.

Privacy is recognised in many international instruments, as pivotal to society, and over time many scholars have tried to define what exactly privacy is. Yet there is no 'one definition'. As canvassed in chapter two, the conceptualisation of privacy is nebulous despite the work done in this area. Some of the early thinkers viewed privacy as merely being a distinction between two spheres 'the public and private', while others stated it was the right to be let alone. However, with time privacy has evolved and it is now considered in a broader sense. It is recognised as an important human right and importantly, privacy is not lost even if an individual is in public sphere.

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452 Daniel Solove *Understanding Privacy* (Harvard University Press, United States, 2008) at 8.

453 J*ustice K.S Puttaswamy (Retd) and Anr. v Union of India And Ors Writ Petition* (Civil) No 494 of 2012.

454 Petra Butler "The Case for a Right to Privacy in the New Zealand Bill of Rights Act" (2013) 11 NZJPIL 213; Law Commission *Privacy Concepts and Issues* (NZSP 19, 2008).

In New Zealand, the courts have recognised the importance of privacy and often stated that it is fundamental to the human dignity. Often the courts have used the concept known as reasonable expectation of privacy when addressing privacy concerns. The constant repeated use of this concept is important. As chapter three shows, this concept was used in search and surveillance cases under s 21 of the NZBORA, privacy tort cases and even in other areas such as broadcasting. While the reasonable expectation of privacy concept has its roots from the United Kingdom and United States, its presence in New Zealand is worthy of examination.

Many have defined the reasonable expectation of privacy as the 'reasonable expectation test'. However, this thesis argues that is an element of a test, but goes to the crux of the relevant privacy protection. In the tort of intrusion into seclusion and the publication of private facts, the reasonable expectation of privacy is an important element and forms a part of the legal test necessary to be successful in a claim. For example, a peek through a window, or private facts that an individual holds do not necessarily constitute as being intrusions or gives rise to a claim under the tort of private facts. The key is that these instances must be one in which an individual has a 'reasonable expectation of privacy'.

Moreover, this thesis argues that the reasonable expectation of privacy is an entitlement. Generally, the judiciary has examined this concept by asking 'whether X had a reasonable expectation of privacy'. 'Had' implies that it is an entitlement or something an individual is entitled to have with them in the circumstances. While subsequent discussions by the courts have generally fallen into the ambit of whether that expectation was 'reasonable', for the purposes of this thesis, the consideration by the courts as to whether a claimant 'had' a reasonable expectation of privacy, is sufficient to warrant the conclusion that it is an entitlement of the individual.

An entitlement has been defined as a right that can be defended.[455] If an entitlement is a right, then can the reasonable expectation of privacy be an embodiment or an expression of a general right to privacy? This thesis argues yes – it can. The repeated use of the reasonable expectation of privacy by the judiciary in a range of case law together with the interpretation of this concept by the judiciary as to whether a claimant had a reasonable expectation of privacy, shows this

[455] Black's Law Dictionary "entitlement" The Law Dictionary <https://thelawdictionary.org/entitlement/>

expectation as an entitlement. If it is an entitlement that can be breached and goes to the heart of particular privacy protections then, it ought to be an expression or an embodiment of a general right to privacy.

"Privacy has long been a conceptual jungle that has entangled law and policy and prevented them from effectively addressing privacy problems".[456] This thesis has argued that one way in which this "conceptual jungle"[457] can be untangled and some clarity be obtained is through using a concept that is well-traversed at common law and considered an entitlement – the reasonable expectation of privacy. This may very well form the basis for a general right to privacy in New Zealand.

456 Daniel Solove *Understanding Privacy* (Harvard University Press, United States, 2008) at 196.
457 Daniel Solove *Understanding Privacy* (Harvard University Press, United States, 2008) at 196.

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