

A TORT OF INVASION OF PRIVACY IN AUSTRALIA?

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[Recent decisions in the House of Lords and the New Zealand Court of Appeal have recognised forms of protection of personal privacy in the United Kingdom and New Zealand respectively. With the High Court clearing the way for the development of such a tort in Australia, this article addresses the potential form that such a development could take. The need to take into account existing laws, including the constitutional freedom of communication concerning governmental or political matters, should result in the development of a tort and corresponding defences which are appropriately adapted to an Australian context.]

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I INTRODUCTION

Australia is a signatory to the *International Covenant on Civil and Political Rights*,¹ art 17 of which requires contracting states to ensure that their domestic legal systems provide adequate protection against interference with privacy.² Although legislation has been enacted at federal and state levels protecting the privacy of information³ and communications,⁴ it has long been asserted that the

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¹ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

² See also the recognition of rights to privacy in the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, art 12, UN Doc A/810 (III) (1948); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222, art 8 (entered into force 3 September 1953) ('ECHR').

³ *Privacy Act 1988* (Cth).

⁴ *Listening Devices Act 1992* (ACT); *Listening Devices Act 1984* (NSW); *Surveillance Devices Act 2000* (NT); *Invasion of Privacy Act 1971* (Qld); *Listening and Surveillance Devices Act*

common law of Australia did not recognise an enforceable right to personal privacy.⁵ However, in 2001 the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*⁶ rejected this assertion and entertained the possibility that the common law might develop to recognise a tort of invasion of privacy.⁷ There have since been mixed messages from lower courts concerning the development of the tort in this country, with cases both supporting⁸ and resisting⁹ its recognition.

What is it about personal privacy that makes its protection problematic? A major difficulty lies in defining what ‘privacy’ means — the concept lacks precision.¹⁰ An associated problem exists in striking the appropriate balance between privacy interests and free speech interests,¹¹ an issue which will involve a determination of the nature and scope of appropriate defences, in particular any public interest defence.

This article discusses the possible development of a tort of invasion of privacy in Australia. After a brief reference to the views expressed by the High Court in *Lenah Game Meats*, it traces the development of privacy torts in the United States, United Kingdom and New Zealand. The article then examines the Australian cases subsequent to *Lenah Game Meats* that have considered privacy, before addressing the various live issues that are involved in the recognition of the tort, including the scope of the defences.

II *LENAH GAME MEATS*: THE REMOVAL OF AN OBSTACLE

It was long believed that the common law of Australia, like that of the United Kingdom, did not recognise a right to privacy. This view was traditionally supported by reference to dicta in *Victoria Park*,¹² which concerned an attempt by the owner of a racetrack to prevent the defendants from observing and broadcasting the races and race information displayed at the track from the vantage point of a platform constructed on adjacent land. The plaintiff based its claim on various grounds, including nuisance, to which Latham CJ remarked

1972 (SA); *Listening Devices Act 1991* (Tas); *Surveillance Devices Act 1999* (Vic); *Surveillance Devices Act 1998* (WA) (‘*Listening Devices Acts*’).

⁵ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 496 (Latham CJ), 521 (Evatt J) (‘*Victoria Park*’).

⁶ (2001) 208 CLR 199 (‘*Lenah Game Meats*’).

⁷ *Ibid* 248–9 (Gummow and Hayne JJ).

⁸ Skoien SJDC of the Queensland District Court took the first ‘bold step’ of recognising the tort in *Grosse v Purvis* [2003] Aust Torts Reports ¶81-706, 64 187 (‘*Grosse*’). Osborn J in *Richards v Victoria* [2003] VSC 368 (Unreported, Osborn J, 2 October 2003) was more equivocal.

⁹ *Giller v Procopets* [2004] VSC 113 (Unreported, Gillard J, 7 April 2004) (‘*Giller*’); *Kalaba v Commonwealth* [2004] FCA 763 (Unreported, Heerey J, 8 June 2004). Leave to appeal was refused on the ground that the case did not sufficiently raise arguments as to whether a tort of privacy existed: *Kalaba v Commonwealth* [2004] FCAFC 326 (Unreported, Tamberlin, North and Dowsett JJ, 14 December 2004).

¹⁰ See *Lenah Game Meats* (2001) 208 CLR 199, 225–7 (Gleeson CJ).

¹¹ *Ibid* 226.

¹² See, eg, *Cruise v Southdown Press Pty Ltd* (1993) 26 IPR 125, 125 (Gray J); *Australian Consolidated Press Ltd v Ettingshausen* (Unreported, New South Wales Court of Appeal, Gleeson CJ, Kirby P and Clarke JA, 13 October 1993).

‘[h]owever desirable some limitation upon invasions of privacy might be, no authority was cited which shows that any general right of privacy exists.’¹³

More recently, however, the High Court in *Lenah Game Meats* rejected the assumed authority of the *Victoria Park* case. Gummow and Hayne JJ (with whom Gaudron J agreed) bluntly stated their view that ‘*Victoria Park* does not stand in the path of the development of ... a cause of action [for invasion of privacy].’¹⁴ Kirby J was of a like mind: ‘It may be that more was read into the decision in *Victoria Park* than the actual holding required.’¹⁵ Callinan J summed up the ‘narrow majority’ decision as being ‘a product of a different time’,¹⁶ which his Honour described as both ‘conservative’ and having ‘the appearance of an anachronism’.¹⁷ His Honour concluded that the decision in *Victoria Park* clearly had no application in a case of invasion of privacy.¹⁸

Therefore, while *Lenah Game Meats* swept away a major obstacle to the recognition of a right to privacy at common law, most of the judges were content to rest at that point. Only Callinan J was prepared to go further and express support for the recognition of a right to privacy, at least for the benefit of individuals as opposed to corporations:

It seems to me that, having regard to current conditions in this country, and developments of the law in other common law jurisdictions, the time is right for consideration whether a tort of invasion of privacy should be recognised in this country, or whether the legislatures should be left to determine whether provisions for a remedy for it should be made.¹⁹

Thus, while the High Court in *Lenah Game Meats* did not make the leap to recognising a tort for invasion of privacy, it is fair to say that it cleared the way for the subsequent development of such a tort.

III INTERNATIONAL EXPERIENCE

It is instructive to examine the experience in three overseas common law jurisdictions, which may influence the future development of a tort of privacy in Australia.²⁰

¹³ *Victoria Park* (1937) 58 CLR 479, 496.

¹⁴ (2001) 208 CLR 199, 248.

¹⁵ *Ibid* 277.

¹⁶ *Ibid* 321.

¹⁷ *Ibid* 322.

¹⁸ *Ibid* 323–4.

¹⁹ *Ibid* 328.

²⁰ Protection of privacy is common among civil law Continental countries such as Germany, France and Italy: see, eg, Basil Markesinis (ed), *Protecting Privacy* (1999) chs 2–4. It should be noted that a discussion of these laws in the context of the civil law is beyond the scope of this article.

A *United States: Genesis of the Tort of Invasion of Privacy*

In 1890, Samuel Warren and Louis Brandeis published a seminal article²¹ which argued that the collection of predominately United Kingdom cases that they had assembled²² in fact reflected an intention to protect personal privacy. The significance of this ‘right to be left alone’²³ was expressed in terms that may be considered just as relevant today:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. ... The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world ...²⁴

The problem, as the authors saw it, was that if the courts continued to rely on artificial applications of existing causes of action, they would be unable to deal with all instances of breach of privacy.²⁵ This was particularly so considering developments in technology, which at the time included the development of photography as a tool a stranger could use to surreptitiously invade privacy in circumstances beyond the reach of existing causes of action.²⁶ Warren and Brandeis sought to ameliorate any fears of a far-reaching doctrine by suggesting various limits: that privacy would be trumped if a publication were of public or general interest; that publications which would be privileged under defamation law would have similar protection against any action for breach of privacy; that, like slander, oral breaches of privacy would not be actionable in the absence of special damage; and that any right to privacy would cease when the material was published by the individual or with his or her consent.²⁷ Although the article initially met with a cool reception,²⁸ it inspired recognition of a common law right to privacy, first in Georgia²⁹ and then throughout the United States.³⁰ It was sufficiently well recognised by 1939 that it had found its way into the *Restatement of Torts* (1939).³¹

²¹ Samuel D Warren and Louis D Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193.

²² The cases had been decided on such grounds as implied contract law, common law copyright, trust and confidentiality, and included: *Prince Albert v Strange* (1849) 1 Mac & G 25; 41 ER 1171 (copyright); *Abernethy v Hutchinson* (1825) 1 H & Tw 28; 47 ER 1313 (confidentiality); *Pollard v Photographic Co* (1888) 40 Ch D 345 (implied contract).

²³ Raymond Wacks, ‘The Poverty of “Privacy”’ (1980) 96 *Law Quarterly Review* 73, 78.

²⁴ Warren and Brandeis, above n 21, 196.

²⁵ *Ibid* 211–12.

²⁶ *Ibid* 211.

²⁷ *Ibid* 214, 216–18.

²⁸ *Roberson v Rochester Folding Box Co*, 171 NY 538 (1902), later effectively overturned by statutes making invasion of privacy both a tort and a misdemeanour: 1903 NY Laws 132 §§ 1–2, now replaced by NY Civ Rights Law §§ 50–1 (2000).

²⁹ *Pavesich v New England Life Insurance Co*, 122 Ga 190 (1905).

³⁰ *Restatement of Torts* § 867 (1939). Today, most, if not all, United States jurisdictions have acknowledged a common law right to privacy in one form or another: Geoff Dendy, ‘The News-worthiness Defense to the Public Disclosure Tort’ (1996) 85 *Kentucky Law Journal* 147, 147.

³¹ Warren and Brandeis’ article has been lauded as ‘perhaps the most influential law journal piece ever published’: P Allan Dionisopoulos and Craig R Ducat, *The Right to Privacy: Essays and Cases* (1976) 20.

Seventy years after Warren and Brandeis' article was published, William Prosser reviewed the body of cases protecting privacy³² and suggested that they in fact represented four separate torts: unreasonable intrusion upon the seclusion of another, public disclosure of private facts, displaying another in a false light before the public, and appropriation of another's name or likeness.³³ This four-way formulation gained judicial acceptance,³⁴ and in 1977 was adopted in the *Restatement (Second) of Torts* § 652A (1977) ('*Second Restatement*'). This section refers to four specific components,³⁵ which provide that liability for invasion of privacy arises where one person:

- 1 intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another (either as to person or private affairs or concerns) if the intrusion would be highly offensive to a reasonable person of ordinary sensibilities: § 652B;
- 2 appropriates to his or her own use or benefit the name or likeness of another: § 652C;
- 3 gives publicity to a matter concerning the private life of another which is matter of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public: § 652D; or
- 4 gives publicity to a matter concerning another which places that person before the public in a false light where (a) that false light would be highly offensive to a reasonable person and (b) the publisher knew of or recklessly disregarded the falsity of the matter and the false light in which the other would be placed: § 652E.

The *Second Restatement* states that all four instances of invasion of privacy are subject to the same absolute privilege defences that apply to defamation, including parliamentary (legislative) and court privilege and consent,³⁶ as well as conditional privileges (such as reports of public proceedings, executive officers performing official duties, protection of defendants' interests, reports to government authorities concerning mental health, and reasonable investigation of a claim against the defendant).³⁷

These torts have enjoyed a less than spectacular existence. The unreasonable intrusion tort, for example, was recognised in almost all jurisdictions; however, until recently it had proved to be 'toothless' against media defendants in particu-

³² William L Prosser, 'Privacy' (1960) 48 *California Law Review* 383.

³³ *Ibid* 389–407.

³⁴ The views of Warren and Brandeis were first accepted by the Georgia Supreme Court in *Pavesich v New England Life Insurance Co*, 122 Ga 190 (1905). The United States Supreme Court has also approved the arguments in the article: see *Time Inc v Hill*, 385 US 374, 383 (Brennan J) (1967); *Cox Broadcasting Corporation v Cohn*, 420 US 469, 488 (White J) (1975).

³⁵ The *Second Restatement* makes it clear that the four forms of invasion of privacy are the ones that crystallised in a majority of states. There is nothing preventing another form being recognised at some time in the future: *Second Restatement* § 652A cmt c (1977). It should also be noted that the formulations in the *Second Restatement* reflect the more common formulations. Differences in formulation may appear in some jurisdictions.

³⁶ *Second Restatement* § 652F (1977).

³⁷ *Second Restatement* § 652G (1977). See also § 890 concerning privileges.

lar, with few surviving motions for summary judgment.³⁸ The United States Supreme Court has held that intrusive newsgathering is ‘not without its First Amendment protections’ as an essential antecedent to publication.³⁹ At the same time, American courts have maintained that it does not provide the news media with general immunity during newsgathering: ‘[t]he First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another’s home or office.’⁴⁰ More recently, the courts have indicated that the balance may have tipped against intrusive newsgathering and in favour of privacy.⁴¹ Intrusion no longer needs to be upon ‘seclusion’, and may be in semi-private places like restaurants⁴² or workplaces.⁴³ Further, it has been recognised that intrusion need not be physical and may be by electronic means.⁴⁴

By contrast, the courts have been more willing to uphold First Amendment rights in preference to preventing an invasion of privacy in the form of the public disclosure of private facts. The elements of this tort are not uniform in all jurisdictions, but the *Second Restatement* § 652D represents a typical formulation. ‘Newsworthiness’ and consent are the principal defences.

Another formulation of this tort that has wide support is that of Prosser and Keeton: (a) a public disclosure; (b) of private facts; (c) that is highly offensive to a reasonable person; and (d) is not newsworthy.⁴⁵ Courts have interpreted the ‘newsworthiness’ defence increasingly widely.⁴⁶ These interpretations have included:

- determining what is of legitimate public concern by distinguishing between information to which the public is entitled and information that would not be the concern of a reasonable member of the community with decent standards;⁴⁷
- requiring the information to be of public interest and ‘decent’, together with a logical nexus between the complainant and the matter of public interest;⁴⁸
- taking into account the social value of the information, the depth of the intrusion into private areas and the extent to which the complainant has

³⁸ Jennifer Marmon, ‘Intrusion and the Media: An Old Tort Learns New Tricks’ (2000) 34 *Indiana Law Review* 155, 164. In the period 1986–96, nearly 90 per cent of intrusion claims were dismissed on summary judgment, possibly due to being pleaded in the alternative: Lyrrisa Barnett Lidsky, ‘Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do about It’ (1998) 73 *Tulane Law Review* 173, 207–8.

³⁹ *Branzburg v Hayes*, 408 US 665, 707 (White J) (1972).

⁴⁰ *Dietemann v Time Inc.*, 449 F 2d 245, 249 (Hufstедler J) (9th Cir, 1971).

⁴¹ *Wilson v Layne*, 526 US 603 (1999) (media ‘riding along’ with police while executing an arrest warrant).

⁴² *Stessman v American Black Hawk Broadcasting Co.*, 416 NW 2d 685 (Iowa, 1987).

⁴³ *Sanders v American Broadcasting Companies Inc.*, 978 P 2d 67 (Cal, 1999), review denied 2000 Cal LEXIS 1892 (Cal, 2000).

⁴⁴ See, eg, *Miller v National Broadcasting Co.*, 187 Cal App 3d 1463 (1986).

⁴⁵ William Prosser and W Page Keeton, *Prosser and Keeton on the Law of Torts* (5th ed, 1984) 856–7.

⁴⁶ *Ibid.*

⁴⁷ *Virgil v Time Inc.*, 527 F 2d 1122, 1129 (Merrill J) (9th Cir, 1975).

⁴⁸ *Campbell v Seabury Press*, 614 F 2d 395 (5th Cir, 1980); *Gilbert v Medical Economics Co.*, 665 F 2d 305, 308–9 (McKay J) (10th Cir, 1981).

placed himself or herself in the public eye, subject to the information being 'decent';⁴⁹

- leaving it to the media to decide whether the facts are newsworthy;⁵⁰ and
- viewing all publications as newsworthy by not recognising a tort of public disclosure of private facts.⁵¹

By regarding the First Amendment as an effective trump factor in many if not most cases,⁵² the tort of disclosure of private facts has been described as having been rendered 'effectively impotent.'⁵³ One commentator has attributed the ineffectiveness of the tort to 'social changes in the relationships between the individual and others, evolution in social values, and profound shifts in the nature, function, and organization of public communication.'⁵⁴

B *United Kingdom: Metamorphosis of a Cause of Action*

In *Kaye v Robertson*,⁵⁵ a journalist and a photographer gained access to a hospital room where a television star was recuperating from serious head injuries (sustained when he was struck by a tree branch in a storm). He had no memory of the events and was not in any state to either consent to an interview or to having his photograph taken.⁵⁶ The star sought to restrain publication based on a range of causes of action, including trespass to the person, defamation, passing off and malicious falsehood.⁵⁷ There was no attempt to rely on breach of confidence, most likely on the basis that the journalist could not be under an obligation of confidence in the circumstances. In the course of upholding an interlocutory injunction, on the ground that it was a malicious falsehood to claim that the plaintiff had given his consent, the English Court of Appeal made it clear that the English common law did not recognise a right to privacy, and that this could only be done by the legislature and not by the courts. Bingham LJ remarked that:

⁴⁹ *Briscoe v Reader's Digest Association Inc*, 483 P 2d 34 (Cal, 1971).

⁵⁰ As first described in Diane L Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort' (1983) 68 *Cornell Law Review* 291, 353–5. See, eg, *Jenkins v Dell Publishing Co*, 251 F 2d 447 (3rd Cir, 1958), cert denied 357 US 921 (1958); *Howard v Des Moines Register & Tribune Co*, 283 NW 2d 289, 302 (McCormick J) (Iowa, 1979), cert denied 445 US 904 (1980).

⁵¹ See, eg, *Hall v Post*, 372 SE 2d 711, 714 (Mitchell J) (NC, 1988).

⁵² Zimmerman, above n 50, 311.

⁵³ *Campbell v Seabury Press* 614 F 2d 395, 397 (The Court) (5th Cir, 1980). See also Harry Kalven Jr, 'Privacy in Tort Law — Were Warren and Brandeis Wrong?' (1966) 31 *Law and Contemporary Problems* 326, 336: 'the claim of [newsworthiness] is ... so overpowering as virtually to swallow the tort.'

⁵⁴ Randall P Bezanson, 'The Right to Privacy Revisited: Privacy, News and Social Change 1890–1990' (1992) 80 *California Law Review* 1133, 1173. See also Randall P Bezanson, Gilbert Cranberg and John Soloski, *Libel Law and the Press: Myth and Reality* (1987) 97, 115–18, summarising an empirical study which showed that plaintiffs won less than three per cent of public disclosure cases.

⁵⁵ (1990) 19 IPR 147 ('*Kaye*').

⁵⁶ *Ibid* 149 (Glidewell LJ).

⁵⁷ *Ibid* 150.

This case none the less highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens. ... The defendant's conduct towards the plaintiff here was 'a monstrous invasion of his privacy' ... If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief in English law.⁵⁸

A catalyst for change since the *Kaye* decision has been the enactment of the *Human Rights Act 1998* (UK) c 42 ('*HRA*'), which requires English courts to take the *ECHR* into account when making determinations.⁵⁹ Article 8 of the *ECHR* provides a 'right to respect for... private and family life, ... home and ... correspondence.'

A further sign of change came with the decision of the European Commission of Human Rights in *Earl Spencer v United Kingdom*,⁶⁰ a case arising from press reports concerning bulimia and mental health problems experienced by Countess Spencer, including photographs taken at a private clinic by means of a telephoto lens. The European Commission of Human Rights ruled that English law had no need for a distinct privacy tort to grant a remedy, because the action for breach of confidence could be developed to embrace cases involving invasions of privacy.⁶¹

The elements of the action were usefully summarised in *Coco v A N Clark (Engineers) Ltd*,⁶² a trade secrets case, as follows:

- 1 the information must have the necessary quality of confidence;
- 2 the information must have been imparted in circumstances importing an obligation of confidence; and
- 3 there must be an actual or threatened unauthorised use or disclosure of the information to the detriment of the confider.⁶³

Two significant developments in the law concerning breach of confidence have helped to facilitate its use in relation to personal privacy. The first was the finding that the requirement that the information have the necessary quality of confidence was not limited to trade or business information, but could include personal information.⁶⁴ At first this meant the secrets of a marital relationship.⁶⁵ The marital relationship was well-recognised and well-defined, involving mutual

⁵⁸ *Ibid* 154.

⁵⁹ *HRA* s 2(1). See Gavin Phillipson and Helen Fenwick, 'Breach of Confidence as a Privacy Remedy in the *Human Rights Act* Era' (2000) 63 *Modern Law Review* 660, especially 664–70; Rabinder Singh, 'Privacy and the Media after the *Human Rights Act*' [1998] *European Human Rights Law Review* 712.

⁶⁰ (1998) 25 EHRR CD 105.

⁶¹ *Ibid* 117–18.

⁶² [1969] RPC 41 ('*Coco*').

⁶³ *Ibid* 47 (Megarry J).

⁶⁴ *Prince Albert v Strange* (1849) 1 Mac & G 25; 41 ER 1171.

⁶⁵ *Duchess of Argyll v Duke of Argyll* [1967] Ch 302.

trust and confidence, and a clear policy could be discerned to protect such confidentiality with the object of preserving the relationship.

However, the category of relevant relationships was then extended to include those involving a sexual relationship.⁶⁶ As one judge observed: ‘To most people the details of their sexual lives are high on their list of those matters which they regard as confidential. The mere fact that two people know a secret does not mean that it is not confidential.’⁶⁷ The relevant information only ceased to be capable of protection as confidential when it was in fact known to a substantial number of people.⁶⁸ Thus, while the nature of the information was important, the category of personal relationship was now left open-ended and was no longer a relevant factor.⁶⁹ The information could now be judged confidential, even where the parties were friends, enemies or strangers, if the relationship involved shared information that was deemed to be confidential, such as details of sexual relations.

The second development lay in the equitable recognition that the obligation of confidence is not restricted to the original confidante, but may also extend to third parties in whose hands the confidential information may come to reside.⁷⁰ A duty of confidence may arise whenever a third party receives information in circumstances in which he or she either knows, or ought to know, that the information is subject to a duty of confidence.⁷¹ For example, the third party might know that the information is received in breach of a duty of confidence, or received in ‘certain circumstances, beloved of law teachers’, such as where an obviously confidential document is wafted by an electric fan into a crowded street or dropped in a public place.⁷²

Accordingly, the doctrine may extend to actual or intended disclosure by third parties such as the media. Thus, courts have been prepared to act where the media had surreptitiously acquired information that it knew or ought to have known was held secret. This was shown in two cases involving photographers gaining access to restricted areas in order to obtain photographs of people or scenes that others wanted to keep confidential.⁷³ In both cases, the court referred to the surreptitious conduct of the photographer as indicative of his knowledge that the information being acquired was confidential.⁷⁴ The notion of the

⁶⁶ *Stephens v Avery* [1988] Ch 449 (claimant communicated information concerning her lesbian relationship with a married woman to the defendant). See also *Barrymore v News Group Newspapers Ltd* [1997] FSR 600, 602 (Jacob J) (married man’s homosexual partner released details of their affair to newspaper).

⁶⁷ *Stephens v Avery* [1988] Ch 449, 454 (Browne-Wilkinson V-C).

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ See, eg. *Campbell v MGN Ltd* [2004] 2 AC 457, 464 (Lord Nicholls) (‘*Campbell*’).

⁷¹ *A-G (UK) v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109, 281 (Lord Goff).

⁷² *Ibid.*

⁷³ *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134 (access to a film set to photograph the set and actors in costume); *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444 (access to a hotel being used as the location for a photo shoot of an album cover).

⁷⁴ *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134, 148–9 (Mann QC); *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444, 455 (Lloyd J).

surreptitious conduct being indicative of a breach of confidentiality then came to be equated with privacy:

If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would ... surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it.⁷⁵

In so doing, the law protected what might be called a right to privacy, although the name given to the cause of action was breach of confidence.⁷⁶

The emphasis, therefore, had shifted from the obligation of confidence, represented by the second element in the *Coco* formulation, to the nature of the information and the means by which it had been obtained.

Perhaps the closest the United Kingdom has come to the recognition of a right to privacy per se was the appeal against an interlocutory injunction in *Douglas v Hello! Ltd*.⁷⁷ The case concerned photographs taken surreptitiously at the wedding of actors Michael Douglas and Catherine Zeta-Jones. An exclusivity deal covering photographs had been reached with a magazine, and great care was taken in warning guests and others that unauthorised photography was not permitted. An interlocutory injunction was granted to restrain a rival magazine from publishing the photographs.⁷⁸ On appeal, Sedley LJ went so far as to suggest that United Kingdom law should now recognise a right to privacy: 'The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.'⁷⁹

The other members of the Court of Appeal did not agree. Brooke LJ thought that the claim to privacy was not a strong one,⁸⁰ and that instead the claimants were likely to establish that the publication should not be allowed on the grounds of confidentiality.⁸¹ Keene LJ thought that whether a liability was described as being a breach of confidence or as a breach of a right to privacy might be little more than deciding what label was to be attached to the cause of action.⁸² At the eventual trial, the case was decided on the basis of the commercial value of the photographs to the media.⁸³ The elaborate steps taken to exclude unauthorised photography meant that the photographs had been acquired by the defendant in

⁷⁵ *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473, 476 (Laws J).

⁷⁶ *Ibid.*

⁷⁷ [2001] QB 967.

⁷⁸ *Douglas v Hello! Ltd* (Unreported, High Court of Justice of England and Wales, Queen's Bench Division, Buckley J, 20 November 2000). The injunction was continued following a contested hearing: *Douglas v Hello! Ltd* (Unreported, High Court of Justice of England and Wales, Queen's Bench Division, Hunt J, 21 November 2000).

⁷⁹ *Douglas v Hello! Ltd* [2001] QB 967, 1001.

⁸⁰ *Ibid* 995.

⁸¹ *Ibid.*

⁸² *Ibid* 1012.

⁸³ *Douglas v Hello! Ltd [No 3]* [2003] 3 All ER 996.

circumstances in which they knew or ought to have known that they were subject to an obligation of confidence.⁸⁴

Statements in two recent cases indicate how far the United Kingdom cases have moved from the original rationale of the action for breach of confidence as a doctrine binding the conscience of a confidante who is subject to an obligation of confidentiality. In *Venables v News Group Newspapers Ltd*,⁸⁵ the claimants, Jon Venables and Robert Thompson, were the notorious 10-year-old murderers of toddler James Bulger. The court held that they were to be released from custody when they turned 18. The plaintiffs sought to prevent the defendant newspapers from disclosing information as to their identity and whereabouts.⁸⁶ It was held that the right to confidence protecting against the disclosure of their identity should be placed above the right of the media to freedom of expression, due to the risk to the claimants' lives.⁸⁷ Butler-Sloss P held that the protection of confidential information could be extended, even if it meant imposing restrictions on the press, 'where not to do so would be likely to lead to the serious physical injury, or to the death, of the person seeking that confidentiality, and there is no other way to protect the applicants'.⁸⁸

The other case, *A v B plc*,⁸⁹ concerned a married professional footballer who had had sexual relations with two women, following which the two women took their story to a newspaper. In the absence of an express agreement to keep the affairs confidential, the question arose as to whether confidentiality could be used as a basis for an injunction restraining publication of the story. In the course of setting aside an injunction, the English Court of Appeal promulgated a series of guidelines designed to allow judges to decide similar applications without being hampered by debate over the relevant authorities.⁹⁰ These guidelines acknowledged the particular importance of freedom of the press. They also provided that '[a] duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected'.⁹¹ In the case at hand, it was held that the degree of confidentiality to which A was entitled was very modest.⁹² The sexual relations here were part of non-permanent relationships outside marriage with women who did not want their relationships to remain confidential.⁹³

⁸⁴ As such, the case was on par with *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134; *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444.

⁸⁵ [2001] Fam 430 ('*Venables*').

⁸⁶ *Ibid* 440 (Butler-Sloss P).

⁸⁷ *Ibid* 466–7.

⁸⁸ *Ibid* 462.

⁸⁹ [2003] QB 195.

⁹⁰ *Ibid* 204–10 (Lord Woolf CJ).

⁹¹ *Ibid* 207 (citations omitted).

⁹² *Ibid* 217.

⁹³ See also *Theakston v MGN Ltd* [2002] EMLR 398, 418 (Ouseley J), suggesting that sexual relations within marriage at home would be at one end of the spectrum and would be protected from most disclosures, in contrast to a one-night stand with a recent acquaintance at a hotel, or a transitory engagement in a brothel, which would be yet further away.

The Court of Appeal also made this curious observation:

It is most unlikely that any purpose will be served by a judge seeking to decide whether there exists a new cause of action in tort which protects privacy. In the great majority of situations, if not all situations, where the protection of privacy is justified ... an action for breach of confidence now will, where this is appropriate, provide the necessary protection. This means that at first instance it can be readily accepted that it is not necessary to tackle the vexed question of whether there is a separate cause of action based upon a new tort involving the infringement of privacy.⁹⁴

Behind this ‘vexed question’, however, lurk some issues of importance, including the kind and extent of publication that is protected, the legitimacy of awarding compensatory damages for breach, and whether other kinds of damages are suitable.

Breach of confidentiality in the United Kingdom has therefore migrated away from an obligation of confidence to being a doctrine based on the surreptitious means of acquiring private information, thus extending to situations where either:

- 1 disclosure would be likely to lead to serious physical injury or death of the claimant, and seeking relief from the court is the only way of protecting the claimant; or
- 2 one person knows or ought to know that another person reasonably expects his or her privacy to be respected.

Ground 1 may be explained as merely an instance of an application of ground 2.

After confirming that United Kingdom law does not recognise a generalised tort of infringement of privacy,⁹⁵ the House of Lords had the opportunity to consider a privacy claim based on breach of confidence in *Campbell*. The defendant newspaper published articles which stated, contrary to her previous false assertions, that supermodel Naomi Campbell was a drug addict and that she was attending meetings of Narcotics Anonymous to beat her addiction. Some details of those meetings were published together with photographs of her leaving a meeting in Chelsea. The House of Lords found in favour of the plaintiff by a 3:2 majority, although this split was based on the facts rather than the applicable law. None of the Law Lords questioned the use of the extended action for breach of confidence as the appropriate means of obtaining redress for invasion of privacy in the form of disclosure of private information. However, the nomenclature ‘breach of confidence’ was now described as misleading, as the label ‘harks back to the time when the cause of action was based on improper use of information disclosed by one person to another in confidence’.⁹⁶ The ‘capacity of the common law to adapt’ to contemporary life had seen the development of the action under two influences: ‘acknowledgement of the artificiality of

⁹⁴ [2003] QB 195, 205–6 (Lord Woolf CJ).

⁹⁵ See *Wainwright v Home Office* [2004] 2 AC 406, 424 (Lord Hoffman), in which no claim was recognised for a prison strip search. Cf *R v Khan (Sultan)* [1997] AC 558, where the Law Lords considered the issue without reaching a concluded view.

⁹⁶ [2004] 2 AC 457, 464 (Lord Nicholls).

distinguishing between confidential information obtained through the violation of a confidential relationship and similar information obtained in some other way', and the influence of the *ECHR*.⁹⁷ As Lord Hope remarked, the language changed following the commencement of the *HRA* and the incorporation into United Kingdom domestic law of arts 8 and 10 of the *ECHR*, which recognise the right to respect for private life and the right to freedom of expression respectively. Instead of the three elements stated in *Coco* and the public interest defence:

We now talk about the right to respect for private life and the countervailing right to freedom of expression ... It seems to me that the balancing exercise to which that guidance is directed is essentially the same exercise, although it is plainly now more carefully focussed and more penetrating.⁹⁸

Lord Nicholls suggested that '[t]he essence of the tort' would today be better summed up by the label 'misuse of private information'.⁹⁹

The exercise now commences with determining whether the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential.¹⁰⁰ Once this threshold test of what is 'private' is satisfied, 'the court must balance the claimant's interest in keeping the information private against the countervailing interest of the recipient in publishing it'.¹⁰¹ In so doing, it is recognised that the importance of free expression may mean that very often the countervailing rights of the recipient will prevail over those of the subject.¹⁰² In the process a measure of latitude is demanded by the 'practical exigencies of journalism',¹⁰³ and the need to allow the press to deal with a legitimate story in its own way.¹⁰⁴ As Lord Hoffmann remarked, '[e]ditorial decisions have to be made quickly and with less information than is available to a court which afterwards reviews the matter at leisure'.¹⁰⁵

It was acknowledged that the balancing exercise is a matter of fact and degree capable of leading different people to different conclusions.¹⁰⁶ Their Lordships rejected the test of Gleeson CJ in *Lenah Game Meats*: that what was 'highly offensive to a reasonable person of ordinary sensibilities' was indicative of what was to be considered private.¹⁰⁷ This test was seen as indicating the proportionality of the expectation instead of a balancing of privacy against free expression.¹⁰⁸

⁹⁷ Ibid 472 (Lord Hoffmann).

⁹⁸ Ibid 480.

⁹⁹ Ibid 465.

¹⁰⁰ Ibid 466 (Lord Nicholls), 480 (Lord Hope). Baroness Hale echoed these sentiments, citing *A v B plc* [2003] QB 195 and *Venables* [2001] Fam 430: at 495.

¹⁰¹ Ibid 496 (Baroness Hale).

¹⁰² Ibid.

¹⁰³ Ibid 475 (Lord Hoffman).

¹⁰⁴ Ibid 468 (Lord Nicholls), 475 (Lord Hoffmann). Cf at 489 (Lord Hope), 502 (Baroness Hale). See also below n 327 and accompanying text.

¹⁰⁵ Ibid 475. See also 491 (Lord Hope), 504–5 (Lord Carswell).

¹⁰⁶ Ibid 504 (Lord Carswell).

¹⁰⁷ Ibid 466 (Lord Nicholls), 482–3 (Lord Hope), 495–6 (Baroness Hale), 504 (Lord Carswell).

¹⁰⁸ Ibid 466 (Lord Nicholls), 483 (Lord Hope), 496 (Baroness Hale).

The English courts have therefore completed a transformation from an equitable breach of confidence to an action for breach of confidence which equates to invasion of privacy. This transformation has received support.¹⁰⁹ However, it is not without conceptual difficulties. Little attention seems to have been focused on the legitimacy of the theoretical transformation of an equitable doctrine, based on a confidante's obligations of good conscience and for which an injunction is the major discretionary remedy, into what is studiously referred to by several judges as the 'action' for breach of confidence but which is evidently a tort protecting an aspect of human dignity, the major remedy for which is substantive damages.¹¹⁰ Indeed, the Court of Appeal has suggested that there is little, if any, purpose in judges who are determining urgent applications for interlocutory injunctions to consider this 'vexed question'.¹¹¹

The mere fact that something is private does not make it confidential.¹¹² Difficulties may also result from any residual elements of confidentiality when applied to the privacy context.¹¹³ If the claimant were still required to show an obligation of confidence, then a privacy claim could be rejected on the ground of the defendant's reasonable ignorance.¹¹⁴ Confidentiality should not protect publication of any images of a person in a public place, since such information would not have the necessary quality of confidence.¹¹⁵ Moreover, once information has reached the public domain, no action for confidentiality should remain regardless of how private the information may be. Finally, the action for breach of confidence goes nowhere in correcting the deficiency in the common law identified in *Kaye* concerning unreasonable intrusions.¹¹⁶

C New Zealand: Protection of Private Facts

The *New Zealand Bill of Rights Act 1990* (NZ) s 14 ('*Bill of Rights*') recognises a right to free speech but not a right to privacy. Nevertheless, a number of lower court decisions have favoured developing the common law to recognise an action for public disclosure of private facts, along the same lines as that available in the United States.¹¹⁷

¹⁰⁹ See, eg, Phillipson and Fenwick, above n 59.

¹¹⁰ A common approach has been to merely cite the dicta of Lord Goff in *A-G (UK) v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109, 281 as recognising that no pre-existing relationship of confidence is now required and acknowledging the influence of the *HRA*. Cf Lord Hoffmann's discussion of the 'shift in the centre of gravity of the action for breach of confidence' in *Campbell* [2004] 2 AC 457, 471–3. Even his Lordship steered clear of discussing the various implications for the development of the law on the ground that the case at hand 'fits squarely within both the old and new law': at 473.

¹¹¹ *A v B plc* [2003] QB 195, 205–6 (Lord Woolf CJ).

¹¹² Raymond Wacks, 'Breach of Confidence and the Protection of Privacy' (1977) 127 *New Law Journal* 328, 328.

¹¹³ Rabinder Singh and James Strachan, 'The Right to Privacy in English Law' [2002] *European Human Rights Law Review* 129, 155.

¹¹⁴ *Ibid.*

¹¹⁵ Jonathan Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' (2003) 62 *Cambridge Law Journal* 444, 457.

¹¹⁶ *Ibid.*

¹¹⁷ See *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 ('*Tucker*') (the plaintiff conducted a fundraising campaign for a heart operation and sought to prevent publication of certain private

In the course of these decisions, one judge remarked that ‘a person who lives an ordinary private life has a right to be left alone and to live the private aspects of his life without being subjected to unwarranted, or undesired, publicity or public disclosure.’¹¹⁸ Another judge observed that while the United States had a constitutional context that did not apply in New Zealand, ‘the good sense and social desirability of the protective principles enunciated are compelling.’¹¹⁹

The issue was brought to a head in March 2004 in *Hosking v Runting*,¹²⁰ which concerned an attempt by a television personality and his wife to restrain a magazine from publishing photographs of their 18-month-old twins. The Court of Appeal, sitting as a five-member bench, held by a narrow 3:2 majority that the tort of invasion of privacy should be recognised as forming part of the law of New Zealand.

The leading judgment was the joint judgment of Gault P and Blanchard J. Their Honours noted an impetus for change based on international concern for human rights. Further, the law governing liability for causing harm to others ‘necessarily must move to accommodate developments in technology and changes in attitudes, practices and values in society.’¹²¹ While such changes in the law were mainly effected by legislation following extensive enquiry and consultation, on occasion courts were called upon to decide a case where the current law did not point clearly to an answer and the law had to be developed to do justice between the parties.¹²² Their Honours noted that the cases to date in New Zealand had not sought to develop a general law of invasion of privacy. In recognising a claim only in cases of public disclosure of private facts, their Honours thought that the New Zealand cases were in effect very close to the position in the United Kingdom; except that in that jurisdiction the matter had been dealt with by way of an extension to the action for breach of confidence, rather than as a separate head of liability.¹²³

The absence of a broad right to privacy in the *Bill of Rights* did not prevent the courts from the incremental development of protection of aspects of privacy in appropriate circumstances.¹²⁴ Further, the protection in current legislation was

details, including criminal convictions; an interim injunction was granted but later lifted when it was shown that the convictions were in the public domain); *P v D* [2000] 2 NZLR 591 (a public figure was granted an injunction to restrain publication of a newspaper story that revealed that he had been treated in a psychiatric hospital and that he had been attended to by police in an emergency medical situation); *L v G* [2002] NZAR 495 (damages were awarded where a client took sexually explicit photographs of a prostitute and then had one of them published in an adult magazine without the prostitute’s consent). Cf *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415, 425 (a ‘splatter’ film filmed near a gravesite was not a breach of privacy because the information on the tombstone was not private information and the filming was not ‘highly offensive and objectionable to a reasonable person of ordinary sensibilities’ in the absence of any overt link between the film and the gravesite).

¹¹⁸ *Tucker v News Media Ownership Ltd* (Unreported, High Court of New Zealand, Jeffries J, 20 October 1986), as cited in *Tucker* [1986] 2 NZLR 716, 731 (McGrechan J).

¹¹⁹ *Tucker* [1986] 2 NZLR 716, 733 (McGrechan J).

¹²⁰ [2005] 1 NZLR 1 (*‘Hosking’*).

¹²¹ *Ibid* 5.

¹²² *Ibid* 5–6.

¹²³ *Ibid* 6; see also 60 (Tipping J).

¹²⁴ *Ibid* 27 (Gault P and Blanchard J).

limited and specifically focused.¹²⁵ While the *Bill of Rights* does make freedom of speech legally enforceable, freedom of speech was never intended to be absolute.¹²⁶

The joint judgment endorsed two ‘fundamental requirements’ for a successful claim of interference with privacy:

- 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.¹²⁷

The boundaries of this protection would be worked out through future decisions.¹²⁸ It was also unnecessary to decide whether the other three aspects of privacy identified by Prosser, including unreasonable intrusion into solitude or seclusion, should be recognised.¹²⁹

While Gault P and Blanchard J saw private facts as being those known to some people but not the world at large (and for this reason bearing some similarity to information having the quality of confidence), their Honours acknowledged that there was no simple test of what constituted a ‘private fact’.¹³⁰ Further, the ‘highly offensive to the reasonable person’ test — applied to the publicity requirement rather than the determination of what is private¹³¹ — was seen as an appropriate prerequisite so that revelation of mere trifling details would not sound in a remedy.¹³² Additionally, there needed to be widespread publicity as opposed to a technical publication, which is sufficient in defamation.¹³³ Moreover, the cause of action was based on humiliation, distress or loss of dignity. As such, no personal injury, including recognised psychiatric injury or economic loss, was necessary.¹³⁴

Their Honours saw a legitimate public concern as an appropriate defence, with the defendant bearing the onus of proof. It was thought ‘more conceptually sound’ to cast legitimate public concern as a defence, rather than as an element of the tort.¹³⁵ As a defence it was also analogous to the public interest defence to breach of confidence in the United Kingdom. A defence of legitimate public concern would mean that judges could determine the appropriate balance, in the circumstances being considered, between freedom of expression and the plain-

¹²⁵ Ibid 30, referring to, eg, *Privacy Act 1993* (NZ) (privacy of information: no civil liability); *Broadcasting Act 1993* (NZ) (‘privacy of individuals’: no definition and no civil liability for breaches); *Harassment Act 1997* (NZ) (fears for safety caused by another’s harassing behaviour: criminal sanctions but no civil remedies).

¹²⁶ *Hosking* [2005] 1 NZLR 1, 31 (Gault P and Blanchard J).

¹²⁷ Ibid 32. This was therefore akin to the formulation of the tort in the *Second Restatement*.

¹²⁸ Ibid.

¹²⁹ As done in *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415.

¹³⁰ *Hosking* [2005] 1 NZLR 1, 32.

¹³¹ Cf *Lenah Game Meats* (2001) 208 CLR 199, 226 (Gleeson CJ).

¹³² *Hosking* [2005] 1 NZLR 1, 35.

¹³³ Ibid 34–5.

¹³⁴ Ibid 35.

¹³⁵ See Prosser and Keeton, above n 45, 856–7, and as adopted in the *Second Restatement* formulation.

tiff's right to privacy. Thus, where there was a risk of serious injury, as in *Venables*, a 'very considerable level' of legitimate public concern would be required to outweigh it.¹³⁶ The deliberate use of the term *public concern* was intended to exclude information which was merely of interest to the public.

The joint judgment saw no need for special attitudes to public figures and their families,¹³⁷ unlike the position taken in the *Second Restatement*.¹³⁸ Instead, it was merely recognised that in the case of a public figure, the reasonable expectation of privacy in relation to many areas of life will be correspondingly reduced as public status increases.¹³⁹ Involuntary public figures may also experience a lessening of expectations of privacy, but not ordinarily to the extent of those who willingly put themselves in the spotlight.¹⁴⁰ Further, the two protection criteria were considered to provide adequate flexibility to protect the privacy of families of public figures and to accommodate for the special vulnerability of children.¹⁴¹ This includes what is considered to be a legitimate public concern that outweighs the right to privacy in circumstances in which there is evidence of a risk of personal injury.¹⁴² In *Hosking* there was no evidence of such risk. The photographs did not reveal any details with respect to which there could be a reasonable expectation of privacy. Publication of the photos also would not have been considered highly offensive to a reasonable person.

The third member of the majority, Tipping J, indicated 'general agreement' with the joint judgment.¹⁴³ However, despite professing a desire to make the law 'as simple and easy of application as possible in the interests of those who have to make decisions about what and what not to publish',¹⁴⁴ his Honour's summary of the tort does not exactly coincide with that of the joint judgment. His Honour's formulation of the tort was as follows:

- publication of information or material with respect to which the plaintiff had a reasonable expectation of privacy, unless that information or material constituted a matter of legitimate public concern justifying publication in the public interest. This reflected a variation of the first element of the joint judgment and its preference for treating legitimate public concern as a defence rather than as pertaining to the cause of action. As such it was closer to the formulation in the United States;
- whether the plaintiff had a reasonable expectation of privacy depended largely on whether publication of the information or material about the plaintiff's private life would, in the particular circumstances, cause substantial offence to a reasonable person. This again addressed the joint judgment's first element, and reflected the definition of 'private facts'

¹³⁶ *Hosking* [2005] 1 NZLR 1, 36.

¹³⁷ *Ibid* 33–4.

¹³⁸ *Second Restatement* § 652E(a) (1977).

¹³⁹ *Hosking* [2005] 1 NZLR 1, 33.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid* 38.

¹⁴² *Ibid* 35–6.

¹⁴³ *Ibid* 54.

¹⁴⁴ *Ibid* 62.

suggested by Gleeson CJ in *Lenah Game Meats*.¹⁴⁵ As such it differed from the joint judgment, which saw the consideration as a second element excluding trivialities; and

- whether there was sufficient public concern about the information or material to justify publication depended upon whether, in the circumstances, those to whom the publication was directed could reasonably be said to have a right to be informed about it. This is similar to the joint judgment's view that a matter of legitimate public concern differed from a matter merely of public interest.¹⁴⁶

The differences therefore lay in whether the standard of 'offence to a reasonable person' was relevant to the facts themselves or to their publication, and whether legitimate public concern was treated as a defence or an aspect of the tort. It is likely that questions as to whether and to what extent these variations make a real difference will depend on the particular circumstances.¹⁴⁷ However, the fact that there are differences in the majority judgments in espousing a new tort is an added complication that will not be welcomed by lower courts.

The main dissenting judgment was delivered by Keith J, with Anderson J delivering a short concurring judgment. Keith J's opposition to the recognition of the new tort was based on three grounds: free speech (as expressly recognised in the *Bill of Rights*); the existing protection of privacy under statutes such as the *Privacy Act 1993* (NZ) and the *Broadcasting Act 1993* (NZ); and the lack of an established need for the proposed cause of action.¹⁴⁸ However, freedom of speech has never been regarded as an absolute right, and a defence such as 'legitimate public concern' constitutes a means for setting an appropriate balance. Further, focused legislation would be no obstacle to the common law recognising a tort providing a civil remedy in other circumstances where considered appropriate.

The New Zealand approach offers an alternative paradigm for recognition of a common law right to privacy in the form of disclosure of private facts. However, while achieving the same end result as the United Kingdom courts, the New Zealand courts have developed the law without mutating the equitable action for breach of confidence under the influence of the *HRA*.¹⁴⁹ Instead, they have adopted the United States law on the point so far as it has been judged to be appropriate to New Zealand circumstances.¹⁵⁰ Perhaps a difficulty, if any, with

¹⁴⁵ (2001) 208 CLR 199, 226.

¹⁴⁶ *Hosking* [2005] 1 NZLR 1, 62.

¹⁴⁷ Keith J suggested that the tort will be easier to demonstrate under Tipping J's formulation: *ibid* 51.

¹⁴⁸ *Ibid* 42.

¹⁴⁹ See also David Lindsay, 'Playing Possum? Privacy, Freedom of Speech and the Media following *ABC v Lenah Game Meats Pty Ltd*' (2002) 7 *Media and Arts Law Review* 161, 180; David Lindsay, 'Protection of Privacy under the General Law following *ABC v Lenah Game Meats Pty Ltd*: Where to Now?' [2002] *Privacy Law and Policy Reporter* 101.

¹⁵⁰ As David Lindsay has said, if Australian courts are to extend the law to better protect privacy, it would be wise to start with a clean slate rather than to do so with the baggage of an existing cause of action designed to protect different interests: Lindsay, 'Protection of Privacy under the General Law', above n 149, 107.

the approach is that it may be viewed as something of a leap, as opposed to the common law tradition of incremental development.¹⁵¹

IV DEVELOPMENTS IN AUSTRALIA

It is worth noting that when the Australian Law Reform Commission ('ALRC') considered the matter of privacy, it did so in terms of the four United States categories — namely, intrusion on solitude or seclusion, appropriation of identity, public disclosure of private facts and display in a false light. The ALRC suggested that Australia should extend protection to the second and third categories, that is, public disclosure of private facts and appropriation of identity.¹⁵² By contrast, in *Lenah Game Meats* Gleeson CJ favoured the United Kingdom approach, protecting private information based on breach of confidence.¹⁵³ However, Gummow and Hayne JJ (with whom Gaudron J agreed) indicated that the first and third categories of privacy under the United States rubric — public disclosure of private facts and unreasonable intrusion on solitude or seclusion — came closest to protecting the interest identified by Sedley LJ and other judges as worthy of protection:¹⁵⁴ 'the fundamental value of personal autonomy'.¹⁵⁵

The only Australian case to date that has recognised a right to privacy also relied upon the United States framework, endorsing an action for breach of privacy in the form of an unreasonable intrusion on another's solitude.¹⁵⁶ In the 2003 Queensland District Court case *Grosse*, the plaintiff, the mayor of a local authority, alleged that she had suffered psychological harm in the form of, inter alia, post-traumatic stress disorder as the consequence of a prolonged course of stalking and harassment by the defendant, her former lover. This conduct included persistent loitering at or near the plaintiff's places of residence, work or recreation; instances of spying on her private life, unauthorised entry to her house and yard; undesired physical contact; repeated offensive phone calls; use by the defendant of offensive and insulting language towards the plaintiff; and offensive behaviour towards her friends and relatives.¹⁵⁷ The plaintiff's action was based on a variety of causes of action, including invasion of privacy, harassment, trespass to land, private nuisance, intentional infliction of harm under the rule in *Wilkinson v Downton*,¹⁵⁸ and negligent infliction of psychiatric damage. The defendant argued that his conduct was innocent, and done for the

¹⁵¹ Cf *Douglas v Hello! Ltd* [2001] QB 967, 997 (Sedley LJ): 'The common law ... grows by slow and uneven degrees. It develops reactively, both in the immediate sense that it is only ever expounded in response to events and in the longer-term sense that it may be consciously shaped by the perceived needs of legal policy.'

¹⁵² ALRC, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979) 130–1.
¹⁵³ (2001) 208 CLR 199, 224.

¹⁵⁴ *Ibid* 256.

¹⁵⁵ *Douglas v Hello! Ltd* [2001] QB 967, 1001.

¹⁵⁶ *Grosse* [2003] Aust Torts Reports ¶81-706.

¹⁵⁷ *Ibid* 64 136.

¹⁵⁸ [1897] 2 QB 57 ('*Wilkinson*').

protection of the plaintiff's reputation and that of a non-profit organisation in which they were both interested.¹⁵⁹

Skoien SJDC was of the view that the conduct of the defendant included a large number of acts which fell within the definition of 'unlawful stalking' in s 359B of the *Criminal Code Act 1899* (Qld) ('*Criminal Code*') and therefore amounted to an offence punishable by imprisonment pursuant to s 359E of the *Criminal Code*.¹⁶⁰ His Honour pointed out that in almost all of the offences contained in the *Criminal Code* in which an individual person was identified in the indictment as the complainant or victim, an actionable tort was also committed so that the victim would have a right to bring a civil claim for damages.¹⁶¹ His Honour stated that the same result should follow in the case of a new offence like stalking where the victim suffered personal injury or some other detriment.¹⁶²

For guidance, Skoien SJDC referred to the four categories of invasion of privacy recognised under United States law.¹⁶³ In particular, his Honour sought guidance from the comments of Gummow and Hayne JJ (with whom Gaudron J agreed) in *Lenah Game Meats*, and what his Honour saw as their implicit support for public disclosure of private facts and unreasonable intrusion upon seclusion as involving interests worth protecting.¹⁶⁴ His Honour then took the 'bold ... [but] logical and desirable step' of recognising an actionable right to privacy in the circumstances,¹⁶⁵ the essential elements of the cause of action being:

- 1 a willed act by the defendant;
- 2 which intrudes upon the privacy or seclusion of the plaintiff;
- 3 in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities; and
- 4 which causes the plaintiff detriment in the form of mental, physiological or emotional harm or distress, or which prevents or hinders the plaintiff from doing an act which he or she is lawfully entitled to do.¹⁶⁶

Skoien SJDC decided that while a defence of public interest should be available in an appropriate case, no such concept was involved here. It was also unnecessary to decide whether an intention to protect or cause a benefit to the plaintiff should be a defence, since no such intention on the part of the defendant was found to have been present on the facts.¹⁶⁷

His Honour also found that some, but not all, of the other pleaded causes of action had been established.¹⁶⁸ Since the stalking that constituted the harassment

¹⁵⁹ *Grosse* [2003] Aust Torts Reports ¶81-706, 64 136.

¹⁶⁰ *Ibid* 64 183.

¹⁶¹ *Ibid* 64 184.

¹⁶² *Ibid*.

¹⁶³ See above Part III(A).

¹⁶⁴ *Grosse* [2003] Aust Torts Reports ¶81-706, 64 186, citing *Lenah Game Meats* (2001) 208 CLR 199, 256.

¹⁶⁵ *Grosse* [2003] Aust Torts Reports ¶81-706, 64 187.

¹⁶⁶ *Ibid*.

¹⁶⁷ *Ibid*.

¹⁶⁸ *Ibid* 64 187-9.

in this case also made out the cause of action in the invasion of privacy, there was no need to decide whether a tort of harassment should be recognised.¹⁶⁹ Otherwise, the claim for intentional infliction of harm based on *Wilkinson*¹⁷⁰ was held to have been made out, inasmuch as there had been damage in the form of injury to mental health capable of causing a recognisable physical condition in the form of post-traumatic stress disorder.¹⁷¹ This finding relieved Skoien SJDC of a decision regarding the claim of negligent infliction of psychiatric harm.¹⁷² While several instances of the defendant's behaviour were found to have amounted to trespass to land, on other occasions, where there had been no actual entry onto the plaintiff's premises, the conduct of the defendant amounted to nuisance.¹⁷³ Moreover, while battery was technically committed through the defendant's administration of an unwanted kiss, it was a matter of *de minimis* for which any damages awarded would only be nominal.¹⁷⁴ By contrast, assault in the sense of an apprehension of contact was held not to have been established.¹⁷⁵ Ultimately his Honour awarded compensatory damages for the invasion of privacy in the amount of \$108 000, together with \$50 000 aggravated damages and \$20 000 exemplary damages, making a total damages award of \$178 000.¹⁷⁶ An alternative assessment was made with respect to the other causes of action that had been upheld, although in each case the appropriate damages were less than those awarded for invasion of privacy (since some, but not all, of the defendant's conduct was relevant), and were regarded as duplicating those damages. The defendant lodged an appeal to the Queensland Court of Appeal, but the case was settled before it was heard.¹⁷⁷

Skoien SJDC was clearly influenced by the United States tort of unreasonable intrusion on seclusion when formulating what he saw as the necessary elements of this nascent tort. However, when compared with the *Second Restatement* § 652B a number of variations are evident, although it is not clear in the absence of discussion whether his Honour intended these changes. The United States formulation 'intentionally intrudes ... upon the solitude or seclusion of another' was restated in two separate elements: (a) a willed act by the defendant; and (b) which intrudes upon the privacy or seclusion of the plaintiff. In changing the intention requirement from covering both the act and result to the act alone, the Queensland formulation would seem to allow for the possibility of culpable intrusions which are accidental, provided the intruding act itself is intended. The second Queensland element deviates from 'solitude or seclusion' to 'privacy and seclusion' without stating a reason. 'Seclusion', the word common to both

¹⁶⁹ Ibid 64 188.

¹⁷⁰ This cause of action was recently reaffirmed in Queensland in *Carrier v Bonham* [2002] 1 Qd R 474.

¹⁷¹ [2003] Aust Torts Reports ¶81-706, 64 188.

¹⁷² Ibid.

¹⁷³ Ibid 64 189.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid 64 188-9.

¹⁷⁶ Ibid 61 189-91.

¹⁷⁷ Barry Stewart, *Invasion of Privacy: A Recent Decision and Its Risks for Australian Business* (26 February 2004) Ebsworth & Ebsworth Lawyers <http://www.ebsworth.com.au/ebsworth/web site/eepublishing.nsf/Content/Publication_Alert_PrivacyUpdate_26Feb04>.

formulations, connotes being shut off or kept apart, while ‘solitude’ conveys a sense of being alone. ‘Privacy’, as already noted, is a term notoriously difficult to define. If the term were used, it would need to be accompanied by some indication of its intended meaning.

The same objective standard for the reaction has been adopted, namely that the intrusion ‘would be highly offensive to a reasonable person of ordinary sensibilities’. In light of the wide range of potential interferences, from the trifling to the most grievous, this would seem to be a sensible limitation which safeguards against indeterminate liability. The limitation is easily justified if, as is the case in the United States, the type of damage being contemplated includes mere emotional or mental distress.¹⁷⁸

Perhaps the major difference between the United States formulation and that introduced by *Skoien* SJDC was the addition of a fourth element requiring ‘detriment in the form of mental psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do’.¹⁷⁹ Prima facie, that ought to be a level of damage which is relatively easily shown. However, the common law traditionally divides civil wrongs in terms of trespasses and actions on the case. A significant aspect of the distinction lies in the fact that damage is the gist of the action in the latter type of claim (such as negligence), whereas the former type of claim is actionable per se. In Australia, the basis of the distinction is whether the injury is regarded as direct or indirect: if direct, then the claim is classified as a trespass; by contrast, if any harm is indirect — or consequential — it is an action on the case.¹⁸⁰ Applying this analysis suggests that in Australia unreasonable intrusions, if recognised, should rank as a trespass and be actionable without proof of damage. *Skoien* SJDC’s fourth element would therefore be unnecessary.

By contrast, an invasion of privacy in the form of a public disclosure of private facts — as in the United Kingdom and New Zealand — involves an indirect but intentional injury: the plaintiff’s dignity or humanity is affronted as a consequence of the defendant’s act. This would indicate that, under current Australian thinking, an action for disclosure of private facts should be classified as an action on the case, ranking alongside the innominate torts such as the action based on *Wilkinson*. As an action on the case, it would require proof of damage of a particular kind in order to be compensable.

This analysis may be distinguished from that which applies in, for example, the United Kingdom. There, the distinction between trespass and actions on the case is based on intention, rather than directness.¹⁸¹ Disclosure of private facts, whether called ‘misuse of private information’ or some other name, as an

¹⁷⁸ As opposed to, for example, the ‘recognisable psychiatric damage’ required for negligence actions in Australia: see, eg, *Mount Isa Mines Limited v Pusey* (1970) 125 CLR 383; *Civil Liability Act 2002* (NSW) s 31; *Wrongs Act 1958* (Vic) s 72.

¹⁷⁹ *Grosse* [2003] Aust Torts Reports ¶81-706, 64 187.

¹⁸⁰ *Platt v Nutt* (1988) 12 NSWLR 231; *Hutchins v Maughan* [1947] VLR 131.

¹⁸¹ *Fowler v Lanning* [1959] 1 QB 426.

intentional injury, would be regarded as a form of trespass and therefore actionable per se. Indeed, this is reflected in the observation of New Zealand judges Gault P and Blanchard J in *Hosking*:

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. ... We are not concerned with issues of whether there need be recognised psychiatric harm.¹⁸²

The requirement that the publicity be ‘truly’ humiliating and distressing is reinforced by the requirement that it be ‘highly offensive to a reasonable person’.¹⁸³

Other courts have shown greater reticence than Skoien SJDC in recognising an enforceable right to privacy. In *Richards v Victoria*, the plaintiff, an unsatisfied litigant who was diagnosed as suffering from a delusional disorder, alleged that he was the victim of harassment by several police officers in a series of incidents.¹⁸⁴ The plaintiff’s personal circumstances had seen him living in his car on public lands. While Osborn J accepted that the plaintiff had been regularly checked by police, including checks of his licence and on occasion the shining of lights into his car, his Honour did not accept several bizarre claims including allegations of harassment using a police helicopter and various unprovoked assaults.¹⁸⁵ After referring to *Grosse*, his Honour thought that it was unnecessary to express a final view as to whether a separate tort of invasion or harassment should be recognised.¹⁸⁶ This was because the plaintiff had failed in any event to show that the alleged invasions of privacy could be regarded as highly offensive to a reasonable person of ordinary sensibility, or that any unwanted harassment was of such a degree of seriousness that no reasonable person should reasonably be expected to endure it.¹⁸⁷

By contrast, the decision in *Giller* was dismissive of a cause of action for breach of privacy. Like *Grosse*, the case involved the aftermath of the breakdown of a de facto relationship. The female plaintiff made a number of claims, the most relevant for present purposes related to the distress and humiliation she felt as the result of the defendant showing and threatening to distribute a video of the parties engaging in sexual activities.¹⁸⁸ The plaintiff relied on three separate causes of action: breach of confidence, intentional infliction of mental harm and breach of privacy.¹⁸⁹ Gillard J dismissed all three claims. While accepting that persons engaging in sexual activity in the privacy of their home involved a relationship of mutual trust and confidence, and that the showing of video footage of this conduct without the consent of the parties would be an unauthor-

¹⁸² [2005] 1 NZLR 1, 35.

¹⁸³ *Ibid.*

¹⁸⁴ [2003] VSC 368 (Unreported, Osborn J, 2 October 2003) [7].

¹⁸⁵ *Ibid* [86].

¹⁸⁶ *Ibid* [93].

¹⁸⁷ *Ibid.*

¹⁸⁸ [2004] VSC 113 (Unreported, Gillard J, 7 April 2004) [1].

¹⁸⁹ *Ibid* [148]–[171] (breach of confidence); [172]–[186] (intentional infliction of mental harm); [187]–[189] (privacy).

ised distribution of confidential information, his Honour emphasised that the cause of action for breach of confidence was an equitable one.¹⁹⁰ General damages for physical or mental injury, distress or upset are common law remedies, but were not recoverable in equity.¹⁹¹ In so finding, his Honour confronted the ‘vexed question’ that the English Court of Appeal suggested that judges should not take time to address. His Honour reached a justifiable conclusion which recognised the consequences of not regarding the equitable action as having somehow been converted into a tort.¹⁹² The plaintiff also failed in her claim for intentional infliction of mental harm, pursuant to *Wilkinson*. This was because it was essential for the plaintiff to prove some form of physical or mental injury. The law did not allow for recovery for pure mental distress alone.¹⁹³

Unfortunately, his Honour gave the claim for breach of privacy short shrift: it was noted that *Kaye* had held that there was no cause of action based on personal privacy, but that nonetheless *Lenah Game Meats* had effectively opened the door to such a development.¹⁹⁴ His Honour simply concluded, however, that in his opinion the ‘law had not developed to the point where the law in Australia recognises an action for breach of privacy.’¹⁹⁵ Gillard J cited three authorities in support. The first was the 1998 edition of a textbook, which merely examined the topic of privacy in a general fashion.¹⁹⁶ The other two were dicta by Murphy J and Kirby P.¹⁹⁷ However, the first of these dicta was in the judgment of Murphy J in the 1982 High Court case *Church of Scientology Inc v Woodward*, where his Honour referred to ‘unjustified invasion of privacy’ as one of the ‘developing torts’.¹⁹⁸ The other was Kirby P’s dicta in *Australian Consolidated Press Ltd v Ettingshausen* that, due to legislative inaction, no tort in relation to invasion of privacy existed and that it would therefore be inappropriate to award

¹⁹⁰ *Ibid* [160].

¹⁹¹ *Ibid*. Gillard J held that the *Lord Cairns’ Act* equitable damages were not available because these were only available in addition to, or in substitution for, an injunction or specific performance. Here the plaintiff had only claimed damages for the breach of confidence, not an injunction: at [165].

¹⁹² This may raise the wider issue of the accepted degree of fusion between law and equity. It would seem that the orthodox Australian view is dualist; that is, while administration of the common law and equity may have become fused, they are based upon different systems of justice. In the words of Walter Ashburner, ‘the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters’: Denis Browne, *Ashburner’s Principles of Equity* (2nd ed, 1933) 18. See also *Felton v Mulligan* (1971) 124 CLR 367, 392 (Windeyer J); R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (4th ed, 2002) xi; P D Finn, *Fiduciary Obligations* (1977). Some English commentators have less difficulty in recognising a law of obligations that integrates equity and the common law: see, eg, Peter Birks (ed), *English Private Law* (2000); *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, 134–5 (Denning J); *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, 924–5 (Lord Diplock).

¹⁹³ *Giller* [2004] VSC 113 (Unreported, Gillard J, 7 April 2004) [177]. His Honour saw concerns of a flood of litigation if, for example, a shop assistant, or a club bouncer or barman, who was publicly offensive to a customer, was to be held liable for any humiliation or distress caused: see also *Wainwright v Home Office* [2004] 2 AC 406, 428 (Lord Scott).

¹⁹⁴ *Giller* [2004] VSC 113 (Unreported, Gillard J, 7 April 2004) [188].

¹⁹⁵ *Ibid*.

¹⁹⁶ John Fleming, *The Law of Torts* (9th ed, 1998).

¹⁹⁷ *Giller* [2004] VSC 113 (Unreported, Gillard J, 7 April 2004) [188].

¹⁹⁸ (1982) 154 CLR 25, 68.

the plaintiff in that case damages for invasion of his privacy.¹⁹⁹ In other words, in support of his summary dismissal of the claim for breach of privacy, Gillard J cited three authorities that all predated *Lenah Game Meats* and its rejection of *Victoria Park* as a barrier to the recognition of a common law right to privacy. Indeed the statement by Murphy J would seem to offer some encouragement for recognition of the tort, rather than being against it. The authorities cited therefore do not constitute a particularly compelling case against the recognition of a tort of invasion of privacy, or at least do not justify a summary dismissal of the claim. Gillard J made no reference to *Grosse*, although it must be acknowledged that the intrusion tort it recognised would have been of limited assistance in the disclosure-type scenario in issue.

In the absence of a detailed examination of any proposed tort of invasion of privacy, two major points emerge from *Giller*. The first is the inadequacy of the action for breach of confidence in providing effective redress for disclosure of private facts where the plaintiff wishes to recover compensation for alleged injury. The action only has utility in this regard if it is developed beyond its traditional equitable form and assumes an existence in tort. This squarely addresses an issue that United Kingdom courts have been reluctant to confront directly. The second is the question of whether the tort of intentional infliction of mental harm under the rule in *Wilkinson* is a sufficient response to invasions of privacy, and whether it relieves the need to consider development of a separate tort even if one concludes that there is a need for some form of protection of personal privacy. This will be considered in detail in the following section.

V PROTECTION OF PRIVACY IN AUSTRALIA?

A *Impetus for Change*

Should privacy in Australia receive more than the piecemeal protection currently available? That there have been developments in other common law countries may be a reason for change in itself. Naturally, however, the impetus for any change in Australia cannot be the same as in the United Kingdom, which operates under the influence of the *HRA* and the *ECHR*. Further, as Callinan J pointed out, Australia should not merely adopt United States jurisprudence, since the political and constitutional history of Australia is unlike that of the United States, where the relevant jurisprudence is complicated by the First Amendment.²⁰⁰ Instead, his Honour suggested that '[a]ny principles for an Australian tort of privacy would need to be worked out on a case by case basis in a distinctly Australian context.'²⁰¹

Australia does share significant historical, political and cultural similarities with New Zealand. As such, the influences that persuaded the New Zealand

¹⁹⁹ (Unreported, New South Wales Court of Appeal, Gleeson CJ, Kirby P and Clarke JA, 13 October 1993) 15.

²⁰⁰ *Lenah Game Meats* (2001) 208 CLR 199, 328.

²⁰¹ *Ibid.*

Court of Appeal might be found equally persuasive by Australian courts. Three factors can be highlighted.

The first consideration is the need for the law to accommodate developments in technology and changes in attitudes, practices and values in society.²⁰² The 21st century is a time of telephoto lenses, long-range parabolic microphones, and mobile phone cameras, as well as other technological advances such as the internet that provide easy means of dissemination of information to a worldwide audience. These advances mean that there is now nowhere on the planet that a person may retreat with an absolute assurance of being left alone. Also, access to means of widespread publicity is now at the fingertips of many rather than a few. Further, while it has perhaps taken longer to become established than that of the United Kingdom, there is now a developing tabloid media in Australia where the profits are the dominant goal and the chequebook is a ready tool in trade when trying to 'out-scoop' the opposition in competition for stories. This is productive of a zealous style of journalism for which sensation, scandal and emotion are common touchstones. These are all developments of the last 10 or so years.

The second factor is the emergence of international concern for the protection of human rights. The relevant right protected by privacy has been variously described as the 'well-being and development of an individual',²⁰³ 'human autonomy and dignity',²⁰⁴ or 'human dignity'.²⁰⁵ There is no reason why an Australian would place any lesser weight on such a right.

The third factor is that privacy is a right or interest recognised to varying degrees of particularity in international covenants and conventions, including those to which Australia is a party. As Gault P and Blanchard J pointed out in *Hosking*, there is an international trend to develop the common law consistently with such treaties and conventions:

To ignore international obligations would be to exclude a vital source of relevant guidance. It is unreal to draw upon the decisions of Courts in other jurisdictions (as we commonly do) yet not draw upon the teachings of international law. There is the additional factor in the field of human rights declared by the *International Covenant on Civil and Political Rights* ... that individuals can seek remedies against the state at international law after exhausting domestic remedies. This cannot be disregarded in considering whether, in a particular case in the domestic Courts, a remedy should be available.²⁰⁶

A further matter that may potentially provide additional impetus in Australia is a likely outcome of recent discussions of the Standing Committee of Attorneys-General directed towards achieving uniformity in defamation laws. A major obstacle that has prevented such an outcome in the past has been the justification

²⁰² *Hosking* [2005] 1 NZLR 1, 5 (Gault P and Blanchard J).

²⁰³ *Campbell* [2004] 2 AC 457, 464 (Lord Nicholls).

²⁰⁴ *Ibid* 472 (Lord Hoffmann).

²⁰⁵ *Lenah Game Meats* (2001) 208 CLR 199, 226 (Gleeson CJ). It has been suggested that there is a division of thought within the High Court between a liberal-utilitarian approach and narrower Kantian approach which may result in a wider or narrower protection for privacy: see Megan Richardson, 'Whither Breach of Confidence: A Right of Privacy for Australia?' (2002) 26 *Melbourne University Law Review* 381.

²⁰⁶ [2005] 1 NZLR 1, 6.

defence, with four jurisdictions (Victoria, South Australia, Western Australia and the Northern Territory) applying the common law standard of truth alone, and four jurisdictions (Queensland, Tasmania, the Australian Capital Territory and New South Wales) applying a truth and public benefit/public interest standard. The latter meaning may be traced back to recommendations of a House of Lords Select Committee in 1847, which was first adopted in New South Wales in the *Defamation Act 1847* (NSW). This was seemingly in order to facilitate the social reintegration of ex-convicts,²⁰⁷ but has since provided a ‘second best’ measure of protection from invasion of privacy in the form of disclosure of private matters under the guise of revealing the truth. The public benefit/public interest standard requires a publication to promote the public good rather than merely pandering to those avid for scandal or invading the legitimate privacy of an individual.²⁰⁸ The most recent attempt to reach uniformity has included an agreement for all jurisdictions to apply the common law defence of truth alone, meaning a loss of protection for privacy in those jurisdictions previously applying the public benefit/public interest standard.²⁰⁹

B *Intentional Infliction of Mental Harm: A Viable Alternative?*

In *Grosse*, a claim based on the rule in *Wilkinson* was successful, while a similar claim was dismissed in *Giller* due to a lack of evidence of the necessary damage.²¹⁰ Could such a claim be a sufficient means of dealing with invasions of privacy without the need to recognise a new tort?

In the first place, the tort of intentional infliction of mental harm will not be a complete answer. It may have been suitable in the kind of circumstances contemplated in *Grosse* and *Giller*, namely an individual being subjected to the deliberately vindictive acts of another. Where, by contrast, the invasion of privacy is by the media, a plaintiff is likely to be confronted with the argument that the defendant’s intention was to cover the story, rather than inflict harm on the plaintiff. The tort of intentional infliction of mental harm would therefore be confined to certain kinds of cases, just as trespass and nuisance or other causes of action that make up the current patchwork of protection may be effective in particular cases to which they are suited.

The intentional infliction of mental harm tort may involve a more fundamental difficulty. Recently, in *Wainwright v Home Office*, Lord Hoffmann (with whom the other Law Lords agreed) considered an argument that an action for invasion of privacy could be based on *Wilkinson*.²¹¹ However, as Lord Hoffmann pointed out, *Wilkinson* was decided at a time when the Privy Council in *Victorian Railways Commissioners v Coultas*²¹² was authority for the view that nervous

²⁰⁷ Fleming, above n 196, 613–14.

²⁰⁸ *Rofe v Smith’s Newspapers Ltd* (1924) 25 SR (NSW) 4, 21–2 (Street ACJ).

²⁰⁹ See Standing Committee of Attorneys-General, *Model Defamation Provisions* (2004) s 29; cf the suggestion by the ALRC that *on its own* such a change might not be enough to justify recognition of a tort protecting privacy: ALRC, *Unfair Publication*, above n 152, 118.

²¹⁰ [2004] VSC 113 (Unreported, Gillard J, 7 April 2004) [293].

²¹¹ [2004] 2 AC 406.

²¹² (1888) 13 App Cas 222 (‘*Coultas*’).

shock was too remote a consequence of a negligent act to be a recoverable head of damage. It was evident that the decision in *Wilkinson*, by being based on intention, was an attempt to evade *Coultas*, although its reliance on intention was dubious since Mr Downton in fact only intended to cause Mrs Wilkinson to suffer a fright, not any resulting illness. An unanswered question, therefore, was whether the intention had to be actual or imputed. When the rule in *Wilkinson* was next considered,²¹³ *Coultas* was no longer good authority and *Wilkinson* was comfortably accommodated by the law concerning nervous shock caused by negligence, dispensing with the need to address whether the requisite intention needed to be actual or merely imputed. Lord Hoffmann concluded that, since in cases of psychiatric injury there is no point in seeking to rely on intention when negligence will do just as well, *Wilkinson* was left with ‘no leading role in the modern law.’²¹⁴ While it was true that a tort of intentional infliction of mental harm would not involve the policy considerations which gave rise to the limits on claims for negligence, the defendant must actually have acted in a way which he or she knew to be unjustifiable and intended to cause harm, or at least acted without caring whether he or she caused harm or not. The kind of imputed intention verging on negligence contemplated by *Wilkinson* would not do.²¹⁵

What, then, is the position in Australia? In *Wilkinson*, Wright J held that the defendant was liable for having ‘wilfully done an act calculated to cause physical harm to the plaintiff’,²¹⁶ since the defendant’s act was ‘so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant’.²¹⁷ It did not matter that more harm was done than was expected or anticipated, since ‘that is commonly the case with all wrongs.’²¹⁸ In Australia, the first case of intentional harm was *Bunyan v Jordan*.²¹⁹ Latham CJ stated that if a person ‘deliberately does an act of a kind calculated to cause physical injury ... and in fact causes physical injury to that other person, he is liable in damages.’²²⁰ ‘Calculated’ was regarded as meaning objectively likely to happen. Latham CJ stated that the requirement was that ‘it was naturally to be expected that they might cause a very severe nervous shock.’²²¹ More recently, in *Northern Territory v Mengel*, it was said that *Wilkinson* proscribed ‘acts which are calculated in the ordinary course to cause harm ... or which are done with reckless indifference to the harm that is likely to ensue’.²²²

In *Carrier v Bonham*, McPherson JA (with whom McMurdo P and Moynihan J agreed) noted the oddity in *Wilkinson* that it was an intentional act which had

²¹³ *Janvier v Sweeney* [1919] 2 KB 316.

²¹⁴ [2004] 2 AC 406, 425.

²¹⁵ *Ibid.*

²¹⁶ [1897] 2 QB 57, 58–9.

²¹⁷ *Ibid.* 59.

²¹⁸ *Ibid.*

²¹⁹ (1937) 57 CLR 1.

²²⁰ *Ibid.* 10 (citations omitted).

²²¹ *Ibid.* 11. See also at 17 (Dixon J).

²²² (1995) 185 CLR 307, 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ) (citations omitted).

reasonably foreseeable consequences, which were apparently not in fact foreseen by the defendant in all their severity.²²³ However, his Honour pointed out that the same could be said for most everyday acts that are called actionable negligence and which are in fact wholly or partly a product of intentional conduct.²²⁴ For example, driving a motor vehicle at high speed through a residential area is an intentional act even if injuring people or property on the way is not a result actually intended.²²⁵ In his Honour's view, *Wilkinson* was merely an example of that kind.²²⁶ Indeed, his Honour reasoned that it was no longer relevant whether the act was done intentionally or negligently, or partly one and partly the other, since what matters is whether the *consequences* of the conduct, whether foreseen or not, were reasonably foreseeable and as such should have been averted or avoided.²²⁷ In fact, there was but a single tort of failing to use reasonable care to avoid damage however caused.²²⁸

It may be, therefore, that Australian courts should also take the view that the rule enunciated in *Wilkinson* was a creature of its time and is of limited utility today. This would mean that there would be no simple alternative available in Anglo-Australian law based on an intentional infliction of mental distress. If there is in truth a single tort related to mental harm, then presumably it is subject to the well-accepted limits of requiring a recognisable psychiatric illness, and the plaintiff's reaction should be judged against the standard of a person of normal resilience.²²⁹

This may raise the question that if the principle in *Wilkinson* itself is a poor vehicle, could privacy nevertheless be protected by recognising an action for an intentional infliction of emotional distress, similar to that operating in the United States? This tort requires that the defendant must have engaged in 'extreme and outrageous behaviour.'²³⁰ Once again there would be difficulties reconciling the tort with the refusal of Anglo-Australian courts to compensate ordinary distress and other emotions. Even though this tort is supported by an extensive body of jurisprudence in the United States, its introduction in Australia might be considered overkill if the main objective is merely to find a way of recognising a right to privacy.

C Potential Form of the Tort

If, as is argued, there is sufficient impetus for Australia to recognise a right to privacy, the next issue is how that right should be protected. Any protection of privacy should correspond to the factors that influence its adoption. It may be

²²³ [2002] 1 Qd R 474, 484.

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ See *Giller* [2004] VSC 113 (Unreported, Gillard J, 7 April 2004) [172]–[186].

²³⁰ *Second Restatement* § 46 (1977).

accepted, for example, that the impetus identified above does not go so far as to promote a general right to privacy.²³¹

Moreover, the above factors do not support protection from breach of privacy in the form of what the United States calls ‘appropriation’. Even in the United States, appropriation of another’s name or likeness has been criticised as being more to do with a right of publicity than with a right to privacy.²³² As Gummow and Hayne JJ stated in *Lenah Game Meats*, the plaintiff’s complaint in such a case is more likely to be that the defendant has acted for a commercial gain, thereby depriving the plaintiff of the opportunity of commercial exploitation of that name or likeness for his or her own benefit.²³³ This has nothing to do with, for example, a right to human dignity.

Indeed, Raymond Wacks has opined that not only appropriation but also the ‘false light’ category in the United States is ‘a questionable application of “privacy” to circumstances that have only the most tenuous relationship to the concept.’²³⁴ Perhaps a stronger basis for rejecting ‘false light’ claims in Australia is to draw a parallel to the position of the High Court when considering whether to expand the tort of negligence. In the United States, being portrayed in a ‘false light’ often arises in relation to reporters embellishing facts to produce ‘a better story’²³⁵ or inappropriate captions being affixed to photographs. It need not, but often does, result in damage to reputation, meaning that there is a high degree of overlap with defamation. The two torts are often pleaded in the alternative.²³⁶ However, it is likely that in Australia, due to the definition of defamatory matter embracing publications which lower the plaintiff in the estimation of others, induce others to shun or avoid the plaintiff, or expose the plaintiff to be despised or ridiculed, there will be an even greater overlap with defamation. The High Court has previously indicated that, in order to preserve coherence in the law, it is unwilling to expand the law where it would lead to one tort encroaching upon the established domain of another.²³⁷ This is especially the case with defamation laws, which ‘strike a balance of rights and obligations, duties and freedoms.’²³⁸

In relation to the remaining two manifestations, there is good reason to support recognition of an action for invasion of privacy *both* in the form of unreasonable intrusion and disclosure of private facts.

In addition to having the support of the ALRC, there was at least implicit support from the High Court in *Lenah Game Meats* for protection from disclo-

²³¹ *Wainwright v Home Office* [2004] 2 AC 406 (humiliation following strip search at prison). This accords with the recommendation of the ALRC: see ALRC, *Privacy*, Report No 22 (1983) vol 2, 26.

²³² See, eg, Melville B Nimmer, ‘The Right of Publicity’ (1954) 19 *Law and Contemporary Problems* 203.

²³³ (2001) 208 CLR 199, 256.

²³⁴ Raymond Wacks, *Personal Information: Privacy and the Law* (1989) 35–6.

²³⁵ *Cantrell v Forest City Publishing Co*, 419 US 245 (1974) (a report following up the effect on the family of a man who died in a bridge disaster emphasised the family’s poverty and contained many inaccuracies, including statements concerning the wife’s mood and attitude when the reporter had not even talked to her. This was held to be an invasion of privacy).

²³⁶ See Prosser and Keeton, above n 45, 865.

²³⁷ *Sullivan v Moody* (2001) 207 CLR 562; *Tame v New South Wales* (2002) 211 CLR 317.

²³⁸ *Sullivan v Moody* (2001) 207 CLR 562, 576 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

sure of private facts, although Gummow and Hayne JJ manifested such support by referring to the relevant section of the *Second Restatement*,²³⁹ while Gleeson CJ endorsed a United Kingdom-style development of breach of confidence.²⁴⁰ This protection might be seen as a useful adjunct to the protection of private information from wrongful use or disclosure by those who have collected or are in possession of it under the Information Privacy Principles²⁴¹ and National Privacy Principles²⁴² enacted at the federal and state level in Australia, as well as in New Zealand and the United Kingdom.²⁴³ It will also replace the protection enjoyed for many years in Queensland, Tasmania, the Australian Capital Territory and New South Wales by virtue of the public benefit/public interest requirement for the justification defence to defamation, if and when it is lost through the reform of defamation laws by the Standing Committee of Attorneys-General.

An obvious shortcoming of the recognition of the disclosure of private facts tort alone is that it is unable to provide a remedy for all media invasions, such as where there is a physical intrusion but usable information is not obtained, disclosed or otherwise used.²⁴⁴ Yet invasion of privacy in the form of unreasonable intrusion has been referred to as the ‘archetypal’ form of breach of privacy.²⁴⁵ Cases such as this prompted the English Court of Appeal’s complaint regarding the inadequacy of existing laws in *Kaye* — a criticism still unaddressed notwithstanding the developments culminating in *Campbell* — and formed the basis of recognition of a right to privacy in *Grosse*.²⁴⁶ There is sufficient impetus for the tort’s recognition, with modern media representatives not infrequently crossing the line of propriety in their competitive zeal.

Like the *Second Restatement* § 652B, an Australian unreasonable intrusion tort should encompass intrusions ‘physical or otherwise’ in order to embrace the technological advances in surveillance that are now available. Whether the ‘solitude or seclusion’ formulation in the United States should be adopted is more problematic. As has been seen, Skoien SJDC in *Grosse* substituted this with the phrase ‘privacy or seclusion’.²⁴⁷ Further, recent cases in the United States have recognised that the unreasonable intrusion tort may apply even where the plaintiff was in a public or semi-public place, such as a restaurant or in the workplace.²⁴⁸ Such recognition may make words such as ‘seclusion’ and ‘solitude’ problematic insofar as they suggest locations generally not open to

²³⁹ *Lenah Game Meats* (2001) 208 CLR 199, 253–6.

²⁴⁰ *Ibid* 224–5.

²⁴¹ *Privacy Act 1988* (Cth) s 14; and in some states: see, eg, *Privacy and Personal Information Protection Act 1998* (NSW) pt 2 div 1; *Information Privacy Act 2000* (Vic) s 14.

²⁴² *Privacy Amendment (Private Sector) Act 2000* (Cth) s 6.

²⁴³ *Privacy Act 1993* (NZ) s 6; *Data Protection Act 1998* (UK) c 29, s 4.

²⁴⁴ Helen Fenwick and Gavin Phillipson, ‘Confidence and Privacy: A Re-Examination’ (1996) 55 *Cambridge Law Journal* 447, 454.

²⁴⁵ Fleming, above n 196, 666.

²⁴⁶ [2003] Aust Torts Reports ¶81-706, 64 187 (Skoien SJDC).

²⁴⁷ *Ibid*.

²⁴⁸ *Stessman v American Black Hawk Broadcasting Co*, 416 NW 2d 685, 687–8 (Lavorato J) (Iowa, 1987) (restaurant); *Sanders v American Broadcasting Companies Inc*, 978 P 2d 67, 69 (Werdegar J) (Cal, 1999), review denied 2000 Cal LEXIS 1892 (Cal, 2000) (workplace).

public view. The real focus in such cases may ultimately be best designated by the term ‘privacy’ or, more accurately, a state or situation in which the plaintiff has a reasonable expectation of privacy.

Adoption of such a meaning has a number of advantages. It recognises that the concept is a matter of fact and degree rather than a matter of absolutes. There will no doubt be a reasonable expectation of privacy where someone is in his or her own home, or where a swimmer sunbathes on a private as opposed to a public beach. By the same token, there would be little if any expectation of privacy in a public shopping centre.²⁴⁹ However, the ‘reasonable expectation’ test also accommodates some cases where the plaintiff is in certain public places.

While the physical setting may be a significant factor when deciding whether there is a reasonable expectation of privacy, it should not be conclusive. Much will depend on the circumstances of the particular case. A niche in a public hallway in circumstances where the parties have gone to lengths to ensure they are not overheard might be regarded as private. Similarly, a parishioner engaged in prayer in a public church should be free from intrusion. The situation may become complicated where, for example, the church visit is in order to mourn a person of public interest. In this case, the expectation as to privacy may alternate between being high and low.

Reasonable expectations of privacy may also accommodate cases involving public figures. Public figures have been defined as, for example, ‘persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport, or in any other domain.’²⁵⁰ The common factor in such a definition is the element of choice. There is, in addition, a category of persons who are unwittingly thrust into the spotlight, perhaps by virtue of their association with an event that attracts the attention of the media.

It would be possible to develop a special test for public figures. For example, it might be asked whether, at the particular time, the individual was ‘contribut[ing] to [a] debate of general interest to society’,²⁵¹ such as performing official functions rather than engaging in activities relating only to his or her private life. Under such a test, a public figure photographed shopping might be deemed as not contributing to a debate of general interest, and therefore entitled to his or her privacy, when, in fact, by venturing into such a public situation it could be said that he or she could not reasonably expect to have his or her privacy respected.²⁵²

²⁴⁹ Cf *Peck v United Kingdom* (2003) I Eur Court HR 123.

²⁵⁰ *Von Hannover v Germany* (2005) 40 EHRR 1, 30 (Cabral Barreto P).

²⁵¹ *Ibid* 27 (Cabral Barreto P, Ress, Caflisch, Türmen, Zupancic, Hedigan and Traja JJ).

²⁵² Thus the Court in *von Hannover v Germany* thought that Princess Caroline of Monaco, when not performing official duties, was not contributing to a debate of public interest. Further, the public had no legitimate interest in knowing where she was or how she behaved in her private life, even if she appeared in places that could not be described as secluded: *ibid* 28. By contrast, the separate concurring judgment of Cabral Barreto P held that ‘it has to be acknowledged that, in view of their fame, a public figure’s life outside their home, and particularly in public places, is inevitably subject to certain constraints’: at 31. In his Honour’s view, the Princess had a reasonable expectation of privacy in some, but not all, cases in which she ventured into public places.

However, the risk with special rules is that the focus can easily shift from the rule itself to whether or not a particular individual meets the definition of ‘public figure’, when there may be varying views about the precise meaning of the term. For example, in the definition cited above, what exactly does ‘any other domain’ mean? Does it include, say, an academic who offers comment in particular instances, or who seeks publicity for his or her research findings but who might, for the greater part of his or her time, live and work in relative obscurity?

A more flexible approach, as favoured by Gault P and Blanchard J in *Hosking*, is to apply a test of whether there is a reasonable expectation of privacy in the circumstances.²⁵³ What a reasonable expectation entails may differ with the attitude of the plaintiff and the facts of the case.²⁵⁴ Nevertheless, one test is able to apply in all cases without the possible distraction of a misleading threshold test. Thus, a popular singer might prima facie be expected to have less of an expectation of privacy on the basis of his or her general courting of publicity. However, in the balancing exercise, this factor may be outweighed by other circumstances, such as his or her attendance at the bedside of a seriously injured or dying family member, which may suggest a greater expectation of being left alone. A person who becomes prominent through his or her involvement in an accident might reasonably expect a temporary loss of privacy, perhaps to the same degree as one who courts publicity, but might also expect that loss of privacy to subside relatively quickly.

The relevant intrusions should be defined as instances of an interference with the plaintiff in a physical sense, such as invading his or her personal space or surreptitiously photographing him or her, and gaining unauthorised access to the plaintiff’s personal affairs, including hacking into his or her computer or reading his or her diary. In relation to the meaning of ‘personal affairs’, reference might be made to the ALRC’s definition of ‘private facts’ in terms of matters related to the health, private behaviour, home life, or personal or family relationships of an individual.²⁵⁵ The ‘gaining unauthorised access to personal affairs’ will be a point of potential interface between the two torts. In the first instance, there may be an intrusion in the course of the gathering of information, followed by a public disclosure of those private facts. The first invasion may have been by the media, but need not have been. The second invasion will usually involve a media organisation, but may involve another defendant, such as where the person who carried out the intrusion then reveals what he or she has learnt during a television interview.²⁵⁶ The remedies available where there has been, for example, an intrusion which produced publishable material or a contemplated publication of private facts, should enable a pending publication to be pre-empted.²⁵⁷ As

²⁵³ *Hosking* [2005] 1 NZLR 1, 41.

²⁵⁴ *Ibid* 33.

²⁵⁵ See also ALRC, *Unfair Publication*, above n 152, 124.

²⁵⁶ Framed this way, if the factory in *Lenah Game Meats* had been, say, a sole trader operation, then there may have been an action for intrusion against the animal activists and an action for disclosure against the television broadcaster.

²⁵⁷ See also Morgan, above n 115, 445.

already seen in the United States, the second tort is more likely to be criticised on free speech grounds, as not even the First Amendment can be used as a means to justify excessive intrusions.

It has been noted in the discussion of the elements articulated in *Grosse* that the wide array of potential intrusions, and the differing degrees of sensitivity in the community, necessitate an objective standard, such as the intrusion being ‘highly offensive to a reasonable person of ordinary sensibilities’. While this may ultimately be an intuitive decision, it is nevertheless a sensible measure that should avoid open-ended liability for all actual or perceived slights. This is especially so in the case of a claim which is actionable per se, and which could therefore compensate cases of mere distress or upset. It has already been suggested that the unreasonable intrusion tort should be such a claim.

In support of the recognition of an unreasonable intrusion tort, reference may be made to the so-called tort of harassment, which is generally regarded as being in its embryonic form. The similarity between the two torts was alluded to by Gummow and Hayne JJ in *Lenah Game Meats*.²⁵⁸ One of the earliest cases involving harassment was *Khorasandjian v Bush*,²⁵⁹ concerning the daughter of a tenant who was the subject of a series of harassing telephone calls.²⁶⁰ This action was actually framed as a private nuisance, which ultimately led to it being overruled in a later case on the grounds that the plaintiff lacked the necessary standing to sue.²⁶¹ Part of the difficulty lies in settling on a precise definition of harassment.²⁶² It may be that harassment is limited to ‘acts calculated to cause harm to the plaintiff’,²⁶³ in which case it might be seen as embracing, but not being limited to, unreasonable intrusion. As noted in *Grosse*, Skoien SJDC was content to hold that since the stalking, which constituted the harassment in that case, also satisfied the cause of action in the invasion of privacy, there was no need to decide whether a tort of harassment should be recognised. Like *Grosse* and its references to the *Criminal Code* provisions concerning stalking, similar cases such as *Khorasandjian* seem to be directed at providing civil remedies for the criminal offence of harassment.²⁶⁴ However, not all cases of unreasonable intrusion will involve harassment, since the intrusion may be constituted by a single act, or the defendant may have no intention of harming the plaintiff. Zealous media pursuit of the plaintiff in coverage of a story may be an example of both points. Harassment, insofar as it has developed, may therefore not itself be the correct fit for unreasonable intrusions. However, a tort of unreasonable

²⁵⁸ (2001) 208 CLR 199, 255.

²⁵⁹ [1993] QB 727 (*Khorasandjian*).

²⁶⁰ In the United States, similar facts are used to illustrate *Second Restatement* § 652B (1977), based on *Housh v Peth*, 165 Ohio St 35 (1956).

²⁶¹ *Hunter v Canary Wharf Ltd* [1997] AC 655.

²⁶² *Northern Territory v Mengel* (1995) 185 CLR 307, 342–3 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

²⁶³ *Chapman v Conservation Council of South Australia* (2002) 82 SASR 449, 492 (Williams J) (citations omitted).

²⁶⁴ The tort was applied in *Thomas v National Union of Mineworkers* [1986] Ch 20, but rejected in *Wong v Parkside Health NHS Trust* [2003] 3 All ER 932. Harassment in England is now both a criminal offence and statutory tort: *Protection from Harassment Act 1997* (UK) c 40. See Morgan, above n 115, 462–5.

intrusion could comfortably accommodate cases of harassment. Thus it is submitted that development of a means of civil recourse for harassment should not be regarded as an end in itself, but should instead be regarded as subsumed within the development of a wider tort of unreasonable intrusion.

Accordingly, it is suggested that Australia should adopt a tort of unreasonable intrusion upon privacy, the elements being:

- 1 an intentional intrusion (whether physical or otherwise) upon the situation of another (whether as to the person or his or her personal affairs) where there is a reasonable expectation of privacy; and
- 2 the intrusion would be 'highly offensive to a reasonable person of ordinary sensibilities'.

In relation to disclosure of private facts, the crucial question will again be whether there is a reasonable expectation that the particular information be regarded as private. This is clear from the experience in both New Zealand (which adapted the United States approach) and the United Kingdom, which have reached approximately the same result by two entirely different routes. The 'reasonable expectation' test is capable of dealing with an issue of information which has reached the public domain. Here, the disclosure tort differs from the action for breach of confidence. Under the latter, once the information reaches the public domain it is no longer capable of protection. However, a reasonable expectation of privacy test is capable of greater flexibility. It is able to provide a principled basis for justifying why information, which has only had a limited release, should still be capable of protection.²⁶⁵ The plaintiff's reasonable expectations may also provide a basis on which information that has been on the public record for a long time, such as an old criminal conviction, may nevertheless be regarded as private and not for publication.²⁶⁶

It is also evident that there should be a standard of what would be 'highly offensive to a reasonable person of ordinary sensibilities.' Less obvious, however, is what this standard should be used to measure. In the *Second Restatement* § 652D, the reference is to the 'matter concerning the private life' of another which is to be 'highly offensive to a reasonable person'. It was also in this sense that the phrase was suggested by Gleeson CJ in *Lenah Game Meats* as being a practical test for what is private.²⁶⁷ However, it was widely rejected as a general test by the House of Lords in *Campbell*.²⁶⁸ Lord Nicholls stated his objection on two grounds:

First, the 'highly offensive' phrase is suggestive of a stricter test of private information than a reasonable expectation of privacy. Second, the 'highly offensive' formulation can all too easily bring into account, when deciding whether the disclosed information was private, considerations which go more properly to issues of proportionality; for instance, the degree of intrusion into private

²⁶⁵ Cf *A-G (UK) v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109, 260 (Lord Keith).

²⁶⁶ Cf *Tucker* [1986] 2 NZLR 716, 733 (McGrechan J).

²⁶⁷ (2001) 208 CLR 199, 226.

²⁶⁸ [2004] 2 AC 457, 466 (Lord Nicholls), 482 (Lord Hope), 495 (Baroness Hale), 504 (Lord Carswell).

life, and the extent to which publication was a matter of proper public concern. This could be a recipe for confusion.²⁶⁹

Baroness Hale simply stated that '[a]n objective reasonable expectation test is much simpler and clearer than the test' attributed to Gleeson CJ.²⁷⁰ Instead, the phrase 'reasonable expectation of privacy' was preferred as the main test for privacy, with the 'highly offensive to a reasonable person' standard being relegated to reflecting proportionality when the balance between the expectation of privacy and freedom of speech is difficult to determine.²⁷¹

However, there were differing views on this point within the majority of the New Zealand Court of Appeal in *Hosking*. While Tipping J saw the standard as indicating when there would be a reasonable expectation of privacy,²⁷² a different approach was taken by Gault P and Blanchard J in their joint judgment. Their Honours endorsed a two-stage test: first, facts in relation to which there is a reasonable expectation of privacy; and second, 'publicity given to those private facts that would be considered highly offensive to an objective reasonable person.'²⁷³ In other words, instead of being a measure of the privacy of the facts, the standard was seen as relevant to the publication aspect.

There may be good reason for following the judgment of Gault P and Blanchard J. When used in relation to the facts, there is a risk of the standard being a fifth wheel. However, associating the test with the publication provides a means for rejection of trivial or objectionable claims. Accordingly, no action for invasion of privacy would lie against a nurse who makes the medical condition of a famous patient the subject of gossip among friends and co-workers, whereas there may be grounds for complaint if the nurse instead gave the patient's details to the media. It would also ensure that the two privacy torts would be consistent, avoiding complications — particularly in the case of intrusion upon the plaintiff's personal affairs — if the test referred to the defendant's act in the case of intrusion, but was then a measure of the quality of the information in the case of disclosure.

It was seen in the discussion of *Grosse* above, by applying the current Australian distinction between trespass and actions on the case, that the disclosure of private facts tort should properly be classified as an action on the case, for which damage is the gist of the action.²⁷⁴ However, as an intentional tort, there is no need for the considerations associated with negligence, which require limitation of claims to recognisable psychiatric illnesses. Accordingly, it is submitted that proof of emotional distress, embarrassment or humiliation should be sufficient to ground the tort.²⁷⁵

²⁶⁹ Ibid 466.

²⁷⁰ Ibid 495.

²⁷¹ Ibid 466 (Lord Nicholls), 482 (Lord Hope), 496 (Baroness Hale).

²⁷² *Hosking* [2005] 1 NZLR 1, 64–5.

²⁷³ Ibid 32.

²⁷⁴ See above nn 180–1 and accompanying text.

²⁷⁵ See also ALRC, *Unfair Publication*, above n 152, 124.

It is submitted, therefore, that a second tort protecting privacy should be recognised in the form of a disclosure of private facts tort, the elements of which would be:

- 1 the existence of facts in relation to which there is a reasonable expectation of privacy;
- 2 publicity given to those private facts which would be highly offensive to a person of reasonable sensibilities; and
- 3 the publicity results in the plaintiff suffering emotional distress, embarrassment or humiliation.

Thus, the question of whether there is a reasonable expectation of privacy is crucial to both torts. Whether such an expectation exists will be a question of degree, upon which different opinions may validly be expressed on the same facts. It will be a decision based on balancing the relevant circumstances of the case: a factor that might on its own suggest a low expectation of privacy may be outweighed by an additional circumstance (or circumstances) which give an entirely different perspective to the matter, and which lead to the conclusion that there is a reasonable expectation of privacy. A non-exhaustive list of factors that may be relevant to this balancing exercise would include:

- How intimate the facts are, there being a reasonable expectation of privacy concerning details of an individual's health, private behaviour, home life or personal or family relationships. 'Private behaviour ... or personal relationships' may require separate treatment where a sexual relationship is involved. There are differing types of liaisons which may have varying levels of privacy that might reasonably be expected.²⁷⁶ Thus a high expectation of privacy may normally attend a sexual relationship within a marriage or a long-term partnership, while a one-night stand with a stranger in a hotel or an even more public location might have a very low expectation of privacy.
- Whether the individual's family is involved. In particular, if children of a vulnerable age are involved then there would generally be a high expectation of privacy.
- The degree to which the particular individual courts publicity generally. Those who constantly invite public attention may usually have a lower expectation of privacy than those who do not, although this should not be a conclusive consideration.
- The degree to which the individual courted publicity on the relevant occasion. A person who only invites public attention on a single occasion may normally have a greater expectation of privacy than someone who constantly seeks that attention.
- How directly the individual is associated with an event of public interest. A person who is a central figure even unwittingly, may normally have a lower expectation of privacy than someone who was merely on the periphery of the event.

²⁷⁶ Cf *A v B plc* [2003] QB 195 and the range suggested in *Theakston v MGN Ltd* [2002] EMLR 398, 418 (Ouseley J).

- How public the location and attendant circumstances are. A public location is normally indicative of a low expectation of privacy, but is by no means conclusive. Thus a meeting in a restaurant may, depending on the surrounding circumstances, be deemed private. There are many variables that may be relevant. Network executives lunching with a personality from a rival network at a public eatery may have no concerns that the *fact* of the meeting's occurrence does not stay private, but may be adamant that the *content* of the meeting should remain so. By contrast, a private location such as a home almost always will suggest a high expectation of privacy. There may also be clear expectations of privacy despite a semi-public setting, such as where the individual is in his or her hospital bed, as in *Kaye*.
- The means used to obtain the information. Use of surreptitious means may normally indicate that the information could not have been obtained otherwise, and may therefore be indicative of a high expectation of privacy. Use of a recording device may also mean that a normally low expectation of privacy, associated with one-off behaviour in a public place in front of passers-by and security observers, is transformed into a much higher expectation of privacy in relation to a much greater exposure through potential replaying of the recording.²⁷⁷
- Whether there is a risk of serious injury if there is disclosure. As suggested above in relation to the *Venables* case,²⁷⁸ a circumstance where there is a risk of serious injury to the individual or other person normally may be an example of a circumstance in which there is a reasonable expectation of privacy.
- Whether any public record, which has been or is to be accessed, may be considered to be still part of the public consciousness. It has been accepted in New Zealand and the United States that simply because information is in a public record does not mean it is deemed to be in the public domain.²⁷⁹ However, it may be difficult to suggest any one fixed time at which information in a public record is effectively no longer 'public'. It is submitted that the relevant consideration for the purposes of expectations of privacy should be how prominent the information in the record remains in the public consciousness. A person who has a 'skeleton in the closet' in the form of a 20-year-old indecency conviction might be regarded as having a reasonable expectation of privacy in this respect.²⁸⁰ By contrast, a notorious paedophile released from jail after serving a long sentence for his or her crimes would only have low expectations of privacy.
- Any other relevant circumstances.

²⁷⁷ *Peck v United Kingdom* (2003) I Eur Court HR 123.

²⁷⁸ See above nn 85–8 and accompanying text.

²⁷⁹ See, eg, *Tucker* [1986] 2 NZLR 716, 733 (McGrechan J); Prosser and Keeton, above n 45, 859.

²⁸⁰ Naturally this expectation might be reduced if there are other considerations, such as the individual being a government minister who courts publicity. It might also ultimately be outweighed, in an appropriate case, by a countervailing public interest.

D *Defences*

As with defamation, the defences for invasion of privacy should be developed in order to achieve a balance between the right to privacy and freedom of expression. It is likely that the relevant defences, and the balance that they achieve, will most prominently reflect the Australian ‘spin’ on privacy, just as the expansive meaning of ‘newsworthiness’ shows the importance placed on an unbridged freedom of speech in the United States. Australia could choose simply to adopt the law of another country, such as balancing an amorphous ‘public interest’ as in the United States and the United Kingdom, but this will not necessarily reflect a law for a distinctly Australian context.²⁸¹

Naturally, due to the limitations of the forensic process, the relevant defences will be teased out by the cases as the need arises. In the absence of specific legislation, a complete set of potential defences is unlikely to emerge until the corresponding torts have been more fully developed.

1 *Existing Indicators*

When determining where Australia should draw the line, it is worth noting that the exercise has previously been addressed in relation to at least one form of privacy in Australia. Every jurisdiction in Australia has legislation prohibiting the listening to or recording of private conversations, together with prohibitions on communicating or publishing the content of private conversations to third parties.²⁸² In some jurisdictions the bans also embrace the visual recording of private activities and the communication or publication of the contents.²⁸³

As such, the prohibitions are closely analogous to the proposed torts of unreasonable intrusion and disclosure of private facts.²⁸⁴ That said, any hope for clear pointers to appropriate defences would be in vain. Not only is there no uniformity in the defences provided under the statutes, but there are also remarkable differences in the various regimes. It is possible, however, to extract defences which each enjoy support in, say, four or more of the eight jurisdictions. Leaving aside defences related to, for example, warrants and statutory authorities, the relevant defences to the intrusive conduct (that is, listening, viewing or recording)²⁸⁵ are:

²⁸¹ *Lenah Game Meats* (2001) 208 CLR 199, 328 (Callinan J).

²⁸² See, eg, *Listening Devices Act 1992* (ACT) ss 4–6; *Listening Devices Act 1984* (NSW) ss 5–7; *Surveillance Devices Act 2000* (NT) ss 5–6, 40; *Invasion of Privacy Act 1971* (Qld) ss 43–5; *Listening and Surveillance Devices Act 1972* (SA) ss 4–5, 7(3); *Listening Devices Act 1991* (Tas) ss 5, 9–10; *Surveillance Devices Act 1999* (Vic) ss 6–7, 11; *Surveillance Devices Act 1998* (WA) ss 5–6, 9.

²⁸³ See, eg, *Surveillance Devices Act 2000* (NT) ss 5–6, 40; *Surveillance Devices Act 1999* (Vic) ss 6–7, 11; *Surveillance Devices Act 1998* (WA) ss 5–6, 9.

²⁸⁴ Indeed, Illustration 3 of *Second Restatement* § 652B (1977) (the intrusion tort) relates to use of a listening device to record private conversations, based on *Rhodes v Graham*, 37 SW 2d 46 (Ky, 1931).

²⁸⁵ For these purposes, no distinction is drawn between the situations where the defendant listened to, viewed or recorded a conversation or activity to which he or she was a party, and where the defendant was a third party to the conversation or activity.

- unintentional hearing, viewing or recording as a result of use of the device;²⁸⁶
- consent;²⁸⁷ and
- that the conduct was reasonably necessary in the public interest, or there is at least a threat of imminent serious injury or property damage.²⁸⁸

Inasmuch as the unreasonable intrusion tort (as formulated above) requires an ‘intentional interference’, a defence based on unintentional conduct would seem superfluous.

The relevant defences to communicating or publishing the content of private conversations²⁸⁹ are:

- where the communication or publication is for legal proceedings;²⁹⁰
- consent;²⁹¹
- that the communication was reasonably necessary in the public interest, or there is at least a threat of imminent serious injury or property damage;²⁹²
- that the communication was reasonably necessary to protect the defendant’s interests;²⁹³
- that the communication was reasonably necessary in performance of the defendant’s duty;²⁹⁴ and

²⁸⁶ See, eg, *Listening Devices Act 1992* (ACT) s 2(b); *Listening Devices Act 1984* (NSW) s 5(2)(d); *Surveillance Devices Act 2000* (NT) ss 6(b), 7; *Invasion of Privacy Act 1971* (Qld) s 43(2)(b); *Listening Devices Act 1991* (Tas) s 5(2)(d); *Surveillance Devices Act 1998* (WA) ss 5(2)(e), 6(2)(e).

²⁸⁷ See, eg, *Listening Devices Act 1992* (ACT) s 4(3); *Listening Devices Act 1984* (NSW) s 5(3); *Surveillance Devices Act 2000* (NT) s 6(b); *Listening and Surveillance Devices Act 1972* (SA) s 4; *Listening Devices Act 1991* (Tas) s 5; *Surveillance Devices Act 1998* (WA) ss 5(3), 6(3).

²⁸⁸ See, eg, *Listening and Surveillance Devices Act 1972* (SA) s 7; *Surveillance Devices Act 1998* (WA) ss 5(2)(b), 6(3)(b), 28–31. See also *Listening Devices Act 1984* (NSW) s 5(2)(c); *Listening Devices Act 1991* (Tas) s 5(2)(c) (imminent threat of serious injury or property damage).

²⁸⁹ For these purposes no distinction is drawn between situations where the defendant is a party to the conversation or activity, or is a third party.

²⁹⁰ See, eg, *Listening Devices Act 1992* (ACT) s 5(2)(c); *Listening Devices Act 1984* (NSW) s 7(2)(b); *Surveillance Devices Act 2000* (NT) s 40(e)(iv); *Invasion of Privacy Act 1971* (Qld) s 45(2)(b); *Listening and Surveillance Devices Act 1972* (SA) s 7(3)(e); *Listening Devices Act 1991* (Tas) s 10(2)(b); *Surveillance Devices Act 1999* (Vic) s 11(2)(c); *Surveillance Devices Act 1998* (WA) s 9(2).

²⁹¹ See, eg, *Listening Devices Act 1992* (ACT) ss 5(2)(b), 6(2)(a); *Listening Devices Act 1984* (NSW) ss 6(2)(a), 7(2)(a); *Invasion of Privacy Act 1971* (Qld) ss 44(2)(a), 45(2)(a); *Listening and Surveillance Devices Act 1972* (SA) s 7(3)(b); *Listening Devices Act 1991* (Tas) ss 9(2)(a), 10(2)(a); *Surveillance Devices Act 1999* (Vic) s 11(2)(a); *Surveillance Devices Act 1998* (WA) s 9(2)(a).

²⁹² See, eg, *Surveillance Devices Act 2000* (NT) s 40(e)(i); *Invasion of Privacy Act 1971* (Qld) s 45(2)(c); *Listening and Surveillance Devices Act 1972* (SA) s 7(3)(c); *Surveillance Devices Act 1999* (Vic) s 11(2)(b); *Surveillance Devices Act 1998* (WA) ss 9(2)–(3). See also *Listening Devices Act 1984* (NSW) s 6(2)(b); *Listening Devices Act 1991* (Tas) s 9(2)(b) (imminent threat of serious injury or property damage).

²⁹³ See, eg, *Listening Devices Act 1992* (ACT) s 5(2)(d); *Listening Devices Act 1984* (NSW) s 7(2)(c); *Surveillance Devices Act 2000* (NT) s 40(e)(iii); *Invasion of Privacy Act 1971* (Qld) s 45(2)(c); *Listening and Surveillance Devices Act 1972* (SA) s 7(3)(d); *Listening Devices Act 1991* (Tas) s 10(2)(c); *Surveillance Devices Act 1999* (Vic) s 11(2)(b); *Surveillance Devices Act 1998* (WA) ss 9(2)–(3).

²⁹⁴ See, eg, *Surveillance Devices Act 2000* (NT) s 40(e)(ii); *Invasion of Privacy Act 1971* (Qld) s 45(2)(c); *Listening and Surveillance Devices Act 1972* (SA) s 7(3)(c); *Surveillance Devices Act 1998* (WA) ss 9(2)–(3).

- where the communication is to someone reasonably believed to have such an interest in the private conversation as to make the communication reasonable.²⁹⁵

There are parallels to be drawn with the United States, the United Kingdom and New Zealand, particularly insofar as public interest and consent defences are concerned. There may, in addition, be similarities with the United States in relation to the other defences. These defences will be addressed in more detail below.

The other existing source that might inform an Australian balance between privacy and freedom of expression is the ‘second best’ protection from disclosure of private facts provided by the public benefit/public interest requirement for the justification defence to defamation in four jurisdictions. This requirement has provided a measure of protection from publication of true, but embarrassing personal information. ‘Public benefit’ will normally be satisfied where ‘the publication discusses or raises for public discussion or information matters which are properly of public concern’.²⁹⁶ A contrast is drawn between promoting the public good and merely pandering to those who are avid for scandal.²⁹⁷ This contrast reflects the distinction drawn by the New Zealand Court of Appeal between a matter of legitimate public concern and a matter merely concerning, or of interest to, the public. ‘Public interest’ is a term chosen to bring the justification defence in line with other areas of defamation law. It has been loosely defined as involving matters that are ‘such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others.’²⁹⁸ This meaning may serve as a useful example of how the notion of public interest may be further delineated when applied in the context of privacy.

2 *Private Interest: Consent*

Like any trespass, an interference which is consented to should not result in a remedy. Although speaking in terms of balancing public interest against confidentiality, the English courts may be seen as effectively entertaining a consent defence when holding that entertainers, who use the media to publicise personal information about their marriage,²⁹⁹ or to present a particular image,³⁰⁰ cannot then complain when that publicity is not favourable to them. Thus, a participant in a so-called ‘reality’ programme who invites cameras into his or her home can hardly complain that there has been an intrusion or disclosure in breach of his or her privacy.

An important caveat in the case of consent, however, is that the scope of the consent must not be exceeded. Consent for one purpose does not amount to a

²⁹⁵ See, eg, *Listening Devices Act 1992* (ACT) s 5(2)(e); *Listening Devices Act 1984* (NSW) s 7(2)(d); *Invasion of Privacy Act 1971* (Qld) s 45(2)(d); *Listening Devices Act 1991* (Tas) s 10(2)(d); *Surveillance Devices Act 1998* (WA) ss 9(2)–(3).

²⁹⁶ *Allworth v John Fairfax Group Pty Ltd* (1993) 113 FLR 254, 263 (Higgins J).

²⁹⁷ *Rofe v Smith's Newspapers Ltd* (1924) 25 SR (NSW) 4.

²⁹⁸ *London Artists Ltd v Littler* [1969] 2 QB 375, 391 (Lord Denning MR).

²⁹⁹ *Lennon v News Group Newspapers Ltd* [1978] FSR 573.

³⁰⁰ *Woodward v Hutchins* [1977] 1 WLR 760.

voluntary assumption of risk that the publication may serve another purpose. Thus, if a footballer allowed a photographer access to the post-match locker room in order to take photographs which, subject to editorial control, would be included in a charity publication, it should be considered an invasion of privacy without an effective consent defence if the photographer takes full frontal shots of the footballer and publishes them in a salacious magazine.³⁰¹ Consent will therefore be limited by any express or implied ‘no-go’ zones which restrict its scope.

3 *Public Interest*

The public interest defence is likely to be the most contentious of the defences in terms of its appropriate scope. It finds expression in the various jurisdictions to different effect. As ‘newsworthiness’ it has enjoyed trump status in the United States, at least in relation to public disclosure of private facts. In the United Kingdom, freedom of expression has great weight, by virtue of art 10 of the *ECHR*. In New Zealand, Gault P and Blanchard J cast the defence in terms of ‘legitimate public concern.’³⁰² A number of observations may be offered concerning the appropriate scope of this defence for Australia.

Unlike the constitutional guarantee of free speech in the United States, or the prominence afforded to freedom of expression which is now required by the *HRA*, the common law approach to free speech continues to apply in Australia. Under the common law, liberty ends where the law begins: citizens are free to do what they wish unless there is a law against it.³⁰³ A right to free speech is not expressly stated in the *Australian Constitution* and cannot be implied into it. However, it was recognised in *Lange* that the *Constitution* prescribes a representative system of government, and that it is essential that there be a freedom of communication concerning government or political matters to enable the people to make informed decisions when they vote.³⁰⁴ Accordingly, there are two questions to be considered when assessing the validity of a law. First, ‘does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?’³⁰⁵ Second, if so, ‘is the law reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?’³⁰⁶

A tort preventing disclosure of private facts would be such a burden, since it would protect from revelation aspects of the private life of a politician, public official or public commentator which have a bearing on that person’s performance or public role, especially instances of hypocrisy, falsehood or double

³⁰¹ Cf *Ettingshausen v Australian Consolidated Press Ltd* (Unreported, Supreme Court of New South Wales, Hunt CJ at CL, 11 March 1993).

³⁰² *Hosking* [2005] 1 NZLR 1, 32.

³⁰³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (*‘Lange’*).

³⁰⁴ *Ibid* 560.

³⁰⁵ *Ibid* 561–2, 567 (citations omitted).

³⁰⁶ *Ibid*.

standards of behaviour. For instance, the action could protect from disclosure revelations of the sexual improprieties of a politician who was campaigning on a strict moral platform.

The second question, however, is not without difficulty. While privacy may be seen as based on personal autonomy, personal autonomy may also be seen as a justification for free speech. In other words, the same rationale may be seen as both supporting and opposing a right to privacy.³⁰⁷ Moreover, personal autonomy may be seen as being promoted by a democratic system such as that prescribed by the *Constitution*. However, it cannot be said that a purely private interest, in the form of the human dignity that privacy serves, is an end the fulfilment of which is compatible with maintaining the Australian system of government in the same way as, for example, a law directed towards public order or safety,³⁰⁸ fiscal responsibility³⁰⁹ or the administration of justice.³¹⁰ A defence to the disclosure tort should at least be fashioned in the form of publications concerning government or political matters in a similar manner as the High Court moulded the means by which defamation laws could be regarded as valid. As with defamation, the defence should be seen as a qualified privilege. In other words, the occasion for free speech should be judged to be more important than the plaintiff's right to privacy. However, free speech is not absolute and again, similarly to defamation, the privilege should be lost if the publication is actuated by malice.

In relation to whether the same defence should apply to the intrusion tort, it might be argued that different considerations should apply since it lacks the same aspect of widespread publicity. However, when attention is focused on the question of whether the *effect* of the law is to burden the freedom of communication of government or political matters, a different result may follow. Take again the case of a politician's suspected hypocrisy in pursuing extra-marital sexual liaisons whilst campaigning on a strict moral platform. It may well be that the investigative journalism employed to obtain the necessary evidence involved surreptitious measures that might otherwise be judged as warranting a remedy on the grounds of being an unreasonable intrusion. If the implied freedom of communication only applied to the disclosure tort, the politician might nevertheless be free to quash the story at its source by relying on the unreasonable intrusion tort. In other words, although it does not involve widespread publicity, it is submitted that the unreasonable intrusion, insofar as it facilitates the later disclosure of discovered information, may still be capable of effectively burdening the implied freedom of political communication. In order to serve an end

³⁰⁷ See further Phillipson and Fenwick, above n 59, 682.

³⁰⁸ See, eg, *Levy v Victoria* (1997) 189 CLR 579.

³⁰⁹ See, eg, *Registrar of the Western Australian Industrial Relations Commission v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch* [1999] WASCA 170 (Unreported, Kennedy, Anderson and Scott JJ, 9 September 1999).

³¹⁰ See, eg, *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81, 109–11 (Kirby P); *Civil Aviation Authority v Australian Broadcasting Corporation* (1995) 39 NSWLR 540, 549, 559–61 (Kirby P), 570–1 (Handley JA); *Hammersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316.

compatible with the Australian system of government, there would again need to be a defence in relation to government or political matters and with no actuating malice.

Such a defence will naturally have a greater or lesser significance depending on the meaning given to the term ‘government or political matter’. In *Theophanous v Herald & Weekly Times Ltd*, the joint judgment of Mason CJ, Toohey and Gaudron JJ regarded the term as including, but not limited to, the conduct, policies or fitness for office of government, political parties, public bodies, public officers and candidates, as well as the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, such as trade union leaders, indigenous political leaders, political and economic commentators.³¹¹ They also saw the term extending to ‘all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.’³¹² Since an intelligent citizen would presumably wish to think about a wide range of issues, the concept may be a particularly broad one. Mason CJ sought to summarise the idea with the words ‘public affairs’.³¹³ A distinction may therefore be drawn from the guarantee of free speech in the United States, which also covers other forms of speech such as ‘commercial speech’ used by a merchant to advertise his or her wares and speech associated with entertainment.

It must be acknowledged, however, that the *Lange* defence has since been narrowed by a limitation of ‘government or political matters’³¹⁴ to those of the ‘electoral and parliamentary sense’,³¹⁵ such as discussion about political candidates.³¹⁶ It does not extend generally to matters of public interest,³¹⁷ nor to commercially significant matters.³¹⁸ Discussion concerning the corporate sector, including non-profit organisations, would now seem to be outside the ambit of the defence.³¹⁹

It is argued, therefore, that in addition to this implied freedom of communication, however it may be described, the law should maintain the level of free speech already afforded under the protection of privacy conferred by the public benefit/public interest defence to defamation. In other words, it should be a defence to a disclosure of private facts if the publication is in the public interest, in the sense of promoting the public good, or is such as to affect people at large

³¹¹ (1994) 182 CLR 104, 122–3.

³¹² *Ibid* 124, approving Eric Barendt, *Freedom of Speech* (1985) 152.

³¹³ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 138–40.

³¹⁴ See Andrew T Kenyon, ‘*Lange* and *Reynolds* Qualified Privilege: Australian and English Defamation Law and Practice’ (2004) 28 *Melbourne University Law Review* 406, 416. See also P H Lane, ‘Constitutional Law: Freedom to Communicate and Criticise’ (2001) 75 *Australian Law Journal* 291; Michael Chesterman, ‘When Is a Communication “Political”?’ (2000) 14(2) *Legislative Studies* 5; Diana Sedgwick, ‘The Implied Freedom of Political Communication: An Empty Promise?’ (2003) 7 *University of Western Sydney Law Review* 35.

³¹⁵ *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, 104 (Warren AJA).

³¹⁶ See, eg, *Brander v Ryan* (2000) 78 SASR 234; *Featherston v Tully [No 2]* (2002) 83 SASR 347.

³¹⁷ See, eg, *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 (Unreported, Beazley, Giles and Santow JJA, 24 December 2002) [1160] (Beazley, Giles and Santow JJA).

³¹⁸ See, eg, *West v Nationwide News Pty Ltd* [2003] NSWSC 505 (Unreported, Simpson J, 15 August 2003).

³¹⁹ See, eg, *Rowan v Cornwall [No 5]* (2002) 82 SASR 152.

so that they may be legitimately interested in it or concerned about it. This would include matters such as disclosure of crime or wrongdoing, risk to community health and/or public safety, and issues related to the environment and education. In some respects there may be overlap with the freedom of communication concerning electoral or parliamentary affairs. Consistency also requires that a similar public interest defence should apply to the unreasonable intrusion tort, particularly where the intrusion amounts to an information gathering exercise which in turn facilitates a later disclosure of facts.

This would seem to be a marginally wider result than the public interest defence in Australia to at least the disclosure tort, arrived at via a different route. Australia could follow the United Kingdom model of transforming its action for breach of confidence as Gleeson CJ suggested in *Lenah Game Meats*.³²⁰ However, in the absence of the influence of the *ECHR*, which saw the United Kingdom courts replace balancing the ‘public interest’³²¹ with balancing ‘freedom of expression’, the Australian courts would presumably be left with the defence that currently has the support of the weight of authority, namely disclosure of iniquity or other misdeed, or disclosure in order to protect public safety. This narrower defence would only embrace disclosure of

matters, carried out or contemplated, in breach of the country’s security, or in breach of law (including statutory duty), fraud or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity.³²²

It would not include matters that would have been covered by the ‘public interest’ test previously applied in the United Kingdom, such as disclosure of hypocrisy by those in the public eye who might otherwise be role models,³²³ or even the public interest test advocated above, which would also include matters of public concern such as environmental issues.

Whatever the appropriate scope of ‘public interest’, there is no doubt that a distinction is to be drawn with matters of mere interest to the public. In New Zealand, this was reflected in *Hosking* by Gault P and Blanchard J’s deliberate use of the term ‘public concern’, which was intended to exclude information which is merely of interest to the public. In several of the *Listening Devices Acts* the reference is phrased as being ‘no more than reasonably necessary’ in the public interest.³²⁴ Accordingly, a photograph of the home of the winner of first prize in a lottery jackpot would be no more than curiosity to the public, rather than being in the public interest, and therefore would fall outside the ambit of a public interest defence. Similarly, much regarding the private life of a public figure will only be something of passing interest to the public, so that if such a

³²⁰ (2001) 208 CLR 199, 225.

³²¹ See, eg, *Woodward v Hutchins* [1977] 1 WLR 760.

³²² *Beloff v Pressdram Ltd* [1973] 1 All ER 241, 260 (Ungoed-Thomas J), approved in *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1980) 33 ALR 31, 55 (Rath J).

³²³ See, eg, *Woodward v Hutchins* [1977] 1 WLR 760.

³²⁴ See, eg, *Surveillance Devices Act 2000* (NT) s 40(e)(i); *Invasion of Privacy Act 1971* (Qld) s 45(2)(c); *Surveillance Devices Act 1999* (Vic) s 11(2)(b); *Surveillance Devices Act 1998* (WA) ss 9(2)-(3); cf *Listening and Surveillance Devices Act 1972* (SA) s 7(3)(c).

person can show a reasonable expectation of privacy in the circumstances, the publication would not attract a public interest defence. In this respect, the publisher's interest in perhaps an increase in audience share should not be confused with the public interest.

Further, if the constitutional freedom of communication is regarded as a qualified privilege, then the privilege may be lost in the case of a widespread disclosure if the publication is not reasonable. In the defamation context, it has been held that the privilege normally only protects occasions where the publication was to a limited number of recipients.³²⁵ Although defamatory material may be false, whereas information disclosed in breach of privacy will be true, it is correct to say that the damage that could be done when there are thousands of recipients of a communication is obviously much greater than when there are only a few recipients. For that reason, a requirement of reasonableness may be considered to be just as sensibly appropriate and adapted to the protection of privacy as it is to the protection of reputation. A similar restraint is indicated for any other public interest defence, where the publication should be 'no more than reasonably necessary'. Thus, a person who is injured, ill or in a distressed state in a car accident might be regarded as having a prima facie claim to privacy in terms of both the intrusion of being filmed and the disclosure when the film is broadcast.³²⁶ It might nevertheless be argued that there is a countervailing public interest in, for example, contributing to the public debate concerning government policy relating to roads or increasing public awareness of accidents and their tragic aftermaths as a means of deterring poor driving habits. However, whether the public interest has been sufficiently served may depend on the detail used. Close-up shots of distressed faces would go beyond that which was reasonably necessary or would exceed a reasonable extent, and would not be covered by the defence. In such cases express or implied consent would be needed before the defendant could publish with impunity.³²⁷

Accordingly, when delineating whether there is a relevant public interest in Australia, the factors that might be considered include:

³²⁵ *Lange* (1997) 189 CLR 520, 570 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

³²⁶ See ALRC, *Unfair Publication*, above n 152, 125, noting that American courts would grant a remedy in such a case.

³²⁷ This may raise the issue of the appropriate degree of judicial oversight of editorial decisions. In *Campbell* [2004] 2 AC 457, for example, differing views were expressed. Lords Nicholls and Hoffmann in particular emphasised the importance of allowing a proper degree of journalistic margin to the press to deal with a legitimate story in its own way, without imposing unnecessary shackles on the press' freedom to publish detail and photographs which add colour and conviction: at 468 and 475 respectively. By contrast, Lord Hope held that while the choice of language used to convey information and ideas, and decisions as to whether or not to accompany the printed word by the use of photographs, were pre-eminently editorial matters with which the court would not interfere, decisions about the publication of material that is private to the individual raise issues that are not simply about presentation and editing and were therefore open to review by the court: at 489. In addition, Baroness Hale thought the trial judge was best placed to judge whether the additional information and the photographs had added significantly both to the distress and the potential harm; to tell how serious an interference with press freedom it would have been to publish the essential parts of the story without the additional material; as well as how difficult a decision this would have been for an editor who had been told that it was, say, a medical matter and that it would be morally wrong to publish the material: at 502. Lord Carswell agreed with Lord Hope and Baroness Hale: at 505.

- Whether the subject matter of any story concerns government or political matters. This term could be defined narrowly, in accordance with the current approach to the *Lange* defence. However, for these purposes the broader interpretation, that is ‘public affairs’, may be preferable. This would not only include speech relevant to factors such as politicians, policy, public bodies and public officers but also all speech relevant to the development of public opinion on the range of issues which an intelligent citizen should think about.
- Whether the defendant is otherwise acting or publishing in the public interest, that is, the matter concerned affects people at large, so that they may be legitimately interested, or concerned about it.
- In the case of the disclosure of private facts, the publication must be reasonable in the circumstances. In the case of both torts the defendant must not be actuated by malice or abuse the privilege.
- The subject matter must be in the public interest rather than merely of interest to the public, such as pandering to a desire for scandal.

4 *Other Defences*

The United States experience and the limited experience in Australia in striking a balance in the context of claims for a form of privacy suggests that there may be a place for other subsidiary defences which may have significance in a more limited number of cases. However, in the absence of privacy legislation, unless a case arises that is on point, it may take some time before the claimed defence receives consideration, as shown in *Grosse*.

The additional defences under the *Second Restatement* have parallels with defences under Australian defamation law, as shown in the following summary:

Table 1: Subsidiary Defences in the United States and Australia

United States — <i>Second Restatement</i>	Australian Equivalent	Australian <i>Listening Devices Acts</i> Equivalent
Legislative privilege	Parliamentary privilege	
Judicial privilege	Judicial privilege	
Conditional privilege: reports of public proceedings	Qualified privilege: fair and accurate reports (Parliament, courts, public meetings etc)	
Conditional privilege: executive officers performing official duties	Absolute privilege: executive officer communications	
Conditional privilege: protection of defendant’s interests	Qualified privilege: protection of interest (retort)	No more than reasonably necessary to protect defendant’s interests

Conditional privilege: report to government authorities concerning mental health	Qualified privilege: limited audience with interest in truth	Communication to one reasonably believed to have an interest such that communication is reason- able
Conditional privilege: reasonable investigation of claim against defendant	Qualified privilege: limited audience with interest in truth	Communication to one reasonably believed to have an interest such that communication is reason- able

In the case of parliamentary and judicial proceedings, an unabridged freedom of speech is considered indispensable to the effective functioning of the institution.³²⁸ This is reflected in the conferral of absolute immunity from suit for defamation.³²⁹ There is no reason why privacy should not similarly defer to freedom of speech. Freedom of speech in such proceedings could clearly be hindered if privacy is protected from public disclosure. However, it could also be restricted where the information has been surreptitiously obtained through an unreasonable intrusion if the plaintiff elected to forego the action based on public disclosure but sought a remedy for the intrusion. Therefore, the defence should apply to both proposed torts.

Fair and accurate reporting both relate to the publication of information. Public interest supports a qualified privilege against defamation proceedings on a number of grounds, such as an extension of proceedings generally open to attendance by members of the public, the public scrutiny of public officials conducting the proceedings, education of the public, and forestalling the circulation of unfounded rumours.³³⁰ These grounds are considered sufficient for the privilege to override an individual's reputation, and should also override an individual's right to privacy in the form of protection from widespread disclosure of private details.

There is no exact match for the 'executive officers performing official functions' defence of the United States. The common law does recognise that communications by high-level officers in their official capacity are in the nature of acts of state, and therefore protected by absolute privilege.³³¹ The precise

³²⁸ *Gibbons v Duffell* (1932) 47 CLR 520, 528 (Gavan Duffy CJ, Rich and Dixon JJ).

³²⁹ In relation to parliamentary proceedings, see *Parliamentary Privileges Act 1987* (Cth) s 16(1); *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 24(3); *Imperial Acts Application Act 1969* (NSW) s 6; *Legislative Assembly (Powers and Privileges) Act 1992* (NT) ss 4, 6; *Defamation Act 1889* (Qld) s 10(1); *Constitution Act 1934* (SA) s 38; *Defamation Act 1957* (Tas) s 10(1); *Constitution Act 1975* (Vic) s 19(1); *Parliamentary Privileges Act 1891* (WA) s 1. In relation to judicial proceedings see, eg, *Defamation Act 1889* (Qld) s 11; *Defamation Act 1957* (Tas) s 11; *Cabassi v Vila* (1940) 64 CLR 130.

³³⁰ *Webb v Times Publishing Co Ltd* [1960] 2 QB 535, 559–62 (Pearson J).

³³¹ *Chatterton v Secretary of State for India in Council* [1895] 2 QB 189, 191 (Lord Esher MR).

scope of this defence is uncertain,³³² but would seem to be limited to communications between government ministers and other ministers or high-level officials.³³³

Protection of self-interest is well-supported as a likely defence. If allegations are made against a person, he or she should be entitled to defend himself or herself without one hand being tied behind their back by the spectre of a breach of privacy claim by either the accuser or a third party. Moderation of this privilege rests in it being ‘qualified’ or ‘conditional’, as it is described in the United States, or in the formulation of the defence as ‘no further than reasonably necessary’ to protect the defendant’s interests.³³⁴ The defence should therefore be unavailable in the event that the intrusion or disclosure was actuated by malice or ill will.

The privilege attracted by a report to authorities about the plaintiff’s mental health is based on the proposition that the restraint and treatment of persons who are mentally ill is a matter of public concern.³³⁵ Further, the communication in such a case is to amount ‘only to the making of a complaint to an officer interested in the subject of the complaint and who is authorised to take proper steps to investigate the matter’.³³⁶ Neither this defence nor ‘reasonable investigations of claims against the defendant’ have direct parallels in the Australian common law, but may be seen as instances of the wider ‘duty/interest’ qualified privilege, which embraces cases where the common convenience and welfare of society is deemed more important than an individual’s reputation, or in the current context, the right to privacy. It is interesting to note that these defences could reflect the more generally drawn defence under the *Listening Devices Acts* of ‘communications to [one who is reasonably believed] to have such an interest in the private conversation as to make the communication reasonable under the circumstances in which it was made.’³³⁷ This defence bears a close resemblance to the defence to defamation provided by s 22 of the *Defamation Act 1974* (NSW). Under this section, there is a defence for the publication of information on a subject to a recipient who has an interest in the information where the conduct in publishing the material is reasonable in the circumstances. This defence has been considered sufficiently wide to accommodate even the implied freedom of communication concerning government or political matters,³³⁸ although the requirement of reasonableness has made it difficult for media defendants to rely on this defence.³³⁹ Although there may be some attraction in also recognising a more widely-drawn defence applying to invasion of privacy at

³³² Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (1998) 156.

³³³ Cf *Gibbons v Duffell* (1932) 47 CLR 520, 526–8 (Gavan Duffy CJ, Rich and Dixon JJ) (communication from a police inspector to a superior was not covered).

³³⁴ See above n 324 and accompanying text.

³³⁵ *Schwartz v Thiele*, 242 Cal App 2d 799, 805 (Frampton J) (Dist Ct App, 1966).

³³⁶ *Ibid* 804.

³³⁷ See, eg, *Listening Devices Act 1992* (ACT) s 5(2)(e); *Listening Devices Act 1984* (NSW) s 7(2)(d); *Invasion of Privacy Act 1971* (Qld) s 45(2)(d); *Listening Devices Act 1991* (Tas) s 10(2)(d); *Surveillance Devices Act 1998* (WA) ss 9(2)–(3).

³³⁸ *Lange* (1997) 189 CLR 520.

³³⁹ Gillooly, above n 332, 202. Now, a checklist of considerations is provided in *Defamation Act 1974* (NSW) s 22(2A).

least in the case of disclosure of private facts, such recognition would more likely come by way of statute. A defence recognised by common law is likely to be more narrowly formulated, in accordance with the particular needs of the case at hand.

VI CONCLUSION

Now that the High Court has cleared the way for Australia to recognise a form or forms of protection against invasion of personal privacy, the threshold question will be whether there is great enough need for such a tort or torts in this country. The fact that other common law countries have taken this step is persuasive, but not conclusive, as to whether Australia should do likewise.

If Australia does choose to follow this path, it is only natural to seek guidance from overseas experience, with the caveat that this experience might be closely linked to broader regimes or contexts that do not apply here. The United States and its century-long experience with torts protecting personal privacy provides obvious guidance, but does so in the context of a constitutional guarantee of free speech. The United Kingdom and New Zealand courts have provided differing paradigms for developing the common law to recognise tortious actions protecting privacy, although in the case of the United Kingdom this was done under the influence of the *HRA* and the *ECHR*.

It has been suggested that there is a case for recognising two separate privacy torts: one protecting against unreasonable intrusion and the other protecting against disclosure of private facts. The first has been described as the 'archetypal' form of invasion of privacy, and its recognition should be seen as subsuming the developing tort of harassment, which should be regarded as merely an instance of the wider tort. The second is a tort which has been recognised in all three of the other common law countries, the United States model being adopted in New Zealand and the United Kingdom by way of transforming the equitable action for breach of confidence. It has been noted that an essential catalyst for the United Kingdom development was the influence of the *HRA*. In the absence of the booster effect of a similar statute in Australia, it is submitted that this country should not follow a similar course of contorting an equitable doctrine based on good conscience into a tort based on human dignity and personal autonomy and yielding a remedy of substantive damages. Instead, a preferable course is to adopt and adapt the United States model, with the two torts consistent in being based on a judgement of whether there is a reasonable expectation of privacy in the circumstances. This should be a decision balancing relevant factors including the setting, means of invasion and degree to which the plaintiff courted publicity. Once this balancing exercise is concluded, a judgement should be made as to whether the relevant invasion of privacy would be highly offensive to a person of ordinary sensitivities as a guard against trivial claims. This is an important means of excluding trivial cases in light of the fact that the relevant damage being compensated is in the nature of mere emotional distress, embarrassment and humiliation.

Unlike, for example, the balancing exercise between reasonable expectations of privacy and freedom of expression undertaken in the United Kingdom under

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the influence of the *HRA* and the *ECHR*, the question in Australia should then be whether there is a relevant defence that will enable the defendant to invade the plaintiff's privacy with impunity. Taking guidance from both past experience in Australia and overseas, it is suggested that defences including consent, public interest (including accommodation of the constitutional freedom of communication concerning government or political matters, but also extending to matters of public concern) and some subsidiary defences will strike a fair balance between an individual's right to privacy and freedom of expression which is, as Callinan J has advocated, adapted to suit Australian conditions.³⁴⁰

³⁴⁰ *Lenah Game Meats* (2001) 208 CLR 199, 328.