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**A Price Too High? Navigating Consent and the Tort of  
Privacy in a Reality TV Show Context**

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*Abstract*

People who consent to have their privacy intruded upon in a reality TV show cannot rely on the tort of privacy for relief when things go wrong. In a reality TV show not all contestants will understand the nature and potential consequences of what they have agreed to – and in some cases will not have agreed to. Some are therefore suffering harm as a result. How, therefore, should we look at the role of consent within the privacy tort?

In other areas of law, such as equity, consent can be set aside if the person fulfils certain characteristics or were subjected to unfair conduct. This essay will look at why some of those principles can apply to a reality tv participant and also why there are good public policy reasons for doing so. It will also examine what other remedies may be available given the myriad of scenarios that occur in a reality tv show context.

Keywords: reality tv, consent, privacy, equity, torts

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## *I Meet Madison and Brian*

The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass.<sup>1</sup>

Madison has just seen a casting call for the popular reality TV show, *Tropical Love*. She is 20 years old and has not been to university. Her dream is to be an influencer. She eagerly signs all the filming consent forms and waivers, but does not consult a lawyer – she is told she does not need one for a basic contract. Besides, she has seen the show and feels like she knows what she is getting into. However, about a year later, when the show finally airs, Madison is shocked to see she has been edited to look like the villain. It looks like she stole another contestant’s boyfriend on the show when in reality Madison was seeing him first. Madison starts receiving harassment and abuse from angry fans. Upset, she makes the mistake of drink-driving. Her appearance in Court is publicised by media and she is surrounded by the press and those upset fans. Madison is angry at what has happened – but what can she do? She agreed to it all.

Brian has been in and out of state and care facilities for most of his life. He has multiple convictions for petty crime and has recently been diagnosed with a mental health disorder, on top of his addiction to alcohol. Brian regularly pans for money on the street. He is frequently apprehended by the police for public intoxication and causing a disturbance. One day, the usual visit from police is accompanied by a filming crew. In his impaired and angry state, Brian does not notice the filming crew and they do not speak to him. Brian is taken back to the station to sleep it off. Several months later Brian’s interaction with police is broadcast on a police reality TV show. Brian has his own problems and is not too concerned – but he was never asked permission. Nor, given his intoxicated state, could he have agreed to the filming. An advocate for Brian contacts

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<sup>1</sup> Edward J. Bloustein “Privacy as an aspect to human dignity” in Ferdinand David Schoeman (ed) *Philosophical Dimensions of Privacy* (Cambridge University Press, Cambridge, 1984) 156 [Bloustein] at 188.

the production company who say they never needed permission to film – Brian was in a public place after all.

Both the scenarios raise questions about the role of consent in privacy. In normal circumstances, both Madison and Brian could bring a cause of action under breach of privacy. However, since there is (a level of) consent, this precludes them from relief. Reality TV shows are a good example of highlighting some of the “gaps” in the tort of privacy. There is some ambiguity given the newness of the tort about the role and manner of consent and how it affects the application of the tort. In other areas of law there are guidelines that address situations where consent, despite being freely given, can be negated or treated as legally irrelevant. This paper will look how reality TV shows fall outside the scope of the tort, the role that consent plays and what legal remedies are available to Brian and Madison in their specific circumstances.

### ***A Competitive reality TV shows***

Madison’s situation represents the light-hearted competition-style shows such as *Love Island* and *Big Brother*. In these shows the contestants have willingly consented to the intrusion of privacy through a contract beforehand.

### ***B Public interest reality TV shows***

Brian’s situations falls into the “public interest” reality TV shows which are promoted as educational or informative. They usually focus on emergency services such as *Police Ten/7*, *Ambulance* or *One Born Every Minute*. Brian is essentially an “involuntary”<sup>2</sup> participant; he has not agreed to be filmed but his lack of consent or otherwise is treated as irrelevant because he was in a public place.

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<sup>2</sup> This is the term used by Natayla King in her article “Privacy and Reality Television: Issues for Producers and Involuntary Participants” in Stephen Penk (ed) *Privacy Law in New Zealand* (2nd ed, Thomson Reuters New Zealand, Wellington, 2016) [King] at 358.

## II Introduction to the tort of privacy

A “haystack in a hurricane” may be an accurate description of the elusive concepts of privacy in law.<sup>3</sup> Privacy is both abstract in theory, drawing on philosophical ideas, but often demonstrated through physical intrusion. It is a tort that offends against individuals but has large implications for society. Its relative newness corresponds with technological changes that have meant an impaired ability to shield ourselves from unwanted intrusions or keep what is private and public separate.<sup>4</sup>

*Hosking v Runting*<sup>5</sup> established that the tort of privacy exists in New Zealand,<sup>6</sup> though there is some doubt over which elements are necessary to fulfil it.<sup>7</sup> This may be because the tort itself encompasses both informational privacy as well as physical privacy. Privacy is considered a “dignitary” tort; an intentional tort where a person has been subjected to something that is considered contrary to the sanctity of human dignity.<sup>8</sup> Privacy and protection of privacy is a recognition that a key part of our identity is the right to shield ourselves from unwanted intrusion.<sup>9</sup> *Hosking v Runting* noted the protections that the privacy tort affords is not against personal injury but protection

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<sup>3</sup> Bloustein quoting *Ettore v Philco Television Broadcasting Corporation*, above n 1 at 156. See also Bloustein’s excellent quote that the “law’s vocabulary of mind is exceedingly limited”. The law often struggles to define concepts Bloustein describes better equipped for a “poet and not a professor”: above n 1, at 186–187.

<sup>4</sup> The impact of technology on privacy was something that was being recognised as far back as 1964: at 190.

<sup>5</sup> Mr Hosking ultimately failed but the Court recognised the validity of a privacy tort: *Hosking v Runting* [2005] 1 NZLR 1 (CA).

<sup>6</sup> The tort has not been confirmed by the Supreme Court. See N A Moreham and Tanya Alpin “Privacy in European, Civil and Common Law” *Tugendhat and Christie The Law of Privacy and the Media* (3rd ed, Oxford University Press, Oxford, 2016), at [3.100]. [*Tugendhat and Christie*].

<sup>7</sup> *Peters v Bennett* [2020] NZHC 761, [2020] 2 NZLR 699 at [82].

<sup>8</sup> N A Moreham “The Nature of the Privacy Interest” in *Tugendhat and Christie*, above n 6, at [2.56]. This includes the torts of battery, assault, false imprisonment, defamation and intentional infliction of emotional distress.

<sup>9</sup> NA Moreham, “Compensating for loss of dignity and autonomy” in Jason N E Varuhas and N A Moreham (eds) *Remedies for Breach of Privacy* (Hart Publishing, Oxford, 2018) at 133. [*Remedies for Breach of Privacy*].

against humiliation and distress.<sup>10</sup> The purpose of the tort is to promote dignity, autonomy, relationships and wellbeing.<sup>11</sup>

### ***A The requirements of the tort***

The tort is concerned with two key elements: the breach of dignity and an undermining of autonomy by an unwanted intrusion into one's privacy.<sup>12</sup> The Court found to establish a breach in tort for privacy there must be:<sup>13</sup>

- (a) the existence of facts in respect of which there is a reasonable expectation of privacy; and
- (b) publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

Satisfaction of these elements may sometimes be readily evident. Meghan Markle recently won a breach of privacy lawsuit when personal correspondence was published because one would reasonably expect that to be private.<sup>14</sup> Similarly, the Duchess of Cambridge won a lawsuit in 2017 for breach of privacy when topless photos were taken while she was on holiday.<sup>15</sup> The position is unclear for Madison and Brian. Neither of them can claim to have a reasonable expectation to privacy under the tort: Madison, firstly, because she consented to the intrusion, and Brian, secondly, because he was in a public setting where traditionally one cannot reasonably expect to have privacy. There can be no reasonable expectation to privacy in a reality TV show because the entire premise is predicated on intrusion into spheres that would normally be considered private.

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<sup>10</sup> At 128.

<sup>11</sup> NA Moreham "The Nature of the Privacy Interest" in *Tugendhat and Christie*, above 6, at [2.02].

<sup>12</sup> *Remedies for Breach of Privacy*, above n 9, at 134 and 136.

<sup>13</sup> *Hosking v Runting*, above n 5, at [117].

<sup>14</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 273 (Ch), [2021] 4 WLR 35 at [73].

<sup>15</sup> Maya Oppenheim "Duchess of Cambridge topless photo case: Closer ordered by French court to pay £91,700 in damages" *Independent* (online ed, London, 5 September 2017).

### ***B Reconciling autonomy and intrusion***

The privacy tort recognises the importance of autonomy and the right to make choices on intrusion into personal lives. In reality TV shows, we have people who are exercising their autonomy to consent to intrusion. However, they are equally exercising that autonomy that the tort recognises in ways that seem at odds or incompatible with conceptions of dignity. For example, a participant may consent to filming knowing that they may be shown in circumstances that impugn their character in the potential trade-off for fame or money. However, in ceding their right to privacy, it is unclear whether this extends to their dignity. In consenting to waive their right to privacy, does that automatically mean they have consented to deliberately humiliating situations? Or is any loss of dignity an anticipated consequence that they also agreed to?

Even if consent does extend to being depicted in humiliating situations that may impair dignity, because privacy is such an elastic and subjective concept, some people may not fully appreciate what they are ceding. Given the myriad of different reality tv show concepts, it does not seem plausible that contestants can anticipate all outcomes. Some of the uncertainty is directly related to how consent interacts with the tort of privacy.

### ***III Key principles of consent***

Not everyone can give consent. Certain characteristics can exclude the ability to give consent, such as being a child or lacking mental capacity.<sup>16</sup> An intoxicated person generally cannot consent.<sup>17</sup>

Leaving aside personal characteristics, consent encapsulates two elements: the ability to understand the choice, coupled with the ability/autonomy to make a decision free of

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<sup>16</sup> There are also statutory classes of people with certain characteristics within criminal law that preclude consent to sexual intercourse: see Crimes Act, ss 132 and 138 in relation to age and impairments. Stephen Todd “Defences” in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters New Zealand, Wellington, 2018) at [21.3.04].

<sup>17</sup> In contract, intoxication either renders the contract void or voidable. In criminal law consent to sexual activity is precluded under s 128A of the Crimes Act if the person is intoxicated.

external control.<sup>18</sup> Consent must be freely and willingly given and can generally be vitiated if it has been obtained by fraud or duress.<sup>19</sup> A failure to disclose pertinent facts or deliberately withholding relevant information crucial to the act in question may also remove consent.<sup>20</sup>

However, notions of consent vary depending on the area of law and context. For example, contract is an area where the courts are reluctant to interrupt commercial certainty. Therefore, in common law rules, a contract that is made with someone who lacks capacity is voidable provided there is knowledge of the other party's incapacity.<sup>21</sup> In criminal law, rules around consent are mostly codified.<sup>22</sup> Within intentional torts, a lack of consent is integral to conduct for battery but in the remainder it is a defence.<sup>23</sup> Consent to assault and battery, both within the criminal and tort context, are subject to public policy,<sup>24</sup> which will be discussed below.

### ***A Consent within the privacy tort***

Within the privacy tort the role of consent, or the lack of it, is still under development. A failure to gain consent in of itself is not an element of the tort.<sup>25</sup> However, consent may be a defence to a breach of privacy, provided it is active consent and not acquiescence.<sup>26</sup> In normal circumstances, consent may be difficult to prove without concrete evidence but

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<sup>18</sup> Tom L Beauchamp "Informed Consent: Its History, Meaning and Present Challenges" (2011) 20 Cambridge Quarterly of Healthcare Ethics 515 at 517–518.

<sup>19</sup> See *Todd on Torts*, above n 16, at [21.3.03] for the tort position. A contract with the intention to deceive or commit fraud is considered illegal: see Jeremy Finn "Illegality" in Jeremy Finn (ed) *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, Lexis Nexis New Zealand Ltd, Wellington, 2018) at [13.4.1]. Duress within contract is discussed below.

<sup>20</sup> See *R v Mwai* [1995] 3 NZLR 149 (CA) where the failure to disclose HIV positive status meant there was no informed consent to sexual activity.

<sup>21</sup> See Stephen Todd "Capacity" in *Burrows, Finn and Todd on the Law of Contract in New Zealand*, above n 19, at [14.3.1].

<sup>22</sup> Consent is preserved as a common law defence, subject to those statutory carve outs, Crimes Act, 1961, s 20.

<sup>23</sup> Stephen Todd "Trespass to the Person" *Todd on Torts*, above n 16, at 109–110.

<sup>24</sup> Stephen Todd "Defences" *Todd on Torts* at [21.03.03].

<sup>25</sup> *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220 (HC) at [70];

<sup>26</sup> Sir Mark Warby and Victoria Shore "Justifications and Defences" *Tugendhat and Christie*, above n 6, at [11.04].

there is clear evidence of Madison’s consent.<sup>27</sup> More recent developments suggest consent may be a consideration to be taken into account when considering the nature of the privacy breach.<sup>28</sup> Lack of consent alone, “without special factors” is usually insufficient.<sup>29</sup>

### ***B The role of revocation of consent***

It is also unclear what part revocation of consent plays within the tort. That may be because in traditional privacy breaches, realistically there would be few occasions where revocation would be possible. But in a reality tv show, there is time for consent to be withdrawn because there is generally a long period of time between filming and subsequent broadcast.<sup>30</sup> Many of the issues around consent may relate to editing decisions – meaning a person may not be unhappy with their participation until broadcast, by which point it is too late. It is suggested that revocation may apply in some circumstances, but where a contract is in operation revocation may be difficult.<sup>31</sup>

It is also clear from case law that revoking consent or providing no consent does not mean your privacy will be respected. In the case of *Ali v Channel 5*, Mr Ali was being filmed being evicted from his house on a show called *Can't Pay? We'll Take it Away*.<sup>32</sup>

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<sup>27</sup> At [11.04].

<sup>28</sup> See the discussion on consent and inferred consent in *Peters v Bennet*, above n 7, at [100](d) and [111].

<sup>29</sup> In the case of *Murray* and *Hosking*, the fact that the photographs were taken without consent plus were of ordinary, everyday occurrences that any member of the public could observe was not sufficient to establish a breach. *Murray v Express Newspapers* [2008] EWCA Civ 446, [2009] Ch 481 at [73]; see also *Campbell v MGM* [2005] UKHL 61, [2005] 1 WLR 3394 at [73]. Some “special factors” are discussed below at 14.

<sup>30</sup> See King, above n 2, at 370 for a discussion on “suitable lengths of time” between filming and broadcast that change the nature of whether there is a breach.

<sup>31</sup> “Justifications and Defences” *Tugendhat and Christie*, above n 6, at 477–478.

<sup>32</sup> The majority of the facts are set out in the Chancery division decision: see *Ali v Channel 5 Broadcasting* [2018] EWHC (Ch), [2018] EMLR 17 [*Ali* Ch]. The Court found in favour of Mr Ali that there was an actionable privacy breach. The Chancery decision was upheld on appeal, with Channel 5’s cross-appeal on the basis of public interest dismissed. Mr Ali’s appeal for a larger award of damages was dismissed also: *Ali v Channel 5 Broadcasting* [2019] EWCA Civ 677 [*Ali* CA].

Despite Mr Ali clearly stating he did not want to be filmed (and later revoking any consent he may have implied) filming continued and the show was broadcast. While it may be possible afterwards to prevent the show from being re-broadcast, with the internet and social media, the damage is already done.<sup>33</sup> In other torts, however, revocation is a powerful tool. For example, in trespass, there is an implied licence to enter someone else's property in limited circumstances but the moment that implied licence is withdrawn, the person then becomes a trespasser.<sup>34</sup> A person can also revoke consent to medical treatment or to false imprisonment.<sup>35</sup>

#### *IV What is the harm?*

Reality television is too old, as a genre, for participants to pretend they didn't know what they were signing up for — at best a modicum of stardom, at worst, abject public humiliation.<sup>36</sup>

The quote above suggests a distinct lack of sympathy for the Madisons of this world. After all, she agreed to filming and knew what she was getting into. But in recent years there is growing societal concern around these reality TV shows which highlight the need to take the issue of consent seriously.<sup>37</sup>

##### **A Harm to mental health**

We were just commodities that were thrown away at the end of the day.<sup>38</sup>

The invasion of one's privacy is considered irreparable.<sup>39</sup> Coupled with that is the link between an invasion of privacy and the harm to mental health.<sup>40</sup> In a reality TV show the

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<sup>33</sup> In the case of Mr Ali, the owner of the rental property also posted videos of the eviction on Facebook, *Ali Ch* at [123]. The show was also watched a total of 9,650,393 times: at [138].

<sup>34</sup> See *Robson v Hallett* [1967] 2 QB 939 (CA) and *Tararo v R* [2010] NZSC 157, [2012] NZLR 145.

<sup>35</sup> "Consent" *Todd on Torts*, above n 16, at [21.03.02].

<sup>36</sup> Scaachi Koul "The '90 Day Fiance' Train Wreck Just Stopped Being Fun to Watch" (11 January 2019) *Buzzfeed*.

<sup>37</sup> It should be noted that it is hard to separate out the types of harm – ie the harm from actually participating in filming versus the harm from the aftermath. They often blur together.

<sup>38</sup> "MAFS NZ star warns: 'Someone will take their own life' if things don't change" *The New Zealand Herald* (online ed, Auckland, 26 May 2019).

<sup>39</sup> Bloustein, above n 1, at 188.

impact on mental health from the lack of privacy can be heightened by showing people at their lowest or worst or by manipulating and editing footage to make participants appear in a certain light. “Public interest” type reality TV shows may depict particularly traumatic or graphic incident in one’s life, such as that in *Andrews v Television New Zealand*, where the plaintiffs were filmed being rescued from a car crash. They stated they were retraumatized by having to relive their accident on national TV.<sup>41</sup>

Following the airing of some shows, a number of contestants have taken their own lives.<sup>42</sup> Central to the privacy tort is also the hurt and distress suffered from being treated as means to an end.<sup>43</sup> A contestant in *Married at First Sight* (New Zealand) said all support ceased upon filming and warned that someone will die if producers do not take their duty of care seriously enough.<sup>44</sup> Some of these contestants may not fully understand the amount of pressure or scrutiny they will come under. Social media and the internet allow cyberbullying to flourish, to the point where *Love Island* producers had to publicly ask fans to stop bullying and harassing contestants.<sup>45</sup> Tabloid journalism and the rapid news cycle has also meant there is an extra layer of scrutiny that extends into personal and private lives outside of what they have consented to within the show.<sup>46</sup>

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<sup>40</sup> “The Nature of the Privacy Interest” in *Tugendhat and Christie*, above n 6, at [2.82]. See also Ruth Gavison “Privacy the Limits of Law” in Ferdinand David Schoeman (ed) *Philosophical Dimensions of Privacy* (Cambridge University Press, Cambridge, 1984) 346 [Gavison] at 364.

<sup>41</sup> *Andrews v Television New Zealand*, above n 25, at [15]. I have decided not to deal with the torts of intentional infliction of emotional distress and nervous shock cases; these torts could of course potentially apply to involuntary participants of reality TV shows.

<sup>42</sup> Several of the competitors on *Love Island* have committed suicide after appearing on the show, including the host. In 2016, the *New York Post* noted 21 reality tv stars had committed suicide in the past decade. Dana Schuster “Dying for fame: 21 reality tv stars committed suicide in a decade” *New York Post* (online ed, New York, 28 February 2016).

<sup>43</sup> “The Nature of the Privacy Interest” in *Tugendhat and Christie*, above n 6, at [2.63].

<sup>44</sup> *The New Zealand Herald*, above n 38.

<sup>45</sup> Natasha Mwansa “Casual cruelty, no diversity, online bullying, death threats: Welcome back to Love Island” *Evening Standard* (online ed, London, 5 July 2021).

<sup>46</sup> See, for example, the case of Caroline Flack. After she was arrested for assault against her boyfriend, the press also published photos of bloodstained sheets as “evidence” of the assault, although it later transpired the blood was Caroline’s: Ellie Harrison “Caroline Flack’s mother says paparazzi followed her and two other 70-year-olds across London after she ‘cleaned up the blood in Carrie’s flat’” *Independent* (online ed, London, 12 March 2021). Caroline had also complained

## **B Public good**

Let the sexual humiliation games begin! The girls and guys line up to pick and be picked, swapped, swapped back, discover themselves to be a prized commodity or a depreciating asset.<sup>47</sup>

Finally, there is the unexpected public harm that can result from an individual's loss of privacy. Within the competitive genre, failure to do due diligence by the production companies means they are often allowing people a platform to promote behaviours that are not in the public good. *Married at First Sight* has come under fire for normalising toxic behaviour bordering on domestic violence and abuse.<sup>48</sup> The winner of *The Bachelor* later took out a restraining order against the Bachelor handpicked by the producers.<sup>49</sup> It is also debatable about how healthy it is for people to consume shows where people are essentially treated as commodities.<sup>50</sup>

Do folks still believe it's acceptable to build reality television around vulnerable communities?<sup>51</sup>

Within the "public interest" shows there is growing recognition about the limited and perhaps curated lens of these shows, such as *Police Ten/7* which has been accused of perpetuating racist stereotypes. In the United States, the long-running show *Cops* was cancelled, a show described as enabling the "removal of dignity of people facing some of

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of paparazzi using long lens photograph to take pictures of her topless: Emma Powell "Caroline Flack slams 'perverted' paparazzi on Twitter for taking pictures of her changing on holiday" *Evening Standard* (online ed, London, 5 January 2016).

<sup>47</sup> A commentator describing the workings of Love Island: Lucy Mangan "Love Island review – I hate myself but I can't stop. Please somebody help!" *The Guardian* (online ed, London, 28 June 2021).

<sup>48</sup> Kellie Scott "Domestic violence survivors share what MAFS has been triggering this season" (12 April 2021) ABC

<sup>49</sup> "Petition against Colton Underwood's Netflix Series reaches over 25,000 signatures" *New Zealand Herald* (online ed, Auckland, 21 April 2021).

<sup>50</sup> This commoditising may be why so many people feel free to bully contestants on social media because it becomes all too easy to not see them as real people.

<sup>51</sup> Emily Writes "If America can cancel Cops, New Zealand can bin Police Ten 7" (12 June 2020) *The Spinoff*.

the worst moments of their lives”.<sup>52</sup> As is the case with Brian, these shows also predominantly feature those most vulnerable: the mentally ill, the addicted and those who have suffered the most from deprivation and poverty. The power and influence of these shows is immense but coupled with very little responsibility.

This provides compelling evidence of the problem and stretches the boundaries of what can be consented to, when what is being consented to is essentially being treated badly or expendable by production companies. This paints a picture of profit over people and the apparent giving of consent allows this to happen.

### *V Legal options for Madison and Brian*

Even before privacy was a tort in New Zealand, legal commentators were, and still are, grappling with the shortcomings of the tort.<sup>53</sup> The many scenarios in which different breaches of privacy can occur, from informational breaches to paparazzi photographs, coupled with an overlap with other torts, such as defamation, intentional infliction of emotional distress and the like, makes the law of privacy difficult to manoeuvre around in niche situations. In situations like Madison and Brian’s, other factors, such as the nature of consent, then become more important in assessing whether the tort is available to them or whether other avenues need to be explored.

### *VI Obtaining consent*

If a commercial use is made of an aspect of the personality of such a man without his consent, he has indeed suffered a pecuniary loss, but the loss concerned is the price he could command for abandoning his right to privacy.<sup>54</sup>

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<sup>52</sup> Emily Writes “If America can cancel Cops, New Zealand can bin Police Ten 7” (12 June 2020) The Spinoff.

<sup>53</sup> Gavison, above n 40, at 370–372, although it is to be noted this article addresses the American legal responses to privacy which are not discussed in any depth in this essay. See also Keith J’s dissent in *Hosking v Runting*, above n 5, at [219].

<sup>54</sup> Bloustein, above n 1, at 177.

How, and even if, consent is obtained is central to any relief for Madison and Brian. The problem with any reality TV show is that there is no consistent practice or industry standard.

### ***A Brian and consent***

Whether consent is obtained at all for people like Brian seems to be at the discretion of the production company, who rely on the principle that no consent is required when filming in a public place. This is predicated on the traditional belief one cannot have a reasonable expectation to privacy in a public place.<sup>55</sup>

However, certain factors may alter this default position.<sup>56</sup> In *Ali*, the Court found there is no default public space argument; a fact-sensitive analysis is required.<sup>57</sup> This is in recognition of the concern for human dignity and that people who may be in a particularly vulnerable state in a public place should not have their right to privacy waived. In the case of *Peck v United Kingdom*,<sup>58</sup> the European Court of Human Rights found that publicising CCTV footage of the claimant before he attempted suicide breached his right to privacy. In their reasoning, while he was in a public place, he was not there for the purposes of participating in any public event and he was not a public figure.<sup>59</sup> He was also obviously in a state of distress and while he was brandishing a knife, no charges followed. There was, therefore, no reason to publicise the footage.

There seems to be a “transformative” element in terms of public places and a reasonable expectation to privacy.<sup>60</sup> The dividing line seems to be when the nature of the intrusion crosses from capturing ordinary, run of the mill events<sup>61</sup> to the capture of situations that

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<sup>55</sup> See *Hosking v Runting*, above n 5, at [164] and *Murray*, above n 29, at [66].

<sup>56</sup> See reference to “special factors” above at 9.

<sup>57</sup> *Ali Ch*, above n 32, at [158].

<sup>58</sup> *Peck v United Kingdom* (2003) 36 EHRR 41.

<sup>59</sup> At 62.

<sup>60</sup> NA Moreham in “Privacy in Public Places” (2006) 65(3) CLJ 606 at 625 and King, above n 2, at 368, similarly recognise the transformative element from public to private.

<sup>61</sup> For example photos that “do not disclose anything more than could be observed by any member of the public on that particular day” in *Hosking v Runting*, above n 5, at [164] and “the simple walk down the street” referenced in *Murray*, above n 29, at [65].

occur in public that would be embarrassing or humiliating should they become widespread.<sup>62</sup> This distinction is also present in reality TV shows: between events that are humiliating and embarrassing but self-created versus one that is forced on the person against their wishes.<sup>63</sup> That, therefore, sets Brian apart from Madison. Brian may very well succeed in satisfying the privacy tort if a Court applied the standard set in *Peck*. Brian is a vulnerable person who does not live a life in the public eye. His lack of consent, coupled with the exploitative nature of the filming, should be a determining factor in finding a breach of privacy.

Even if Brian was not vulnerable, courts have shown that consent is a relevant factor for determining a breach.<sup>64</sup> In the case of *Ali v Channel 5*, the Court noted the significant issues around consent. Mr Ali was never asked for his consent and his requests for filming to cease were ignored by the production company.<sup>65</sup> While the traditional elements of the tort were still the essential factors in the case, the Court found that Channel 5 could not rely on the defence of consent, because they never had it in the first place.<sup>66</sup> The information sheet used by production company stated “always try and get a full on camera release” but also said “Some cases don’t need consent according to Channel 5”.<sup>67</sup> The release did not mention what those cases are and also stated “no promises can be made for blurring out faces because this is a matter of editorial control”. In cases when consent was not given, filming was not halted but the production team was told to instead say “I can’t make any guarantees about that”.

### ***B Madison and consent***

Madison has given consent and has signed a contract and contracts are powerful. But how should that consent be viewed, given it has been noted that these contracts are

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<sup>62</sup> For example, as is the case in *Campbell v MGM* where Ms Campbell was photographed entering rehab.

<sup>63</sup> NA Moreham “Privacy in Public Places”, above n 60, at 625.

<sup>64</sup> See *Peters v Bennett*, above n 7, at [111] where the judge referenced the fact that while there was consent it was used outside of that actually consented to. The judge in *Murray* noted obiter that the lack of consent may be an aggravating factor, above n 29, at [73].

<sup>65</sup> *Ali Ch*, above n 32, at [79] and [99].

<sup>66</sup> At [171] and [177].

<sup>67</sup> *Ali Ch*, above n 32, at [68].

extensive and include provisions that allow editorial decisions, right through to exclusionary liability provisions if participants get a STI.<sup>68</sup> In some cases, it is unclear whether consent could ever be fully informed where deception forms a key part of the show: for example, *Joe Millionaire*<sup>69</sup> or *I Wanna Marry Harry*.<sup>70</sup> *Jeremy Kyle* was a talkshow where guests are generally brought onto the show under false pretences to have a “bombshell” revealed or a confrontation. These have all too real implications. A guest on the *Jeremy Kyle Show* was convicted of assault after he headbutted a man who was having an affair with his wife. The guest claimed he was tricked into appearing on the show by the producers who told him his wife wished to reconcile but once on air he was confronted with his wife’s affair instead.<sup>71</sup> *The Jeremy Kyle Show* was later cancelled after a man died shortly after appearing on the show after submitting to a “lie detector” test that apparently revealed he had been cheating.<sup>72</sup>

One would think that this would immediately negate consent to render the contract voidable but even in these cases, the contractual terms may be worded in such a way that it allows consent to all manner of things. That, to some degree, should be challenged or challengeable in a Court should the contract come into question and that is where equity may play an important part.

## VII *Equitable options*

I have thought about going on X Factor but the problem is all my family are healthy, my dad hasn’t been in prison, I wasn’t bullied. When you think about it what the X Factor does is takes people’s personal tragedies and turns them into qualifications.<sup>73</sup>

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<sup>68</sup> Daniel Frankel “Reality Shows: You Sign Your Life Away” (21 October 2009) *The Wrap*.

<sup>69</sup> Contestants are led to believe they are dating a millionaire when he is actually a construction worker.

<sup>70</sup> Contestants think they are dating Prince Harry but it is really a (poor) lookalike.

<sup>71</sup> Ben Dowell “Kyle show ‘human bear baiting’” *The Guardian* (online ed, London, 24 September 2007).

<sup>72</sup> “Jeremy Kyle Show death: UK’s PM calls death ‘deeply concerning’ as more details emerge (15 May 2019) *Stuff*.

<sup>73</sup> As said by the late great comedian, Sean Lock.

Contracts and waivers for reality TV shows generally suffer from a power imbalance between the individual and the production company. This can then be exacerbated by the nature of the shows which may look for a certain type of person that will provide content that will garner ratings. As noted in the quote above, these are often people that have had challenging backgrounds which are used for a plot device. This may be people from certain socio-economic backgrounds who are generally young.<sup>74</sup> The production companies have the superior knowledge and the wealth of experience but are not obliged to make sure the other party understands the terms. While this may not seem to relate to the idea of maintaining human dignity, the right to be treated fairly and respect is inherent to the concept of dignity. The feeling of being “used” or being treated as a commodity undermines dignity. Because the tort of privacy in its current form would not address the issues Brian and Madison face, equitable remedies relating to power imbalances, such as duress, undue influence and unconscionable bargain may be of assistance, particularly for navigating the issues around consent. Equity recognises that sometimes agreements may be unfair and it would be wrong to hold people to them.

How equitable doctrines work has been neatly summarised by Hammond J in *Pharmacy Care Systems v Attorney-General*:<sup>75</sup>

It is important to recognise at the outset that New Zealand Courts supervise agreements against “unfairness” by placing limits on their enforceability to only a limited extent. They do so, broadly, under three heads: substance, status, and behaviour.

### ***A Duress – the behaviour***

Duress or coercion looks to the conduct or “behaviour” and whether one party has put illegitimate pressure on the other party. This pressure can be physical intimidation,<sup>76</sup> blackmail<sup>77</sup> or economic pressure.<sup>78</sup> It can include “lawful conduct” threats, such as

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<sup>74</sup> American Idol for example has an age limit and it has been noted the oldest person on Love Island was 31.

<sup>75</sup> *Pharmacy Care Systems v Attorney-General* CA198/03, 16 August 2004 at [87].

<sup>76</sup> As it was initially confined to: at [88].

<sup>77</sup> *Haines v Carter* [2001] 2 NZLR 167

<sup>78</sup> See *Williams v Roffey Bros* [1991] 1 QB 1.

litigation or a threat to go to authorities.<sup>79</sup> There must be exertion of an improper threat or pressure that means the person's will is overborne.<sup>80</sup> That threat must be causally linked to their assent but does not need to be the sole means.<sup>81</sup> A Court may also look at quality of the consent received and to what extent it had been induced rather than freely given.<sup>82</sup> If there is an "absence of a practical choice" but to submit, then duress can be made out.<sup>83</sup>

While it may not seem that duress is a viable option open to a reality TV participant, there could be subtler forms of duress.<sup>84</sup> In the case of *Ali*, the Court noted Mr Ali had no choice but to agree to be filmed as the "lesser of two evils".<sup>85</sup> Otherwise he risked the show airing and no one hearing his side of the story, which had been exacerbated by the allegations against his character made during filming.<sup>86</sup> The judge found this pressure did not "amount to true consent".<sup>87</sup> It has been noted anecdotally that participants like Brian who are taken into custody may have had waivers slipped into their arrest paperwork. It may not be unthinkable that there is a level of coercion or pressure placed on those who have been arrested to give their consent in exchange for leniency or better treatment.

### ***B Undue influence***

Undue influence is similar to duress but focuses on the nature of the relationship between the two parties.<sup>88</sup> In cases of undue influence, there may still be pressure or coercion exercised similar to duress, but there will be a relationship or position of trust or

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<sup>79</sup> See *Haines v Carter* [2001] 2 NZLR 167.

<sup>80</sup> *Pharmacy Care Systems Ltd*, above n 75, at [98]. The test is abridged here for relevancy.

<sup>81</sup> At [90].

<sup>82</sup> *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 at [60].

<sup>83</sup> At [62].

<sup>84</sup> It is accepted that these may not reach the standard as required in equity but provides evidence that consent may not be fully free or informed.

<sup>85</sup> Again, it should be noted he later revoked this consent in writing.

<sup>86</sup> *Ali Ch*, above n 32, at [82] and [84].

<sup>87</sup> At [177].

<sup>88</sup> The law in itself is quite complex and can be split into actual undue influence versus presumed undue influence.

confidence between the two parties which has been misused.<sup>89</sup> Sometimes trust and confidence can be inferred where there are occupations that give rise to trust and confidence, such as lawyers and clients, but it can also include familial relationships.

There are two classes of undue influence: actual undue influence, where there has been a positive act by a party, and presumed undue influence, which is the failure to protect a weaker party when there was a relationship where it was expected that protection would occur.<sup>90</sup> Cases of actual undue influence generally the exploitation of a weakness for financial gain.<sup>91</sup> Cases of presumed undue influence usually involve a person suffering frailty of a disability making a decision that is contrary to their best interests or where they receive little or no advantage to themselves.<sup>92</sup> There does not have to be a manifest disadvantage to the weaker party but it forms part of the evidentiary burden that rests on the plaintiff to prove they were subject to undue influence.<sup>93</sup>

Looking to Madison, one might assume that there can be no special relationship between her and the production company. However, in the case of Madison and many other reality TV shows, the contestants are usually isolated from friends and family for filming. They are completely reliant on the production company for their living circumstances. They thus become vulnerable to make decisions they might not ordinarily agree to. In many cases of undue influence, the vulnerable party is usually young and impressionable and therefore more susceptible to someone in a position of authority.<sup>94</sup> It is not too dissimilar that putting pressure on contestants to conduct certain acts during filming when they are isolated and vulnerable would fall under undue influence or even duress. If you fail to agree, you may be removed from the show. A *Love Island* contestant was

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<sup>89</sup> *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157 at 165.

<sup>90</sup> Stephen Todd “Exploitation” in *Burrows, Finn and Todd on the Law of Contract*, above n 19, at 12.4.3.

<sup>91</sup> See *Contractors Bonding Ltd v Snee, Sexton v Titiro Trustee Co Ltd* [2008] NZAR 312.

<sup>92</sup> “Exploitation” *Burrows, Finn and Todd on the Law of Contract*, above n 19, at 12.4.5.

<sup>93</sup> At 12.4.4.

<sup>94</sup> At 12.4.5. See *O’Sullivan v Management Agency and Music Ltd* [1985] QB 428.

reportedly removed by the producers because she refused to kiss another contestant.<sup>95</sup> If contestants are already in a vulnerable state, they may agree to do something that is not covered in their contract. It should also be noted that many of these contestants are unpaid or paid so little it is essentially a token gesture.<sup>96</sup> Youth, inexperience and impaired financial rewards were all factors for a finding of undue influence *O'Sullivan v Management Agency and Music Ltd*. Mr O'Sullivan entered into an agreement with his manager and a record company, the manager being shareholder in that company. The Court noted the record company "knew they were dealing with a young and inexperienced man ...who relied entirely on them to give him a fair deal".<sup>97</sup> They did not encourage the plaintiff to get independent legal advice as they then would not have had the advantage of "bargain basement terms".<sup>98</sup> They benefited off the relationship of trust and confidence between O'Sullivan and his manager. The Court noted that while both parties were working to a joint objective, the record company was taking the larger share of the profits when the contributions were equal.<sup>99</sup> In Madison's case, the production companies similarly are then using their position of power to receive the benefit of cheap or free content when the contribution of the contestants is essential to making any profit.

### ***C Unconscionable bargains - status***

Unconscionable bargain looks to inequities due to "status" rather than the nature of the relationship.<sup>100</sup> Unconscionability looks to the characteristics of the weaker party and the conduct of the stronger party. Unconscionability has been described as "victimisation,

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<sup>95</sup> Sarah Packer "Love Island's Shannon Singh was dumped after she 'wouldn't play ball and refused to kiss anyone' causing producers to 'orchestrate her exit' – and she will NOT be returning" *The Daily Mail* (online ed, London, 1 July 2021). Contestants may also be instructed on what to wear: In front of the House of Commons Select Committee Inquiry in the UK which was prompted by the *Jeremy Kyle* incident, *Love Island* participants stated that the men were required to wear speedos.

<sup>96</sup> Jim Waterson "Love Island contestants did not mind low pay, MPs told" *The Guardian* (online ed, London, 4 September 2019)

<sup>97</sup> *Sullivan v Management Agency and Music Ltd* [1985] QB 428, above n 94, at 457.

<sup>98</sup> At 457.

<sup>99</sup> At 479.

<sup>100</sup> See Hammond J's quote above at 17.

which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances”.<sup>101</sup>

To satisfy an unconscionable bargain, the person must be suffering from a qualifying disability or disadvantage. Qualifying disabilities are not closed classes and can range from “poverty or need of any kind, sickness, age, sex, infirmity of mind or body, drunkenness, illiteracy, lack of education, lack of assistance or explanation”.<sup>102</sup>

Brian would fall into the category of a qualifying disability. For Madison, the roots of unconscionable bargain relate to youthful inexperience. It originated out of the “expectant heir” coming of age and into money and being taken advantage of as a result.<sup>103</sup> Participants in these reality TV shows, like Madison, are generally young people, with limited life experience, including business experience. These people may not fully realise the consequences of their actions because of their age. While contestants might generally be of legal age<sup>104</sup> they are generally in their early twenties. There is also the crucial distinction in that these contracts are a corporate company versus an individual. It has been noted that while “it is to be expected that commercial parties are capable of taking care of their own interests” ... it is not necessarily the case that private individuals are in a position to be able to protect themselves”.<sup>105</sup> That alone, it has been suggested, entitles a different treatment, in particular because of the social value in allowing adequate self-protection for the individual.<sup>106</sup>

Once a disability has been established, the next limb is that the stronger party have actual or constructive knowledge of that disability.<sup>107</sup> The knowledge must be at the time of

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<sup>101</sup> *Hart v O'Connor* [1985] AC 1000 at 1024.

<sup>102</sup> *Blomley v Ryan* (1956) 99 CLR 362 at 405.

<sup>103</sup> *Duress, Undue Influence and Unconscionable Dealing* (2<sup>nd</sup> ed, Thomson Reuters, London, 2006) at 391–392.

<sup>104</sup> Particularly to consent to the various sexual activities that take place on the show.

<sup>105</sup> *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 325 (CA) at [118].

<sup>106</sup> At [118].

<sup>107</sup> *Nichols v Jessop (No 2)* [1986] 1 NZLR 237 (HC) at 239.

contracting.<sup>108</sup> This is a difficult limb to prove, but in Brian’s case should be apparent. If the police knew he was drunk enough to be arrested, then the production company equally is aware of his disability at the time of filming. If a waiver is signed at a later point, the company may point that he was no longer intoxicated and suffering from a disability. The production company would equally be aware at the time of contracting that Madison was young and unversed in business matters.

The final limb to satisfy is whether the stronger party has victimised the weaker party or passively accepted what they know to be a lopsided bargain.<sup>109</sup> In *Nichols v Jessop*, the agreement to allow road access via her property had no value at all to the defendant.<sup>110</sup> The Court recognised that Ms Jessop was “ignorant in property matters” as against Mr Nichols, who worked in real estate. Being aware of this discrepancy, he passively accepted the benefit to him despite having no moral fraud.<sup>111</sup>

If all the limbs are made out, the onus is then on the production company to demonstrate their conduct was above board. A lack of consideration or inadequate consideration may evidence of procedural impropriety.<sup>112</sup> Brian has got nothing in return for the company essentially getting free content. Madison too is likely not being paid or being paid a token amount. The production company, like Mr Nichols, has industry knowledge that gives them the upper hand. Neither Madison nor Brian have sought the advice of a lawyer, nor were they encouraged by the production company.<sup>113</sup> The production companies will know they have a commercial advantage and are willing to accept the benefit from Brian’s impaired state or Madison’s lack of business knowledge.

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<sup>108</sup> *Gustav & Co Ltd v Macfield Ltd* [2008] NZSC 47, [2008] 2 NZLR 735 at [5].

<sup>109</sup> *O’Connor v Hart* [1985] 1 NZLR 159 (PC) at 171.

<sup>110</sup> Her property would actually diminish in value. *Nichols v Jessop* [1986] 1 NZLR 226 (CA) at 230.

<sup>111</sup> *Nichols v Jessop (No 2)*, above n 107, at 239.

<sup>112</sup> *Bowkett v Action Finance* [1992] 1 NZLR 449 (HC) at 460.

<sup>113</sup> Lack of independent advice was relevant in *Bowkett* at 460 and was a factor in dismissing the application in *O’Connor v Hart*, precisely because he had received independent legal advice, above n 109, at 174.

If either Madison or Brian succeed, the contract will be voidable. The tort of privacy, therefore, may then be applicable.

### *VIII The last resort – public policy options*

In the event either Brian or Madison fails on the above grounds, there may be applicable public policy factors. In the case of Madison, there may be good arguments that strict contractual application should not apply because of the nature of harm involved and public policy grounds. This approach is demonstrated in laws relating to consent to harm.

Consent to harm in a criminal context is an area of law where judges have the power to remove that consent under public policy grounds. Consent to harm can be agreed to implicitly when it is non-intentional such as playing contact sports, but the level of risk is accepted because of the social utility of sports.<sup>114</sup> However, other “non-traditional” areas where people may consent to intentional harm may come under Court scrutiny such as body modification,<sup>115</sup> BDSM<sup>116</sup> and exorcism.<sup>117</sup> In some ways agreeing to appear on a reality TV show is an agreement to consent to harm, both mental and physical.

Consent as a defence to a criminal charge is maintained as a common law defence.<sup>118</sup> However, a Court can remove this defence in upon taking a balancing exercise. When there is a demonstrated intent to inflict injury or recklessness to the fact, the Court weighs the social utility of the conduct and any public policy reasons against the value of personal autonomy.<sup>119</sup> Generally, the higher the risk of the activity, coupled with no public utility, the more likely the Court is to remove that consent. In *BM*, while the defendant was practising body modification on people who had consented, the Court

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<sup>114</sup> “Defences” *Todd on Torts*, above n 17, at [21.3.02].

<sup>115</sup> *R v BM* [2018] EWCA Crim 560, [2019] QB 1.

<sup>116</sup> *R v Barker* [2009] NZCA 186, [2010] 1 NZLR 235.

<sup>117</sup> *R v Lee* [2006] 3 NZLR 42 (CA).

<sup>118</sup> Crimes Act, s 20.

<sup>119</sup> *R v Lee*, above n 117, at [316].

noted they were people who were vulnerable and potentially mentally unwell.<sup>120</sup> The risk of harm from that activity, such as infection, coupled by the fact it was not good public policy to allow unregistered people to essentially carry out medical procedures, meant that the consent could be removed.<sup>121</sup>

We can see that harm does occur in reality TV shows. While a lot of that harm is mental harm, it can sometimes be physical harm. *The Biggest Loser*, for example, encouraged contestants to engage in extreme exercise to lose weight, with some of them left with irreparable damage to their health.<sup>122</sup> In shows such as *Love Island*, sexual activity is expected between contestants which means they might be at risk of STIs or, more topically, Covid-19.<sup>123</sup>

Some of these shows normalise behaviour that is not in the public good, such as domestic violence.<sup>124</sup> These are all scenarios where the risk of harm is high and there is little to no public interest in allowing the behaviour. In case of in *R v S*, New Zealand's high domestic violence rates were cited as a factor in withdrawing the victim's consent to have her finger broken, given the power dynamic between the parties.<sup>125</sup> The victim was 16 years old with a history of being in state care and suffering from mental health issues.<sup>126</sup> Her partner was older and it was unacceptable to "condone a mature man intentionally inflicting serious harm on a teenage female". The ruling was upheld on appeal, with the Court of Appeal noting "there is no social utility on offer here".<sup>127</sup>

In some ways, compared to the body modification cases, which relate to a small niche group of people, the behaviours in reality tv shows are being broadcast to millions of

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<sup>120</sup> *R v BM*, above n 115, at [39].

<sup>121</sup> At [43].

<sup>122</sup> Olga Khazan "Doomed to be the Biggest Losers?" *The Atlantic* (online ed, New York, 12 May 2016).

<sup>123</sup> Because it this would not be intentional harm though, it may fall under the doctrine of assumption of risk "Defences" *Todd on Torts*, above n 17, at [21.3.01].

<sup>124</sup> See above at 13.

<sup>125</sup> *R v S* [2016] NZHC 1185 at [24].

<sup>126</sup> At [24].

<sup>127</sup> *S v R* [2017] NZCA 83 at [47].

people. The level of harm, which initially seems to be related to an individual, can radiate out. If a Court would not allow consent to stand in a criminal matter because of policy concerns, then there is equally a good reason in a reality TV show context to remove consent as well.

## *IX Solutions*

[The] law of privacy attempts to preserve individuality by placing sanctions upon outrageous or unreasonable violations of the conditions of its sustenance. This is the social value served by the law of privacy.<sup>128</sup>

While these issues arguably only affect a small subset of the population, they are important. These shows represent a microcosm of public attitudes and values, not to mention these shows are hugely influential. Careless treatment of human dignity on TV screens is not just potentially harmful for that individual but society. The legal solutions set out above are complex. It would be difficult and costly for Madison and Brian to mount a legal challenge. Court-based solutions also are the ambulance at the bottom of the cliff, requiring the harm to be done first, rather than attempt to prevent or mitigate the harm. There needs to be practical options to prevent the harm.

### *A Strengthening the consent process*

They didn't sign up to be portrayed as the bully or the slut or the drunk or whatever. But they were, because that creates ratings and ratings equal dollars"<sup>129</sup>

Even if the tort of privacy does not always place weight on consent, the parallel areas of law, particularly public policy suggests producers must ensure the nature and quality of consent is robust. This is protective for them as well in the event of litigation. When filming is taking place in such contentious and very emotionally heightened scenarios that affect someone's privacy interest and dignity there should be more stringent protocols in

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<sup>128</sup> Bloustein, above n 1, at 188.

<sup>129</sup> Former contestant on the Bachelorette, Jesse Csinsack. Antonio Petronzio "What happens to reality tv stars when the cameras stop rolling" *Cosmopolitan* (online ed, New York, 18 March 2019).

place around consent. Individual scenarios, such as taking a lie detector test, should be consented separately to the main contract. There should also be individualised consent for editorial decisions where footage is being spliced or edited a certain way. Or, in the alternative, inform contestants when this is taking place and allow them to view the footage in advance.<sup>130</sup>

It has been noted there are practical difficulties for gaining consent with involuntary participants like Brian.<sup>131</sup> This could be partially addressed by having a policy in place for revocation of consent. While a filming company may feel they have the right to film someone like Brian without seeking consent, an “implied licence with revocation” like the trespass tort could be helpful. This means if someone actively asks for filming to cease, the production company should take their wishes into account. That in the very least provides some recognition of their right to dignity and acknowledges their autonomy. Any lack of consent must always be relevant. That is in keeping with current attitudes and practice around consent.<sup>132</sup>

## ***B Strengthening the duty of care process***

While filming, you’re in a bubble. No one knows who you are yet. When you need care is when you get out the other side. That’s when you need that support.<sup>133</sup>

### *1 UK*

It is recognised that producers of these shows owe a duty of care to those who appear on their shows. In response to the some of the tragic events, *Love Island* has now put in place duty of care protocols. This includes psychological support, an aftercare package and social media training.<sup>134</sup> The UK Government announced an inquiry into the duty of

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<sup>130</sup> Similar to the “no surprises policy” in Cabinet.

<sup>131</sup> See King, above n 2, at 379.

<sup>132</sup> See for example current Government campaigns around ensuring consent to sexual activity “Don’t guess the yes” <<https://wellington.govt.nz/community-support-and-resources/safety-in-wellington/community-safety/sexual-violence>>.

<sup>133</sup> *Married at First Sight* (Australia) contestant, Tracey Jewel quoted in Alica Vrajilal “Former Married at First Sight Starts Reveal the Price They Paid for Fame” (2 February 2020) HuffPost.

<sup>134</sup> See Press Release of 16 June 2021 on the ITV website: <<https://www.itv.com/presscentre/press-releases/love-island-confirms-duty-care-protocols>>

care owed to participants of reality TV shows following the death of a guest on the show *Jeremy Kyle*.<sup>135</sup>

In March 2021, the UK Office of Communications (Ofcom) changes to Broadcasting Code came into force. This extends the duty of care requirement to reality TV show participants where it originally only applied to those under 18 and those particularly vulnerable. It also now states that duty of care protocols apply during production, broadcast and afterwards. It explicitly sets out guidelines for informed consent, in that participants should be “informed about potential risks arising from their participation ... that may affect their welfare ...and any steps the programme maker intends to take to mitigate these”.<sup>136</sup> The guidelines contain a risk matrix for production companies to assess the potential risk dependent on the different scenarios.<sup>137</sup>

This strengthening of the remit of broadcasting standards may be the most helpful solution but it remains to be seen how effective it really is. That same inquiry that was commissioned by the UK Government was abruptly suspended after hearing evidence due to the dissolution of Parliament in 2019.<sup>138</sup> Since the change to the code, *Love Island* a record number of 25,000 complaints were made to Ofcom after a scene was aired showing a contestant verbally abusing her partner. However, the complaints were

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<sup>135</sup> Unfortunately, due to the UK Parliament transitioning over to a new website, most of the information to do with this inquiry is now dead links. Some limited statements received by production companies are still available at <https://committees.parliament.uk/committee/378/digital-culture-media-and-sport-committee/news/103573/committee-reality-tv-inquiry-jeremy-kyle-show-targeted-contestants-who-wanted-to-take-lie-detector-tests/>

<sup>136</sup> Ofcom Broadcasting Code, *Guidance Notes on Section Seven* Fairness: Practice to be followed 7.15 – Due care over the welfare of contributors (3 March 2021). It should be noted that these changes only affect this part of the Code. There have been no changes to the “Privacy” guidance since 2009: see Ofcom Broadcasting Code, *Section Eight Privacy Guidance* (16 December 2009).

<sup>137</sup> See Appendix 1 of the Code: Risk Matrix Example.

<sup>138</sup> See the statement published on the archived UK Parliament website: <https://old.parliament.uk/business/committees/committees-a-z/commons-select/digital-culture-media-and-sport-committee/inquiries/parliament-2017/realitytv/>

dismissed by Ofcom because they were “within the viewers likely expectations of this programme’s established format”.<sup>139</sup>

Because no two reality shows are the same, defining what duty of care looks like may be difficult. What Madison will be entitled to will be different to Brian. The broadcasting standards demonstrate there may not be any duty of care towards Brian in the current system. The changes to the Ofcom code do not apply to contributors whose participation is “trivial or minor”.<sup>140</sup> The Code also does not protect those who do not consent to being filmed:<sup>141</sup>

Anyone has the right to refuse to participate in a programme, but the refusal of an individual or organisation to take part need not normally prevent the programme from going ahead.

## 2 *New Zealand*

It has been noted in a New Zealand context that there are number of complaint processes available to “involuntary” participants like Brian, such as a complaint to the New Zealand Broadcasting Standards Authority.<sup>142</sup> However, New Zealand’s code is generalised and not specifically aimed at reality TV shows.

It has also been suggested that people like Brian should not be afforded the protection of the Code or the privacy tort because of culpability from illegality.<sup>143</sup> However, being held culpable for a crime is one thing, but having it broadcast on TV is another. It can, therefore, be viewed as some form of social, non-state sanctioned additional punishment by having that publicised on a reality tv show. Given the reference that shows like *Police Ten/7* disproportionately focus on specific communities, even if there is culpability and no right to have an expectation to privacy, it must be accepted that there may be societal harm outside of any hurt suffered by Brian. Because New Zealand is so small, the impact

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<sup>139</sup> Daniel Welsh “Ofcom Reaches Decision After Faye’s Love Island Outburst Breaks Show’s Complaints Record” (3 September 2021) HuffPost.

<sup>140</sup> At 7.15.

<sup>141</sup> At 7.12.

<sup>142</sup> These and their shortcomings are examined more fully by King, above n 2, at 360.

<sup>143</sup> At 381.

felt by communities can be immense. It is therefore appropriate, especially in a New Zealand context that there is a specific code for reality TV shows, particularly those like *Police Ten/7* in how they film people with vulnerabilities or interact with subsets of communities. Any code should adopt the risk matrix that is in the Ofcom code that has suitable accommodation for New Zealand's bicultural nature.

### ***C Complaints from the public***

Viewers of these shows also have the power to make change. With enough complaints against certain production companies this may force them to change the way they operate and what they decide to broadcast. Before or after the airing of a reality TV show, this could be reinforced by displaying a notification for viewers that a complaints process is open to them should they think any standard has been breached. This should also be adopted into on-demand programming as the demographic is younger for these shows. They are unlikely to watch live TV and may not be aware of the broadcasting standards code.

### ***D Final thoughts on Court intervention***

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.<sup>144</sup>

Finally, in the event litigation is the only option, courts may find themselves having the difficulty of weighing competing issues, such contract against the tort of privacy, autonomy versus public good and individual rights against public interest. These are not insurmountable. The need for flexibility and a holistic approach in the privacy tort was recognised by the Court in *Andrews* that “as the tort develops, numerous issues will arise and need to be resolved in accordance with policy, and just outcomes for particular factual circumstances”.<sup>145</sup> The underlying concept of dignity that sits within the privacy tort should be a balancing factor against any contractual issues under consideration.

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<sup>144</sup> *Hosking v Runting*, above n 5, at [3].

<sup>145</sup> It was this reason that the Court refused to strike out the initial proceedings in *Andrews v Television New Zealand* HC Auckland CIV-2004-404-003536, 15 March 2005, at [21].

Because the tort is still so new, there is scope for the courts to address some of the more unique issues that arise out of reality TV programmes. Any award of damages will likely be small, but vindicatory damages may go some small way acknowledging the harm that has been caused.<sup>146</sup>

If you can be anything in this world, be kind.

It is perhaps best to end this paper with a quote from Caroline Flack, whose death has highlighted that reality TV shows, despite being largely for light-hearted entertainment value, can cause harm. It is also a timely reminder that those we castigate and say are not worthy of protection because they have consented to something are still entitled to kindness at the end of the day and the dignity that the privacy tort affords us all. The Madisons and Brians of this world cannot merely be for our entertainment value without some countervailing responsibility and if they are not going to get it from the production companies, then pressure needs to come from society to ensure that dignity is maintained.

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<sup>146</sup> See King, above n 2, at 376, on awards to date for privacy breaches in New Zealand.

***Word count: (excluding abstract, bibliography and footnotes) 7475***

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