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EXAMING THE UNDERLYING VALUES OF TIKANGA AND PRIVACY

How can tikanga values be incorporated into the privacy torts?

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Abstract

New Zealand courts have increasingly recognised the importance of considering tikanga when developing the common law. This paper argues for the incorporation of tikanga into the privacy torts by using tikanga values. It contends this focus on values is the approach taken by the courts thus far, as well as one suggested by some key scholars. In the context of looking at the privacy torts, an approach which considers tikanga values is particularly relevant. The elements of both the breach of privacy tort and the intrusion into seclusion tort explicitly require consideration of societal values in their application. Such values should include tikanga values. In determining which tikanga values are most relevant to privacy, this paper also illustrates the compatibility of underlying values in privacy law with values of tikanga. Moreover, it uses this to reconsider the elements of the torts. It highlights how the reasonable expectations test should take into account tapu notions of reasonable expectations of privacy. This may include the information or place itself, as well as what tapu says about whether the information should be shared. It advocates that a privacy tort which is reflective of tikanga should not include the highly offensive test. It also argues that the public interest defence may no longer be required.

Keywords: *"Privacy Torts", "Tikanga", "Values", "Intrusion into Seclusion"*

Contents

I Introduction

Tikanga is increasingly being seen as a key part of the common law in New Zealand.[1] This is evident in the approach courts have taken to incorporating tikanga into different aspects of the common law. Tika is defined as 'correct, right or just', and nga turns this into a noun. Tikanga therefore means 'the system by which correctness, rightness or justice is maintained.'[2] Mead discusses the wide-ranging role of tikanga:[3]

> Tikanga refers to the ethical and common law issues that underpin the behaviour of members of whanau, hapū and iwi as they go about their lives and especially when they engage in the cultural, social, ritual and economic ceremonies of their society.

This explains how central tikanga is to Māori society. It has strong values, which have been drawn on when courts look to incorporate tikanga into the common law.

This paper considers how tikanga might be incorporated into the privacy torts. It emphasises the importance of values in seeking to incorporate tikanga. Values are a crucial part of this discussion; the torts, in particular through the use of a reasonable expectations test, require consideration of societal values. This explicit requirement to consider values makes the torts well placed to consider how tikanga values might inform this strand of the common law. Moreover, this is supported by the tendency of the common law to draw on values when incorporating tikanga.

In part II, this paper will discuss the key elements of the privacy torts. This will explain where tikanga may be able to inform the construction. Part III will develop the argument that a values-based approach to incorporation is the most appropriate one to take, based on scholarly writing and consideration of the actual approach courts have taken. This paper

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[1] *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [94].

[2] Joseph Williams "Lex Aotearo: An Heroic Attempt to Map The Māori Dimension in Modern New Zealand Law" (2013) 21 Wai Law Rev 1 at 2.

[3] Sidney Mead *Tikanga Māori: living by Māori values* (Revised Edition, Huia Publishers, Wellington, 2016) at 19.

will then compare the underlying values of privacy and tikanga, to illustrate how these are compatible. The identified values in Part IV will be drawn on in Part V, which seeks to explain what incorporation of tikanga might look like in the privacy torts.

It should be noted that this paper does not seek to discuss the proper way of recognising the obligations of Te Tiriti o Waitangi in Aotearoa. I acknowledge that there is much discourse as to the appropriate means of infusing tikanga into the laws. Some scholars such as Ani Mikaere argue strongly that incorporating tikanga into the state legal system only serves to legitimise the system. She contends that to truly affirm tikanga, this must happen outside of a state legal system.[4] However, there are also many scholars who see incorporation as having positive outcomes for Māori.[5] Given this, there seems to be a viable argument that incorporation is appropriate. Incorporation would focus on bringing in tikanga values to assist with developing the common law. This paper will proceed on the basis that incorporation is a potential means of giving effect to Te Tiriti obligations.

II Privacy Torts

As indicated, this essay will emphasis the underlying values of the privacy tort. However, to understand the context this discussion occurs in, it is important to first understand the common law privacy torts. This section will traverse the two torts, and from this we can see how they both require social values to be considered in their application. This is particularly evident in the reasonable expectations test. An emphasis on values leaves room for us to consider how tikanga might inform the development of the tort.

A Overview of the Torts

The tort of invasion of privacy is a relatively new tort. The first case to substantially consider whether a tort for invasion of privacy exists in New Zealand was *Hosking.v*

[4] Ani Mikaere *Colonising Myths – Māori Realities: He Rukuruku Whakaaro* (Huia, Wellington, 2013 at 161.

[5] See Natalie Coates "The recognition of tikanga in the common law of New Zealand" (2015) 1 NZ L Rev 1.

Runting, in 2005.[6] *Hosking* centered around an attempt to prevent the publication of photographs of Mike Hosking's twin daughters. The photographs were taken of the children in a pram, being pushed on a public footpath. It provided an opportunity to seriously consider whether there was a privacy tort, and if so, what the elements of the tort might be.

The majority judgment found that a tort of privacy existed in New Zealand.[7] Gault J delivered the judgment on behalf of himself and Blanchard J. Two key criteria for the claim were confirmed: firstly, 'the existence of facts in which there is a reasonable expectation of privacy' and secondly, 'publicity given to those private facts would be considered highly offensive to the objective reasonable person.'[8] A defence in cases of legitimate public concern is available, in order to give effect to the value of freedom of expression.[9] The court then noted that injunction as a remedy will only be available in the most extreme cases, and damages will usually suffice.[10] Tipping J concurred that there should be a privacy tort, but disagreed with the inclusion of a highly offensive test.[11]

The remaining minority did not think the tort was part of New Zealand law, and expressed concerns over the impacts on freedom of expression, guaranteed in the New Zealand Bill of Rights Act.[12] The majority judgment of Gault J, supported by Blanchard J, has tended to be followed by the courts. However, while the tort has been considered in several other cases since *Hosking*, it has yet to be substantively dealt with by the Supreme Court. The case of *TVNZ v Rogers* went to the Supreme Court, but there was little debate as to the *Hosking* formation of the tort.[13]

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[6] *Hosking v Runting* [2005] 1 NZLR 1 (CA),

[7] At [7].

[8] At [117].

[9] At [130].

[10] At [158].

[11] At [256].

[12] New Zealand Bill Of Rights Act 1990, s 14.

[13] *Television New Zealand v Rogers* [2007] NZSC 91, [2008] 2 NZLR 277 [*TVNZ v Rogers*]

The tort of intrusion into seclusion is an even newer tort. It was first recognised in the High Court, in the case of *C v Holland*.[14] The plaintiff brought the case after being filmed by a roommate exiting and entering the shower.[15] The video was not shared, and therefore there was no publicity given to come within the requirement of the privacy tort. Whata J considered the state of the law in New Zealand overseas, before emphasising the clear value of privacy and autonomy internationally. He then discussed how a tort of intrusion to seclusion is targeted at the same wrong the *Hosking* tort is; unwanted intrusion into a reasonable expectation of privacy. This further development of the law can be seen as fulfilling the role of the common law to change according to the needs of society. [16] Whata J went on to find that a tort of intrusion into seclusion is part of the New Zealand common law. The requirements of this tort reflect those of *Hosking.* A plaintiff must show an intentional and unauthorised intrusion into seclusion, which infringes a reasonable expectation of privacy and would be considered highly offensive to the objective reasonable person.[17] Like in *Hosking,* a legitimate public concern may be a defence.[18]

This section will briefly consider each element of the torts in turn, to explain how the courts have dealt with the different tests. Much of the case law is related to the tort of invasion of privacy. However, the intrusion into seclusion tort has utilises the same basic tests, and much of the discussion can apply to this tort as well.

B Reasonable Expectation of Privacy

This part of the test is about whether there are facts in which a claimant has a reasonable expectation of privacy. As noted by Tipping J in his judgment in *Hosking*, the use of reasonableness allows control of the individual's subjective expectations. It creates the need for an objective value judgment.[19] This means that what is reasonable will be considered in light of societal values and norms. This idea was reiterated in the more recent

[14] *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.
[15] At [2].
[16] At [76].
[17] At [94].
[18] At [96].
[19] At [250].

judgment of *Peters v Attorney-General*.[20] There, the Court of Appeal discussed the normative nature of the test.[21] On a normative approach, the test focuses on what should be protected, thereby requiring a values-based judgment as to what society sees as private.

We can see the idea of underlying social expectations reflected in the judgments on this issue. In *Hosking*, the majority considered that there were no facts in which there is a reasonable expectation of privacy, because no more information was published than what anyone could have seen on the street.[22] This shows an underlying idea that privacy in a public place is limited. However, in *Andrews v TVNZ*, where a claim was brought in relation to filming of a couple after a car crash, the court considered the recording of intimate conversation between the couple was something they had a reasonable expectation of privacy in.[23] Again, we can see the court making a judgment that this conversation is the sort of thing people expect to have in private.

These are just two examples, but from the court's comments discussed above, as well as these cases, we can see how the test is fundamentally about determining whether this information is the sort society would expect to have a reasonable expectation of privacy in. The inherent values judgment within this leaves room for us to consider how tikanga values might develop our understanding of when we have a reasonable expectation of privacy. In terms of the intrusion into seclusion tort, tikanga may impact the sort of spaces we consider that people have a reasonable expectation of privacy in.

C Highly Offensive

The requirement that the publication be highly offensive is a controversial part of the tort. Questioning of this test first began with Tipping J in *Hosking*, who thought that this could be controlled within the reasonable expectations of privacy test.[24] Following this, the

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[20] *Peters v Attorney-General Sued obh Ministry of Social Development* [2021] NZCA 355.
[21] At [107]-[108].
[22] *Hosking*, above n 7, at [164].
[23] *Andrews v TVNZ* HC Auckland BC200662994, 15 December 2006 at [65].
[24] At [256].

Supreme Court in *Rogers* declined to approve the *Hosking* formulation of the tort, with Elias CJ reserving a position on the test and noting doubts around it.[25] Recently, in *Hyndman v Walker,* the plaintiff asked the court on appeal to remove the 'highly offensive' element. [26] The court accepted that the tort may need re-examination, but did not see this case as the appropriate one to do so. Finally, it should be noted that English authority has explicitly rejected the test in the case of *Campbell v MGN.*[27]

It is clear there is some judicial hesitation as to this test. Moreham explains some of these hesitations. Importantly for this paper, one point raised is that the test fails to recognise that a breach of your reasonable expectation of privacy undermines your dignity and autonomy. The sharing of information which you should have control over is humiliating in its own right.[28] Tikanga ideas are arguably consistent with this argument, and later in this paper it can be examined how when we draw on tikanga values, this may support arguments for the removal of the highly offensive test.

D Public Interest Defence

Finally, a defence that the sharing of information is in the public interest is available. In *TVNZ v Rogers,* the majority of the Supreme Court held that a tape where Rogers confessed to a murder, which had been excluded from the evidence, was information in the public interest. There is a legitimate public interest in the way the law operates.

Most recently, the case of *Peters* considered this defence. The court reframed the public interest defence to include private interest in the information.[29] On the facts, there was a need to brief the Minister on the issues and no reasonable expectation the information would not be disclosed.[30]

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[25] *TVNZ v Rogers,* above n 14, at [41]-[44] per Elias CJ.

[26] *Hyndman v Walker* [2021] NZCA 25.

[27] *Campbell v MGN* [2005] UKHL 61, see also Nicole Moreham "Abandoning the High Offensive Test" (2018) 4 JCCL 161 at 173.

[28] Moreham, above n 28, at 182-183.

[29] At [119].

[30] At [177].

III A Values Based Approach to Incorporation

Having discussed the privacy torts, and the central role values play in the components of the tort, we can now look at how we might incorporate tikanga into the torts. As Jones stated, "tikanga is not frozen in time, and has processes to enable it to develop according to changing societal needs."[31] This section will discuss one such process of developing tikanga for the situation; a values-based one. In considering how this approach might work, we will also examine the way the common law has dealt with incorporating tikanga until now. We can see where the courts consider how tikanga values might assist them reaching their decisions. Finally, it will explain why looking at values is particularly relevant in the context of privacy torts.

Hirini Mead discusses potential frameworks to formulating a tikanga Māori perspective on current issues. The first few of these focus more on the potential effects of concepts such as tapu and mauri. These approaches tend to be more relevant in dealing with contemporary issues. However, Mead's alternative suggestion is to focus on the principles of tikanga. On this approach, one would look at the relevant issue against the general principles and values of tikanga.[32] Values inform rules in tikanga; thus the best way of determining a tikanga based approach is to focus on the values.[33] Mead's general approach can be seen in the writing of other scholars. Stephens notes that principles of tikanga can be identified that are relevant to the common law, and can have an influence over its development.[34] She argues that principles can be analogised to some common law ideas such as natural justice. They have the potential to play the same role in guiding judicial decision making.[35] In a similar vein, we can consider how the common law system is really a values based one. It serves to reflect the society it operates in, and will change over time to do this. An example

[31] Carwyn Jones "Tikanga Māori in NZ Common Law" (2020) 943 Lawtalk 20 at 21.

[32] Mead, above n 3, at 273.

[33] Robert Joseph "Re-creating Legal Space for the First Law of Aotearoa-New Zealand" (2009) 17 Wai Law Rev 47 at 88.

[34] Māmari Stephens "Rāhui, mana and Peter Ellis" (26 July 2020) E-tangata <www.e-tangata.co.nz>.

[35] Stephens, above n 35.

given is tort of negligence, which has had to continually develop and expand to remain relevant.[36]

Mead's framework of focusing on key principles seems a useful one in the context of a tort that is extremely values based. It is also arguable that the judicial system is already taking on this approach, in the way it has approached issues of tikanga. Justice Williams, in his famous piece *Lex Aotearoa*, reflects on how courts have been 'integrating first law values into mainstream decision making.'[37] The idea that tikanga values have a role to play in our common law was also expressed by Elias CJ in the landmark case of *Takamore v Clarke:*[38]

> Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case… Māori custom according to tikanga is therefore part of the values of the New Zealand common law.

Takamore signalled a turning point for considering tikanga in the common law. Prior to this case, the relevance of tikanga and Te Tiriti was limited to statutory incorporation. *Takamore* considered whether the executor under the will had the right to determine where a deceased Māori should be buried, or whether Māori customary law applied above the common law rule. In this case, the Pākehā wife, executor under the will, wished for Mr Takamore to be buried in Christchurch. However, Mr Takamore's Māori family had moved his body to the family urupa in the Bay of Plenty, in accordance with the tikanga of their hapu. The case went to the Supreme Court, who made a novel judgment, but one which still left the law in a relatively uncertain state. The court started from a presumption that tikanga is part of the common law, although the extent of this is unclear. The majority considered that it is clear under the common law the executor has the final decision, and the common law rule is not displaced due to the fact the deceased was Māori. However, tikanga Māori is a relevant consideration for the executor, among other considerations.[39]

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[36] Christian Whata "Biculturalism in the law: the I, the kua and the ka" (2018) 26 Wai Law Rev 24 at 27-28.
[37] Williams, above n 2, at 32.
[38] *Takamore v Clarke*, above n 1, at [94].
[39] At [164]

Elias CJ's minority judgment, as mentioned above, focused on the idea that the common law will necessarily be reflective of the society in which it operates.

The entire court therefore appeared to recognise that tikanga plays an important role in the common law of New Zealand. The majority judgment saw tikanga as a consideration, whilst the minority seemed to take a stronger approach in viewing tikanga as a necessary value in the common law. This approach recognised the way common law must adapt to the societal values it functions in. Exactly how tikanga should be weighed as a value in the common law is left open.[40]

This case illustrates the willingness of courts to integrate tikanga with the common law. Later courts have used *Takamore* as a basis for allowing them to consider tikanga when exercising their own discretion. Recently, the District Court relied heavily on tikanga, citing *Takamore* to do so, when determining it was not appropriate to amend a criminal charge. Hastings J referred to tikanga values of utu and mana when exercising his discretion, noting that utu is not achieved where the charged offence is disproportionate to the hara. His evaluation based on tikanga was a key factor in his conclusion not to amend the charge. [41]

Most significantly, we have seen this willingness in the case of Mr Ellis. Mr Ellis successfully applied to the Supreme Court for leave to appeal an historic conviction of sexual offending against children.[42] However, he passed away shortly after his application was approved. A hearing occurred in November 2019 as to whether the appeal should carry on after his death. After the hearing, the court asked for further submissions as to the applicability of tikanga to the Court's decision. This resulted in a further hearing in June 2020.[43] Prior to the hearing, a wānanga was held with tikanga experts to discuss the issues raised in this case. The outcome of this wānanga was documented in a 'Statement of

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[40] Jones, above n 32, at 22.

[41] *R v Rutene Ethan Grace* [2020] NZDC 13862, at [26].

[42] *Ellis v R* [2019] NZSC 83.

[43] Supreme Court of New Zealand "*Peter Hugh McGregor Ellis v The Queen* (SC 49/2019)" (Media Release, 11 June 2020).

Tikanga'. This statement summarised some of the key tikanga values and principles that applied. This shows how willing the courts are to deeply engage in tikanga values, and consider in depth which values might be most appropriate to the case at hand. After this, a decision was issued that the hearing was to continue despite the appellant's death. Reasons for this decision were reserved.[44] It is worth noting that Mr Ellis is not Māori, yet the court still requested submissions on the relevance of tikanga. This demonstrates the potential for further incorporation of tikanga in the common law.

This section has highlighted how the common law approach to incorporating tikanga has been to consider it as a relevant value. The common law is fundamentally guided by societal values, and should be reflective of the society in which it functions. This idea is expressed in the privacy tort context by Tipping J in *Hosking*: [45]

> "what expectations of privacy are reasonable will be a reflection of contemporary societal values and the content of the law will in this respect be capable of accommodating changes in those values"

The tort thereby explicitly requires consideration of social values, and at this stage in New Zealand society, these social values must include tikanga. Critically, this contention is supported by examining the courts' approach to infusing tikanga in the common law so far. The case law traversed has considered tikanga values in order to incorporate tikanga. This aligns with Mead's approach to dealing with new issues using tikanga, which is to focus on underlying values and principles of tikanga. So, when developing a tort and considering the bounds of a tort, an approach which seeks to use tikanga needs to consider what tikanga values might say about the tort. This is particularly relevant when looking at the privacy tort, which specifically raises questions of what the current societal values are.

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[44] *Ellis v R* [2020] NZSC 89.

[45] *Hosking v Runting,* above n 7, at [250] per Tipping J.

IV The Compatibility of Privacy Values and Tikanga Values

The previous section discussed the values-based approach this paper will take to incorporating tikanga into the privacy tort. It is now important to consider what the relevant tikanga values in this context might be. There are two key purposes to examining these values. Firstly, we need to understand what the key values of tikanga are, as well as how they might be relevant in the privacy context. This will allow us to draw on these values to consider how tikanga might inform the development of the privacy tort. However, looking at tikanga values also allows us to compare them to underlying values of privacy law. Comparing the values, and discussing how they are compatible, has a distinct purpose. Privacy law is often seen as an area focused on protecting the autonomy of the individual. Comparatively, tikanga tends to focus more on the collective, with the key value of whanaungatanga emphasising the importance of relationships. As a result, it could be argued that the two values systems are too far apart to be reconciled in the way this paper proposes. However, in this section this paper will show how the systems can be viewed as consistent, thereby justifying the approach of incorporating tikanga into privacy.

Mead reminds us that tikanga is more than just a legal system, but a broader means of regulating behaviour and providing for norms and customs. [46] "From a Pākehā view, tikanga is law, custom and religion rolled into one."[47] It comes from an old knowledge base, built up from the collective Māori knowledge of many generations. It is an essential part of mātauranga Māori.[48] Tikanga is varied across iwi, but many iwi would agree on core values such as whanaungatanga, mana, utu, tapu and noa, as well as kaitiakitangi.[49]

With this basic understanding of what tikanga is, we can now consider in detail some of the key concepts when looking at tikanga in the privacy sphere.

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[46] Mead, above n 3, at 19.

[47] Khylee Quince "Māori Concepts of Privacy" in Stephen Penk *Privacy law in New Zealand* (2nd Ed, Thomson Reuters, Wellington, 2016) at 32.

[48] Mead, above n 3, at 19 and 26.

[49] Linda Te Aho "Tikanga Māori, Historical Context and the Interface with Pākehā Law in Aotearoa/New Zealand" (2007) 10 Yearbook of New Zealand Jurisprudence 10 at 11.

A Whanaungatanga and Autonomy: The Connection Between the Individual and the Collective

As mentioned above, privacy law is often explained as protecting individual rights. This might seem inconsistent with tikanga, which tends to emphasise the collective. This discussion will explain tikanga ideas of relationship and the collective. It will then expand on the key privacy value of autonomy, to show how this can be conceptualised to have more focus on the group. It argues that the values of tikanga and privacy law are more consistent than initially appears.

Whanaungatanga focuses on the importance of whakapapa and relationships. There is a reciprocal relationship, whereby individuals expect support and in turn are required to provide support to the collective group.[50] Manaakitanga is about the nurturing of relationships and the importance of looking after people.[51] From these two concepts, the importance of relationships is evident. Mead argues that these relationships are influenced by the value placed on mana. Mana is the idea of 'authority' or 'prestige', and can be drawn primarily from ancestors, as well as the individual action.[52]

It is evident that relationships and the collective are a central part of key tikanga values. Who you are as an individual is drawn from your whakapapa, and your broader relationship with the group. This appears to be a stark contrast with the focus of individual autonomy in the underlying values of privacy. In his judgment in the case of *Hosking v Runting*, Tipping J explained the idea of privacy:[53]

> Privacy is potentially a very wide concept: but, for present purposes, it can be described as the right to have people leave you alone if you do not want some aspect of your private life to become public property… it is the essence of dignity and personal autonomy and well-being of all human beings that some aspects of their lives should be able to remain private if they so wish."

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[50] Mead, above n 4, at 32.

[51] Mead, above n 4, at 32.

[52] At 32.

[53] *Hosking v Runting*, above n 7, at [238]-[239] per Tipping J.

His reference to the ideas of autonomy and dignity are reflective of the generally accepted notion that these are the two key values protected by privacy. These are distinct, but can also be linked, with Winkelmann J, writing extrajudicially, stating "privacy supports true autonomy of the individual and in doing so ensures each human is afforded dignity."[54]

Autonomy is particularly reflective of the idea to have choice in what you display to the outside world. Moreham construes this as the idea of having a retreat. She also frames it as 'the ability to remove oneself from the world, to keep certain information beyond the reach of others and to exclude strangers from our innermost spaces.'[55] Autonomy has a distinct value in that it provides a space for people to be themselves and have their own thoughts in a space away from external judgment.[56] A tort of privacy can be argued as enhancing autonomy through placing the power in the hands of a claimant to determine what is accessible. It also allows us to create a space which is entirely our own, and to have the power to protect this space and do what we like in it.

So, autonomy is a key value that privacy law protects. Comparatively, some of the key values of tikanga, such as whanaungatanga and mana, emphasise the importance of relationships and the collective. Initially, it appears the two might not be compatible. However, autonomy and the creation of individual space can be viewed more broadly than the value it provides the individual, and can instead be considered in terms of what it adds to society more broadly. On this approach, tikanga and privacy values are more consistent.

The creation of individual space for free thought, away from the public gaze, can be seen as having a broader societal value in addition to the individual interest which it protects. It means people are free to express themselves and develop ideas away from judgment. This

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[54] Helen Winkelmann, Justice of the Court of Appeal "Sir Bruce Slane Memorial Lecture" (November 2018) at 4.

[55] Nicole Moreham "A Conceptual Framework for the New Zealand Tort of Intrusion" (2016) 47 VUWLR 283 at 284.

[56] Nicole Moreham "The Nature of the Privacy Interest" in N A Moreham, Wark Warby, Michael Tugendhat and Iain Christie *The Law of Privacy and the Media* (3rd Ed, Oxford University Press, Oxford, 2016) at 70.

helps create diversity of expression and opinion.[57] Hughes also argues that time to oneself in private allows for greater development of personal identity. As noted, this is important for creating a diverse society.

However, a strong understanding of self allows for relationships to form and develop. Hughes contends that as a result of this, we can start thinking of privacy in terms of how it governs social interactions. [58] Beyond giving us time to develop ourselves, which adds to our relationships, other scholars argue that autonomy plays a central role in allowing us to create relationships. As Rachels puts it, "there is a close connection between our ability to control who has access to us and information about us, and our ability to create … social relationships."[59] An important aspect of creating a friendship is choosing the information to share with them, and sharing different information with different people depending on the relationship in question. This information-sharing is essential to creating intimacy in a relationship.[60] Additionally, the ability to remove yourself from public with a close friend or spouse allows you to develop the relationship in a way you could not if you were subject to the public. It creates a space where you can share the information and a more open version of yourself, allowing for a relationship to be created.[61] Without the autonomy to do this, we could not form such intimate relationships.

On this view of autonomy, we can see it as being central to forming relationships. This aligns with tikanga, in which relationships are a crucial part of who a person is. In tikanga, it can be said that whanaungatanga does not minimise individual significance, but instead adds to personal value by placing an individual within a group.[62] In a similar vein, in Western culture you gain value and meaning from the relationships you have with others.

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[57] Moreham, above n 57, at 71; and Winkelmann, above n 55, at 13.

[58] Kirsty Hughes "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012) MLR 806 at 823

[59] James Rachels, 'Why Privacy is Important' (1975) 4 Phil and Publ Aff 323 at 326

[60] Charles Fried, 'Privacy' (1968) 77 The Yale Law Journal 3 at 475 at 484.

[61] Rachels, above n 60, at 328-330.

[62] Ani Mikaere, Di Pitama and George Ririnui *Guardianship, Custody and Access: Māori Perspectives and Experiences* (Ministry of Justice, August 2002) at 22.

Autonomy and privacy are crucial to allowing us to form these relationships. So, it could be argued that although we might often place weight on the importance of the individual in Western culture, the main point of this is because having this idea of the individual allows us to form relationships. The idea of a connection between the individual and our relationships is evident in both whanaungatanga and autonomy, showing how tikanga and values of privacy might be consistent.

This discussion is important when considering the privacy tort. Western ideas of privacy might include group privacy, for example the space to have a private moment between friends. If we accept this, then from a purely Western perspective it might seem the privacy tort can be expanded to encompass collective privacy. Tikanga, and its emphasis on relationships, might also require group privacy be a key part of constructing privacy torts. Therefore, it seems both schools of thought would support a privacy tort which allowed for more than just individualistic notions of privacy. What this means in practice will be discussed when we consider formulating the privacy torts.

B Tapu, Autonomy and Dignity

The key tikanga value of tapu is particularly relevant to the privacy torts. We can consider how tapu governs what is restricted in tikanga, and when certain information might be shared. Tapu's relationship with other key tikanga values, in particular mana and utu, can also be used to explain the connection between tapu and the key privacy value of dignity. Both of these discussions will be crucial to considering how tikanga can be used to inform the privacy torts.

An essential element of tikanga is tapu. Mead provides a strong explanation of tapu:[63]

> Tapu is everywhere in our world. It is present in people, in places, in buildings in things, words, and in all tikanga. Tapu is inseparable from mana, from our identity as Māori and from our cultural practices.

[63] Mead, above n 3, at 33.

Tapu is an essential factor in the actions of Māori. Tapu of people, and important buildings such as marae, must be respected.[64] Tapu is one of the key values when looking at the privacy tort. As Quince has noted, tapu defines what is 'special and restricted'.[65] It can be seen as a warning, or mean that something is protected.[66] Consequently, it is often associated with privacy, and is an important principle to consider further.

It should be noted that tapu is what Shirres describes as an analogous term. This is the idea that there are different meanings of tapu, which are related, but are different when applied in different contexts.[67] This paper considers tapu in the sense of personal tapu, which can be extended to other things. It also draws on tapu as something which restricts or dictates processes.

1 Tapu and restricting information through autonomy

Tapu is an important spiritual aspect, that is present in all aspects of the world. Particularly relevant to consideration of privacy is personal tapu. There are different forms of tapu. Māori have an intrinsic tapu from when they are born, and this tapu does not change according to your actions or state.[68] It is derived from Māori parent(s), and your genetic make-up.[69] It is part of the recognition of life value, and tapu will be linked to your whakapapa, as well as members of whanau, hapu and iwi.[70] Importantly for a discussion of privacy, intrinsic personal tapu might extend to things that come into contact with the body. For example, certain times, food, places or tools might be seen as tapu.[71] When tapu is extended, it places restrictions on people from doing certain things. An example of this is entering a marae. When someone goes onto another person's marae, then their tapu means they are restricted, or under tapu, due to the fact that the people they are meeting

[64] Mead, above n 3, at 33.
[65] Quince, above n 47, at 29.
[66] Quince, above n 47, at 33.
[67] Michael Shirres "Tapu" (1982) 91 Journal of the Polynesia Society 29 at 33.
[68] Quince, above n 47, at 35.
[69] Quince, above n 47, at 43.
[70] Mikaere, above n 5, at 132.
[71] Michael Shirres *Te tangata = The human person* (Accent Publications, Auckland, 1997) at 40.

also have their own tapu. An acknowledgment and process is needed to lift the tapu restriction on the person and they become noa.[72] Noa in this context is used to refer to a more neutral state, one without restrictions. In a way, the idea that people are restricted where they are engaging with another person's tapu can be compared to Western ideas of privacy. In particular, this applies when you conceptualise autonomy as focused on the ability to restrict and choose what you show to others.

We can develop the discussion of similarities related to restriction when we consider a further extension of intrinsic tapu. The notion of tapu as extending over physical things can also apply to more conceptual things that have a close connection to the person; for example, health information or whakapapa. This is where considering the concept of mana, and the extent of its interconnectedness with tapu, may also be helpful. Mana is about the exercise of power and control. This is often considered in a leadership context, but we could also think of it as the right to exercise control over personal information. Knowledge is something Māori may exert control over, thereby choosing what they reveal to the world, just like in Western concepts of autonomy. Privacy can be viewed as the right to grant access to certain information.

Similarly, tapu might dictate the relevant contexts in which information might be shared. An example of this is tikanga related to caring for human remains. Knowledge related to caring with remains is not necessarily private, but it is restricted to those for whom the information is relevant. Members of a community may have distinct roles within the group, but learn and perform these roles in private away from the group. In the burial context, graves may be tended to according to tikanga, but if this is not your role then you may never see it happen.[73] These tikanga ideas show how information may be restricted to those who the group chooses to share it with. In Western autonomy, the focus is on the individual having the right to grant access to information. However, here we can see the same emphasis on the need to restrict information, but it is restricted on behalf of the group. It is collective information that is protected in this context.

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[72] Shirres, above n 72, at 44.

[73] Quince, above n 47, at 36.

2 Breaches of tapu and the relationship to dignity

We have discussed how the ability to restrict information, as well as the idea certain information is limited, can be compared to tikanga ideas of autonomy. However, tapu also brings up another point which is a useful contrast to privacy law. This is to do with the idea that a breach of tapu has a negative impact on your mana, and therefore standing in society. Violation of tapu can damage your personal tapu.[74] A breach of tapu can impact your mana, which can be detrimental given mana affects the way you are viewed in society.[75] It is noted that 'sorcery, gossip, being publicly humiliated, and personal abuse of any form can all damage one's personal tapu.'[76] This is because tapu can be seen as the idea a person is restricted; similar to the notion of inviolability of the person in common law.[77]

Privacy is often seen as fundamentally linked to dignity. This is because it might be seen as humiliating to expose certain aspects of yourself to the public, such as your personal thoughts or your naked body.[78] It reflects the idea that every human being has an inherent value as a human, that ought to be respected. This means that people should not be used as a means to an end such as making money or for entertainment; to do so fails to recognise a person's inherent value.[79] This can be compared to the idea that if tapu is breached, then mana and consequently your societal standing is also affected. In tikanga, the concept of tapu-mana-utu refers to the idea that a breach of tapu, and effect on mana, requires utu (rectification or recompense) in order for balance to be restored.[80] Balance is an essential part of tikanga, with Quince explaining it as: "the overall normative ideal in tikanga is for us to coexist in a state of balance and harmony with all of the other elements in the universe."[81] Restoring balance in tikanga can be compared to the privacy tort itself; it

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[74] Mead, above n 3, at 46.
[75] Quince, above n 47, at 34.
[76] Mead, above n 3, at 44.
[77] Quince, above n 47, at 33.
[78] Ann Cudd and Mark Navin *Core Concepts and Contemporary Issues in Privacy* (1st Ed, Cham: Springer International Publishing: Imprint: Springer, 2018) at 1.
[79] Moreham, above n 57, at 67.
[80] Quince, above n 47, at 34.
[81] At 33.

provides a legal remedy where one's dignity has been interfered with. It allows for a form of utu, where the harm is rectified through damages or similar.

When it comes to considering how we develop the privacy tort, this discussion becomes particularly useful in the context of the public interest defence.

V Developing the Privacy Torts

In the previous section, this paper has compared and contrasted some of the key values of tikanga and privacy. In doing so, it has done two key things of value for the rest of this paper. Firstly, it has established some key tikanga values that may be of use when considering how we construct the tort generally. These values may also be useful when we examine what application of the tort should look like. Secondly, it has shown that privacy law and tikanga have underlying values which are compatible. The idea that the individual and the group are intertwined is present across both schools of thought, just in different ways. More specifically, the idea that certain things are restricted is consistent. Notions of dignity and tapu both show the importance of respecting the person.

Both the tort of invasion of privacy and intrusion into seclusion have similar elements in reasonable expectations, highly offensive and the public interest defence. We can discuss the two torts together when we examine what tikanga might say about the different elements.

A Reasonable Expectation of Privacy

This test asks whether there is a reasonable expectation of privacy in regard to the facts in question. In the intrusion into seclusion tort, it asks whether there is an intentional and unauthorised intrusion into seclusion, which infringes a reasonable expectation of privacy. As discussed, the question of reasonable expectation is inherently one about social values. In a New Zealand context, reasonableness should be able to reflect a tikanga perspective as part of its increasing recognition in society. Therefore, when we use tikanga values we can consider how they affect what we see as reasonable. This requires moving away from

viewing reasonableness from a purely Western perspective, and instead thinking about how tikanga might conceptualise reasonableness.

1 Reasonable expectations of private facts

Given the possibility of there being room for tikanga within what we consider reasonable, we can now examine what this might look like. The starting point is that we may need to expand this to cover information that the collective has an expectation of privacy in, rather than an individual. As explained when considering the underlying values of privacy and tikanga, it seems both of these recognise the importance of privacy for the group. Whilst tikanga might place greater importance on collective rights, Western notions of privacy law seem to acknowledge the value privacy has for society as a whole. As noted in the comparison of tikanga values and privacy tort values, tapu can exist over certain group knowledge. This is similar to the *Hosking* tort idea of protecting specific information. Māori may have collective privacy over information. Mātauranga Māori is an example of the sort of information Māori have a collective expectation of privacy in. It is something we normally see protected by the intellectual property system. However, Quince mentions it as something that could viewed in privacy terms. Wai 262 called for the need to protect mātauranga Māori, and we could view this protection as a need to protect the collective privacy of Māori.[82]

We can look at some specific examples of mātauranga Māori that Māori might see as the sort of information that they have a reasonable expectation of privacy in. One example is DNA. Whakapapa is a tikanga principle that described the connections between people, including past and future generations. The body, containing a gene sequence, is considered a physical manifestation of whakapapa.[83] Whakapapa information is considered tapu, and should be protected.[84] As whakapapa is reflective of more than one individual, it is the sort of information that whanau, hapū and iwi seek to protect. Thus, we can see DNA as a

[82] Quince, above n 47, at 46.

[83] Law Commission *The Use of DNA in Criminal Investigations* (NZLC IP43, 2018) at 46.

[84] Law Commission, above n 84, at 47.

specific example of Māori knowledge that wider Māori society have an interest in protecting. Given the importance of whakapapa information, it is something that we might see Māori as having a reasonable expectation of privacy.

Another example was also discussed when considering extensions of tapu above. Certain tikanga protocols, for example related to burial processes, may be limited to those who need the information for their roles. This information is held by some individuals on behalf of the group. Reasonable expectations of privacy may be able to accommodate the idea that there is certain information over which tapu dictates the context in which information can be shared. Sharing outside of these contexts is a breach of tapu. Māori may therefore have a reasonable expectation of privacy in this information, in that it should not be shared outside of contexts in which tapu dictates this is appropriate.

It is clear that tikanga values, in particular tapu, may dictate when Māori have a reasonable expectation of privacy. Information which is an extension of tapu, or where tapu may determine the appropriate point for sharing information, is the sort of information Māori arguably have a reasonable expectation of privacy in. As this test is inherently one about societal values, there is room to accommodate tikanga Māori values in determining the application of this test.

2 Reasonable expectation of privacy in a space

This intrusion into seclusion tort is premised on the same ideas of autonomy and right to privacy as the *Hosking* tort is. However, it is a distinction between informational privacy, which we see in the *Hosking* tort, and the idea of physical privacy.[85] It recognises that privacy is more than merely informational, and that privacy can be infringed by a person entering your space, rather than needing a public disclosure as in the *Hosking* tort. The idea of recognising certain places as inherently private, and thus deserving of protection would seem to be supported by tikanga values.

[85] Moreham, above n 56, at 294.

For example, the marae space can be considered. Such a space can not be analogised to one in Western culture. At one level, it is a public space for those who have access to it, for example the iwi. However, outsiders must be granted access, and it is a space private from those without access.[86] *R v Iti* held that a marae was a private place, and in doing so noted that the idea of a private space within a broader public one did not fit within the Western legal system.[87] A tort for inclusion into seclusion that recognised Māori values might have room to recognise collective privacy in a space such as a marae. While actions such as entering a marae might be covered by trespass, it could protect observation of private tikanga occurring on a marae, for example. It would be observation of an intimate or private activity, in the same way entering a shower was in *Holland.*

B Highly Offensive

As discussed, this part of the tort is a controversial test. Given this test is controversial, it seems likely that when the appropriate case comes along the Supreme Court would reconsider the need for the test in the requirements for the privacy tort. We can consider how tikanga values might inform a conclusion on whether the test should be part of the law.

When considering tikanga values, this paper discussed the similarities between Western ideas of dignity and tikanga ideas of tapa-manu-utu. This is particularly useful when considering the highly offensive test and what tikanga might say about the test. Moreham argues that any interference with your reasonable expectation of privacy undermines your dignity by taking away your ability to control information.[88] If privacy is about these underlying ideas of dignity and autonomy, then they are impacted by any breach of your expectations. On an approach focused on these values, then the highly offensive test may need to be removed in order to give true effect to the importance of these values.

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[86] Quince, above n 47, at 43-44.

[87] *R v Iti* [2007] NZCA 119, [2008] 1 NZLR 587.

[88] Moreham, above n 28, at 182-183.

This argument can be analogised to the idea of tapu-mana-utu. As explained above, this concept refers to the need to restore balance once one's mana has been affected due to a breach of tapu. An interference with tapu impacts mana; nothing more than a breach is required. Once this occurs, utu is required in order to return to a state of balance, which is an essential part of tikanga. In the reasonable expectations of privacy discussion, this paper discussed how breaches of tapu, or interference with tapu notions of sharing information, may be an interference with the reasonable expectations of Māori. If this occurs, and tapu is interfered with, then balance must be restored. It does not appear that tikanga ideas of balance would have room for a highly offensive test. The very interference is enough to upset the state of things, undermining reasonable expectations, and tikanga would require utu.

A construction of the privacy tort which gave effect to tikanga values would need to consider removing the highly offensive test. This is supported by underlying privacy values of autonomy and dignity, which would also require this in order for their importance to be fully realised.

C Public Interest Defence

The torts provide for a defence where there is a public concern in the information. This is said to give effect to freedom of expression values. In *Peters v Attorney-General,* the court extended this to include where there is a private interest in the information, in the context of providing information to a Minister.[1]

The idea of having interest in information is reflected in tikanga, in particular through tapu. This paper discussed how tapu might dictate when certain information should be shared, and gave the example of information about burial processes. This reflects how on a tikanga view, information is regulated through tapu. Information and knowledge might be shared in certain situations, but this will depend on the context. The Western idea in this tort that some information is inherently public may not be reconcilable with tikanga notions of tapu regulating when information is shared. It is more of a spectrum; that certain information can be shared with certain people, depending on the circumstances. When considering the

reasonable expectations of privacy test, this paper suggests that the idea of tapu as regulating information could be dealt with there.

It appears the idea of there being public interest in information may not be compatible with tikanga ideas of information as more spectrum based. This paper has suggested the reasonable expectations test may be placed to deal with tapu regulation of information. This may mean the defence is not appropriate when we consider tikanga values.

VI Conclusion

Tikanga and its values have an important role to play in the development of the common law. This paper has taken one example, privacy torts, which particularly engages consideration of social values in its formulation. It identified key tikanga values, and showed how we might understand these as compatible with privacy law values. More importantly, it drew on these values to examine what a reconstruction of the tort might actually look like in terms of how it is applied. This showed how the reasonable expectations of privacy test could easily be applied in a way which recognised tapu ideas of information and spaces that are private. It also argued that tapu notions as to when it is appropriate to share information might give rise to a reasonable expectation of privacy in information staying within the bounds of what tapu considers appropriate. Next, it showed how a highly offensive test should not be required in light of tikanga values, and explained why an argument for this is similar to arguments based on Western ideas of autonomy and dignity. Finally, the lack of a need for a public interest defence when applying tikanga was discussed. In tikanga, this defence does not acknowledge the different contexts in which information may be shared. It appears the reasonable expectations test might deal with this issue better.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7,821 words.

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