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I INTRODUCTION

At the beginning of the new millennium, technology is progressing at a remarkable rate in the area of video surveillance.[1] Consequently, people are now subject to surveillance not only in public areas, but also in private places such as their own home.[2] This paper considers such home video surveillance a possible invasion of privacy.[3]

Although video surveillance is recent, invasion of privacy has long been an issue addressed by academics. Samuel Warren and Louis Brandeis formulated an insightful argument in 1890 when they stated:

> Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'[4]

Today, however, surveillance technology has even greater potential to intrude into New Zealanders' homes. The most common instrument used for such intrusion is the video camera, and there have been four main advances in this area. Firstly, digitisation of camera recorded images has developed. This allows for easier replication and the more efficient exchange of the image and hence, more people can use the video camera and copy images without specialist knowledge. In addition, the ease of passing on images in digital form has made them available to a wider audience. Secondly, there have been

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[1] "To video" involves both the recording and the showing of the captured image (*Collins Compact English Dictionary* (3 ed, HarperCollins Publishers, Wrotham, 1994) 988). "Surveillance" means the observation of a person (*Collins Compact English Dictionary*, above n 1, 884). Therefore, this paper refers to video surveillance as observing a person by either the recording or viewing of a captured image. This paper also proceeds on the basis that what the video surveillance captures will be watched.

[2] The *Collins Compact English Dictionary*, above n 1, 400 defines the home as the place where someone lives. Although very wide, this paper proposes to adopt the same definition. More specifically, however, this paper will refer to the home as including both the inside and outside property.

[3] See: Ruth Gavison "Privacy and the Limits of Law" (1980) 89 Yale LJ 421, 428, 433; William L Prosser "Privacy [a legal analysis]" in Ferdinand D Schoeman (ed) *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, Cambridge, 1984) 104, 107.

advances in miniaturisation, resulting in cameras being so small that people can put them in virtually any place without someone detecting the equipment. This, and reduced prices, has meant that people are using miniature video cameras at an increasing rate. [5] Thirdly, today's surveillance cameras also have powerful zoom lenses, which means that from far away people can obtain clear images of another's private activities. Finally, cameras now have infrared capabilities. Therefore, cameras can now clearly watch and record someone's private activities at night. [6] These developments have meant that video surveillance is now one of the best methods to invade someone's home. [7]

In my opinion, this technology threatens to fulfill Warren and Brandeis' prediction by virtue of New Zealand law having no clear and simple prohibition or regulation relating to home video surveillance. This paper, however, explains New Zealand's existing law and suggests a solution to the problem.

Part II of this paper discusses whether the public even needs legal protection from home video surveillance and then considers the legal routes currently available. This part separates these laws into two sections: common law and legislation. Part III then discusses which body, Parliament or the judiciary, is more equipped to deal with the problem of home video surveillance. In addition, Part III also suggests an extension to New Zealand's law that would cover home video surveillance and, in doing so, this paper reviews the United State's tort of intrusion upon solitude. Overall, this paper advocates the view that current New Zealand law does not sufficiently deal with the problem of home video surveillance. In my opinion, Parliament should pass broad legislation relating to this issue, thereby providing the courts with enough scope to deal with this, and future, video surveillance problems.

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[4] Samuel Warren and Louis Brandeis "The Right to Privacy" (1890) 4 Harv L Rev 193, 195.
[5] Christopher S Milligan "Facial Recognition Technology, Video Surveillance, and Privacy" (winter, 1999) 9 S Cal IntDiscp L J 295, 303.
[6] Bruce Philips "Privacy in a Surveillance Society" (1997) 46 U NB L J 127, 129.
[7] The above discussion is merely a brief background of the video surveillance technology available which is directly applicable to this paper. For example, there is also facial recognition technology and aerial thermal imaging technology. For a good overview of the technology see: Milligan, above n 5, 295.

II EXISTING PROTECTION

This part first analyses whether the public does need protection from home video surveillance and then discusses the common law and legislation that may already sufficiently protect New Zealanders.

A The Need for Protection

There is much evidence suggesting that privacy is a fundamental right in today's society. Firstly, people commonly define privacy as the *right* to be left alone,[8] and, as Alan Westin explains, privacy is more than simply a human desire, "but arises in the biological and social processes of all life."[9] In addition, privacy is a necessity in modern life because it is essential to each person's individuality and the right to control their own lives. Charles Fried has also linked privacy to friendship, love, trust and respect.[10] This indicates that people need, and recognise, privacy as an important right.[11]

There is also evidence that privacy has obtained the status of a human right. Article 12 of the Universal Declaration of Human Rights 1948, to which New Zealand is a signatory, states:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.[12]

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[8] Warren and Brandeis, above n 4, 195; Judith Jarvis Thomson "The Right to Privacy" in Ferdinand D Schoeman (ed) *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, Cambridge, 1984) 272. Emphasis added.

[9] Alan Westin *Privacy and Freedom* (Bodley Head, London, 1970) 11.

[10] Charles Fried "Privacy [a moral analysis]" in Ferdinand D Schoeman (ed) *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, Cambridge, 1984) 203, 205.

[11] Harry Kalven, Jr. "Privacy in Tort Law – Were Warren and Brandeis Wrong?" (1966) 31 L & Contemp Probs 326.

[12] General Assembly Resolution 217A (III), G.A.O.R., 3rd Session, Part I, 71.

Article 12 embraces all aspects of privacy and shows that privacy is a basic right that all people should have.[13] In addition, Parliament passed the Privacy Act in 1993 in order to "promote and protect individual privacy"[14] and, more recently, Nicholson J expressly accepted that a right of privacy does exist.[15] Privacy therefore, is a recognised right belonging to individuals in New Zealand.

Since privacy is a right, the next issue is whether home video surveillance infringes this right. One important element of privacy is an individual's right to be alone or with a specific group of people without outside interference; this is the right to seclusion or solitude.[16] Home video surveillance, however, clearly violates this aspect of privacy. Once in the home, people are usually exercising their right to seclusion or solitude. Someone's use of video surveillance to watch or record what occurs in that home, however, invades this right. In effect, an outsider is invading this person's private life, and this is an obvious form of privacy invasion.[17] Home video surveillance therefore, is an infringement of privacy.

Overall, technological advancements have meant that people in today's society are more likely to use video surveillance to invade another's home, and cases have shown that this occurs in New Zealand.[18] Therefore, since it infringes privacy, home video surveillance is a problem which New Zealand law must address.

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[13] Article 17 of the International Covenant on Civil and Political Rights 1966 contains a similar protection of privacy. New Zealand is also a signatory to this treaty.
[14] Privacy Act 1993 Title.
[15] *P v D* [2000] 2 NZLR 591, 601. Nicholson J, however, did limit this to the facts of the case, which was the public disclosure of private facts.
[16] Prosser, above n 3, 107; Gavison, above n 3, 428.
[17] James Rachels "Why Privacy is Important" in Ferdinand D Schoeman (ed) *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, Cambridge, 1984) 290; Gavison, above n 3, 433; Prosser, above n 3, 108.
[18] For examples see: *R v Gardiner* [1997] BCL 1144 (HC); *Marris v TV3 Network Ltd* (14 October 1991) unreported, High Court, Wellington, CP 754/91; *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720 (HC).

B Common Law

Under this heading, this paper discusses trespass to land, private nuisance and privacy as possible existing common law prohibitions on home video surveillance.

1 Trespass to land

The tort of trespass to land protects the person in possession of the land from any unjustifiable or unlawful interference with that person's right of possession.[19] If someone wanted to use this tort to remedy home video surveillance, however, a number of issues arise. Firstly, the person invoking the tort must be in possession of the land and therefore this tort will not be available to someone with a mere licensee interest.[20] Generally, however, someone subjected to video surveillance while in his or her home will satisfy this element.[21]

Secondly, the courts usually only apply this tort to acts that physically interfere with someone's possession. Therefore, trespass to land will only apply if someone actually enters another's area of possession.[22] Nevertheless, the courts have applied this tort in video surveillance cases when the defendant has also committed a physical trespass.[23] The courts, however, were only willing to remedy the physical entry into the plaintiffs' private property, not the act of video surveillance. [24] In addition to this, video surveillance

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[19] *Entick v Carrington* (1765) 19 ST TR 1030; Stephen Todd *The Laws of New Zealand: Tort* (Butterworths, Wellington, 1994) 144.

[20] Todd, above n 19, 144; John G Fleming *The Law of Torts* (8 ed, The Law Book Company Ltd, Australia, 1992) 603. Note also that *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL), although directly concerned with nuisance, may also be relevant to trespass to land.

[21] However, if someone is the subject of video surveillance in a hotel room, or a hospital room, they will not gain a remedy under this tort. See: *Kaye v Robertson* (1990) IPR 147 (CA) (hospital patient); *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415, 429 (HC) (mentioning a lodger).

[22] Fleming, above n 20, 603; *Lincoln Hunt Australia Pty Ltd v Willessee* (1986) 4 NSWLR 460.

[23] *Marris*, above n 18, 754/91; *Lincoln Hunt*, above n 22, 457.

[24] The danger, however, is that the courts may be indirectly providing the plaintiffs with damages under this tort. In *Marris* and *Lincoln Hunt* the court suggested that exemplary damages may be appropriate (*Marris*, above n 18, 15; *Lincoln Hunt*, above n 22, 464, 465). If the court did grant exemplary damages in these cases, the courts may be providing the plaintiffs with reparation for both the video surveillance and the physical trespass. This is because in my opinion, neither of these trespass situations justified punishing the

technology has advanced to the stage where it is not even necessary for any physical trespass to occur. The development of powerful zoom lenses and infrared vision has meant that someone could obtain a clear picture of someone in their home without the camera being near their area of possession.

Another major problem with someone relying upon trespass to land to obtain a remedy for home video surveillance is that this tort is land-based. More specifically, trespass to land aims at remedying unlawful intrusions upon someone's property.[25] In theory, therefore, there are no situations where this tort should remedy home video surveillance. This is because video surveillance never physically intrudes upon the land, but at most, it interferes in an abstract sense with someone's right of seclusion.

Nevertheless, some may argue that the courts should extend trespass to land beyond acts that only physically interfere with someone's area of possession. Any such judicial reformulation of this tort, however, would undermine over 200 years of common law and it is unlikely that the courts would do this to provide a remedy for home video surveillance. Lord Camden in *Entick v Carrington* stated that "the eye cannot by the laws of England be guilty of a trespass"[26] and courts have also stated that someone does not trespass by photographing,[27] or disclosing what they see.[28] In addition, the courts would not reformulate trespass to land in this way because, since this tort is land-based, the courts will only base an extension of the tort on harm to the plaintiff's land. As already stated, however, video surveillance does not physically harm the land. The problem of home video surveillance therefore, is no reason for the courts to extend this tort.

Under trespass to land, the plaintiff must have possession of the private space upon which the video surveillance is intruding. Although the plaintiff will usually satisfy this, the major problems are that the courts have only used this tort to remedy instances of actual

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defendants further with exemplary damages. This, however, is only a personal view, and the courts never stated they would provide damages for the surveillance.

[25] Todd, above n 19, 144.

[26] *Entick v Carrington*, above n 19, 1066 (obiter dicta).

[27] *Sports and General Press Agency Ltd v "Our Dogs" Publishing Co Ltd* [1916] 2 KB 880.

physical trespass and this tort is land-based. Trespass to land therefore, does not protect the public from home video surveillance.

2 Private nuisance

A private nuisance occurs when someone interferes unreasonably with another's land.[29] At first, it seems arguable that this tort will protect people from home video surveillance. There are, however, a number of hurdles with using this tort. The first is similar to trespass to land in that only the person having a right in the private land that another is invading can claim private nuisance.[30] Usually this will only include a person with a freehold interest, a tenant or a licensee with exclusive possession. As with trespass to land therefore, the tort of private nuisance is not available to a person with only a licensee interest.[31]

Secondly, if the video surveillance is only temporary and does not cause any actual physical damage to the land, it may not be a nuisance.[32] It is difficult to determine for what time the surveillance must continue to constitute a nuisance. As a general proposition, however, someone would have to conduct the surveillance on enough occasions, or for such a time-period, as to be offensive to a reasonable person.[33]

The third issue is whether the courts have classified video surveillance as a nuisance. Traditionally the courts have separated their analysis of nuisances into those causing actual physical damage to the land and those that only cause abstract damage: such as

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[28] *Victoria Park and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

[29] See: William C Hodge, Bill Atkin, Geoff McLay and Bruce Pardy *Torts in New Zealand: Cases and Materials* (2 ed, Oxford University Press, Auckland, 1999) 423.

[30] *Canary Wharf*, above n 20, 692. But see: *Canary Wharf*, above n 20, 712-719 per Lord Cooke of Thorndon dissenting. Lord Cooke provides a thorough and reasoned judgement concerning whether spouses, children or lodgers could sue in nuisance. Lord Cooke states at page 717 that the "preponderance of academic opinion seems also to be against confining the right to sue in nuisance for interference with amenities to plaintiffs with proprietary interests in the land." Although a dissenting judgement in an English case, Lord Cooke's judgement could be valuable to the development of New Zealand law, given his background and influence.

[31] *Canary Wharf*, above 20, 692. Contrast: *Khorasandjian v Bush* [1993] QB 727.

[32] See: Hodge and others, above n 29, 423; *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683.

annoyance or discomfort. If the nuisance causes actual damage, the courts will presume that it is unreasonable. In extreme situations, home video surveillance may cause actual physical damage. This could occur when someone enters the home and damages it while either installing or conducting the video surveillance. If this transpired the court would provide redress, but they would only remedy the physical damage, not the surveillance.

The more likely scenario is that home video surveillance will cause abstract damage in which case the court must also find that it was unreasonable.[34] Traditionally, however, the courts have not been willing to define intrusion into someone's private life as a nuisance.[35] In *Bernstein of Leigh (Baron) v Skyviews & General Ltd* Griffiths J stated that there "is no law against taking a photograph,"[36] and the Australian High Court in *Victoria Park Racing Co v Taylor* found that there is no law prohibiting someone from observing races from an outside platform.[37]

These cases show that private nuisance is unlikely to prohibit home video surveillance. This is because courts distinguish between things that emanate from somewhere, such as noise, and those that do not; the latter not being a nuisance.[38] An example of something that does not emanate from somewhere would be video surveillance. Such surveillance only observes and records what is occurring upon someone's land, and therefore, nothing physical or otherwise interferes with that person's property.

John Fleming, however, argues that certain conduct, with no social value, that interferes with someone's use and enjoyment of their land may be a nuisance.[39] If correct, this proposition means that the courts would define home video surveillance as a nuisance in

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[33] Fleming, above n 20, 604.
[34] Hodge and others, above n 29, 423.
[35] Fleming, above n 20, 603.
[36] *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] QB 479, 488.
[37] *Victoria Park*, above n 28, 479.
[38] *Canary Wharf*, above n 20, 685-686, 708-709. Lord Goff of Chieveley raises the case of *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525. In this case, the court decided that reflected sunrays constituted a nuisance. As Lord Goff explains, one should also interpret the sunrays as emanating from somewhere.
[39] Fleming, above n 20, 604.

extreme circumstances.[40] There are reasons, however, why the courts should not define extreme cases of video surveillance lacking social utility as instances of private nuisance. Firstly, the courts would have to decide in each case whether the video surveillance was intrusive enough to justify using private nuisance, and whether the surveillance had a legitimate purpose. This would mean that neither defendant nor plaintiff would have any firm idea concerning whether the courts would define their situation of home video surveillance as a private nuisance.

Secondly, the purpose of private nuisance is to prohibit intrusions onto someone's land. With modern video surveillance however, generally no physical intrusion occurs. Although video surveillance can record what occurs in private places, it does not physically intrude upon the home in the same way as smell, smoke or even sound waves.[41]

Finally, as with trespass, nuisance is a land-based tort. Courts therefore, will proceed with nuisance based on a interference with the land. Although one could argue that home video surveillance interferes with the enjoyment of the land, in essence the surveillance has not as much to do with the land as it does with the intangible right of privacy. In addition, if the courts were to remedy privacy invasions with a land-based tort, they would be mistakenly defining privacy as a right that goes with the land instead of one that travels with the person.

Overall, under private nuisance, the plaintiff must have a right in the land, and if no actual physical damage occurs, the plaintiff must show the interference was unreasonable. In addition, if the person was abnormally sensitive to the nuisance the court will not grant them a remedy.[42] Regardless, the likely view is that the courts will

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[40] Note also that if video surveillance is a nuisance and someone moves into a house that has always been the subject of surveillance, the court may still grant him or her a remedy. See: *Miller v Jackson* [1977] 3 All ER 338 per Geoffrey Lane LJ (Cumming-Bruce LJ concurring).

[41] See generally: *Halsey*, above n 32, 683.

[42] *Robinson v Kilvert* (1889) 41 Chd 88.

not class home video surveillance as a private nuisance. This tort therefore, does not provide the public with any certain protection.

3 *Privacy*

In *P v D* the High Court recently confirmed the existence of a privacy tort in New Zealand. The court formulated the tort under four parts: (a) the information must be a private fact; (b) the publication must be a public disclosure; (c) the disclosure must be highly offensive and objectionable to a person of ordinary sensibilities in the plaintiff's position; and (d) the court must have regard to the nature and extent of the legitimate public interest in disclosure.[43]

Home video surveillance would usually capture private facts and any disclosure would generally satisfy the highly offensive test. In addition, many of these disclosures would probably not be matters of legitimate public interest under (d).[44] Nevertheless, this tort does little to remedy situations of home video surveillance since the person using the video surveillance must publicly disclose what the equipment has recorded.[45] The only common situation, however, where private information obtained through video surveillance would certainly be publicly disclosed is when the news media are using the surveillance. In addition, even if someone gains a remedy under the *P v D* expression, the tort punishes the disclosure, not the actual intrusion the video surveillance has committed. Since the *P v D* formulation is the only clearly accepted expression of the privacy tort in New Zealand,[46] it is reasonable to state that this current tort formulation does not prohibit home video surveillance.

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[43] *P v D*, above n 15, 591, 601.

[44] In order to satisfy the public interest test the information disclosed must be a matter of public concern rather than something in which the public has an interest. Clearly in some situations disclosure of what home video surveillance captures will be in the public interest, especially when it relates to crime and national security (John Burrows and Ursula Cheer *Media Law in New Zealand* (4 ed, Oxford University Press, Auckland, 1999) 175).

[45] The exact meaning of public disclosure is uncertain. It may be similar to defamation in that publication to one person would be enough, but, in my opinion, wider disclosure is probably required (Burrows and Cheer, above n 44, 175.

[46] But see: Rosemary Tobin "The New Zealand Tort of Invasion of Privacy" (2000) 5 Tolley's Comm L 129, 133.

C *Legislation*

This section discusses the Broadcasting Standards Authority Privacy Principles, the Harassment Act 1997, the Privacy Act 1993 and the Bill of Rights Act 1990.

1 *Broadcasting Standards Authority Privacy Principles*

The Broadcasting Standards Authority (BSA) has developed a number of privacy principles that all broadcasters should follow.[47] Principle III, however, is the only principle directly applicable to home video surveillance. Principle III provides a ground for complaint when there is:

> Intentional interference (in the nature of prying) with an individual's interest in solitude or seclusion. The intrusion must be offensive to the ordinary person but an individual's interest in solitude or seclusion does not provide the basis for a privacy action for an individual to complain about being observed or followed or photographed in a public place.

Provided someone intentionally interferes with another's seclusion or solitude, the BSA should provide the plaintiff with redress under this principle. If one applies this to home video surveillance, it is apparent that this principle should remedy such conduct. Once in the home, someone is clearly within his or her zone of seclusion and the use of video surveillance would be an intentional intrusion upon this area.[48] In addition, the BSA commonly uses this principle to remedy cases where someone has not consented to video recording and filming.[49] This shows that, when not consented to, video surveillance is both an intentional interference and offensive to a reasonable person. Therefore, this

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[47] Although not strictly legislation, the BSA does gain its authority to deal with privacy complaints under the principles from the Broadcasting Act 1989.
[48] *TV3 v BSA*, above n 18, 733.
[49] Burrows and Cheer, above n 44, 182.

principle seemingly prohibits home video surveillance. Unfortunately, however, this is not the case.

As stated previously, new surveillance technology means someone using such equipment will not have to enter the subject's home. This was a problem with trespass, and it is also an obstacle with principle III. If a broadcaster is operating the surveillance from a public place, or their own private area, they will not be breaching principle III.[50] Authority for this comes from *TV3 v BSA* when the judge decided that surreptitious filming from outside the plaintiff's land was not unlawful and, therefore, the crew did not breach principle III. The only time TV3 breached this principle was when they publicly disclosed what the camera recorded,[51] but the actual video surveillance was not a breach. This means home video surveillance will only breach principle III if the broadcaster physically enters the private area, or subsequently discloses what they recorded in a way that is offensive to an ordinary person.[52] This, and the fact the principles only apply to radio and television media, severely limits the ability of principle III to remedy instances of home video surveillance. Overall therefore, principle III clearly does not provide New Zealanders with much protection from home video surveillance.

2 *Harassment Act 1997*

The New Zealand Harassment Act came into force in 1998 and provides for civil and criminal forms of harassment.[53] The first problem with defining home video surveillance

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[50] Burrows and Cheer, above n 44, 183.
[51] *TV3 v BSA*, above n 18, 732, 733.
[52] Principle III; *TV3 v BSA*, above n 18, 733.
[53] Harassment Act 1997, Part 2 & Part 3. This Part will not consider criminal harassment in detail because, in addition to the requirements of civil harassment, one must also satisfy section 8(1). Section 8(1) states that the accused must intend to cause the subject to fear for their own or their family's safety, or know the harassment will cause the subject to fear for their own or their family's safety. In my opinion, although it will depend on each case, the courts would find it difficult to impute the accused with either intent or knowledge. This is because people generally use video surveillance to obtain private information about someone, not to make that person fear for their safety. In addition, the person using the surveillance would usually want their activities to remain secret, and therefore would probably not intend or even know that their actions would cause the subject to fear for their safety. A similar provision is s 21(d) of the Summary Offences Act 1981 (substituted previous s21 in 1998). This section states that if someone intends, or knows their watching of another's home will frighten or intimidate that person they will be liable for either 3

as a form of harassment is that there is very little legal authority relating to this Act. Nevertheless, the relevant sections state:

> **3. Meaning of "harassment"**-(1) For the purposes of this Act, a person harasses another person if he or she engages in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months.
>
> **4. Meaning of "specified act"**-(1) For the purposes of this Act, a specified act, in relation to a person, means any of the following acts:
>
> (a) Watching, loitering near, or preventing or hindering access to or from, that person's place of residence, business, employment, or any other place that the person frequents for any purpose:
>
> ...
>
> (f) Acting in any other way-
>
> (i) That causes that person ("person A") to fear for his or her safety; and
>
> (ii) That would cause a reasonable person in person A's particular circumstances to fear for his or her safety.

Consequently, the first element of civil harassment is that the accused must be engaging in a pattern of behaviour.[54] Section 3(1) provides that a pattern of behaviour occurs when a person does "any specified act to the other person on at least 2 separate occasions...within 12 months." The issue, therefore, is whether home video surveillance is a specified act.

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months imprisonment or a $2,000 fine under s21(3). This section raises the same problematic issues of intent and knowledge. Section 30 of the Summary Offences Act also states that someone is liable for a $500 fine if they peep or peer into someone's home at night: night being from one hour after sunset to one hour before sunrise. Problems, however, are that this section will not protect someone from home video surveillance during the day, and it is uncertain whether video surveillance can be included within the definition of peeping or peering. In addition, $500 is not a very substantial penalty.

[54] Harassment Act 1997, s3(1).

Under section 4(1)(a) someone watching another's home is a specified act. The Harassment Act does not define watching, but the common definition is "to look at or observe closely and attentively."[55] Given this definition, it is clear that video surveillance could be a form of watching as long as someone actually observes the private acts using the video surveillance. In addition, it should make no difference if someone watches the acts as they occur, or whether they watch the recording later. In effect, they are still observing the private acts closely and attentively.

Another issue is whether the acts of "loitering...preventing or hindering" colour the meaning of watching.[56] One could argue that someone can do these acts without technological instruments and therefore the term "watching" does not include observing someone with video surveillance equipment. In my opinion, however, someone will commonly use other instruments when conducting all these acts. For example, person A may prevent person B from leaving their home by aiming a rifle at their front door. Here person A is clearly using a foreign instrument to prevent person B from leaving his or her place of residence. Therefore, there is no reason why the acts of loitering, preventing or hindering should exclude observing with video surveillance equipment from the meaning of watching.

Given this conclusion, home video surveillance will be a pattern of behaviour if the plaintiff can show that the defendant has directed the video surveillance against them,[57] and did so on two or more separate occasions within twelve months.[58] If the above

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[55] *Collins Compact English Dictionary*, above n 1, 1000.

[56] Harassment Act 1997, s4(1)(a).

[57] Harassment Act 1997, s3(1).Therefore, if someone is directing the surveillance against person A, but person B is captured by the surveillance twice within twelve months, only person A can invoke the Harassment Act. In addition, if someone directs the surveillance against no one, then the surveillance is not a form of harassment. Nevertheless, commonly the person using the Act will be the subject of the surveillance.

[58] Harassment Act 1997, s3(1). It is not entirely clear whether the Harassment Act would class continuous surveillance as occurring on two or more occasions under section 3(1) and there is no case law relating directly to the interpretation of "separate occasions". Under section 6(b), however, the aim of this Act is to provide people with adequate legal protection from harassment. It would seem absurd for the Act to prohibit person A from following person B on Mondays and Thursdays, which would clearly be harassment (see: Harassment Act 1997, ss 3 & 4(b)) but not person A following person B for twelve months

analysis is incorrect, however, providing the video surveillance caused the plaintiff to fear for his or her safety and this fear was reasonable in the circumstances, the video surveillance will constitute a specified act.[59]

From the above analysis, home video surveillance is likely to constitute civil harassment under the Act and therefore the court may grant a restraining order.[60] In my opinion, however, this Act still does not provide enough protection. There are three reasons for this view. Firstly, this Act aims at punishing individuals for harassing other individuals. In some situations, however, certain agencies, such as Crown agencies[61] or private detective organisations,[62] will employ video surveillance. Although the courts may punish some individuals in these agencies, the organisation itself will probably escape any liability.

Secondly, the person seeking to invoke the Act must prove that the specified act has occurred more than once in twelve months. This means that if the person using the surveillance knows that the subject has detected them, he or she has an opportunity to either stop the surveillance or make it less detectable. Conversely the subject has had their private life invaded, but has no remedy under this Act.

Finally, the Act's punishments do not remedy the privacy invasion. Although the court may grant a restraining order against the person, this does not address the actual invasion into the subject's private area. It may stop, or deter future home video surveillance, but

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continuously. Common sense therefore, would suggest that the courts would interpret continuous surveillance as occurring on two separate occasions under s3.

[59] Harassment Act 1997, s4(1)(f). Note also that fear for safety includes a fear for mental safety (Harassment Act 1997, s2(1)).

[60] Harassment Act 1997, s9.

[61] Harassment Act 1997, s7, this Act binds the Crown.

[62] There is, however, the Private Investigators and Security Guards Act 1974, which applies directly to private investigators. Section 52, although somewhat dated, makes it an offence against this Act for a private investigator to take a videotape recording of another person without the prior written consent of that person. If the private investigator breaches this section, under s57 the Registrar may suspend, cancel or reprimand the investigator's license or fine them $500. The main problem with this Act is that it only applies to private investigators, and this is defined narrowly in s3. More specifically, s3(4)(a) provides that someone is not a private investigator because they seek information for the Crown, the Police or the news

under this Act, the courts cannot compensate the victim for any damage that has already occurred. In my opinion therefore, the Harassment Act does not adequately protect New Zealanders from home video surveillance.

3 *Privacy Act 1993*

Parliament passed the Privacy Act in 1993 and the Act set up a Privacy Commissioner together with a means for the Complaints Review Tribunal to remedy privacy breaches.[63] In addition, this Act also formulated twelve information privacy principles,[64] but only one is directly relevant to home video surveillance.[65] Principle 4 states:

> Personal information shall not be collected by an agency-
>
> (a) By unlawful means; or
>
> (b) By means that, in the circumstances of the case, -
>
> (i) Are unfair; or
>
> (ii) Intrude to an unreasonable extent upon the personal affairs of the individual concerned.

Home video surveillance would clearly involve obtaining personal information,[66] and anyone using video surveillance would be an agency.[67] The first issue therefore, is

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media. In addition, the fine of $500 is far too low to be an effective remedy or deterrent against home video surveillance.

[63] Privacy Act 1993, Part III & Part VIII.

[64] Privacy Act 1993, Part II.

[65] Principle 1 does not apply because there is no clear evidence that video surveillance of private places is unlawful under Principle 1(a) (See: *Marris*, above n 18, 13). Video surveillance also would not breach Principle 2(1) because in effect the person is collecting the information directly from the surveillance subject. Nor would it breach Principle 3 because under Principle 3(4)(e), compliance would not be reasonably practicable.

[66] Privacy Act 1993, s2 defines personal information as "information about an identifiable individual". Any video surveillance of someone's private area would be about this individual, and therefore, personal information.

[67] Privacy Act 1993, s2 defines an agency as "any person or body of persons, whether corporate or unincorporate, and whether in the public sector or the private sector." This wide definition clearly includes anyone that would decide to use video surveillance.

whether someone using home video surveillance collects the personal information, which under section 2 "does not include the receipt of unsolicited information.".[68]

A situation similar to home video surveillance arose in *Harder v Proceedings Commissioner*.[69] The defendant received a telephone call from the plaintiff and recorded the conversation. Counsel for the defendant argued the call was unsolicited, but both the Complaints Review Tribunal and the High Court rejected this on the basis that the defendant became an active recipient of the information by turning on the recorder.[70] The Court of Appeal, however, overruled these decisions because the "unsolicited nature of the information was not affected by the fact that it was recorded or the way it was recorded."[71] This decision, if correct, would seem to mean that someone using home video surveillance would not be collecting personal information under this Act. The reason being that, the person using the surveillance did not specifically ask for the personal information and, under *Harder*, the fact that the surveillance is actively recording the information does not change its unsolicited nature.

In my opinion, however, home video surveillance will be a form of collection. The reason for this is that information is only unsolicited if someone actively gives or sends the information to another person.[72] In the case of home video surveillance, however, the subject generally never actively or knowingly gives personal information to the surveillance operator. The information is solicited; therefore, since surveillance equipment is a collecting device, the person operating the video surveillance collects it under principle 4.

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[68] The *Collins Compact English* Dictionary, above n 1, 972 defines "unsolicited information" as someone giving or sending information to another person without him or her asking for it.
[69] *Harder v Proceedings Commissioner* (13 August 1999) unreported, High Court, Auckland, AP 65SW/99. See also: *Proceedings Commissioner v Harder* (28 May 1999) unreported, CRT, Decision No 14/99; *Harder v Proceedings Commissioner* [2000] 3 NZLR 80 (CA).
[70] *Proceedings Commissioner v Harder*, above n 69, 6.
[71] *Harder v Proceedings Commissioner*, above n 69, 91 (CA).
[72] *Collins Compact English Dictionary*, above n 1, 972. See also: *Harder*, above n 69, (CRT; HC; CA).

The next issue is whether home video surveillance will be unfair under principle 4(b)(i).[73] This will depend upon the circumstances of each case,[74] but previous cases do provide some indication. The Court of Appeal in *Harder* found that the defendant's conduct was not unfair because the plaintiff should have anticipated that the defendant would make a full record of the conversation.[75] Applying this reasoning to home video surveillance, generally someone would not expect to be the subject of video surveillance while in such a private place. Commonly therefore, this method of collecting personal information would be unfair. This conclusion accords with common sense in that, unless the subject did something to make it warranted, home video surveillance is not a very fair way to collect personal information.

Conversely, if the video surveillance "intrude[s] to an unreasonable extent upon the personal affairs of the individual concerned" the video surveillance will also breach principle 4.[76] Again, whether the intrusion is unreasonable will depend on the circumstances,[77] but the Privacy Commissioner's Case Note 0632, although not a legal precedent, provides a number of factors to consider. In this case, an employer was using video surveillance to monitor their employees. The Privacy Commissioner decided the employer was not intruding unreasonably upon the employees' personal affairs because they were not in a private place, the employer minimised the surveillance and they used the surveillance to uncover criminal activity.[78] The situation, however, is much different with home video surveillance. The video surveillance is intruding on a private place and generally, it would defeat the purpose of the surveillance for the users to minimise its use. Home video surveillance therefore, will in certain circumstances be either unfair or intrude upon someone's personal affairs to an unreasonable extent.

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[73] It is not clear whether video surveillance of private places is unlawful, therefore this paper will not deal with principle 4(a).
[74] Privacy Act 1993, s6 principle 4(b).
[75] *Harder* (CA), above n 69, 92.
[76] Privacy Act 1993, s6 principle 4(b)(ii)
[77] Privacy Act 1993, s6 principle 4(b).
[78] Privacy Commissioner's Case Note 0632.

Provided the complainant can show they have had their privacy interfered with under section 66 and they have suffered some loss under section 88, the Complaints Review Tribunal may grant them damages. Principle 4 of the Privacy Act 1993 therefore, seems to provide reasonably good protection. There are, however, some serious shortcomings. Firstly, nothing in principle 4 applies to personal information that an intelligence organisation collects.[79] These organisations are the New Zealand Security Intelligence Service and the Government Communications Security Bureau.[80] These two organisations are likely to be among the most common users of video surveillance.

Related to this first problem is the fact that a news medium is not an agency under the Privacy Act 1993 while carrying out its news activities,[81] and hence not subject to principle 4. Therefore, If the news media are using home video surveillance in relation to their news activities, the victim will not be able to invoke principle 4.

Thirdly, the Court of Appeal and the Privacy Commissioner seem to suggest that if someone is collecting the personal information for a legitimate purpose, principle 4 will not apply. In *Harder*, this purpose was to have an accurate record and in Case Note 0632, the purpose was to detect crime.[82] This is a problem when one applies the legitimate purpose exception to different circumstances. For example, take the situation of a Neighbourhood Watch group attempting to prevent crime by setting up video surveillance around a suspected burglar's home. In this situation, the user of the surveillance may have a legitimate purpose for their actions. Namely, the Neighbourhood Watch group may be attempting to prevent crime. The point is that many people who use video surveillance may claim to have a legitimate reason for their actions, but they are still intruding upon someone's privacy. Due to case law, however, the Privacy Act 1993 will probably not provide the victim with a remedy.

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[79] Privacy Act 1993, s57.
[80] Privacy Act 1993, s2.
[81] Privacy Act 1993, s2.
[82] *Harder* (CA), above n 69, 83; Case Note 0632, above n 78.

Due to these shortcomings, in my opinion the Privacy Act does not sufficiently protect the public from home video surveillance.

4 *Bill of Rights Act 1990*

The Bill of Rights Act 1990 (BORA) does provide the public with some degree of privacy protection. Section 21 states that "everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise."[83] The first point to note, however, is that section 3 limits the BORA's application:

> **3. Application**- This Bill or Rights applies only to acts done-
> (a) By the legislative, executive or judicial branches of the government of New Zealand; or
> (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

In relation to home video surveillance, section 3 would mean that the BORA only applies to law enforcement and intelligence agencies.[84] Despite section 3, however, section 21 of the BORA may still protect someone from police or security agency surveillance.

The first issue is whether home video surveillance would constitute a search. The case of *R v Grayson and Taylor* defines search as "an examination of a person or property."[85] This definition seems to include home video surveillance, but the courts have further complicated this issue. The courts have first done this by, when presented with relevant fact scenarios, declining to decide whether video surveillance constitutes a search.[86]

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[83] BORA 1990, s21.
[84] But see: *R v Grayson and Taylor* [1997] 1 NZLR 399, 407 (CA). The court stated that so long as the government is involved somewhat in the act, this would satisfy s 3 of the BoRA.
[85] *Grayson*, above n 84, 406.
[86] See: *Grayson*, above n 84, 399; *R v Fraser* [1997] 2 NZLR 442 (CA).

Secondly, the judicial comments that have emerged from the case law provide evidence for, and against, video surveillance being a search under section 21. Hardie Boys J in *R v Barlow*[87] stated that participant surveillance was probably not a search under section 21. In addition, at District Court level in *R v Fraser* the judge expressed serious doubts concerning whether the use of any video surveillance was a search.[88] In my opinion, however, home video surveillance will be a search under section 21. Firstly, Gault J in *Barlow* stated that video surveillance could possibly be a search,[89] and Casey J in *R v A*[90] concluded that search or seizure should cover infringements of privacy by electronic listening devices. It would be reasonable to extend Casey J's reasoning to video surveillance. Secondly, in *R v Gardiner* the police subjected the accused to six months of video surveillance then used the information they gained to charge him with drug offenses. The High Court decided the video surveillance was a search because the police would not have gained the information without the surveillance, surveillance technology extended the meaning of search and the Court of Appeal tended to define search widely. In addition, the High Court in *Gardiner* believed the purpose of section 21 was to cover video surveillance.[91] This belief is supported by the White Paper *A Bill of Rights for New Zealand* (1985) when at paragraph 10.152 it states: "Article [21] should extend not only to the interception of mail, for example, but also to the electronic interception of private conversations, and other forms of surveillance." Overall, despite cloudy case law, in my opinion if someone approached the court with a situation concerning home video surveillance, the court would define this as a search under section 21 of the BORA.

The next issue is whether the court will define the home video surveillance as an unreasonable search.[92] The first point to note is that the police or intelligence agency using the video surveillance will normally not be acting illegally.[93] Just because the surveillance is legal, however, does not automatically mean it is reasonable under section

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[87] *R v Barlow* (1995) 14 CRNZ 9, 41 (CA).
[88] *Fraser*, above n 86, 447.
[89] *Barlow*, above n 87, 48, although he did not directly decide the issue.
[90] *R v A* [1994] 1 NZLR 429, 440 (CA).
[91] *Gardiner*, above n 18, 1144.
[92] BORA 1990, s21.
[93] *Fraser*, above n 86, 452. Unless of course they commit a trespass.

21.[94] Overall, the search's reasonableness will depend upon the circumstances,[95] but from the cases, the main factor was whether the police had good reason to believe they needed the surveillance to uncover a crime.[96] The police therefore, will usually be acting reasonably so long as they have a good reason to believe the subject is engaging in criminal activity. With intelligence agencies, their reason for surveillance will probably be national security; it would take a bold judiciary to question the validity of this justification.[97]

If the victim of the video surveillance can satisfy all these elements, they can gain two kinds of remedy under the BORA. Firstly, if the police charge the subject with a crime they may ask the court to exclude the video surveillance evidence,[98] or alternatively, they may claim damages from the Crown.[99]

Apart from the limitation in section 3, the BORA probably provides the public with some protection against home video surveillance. That courts have generally found video surveillance reasonable is, however, a major shortcoming, especially since they have not identified the basis for the reasonable belief that someone is committing a crime. In addition, despite comments to the contrary,[100] it seems the courts are judging reasonableness on whether the police successfully uncover criminal activity; that is that the police can use video surveillance providing they in fact uncover a crime. Nevertheless, the BORA may protect people from some government use of home video surveillance, but in my opinion, more protection is required.

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[94] *Fraser*, above n 86, 452; *Grayson*, above n 84, 407.
[95] *Grayson*, above n 84, 400.
[96] *Grayson*, above n 84, 401 "suspicion of criminal activity"; *Fraser*, above n 86, 453 "suspected of involvement in drug dealing"; *Gardiner*, above n 18, 1144 had good reason to think they were committing serious offenses.
[97] If, however, the police or intelligence agency clearly had no reason to believe the subject of the surveillance was involved in either a crime or a threat to national security, the court may find their conduct to be unreasonable. Such a situation may arise if the police or intelligence agency were conducting surveillance upon the wrong person (See generally: *Simpson v Attorney General [Baigent's Case]* [1994] 3 NZLR 667, 703 (CA)). In my opinion, however, the court would not define surveillance as unreasonable if the agency had a bona fide belief it was for national security purposes.
[98] *R v Goodwin* [1993] 2 NZLR 153 (CA).
[99] *Baigent's Case*, above n 97, 703. This remedy however, will probably only be available to those who the police never charged with a crime

III EXTENDING PROTECTION

So far, this paper has shown that the public needs protection from home video surveillance, but all the existing laws have serious shortcomings when applied to this situation. This part, however, will suggest a solution to this problem. Firstly, this part decides whether Parliament or the courts should have the task of prohibiting home video surveillance. Secondly, this part analyses the United State's tort of intrusion upon solitude and determines whether it covers such surveillance. Thirdly, this part creates, and discusses a preliminary formulation of law, with reference to the situation in the United States, that would prohibit home video surveillance.

A Legislation or Common Law?

A major issue is whether it should be the courts, or Parliament, who prohibit home video surveillance. McGechan J in *Tucker v News Media Ownership Ltd* believed that parliamentary intervention into the privacy issue would be the preferable approach,[101] and in relation to home video surveillance, the passage of legislation certainly has many benefits. Firstly, As Lord Buckmaster stated in the case of *Donoghue v Stevenson*,[102] the courts cannot simply make new law; if New Zealand desires a new law, its creation rests with Parliament, not the courts.[103] Secondly, legislation would be reasonably efficient in providing a clear prohibition on this issue. Conversely, the judiciary has to develop the common law on a case-by-case basis and it would take time for the courts to develop a tort that clearly prohibited home video surveillance.[104] As an example, it took the courts fourteen years to acknowledge the public disclosure of private facts tort in *P v D* after the

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[100] *Fraser*, above n 86, 452.
[101] *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 (HC). 733.
[102] *McAlister (or Donoghue) (Pauper) v Stevenson* [1932] AC 562 (HL).
[103] Although New Zealand does have a public disclosure of private facts tort and McGechan J in *Tucker*, above n 101, 716, 731, 733 did made some comments suggesting that the privacy tort could extend to intrusion. In addition, Rosemary Tobin argues that a tort for intentional intrusion may already exist (Tobin, above n 46, 133), but she does not go into much detail concerning this point.
[104] John Burrows "Invasion of Privacy" in Stephen Todd (ed) *The Law of Torts in New Zealand* (3 ed, Brookers Ltd, Wellington, 2001) 908, 936.

Tucker case raised it in 1986. In addition, if Parliament do not intervene, there is uncertainty as to whether the courts will even decide to extend the privacy tort and if they do, what form it will take.[105]

A judicial development of the privacy tort, however, may be preferable to a legislative approach. Firstly, all previous legislative intervention into the privacy arena has, in short, been unsatisfactory. This paper has discussed in detail the Broadcasting Standards Authority Privacy Principles, the Privacy Act 1993, the Harassment Act 1997 and the BORA. This paper has also referred to the Summary Offences Act 1981 and the Private Investigators and Security Guards Act 1974. All this legislation, although not directly aimed at home video surveillance, encounters problems when applied to this situation. This is because legislation is quickly outdated when it attempts to monitor an area, such as privacy, that is highly influenced by technology.[106] Therefore, if Parliament did pass legislation prohibiting home video surveillance, further advances in technology may soon make the legislation redundant. Conversely, common law torts are much more flexible and have an ability to change to meet the needs of society.[107] In addition, common law development by the courts will be able to take account of new privacy issues as they arise and alter the law as society advances.[108]

Overall, the best approach is not obvious, but there is a good middle ground. This would be for Parliament to pass legislation that dealt with intrusions into privacy in a broad manner. More specifically, the legislation would have to take a form similar to that of common law torts, but obviously with certain guidelines. Such legislation would deal with most of the problems raised above relating to the creation of legislation or common law in this area. Namely, Parliament could create it reasonably quickly, it would remove the uncertainty of judicially created law and the guidelines would help the courts interpret

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[105] Burrows, above n 104, 936. Also note the way the courts interpreted principle III of the Broadcasting Standards Authority Privacy Principles.
[106] See: Warren and Brandeis, above n 4, 195.
[107] For example, in the 1815 case of *Pickering v Rudd* (1815) 4 CAMP 219 it was doubtful whether trespass into airspace was encompassed by the tort of trespass to land. By 1927, however, the case of *Davies v Bennison* (1927) 22 Tasmania LR 52 clearly accepted that airspace was included.
[108] Burrows, above n 104, 936.

the legislation how Parliament intended. In addition, the broad principles would be able to deal with technology and societal advancements better than specific legislation since they would be subject to a degree of judicial development if needed. Ultimately therefore, if drafted well, this legislation would provide the public with protection against home video surveillance. The issue remains, however, about what form this tort-like legislation should take. In resolving this issue, New Zealand would have to look to a jurisdiction that has formulated their law in such a way as to prohibit home video surveillance.

B United States

Currently there are four recognised privacy torts in the United States.[109] For present purposes, however, only intrusion into the plaintiff's seclusion or solitude is directly relevant. This tort has three elements: (a) the defendant must have committed an intrusion; (b) this intrusion must be highly offensive to the plaintiff; and (c) the intrusion must be highly offensive to a reasonable person.[110] This paper will now determine to what extent this tort covers home video surveillance.

In relation to the first element, the courts must class home video surveillance as an intrusion. Yet, as this paper has shown, commonly someone using video surveillance will not physically enter another's private area. United States courts have recognised this, however, and have classed video surveillance as a non-physical intrusion, which is still an intrusion for the purposes of this tort.[111] For example, in *Pemberton v Bethlehem Steel Corporation* the court held that a surveillance device on the plaintiff's motel door was an intrusion.[112] Similarly, the court in *Harkey v Abate* found that surveillance of a restroom

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[109] Charles Morgan "Employer Monitoring of Employee Electronic Mail and Internet use" (1999) 44 McGill LJ 849, 856. These are (a) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (b) Public disclosure of embarrassing private facts; (c) Publicity which places the plaintiff in a false light in the public eye; and (d) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness (Prosser, above n 2, 107). See also: David A Elder *The Law of Privacy* (Lawyers Cooperative Publishing, New York, 1991)

[110] Elder, above n 109, 17

[111] Elder, above n 109, 34, 41.

[112] *Pemberton v Bethlehem Steel Corporation* (1986) 479 US 984.

was an intrusion.[113] Overall, United States courts have decided that any video surveillance will satisfy the intrusion element of this tort.[114] In addition, the defendant must also intend to intrude upon the plaintiff's seclusion or solitude.[115]

Secondly, the defendant's intrusion must be highly offensive to the plaintiff. As this is a subjective element, whether it is satisfied will depend upon each case. The United States courts, however, generally look at the degree of the intrusion, the surrounding circumstances, the purpose of the intrusion and the plaintiff's privacy expectations.[116] The courts look to these factors to ascertain whether the plaintiff was actually highly offended by the intrusion. Nevertheless, since this is the subjective element of the tort, the plaintiff's complaint will normally suffice.

The fact that the intrusion must also have been highly offensive to a reasonable person is the main method the United States courts use to control the scope of this tort. This element, however, involves many separate issues.

Firstly, a plaintiff will normally not be able to prove a breach if the intrusions are offensive without being highly offensive, but this distinction is sometimes difficult to make. The main object of this element of the tort, however, is to prevent people being able to sue for intrusions that are merely trivial or annoying.[117] The court in *N.O.C Incorporated v Schaefer* stated that someone using moderate surveillance to record suspected illegal dumping was not highly offensive.[118] In addition, the court in *Dempsey v National Enquirer* found that the defendant's continual attempts to photograph the plaintiff were merely annoying.[119] Overall, however, the view of the United States courts is that home video surveillance will be more than a trivial intrusion.[120]

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[113] *Harkey v Abate* (1983) 346 NW 2d 74 (Mich App 1983).
[114] Morgan, above n 109, 869.
[115] Elder, above n 109, 23.
[116] Morgan, above n 109, 869.
[117] Elder, above n 109, 17, 18, 21.
[118] *N.O.C Incorporated v Schaefer* (1984) 484 A 2d 729 (NJ, 1984).
[119] *Dempsey v National Enquirer* (1988) 702 F Supp 927 (DC Me, 1988).

Secondly, the plaintiff normally has to show a pattern of intrusive conduct. United States case law, however, has created an exception to this by finding that a single act of filming or taking a picture will be enough.[121] In my opinion, there is no reason why a United States court would treat a single act of video surveillance any differently. With video surveillance therefore, whether the intrusion was singular instead of continual will not be fatal to the plaintiff's case under this tort. The courts, however, may be more likely to class continual home video surveillance as highly offensive.

In addition, if the defendant has legal authority for committing the intrusion, a United States court will not find the act highly offensive to a reasonable person.[122] For example, if the police are subjecting someone to surveillance in their home, so long as they have a warrant or some other legal authority, they will not have breached this tort. This means the tort will not prevent effective law enforcement or other lawful acts so long as the people using the surveillance have fulfilled their own legal requirements.

Despite these exceptions, the common view in the United States is that home video surveillance will usually satisfy this element of the tort. This is because in private areas such as the home, one has a reasonable expectation of privacy and any intrusion into this private sphere by video surveillance would be highly offensive to any reasonable person.[123]

The final aspect of the United States invasion of solitude tort that this paper will discuss is the possibility that someone may consent to privacy invasions.[124] This may be express or implied and, if the person's consent exists at the time of the privacy invasion, it neutralises any liability under the tort. Overall, the main point of this is that all people

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[120] See: *Pemberton*, above n 112, 984; *Harkey*, above n 113, 74.
[121] Elder, above n 109, 19.
[122] Elder, above n 109, 20.
[123] See: *Pemberton*, above n 112, 984; *Harkey*, above n 113, 74; Elder, above n 109, 41-44; Morgan, above n 109, 869.
[124] Elder, above n 109, 68; Elizabeth Paton-Simpson "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000) 50 U Toronto LJ 305, 311.

consent to some privacy invasions.[125] When someone ventures into public especially, he or she generally consents to a high degree of privacy invasion from other people.[126] The case of *International Union v Garner* concerned the police and others using surveillance to record the license plate numbers of people at union meetings. They then traced the numbers, discovered the people's identities and informed each of their employers that they were at the meetings. The court stated that there was no privacy invasion because the car numbers were in public view and therefore they had no reasonable expectation of privacy.[127] This at first seems to have no direct relevance to home video surveillance. If however, someone is in their home and people outside that area can observe them easily, the courts will find that they consented to any video surveillance intrusion that views the same acts as the people outside.[128] Concerning home video surveillance therefore, the United States tort of invasion of solitude will not apply if the surveillance only sees what is already in the public view.

Therefore, home video surveillance is an intrusion that is normally highly offensive to both the subject and a reasonable person. Consequently, so long as the video surveillance does not merely observe that which is already in the public view, in the United States there is an obvious tort prohibiting home video surveillance. When formulating broad tort-like legislation therefore, this paper, and Parliament, should have specific regard to the United States experience.

C A Preliminary Formulation

In my opinion, the New Zealand Parliament should create broad legislation to cover intrusions into people's privacy, which would in turn prohibit home video surveillance. In doing so, they should have regard to the law in the United States. Therefore, any intrusion upon someone's privacy that would be highly offensive and objectionable to a person of ordinary sensibilities in the plaintiff's position would breach the legislation. The courts

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[125] Elder, above n 109, 68.
[126] See: Paton-Simpson, above n 124, 313.
[127] *International Union v Garner* (1985) 601 F Supp 187 (MD Tenn 1985).

should also have to determine under the legislation whether the public interest in not punishing the intrusion in each situation clearly outweighs the plaintiff's privacy rights.

D Elements of the Preliminary Formulation

1 Intrusion

Firstly, the defendant must have committed an intrusion. This is virtually identical to the United States tort in that this law will expressly remedy the intrusion. This is especially relevant when applied to home video surveillance. For example, if someone used surveillance to record the private acts of another but did not watch the recording, they will have still committed an intrusion. This law therefore, should remedy the actual intrusion, not the watching of the private acts.[129]

In addition, this element does not, and should not, require the perpetrator to have the intention to intrude upon someone's privacy. The reason for this is simply that intrusion upon someone's solitude can occur without intent. For example, take the situation of someone that places their video camera on a table but accidentally leaves it running on zoom-mode. Unfortunately, the camera records another person carrying out private activities which nobody would be able to see without using a zoom lens. Although these occurrences, and even unintentional intrusions upon privacy, are unlikely to arise often, it is possible. The point is that even with unintentional intrusions, the perpetrator has still invaded someone's privacy and in my opinion that person is entitled to redress. In these situations therefore, although the victim will not need an injunction, they should be entitled to damages as a remedy for the privacy invasion.[130]

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[128] Elder, above n 109, 36.

[129] Of course, this may influence the quantum of damages. The courts, however, should not let a lack of watching affect the damages too much given it is the intrusion that the tort is attempting to remedy.

[130] There is an argument, however, that this results in the broad legislation imposing strict liability, which may be going too far. More discussion is clearly needed on this point.

Secondly, instead of "intruding upon someone's solitude",[131] in my opinion the wording should be "intruding upon someone's privacy."[132] The difference this makes is that the aspect of another's life someone is intruding upon must be private. This simplifies the United States formulation in that the idea of consent does not arise. More specifically, instead of the courts having to state that people consent to some privacy intrusions in public places, all they would have to determine is whether the intrusion was upon an act that society should deem as private. For example, if a couple is engaged in intimate acts in a public market and someone takes a photo,[133] this would not be an intrusion upon their privacy because they are conducting their affairs in public view. The act therefore, is not private. In contrast, if a couple is acting the same in their bedroom away from public scrutiny, the act will be private. Anyone using techniques to photograph this will be intruding upon their privacy.

An important issue that arises from this element is what Parliament or the courts will define as private. Namely, they may distinguish between acts that occur in public as opposed to those that someone carries out within their private property, or even those acts that occur in someone's garden as opposed to their bedroom.[134] There is no certain way to determine how Parliament should decide this issue, but it seems that if an aspect of someone's life is not readily in public view, it will be private.[135] Commonly, therefore, someone using home video surveillance will be intruding upon the subject's privacy.

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[131] Elder, above n 109, 16.
[132] See: Paton-Simpson, above n 124, 310.
[133] *Gill v Hearst Publishing Company* (1953) 253 P 2d 441 (Cal 1953).
[134] See: *Fraser*, above n 86, 453; the court stated that "reasonable expectations of privacy for activities readily in visible from outside the property (in this case the garden) must be significantly less than...for activities within buildings."
[135] See: *Fraser*, above n 86, 453; *Grayson*, above n 84, 407.

3 *Highly offensive and objectionable*

Thirdly, this formulation adopts the wording of "highly offensive and objectionable to a reasonable person of ordinary sensibilities" which is identical to the public disclosure of private facts tort.[136] This wording is also analogous to the United States expression, but the reason for adopting the phrase used in the New Zealand tort is merely to keep the general law of privacy as simple as possible.

4 *Public interest*

Finally, the above formulation also includes the public interest element that Nicholson J added to the public disclosure of private facts tort.[137] In my opinion, it important to include this element to allow certain intrusions upon someone's privacy. For example, the police conducting surveillance of someone's home under the authority of a warrant would be in the public interest, and would outweigh the subject's privacy rights. The courts, however, would have to use this element sparingly to ensure the new law remains effective and, as stated above, the public interest must *clearly* outweigh the plaintiff's privacy rights.

If Parliament did create broad legislation as this paper has suggested, New Zealanders would have a great deal more protection from home video surveillance. In addition, this would prohibit the actual surveillance intrusion, not the trespass, the nuisance, the disclosure, the harassment, the collection or the unreasonable search. All the laws Part II discussed may provide the public with some protection, but in effect using these laws is a makeshift approach to an issue that is highly relevant in New Zealand and requires its own law.

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[136] *P v D*, above n 15, 601.
[137] *P v D*, above n 15, 601.

IV CONCLUSION

This paper has shown that privacy is a fundamental right in New Zealand and is deserving of protection. An aspect of this is the right to be free from the video surveillance of your home. Technology, however, has meant that home video surveillance is a greater threat than ever before and is a very real problem. Despite this, existing laws in New Zealand do not clearly and effectively protect the public from such surveillance. This paper has examined seven such laws and has shown that they all have serious shortcomings. Nevertheless, the United States has developed a tort that provides effective protection for the public from home video surveillance: this being the tort of intrusion upon solitude.

In my opinion, the New Zealand Parliament should create broad legislation with guidelines, having specific regard to the present United State's law of intrusion upon solitude. This paper has also provided a preliminary formulation of the law that would be applicable to the New Zealand situation. Despite the current lack of protection against home video surveillance therefore, Parliament should make changes in the future. If Parliament did create new law along the lines of what this paper has suggested, New Zealanders would finally have legal recourse against those who implement home video surveillance and personal privacy would finally get the protection it deserves.

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